

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Requests by FCR, Inc., Progeny LMS, LLC,)	WT Docket No. 12-202
PCS Partners, L.P. and Helen Wong-Armijo)	
for Waiver and Limited Extension of Time)	

PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

E. Ashton Johnston
Jessica DeSimone
TELECOMMUNICATIONS LAW
PROFESSIONALS PLLC
1025 Connecticut Ave., N.W.
Suite 1011
Washington, DC 20036
(202) 789-3120
ajohnston@telecomlawpros.com
jdesimone@telecomlawpros.com

Counsel for PCS Partners, L.P.

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PCS Partners, L.P. (“PCSP”), by its attorneys and pursuant to Section 405(a) of the Communications Act, 47 U.S.C. § 405(a), and Section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, respectfully requests reconsideration of the Order of the Mobility Division of the Wireless Telecommunications Bureau (“Division”) in the above-captioned proceeding, to the extent that decision denies in part PCSP’s requests for relief from the construction deadlines for its Multilateration Location and Monitoring Service (“M-LMS”) licenses.¹ PCSP also requests clarification of certain aspects of the Order.

I. INTRODUCTION AND SUMMARY

PCSP shares the Commission’s goals of making efficient use of spectrum and promoting competition, and is committed to development of viable technologies utilizing its authorized spectrum. However, the Order takes a Draconian approach to construction that does not serve these objectives, announcing that PCSP’s licenses will terminate automatically notwithstanding causes beyond its control and the Commission’s own finding that due to the unique circumstances of the band the public interest is not harmed by lack of additional operations.

¹ *Requests by FCR, Inc., Progeny LMS, LLC, PCS Partners, L.P. and Helen Wong-Armijo for Waiver and Limited Extension of Time*, WT Docket No. 12-202, DA 14-1257, Order (Aug. 29, 2014) (“Order”).

As explained more fully below, the Order should be modified because (1) the brief extensions granted in the decision are not supported by the record or applicable precedent, (2) the Division failed to provide a reasoned analysis for its decision, and (3) the Division failed to fully address PCSP's requests for relief. On reconsideration, the Division should extend the mid-term and end-of-term construction periods 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 mid-term construction period, the Division should waive the requirement to satisfy a construction requirement prior to the end of the license term. And, the Division should ensure that PCSP is not afforded less time to satisfy any applicable M-LMS construction obligation than any other M-LMS licensee. In addition, in order to resolve uncertainty resulting from the Order, the Division should clarify (1) its reference to "secondary market transactions," including whether such transactions include possible combinations of M-LMS spectrum blocks that would require rule waivers; (2) whether its statement regarding the existence of equipment includes commercially available M-LMS equipment compliant with the existing rules; (3) to the extent the Order's reference to equipment that currently exists includes only Progeny's proprietary equipment, whether it will require Progeny to license that equipment to other M-LMS licensees; (4) whether Progeny's technology currently satisfies the definition of M-LMS in Section 90.7 and whether its network satisfies the construction and obligation requirements of Section 90.155(e); and (5) whether the issues raised in various pending petitions in WT Docket No. 11-49 are now moot. Finally, as an alternative to establishing new deadlines, the Division should immediately initiate a proceeding to determine, given the totality of the circumstances, what would constitute a reasonable construction obligation for M-LMS licensees.

II. BACKGROUND

In light of the Order's attempt to sweep away the challenges that M-LMS licensees have faced in trying to develop business plans utilizing their licenses, it is necessary to review the Order in the context of the Commission's rules for M-LMS and, more broadly, the 902-928 MHz band.

Overview of M-LMS Rules. M-LMS operations are authorized in the 902-928 MHz band, which is shared by myriad users and is allocated on a primary basis to federal radiolocation systems and Industrial, Scientific, and Medical equipment; on a secondary basis to federal fixed and mobile services; on a tertiary basis to M-LMS; and finally to amateur radio operations. As the Commission is aware, Part 15 unlicensed devices also use the band extensively.²

The Commission adopted the current technical and operational rules that govern M-LMS in 1995.³ The rules were designed to protect federal and other licensed users and avoid increasing interference to unlicensed Part 15 users.⁴ Because of the heavy use of the band for licensed and unlicensed operations, the Commission recognized even before it auctioned M-LMS licenses that “*even if a [M]-LMS licensee fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible.*”⁵

In 1998, prior to holding its first auction for geographic area M-LMS licenses, the Commission adopted five-year and ten-year construction requirements applicable to those licenses.⁶

² See, e.g., Petition for Reconsideration of the Part 15 Coalition, WT Docket No. 11-49, at 2-3 (July 8, 2013).

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 (1995); Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd. 13942 (1997).

⁴ See 10 FCC Rcd. 4695 at ¶¶ 6-8.

⁵ 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) (emphasis added).

