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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Dismissal of All Pending Pioneer's Preference Requests	)	CC Docket No. 92-297, RM-7872, PP-22
	)	ET Docket No. 94-124, RM-8784
	)	GEN Docket No. 90-314, PP-68
	)	GEN Docket No. 90-357, PP-25
	)	IB Docket No. 97-95, RM-8811
	)	RM-7784, PP-23
	)	RM-7912, PP-34 *et. al.*
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266
	)	(Docket Terminated)

COMMENTS OF QUALCOMM INCORPORATED

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COMMENTS

QUALCOMM Incorporated ("QUALCOMM"), by its attorneys, hereby submits its comments to the Federal Communications Commission ("FCC" or "Commission") on QUALCOMM's Petition for Reconsideration ("Petition") of the *Order* dismissing all pending pioneer's preference requests in the above-captioned proceedings.[1]

QUALCOMM is taking the unusual step of commenting on its own Petition to assure that every issue QUALCOMM might raise in judicial review of the disposition of the Petition is before the Commission. In particular, QUALCOMM notes that the Commission has previously addressed one aspect of an issue raised in that Petition -- the retroactivity of the

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[1] *Dismissal of All Pending Pioneer's Preference Requests*, FCC 97-309, 62 Fed. Reg. 48, 951 (September 18, 1997) ("*Dismissal Order*").

Balanced Budget Act of 1997.[2] To be certain that the Commission has an opportunity to reconcile its contradictory views on this matter, QUALCOMM submits these Comments.[3]

Background

QUALCOMM's Petition asks the FCC to reconsider its dismissal of QUALCOMM's pending pioneer's preference request. The background to this matter is complicated and is, perhaps, best described in a chronology:

- On May 4, 1992, QUALCOMM filed a request for a pioneer's preference in the Personal Communications Service ("PCS") for its Code Division Multiple Access ("CDMA") technology.
- On February 9, 1994, the Commission denied QUALCOMM's request. On December 2, 1994, the Commission denied a QUALCOMM Request for Reconsideration. QUALCOMM appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

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[2] Pub. L. 105-33 (1997) ("Budget Act").

[3] The retroactivity of the Budget Act, and the Commission's previous conclusions about the applicability of the sunset provisions of Section 309(j)(13)(F), are the subject of filings made in connection with QUALCOMM's Motion for Enforcement of Mandate filed on October 9, 1997, in *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997).

- On December 8, 1994, Congress enacted the Uruguay Round Agreements Act ("URAA" or "GATT Legislation"),[4] which added Section 309(j)(13) to the Communications Act. This Section established a "sunset" provision for the FCC's authority to provide preferential treatment in licensing procedures.[5] The "sunset" date was September 30, 1998.
- On March 1, 1995, the Commission released a *Second Report and Order* in Docket No. 93-266 in which it repeatedly interpreted the sunset provision as applying only to preference requests accepted for filing after September 1, 1994.[6] (The QUALCOMM request was accepted for filing on May 11, 1992.)
- On January 7, 1997, the Court of Appeals ruled that the Commission had unfairly denied QUALCOMM's preference request.[7] The Court ordered the Commission to conduct further proceedings on the merits of QUALCOMM's request.[8]
- On August 5, 1997, the Budget Act was enacted. The Budget Act amended Section 309(j)(13)(F) to change the sunset provision from September 30, 1998, to the date of the Budget Act's enactment.

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[4] Pub. L. 103-465 (1994).

[5] 47 U.S.C. § 309(j)(13)(F).

[6] *Review of the Pioneer's Preference Rules, Second Report and Order*, 10 FCC Rcd 4523, 4526 (1995) ("*Second R&O*").

[7] *Freeman*, 103 F.3d at 180.

[8] *Id.*

- On September 11, 1997, the Commission dismissed QUALCOMM's request summarily, concluding that it no longer had the authority to act on any pioneer's preference requests. The *Dismissal Order* did not discuss or attempt to reconcile the Commission's previous conclusion that Section 309(j)(13)(F) applied only to requests accepted for filing after September 1, 1994.
- On October 9, 1997, QUALCOMM filed a Motion to Enforce Mandate with the Court of Appeals asking the Court to order the Commission to consider QUALCOMM's request on its merits.
- On October 20, 1997, QUALCOMM filed a Petition for Reconsideration of the *Dismissal Order* dismissing its pioneer's preference request.

