FCC MAIL SECTION

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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)

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1998; Released: April 23, 1998

By the Commission:

I. INTRODUCTION

1. On October 20, 1997, QUALCOMM Incorporated (QUALCOMM) filed a petition for reconsideration of our *Order*[1] which dismissed all pending pioneer's preference requests, including QUALCOMM's request for a pioneer's preference in the 2 GHz broadband Personal Communications Service.[2] For reasons that follow, we deny the petition for reconsideration.

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[1] *Dismissal of All Pending Pioneer's Preference Requests*, 12 FCC Rcd 14006 (1997) (*Order*).

[2] On November 6, 1997, QUALCOMM filed a pleading styled as "Comments" on its own petition for reconsideration. On November 12, 1997, Global Broadcasting Company, Inc. (Global) also filed "Comments" on the petition. On November 20, 1997, PrimeCo Personal Communications, L.P. and Sprint PCS (PrimeCo/Sprint) jointly filed an opposition to the petition. On December 3, 1997, QUALCOMM filed a reply to PrimeCo/Sprint's opposition.

II. BACKGROUND

2. In 1994, we denied QUALCOMM's request for a pioneer's preference, filed in May 1992, in the 2 GHz broadband Personal Communications Service.[3] In January 1997, however, the United States Court of Appeals for the District of Columbia Circuit (Court) granted QUALCOMM's petition for review of our action, vacated our denial of QUALCOMM's pioneer's preference request, and remanded the proceeding to us for further consideration.[4]

3. On August 5, 1997, President Clinton signed into law the Balanced Budget Act of 1997 (Budget Act).[5] Among other things, the Budget Act revised the expiration date of the pioneer's preference program, as set forth in Section 309(j)(13)(F) of the Communications Act of 1934, as amended. That section had been added in 1994 legislation domestically implementing the General Agreement on Tariffs and Trade (GATT),[6] and read prior to enactment of the Budget Act: "The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on September 30, 1998."[7] The Budget Act advanced that date to "the date of enactment of the Balanced Budget Act of 1997."[8] Thus, the pioneer's preference program expired on August 5, 1997. In our *Order* released September 11, 1997, we formally terminated the pioneer's preference program and dismissed all pending pioneer's preference requests, including QUALCOMM's.[9]

4. On October 9, 1997, QUALCOMM filed with the Court a "Motion to Enforce Mandate and Supporting Memorandum," contending that our *Order* misconstrued the Budget Act and requesting the Court to order us to consider QUALCOMM's pioneer's preference request on its merits. On October 16, 1997, counsel for the Commission filed an opposition to the motion,

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[3] *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Third Report and Order*, 9 FCC Rcd 1337, 1368-1370, *reconsideration denied*, 9 FCC Rcd 7805, 7810-7811 (1994).

[4] *See Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997) (*Freeman Engineering*).

[5] Pub. L. No. 105-33, 111 Stat. 251 (1997).

[6] Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), codified at 47 U.S.C. § 309(j)(13).

[7] 47 U.S.C. § 309(j)(13)(F) (1996).

[8] Pub. L. No. 105-33, § 3002(a)(1)(F), 111 Stat. 251 (1997).

[9] *See* note 1, *supra*.

pointing out, *inter alia*, that QUALCOMM's motion was procedurally improper because QUALCOMM had not filed a petition for reconsideration of the *Order* affording us an opportunity to address its contentions. On October 20, 1997, while QUALCOMM's motion was still pending before the Court, QUALCOMM filed with the Commission a petition for reconsideration of the *Order*. On November 5, 1997, the Court dismissed the motion on the grounds that QUALCOMM had failed to exhaust its administrative remedies, stating that the "appropriate procedure for QUALCOMM to seek relief is to petition to the Commission to reconsider its decision dismissing QUALCOMM's application."[10]

III. DISCUSSION

5. In its petition for reconsideration, QUALCOMM argues that "the FCC's application of the Budget Act violates the rule against retroactive application of the law,"[11] that "the language of the Budget Act suggests that Congress intended to permit continuation of the [pioneer's preference] program, while placing restrictions on the Commission's authority to preclude the filing of mutually exclusive applications,"[12] and that "QUALCOMM is entitled to a fair hearing on the merits of its pioneer's preference application."[13] QUALCOMM also claims that, in terminating the pioneer's preference program and dismissing its request for a preference without providing for public notice and comment, our *Order* violated the requirements of the Administrative Procedure Act (APA).[14] We reject each of these arguments.