⁶ See *id.*

The rules, as amended, require M-LMS⁷ 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.”⁸

M-LMS EA Licensing. The Commission auctioned M-LMS EA licenses in 1999 (Auction 21) and 2001 (Auction 39). There are three blocks of M-LMS spectrum within each EA: Block A (6 MHz total) consists of a 5.75 MHz block paired with a 0.25 MHz narrowband channel. Block B (2.25 MHz total) consists of a 2 MHz block (shared with non-MLMS licensees) paired with a 0.25 MHz narrowband channel. Block C (5.75 MHz total) consists of a 5.5 MHz block paired with a 0.25 MHz narrowband channel.⁹ A single M-LMS licensee may not hold licenses for both Block A and Block C in an EA.¹⁰

⁷ 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.

⁸ 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. An M-LMS station “will be considered constructed and placed in operation if it is built in accordance with its authorized parameters and is regularly interacting with one or more other stations to provide location service, using multilateration technology, to one or more mobile units. Specifically, LMS multilateration stations will only be considered constructed and placed in operation if they are part of a system that can interrogate a mobile, receive the response at 3 or more sites, compute the location from the time of arrival of the responses and transmit the location either back to the mobile or to a subscriber’s fixed site.” 47 C.F.R. § 90.155(e).

⁹ 47 C.F.R. § 90.357(a).

¹⁰ See 47 C.F.R. § 90.353(f).

PCSP was the high bidder at Auction 39 for 31 Block A licenses and one Block C license. PCSP's licenses were granted on July 25, 2003, for a 10-year term;¹¹ consequently, PCSP's initial (mid-term) construction deadline was July 25, 2008 and its end-of-term deadline was July 25, 2013. Because the grant of PCSP's licenses occurred after the other M-LMS licensees, its deadlines fell later than those licensees' deadlines.¹²

2004-2007 Extension Grants. As noted, 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. In granting each request, the Division found that the unavailability of equipment was due to causes beyond the licensees' control.¹³

¹¹ In addition to the 32 M-LMS licenses held by PCSP, five other entities hold a total of 582 M-LMS licenses: Progeny LMS, LLC ("Progeny") holds 228 Block B and Block C licenses in 113 EAs throughout the country, and also holds two Block A licenses; Skybridge Spectrum Foundation ("Skybridge") holds 128 Block A licenses and its affiliate Telesaurus Holdings GB, LLC ("Telesaurus") holds 128 Block A licenses and one Block C license; Helen Wong-Armijo ("Wong-Armijo") holds 24 Block B and 60 Block C licenses; and FCR, Inc. ("FCR") holds 13 Block A licenses. *See Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules*, WT Docket No. 08-60, *Order*, 23 FCC Rcd. 17250, ¶ 4 (WTB 2008), *recon. pending*.

¹² FCR's licenses were granted in July 1999 and October 2001, *see, e.g.*, ULS, Call Sign WPOJ871 and Call Sign WPTH901; thus, its initial construction deadlines were July 2004 and July 2009, and October 2006 and October 2011. Telesaurus' licenses were granted in July 1999, *see, e.g.*, ULS, Call Sign WPOJ876; thus, its initial construction deadlines were July 2004 and July 2009. Progeny's licenses were granted in July 2000, *see, e.g.*, ULS, Call Sign WPQP845; thus, its initial construction deadlines were July 2005 and July 2010. Wong-Armijo's licenses were granted in October 2001, *see, e.g.*, ULS, Call Sign WPTH955; thus, its initial construction deadlines were October 2006 and October 2011.

¹³ *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" Havens' control); *FCR, Inc.*, Letter, 20 FCC Rcd. 4293 (WTB MD 2005) (finding FCR "similarly situated [to Havens] 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"); *In the Matter of Multilateration Location and Monitoring Service Construction Requirements*, 22 FCC Rcd. 1925, ¶¶ 8, 9, 10, 11 (WTB MD 2007) (granting extension to Wong-Armijo, and additional extensions to FCR and Telesaurus, based on finding that "the failure to complete construction is

2006 Proposed Rule Changes. In March 2006, less than three years after PCSP was granted its licenses, the Commission observed that “there has been very limited development of M-LMS service under” the rules adopted in 1995, and initiated a reexamination of those rules.¹⁴ The purpose of the *2006 NPRM* was to consider “rule changes that could facilitate higher-valued licensed use of the spectrum in the M-LMS bands” while protecting federal, licensed, and unlicensed users.¹⁵ Finding that “current M-LMS rules place significant restrictions on M-LMS operations that were designed in large measure to limit interference among the variety of users within the band,”¹⁶ the Commission proposed changes to five significant aspects of the rules that it found limit flexible use by M-LMS licensees: (1) restrictions on the scope of permissible communications and interconnection; (2) power and other technical limitations; (3) the prohibition on a single licensee holding licenses for both Blocks A and C for an EA; (4) the safe harbor for operations under Parts 15 and 97; and (5) the M-LMS testing requirement.¹⁷ The Commission took no action until 2014 when it terminated the proceeding without notice or comment.¹⁸

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....”).

