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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Second Memorandum Opinion And Order, Released 4/8/02	)	PR Docket No. 92-257
In the Matter of	)	
Applications of Warren C. Havens For New Automated Maritime Telecommunications Systems Dismissed Per *Second Memorandum Opinion, And Order*, PR Docket No. 92-257	)	File Nos.: *Group A1:* 853032 -035 (Guadalupe River), 853036 -037 (Lake Mojave), 853038 -042, 044 –046, 855043 (Brazos River), 853057 -058 (South Platte River), 853059 -060 (Provo River), 853070 -072 (Truckee River), 853175 -176 (Upper Chattahoochee River), 853190 -193 (Upper Rio Grande River), 853252 -258 (Catawba River), 853460 -461 (Hawaiian Islands coastline), *Group A2*: 853562 -569 (Missouri RBSNP), 853570 -576, -578- 581 (MCKARNS) ***Group B:*** 53611 (MCKARNS), 853615 (South Platte River), 853667 -668 (Owens River), 853669 -674 (Kings River), 853675 -676 (Highland Lakes), 853677 (Mt. Desert Island- Acadia coastline)

To the Commission

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Petition for Reconsideration

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Dated May 8, 2002

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Petition for Reconsideration

I, Warren C. Havens ("Havens") hereby petition for reconsideration under Section 1.429 of the Commission Rules of the decisions within the *Second Memorandum Opinion and Order* released April 8, 2002 in PR Docket No. 92-257 (the "*Second MO&O*") that relate to and effected the dismissal of my applications for new Automated Marine Telecommunications System ("AMTS") licenses listed in the caption above (the "Applications"), and well as under Section 1.106 of the Commission Rules of the dismissal of the Applications set forth in "Notice of Dismissal" letters I received from the Wireless Telecommunications Bureau all dated April 9, 2002.

For reasons given herein, and per the means described herein— including applying the threshold application-qualification rules discussed below to the applications it has thus far deemed mutually exclusive with the Applications (the "Deemed MX Applications") which, in fact, are defective under such rules— I request that the Commission reinstate and act upon the Applications.

Background and Summary

All of the Applications were pending before the FCC as of November 16, 2000, the date the Commission "froze" (ceased accepting) new AMTS license applications in its *Third Further Notice of Proposed Rulemaking* (the "*Third FNPRM*"). The *Third FNPRM* imposed a suspension of acceptance of applications for new AMTS systems (for new or additional spectrum or service

area),1 and a suspension of processing of AMTS applications that were pending as of November 16, 2000 if the application was mutually exclusive with other applications as of November 16, 2000, or if the cut-off period2 (the "Cut Off Period") for the application had not yet closed.3

However, the Third NPRM ordered that all other pending applications "will be processed.".4 In fact, the Bureau did process such other pending applications, including those of Mobex and Havens.5

All of the Applications were deemed by the Bureau to be subject to mutually exclusive applications by Mobex Communications, Inc. ("Mobex")6 (the "Deemed MX Applications").7.

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1 ¶ 88. (However, applications for renewals, transfers, assignments, and modifications to applications would continue to be accepted so long as they did not seek additional spectrum or to expand a station's existing or proposed service area. ¶ 77.)

2 The period in which competing applications could be filed. ¶ 89.

3 ¶ 89.

4 ¶ 89. See also footnote 266 to ¶ 78 in which the Commission properly notes the "required coverage . . . or other[ ] . . . technical requirements in our AMTS rules" that also must be satisfied: these are the threshold requirements which, if not satisfied, result in dismissal under §1.934 according to usual Bureau practice (apart from the suspension effected in the *Third FNPRM*).

5 For example, Havens' seven-station application to serve the South Platte River was processed and granted, and (under ¶77) Mobex's application to renew its Atlantic Coast license was processed and granted, despite manifest threshold defects including under §80.475(a) (large, impermissible gaps in coverage, etc.).

6 Herein, by "Mobex" we include Regionet Wireless Licensee, LLC ("Regionet") and Waterway Communications ("Watercom"), each wholly owned by Mobex.

7 The Bureau deemed these mutually exclusive only by way of Public Notices listing the Deemed MX Applications as accepted for filing, noting that they were mutually exclusive with one or more previously submitted Application.

Applications in "Group A1" in the caption ("Group A1 Applications") had Cut Off Periods that had closed and were subject to Deemed MX Applications whose Cut Off Periods that had closed.