6. *Retroactivity.* We find QUALCOMM's characterization of our *Order* dismissing its pioneer's preference request as an improper "retroactive" application of the Budget Act to be without merit. As explained below, the *Order* appropriately gave *prospective* effect to this statute in concluding that as of the date of its enactment, August 5, 1997, we no longer had authority to grant pending requests for pioneer's preferences. Thus, contrary to QUALCOMM's claim,[15]

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[10] *Freeman Engineering Associates, Inc. v. FCC*, No. 94-1779 (D.C. Cir. Nov. 5, 1997)(order denying motion to enforce mandate).

[11] Petition for Reconsideration at 2. *See id.* at 9-10.

[12] *Id.* at 2-3. *See id.* at 10-12.

[13] *Id.* at 2. *See id.* at 12-20.

[14] *Id.* at 20-21.

[15] *Id.* at 9-10.

our action did not violate the traditional presumption against retroactivity that the Supreme Court reiterated in *Landgraf v. USI Film Products.*[16]

7. The Court in *Landgraf* declared: "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations."[17] QUALCOMM's case presents one such situation. The Court in *Freeman Engineering* provided QUALCOMM with a prospective remedy; it directed us to hold "further proceedings" to determine whether QUALCOMM should receive a preference.[18] The Budget Act directly affected the propriety of that prospective remedy; it terminated our authority to grant pioneer's preferences. Under these circumstances, the Supreme Court in *Landgraf* stated: "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."[19]

8. Moreover, our application of the Budget Act in this case is consistent with the firmly-established principle that, "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."[20] The Supreme Court has explained that application of a new jurisdictional rule normally does not raise concerns about retroactivity "because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties."[21] Similarly, application of the Budget Act in this case does not produce an impermissible retroactive effect because that statute addresses our authority to act, not the merits of QUALCOMM's pioneer's preference request.

9. Accordingly, we find that we properly applied the time-honored tenet of statutory construction that, "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."[22] Moreover, even if the Budget Act properly could be characterized as altering the substantive law applicable to pioneer's preferences, the statute's application in QUALCOMM's case does not raise the retroactivity concerns identified in *Landgraf.* As the Supreme Court explained, a new statute is considered retroactive only if "it

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[16] 511 U.S. 244 (1994).

[17] *Id.* at 273.

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

[19] *Landgraf,* 511 U.S. at 273.

[20] *Bruner v. United States,* 343 U.S. 112, 116-117 (1952).

[21] *Landgraf,* 511 U.S. at 274 (internal quotations omitted).

[22] *Bruner,* 343 U.S. at 116-17.

would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[23] The Budget Act has none of these effects. It neither increases QUALCOMM's liability for past conduct nor imposes new duties relating to completed transactions. Additionally, this new statute does not impair any right possessed by QUALCOMM "because none vested on the filing of its [request]."[24] Further, in its remand order, the Court in *Freeman Engineering* did not find that QUALCOMM had a vested right to a pioneer's preference; it simply required us to reevaluate whether QUALCOMM's request for a preference should be granted or denied. Thus, the effect of the remand was to return QUALCOMM's preference request to pending status before the Commission and afforded QUALCOMM no greater or lesser rights than those of any other party with a pending preference request. Clearly, Congress had the power to enact legislation that terminated our authority to grant pending requests for pioneer's preferences; and "the mere expectations of a license applicant cannot bar the legitimate exercise of such congressional power."[25] The mere fact that a statute is "applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law" does not render the statute retroactive."[26]