¹⁴ *Amendment of the Commission’s Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands*, WT Docket No. 06-49, Notice of Proposed Rulemaking, 21 FCC Rcd. 2809, ¶ 1 (2006) (“*2006 NPRM*”).

¹⁵ *Id.* at ¶ 3.

¹⁶ *Id.* at ¶ 18.

¹⁷ *See 2006 NPRM* at ¶¶ 19-41 and Appendix at ¶ 17.

¹⁸ There was strong record support for adopting the proposed changes, *see, e.g.*, WT Docket No. 06-49, Comments of Progeny LMS, LLC (May 30, 2006); Comments of Helen Wong-Armijo at 3-6 (May 30, 2006); Comments of FCR, Inc. (May 30, 2006), as well as opposition from equipment manufacturers and other Part 15 stakeholders, *see, e.g.*, Comments of TIA, at 5-11 (May 30, 2006); Comments of Consumer Electronics Association, at 3-8 (May 30, 2006); Comments of Motorola, Inc., at 3-8 (May 30, 2006); Comments of Southern Company Services, Inc., at 7-10 (May 30, 2006); Comments of WISPA, at 1 (May 30, 2006); Comments of IEEE 802.18, at 2 (May 30, 2006).

2008 Extension Request. In light of the upcoming deadline to satisfy its mid-term construction deadline, in June 2008 PCSP for the first time requested an extension, based on causes beyond its control and the unresolved *2006 NPRM*.¹⁹

2008 Extension Order. The Bureau granted in part PCSP's extension request, approving an extension of the mid-term construction deadline by just less than four years, to July 19, 2012, and of the end-of-term construction deadline by just less than one year, to July 19, 2014.²⁰ The Bureau based its decision on "the totality of the circumstances," finding that the lack of available equipment warranted relief and "acknowledg[ing] the regulatory uncertainty engendered by the pending M-LMS rulemaking."²¹ The *2008 Extension Order* also granted Progeny's request for extension, and, on the Bureau's own motion, granted extensions to the other M-LMS licensees.²² As a result, all M-LMS licensees generally were given the same mid-term and end-of-term deadlines going forward.²³

Progeny Waiver. In 2011, Progeny 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 rules adopted in a different proceeding.²⁴ Reiterating the Bureau's finding in the *2008 Extension Order* that "no M-LMS equipment is commercially available for current deployment in the United States, and no M-LMS

¹⁹ See ULS File No. 0003469981 (June 12, 2008) ("PCSP 2012 Extension Request").

²⁰ See *Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules*, WT Docket No. 08-60, *Order*, 23 FCC Rcd. 17250, ¶¶ 21, 30, 33 (WTB 2008), *recon. pending* ("2008 Extension Order").

²¹ *2008 Extension Order* at ¶¶ 21, 22, 23, 30. The Bureau further noted the "significant restrictions on M-LMS operations" as a contributing factor in the lack of equipment. *Id.* at ¶ 22.

²² *Id.* at ¶¶ 9, 30, 32, 34-37.

²³ See *id.* at ¶ 30.

²⁴ *Petition for Waiver of the Rules and Request for Expedited Treatment, Progeny LMS, LLC*, at 5 (Mar. 8, 2011) ("Progeny Waiver Request").

licensee provides service today,”²⁵ Progeny requested a waiver that would allow it to be deemed to satisfy the M-LMS buildout requirements using its proprietary technology.²⁶ The Bureau immediately opened a new docket and sought comment on Progeny’s request.²⁷

Less than three years ago, the Bureau granted the Progeny Waiver Request,²⁸ waiving Section 90.155(e) to permit Progeny to operate, using proprietary equipment, a multilateration network different from the specific construction requirements in that rule; waiving Section 90.353(g) to allow Progeny to make M-LMS services “equally available” to track the location of both vehicular and non-vehicular mobile devices; and waiving the “primary operations” requirement of Section 90.353(g) to allow Progeny to make its service equally available to both vehicular and non-vehicular mobile devices provided that Progeny provides its location service to both vehicular and non-vehicular location services.²⁹

Request for Clarification of Progeny Waiver Order. Neither the Progeny Waiver Request nor the *Progeny Waiver Order* addressed directly the rule changes proposed in the *2006 NPRM* or the state of the market for commercial M-LMS equipment. Consequently, in early 2012, one M-LMS licensee asked the Bureau to clarify numerous issues raised by the *Progeny Waiver Order*, including the relationship between the *2006 NPRM* and the *Progeny Waiver Order*.³⁰ The Bureau has never acted on that petition.

²⁵ *Id.*

²⁶ *Id.* at 3, 4.

²⁷ See Public Notice, WT Docket No. 11-49, Wireless Telecommunications Bureau Seeks Comment on Request by Progeny LMS, LLC for Waiver of Certain Multilateration Location and Monitoring Service Rules, 26 FCC Rcd. 3495 (WTB 2011).

