

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-266

In the Matter of

Review of the Pioneer's
Preference Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1995; Released: January 30, 1996

By the Commission:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* Et6 addresses petitions for reconsideration filed in this proceeding by Qualcomm Incorporated (Qualcomm) to the *Second Report and Order (Second R&O)*¹ and by Celsat America, Inc. (Celsat) to the *Third Report and Order (Third R&O)*.² We deny Qualcomm's petition and grant Celsat's petition for reasons that follow.

II. BACKGROUND

2. The pioneer's preference program provides preferential treatment in the Commission's licensing processes for parties that make significant contributions to the development of a new service or to the development of a new technology that substantially enhances an existing service. The program was established to foster new communications services and technologies and to encourage parties to submit innovative proposals to us in a timely manner. Under our pioneer's preference rules, a necessary condition for the award of a preference is that a preference applicant demonstrate that it has developed the capabilities or possibilities of a new technology or service, or has brought the technology or service to a more advanced or effective state. The applicant must also demonstrate that the new service or technology is technically feasible by submitting either the summarized results of an experiment or a technical showing. Finally, a preference is granted only if the service rules adopted are a reasonable outgrowth of the applicant's proposal and lend themselves to grant of a preference. A pioneer's preference recipient's license application is not subject to mutually exclusive applications.

A. Qualcomm Petition

3. The *Second R&O* addressed proposals set forth in the *Notice of Proposed Rule Making (Notice)*³ in this proceeding and modified certain rules regarding our pioneer's preference program. Specifically, the *Second R&O* provided pioneers with a discount on license charges in services in which licenses are awarded by competitive bidding, and it also modified several administrative rules. In addition, the *Second R&O* also held that, where an "innovative technology" has developed or enhanced more than one service, the grant of a pioneer's preference in only one such service is sufficient incentive to encourage pioneering proposals to be submitted.

4. Qualcomm states that we should reconsider our determination of what constitutes "innovative technology." It contends that four aspects of the *Second R&O* are not clearly defined. First, Qualcomm maintains that a technology should not be considered ineligible for a pioneer's preference merely because that technology could be used in an existing service. It notes that in the *Notice* we stated: "Transferring a technology from an existing service in a lower band to a new service in a higher band should not be recognized by award of a pioneer's preference."⁴ Qualcomm requests that we clarify that "a technology from an existing service" refers to a technology that was being used to provide an existing service at the time of the filing of the preference request, not a service that is implemented after the request is filed.

5. Second, Qualcomm requests that we clarify that an innovative technology that can be applied to more than one new service should be eligible for a preference in all services that are not existing services. Qualcomm notes that in the *Second R&O* we stated: "Once a pioneer's preference has been granted for a service that uses a new technology, that technology is no longer new."⁵ Qualcomm states that it concurs that a new technology should not receive multiple preference awards, but maintains that we should not use the fact that a technology is applicable to multiple services to deny the technology a preference in any service.

6. Third, Qualcomm requests that an innovator who develops a new technology that both significantly improves an existing service and that may also be used to provide a new service in a different band be eligible for a preference in the new service. Qualcomm states that it agrees with the *Second R&O*'s finding that "granting a pioneer's preference in the first service that was developed or enhanced by the innovative technology is sufficient incentive to encourage proposals to be submitted,"⁶ but proposes that in cases in which we are unable or unwilling to grant a preference in the first service, a preference be available in the new service.

7. Finally, Qualcomm requests that we clarify what we mean by a "new service" operating in a higher band. It states that there may be some confusion on this point with respect to broadband Personal Communications Services (PCS). Qualcomm notes that Section 24.5 of our rules defines broadband PCS as: "Radio communications that

¹ See *Second Report and Order and Further Notice of Proposed Rule Making*, ET Docket No. 93-266, 10 FCC Rcd 4523 (1995).

² See *Third Report and Order*, ET Docket No. 93-266, FCC 95-218, released June 8, 1995.

³ See *Notice of Proposed Rule Making*, ET Docket No. 93-266,

⁸ FCC Rcd 7692 (1993).

⁴ *Id.* at para. 17.

⁵ See *Second R&O*, at para. 30.

⁶ *Id.*

encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks." Qualcomm also contends: "Section 22.901(d) provides, in pertinent part, that, 'licensees of cellular systems may ... provide personal communications services ... on the spectrum within their assigned channel block.'"⁷ According to Qualcomm, therefore, "the Commission rules imply that broadband PCS is not a new service; rather as cellular [innovator] Craig McCaw recently observed 'Basically, PCS is cellular at a different frequency.'"⁸ No party filed comments on Qualcomm's petition.