10. *Scope of Sunset Provision in Budget Act.* QUALCOMM asserts that the Budget Act does not bar us from awarding pioneer's preferences, but only limits our power to provide preferential treatment to pioneers by precluding the filing of mutually exclusive applications. We disagree. Our preference program rewarded innovators by enabling them to obtain licenses without having to face competing (*i.e.*, mutually exclusive) applications.[27] We are not at liberty to grant some other sort of preference to communications pioneers. Section 309(j)(13)(A) of the Communications Act provides that we "shall not award licenses" by giving preferential treatment

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[23] *Landgraf*, 511 U.S. at 280. *See also Saco River Cellular, Inc. v. FCC*, No. 91-1248, slip op. at 9 (D.C. Cir. Jan. 16, 1998) (*Saco River*).

[24] *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 241 (D.C. Cir. 1997).

[25] *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1526 n.12 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984).

[26] *Saco River*, slip op. at 9, quoting *Landgraf*, 511 U.S. at 269.

[27] *See, e.g., Freeman Engineering*, 103 F.3d at 174 (a pioneer's preference "effectively ... guarantee[s]" a license to an innovating party "by permitting the recipient of a pioneer's preference to file a license application without being subject to competing applications") (quoting *Pioneer's Preference Order*, 6 FCC Rcd at 3492 (¶ 32)); *Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399, 1402-03 (D.C. Cir.) (a pioneer's preference enables an applicant to "receive a communications license ... without having to face competing applications"; the preference gives "its holder a pass on any ... competition" for licenses at auction), *cert. denied*, 117 S. Ct. 81 (1996); *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 578 (D.C. Cir. 1994) (the recipient of a pioneer's preference "is not subjected to competing applications").

to innovators "except in accordance with the requirements" of Section 309(j)(13).[28] Following its amendment by the Budget Act, Section 309(j)(13) contains no provision authorizing us to give preferences to innovators in the licensing process. Further, while Sections 7(a) and 303(g) give us the authority to award pioneer's preferences in the absence of an explicit statute to the contrary, Section 309(j)(13)(F) is just such a statute.

11. QUALCOMM contends, however, that Congress did not intend for the Budget Act's immediate termination of the pioneer's preference program to affect its pending preference request because the House Report on the 1994 GATT Legislation stated that Congress did not intend to "affect the rights of persons who have been denied a pioneer's preference."[29] We are not persuaded by QUALCOMM's argument. The quoted statement from the House Report does not address the sunset provision set forth in Section 309(j)(13)(F) of the Communications Act. Instead, the statement in question clarified that a different provision of the Act, Section 309(j)(13)(E), which precluded further administrative and judicial review of certain *grants* of pioneer's preference requests, was not intended to "affect the rights of persons who have been *denied* a pioneer's preference."[30] That is, Congress intended simply to make clear in 1994 that parties like QUALCOMM could appeal the denial of a pioneer's preference request despite the no review provision.

12. *Right to a Hearing.* QUALCOMM argues that the *Order* violated its right to due process by denying its "right to a fair hearing [that had] vested long before Congress changed the law relating to pioneer's preferences on a going forward basis."[31] We disagree. QUALCOMM does not have a constitutional "right to a fair hearing" unless that hearing concerns constitutionally protected liberty or property interests: "The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Constitution's] protection of liberty and property."[32] Although QUALCOMM claims a property interest in a fair hearing, any hearing that it would receive at this point would not implicate any property interest because we no longer have authority to grant QUALCOMM's preference request. As the U.S. Court of Appeals for the District of Columbia Circuit recently reaffirmed, "[t]he filing of an application

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[28] 47 U.S.C. § 309(j)(13)(A).

[29] Petition for Reconsideration at 6 (quoting Report to accompany H.R. 5110, 103 Cong. 2nd. House Rept. 103-826 (House Report)).