²⁸ *Request by Progeny LMS, LLC for Waiver of Certain M-LMS Rules*, WT Docket No. 11-49, Order, 26 FCC Rcd. 16878 (2011), *recon. pending* (“*Progeny Waiver Order*”).

²⁹ *Id.* at ¶¶ 13-20.

2012 Waiver and Extension Requests. Faced with a July 2012 construction deadline, and with both the *2006 NPRM* and clarification of the then-recent *Progeny Waiver Order* still unresolved, PCSP filed a request for extension of the deadlines established in the *2008 Extension Order*.³¹ As PCSP confirmed, the factors cited by the Bureau as the basis for the *2008 Extension Order* – regulatory uncertainty engendered by the *2006 NPRM*, and the unavailability of M-LMS equipment – remained unchanged.³² The other M-LMS licensees also filed extension requests citing the effects of continued regulatory uncertainty, including lack of equipment.³³ In its request, Progeny explained the significant uncertainty and resulting delay experienced in the development of M-LMS, notwithstanding its development of proprietary equipment to be used in conjunction with the network authorized by its waiver, noting that “[p]rimarily because of this regulatory uncertainty,” mass-produced M-LMS equipment remains unavailable.³⁴

After receiving the 2012 Extension Requests, the Bureau opened this docket and requested comments.³⁵ Just two parties responded. IEEE 802 informed the Bureau that its Radio Regulatory Technical Advisory Group has adopted the position that M-LMS technology “is no longer viable considering current market conditions,” and that it “see[s] no evidence that M-LMS services are viable technology offerings given the products currently available in the market place using low cost

³⁰ Skybridge and Telesaurus Petition for Partial Reconsideration and Clarification, WT Dkt. No. 11-49 (Jan. 19, 2012).

³¹ See, e.g., PCS Partners, L.P., ULS File No. 0005299291 (July 6, 2012) (requesting extension until five years after final Commission action on the rule changes proposed in WT Docket No. 06-49).

³² *Id.* at Attachment 1.

³³ See Order at nn. 2, 4 (collectively, the “2012 Extension Requests”).

³⁴ See Progeny, ULS File No. 0005273607, Attachment at 3-5 (June 21, 2012) (emphasis added).

³⁵ Public Notice, WT Docket No. 12-202, 27 FCC Rcd. 8070 (WTB 2012).

Global Positioning System ('GPS') alternatives for geolocation services in outdoor applications.”³⁶

The Part 15 Parties stated that “there is no reason to require” any M-LMS licensee to construct until it can satisfy obligations (including the testing requirement) under the original M-LMS rules – obligations that the Commission had proposed to eliminate in the *2006 NPRM*.³⁷

The Division did not act on the 2012 Extension Requests and did not address IEEE 802's comments until the Order.

Progeny Conditional Operations Order. In June 2013, following two-and-a-half years of objections by other 902-928 MHz users over whether Progeny satisfied the conditions of both the rules and the *Progeny Waiver Order*, the Commission conditionally approved commercial operations by Progeny utilizing its proprietary equipment and the network approved by the *Progeny Waiver Order*.³⁸ Six parties filed petitions for reconsideration of the *Progeny Conditional Operations Order*, with some asking the Commission to overturn it.³⁹ The Commission has not acted on those petitions.

Termination of 2006 NPRM. In June 2014, without notice or comment, the Commission terminated the *2006 NPRM* proceeding.⁴⁰ The Commission stated that “based on the record before

³⁶ Comments of IEEE 802, WT Docket No. 12-202, at 2 (Aug. 7, 2012).

³⁷ Comments of Itron, Inc., the Wireless Internet Service Providers Association, and Landis+Gyr Company (“Part 15 Parties”), WT Docket No. 12-202, at 5-6 (Aug. 16, 2012).

³⁸ *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 Docket No. 11-49, Order, 28 FCC Rcd. 8555 (2013), *recon. pending* (“*Progeny Conditional Operations Order*”).

³⁹ *See* WT Docket No. 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); Petition for Reconsideration of Utility Trade Associations (July 8, 2013); Petition for Reconsideration of Plantronics, Inc. (July 8, 2013); Petition for Reconsideration of Silver Springs Networks, Inc. (July 8, 2013); Petition for Reconsideration of Skybridge and Telesaurus (July 8, 2013). *See also* WT Docket No. 11-49, Reply Comments of Google Inc. in Support of Petitions for Reconsideration, at 1 (Aug. 2, 2013) (“When it authorized Progeny ... to commence commercial operations, the Commission changed the rights and responsibilities of licensed and unlicensed users in the 902-928 MHz band.”).