B. Celsat Petition

8. Legislation implementing domestically the General Agreement on Tariffs and Trade (GATT) was enacted on December 8, 1994, and contained an amendment to the Communications Act relating to the pioneer's preference program.⁹ Included in this amendment was Section 309(j)(13)(D), which specified new requirements regarding criteria, peer review, and unjust enrichment for pioneer's preference requests that were accepted for filing after September 1, 1994.¹⁰ In the *Third R&O*, we implemented the new requirements specified in Section 309(j)(13)(D) and extended them to pioneer's preference requests filed on or before September 1, 1994 in proceedings that have not reached the tentative decision stage. We stated that such action would further our pioneer's preference policy in an auction environment.¹¹ Also, we imposed the requirement that pending pioneer's preference requests must be amended so as to conform to the new requirements -- including an additional requirement adopted in the *Third R&O* and a requirement adopted in the *Second R&O*¹² -- no later than 30 days from the effective date of the rules established by the *Third R&O* (i.e., by September 20, 1995).¹³

9. In its petition, Celsat requests that we reconsider our decision to apply the new requirements regarding criteria, peer review, and unjust enrichment to pioneer's preference requests that were accepted for filing on or before September 1, 1994. Celsat also requested that we defer the deadline for filing amendments to pioneer's preference requests until 30 days after the effective date of the Order that responds to its petition; however on September 18, 1995, Celsat requested that the Commission's Office of Engineering and Technology (OET) grant it a 30-day extension to file an amendment to its pioneer's preference request (PP-28 in RM-7927). On September 20, 1995, OET granted Celsat an extension to file an amendment until October 20, 1995. On October 17, 1995, Celsat requested that OET grant it an additional 30-day extension. On October 20, 1995, OET granted Celsat a further extension until 10 days after the Commission rules on Celsat's petition for reconsi-

deration, or as otherwise directed in such ruling. No party filed comments on Celsat's petition, its request for deferral, or its requests for extensions of time.

III. DISCUSSION

A. Innovative Technologies

10. We emphasize that the pioneer's preference program was established "to foster a host of valuable new technologies and services to the public" and "to induce innovators to present their proposals to the Commission in a timely manner."¹⁴ To the extent that new technologies are being developed and presented to us in a timely manner for use in existing services independently of the pioneer's preference program, we see no need to award preferences based upon the additional use of those technologies in new services. Therefore, we find unpersuasive Qualcomm's argument that a technology that is first used in an existing service independently of the pioneer's preference program should be eligible for a preference in the new service. With respect to Qualcomm's argument regarding the eligibility of an innovative technology to multiple new services, we do not intend to reward the same technology with a preference in more than one service.¹⁵ Further, we believe that such a technology should be eligible for a pioneer's preference only in the first new service that is proposed to the Commission (provided that the technology has not previously been implemented in an existing service). To permit an applicant to use the same technology as the basis for a pioneer's preference in more than one new service would be administratively burdensome, because there may be numerous new services in which an innovative technology can be used and a party could repeatedly apply for a preference using that technology.

11. With respect to new services operating in higher bands, we disagree with Qualcomm that our rules imply broadband PCS is not a new service. While broadband PCS has similarities to the cellular radio service, the latter is defined differently. Specifically, our rules define a cellular system as: "A high capacity land mobile system in which assigned spectrum is divided into discrete channels which are assigned in groups to geographic cells covering a cellular geographic service area. The discrete channels are capable of being reused in different cells within the service area."¹⁶ As Qualcomm notes, PCS is defined as: "Radio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks."¹⁷ Our rules also state: "Cellular system licensees may employ alternative technologies and may provide auxiliary common carrier services, including per-

⁷ See Qualcomm Petition at 4. We note that this quotation is inaccurate. Section 22.901(d) does not mention PCS, but rather pertains to cellular radio eligibility.

⁸ *Id.*

⁹ See Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), to be codified at 47 U.S.C. § 309(j)(13).

¹⁰ *Id.*

¹¹ See *Third R&O*, at para. 22.

¹² Specifically, the *Third R&O* required a new spectrum allocation as a condition for pioneer's preference eligibility, *id.* at

para. 21; and the *Second R&O* required that any experimental data a pioneer's preference applicant desires to make part of its technical feasibility showing must be summarized, see *Second R&O*, at para. 27.

¹³ See *Third R&O*, at para. 22.

¹⁴ See Establishment of Procedures to Provide a Preference, GEN Docket No. 90-217, *Report and Order*, 6 FCC Rcd 3488 at para. 18 (1991).

¹⁵ See *Second R&O*, at para. 30.

¹⁶ See 47 C.F.R. § 22.2.

¹⁷ See 47 C.F.R. § 24.5.

sonal communications services (as defined in § 99.5 of this chapter) on their assigned cellular spectrum, *provided that* interference to other cellular systems is not caused."¹⁸

12. The mere fact that a cellular system may provide PCS, among a host of other auxiliary common carrier services, does not make the cellular service identical to PCS. Further, we note that cellular radio still uses predominantly analog technology and serves mostly vehicular subscribers, whereas broadband PCS is expected to be entirely digital and serve mostly non-vehicular subscribers. Qualcomm does not cite any additional basis for considering PCS to be the same as the cellular service other than Mr. McCaw's opinion, which itself is significantly hedged by use of the word "basically." Further, Qualcomm does not present any additional reason to believe that there is confusion as to what constitutes a new service. Accordingly, we find no need to clarify our rules regarding new services.