[30] House Report at 8 (emphasis added).

[31] Petition for Reconsideration at 18.

[32] *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed."[33]

13. While QUALCOMM contends that it has a vested right in a pioneer's preference, neither we nor the court has ever found that QUALCOMM was entitled to a preference under our rules. Further, QUALCOMM has no right to a hearing that cannot yield the benefits it seeks. A hearing is a means to an end, and the end that QUALCOMM seeks -- grant of a pioneer's preference -- is no longer available. A hearing thus would be futile. Accordingly, our decision to dismiss QUALCOMM's preference application "simply respects the statutorily-fixed deadline" for exercising our authority to award pioneer's preferences: "[I]n thus following the legislature's direction, the [Commission] contravened no due process right to fundamentally fair procedures."[34]

14. *APA Notice and Comment Requirements.* QUALCOMM argues that "[t]he APA requires that the Commission allow an opportunity for notice and comment before promulgating rules other than those 'of agency organization, or practice.'"[35] The APA also, however, permits us to proceed without notice and comment procedures when good cause exists for finding such procedures are "impracticable, unnecessary, or contrary to the public interest."[36] Similarly, publication or service of a rule change at least 30 days before its effective date is not required when good cause is found.[37] Such is the situation before us. The unambiguous language of the Budget Act terminating our authority to grant pioneer's preferences effective upon enactment of the Act made it unnecessary for us to follow public notice and comment procedures or to provide for at least 30 days advance publication in order to amend our rules to terminate the pioneer's preference program and to dismiss pending pioneer's preference requests. As we explained in the *Order*: "In light of the fact that these rule changes are mandated by Congress and we have no discretion, we find good cause to proceed without notice and comment. . . ."[38]

15. *Other Matters.* In comments filed November 6, 1997, QUALCOMM argues that the *Order* interpreted the sunset provision of Section 309(j)(13)(F) in a manner inconsistent with past Commission precedent but failed to explain the reasons for this departure from precedent.

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[33] *Chadmoore,* 113 F.3d at 241 (quoting *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989)); *see also Melcher v. FCC*, 134 F.3d 1143, 1164-65 (D.C. Cir. 1998).

[34] *Spannaus v. FEC*, 990 F.2d 643, 645 (D.C. Cir. 1993).

[35] Petition for Reconsideration at 20.

[36] 5 U.S.C. § 553(b)(B).

[37] 5 U.S.C. § 553(d)(3).

[38] *Order* at n. 13. *See also* 5 U.S.C. § 553(b)(B) and (d)(3).

Specifically, QUALCOMM claims that in the *Second Report and Order and Further Notice of Proposed Rule Making* (*Second R&O*) in the Pioneer's Preference Review Proceeding[39] we interpreted Section 303(j)(13)(F) as applying only to pioneer's preference requests filed after September 1, 1994, but in our *Order* we applied that provision to pioneer's preference requests, such as QUALCOMM's, which were filed before that date. Because the *Order* relied on the sunset provision as the basis for dismissing QUALCOMM's request, QUALCOMM asserts that it was denied administrative due process because the Commission changed its interpretation of the sunset provision without explanation.

16. As an initial matter, we agree with observations made by PrimeCo/Sprint, in their opposition to the petition, that QUALCOMM's comments constitute a late-filed supplement to its petition for reconsideration. Section 1.429(d) of our rules states: "The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action. . . . No supplement to a petition for reconsideration filed after expiration of the 30 day period will be considered, except upon leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement. . . ."[40] The deadline for filing the petition for reconsideration and any supplement thereto was October 20, 1997.[41] Since QUALCOMM's comments were filed on November 6, 1997, and QUALCOMM did not file a separate pleading requesting leave to file a late-filed supplement, we are dismissing its comments pursuant to Section 1.429(d).