⁴⁰ *Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands*, WT Docket No. 06-49, Order, 29 FCC Rcd. 6361 (2014) (“*Termination Order*”).

us, and on recent developments” – citing, specifically, the 2011 Progeny Waiver Request, the *Progeny Waiver Order*, and the *Progeny Conditional Operations Order*⁴¹ – the 2006 NPRM’s proposals “do not merit further consideration at this time.”⁴² The Commission found that “the types of revisions” suggested in the 2006 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.”⁴³

2014 Waiver and Extension Requests. In July 2014, PCSP, pursuant to Sections 1.946(e) and 90.155(g), requested a further extension of time to meet the construction benchmarks, and, pursuant to Section 1.925, waiver of applicable rules. 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 No. 06-49 becomes final.⁴⁴ The other M-LMS licensees filed similar requests.⁴⁵ 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.⁴⁶ Finally, noting that 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 will have received.⁴⁷

⁴¹ *Id.* at ¶ 6.

⁴² *Id.* at ¶ 7.

⁴³ *Id.* at ¶ 8.

⁴⁴ *See, e.g.*, ULS File No. 0006384500 (July 18, 2014) (“PCSP 2014 Extension Request”), Attachment 1 at 1, 18.

⁴⁵ *See* Order at nn. 2, 4 (collectively, the “2014 Extension Requests”).

⁴⁶ PCSP 2014 Extension Request, Attachment 1 at 1, 18.

⁴⁷ *Id.*

Order. The Order granted in part PCSP's requests for relief from the construction deadlines. Specifically, the Division waived the two deadlines until September 4, 2016 and September 4, 2018, respectively.⁴⁸ The Division denied PCSP's other requests for extension and waiver.⁴⁹ The Division granted in part the requests for relief filed by other M-LMS licensees, except Progeny, stating that it would address Progeny's requests in a separate order.⁵⁰

III. ARGUMENT

A. The Conclusion that Regulatory Uncertainty Has Been “Removed” Is Not Justified

In granting just two additional years to construct, the Order states categorically that termination of the *2006 NPRM* “remov[ed] regulatory uncertainty for licensees regarding potential M-LMS rules changes,”⁵¹ adding that “the regulatory landscape for this service is no longer uncertain.”⁵² In reaching this conclusion, the Division failed to consider relevant factors, including both the regulatory uncertainty engendered by proceedings other than the *2006 NPRM*, as well as the uncertainty created by eight years of inaction in that docket.⁵³

Even assuming that termination of the *2006 NPRM* removed uncertainty about whether the Commission would amend the rules as proposed, that action did not erase all regulatory uncertainty resulting from other open proceedings that affect the viability of M-LMS. Considered in their

⁴⁸ Order at ¶ 16.

⁴⁹ *Id.*

⁵⁰ *Id.* at ¶ 1.

⁵¹ *Id.* at ¶ 17.

⁵² *Id.*

⁵³ 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).

totality, the history and current circumstances of M-LMS plainly show that the Order's determination that "the regulatory landscape for this service is no longer uncertain" is not justified.

In particular, the Division failed to acknowledge or discuss the effects of the still-pending request for reconsideration and clarification of the *Progeny Waiver Order*⁵⁴ and the still-pending procedural and substantive challenges to the *Progeny Conditional Operations Order*.⁵⁵ These unresolved proceedings are subject to further agency and judicial review that could result in modification or vacatur of those orders and further proceedings.

Moreover, it is unreasonable to conclude that terminating the long-pending docket did not add to uncertainty about M-LMS licensees' ability to utilize the spectrum under the original rules, regardless of whether the Commission followed its rules when it adopted the *2014 Termination Order*.⁵⁶ For eight years, PCSP placed substantial reliance on the Commission's 2006 finding that "current M-LMS rules place significant restrictions on M-LMS operations,"⁵⁷ and reasonably believed that the Commission either would adopt the proposed changes or take other actions consistent with its findings. During that time, nothing in the *Progeny Waiver Order* or the *Progeny Conditional Operations Order* suggested that the singular, costly path chosen by Progeny – the development of proprietary equipment and technology and pursuit of rule waivers in order to

⁵⁴ See *supra* at p. 8.

⁵⁵ See *supra* at p. 10.

⁵⁶ The Commission delegated to the Consumer and Government Affairs Bureau authority to review all open dockets periodically and, when it identifies an open docket that appears to be a candidate for termination, to consult with the Commission bureau or office responsible for that docket. *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). Further, "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 CGB. *Id.* at ¶ 24. It remains unclear why the Commission did not follow its own regulations.

⁵⁷ *2006 NPRM* at ¶ 18. That reliance was hardly misplaced, as the Division itself relied on the *2006 NPRM* in finding regulatory uncertainty, see *2008 Extension Order* at ¶ 23, and all of the 2012 Extension Requests and 2014 Extension Requests cited the *2006 NPRM* as justifying relief.

implement that equipment and technology, in the face of strong opposition by licensed and unlicensed users of the 902-928 MHz band – would be considered an alternative to the proposed rule changes. Even Progeny, which seemingly is responsible for “the existing M-LMS framework” that the Order relies on, repeatedly expressed concerns about the viability of M-LMS under existing rules.⁵⁸

B. The Order Lacks Reasoned Analysis and Is Contrary to Precedent

The Order does not satisfy the requirement that an agency “make its decision based on a consideration of the relevant factors.”⁵⁹ The decision that resulted in this outcome was not based on a consideration of relevant factors. The Order’s assertion that a further two-year extension “will permit M-LMS licensees to make appropriate business decisions regarding their M-LMS licenses,” in particular, is not supported by any analysis, and ignores the realities of equipment cycles and business planning.⁶⁰

1. The Brief Extensions Granted Are Not Justified

The decision to extend the construction deadlines for only an additional two years was not based on a reasoned analysis of relevant factors. The many factors that the Order failed to consider include (1) the Commission’s finding that “even if a [M]-LMS licensee fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible”;⁶¹ (2) the Commission’s finding

⁵⁸ See, e.g., Progeny FCC Form 601, File No. 0005273607, Attachment at 3-5 (June 21, 2012).

⁵⁹ *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, in order to withstand review).

⁶⁰ See *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d at 604.

⁶¹ 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).

that the current M-LMS rules “place significant restrictions on M-LMS operations”;⁶² (3) the lack of commercially available M-LMS equipment, as explained in PCSP’s 2014 Extension Request;⁶³ (4) the fact that Progeny’s proprietary equipment remains unavailable to other M-LMS licensees;⁶⁴ (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 it were available to other M-LMS licensees, is interoperable across all M-LMS bands. The Order also lacks any substantive analysis supporting the rejection of IEEE 802’s argument that M-LMS is an obsolete technology.⁶⁵

The Order also is inconsistent with Commission decisions acknowledging that longer construction periods are necessary when developing business plans that must account for the challenges of incumbent spectrum users. For example, for AWS-1 spectrum, the Commission adopted a 15-year license term, and required licensees to make a showing of substantial service in their license areas within the license term, with no interim construction obligations.⁶⁶ The Commission found these longer periods were necessary to encourage investment in bands encumbered by existing users.⁶⁷ For the 3.5 GHz band, the Commission has proposed forgoing buildout requirements entirely.⁶⁸ And, as noted, the Commission repeatedly has emphasized the challenges of the M-LMS bands due to the existence of both incumbents and the growing number

⁶² 2006 NPRM at ¶ 18.

⁶³ PCSP 2014 Extension Request, Attachment 1 at 14-17.

⁶⁴ See *id.* at 16.

⁶⁵ Order at ¶ 19. See *Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134-35 (D.C. Cir. 2002) (“substantial” argument “requires an answer from the agency”).

⁶⁶ 47 C.F.R. ¶ 27.14(a).

⁶⁷ See also *In the Matter of Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 03-253, Report and Order, 18 FCC Rcd. 25162, ¶¶ 70, 73 (2003) (“AWS-1 Order”).

⁶⁸ Public Notice, Commission Seeks Comment on Licensing Models and Technical Requirements in the 3550-3650 MHz Band, 28 FCC Rcd. 15300, ¶ 24 (2014).

of unlicensed users, and determined that there is “negligible” risk that the spectrum will be underutilized – the underlying purpose of a buildout requirement⁶⁹ – even if M-LMS licensees do not operate.

The Division must address these factors on reconsideration, and find that two years is an unreasonably short period of time to meet the M-LMS buildout requirements, particularly across multiple markets. Only after thoroughly considering these matters will it be possible to determine what would constitute a reasonable period.⁷⁰ Failure to do so will constitute arbitrary and capricious decisionmaking.⁷¹

2. The *Termination Order* Does Not Support the Decision

The Order’s reliance on the *Termination Order* is misplaced. The Commission’s decision to terminate the docket was based on “recent developments” – specifically, the 2011 Progeny Waiver Request, the *Progeny Waiver Order*, and the *Progeny Conditional Operations Order*.⁷² The Commission’s reference to “the existing M-LMS framework” thus clearly encompassed these Progeny proceedings, not the development of M-LMS under the original rules.

In relying on this “framework,” the Order did not acknowledge or discuss the fact that it is one within which only one M-LMS licensee, Progeny, currently operates, because other M-LMS licensees lack access to Progeny’s proprietary equipment, and would be compelled to develop their

⁶⁹ See *Order* at ¶ 17.

⁷⁰ PCSP agrees that granting extensions “in perpetuity,” *Order* at ¶ 17, would not serve the public interest. Neither PCSP nor any other M-LMS licensee made such a request. However, the agency has an obligation to determine what would be a reasonable period based on an analysis of all relevant factors.

⁷¹ Never before has the agency (a) proposed new service rules, (b) extended licensees’ deadline for compliance with the original rules based substantially on regulatory uncertainty created by the pending consideration of the proposed new rules, (c) abandoned its proposals to change the rules, (d) then immediately and unilaterally informed licensees, while failing to consider causes beyond their control, that regulatory uncertainty no longer existed and that the licensees would have only two years to satisfy a construction deadline.