Applications in "Group A2" in the caption ("Group A1 Applications") had Cut Off Periods that had closed and were subject to Deemed MX Applications whose Cut Off Periods had not closed.

In this case, where mutual exclusivity would be avoided if the Commission followed its established application threshold rules, Section 309(j)(6)(E) requires it to do so, especially since the Commission inconsistently applied these rules and other application review or processing rules to some applications but not to the Applications.

Applications in "Group B" in the caption ("Group B Applications") had Cut Off Periods that had not closed and were subject to Deemed MX Applications whose Cut Off Periods had not closed.

In the Second MO&O, the Commission dismissed all of the suspended (held in abeyance) Group A1 Applications and Group A2 Applications on the basis that they were subject to the Deemed MX Applications, and it dismissed all of the suspended Group B Applications on the basis that their Cut Off Periods had not closed.

The Deemed MX Applications Were Defective Under §1.934 and Per Commission Practice Should Have Been Dismissed

The Deemed MX Applications were defective on their face, and would not have been accepted for filing and placed on public notice but returned, or in any case would have been dismissed, if the Commission (the Bureau) had followed its usual threshold-qualification review

process set forth in §1.934 of the Commission Rules8 (and its numerous precedent Orders in AMTS licensing applying 1.934, see below) as especially required by Section 309(j)(6)(E) of the Communications Act of 1934, as Amended (the "Act")9 in this situation where the Commission has given notice of an intent to transition to a new, competitive-bidding, licensing scheme under Section 309(j) of the Act. Accordingly, the Bureau erred in finding that the Deemed MX Applications were mutually exclusive with the Applications, and on this faulty basis, it then erred in dismissing the Applications.

Instead, the Bureau should have, consistent with the goals of the *Third FNPRM* ordering clause noted above regarding continuing to process applications that were not subject to mutually exclusive applications (and whose Cut Off Period had closed), and as required under Section 309(j)(6)(E) of the Act, completed the application of the threshold requirements in §1.934 which it had begun (see below), dismissed defective applications to avoid artificial mutual exclusivity, and processed the Applications that were then not subject to mutually exclusive applications. In placing the Deemed MX Applications on Public Notice as mutually exclusive with the Applications, the Bureau began application of §1.934: it had to have found under §1.934(f) that the Deemed MX Applications were not defective due to being "filed after the cut off date for a mutually exclusive application filing group."10 The Bureau also, clearly, had to have applied §1.934(d)(1) to check if the applications were "unsigned" and §1.934(d)(3) to check if the

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8 47 C.F.R. § 1.934(d), and in some cases, 47 C.F.R. § 1.934(e).

9 §309(j)(6)(E) and its requirements in this case are discussed below.

10 Indeed, when it did find under this subsection of §1.934 that Mobex applications that were geographically mutually exclusive with previously submitted Havens applications were filed beyond the cut off date for a mutually exclusive application, the Bureau properly dismissed such applications. See letter dated April 14, 2000 from Mary Shultz of the Bureau to Mobex (dismissing numerous Mobex applications in Nevada, Utah, Colorado, and Texas citing §1.934).

"appropriate filing fee has not been paid." However, after such partial application, the Bureau erred in not completing, per its practice, and per the requirements of §309(j)(6)(e), the other threshold-review tasks in §1.934, including under §1.934(d)(1) regarding "required . . . informational showings," §1.934(d)(2) regarding "requests [of] an authorization that would not comply with one or more of the Commission's rules," and §1.934(e) regarding "applications that request spectrum that is unavailable because [ ] it is not allocated for assignment in the specific service requested" (see below).

In fact, prior to the Third FNPRM, in the Commission's *Third Report and Order*, released July 9, 1998, in PR Docket 92-257, in footnote 3 the Commission set gave notice of its intent to continue to apply the current licensing procedures (which begin with applying the above-noted threshold requirements):

> Applications for that [AMTS] spectrum will be governed by current procedures, but we nonetheless note that mutually exclusive applications for . . . AMTS public coast spectrum cannot be resolved until competitive bidding procedures are adopted for those services, and that such applications may ultimately be dismissed.

However, the Commission failed to follow the above-stated policy when, failing to apply these threshold standards, it deemed that the Deemed MX Applications mutually exclusive with the Applications and on that basis dismissed them per the Second MO&O.