17. Nonetheless, we note *sua sponte* that the "unexplained departure from precedent" argument advanced in QUALCOMM's comments is without merit. In the *Second R&O*, in rejecting comments suggesting that we immediately repeal the pioneer's preference program, we explained that, for preference requests filed after September 1, 1994, Section 309(j)(13)(F) directed us to continue this program until September 30, 1998, and that for preference requests filed on or before September 1, 1994, we did not find any valid reason for terminating the program earlier.[42] No commenter in that proceeding had raised, and we did not discuss, whether we had the authority to continue the pioneer's preference program beyond the date specified in Section 309(j)(13)(F) for preference requests filed on or before September 1, 1994. It is clear, however, that we retained no such authority. The GATT legislation required the termination of

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[39] *See* ET Docket No. 93-266, 10 FCC Rcd 4523, 4526 (1995).

[40] 47 C.F.R. § 1.429(d).

[41] *See* 62 Fed. Reg. 48,951 (Sept. 18, 1997). Because the thirtieth day fell on October 18, 1997, a Saturday, the due date became the next business day, Monday, October 20, 1997. *See* 47 C.F.R. § 1.4(b)(1), (e)(1), and (j).

[42] 10 FCC Rcd at 4526.

the entire pioneer's preference program by a date certain, September 30, 1998.[43] That we retained the discretion to terminate the program with respect to earlier-filed preference requests (but chose not to exercise that discretion) does not imply that we had discretion to continue the program in any respect beyond the date set forth in the legislation.[44] Our actions in the *Order* dismissing QUALCOMM's preference request and terminating the pioneer's preference program as of the date set forth in Section 309(j)(13)(F) as amended by the Budget Act, August 5, 1997, are thus fully consistent with our actions in the *Second R&O*.

18. Finally, we note that in comments filed November 12, 1997, Global requests that we "consider on the merits" the pioneer's preference request filed by Web SportsNet, Inc. and Gregory D. Deieso but also dismissed in our *Order*. We are dismissing these comments as an improperly late-filed petition for reconsideration of our action dismissing the preference request,[45] but also note that we have no authority to grant the relief requested.[46]

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that the petition for reconsideration filed on October 20, 1997 by QUALCOMM Incorporated IS DENIED. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

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[43] As QUALCOMM points out, the pioneer's preference program was initially authorized pursuant to Sections 7(a) and 303(g) of the Communications Act. As discussed above, however, the GATT legislation provided that the Commission "shall not award licenses [by giving preferential treatment to innovators] except in accordance with the requirements [of Section 309(j)(13)]." *See* paragraph 10, *supra*. Thus, this legislation entirely subsumed the Commission's pioneer's preference program and terminated the Commission's authority to award such preferences as of the date set forth in Section 309(j)(13)(F).

[44] Indeed, in its petition for reconsideration, QUALCOMM seems to accept this assessment of the program's termination date. At note 10 of the petition, QUALCOMM states: "Congress also established a termination date for the Commission's authority to preclude mutually exclusive applications. That date was September 30, 1998." Later, at p. 7 of the petition, QUALCOMM states: "The Budget Act, among other things, amended the Communications Act to change the deadline for the expiration of the FCC's authority to provide preferential treatment in licensing procedures by precluding the filing of mutually exclusive applications from September 30, 1998 to August 5, 1997." Nowhere in its petition does QUALCOMM state, or even imply, that preference requests filed on or before September 1, 1994 should be accorded a later expiration date than that specified in Section 309(j)(13)(F).

[45] *See* 47 C.F.R. § 1.429(d). *See also supra* ¶ 16.

[46] *See* ¶ 17, *supra*.

20. IT IS FURTHER ORDERED that the comments filed on November 6, 1997 by QUALCOMM Incorporated and on November 12, 1997 by Global Broadcasting Company, Inc. ARE DISMISSED. This action is taken pursuant to Section 1.429(d) of our rules, 47 C.F.R. § 1.429(d).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary