BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
PCS Partners, L.P.	)	WT Docket No. 12-202
	)	
Applications for Waiver and	)	
Limited Extension of Time	)	

APPLICATION FOR REVIEW

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TABLE OF CONTENTS

Page

SUMMARY iii

I. STATEMENT OF FACTS 1

II. ARGUMENT 11

A. PCSP's Right to Due Process Was Violated 11

B. Extension Must Be Granted Because Failure to Commence Service Is Due to Causes Beyond PCSP's Control 13

C. Termination of the *M-LMS NPRM* Did Not Remove Regulatory Uncertainty 14

D. The Extensions Granted by the *2014 Extension Order* Were Not Based on 17

Reasoned Analysis, and Were Arbitrary 17

E. The Bureau Failed to Clarify Significant Aspects of the *2014 Extension Order* 20

F. The Bureau Erred in Giving PCSP Less Time Than Other M-LMS Licensees to Satisfy Construction Obligations 23

III. CONCLUSION 25

SUMMARY

In this matter, the agency followed an unprecedented, and ultimately arbitrary and unreasonable course: It proposed new service rules in recognition of the fact existing rules did not offer a viable path forward for any M-LMS licensees; extended all licensees' deadlines to comply with the original rules, based on regulatory uncertainty and lack of equipment; abandoned its proposals to change the rules, without following its notice-and-comment procedures; and then informed PCS Partners, L.P. ("PCSP") that – because another M-LMS licensee had obtained waivers of the original rules in order to implement a proprietary technology not available to PCSP – regulatory uncertainty no longer existed, and PCSP would have just two additional years to satisfy its construction obligations.

Commission review of the issues presented herein is warranted because the Bureau's 2014 Order granting PCSP an unreasonably brief extension of time to satisfy construction obligations, and the Bureau's Order on Reconsideration denying PCSP's petition for reconsideration of the 2014 Order, conflict with the agency's rules, precedent, and established policy, contain numerous erroneous findings as to important and material questions of fact, and violate PCSP's due process rights. *See* 47 C.F.R. § 1.115(b)(2).

In particular, extension must be granted because PCSP's inability to construct and commence service at all times has been due to causes beyond its control. As shown herein, the Bureau's finding that termination of the proceeding proposing to change the service rules for all M-LMS licensees did not remove regulatory uncertainty. And, the extensions granted were arbitrary, and not based on reasoned analysis. When presented with requests to clarify significant aspects of its arbitrary decision, the Bureau failed to do so. Finally, the Bureau erred in its disparate treatment of PCSP relative to other M-LMS licensees.

On review, PCSP respectfully requests that the Commission, taking into account relevant facts and changed circumstances, extend end-of-term construction deadlines for PCSP's M-LMS licenses and waive the requirement to satisfy the interim construction requirement; or, alternatively, initiate a proceeding to determine appropriate construction obligations for M-LMS Band licensees.

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To: The Commission

APPLICATION FOR REVIEW

PCS Partners, L.P. ("PCSP"), by its attorneys and pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, respectfully requests that the Commission review and reverse the Order[1] and the Order on Reconsideration[2] of the Mobility Division of the Wireless Telecommunications Bureau (the "Bureau") in the above-captioned proceeding.

I. STATEMENT OF FACTS

Overview of M-LMS Rules. The Commission adopted rules establishing M-LMS more than 20 years ago. The M-LMS rules were intended to "promote certainty for all users of the band so they can invest in the equipment and facilities necessary to bring quality, low cost services to consumers" and to allow "efficient and competitive use" of dedicated spectrum.[3] Due to heavy incumbent use of

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[1] *Requests by FCR, Inc., et al. for Waiver and Limited Extension of Time*, Order, 29 FCC Rcd 10361, ¶ 16 (WTB MD 2014) ("*2014 Extension Order*").

[2] *PCS Partners, L.P., Applications for Waiver and Limited Extension of Time,* WT Dkt. 12-202, DA 17-68, Order on Reconsideration (Jan. 18, 2017) ("*Reconsideration Order*").

[3] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Report and Order, 10 FCC Rcd 4695, ¶¶ 1, 2 (1995) ("*M-LMS R&O*"). M-LMS is defined as "a system that is designed to locate vehicles or other objects by measuring the difference of time of arrival, or difference in phase, of signals transmitted from a unit to a number of fixed points or from a number of fixed points to the unit to be located." 47 C.F.R. § 90.7.

the band, the Commission recognized that "even if a [M]-LMS licensee fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible."[4]

In 1998, prior to holding its first auction for geographic area M-LMS licenses, the Commission adopted five-year and ten-year construction requirements for those licenses.[5] The rules require M-LMS Economic Area ("EA") licensees to "construct and place in operation a sufficient number of base stations that utilize multilateration technology ... to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two-thirds of the population within ten years," or, alternatively, to "provide substantial service to their licensed area within the appropriate five- and ten-year benchmarks."[6]

M-LMS EA Licensing. The Commission auctioned M-LMS EA licenses in 1999 (Auction 21) and 2001 (Auction 39). The auctioned M-LMS spectrum is divided into three blocks within each EA: Block A (6 MHz total), Block B (2.25 MHz total), and Block C (5.75 MHz total) (collectively, the "M-LMS Bands").[7] PCSP was the high bidder at Auction 39 for 31 Block A licenses and one Block C license. PCSP's licenses were not granted until July 25, 2003 – substantially later than any other M-LMS licensee, including licensees that participated in Auction 39. Based on its grant date,

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[4] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, ¶ 30 (1998). Five separate user groups share the 902-928 MHz band: Federal Government fixed and mobile radiolocation services, and Industrial, Scientific, and Medical devices have a primary allocation; government fixed and mobile and LMS systems may operate secondary to primary users; and licensed amateur radio operations and Part 15 equipment may operate on a secondary basis to all other users. *M-LMS R&O* at ¶ 29. *See also* Petition for Reconsideration of the Part 15 Coalition, WT Dkt. 11-49, at 2-3 (July 8, 2013) (describing competing uses of the band).

[5] *Id.*

[6] 47 C.F.R. § 90.155(d). The Commission added the alternative "substantial service" construction showing in 2004. *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078 (2004), Appendix A.

[7] 47 C.F.R. § 90.357(a). A single M-LMS licensee may not hold licenses for both Block A and Block C in an EA. *See* 47 C.F.R. § 90.353(f).

PCSP's initial (mid-term) construction deadline was July 25, 2008 and its end-of-term deadline was July 25, 2013.

History of Underutilization of the M-LMS Bands. The M-LMS Bands have a lengthy history of underutilization – today, no entity is using these bands to provide any service authorized under the M-LMS rules. As detailed below, primary reasons include changes in location position technology; the unique constraints of the M-LMS Bands rules; uncertainty created by the Commission's decisions in 2006 to propose new M-LMS service rules and, in 2014, to terminate that proceeding without notice; and the continuing lack of commercially available equipment for the M-LMS Bands. All of these events have been outside of PCSP's control.

Location Technology Developments. Since adoption of the M-LMS Bands rules, there have been substantial developments in the evolution of competing location technologies. Mandates in the U.S. and around the world compelled mobile services providers to implement location-based technologies in order to provide access to critical emergency services.[8] Equipment manufacturers and carriers understandably focused on market-driven location and positioning solutions, realizing economies of scope and scale that drive down costs throughout the communications ecosystem. Carriers generally meet their obligations by relying on standardized techniques that essentially use the concept of measuring the time difference of arrival of transmission from or to a fixed number of stations at known locations, to or from a device to be located.[9] These technologies have been

[8] *See, e.g.*, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676 (1996); *Wireless E-911 Location Accuracy Requirements*, PS Dkt. 07-114.

[9] *See* Alan Bensky, *Wireless Positioning Technologies and Applications* (2nd ed. 2016); Nat Natarajan and Ken Zdunek, *E911 Indoor Location Technology Assessment*, Jan. 21, 2015, *available at* http://apps.fcc.gov/ecfs/document/view?id=60001015543. In practical commercial deployments, a variety of technologies based on both multilateration and non-multilateration principles are used and results are combined to yield the best location estimate. The emerging solution uses 3GPP standardized technology is conjunction with satellite (GPS and many variants including A-GPS) and indoor (Wi-Fi and Bluetooth) technologies. *Id.*

standardized by the Third Generation Partnership Project ("3GPP").[10] The most successful location-based technologies, such as GPS (owned by the U.S. Government), and more generally Global Navigation Satellite Systems ("GNSS"), are widely available to consumers as an integral part of service providers' bundled offerings.[11]

In contrast, there never has been equipment developed and sold commercially for a stand-alone position location service such as was contemplated by the Commission when it established M-LMS and auctioned the M-LMS licenses purchased by PCSP. Instead, manufacturers and carriers alike have opted to pursue solutions that are based on open standards and that enable multiple services, because such technologies can deliver services to consumers more efficiently and cost-effectively.

Proposed M-LMS Rule Changes. Recognizing marketplace realities, in March 2006, well before the deadline for PCSP to satisfy its mid-term buildout requirement, the Commission observed that "there has been very limited development of M-LMS service under" the rules adopted in 1995, and initiated a reexamination to determine whether those rules should "afford licensed service providers greater flexibility to respond to changing market conditions," including "[s]pecifically, whether our current M-LMS rules are limiting licensees from providing services that are desired in the market and that could be profitably deployed without causing harmful interference to other users."[12] The

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[10] *See* 3GPP TS 36.355, E-UTRA LTE Positioning Protocol (LPP), Release 9; 3GPP TS 36.455, E-UTRA LTE Positioning Protocol A (LPPa), Release 9; 3GPP TS 25.305 V11.0.0 Stage 2 Functional Specification of User Equipment (UE) Positioning in UTRAN (Release 11); 3GPP TS 37.571-1, v12.0.0 Universal Terrestrial Radio Access (UTRA) and Evolved UTRA (E-UTRA) and Evolved Packet Core (EPC) – User Equipment (UE) Conformance Specification for UE Positioning: Part 1: Conformance Test Specification (Release 12).

[11] *See, e.g.*, European Global Navigation Satellite Systems Agency, GNSS Market Report, Issue 4, 16-23 (Mar. 2015), *available at* http://www.gsa.europa.eu/systems/files/reports/GNSS-Market-Report-2015-issue4_0.pdf.

[12] Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Dkt. 06-49, Notice of Proposed Rulemaking, 21 FCC Rcd 2809, ¶¶ 1, 2 (2006) ("*M-LMS NPRM*").

Commission expressly acknowledged the development of GPS and other competing location technologies, noting that its own "recent actions ... have advanced the broader development of location-based services in other bands."[13] The Commission asked whether "[u]nder these circumstances ... there is any public interest benefit associated with continuing to limit M-LMS service flexibility to promote vehicle and other location-based services in the nation's transportation infrastructure."[14] Finding that "current MLMS rules place significant restrictions on M-LMS operations,"[15] the Commission proposed "rule changes that could facilitate higher-valued licensed use of the" M-LMS Bands."[16]

In light of these statements, it is hardly surprising that while the *M-LMS NPRM* was pending, no manufacturer brought to market any commercially available equipment for the M-LMS Bands, and there is no evidence that any party invested in equipment development that conformed to the service concept and technical rules that were adopted in 1995 and remain unchanged today.

Unavailability of Equipment. Prior to the *M-LMS NPRM*, and well before PCSP's initial mid-term buildout deadline, the Bureau acknowledged that the "unique sharing constraints" of the M-LMS bands had rendered licensees' ability to satisfy their construction obligations impossible due to circumstances – including lack of equipment – beyond their control.[17]

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[13] *Id.* at ¶ 20. The Commission noted that the *M-LMS NPRM* was issued partly in response to a petition filed by M-LMS licensee Progeny LMS, LLC filed prior to grant of PCSP's M-LMS licenses. *Id.* at ¶ 2.

[14] *Id.* at ¶ 20.

[15] *Id.* at ¶ 18.

[16] See *M-LMS NPRM* at ¶¶ 19-41 and Appendix, ¶ 17. The comprehensive record on the *M-LMS NPRM*'s proposed changes included support from M-LMS licensees. *See, e.g.*, WT Docket No. 06-49, Comments of Progeny LMS, LLC (May 30, 2006).

[17] As noted above, the Commission granted licenses to all winning bidders in the M-LMS auctions well before it granted PCSP's licensees. Beginning in 2003, those licensees all filed requests for extension or waiver of their interim construction deadlines. The Bureau granted each request. *See Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for His Multilateration Location and Monitoring Service Economic Area Licenses*, 19 FCC Rcd 23742, ¶¶ 7, 10 (WTB MD 2004) (finding that "failure to complete construction was due to causes beyond" licensee's control); *FCR,*

In 2008, the Bureau affirmed market realities when it granted PCSP's initial request for extension of construction deadlines.[18] The Bureau also "acknowledge[d] the regulatory uncertainty engendered by the pending M-LMS rulemaking."[19]

In March 2011, Progeny (having at that time held its licenses for more than ten years) informed the Commission that "M-LMS development is stalled," noting that "a lot has happened in the field of position location technology since the Commission adopted its M-LMS rules and issued licenses," including the spread of GPS chipsets and receivers in consumer and commercial devices as a result of mobile carriers' obligations under the Commission's E-911 rules.[20] Reiterating the *2008 Extension Order* finding that "no M-LMS equipment is commercially available for current deployment in the United States,"[21] Progeny requested a waiver that would allow it to be deemed to satisfy buildout requirements using proprietary technology developed by its affiliate NextNav, LLC.[22]

Inc., Letter, 20 FCC Rcd 4293 (WTB MD 2005) (finding FCR "similarly situated insofar as the unique sharing constraints presented by the M-LMS band have resulted in a lack of M-LMS equipment"); *Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for Its Multilateration Location and Monitoring Service Economic Area Licenses*, 21 FCC Rcd 5928, ¶¶ 13, 16 (WTB MD 2006) (finding "the lack of available M-LMS equipment continues to make construction impossible," that "spectrum sharing in the M-LMS band . . . has hindered the ability of licensees to secure equipment," and that "failure to complete construction is due to causes beyond Progeny's control"); *Multilateration Location and Monitoring Service Construction Requirements*, 22 FCC Rcd 1925, ¶¶ 8, 9, 10, 11 (WTB MD 2007) (granting extensions based on finding that "the failure to complete construction is due to causes beyond [their] control," and "based on the totality of the record ... strict application of the construction requirement would be contrary to the public interest….").

[18] *See Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules*, WT Dkt. 08-60, Order, 23 FCC Rcd 17250, ¶¶ 21, 30, 33 (WTB 2008), *recon. pending* ("*2008 Extension Order*").

[19] *Id.* at ¶¶ 21, 22, 23, 30. The Bureau noted "significant restrictions on M-LMS operations" as a contributing factor in the lack of equipment. *Id.* at ¶ 22. The *2008 Extension Order* also granted extensions to all other M-LMS licensees. *Id.* at ¶¶ 9, 30, 32, 34-37.

[20] Petition for Waiver of the Rules and Request for Expedited Treatment, Progeny LMS, LLC, at 5 (Mar. 8, 2011) ("Progeny Waiver Request").

[21] *Id.*

[22] *Id.* at 3, 4.

The Bureau granted the Progeny Waiver Request in December 2011,[23] waiving construction requirements and other rules to allow Progeny to operate a multilateration network using proprietary equipment that would make M-LMS services "equally available" to track the location of both vehicular and non-vehicular mobile devices, and "equally available" to both vehicular and non-vehicular mobile devices.[24] In June 2013, over the objections of other 902-928 MHz band users, the Commission conditionally approved commercial operations by Progeny.[25] Petitions for reconsideration challenging grant of the *Progeny Conditional Operations Order* remain pending.[26]

Neither the Progeny Waiver Request nor the *Progeny Waiver Order* addressed directly the rule changes proposed in the *M-LMS NPRM* or the state of the commercial market for M-LMS equipment. Consequently, in early 2012, one M-LMS licensee asked the Bureau to clarify issues raised by the *Progeny Waiver Order*, including the relationship between the *M-LMS NPRM* and the *Progeny Waiver Order*.[27] The Bureau never acted on that petition. At no time did the Commission provide notice that it was considering terminating the *M-LMS NPRM*.

With both the *M-LMS NPRM* and the status of Progeny's equipment and operations still unresolved, PCSP filed its second request for extension in July 2012.[28] PCSP confirmed that the underlying rationale for the *2008 Extension Order* – regulatory uncertainty resulting from the *M-LMS*

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[23] *Request by Progeny LMS, LLC for Waiver of Certain M-LMS Rules*, WT Dkt. 11-49, Order, 26 FCC Rcd 16878 (2011), *recon. pending* ("*Progeny Waiver Order*").
[24] *Id.* at ¶¶ 13-20.
[25] *Request by Progeny LMS, LLC for Waiver of Certain M-LMS Rules; Progeny LMS, LLC Demonstration of Compliance with Section 90.353(d) of the Commission's Rules*, WT Dkt. 11-49, Order, 28 FCC Rcd 8555 (2013) ("*Progeny Conditional Operations Order*").
[26] *See, e.g.,* WT Dkt. 11-49, Petition for Reconsideration of Wireless Internet Service Providers Association (July 8, 2013); Petition for Reconsideration of The Part 15 Coalition (July 8, 2013).
[27] Skybridge and Telesaurus Petition for Partial Reconsideration and Clarification, WT Dkt. 11-49 (Jan. 19, 2012).
[28] *See, e.g.*, PCS Partners, L.P., ULS File No. 0005299291 (July 6, 2012). PCSP's 2012 extension request remained pending until July 2014.

NPRM, and the unavailability of equipment – remained unchanged.[29] The other M-LMS licensees, including Progeny, also requested extensions for the same reasons.[30] In its request, Progeny explained the significant uncertainty and resulting delay experienced in the development of M-LMS, noting that "[p]rimarily because of this regulatory uncertainty," commercial M-LMS equipment remains unavailable.[31]

Termination of *M-LMS NPRM*. In June 2014, the Commission took the unprecedented action of terminating the *M-LMS NPRM* without notice.[32] The Commission stated that "based on the record before us, and on recent developments" – specifically citing only the 2011 Progeny Waiver Request, the *Progeny Waiver Order*, and the *Progeny Conditional Operations Order*[33] – the *M-LMS NPRM*'s proposals "do not merit further consideration at this time."[34] The Commission found that "the types of revisions" proposed in the *M-LMS NPRM* "are not necessary to provide sufficient flexibility to M-LMS licensees to provide their location services," and that "[b]ased on recent developments pertaining to M-LMS operations in the 902-928 MHz band, we believe that the existing M-LMS framework can provide M-LMS licensees with sufficient opportunities to provide service offerings."[35] The Commission did not specify whether these "recent developments" were the

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[29] *Id.* at Attachment 1.
[30] *See 2014 Extension Order* at nn. 2, 4.
[31] *See* Progeny, ULS File No. 0005273607, Attachment at 3-5 (June 21, 2012). After receiving these requests, the Bureau opened WT Docket No. 12-202. Public Notice, 27 FCC Rcd 8070 (WTB 2012). Just two parties filed comments. IEEE 802 informed the Bureau that its Radio Regulatory Technical Advisory Group had determine that M-LMS technology "is no longer viable considering current market conditions," and it saw "no evidence that M-LMS services are viable technology offerings given the products currently available in the market place using low cost [GPS] alternatives for geolocation services in outdoor applications." Comments of IEEE 802, WT Dkt. 12-202, at 2 (Aug. 7, 2012).
[32] *Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands*, WT Dkt. 06-49, Order, 29 FCC Rcd 6361 (2014) ("*NPRM Termination Order*").
[33] *Id.* at ¶ 6.
[34] *Id.* at ¶ 7.
[35] *Id.* at ¶ 8.

same as those it referred to in paragraph 6 of the decision.[36] The Commission did not condition further extensions on development by M-LMS licensees of their own proprietary equipment.

2014 Extension Order. With the *M-LMS NPRM* having been terminated one month earlier, and its 2012 extension request still pending, in July 2014 PCSP renewed its request for extension and waiver.[37] Because its licenses were granted after all of the other M-LMS licensees, PCSP also asked that it not be given less time to meet applicable deadlines than any other M-LMS licensee.[38]

The *2014 Extension Order* granted in part PCSP's requests; however, it extended the interim and end-of-term deadlines for just two years (until September 4, 2016 and September 4, 2018, respectively). The Bureau granted the same extensions to the other M-LMS licensees, except Progeny, stating that it would address Progeny's requests in a separate order.[39]

PCSP Petition for Reconsideration. PCSP sought reconsideration of the *2014 Extension Order*, arguing, *inter alia*, that (1) the brevity of the extensions was not supported by the record or applicable precedent; (2) the Bureau failed to provide a reasoned analysis for its decision; (3) the Bureau failed to fully address PCSP's requests for relief; and (4) PCSP should not receive less time to satisfy construction obligations than any other M-LMS licensee. PCSP also asked the Bureau to clarify numerous statements bearing on its decision.[40]

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[36] *See id.*

[37] PCSP asked that the interim and end-of-term deadlines be extended until the later of (1) July 18, 2019 and July 18, 2024, respectively; or (2) five years and ten years, respectively, after Commission action terminating WT Docket 06-49 becomes final. As an alternative to extension of the five-year benchmark, PCSP requested waiver of the requirement to satisfy a construction requirement prior to the end of the license term. *See* ULS File No. 0006384500 (July 18, 2014) ("PCSP 2014 Extension Request"), Attachment 1 at 1, 18. The other M-LMS licensees filed similar requests. *See 2014 Extension Order* at nn. 2, 4.

[38] PCSP 2014 Extension Request, Attachment 1 at 1, 18.

[39] *2014 Extension Order* at ¶ 1.

[40] PCSP Petition for Partial Reconsideration and Clarification, WT Dkt. 12-202 (Sept. 29, 2014), at 12-21. The extensions sought were identical to PCSP's July 2014 extension request. *Id.* at 21. As an alternative to establishing new deadlines, PCSP requested initiation of a proceeding to determine what would constitute reasonable construction obligations for M-LMS licensees.

PCSP Request for Waiver and Extension. Since the *2014 Extension Order*, PCSP has made substantial efforts to identify a viable technology solution in its M-LMS spectrum, taking into consideration both the obligation to provide location functionality and the realities of current and anticipated markets for equipment and services (including the unavailability to it of Progeny's equipment). Subject to Commission approval, PCSP has identified a clear path forward for utilization of its spectrum that takes into account today's mature market for position location technology and serves the public interest.[41] However, the extensions granted by the *2014 Extension Order* do not allow enough time for PCSP's plan to be accomplished.

2017 Progeny Extension Order. On January 17, 2017, the Bureau finally acted on the Progeny requests that, in the *2014 Extension Order*, it had said it would address separately.[42] In the interim, Progeny had amended its requests to correspond to mobile carriers' deadlines for compliance with wireless E-911 obligations.[43] The Bureau conditionally granted extensions of Progeny's initial construction deadline for its "top 40 EA" licenses to June 21, 2013; waived the interim deadline entirely for all of Progeny's remaining licenses outside its top 40 EAs; and extended (based on market size) end-of-term deadlines to April 3, 2020 for 21 licenses, to April 3, 2021 for 21 licenses, and to April 3, 2023 for 71 licenses.[44]

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[41] PCS Partners, L.P. Petition for Waiver of 47 C.F.R. § 90.353(b) and Request for Extension of Time, WT Dkt. 16-149 (Apr. 15, 2016), amended August 19, 2016 ("PCSP Waiver Request"). Grant of the PCSP Waiver Request, which remains pending, would make this Application for Review moot.

[42] *Request of Progeny LMS, LLC for Waiver and Limited Extension of Time*, WT Dkt. 12-202, Order, DA 17-20, (Jan. 17, 2017) ("*2017 Progeny Extension Order*").

[43] *See* ULS File Nos. 0006383272 *et al.*, Request of Progeny LMS, LLC for Waiver and Extension of Time, Amendment and Restatement to Requests for Waiver and Extension of Time (Mar. 27, 2015) at 2 (citing *Wireless E911 Location Accuracy Requirements*, Fourth Report and Order, 30 FCC Rcd 1259 (2015)); Request of Progeny LMS, LLC for Waiver and Extension of Time (Jul. 17, 2014), at i; Request of Progeny LMS, LLC for Waiver and Limited Extension of Time, Limited Amendment to Amendment and Restatement to Requests for Waiver and Extension of Time (Jun. 26, 2015), at 3-4.

[44] *Id.* at ¶ 27. As Progeny had requested, the new deadlines correspond to the timeline for mobile service provider implementation of indoor location accuracy requirements established in

II. ARGUMENT

A. PCSP's Right to Due Process Was Violated

The *Reconsideration Order* constitutes reversible error because, in two separate respects, it violates PCSP's right to due process of law under the Fifth Amendment to the United States Constitution (the "Due Process Clause"). The Bureau not only failed to give PCSP notice that it was going to simultaneously adopt and apply in the *2014 Extension Order* a new "framework" for assessing license extension requests, a framework predicated on a grant of rule waivers to Progeny and Progeny's development of proprietary equipment (the "New Framework"), the Commission also failed to satisfy its own Rule 0.141 as adopted in 2011 (the "Termination Rule")[45] by abruptly terminating the *M-LMS NPRM* **without any notice**. As the Commission explained in 2011, the Termination Rule stipulates that "the issuance of a public notice and a reasonable opportunity for public input will be conditions precedent to termination" of an open docket identified by the CGB.[46] Due process concerns are effectively part and parcel of the fair notice issues raised before the Bureau. A failure to provide fair notice *is* a failure to provide due process. The *Reconsideration Order* gave impermissibly short shrift to PCSP's arguments – a failure that has Draconian consequences for PCSP, effectively depriving it of adequate time to construct its facilities and thereby imposing a *de facto* death sentence on the authorizations. The Due Process Clause, as applied in controlling Supreme Court precedent, does not tolerate such a result.

2015. Progeny must "demonstrate that it is in fact supporting the wireless carriers' efforts to comply with their E911 location accuracy requirements as set forth in the *Indoor Location Accuracy Order*." *Id.* at ¶¶ 27, 33.

[45] *See* 47 C.F.R. §§ 0.141(b), (c), which in relevant part require the FCC's Consumer and Government Affairs Bureau ("CGB") to take certain specified actions before terminating an open rulemaking docket: ". . . (2) The issuance of a public notice listing proceedings under consideration for termination, and; (3) A reasonable period during which interested parties may comment…." CGB took neither of these steps.

[46] *See* PCSP Reconsideration Petition at n.56, citing *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, ¶ 23 (2011) (the "*2011 R&O*").

In *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), the Supreme Court reaffirmed the well-established fundamental principle that, before imposing negative consequences on parties subject to its regulatory authority, the Commission must give fair notice thereof. The Court in that case explained the principle simply and succinctly: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[47] Of particular importance for this matter is that, as noted above, the Commission in 2011 incorporated the bedrock concept of fair notice in the Termination Rule and the *2011 R&O*. Had the Commission given notice and opportunity to comment that it was contemplating the termination of the *M-LMS NPRM* and adoption of the New Framework, PCSP would have had the critically important chance to explain to the Commission how those agency actions would impact PCSP and the public interest. Those opportunities, however, were never afforded. Rather, the *M-LMS NPRM* was silently and improvidently terminated, while the New Framework appeared out of nowhere.

The Commission's failure to follow the Termination Rule contravenes another fundamental legal doctrine, established in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), that administrative agencies are obligated to follow their own regulations.[48] The Commission must comply with this overarching, longstanding principle of law at all times, whether a private party raises it or not. Similarly, although the Bureau criticizes PCSP for not seeking reconsideration of the *NPRM Termination Order*,[49] PCSP

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[47] *FCC v. Fox*, 567 U.S. at 245 (citation omitted).

[48] *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 127 (2007) (*quoting* Richard Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000)) (identifying "as applied" challenges as "the basic building blocks of constitutional adjudication."'). PCSP appropriately and timely raised the fair notice issues with the Bureau. In any event, seeking reconsideration of the *NPRM Termination Order* may have been appropriate *if* PCSP wanted the Commission to reinstate the proceeding; however, that is not what PCSP sought. Rather, it wanted additional time to adapt to the fact that the rule changes it was expecting were no longer under consideration. And the timing problem was exacerbated by the failure to give the notice required by the Termination Rule. The due process harm would have been cured, not by reconsideration, but by extension.

[49] *Reconsideration Order* at n.16.

did not need to do so in order to challenge the detrimental *application* of that agency action to PCSP in the circumstances presented in this case.

In sum, the record below makes clear that the Bureau did not provide PCSP the requisite fair notice either that the Commission would be terminating the *M-LMS NPRM* or that it was going to adopt the New Framework, both in derogation of the fair notice requirements embedded in the Due Process Clause as articulated in *FCC v. Fox*, and to the clear and unlawful detriment of PCSP.

B. Extension Must Be Granted Because Failure to Commence Service Is Due to Causes Beyond PCSP's Control

Section 90.155(g) of the Commission's rules provides that extensions "**will be granted**" if the licensee shows that the failure to commence service is due to causes beyond its control, and that no extensions will be granted for delays caused by lack of financing, lack of site availability, assignment or transfer of control of an authorization, or failure to timely order equipment. 47 C.F.R. § 90.155(g) (emphasis added).

PCSP has demonstrated consistently that its failure to commence service has been due to causes beyond its control, specifically, regulatory uncertainty engendered by the *M-LMS NPRM* and the lack of commercially available M-LMS equipment,[50] and that extension therefore is justified under Section 90.155(g). In its Petition for Reconsideration, PCSP explained that the Bureau had failed to address this PCSP argument.

On reconsideration, the Bureau agreed "that PCSP sought a request for extension of its construction deadlines pursuant to Sections 1.925, 1.946(e), and 90.155(g) of the Commission's rules," but concluded that it had no obligation to address PCSP's request for relief under Section 90.155(g), stating: "These rule sections have different standards for relief, and PCSP has not demonstrated that we erred in exercising our discretion to resolve the PCSP Petition through a

[50] *See* PCSP 2014 Extension Request, Attachment 1 at 3-17; PCSP Petition for Reconsideration at 19-20. PCSP also showed that it had not been delayed by lack of financing, lack of site availability, assignment or transfer of control of an authorization, or failure to timely order equipment.

finding that PCSP merited relief pursuant to Section 1.925."[51] Evaluating (and denying) PCSP's request only under the waiver standard (which places a higher burden on the party seeking relief than does Section 90.155(g), and is discretionary), rather than under Section 90.155(g) (which is not discretionary), is arbitrary.

The Commission must correct the Bureau's error in selectively refusing to apply Section 90.155(g). This rule applies specifically to M-LMS. PCSP has identified the causes beyond its control that have prevented it from commencing service. The Commission therefore has an obligation to address PCSP's argument and, upon confirming that M-LMS equipment is not commercially available, grant PCSP an extension of time.[52]

C. Termination of the *M-LMS NPRM* Did Not Remove Regulatory Uncertainty

In granting brief extensions of the construction deadlines, the Bureau stated categorically that termination of the *M-LMS NPRM* "remov[ed] regulatory uncertainty for licensees regarding

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[51] *Reconsideration Order* at ¶ 20. The Bureau also did not address Section 90.155(g) in its *2014 Extension Order*, instead relying solely on the waiver rule, and unjustifiably disclaimed reliance on equipment availability. *2014 Extension Order* at ¶ 17 ("we do not rely on the current state of equipment deployment as justification").

[52] Alternatively, extension is justified under the waiver standard of 47 C.F.R. § 1.925(b)(3)(ii), which provides: "In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." Given the lack of commercially available equipment, there has been no reasonable alternative to PCSP's request for relief that would enable it to satisfy the construction deadlines. Under the circumstances, it would be inequitable and unduly burdensome, and contrary to the public interest, not to grant extension. *Cf. Maritel, Inc., Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses*, Memorandum Opinion and Order, 22 FCC Rcd 14074, ¶ 11 (2007). *Cf. Maritel Waiver MO&O*, ¶ 11 (in light of increased availability of alternative technology solutions to meet demand for service, "it would be unduly burdensome" to require licensee to satisfy its construction deadline by investing in technology "for which the record indicated there was little demand."). *See also P&R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984) ("When any administrative rule, although considered generally to be in the public interest, is not in the public interest as applied to particular facts, an agency should waive application of the rule."). The public interest would be served by extending PCSP's deadlines so that it may pursue its plans for its licensed spectrum.

potential M-LMS rules changes."[53] More recently, the Bureau asserted that its "primary rationale for granting the [2014] extension was that the termination of the [*M-LMS NPRM*] had removed regulatory uncertainty."[54]

PCSP's Petition for Reconsideration challenged the conclusory language regarding regulatory uncertainty.[55] The *Reconsideration Order* responded, "[a]s stated [in paragraph 8], the Division fully considered the impact of the *M-LMS NPRM* termination in its decision to afford additional relief to PCSP and other M-LMS licensees."[56] Paragraph 8 in turn stated that "the Division found it significant that the Commission terminated the *M-LMS NPRM* proceeding, thereby removing regulatory uncertainty for licensees regarding potential M-LMS rule changes.[57] The Division found that the further extension would permit M-LMS licensees to make appropriate business decisions regarding their licenses, including deployment of services, or, if necessary, to engage in secondary market transactions." These findings regarding material questions of fact are erroneous, and contradict the Bureau's (and the Commission's) own prior findings.[58] "An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence."[59]

Between 2004 and 2014, both the Bureau and the full Commission repeatedly acknowledged that the M-LMS rules impeded the development of equipment for the M-LMS Bands and, by extension, satisfaction of the buildout requirements.[60] The stated purpose of the *M-LMS NPRM* was to find a solution to the enduring lack of a viable use case for the M-LMS Bands within an otherwise

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[53] *2014 Extension Order* at ¶ 17.
[54] *Progeny 2017 Extension Order* at ¶ 12.
[55] *See* PCSP Petition for Reconsideration at 12-14.
[56] *Reconsideration Order* at ¶ 18.
[57] *Id.* at ¶ 8.
[58] The Bureau did not meaningfully address this issue. But substantial argument "requires an answer from the agency." *See Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134-35 (D.C. Cir. 2002). The Bureau's statements in paragraphs 8 and 18 of the *Reconsideration Order* simply refer to one another; they do not answer PCSP's argument.
[59] *Ctr. For Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992).
[60] *See supra* nn. 12-19.

crowded spectrum environment.[61] The Bureau's own clear statements in 2004, 2006, 2007, and 2008,[62] in addition to the Commission's findings in the *M-LMS NPRM*, succinctly and accurately cited this marketplace reality as a fundamental basis for granting extensions.

It is clearly erroneous and unreasonable to completely ignore prior findings and then conclude that uncertainty about the viability of the M-LMS Bands magically vanished just one month after the Commission abruptly (and in violation of its own procedures) ceased consideration of rule changes it previously had said were critical for the future of this spectrum.[63] It is even more unreasonable in light of the Commission's stated rationale for terminating the *M-LMS NPRM*, which was that a single M-LMS licensee (Progeny) had been granted conditional waivers to meet the construction obligations by using equipment unavailable to any other M-LMS licensee to implement a network that today does not provide commercial service (and which may never be built or provide service). Indeed, terminating the *M-LMS NPRM* only **increased** uncertainty for PCSP, as it described in its Petition for Reconsideration.[64] Nothing in the *Progeny Waiver Order* or the *Progeny Conditional Operations Order* suggested that the "New Framework" – that is, the singular path chosen by Progeny – would later be held to be the sole *de facto* alternative to changes proposed in the *M-LMS NPRM*.

In sum, the Bureau erroneously relied on the *NPRM Termination Order* to justify the *2014 Extension Order*, and failed to correct its error in the *Reconsideration Order*. The Commission's decision to terminate the *M-LMS NPRM* was based on "recent developments" – specifically, the 2011 Progeny Waiver Request, the *Progeny Waiver Order*, and the *Progeny Conditional Operations Order*.[65] The Commission's reference to "the existing M-LMS framework" clearly encompassed **only** the Progeny

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[61] *See M-LMS NPRM* at ¶¶ 18-20.
[62] *See supra* nn. 17-19.
[63] *See supra* nn. 12-16 and text.
[64] PCSP Petition for Reconsideration at 12-14, 16-17, 17-18, 20-21.
[65] *NPRM Termination Order* at ¶ 6.

proceedings. In relying on the Progeny-centric "New Framework," the Bureau did not acknowledge or discuss the fact that it encompasses only one licensee, and in fact excludes PCSP, which has no access to Progeny's equipment.

D. The Extensions Granted by the *2014 Extension Order* Were Not Based on Reasoned Analysis, and Were Arbitrary

In reaching the conclusion that termination of the *M-LMS NPRM* removed regulatory uncertainty, the Bureau failed to consider relevant factors.[66] Consequently, the *Reconsideration Order*, like the *2014 Extension Order*, does not satisfy the fundamental tenet that an agency "make its decision based on a consideration of the relevant factors."[67] This failure resulted in an arbitrary extension of two years that was not supported by facts or analysis.

The *2014 Extension Order* made the unsupported assertion that the extensions granted "will permit M-LMS licensees to make appropriate business decisions regarding their M-LMS licenses."[68] Granting only a 24-month extension ignored the realities of equipment cycles and business planning. These realities are well illustrated by the Bureau's own experience with Progeny, which makes clear that two years was an unreasonably short extension: more than two years elapsed between when Progeny filed its waiver request and the *Progeny Conditional Operations Order* approving commercial operations using its proprietary technology, which it now has until 2021 to implement. The *Reconsideration Order* failed to correct this error. Furthermore, it was error, both in the *2014 Extension Order* and the *Reconsideration Order*, to ignore numerous relevant factors cited in PCSP's Petition for Reconsideration, including (1) the Commission's acknowledgement that "even if a [M]-LMS licensee

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[66] *See Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593,604 (D.C. Cir. 2007) (an agency's "declaration of fact that is capable of proof but is unsupported by any evidence" is not sufficient to qualify the decision as non-arbitrary) (citation omitted).

[67] *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 297 (3d Cir. 1986) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). *See also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (agency decision must be based on adequate record and consideration of all relevant factors).

[68] *2014 Extension Order* at ¶ 17.

fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible";[69] (2) the Commission's 2006 finding that the M-LMS rules "place significant restrictions on M-LMS operations," and the corollary effect of those restrictions on the equipment market;[70] (3) the lack of commercially available M-LMS equipment, as found by the Bureau and the Commission in numerous decisions and confirmed by PCSP in its 2014 Extension Request;[71] (4) the fact that Progeny's equipment remains unavailable to other M-LMS licensees;[72] (5) the lack of evidence as to whether Progeny intends to license its equipment to other M-LMS licensees; and (6) whether Progeny's equipment, even if available to other M-LMS licensees, is interoperable across all M-LMS bands.[73] The Bureau also never provided any substantive analysis supporting its rejection of IEEE 802's argument that M-LMS under the existing rules (without waivers) is an obsolete technology.[74] All of these questions are material to the Bureau's conclusion that the fact that Progeny has equipment resolves uncertainty for PCSP.

Reasoned analysis also must take into account Commission decisions that bear on the matters at issue. Most importantly, the Bureau's finding that it will not consider equipment availability to be grounds for an extension alters, without adequate notice or justification, a long line of precedent,[75] and must be reversed. The Bureau also ignored the Commission's repeated emphasis

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[69] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd. 15182, ¶ 30 (1998). Consequently, there is no harm to the public interest by granting a reasonable extension of the deadlines.
[70] *M-LMS NPRM* at ¶ 18; *see supra* nn. 17-19.
[71] PCSP 2014 Extension Request, Attachment 1 at 14-17.
[72] *See id.* at 16. This has not changed since PCSP filed its 2014 Petition for Reconsideration.
[73] *Id.* at 15.
[74] *2014 Extension Order* at ¶ 19.
[75] *Applications Filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service*, Memorandum Opinion and Order, 23 FCC Rcd 5894, ¶ 24 (WTB 2008) (holding that "difficulties in obtaining viable, affordable equipment" is a factor beyond licensees' control that justifies granting additional time to construct). *See also Multilateration Location and Monitoring Service Construction Requirements*, Order on Reconsideration, and Memorandum Opinion and Order, 22 FCC Rcd 1925, ¶ 7 ("Factors that

on the challenges faced by M-LMS Bands licensees due to the existence of both licensed incumbents and unlicensed users, leading to its finding that there is "negligible" risk that the spectrum will be underutilized even if M-LMS licensees do not operate.

Likewise, the Bureau did not acknowledge applicable precedent holding that regulatory uncertainty is beyond a licensee's control and supports extension of construction obligations,[76] and that longer construction periods are justified when developing business plans that must account for the challenges of incumbent spectrum users.[77] The Commission has found longer periods necessary to encourage investment in bands encumbered by existing users.[78]

In sum, although the Bureau stated that it "in fact gave full consideration to the factors affecting M-LMS licensees,"[79] this is demonstrably not the case. Considering all relevant factors, it is evident that the extensions granted in the *2014 Extension Order* were arbitrarily chosen, unreasonably brief, and based on inadequate analysis and erroneous findings.[80]

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supported the grant of additional time to Havens apply equally to Progeny, including the lack of available M-LMS equipment make construction impossible, and complex spectrum sharing hindering the ability to secure such equipment."), ¶¶ 8-11 (WTB MD 2007). *See also Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its MLMS Economic Area Licenses*, Memorandum Opinion and Order, 21 FCC Rcd 5928, ¶ 13 (WTB MD 2006); *FCR, Inc. Request for Extension of Five-Year Construction Requirement*, Letter, 20 FCC Rcd 4293 (WTB MD 2005); *Warren C. Havens, Request for Waiver of the Five-Year Construction Requirement*, Memorandum Opinion and Order, 19 FCC Rcd 23742 (WTB MD 2004).

[76] *See DTV Build-Out; Requests for Extension of the Digital Television Construction Deadline*, 18 FCC Rcd 22705, ¶ 27 (2003); *MariTel, Inc., Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses*, 22 FCC Rcd 14074, ¶ 19 (2007).

[77] For example, for the AWS-1 band, the Commission adopted a 15-year license term, and required licensees to make a showing of substantial service within the license term, with no interim construction obligations. 47 C.F.R. ¶ 27.14(a).

[78] *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Dkt. 03-253, Report and Order, 18 FCC Rcd 25162, ¶¶ 70, 73 (2003).

[79] *Reconsideration Order* at ¶ 19.

[80] The Bureau asserts that PCSP has not justified the specific interim and end-of-term dates it requested. *Reconsideration Order* at ¶ 18. However, PCSP has made clear that deadlines should be established based on reasoned analysis, which may result in alternatives to the specific dates PCSP requested. *See* PCSP Petition for Reconsideration at 22. To date, no such consideration has occurred.

E. The Bureau Failed to Clarify Significant Aspects of the *2014 Extension Order*

PCSP asked the Bureau to clarify five aspects of the *2014 Extension Order* that are directly related to the Bureau's conclusions regarding regulatory certainty and equipment availability. Specifically, noting the *2014 Extension Order*'s reliance on the status of Progeny's technology in concluding that "the regulatory landscape is no longer uncertain" and that M-LMS licensees consequently had sufficient basis to proceed with their business plans, PCSP asked the Bureau to clarify: (1) its reference to "secondary market transactions";[81] (2) whether the assertion that "equipment capable of operating in the M-LMS band currently exists"[82] included commercially available M-LMS equipment compliant with the rules;[83] (3) whether, if the reference to equipment that "currently exists" *did not* include commercially available equipment, but only Progeny's proprietary equipment, Progeny would be required to make that equipment available to PCSP;[84] (4) whether as of September 2014 Progeny's technology satisfied the definition of M-LMS and whether

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PCSP continues to believe the most reasonable course would be to initiate a new proceeding for this purpose.

[81] *2014 Extension Order* at ¶ 17 (stating that the limited extension granted therein "will permit M-LMS licensees to make appropriate business decisions regarding their M-LMS licensees, including deployment of services or, if necessary, to engage in secondary market transactions."). *See* PCSP Petition at 20.

[82] *2014 Extension Order* at ¶ 17.

[83] PCSP Petition at 20. In seeking clarification of this statement, PCSP noted that the *2014 Extension Order* referred only to (and PCSP was only aware of) only Progeny's equipment, which remains unavailable to PCSP.

[84] *Id.* at 21.

its buildout satisfied the requirements of Section 90.155(e);[85] and (5) whether the issues raised in still-pending petitions in WT Docket No. 11-49 were moot.[86]

The *Reconsideration Order*, in just three sentences,[87] sidestepped PCSP's requests. In fact, it purported to address only the first, "clarify[ing] that M-LMS licensees are free to make whatever appropriate business decisions are warranted to ensure use of the spectrum in the public interest; these could include licensee deployment of service or secondary markets transactions (including assignment of license, partition, disaggregation, or leasing)."[88] This response clarifies nothing; it merely defines secondary market transactions as including "assignment of license, partition, disaggregation, [and] leasing." It sheds no light on the Bureau's underlying rationale. Consequently, it is impossible to determine if the Bureau intended the extensions granted in the *2014 Extension Order* either to compel M-LMS licenses to pursue, or to interest third parties in pursuing, secondary market transactions. Likewise, it is impossible to determine if the Bureau included licensing of Progeny's technology as a potential "business decision regarding ... deployment of service" or a secondary market transaction, and, if so, took into account the likelihood that Progeny would refuse to license its technology to a potential competitor. In sum, it is impossible to discern the reasoning or intent behind the Bureau's assertion that the limited extensions would either "permit M-LMS licensees to make appropriate business decisions" or "to engage in secondary market transactions." The Bureau's conclusion that the existence of Progeny's equipment created regulatory certainty

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[85] PCSP stated this clarification was necessary, given that Progeny's extension request remained pending, was based in part on "regulatory uncertainty" related to the Commission's proposed rules for E911 (*see* ULS File No. 0006383639, Progeny Request for Waiver and Extension of Time, at 12-15), that Progeny sought "to construct its network consistent with Commission direction and industry consensus in the indoor location accuracy proceeding," *id.*, and that the Bureau had stated that Progeny had "demonstrated that [its technology] provides improved location capabilities for E-911," *2014 Extension Order* at ¶ 19.

[86] PCSP Petition at 21.

[87] *Reconsideration Order* at ¶ 22.

[88] *Id.*

clearly was not accurate, contravening the principle that "elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected."[89]

The *Reconsideration Order* "decline[d] to address" PCSP's four other requests for clarification, stating that they are "beyond the scope of this proceeding."[90] Regarding PCSP's second and third requests, the *Reconsideration Order*'s assertion that the "availability of equipment generally or Progeny's equipment specifically"[91] are beyond the scope of this proceeding is plainly erroneous. Both questions go to the very heart of this matter: The *2014 Extension Order* expressly relied on the status of Progeny's technology in finding that "the regulatory landscape is no longer uncertain" and concluding that, as a result, M-LMS licensees had sufficient basis to proceed with their business plans – and that two years was sufficient.[92]

The Bureau's assertion that "the *2014 M-LMS Extension Order* explicitly **did not** rely on the then-existing state of equipment development as justification for relief"[93] is nonsensical. The *2014 Extension Order* expressly stated that "equipment capable of operating in the M-LMS band currently exists" and therefore the limited extensions granted were sufficient to develop and implement business plans.[94]

Thus, the specific questions raised by PSCP – whether the reference to "equipment [that] currently exists" included equipment other than Progeny's, and, if not, whether PCSP had access to Progeny's equipment – merit a response. And, because the answer to both questions is "no," the brief extension is not justified.

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[89] *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), *cert. denied*, 429 U.S. 895 (1976).
[90] *Id.*
[91] *Id.*
[92] *2014 Extension Order* at ¶ 17.
[93] *Reconsideration Order* at ¶ 22 (emphasis added).
[94] *2014 Extension Order* at ¶ 17. However, the Bureau also contradicts itself by stating that "the Division fully considered the fact that equipment capable of operating in the M-LMS band currently exists when granting relief to PCSP." *Reconsideration Order* at ¶ 18.

Finally, the *Reconsideration Order* "decline[d] to address" PCSP's fourth and fifth clarification requests, which the Bureau states concern "any rule waivers that may be required in connection with secondary market transactions and issues raised by the *M-LMS NPRM*, which would be addressed on a case-by-case basis."[95] But PCSP did not ask for clarification of these issues.[96]

F. The Bureau Erred in Giving PCSP Less Time Than Other M-LMS Licensees to Satisfy Construction Obligations

It is well-settled that the Commission must "treat[] similarly situated parties alike or provid[e] an adequate justification for disparate treatment," *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); *see also Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997). The Bureau did neither. PCSP, having been granted its licenses well **after** any other M-LMS licensee, has been prejudiced by receiving **substantially less** time – up to 48 months – to meet its construction obligations than other M-LMS licensees.

Unlike the *2014 Extension Order*, which did not acknowledge PCSP's request that it not be given less time than other licensees to meet its construction obligations,[97] the *Reconsideration Order* concedes that M-LMS licensees' original construction deadlines differed based on their license grant dates.[98] However, the Bureau did not correct the error or justify its disparate treatment of PCSP. Rather, it simply responded that "the first band-wide extension for M-LMS licensees" in 2008 resulted in common construction deadlines, and that "all M-LMS licensees have been afforded the full five and ten years, respectively, to meet their interim and final construction deadlines."[99] These statements do not address the substance of PCSP's argument.

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[95] *Reconsideration Order* at ¶ 22.
[96] *See* PCSP Petition at 20-21.
[97] PCSP 2014 Extension Request, Attachment 1 at 1.
[98] *Reconsideration Order* at ¶ 20.
[99] *Id. But see* PCSP Petition at 2, 18.

The Bureau's denial of equivalent time to construct must be corrected. Other M-LMS licensees had up to a four-year head start on PCSP *prior to* "the first band-wide extension."[100] Simply put, they have had more time to meet their obligations. The fact that all licensees ultimately were given the same deadline does not negate the substantial first-in-time advantage that accrued to licensees whose grants preceded PCSP's. *See Fresno Mobile Radio Svcs., Inc. v. FCC*, 165 F.3d 965, 969 (D.C. Cir. 1999) (Commission must explain why one group of licensees should have a "permanent advantage" over similarly situated licensees with respect to buildout obligations).

The relevant date for calculating whether PCSP has been treated like other M-LMS licensees is July 25, 2003 – the date of grant of PCSP's licenses. Based on that date, as of the *2014 Order* PCSP had held its licenses for less than 14 years, in contrast to nearly 17 years for Progeny – which, as a result of the *2017 Progeny Extension Order*, now will have until 2023 to meet its end-of-term obligations, with *no* interim requirements. Calculating from a common end date, as the Bureau did, is arbitrary and constitutes detrimentally different treatment for PCSP relative to other M-LMS licensees.

The issue of disparate treatment also arises with respect to the Bureau's denial of PCSP's request to waive the interim construction requirement. In the *2017 Progeny Extension Order*, the Bureau – without discussion – waived the interim deadline entirely for Progeny's licenses outside the top 40 EAs.[101] In contrast, in the *Reconsideration Order*, the Bureau denied PCSP's request to waive the interim deadline, stating that "construction requirements serve the important purpose of ensuring that licensees construct their licenses in a timely fashion and do not warehouse spectrum."[102] But

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[100] See PCSP Petition for Reconsideration at nn.12-13

[101] *Progeny 2017 Extension Order*, ¶ 27.

[102] *Reconsideration Order* at ¶ 20. The question of an interim construction deadline is yet another argument the Bureau failed to address fully. In its Petition for Reconsideration (at 19), PCSP argued that such a requirement should be waived because the underlying purpose of the rule – to support competing uses of the 902-928 MHz band on an interference-free basis – would not be served, and a grant would be in the public interest; and because given the unique circumstances of the M-LMS

"warehousing" (a term the Bureau did not explain) is not a plausible concern given that, as shown above, "even if a [M-LMS] licensee fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible."

III. CONCLUSION

For the foregoing reasons, PCSP respectfully requests that the Commission, taking into account relevant facts and changed circumstances, (1) grant this Application for Review and extend PCSP's end-of-term construction deadlines consistent with those established for Progeny's licenses, or to the later of (a) July 18, 2024 or (b) ten years after Commission action terminating WT Docket No. 06-49 becomes final; (2) waive the requirement to satisfy an interim construction requirement; and (3) as an alternative to the requested extensions, initiate a proceeding to determine appropriate construction obligations for M-LMS Band licensees.

Respectfully submitted,

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Bands, application of an interim construction obligation would be inequitable, unduly burdensome, and contrary to the public interest; and because elimination of an interim buildout obligation is consistent with precedent. The *Reconsideration Order* failed to address the waiver standard or precedent, and ignored PCSP's showing regarding the purpose of the rules.