Bureau and Commission Practice in AMTS Licensing of Dismissals Under §1.934, and Application Thereof to the Deemed MX Applications and Related Applications

Regarding this well-established practice under §1.934(d)(1), §1.934(d)(2), and §1.934(e), the Bureau had a practice, upheld by Commission Orders, to dismiss AMTS applications that were defective, including Mobex applications. The Deemed MX Applications (other Mobex applications) manifestly have the same defects as those which, under this practice, have resulted

in dismissal. In some cases, the Deemed MX applications were identical in all aspects to other applications dismissed under §1.934 except for the frequency block (where the dismissed applications had less severe defects due to such other frequency block, as shown below).

These §1.934 dismissal practices (the "AMTS §1.934 Practices"), the related AMTS application-rule required showings (the "Required Showings"), the Deemed MX Applications that clearly lack such requirements, and the corresponding Applications dismissed due to such Deemed MX Applications, are as follows:

(i) First, see letter dated April 12, 2002 to Havens from D'wana Terry of the Bureau: this references certain petitions to deny and other filings filed by Havens against or in relation to Mobex applications11 that were Deemed MX Applications (the "Filings Re Deemed MX Applications"). In these Filings Re Deemed MX Applications, the Practices, Required Showings, and Deemed MX Applications and corresponding Applications, are defined and discussed. Included in the Filings Re Deemed MX Applications is, as noted on page 2 of this April 12, 2002 letter, the March 11, 2002 supplement filed by Havens to his June 4, 2001 petition for declaratory ruling. This supplement discusses the AMTS §1.934 Practices and the Required Showings.12

(ii) As noted in footnote __ above, see footnote 266 to ¶ 78 of the *Third FNPRM* in which the Commission notes the "required coverage . . . or other[ ] . . . technical requirements in our AMTS rules" that must be satisfied by an application: these are the Required Showings, which, if not present or incomplete in an application, result in dismissal under the AMTS §1.934 Practices.

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11 (Mobex, including Regionet.)

12 To be clear: in this Petition for Reconsideration, Havens is not petitioning to reconsider the dismissal actions taken in this April 12, 2002 letter.

(iii) See Exhibit 1 hereto for a chart summarizing these. See Exhibit 2 hereto for a summary of the Bureau and Commission Orders and letters on the AMTS §1.934 Practices. The following discussion corresponding to Exhibits 1 and 2:

1. Defects under §1.934(d)13 for failing to provide technical and other informational showings required in rules pertaining to AMTS Applications:.14 15 Exhibit 1 lists these Required Showings and the Deemed MX Applications with these defects, along with the corresponding Applications. Exhibit 2 lists Commission Orders and letters reflecting AMTS §1.934 Practices regarding these Required Showings. These Deemed MX Applications were clearly defective in that they did not provide one or more of these Required Showings per these AMTS §1.934 Practices.

2. Defects under §1.934(d)(2) and (e), for applying for both the A-block and the B-block AMTS spectrum (all AMTS spectrum) at the same time with no need showing and no waiver request:. Exhibit 1 lists the Deemed MX Applications with this defect under the symbol "AB." Under FCC rules and policies, an applicant may not apply for both A and B block

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13 These defects are subject of §1.934(d)(1) and (2).

14 Including (i) under §80.475(a) a certain showing of continuity of proposed service (radio coverage) from at least two proposed sites in the aggregate covering a defined percentage of the subject navigable inland waterway to be served and (ii) under §80.475(a) and §80.215(h), when within certain distances of a TV station on Channel 13 or 10, or when proposing a transmit antenna of over 200 feet above ground, a certain TV protection plan which must include: description of the interference contour describing methods used, a statement of the number of residences in the interference contour ((area inside the TV grade B, etc.), and where more than 100 residents are within the defined interference contour, then a showing that the proposed site is the only suitable location along with a plan to control any interference to TV reception.