B. New Pioneer's Preference Requirements

13. We find that applying the new pioneer's preference requirements regarding criteria, peer review, and unjust enrichment to pioneer's preference requests that were accepted for filing on or before September 1, 1994 is unnecessary to evaluate these requests and would be administratively burdensome on the Commission and on the applicants. We believe that we have sufficient information on each of these requests to determine whether they are entitled to a pioneer's preference. Accordingly, we will not apply the new requirements regarding criteria, peer review, and unjust enrichment to these requests.

14. However, we note that all pending pioneer's preference applicants except Celsat in proceedings that have not reached the tentative decision stage were required by the *Third R&O* to submit by September 20, 1995 amended filings pertaining to these and other new pioneer's preference requirements adopted in the *Second R&O* and *Third R&O*. Even though a number of pending applicants supplemented their preference requests by that date, the Office of Management and Budget (OMB) has not yet approved a new information collection for pioneer's preference requests pursuant to the Paperwork Reduction Act. Accordingly, pursuant to that statute, we are ordering that subsequent to approval by OMB of the new collection, the Chief, OET announce a new date for the submission of amended pioneer's preference requests and publish that date in the Federal Register. Therefore, Celsat and other parties who may wish to amend their pioneer's preference requests will not be required to do so prior to the new filing date. On that date, a party that has not previously filed an amended pioneer's preference request will be required to do so by submitting a filing pertaining to the new requirements adopted in the *Second R&O* and *Third R&O*. Specifically, a party that filed a pioneer's preference request on or before September 1, 1994, must submit a statement that a new allocation of spectrum is necessary for its innovation to be implemented. Further, if the applicant relied on experimental results to demonstrate the technical feasibility of its innovation, it must submit a summary of those experimental results. Additionally, for pioneer's preference requests filed after September 1, 1994, an applicant must submit a showing demonstrating that the Commis-

sion's public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license; *i.e.*, the applicant must show that it may lose its intellectual property protection because of our public process; that the damage to its intellectual property is likely to be more significant than in other contexts, such as the patent process; and that the guarantee of a license is a significant factor in its ability to capture the rewards from its innovation. Failure by any party to amend in a timely manner will result in the dismissal of its request.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that Parts 0 and 1 of the Commission's Rules ARE AMENDED as specified in the Appendix, effective 30 days after publication in the Federal Register. IT IS FURTHER ORDERED that the petition for reconsideration filed by Qualcomm Incorporated IS DENIED. IT IS FURTHER ORDERED that the petition for reconsideration filed by Celsat America, Inc. IS GRANTED. IT IS FURTHER ORDERED that the request for deferral filed by Celsat America, Inc. IS DISMISSED AS MOOT. IT IS FURTHER ORDERED that the Chief, Office of Engineering and Technology announce a new date for the submission of amended pioneer's preference requests and publish that date in the Federal Register, subsequent to approval from the Office of Management and Budget of the new information collection for pioneer's preference requests. This action is taken pursuant to Sections 4(i), 7(a), 303(g), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix -- Final Rules

Parts 0 and 1 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 0 -- COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.241 is amended by revising paragraph (f) to read as follows:

Section 0.241 Authority Delegated.

¹⁸ See 47 C.F.R. § 22.930. We note that PCS is now defined in § 24.5.

* * * * *

(f) For pioneer's preference requests accepted for filing after September 1, 1994, the Chief, Office of Engineering and Technology (OET) is authorized to select, in appropriate cases on his/her own initiative or upon request by a pioneer's preference applicant or other interested person, a panel of experts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request and who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. In consultation with the General Counsel, the Chief, OET, shall also impose other conflict-of-interest requirements that are necessary in the interest of attaining impartial, expert advice regarding the particular pioneer's preference request or requests.

the Commission has not determined at the time a pioneer's preference request is filed whether assignments in the proposed service will be made by competitive bidding.

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PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.402 is amended by revising paragraphs (h) and (i) to read as follows:

Section 1.402 Pioneer's Preference.

* * * * *

(h) For pioneer's preference requests accepted for filing after September 1, 1994, an opportunity for review and verification of the requests by experts who are not Commission employees will be provided by the Commission. The Chief, Office of Engineering and Technology (OET) may select a panel of experts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request and who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. The panel of experts will generally be granted a period of up to 90 days, but no more than 180 days, to present their findings to the Commission. The Commission will generally establish, conduct, and seek the consensus of the panel pursuant to the Federal Advisory Committee Act, and will evaluate its recommendations in light of all the submissions and comments in the record. Panelists will have the authority to seek further information pertaining to preference requests and to perform field evaluations, as deemed appropriate by the Chief, OET.

(i) For pioneer's preference requests accepted for filing after September 1, 1994, in order to qualify for a pioneer's preference in services in which licenses are awarded by competitive bidding, an applicant must demonstrate that the Commission's public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license. The applicant must show that it may lose its intellectual property protection because of the Commission's public process; that the damage to its intellectual property is likely to be more significant than in other contexts, such as the patent process; and that the guarantee of a license is a significant factor in its ability to capture the rewards from its innovation. This demonstration will be required even if