⁷² *Termination Order* at ¶ 6.

own equipment and/or pursue individual rule waivers similar to those Progeny received, in order to operate within that framework. Furthermore, the Order fails to acknowledge the effects of the agency's failure to give notice between 2011, when the Progeny Waiver Request was filed, and 2014, when the *Termination Order* was adopted, that the "framework" included Progeny's proprietary technology and rule waivers. Nor did it acknowledge or discuss the agency's failure to give notice that it was considering abandoning the proposed rule changes, or to update the record in WT Docket No. 06-49, and to rely instead on an evolving "framework."

3. The Order Failed to Consider Causes Beyond PCSP's Control

The Order states that the Division "did not rely on the current state of equipment deployment as justification" for the brief extension.⁷³ However, the current state of the M-LMS equipment plainly is a factor contributing to PCSP's extension request, as PCSP explained at length,⁷⁴ and whether that is within PCSP's control is relevant to any consideration of PCSP's extension requests. The Order's disclaiming of any review of the state of M-LMS equipment must be corrected on reconsideration. In particular, the Division cannot ignore such relevant facts as the effect of sharing on equipment availability, given its own prior finding that "spectrum sharing in the M-LMS band . . . has hindered the ability of licensees to secure equipment."⁷⁵ The Division also cannot ignore evidence that M-LMS equipment is not available to PCSP.⁷⁶ Nor may the Division ignore applicable precedent holding that "difficulties in obtaining viable, affordable equipment" is a

⁷³ Order at ¶ 17.

⁷⁴ PCSP 2014 Extension Request, Attachment 1 at 14-17.

⁷⁵ *Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses*, Memorandum Opinion and Order, 21 FCC Rcd. 5928, ¶ 13 (WTB MD 2006).

⁷⁶ *See* PCSP 2014 Extension Request, Attachment 1 at 16.

factor beyond licensees' control that justifies granting additional time to construct.⁷⁷ Likewise, the Division may not ignore applicable precedent that regulatory uncertainty is beyond a licensee's control and supports extension of construction obligations.⁷⁸

C. The Division Failed to Fully Address PCSP's Requests for Relief

The Order did not address PCSP's 2014 Extension Request in three respects.

First, the Division neither acknowledged nor addressed PCSP's request⁷⁹ that it not be given less time than other licensees to meet its construction obligations. As noted above, because other M-LMS licensees received their licenses between July 1999 and October 2001, and received their initial extensions prior to PCSP, they have had from 22 to 48 months longer than PCSP (which was granted its licenses in July 2003) to build out. It is arbitrary and capricious not to permit PCSP the same length of time as other licensees to satisfy the benchmarks.⁸⁰

Second, although the Division acknowledged PCSP's request to waive the mid-term construction requirement,⁸¹ it did not address it. On reconsideration, the mid-term construction

⁷⁷ *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). See also *Multilateration Location and Monitoring Service Construction Requirements, Order on Reconsideration, and Memorandum Opinion and Order*, 22 FCC Rcd. 1925, ¶ 7 ("Factors that 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 Multilateration Location and Monitoring Services 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).

⁷⁸ See *In the Matter of 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).

⁷⁹ PCSP 2014 Extension Request, Attachment 1 at 1.

⁸⁰ See *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997).

⁸¹ Order at n.31.

requirement should be waived in light of the regulatory uncertainty that has existed since at least 2006.⁸² The Commission has consistently taken the position that a mid-term buildout obligation is unnecessary.⁸³ For all of the reasons stated in PCSP's 2014 Extension Request, the underlying purpose of the rule – which is to support the operations of competing uses of the 902-928 MHz band on an interference-free basis – would not be served,⁸⁴ and a grant would be in the public interest; in addition, because of the unique factual circumstances of M-LMS, application of an interim construction obligation would be inequitable, unduly burdensome, and contrary to the public interest.⁸⁵

Third, the Division expressly ignored PCSP's explanation that an extension is warranted under Section 90.155(g) of the rules. This rule is applicable solely to M-LMS, and provides that extensions of time to meet the M-LMS construction obligations “will be granted only if the licensee shows that the failure to commence service is due to causes beyond its control.”⁸⁶ PCSP plainly identified the “cause[] beyond its control,” specifically, regulatory uncertainty and the lack of commercially available M-LMS equipment.⁸⁷ The Division never addressed this argument, instead

⁸² See *Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year Construction Deadline*, 14 FCC Rcd. 5190, ¶ 9 (WTB PSPWD 1999) (waiving mid-term construction requirement pending resolution of construction requirement by Commission or Bureau action).

⁸³ See, e.g., *AWS-1 Order* at ¶ 77; see also 47 C.F.R. § 27.14(a) (AWS and WCS licensees subject only to end-of-term construction obligation).