15 In Exhibit 1, defects designated by the following symbols all in this category: S, NTV, W, D, NM, and O.

spectrum at the same time, and in any case, not without a special showing of need. See, e.g., *Third FNPRM*, ¶ 44 and footnote 170 thereto.16

Second MO&O Error: It Did Not Consider,
As Havens Sought, Dismissals for Threshold Defects
Per Usual §1.934 Practice and Requirements of §309(j)(6)(E),
Which is Not Action or Processing of Applications

In the *Second MO&O*, the Commission concluded that "it would be contrary to the public interest goals of Section 309(j)(3) to continue to process site-based applications, including the review and resolution of petitions to deny those applications." *Second MO&O* ¶ 18. The Commission deals with the Deemed MX Applications in ¶¶ 19-20. It states that Havens has requested that the FCC "process the Mobex applications (*i.e.*, address the petition to deny)" and declines to do so. The *Second MO&O* concludes that "it would be inconsistent with the

16 Mobex, in a filing against Havens (the Watercom petition to deny Havens' applications in Texas) argued that Havens had applied for both AMTS spectrum blocks and this was not permissible. In fact, Havens clearly had not applied for both blocks. However, this reveals Mobex's understanding of this rule or rule interpretation (policy). Thus, Mobex's submission of applications for both blocks on to serve the same waterways (with no need showing whatsoever) is start evidence of its motivation in filing geographically mutually exclusive applications wherever Havens first filed applications: not to comply with the rules and thereby obtain license grants, but to block Havens from obtaining AMTS spectrum (and in these cases, to block him or others from seeking the other block in such areas). For more on this "strike application" intent, see Exhibit 3 below.

Also, in Exhibit 1, the Mobex applications listed with the symbol "SB" also blatantly reveal this impermissible "strike application" intent, which is clear abuse of process under Commission rules: Havens first applied for one block to serve a waterway, then Mobex applied for the same block when the other block was fully available. Under Commission rules, a license applicant in submitting and attesting to its application (the required signature under §1.934(d)(1)) must have intent to obtain the license for the purposes intended for it under the rules: for service to the public (or internal uses in some cases) and not to block another party from licensing. Such manifest "strike" intent is as clearly a "threshold defect" (§309(j)(6)(E) of the Act) as are defects under §1.934. See Exhibit 3 for a discussion of additional compelling evidence that the Mobex applications (the Deemed MX Applications) were all strike applications and thus, on such basis alone, were defective and should have been dismissed and not accepted to create artificial mutual exclusivity with the Applications.

Commission's processing suspension, and would undermine one of the purposes of the processing suspension, *i.e.*, to prevent the further grant of licenses under our current rules that could lead to results inconsistent with the decisions ultimately made in this rulemaking proceeding." *Id.* at ¶ 20.

The *Second MO&O* fails to respond fully to the issues raised in Havens' Petition for Declaratory Ruling filed June 4, 2001, and more significantly, to the Supplement to the Petition for Declaratory Ruling filed on March 8, 2002, noted above (the "Supplemental Petition"). The *Second MO&O* concludes that the Commission is not obligated by Sections 309(d)(2) and 309(e) to conduct comparative hearings or otherwise "process" the contested applications (including the Applications). *Second MO&O* at ¶¶ 18, 20. But it fails to address the question raised in the Supplemental Petition: Whether the Commission should have dismissed Mobex applications (the Deemed MX Applications) that were facially defective under its threshold filing rules *without processing them.*[17] As shown above, if the Commission had followed its own rules in this regard, as it should have done, the Applications would not have been considered mutually exclusive and thereby dismissed under the *Second MO&O* since the Deemed MX Applications would have been dismissed upon the usual threshold-qualification review (before or after placement on Public Notice). Contrary to the findings in the *Second MO&O*, Havens was not arguing in his Supplemental Petition that these applications should be "processed" or that his petitions to deny be decided. Rather, the request was to respond to his inquiries, principally,

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17 §1.945 concerns processing of applications to grant or denial (including when there is a petition to deny: see §1.945(d), reflecting §309(d)(1) of the Act) as opposed to dismissing applications that are defective under §1.934, whether prior to or after accepting them for filing and placing them on public notice (see §1.933(b): ". . . acceptance for filing shall not preclude the subsequent dismissal of an application as defective").

whether the defective Mobex applications (discussed above) should have been or should be dismissed.[18]

The Communications Act Requires the Commission to Avoid Mutual Exclusivity Where Possible. The argument raised in the Supplemental Petition, and that the Commission ignored in the *Second MO&O*, is whether Section 309(j)(6)(e) of the Communications Act requires it to avoid mutual exclusivity by adhering to its own rules governing facially defective applications.