Argument

The Commission Directly Contradicted Its Earlier Conclusion Without Explanation

QUALCOMM is aware that the Commission no longer favors the pioneer's preference program and that the FCC therefore desires to interpret the sunset provision of Section 309(j)(13)(F) as terminating its authority to grant any pioneer's preferences. However, in 1995, the Commission interpreted the sunset provision as applying only to applications accepted for filing after September 1, 1994.[9] It is reversible error for the Commission now to interpret essentially the same provision as applying to all applications, including QUALCOMM's, without explaining its changed interpretation.

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[9] *Second R&O*, 10 FCC Rcd at 4526.

In 1995, the Commission found:

> The GATT legislation directs us to maintain the [pioneer's preference] program until September 30, 1998 *for preference requests accepted for filing after September 1, 1994*, and we believe that terminating the program for requests filed on or before that date -- even if desirable -- would accord inconsistent treatment to preference requests simply because of the date on which they were submitted for filing. We do not see a valid reason to distinguish preference requests on that basis.[10]

In 1997, in the *Dismissal Order* the Commission found:

> The Budget Act amended the pioneer's preference program's expiration date, which is specified in Section 309(j)(13)(F) of the Communications Act. That section, which was enacted as part of the legislation implementing the [GATT] read prior to the Budget Act: 'The authority of the Commission to provide preferential treatment in licensing procedures . . . shall expire on September 30, 1998.' The Budget Act changed that date to 'the date of enactment of the Balanced Budget Act of 1997.' Thus, as of August 5, 1997, the Commission's authority to grant *any* applicant a pioneer's preference expired.[11]

With these words, the Commission reversed its previous conclusions about the applicability of Section 309(j)(13)(F). The *Dismissal Order* contains no explanation of this reversal.

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[10] *Id.* (emphasis added). *See also*, *Second R&O* at 4528 ("[T]his legislation applies only to pioneer's preference requests that were accepted for filing after September 1, 1994."); *Id.* at 4533 ("[T]he GATT legislation does not apply to pioneer's preference requests accepted for filing on or before September 1, 1994.").

[11] *Dismissal Order*, p.2 (¶ 3) (emphasis added).

While the FCC may alter its past policies, it may only do so when it furnishes opinion or analysis indicating its standard is being changed, not ignored, and assuring it is faithful and not indifferent to the rule of law. *See Pocket Phone Broadcast Service, Inc. v. FCC*, 538 F.2d 447 (D.C. Cir. 1976). *See also*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from tolerably terse to intolerably mute."); *Airmark Corp v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985). This principle applies to both adjudicatory precedent and the interpretation of statutes and regulations. *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987).

The Commission has violated this established principle. In its rush to get rid of an unpopular program, the Commission has acted in the most obviously arbitrary and capricious manner. It has ignored its previous conclusions regarding the applicability of Section 309(j)(13)(F) and has reversed itself without any discussion of why. This is a violation of the fundamental principles of administrative procedure.

The Commission Should Reconsider Its Dismissal Of QUALCOMM's Request

As is apparent from the Petition, as well as from the indifference to precedent demonstrated above, the Commission faces reversal of the *Dismissal Order* if it does not reconsider. The Commission should, therefore, take this opportunity to reconsider its dismissal of the QUALCOMM request for a pioneer's preference. The Commission should

accept the mandate of the Court in *Freeman* and consider the QUALCOMM application on its merits.

Respectfully submitted,

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Dated: November 6, 1997

CERTIFICATE OF SERVICE

I, Susanne M. Gyldenvand, certify that on this 6th day of November, 1997, caused copies of the foregoing Comments of QUALCOMM Incorporated to be served by hand delivery or United States mail, first-class, postage prepaid, on the parties on the attached service list.

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