⁸⁴ The Bureau may not ignore the Commission's finding that “even if a [M]-LMS licensee fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible,” because their spectrum is shared with other services and is heavily used for licensed and unlicensed operations. *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).

⁸⁵ 47 C.F.R. § 1.925(b)(3).

⁸⁶ 47 C.F.R. § 90.155(g).

⁸⁷ PCSP 2014 Request for Extension, Attachment 1 at 3-17.

relying solely on its waiver rule, and in fact disclaimed reliance on equipment availability.⁸⁸ The Division, however, had an obligation to address the request and, in particular, to determine whether M-LMS equipment is commercially available.

D. The Division Should Clarify Certain Aspects of the Order

The Order's reliance of the status of Progeny's technology, particularly in concluding that "the regulatory landscape is no longer uncertain"⁸⁹ and that M-LMS licensees now have sufficient basis to proceed with their business plans, creates uncertainty about certain aspects of the decision. Consequently, PCSP respectfully requests that the Division provide clarification as set forth below.

First, the Order states that the limited extension granted "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." Because one of the changes under consideration in Docket 06-49 was elimination of the rule prohibiting common ownership of Block A and Block C licensees, it is necessary to clarify the reference to "secondary market transactions," including whether such transactions include possible combinations of M-LMS spectrum blocks that would require rule waivers.

Second, the Order states that "equipment capable of operating in the M-LMS band currently exists." However, the Order refers only to, and PCSP is aware of, only Progeny's proprietary equipment, which has not been made available to PCSP. PCSP asks the Division to clarify whether its statement regarding the existence of equipment includes commercially available M-LMS equipment compliant with the existing rules.

⁸⁸ Order at ¶ 17 ("we do not rely on the current state of equipment deployment as justification").

⁸⁹ *Id.*

Third, to the extent that the Order's reference to equipment that currently exists includes only Progeny's proprietary equipment, PCSP asks that the Division clarify whether it will require Progeny to license that equipment to other M-LMS licensees.

Fourth, given that Progeny's most recent extension request remains pending, that it is based in part on regulatory uncertainty related to the Commission's proposed rules for E911,⁹⁰ that Progeny "seeks to construct its network consistent with Commission direction and industry consensus in the indoor location accuracy proceeding,"⁹¹ and that the Order states that Progeny has "demonstrated that [its technology] provides improved location capabilities for E-911,"⁹² PCSP asks that the Division confirm that Progeny's technology currently satisfies the definition of M-LMS in Section 90.7 and that its buildout to date satisfies the construction and obligation requirements of Section 90.155(e).

Finally, PCSP requests that the Division clarify whether the issues raised in various pending petitions in WT Docket No. 11-49 are now moot.

IV. CONCLUSION AND REQUEST FOR RELIEF

Wherefore, PCSP respectfully requests that the Division, on reconsideration of the Order, (1) extend the mid-term and end-of-term construction periods until the later of (a) July 18, 2019 and July 18, 2024, respectively; or (b) five years and ten years, respectively, after Commission action terminating WT Docket 06-49 becomes final; (2) as an alternative to extension of the mid-term construction period, waive the requirement to satisfy a construction requirement prior to the end of the license term; and (3) ensure that PCSP is not granted less time to satisfy any applicable M-LMS

⁹⁰ ULS File No. 0006383639, Progeny Request for Waiver and Extension of Time, at 12-15.

⁹¹ *Id.*

⁹² Order at ¶ 19.

construction obligation than any other M-LMS licensee. In addition, in order to resolve uncertainty resulting from the Order, PCSP respectfully requests that the Division clarify (1) its reference to “secondary market transactions,” including whether such transactions include possible combinations of M-LMS spectrum blocks that would require rule waivers; (2) whether its statement regarding the existence of equipment includes commercially available M-LMS equipment compliant with the existing rules; (3) to the extent the Order’s reference to equipment that currently exists includes only Progeny’s proprietary equipment, whether it will require Progeny to license that equipment to other M-LMS licensees; (4) whether Progeny’s technology currently satisfies the definition of M-LMS in Section 90.7 and whether its network satisfies the construction and obligation requirements of Section 90.155(e); and (5) whether the issues raised in various pending petitions in WT Docket No. 11-49 are now moot. Finally, as an alternative to establishing new deadlines, the Division should immediately initiate a proceeding to determine, given the totality of the circumstances, what would constitute a reasonable construction obligation for M-LMS licensees.

Respectfully submitted,

PCS PARTNERS, L.P.

By:

E. Ashton Johnston
Jessica DeSimone
TELECOMMUNICATIONS LAW
PROFESSIONALS PLLC
1025 Connecticut Ave., N.W.
Suite 1011
Washington, DC 20036
(202) 789-3120
ajohnston@telecomlawpros.com
jdesimone@telecomlawpros.com

Its Attorneys

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