When Congress adopted Section 309(j) of the Communications Act authorizing the FCC to replace comparative hearings and other methods of assigning licenses with auctions, it did not empower the agency to ignore established procedures for avoiding application conflicts. For example, Section 309(j)(6)(E) provides that the Commission's auction authority does not "relieve [it] of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E) When Congress expanded the FCC's auction authority in 1997, it added language to Section 309(j)(1)

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18 Also, the Supplemental Petition discussed the Commission's "Unified Policy" for returns and dismissals of facially defective applications. This is articulated for the first time in the following proceeding: *Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, Report & Order*, 13 FCC Rcd 21027, paras. 89-92, (1998). That the new policy took effect on May 1, 1999, announced in: *Wireless Telecommunications Bureau Announces Unified Policy for Dismissing and Returning Applications and Dismissing Pleadings Associated with Applications*, Public Notice, 14 FCC Rcd 5499 (WTB 1999). That the revised policy will take effect July 1, 1999 for Cellular, PCS,WCS, Part 22, Paging, Offshore, and Auctioned Licenses is announced in: *Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings*, Public Notice, 14 FCC Rcd 11,182 (WTB 1999). This notice also indicates that the policy was adopted to promote "consistency in the treatment of all applications received by the Bureau." This case discusses the validity of dismissal pursuant to Section 1.934(a) of the Commission's rules: *Interactive Control Two, Inc. et al., Order on Reconsideration*, ___ FCC Rcd ___, DA 01-2504 (rel. Oct. 26, 2001). See paras. 10-11.

to prevent the Commission from abusing its this authority by requiring it to exercise its auction authority "consistent with obligations described in paragraph (6)(E)." *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. III, § 300, 111 Stat. 258. The Conference Report accompanying the 1997 amendments emphasized that "notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under Section 309(j)(6)(E)." H.R. Conf. Rep. No. 105-217, at 572 (1997). The conferees noted their "particular[] concern[] that the Commission might interpret its expanded auction authority in a manner that minimizes its obligations under Section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity." *Id.*

The Commission has acknowledged that Section 309(j)(6)(E) requires that it continue to use "threshold qualifications," among other things, "to avoid mutual exclusivity in application and licensing proceedings." *In the Matter of Implementation of Section 309(j) of the Communications Act*, 14 FCC Rcd 8724, 8750 (1999). Similarly, the United States Court of Appeals for the D.C. Circuit has recognized that Section 309(j)(6)(E) reflects congressional intent that the Commission pursue other available avenues to resolve mutual exclusivity *before* holding an auction. *See Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000). The Commission noted this requirement in its *Second MO&O*, but claims that has an obligation to avoid mutual exclusivity by the methods prescribed in Section 309(j)(6)(E) "only when it would further the public interest goals of Section 309(j)(3)." *Second MO&O* ¶ 18. That section generally relates to the efficient transition to a system of competitive bidding, and the Commission and courts have held that Section 309(j)(6)(E) does not require the FCC to perpetuate an "outmoded" policy

in order to avoid mutual exclusivity. *See id.* ¶ 18 & n.77, quoting *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997).

However, the Commission's reference to preserving an "outmoded policy" does not apply to the arguments in Havens' Supplemental Petition. Therein, Havens was not arguing that the Commission hold comparative hearings, or otherwise preserve its prior licensing policies. Rather, Havens asked only that the Applications be treated the same as other applications filed during the transition to a system of competitive bidding under the FCC's established ruled governing the filing of applications.

In this regard, it is immaterial that the Commission is moving to a system of geographic area licensing rather than site-by-site licensing, *see* Second MO&O ¶ 18, since the Commission did not decide to dismiss all site-by-site license applications that were on file prior to November 16, 2000. Rather, in short, the Commission decided to act upon such applications if they were not mutually exclusive with another application, and to dismiss rather than process applications against which a competing application had been filed.19 Accordingly, Havens was not asking the Commission to adhere to an "outmoded" system of assigning licenses; he was asking only that the Commission follow its own rules in deciding which of the applications on file as of November 16, 2000 were mutually exclusive. *See Bachow Communications, Inc. v. FCC*, 237 F.3d 683687 (D.C. Cir. 2001) (*McElroy* stands for the proposition that the Commission must follow its own rules"); *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996).

The Commission Should Have Used its Existing Rules to Dismiss Applications that Were Facially Defective (and also "Strike" Applications). See the above discussion of subsections of 1.934 noted above, the defects thereunder contained in the Deemed MX Applications, and why

19 And in so doing, as noted above, it noted that these threshold requirements remained in effect: see footnote 266 to the *Third FNPRM*.

they should have been dismissed prior to or at least after (see §1.933(b)) placing them on Public Notice.

In other instances, the Commission dismissed AMTS applications because of the same types of deficiencies, yet inexplicably failed to do so here. 20 The Commission's failure to apply the same level of initial scrutiny in this instance resulted in disparate treatment for the Havens applications that were improperly designated as mutually exclusive. The D.C. Circuit has long held that "an agency must provide adequate explanation before it treats similarly situated parties differently."21

Routine scrutiny of applications filed in this proceeding is imperative, where the Commission may inadvertently have created an incentive to file strike applications. For example, in *Kessler v. FCC*, 326 F.2d 673, 684 (D.C. Cir. 1963), the D.C. Circuit upheld the Commission's ability to impose an application freeze without advance notice because such a warning "would have brought, prior to the cut-off date fixed in the notice, a flow of new applications, all to be decided upon existing and possibly inadequate standards." In the case of AMTS licensing, the Commission provided advance notice that it was planning to adopt a system of auctions, thus encouraging would-be competitors such as Mobex to file transparently defective applications solely to preclude consideration of Havens' applications that already were on file.22 However, if the Commission had subjected those applications even to a cursory

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20 See Exhibit 2 for examples.

21 Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172; see also, New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 366 (D.C. Cir. 1987); Public Media Center v. FCC, 587 F.2d 1322, 1331 (D.C. Cir. 1978); Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

22 Indeed, this appears to be precisely what happened. See Exhibit 3. Mobex, the holder of the largest amount of AMTS spectrum, understood from Commission notice preceding Havens' filing of his AMTS applications that, by submitting applications that may be construed as

review – as it typically has done in the past – it would have dismissed the Mobex applications without further consideration and without the need for "processing."

Conclusion

In this case, where mutual exclusivity would be avoided if the Commission followed its established application threshold rules, Section 309(j)(6)(E) requires it to do so, especially since the Commission inconsistently applied these rules and other application review or processing rules to some applications but not to the Applications.

[Execution on next page.]

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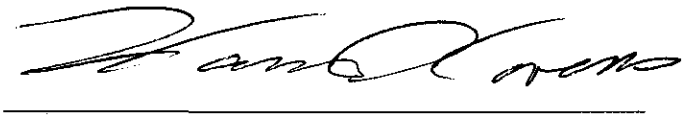
mutually exclusive, it may block a competitors from access to any spectrum until the FCC held auctions for remaining AMTS spectrum. This notice, also noted above, was given in the Commission's *Third Report and Order*, released July 9, 1998, in PR Docket 92-257, footnote 3:

> Applications for that [AMTS] spectrum will be governed by current procedures, but we nonetheless note that mutually exclusive applications for . . . AMTS public coast spectrum cannot be resolved until competitive bidding procedures are adopted for those services, and that such applications may ultimately be dismissed.

This Petition for Reconsideration is hereby,

Respectfully submitted,



Warren C. Havens

Date: May 8, 2002

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Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing Petition for Reconsideration, including all Attachments and Exhibits, was prepared pursuant to my direction and control and that all the factual statements and representations contained herein are true and correct.

Warren C. Havens

Date: May 8, 2002

Exhibit 1

Chart of Dismissed Havens Applications, Related Mobex Applications which the Bureau Erroneously Accepted as Mutually Exclusive, Defects Therein (including under §1.934), and Havens Petitions to Deny the Mobex Applications

"Defects" Column Legend: Key defects including under §1.934 and AMTS application requirement rules:

S = Single site: failure to have required multiple sites (one site fully contains the other, or one site fully covers the waterway) (see Orders cited in text imposing this requirement and citing various AMTS rules and definitions)

NTV = Failure to provide required TV protection study /showing under §80.475 and §80.215

W = Failure to designate navigable waterway and show 60%+ coverage thereof under §80.475(a)

D = No Demonstration of navigability of a waterway not previously deemed navigable by FCC: §80.475(a) requirement

AB = Applied for both A&B block (at same time and without need showing) contrary to FCC Orders, and §1.934(d)(1) and (e)(2)

C = Copied Havens site-specific TV protection engineering, and used it for different sites, resulting in facially defective TV protection study under §80.475 or §80.215

SB = Applied for same block as Havens first applied for, when other block was available (manifest "strike" application and abuse of process)

NM = No coverage map: failure to show coverage requirement under §80.475(a).

O= = Over 100 TV household residences under §80.215(h)(3) with no required TV protection showing and plan under §80.215(h)(3)(I) and (ii). as required under §80.475 and §80.215

#	Havens Applications	Block	Waterway*	File #s	Mobex MX Applications	Block	Waterway	File #s	Defects	Havens Petitions to Den Date	Ptn #*
1	Kerrville, TX	A	Guadalupe River	853032	San Antonio, TX	A	San Antonio	853124	S, NTV, W, D, C	5/11/00	1
2	Buda, TX	A	Guadalupe	853033	Kennedy, TX	A	San Antonio	853125	S, NTV, W, D, C	5/11/00	1
3	Gonzales, TX	A	Guadalupe	853034	White Stone, TX	A	Lower Colorado	853122	NTV, W, D, C	5/11/00	1
4	San Antonio, TX	A	Guadalupe	853035	La Grange, TX	A	Lower Colorado	853123	NTV, W, D, C	5/11/00	1
5	Graham, TX	A	Brazos	853038	Cedar Hill, TX	A	Trinity	853133	NTV, W, D, C	5/11/00	1
6	Cedar Hill, TX	A	Brazos	853039	Buffalo, TX	A	Trinity	853134	NTV, W, D, C	5/11/00	1
7	Moody, TX	A	Brazos	853040	Buffalo, TX	A	Trinity	853135	NTV, W, D, C	5/11/00	1
8	Rockdale, TX	A	Brazos	853041		A	Trinity				
9	Caldwell, TX	A	Brazos	853042		A	Trinity				
10	Rochester, TX	A	Brazos	853044		A	Trinity				
11	Seymour, TX	A	Brazos	853045		A	Trinity				
12	Lakeside Village, TX	A	Brazos	853046		A	Trinity				
13	Metcalf, TX	A	Brazos	855043		A	Trinity				
14	Las Vegas, NV	A	Lake Mojave	853036	Las Vegas, NV	A	Lake Mead	853126	S, NTV, W, D, C	5/11/00	1
15	Laughlin, NV	A	Lake Mojave	853037	Las Vegas, NV	A	Lake Mead	853127	S, NTV, W, D, C	5/11/00	1
16	Ft. Lupton, CO	A	S. Platte	853057	Colorado Springs, CO	A	Arkansas	853119	NTV, W, D, C	5/11/00	1
17	Snow Water, CO	A	S. Platte	853058	Chaffee, CO	A	Arkansas	853121	NTV, W, D, C	5/11/00	1
					Sterling, CO	A	S. Platte	853130	NTV, W, D, C	5/11/00	1
					Ft. Collins, CO	A	S. Platte	853131	NTV, W, D, C	5/11/00	1
					West Creek, CO	A	S. Platte	853132	NTV, W, D, C	5/11/00	1
18	SLC, UT	A	Provo	853059	Salt Lake City, UT	A	Great Salt Lake	853128	S, NTV, W, D, C	5/11/00	1
19	Wanship, UT	A	Provo	853060	Ogden, UT	A	Great Salt Lake	853129	S, NTV, W, D, C	5/11/00	1

20 Tahoe City, CA	B	Truckee	853070	Tahoe City, CA	B	Truckee	853146	S, NTV, W, D, C	5/11/00	1
21 Tahoe City, CA	B	Truckee	853071	Reno, NV	B	Truckee	853147	S, NTV, W, D, C	5/11/00	1
22 Washoe City, NV	B	Truckee	853072	Reno, NV	B	Carson	853148	S, NTV, W, D, C	5/11/00	1
				Nixon, NV	B	Carson	853149	S, NTV, W, D, C	5/11/00	1
23 Roswell, GA	B	Chattahoochee	853175	Marietta, GA	B	Chattahoochee	853246	NTV, W, D, AB	7/6/00	2
24 Pendergrass, GA	B	Chattahoochee	853176	Pendergrass, GA	B	Chattahoochee	853247	NTV, W, D, AB	7/6/00	2
25 South Fork, CO	A	Rio Grande	853190	Albuquerque, NM	A	Rio Grande	853248	NTV, W, D, SB	7/6/00	2
26 Santa Fe, NM	A	Rio Grande	853192	Tres Piedras, NM	A	Rio Grande	853249	NTV, W, D, SB	7/6/00	2
27 Albuquerque, NM	A	Rio Grande	853193	Santa Fe, NM	A	Rio Grande	853250	NTV, W, D, SB	7/6/00	2
28 San Miguel, NM	A	Rio Grande	853191	South Fork, CO	A	Rio Grande	853251	NTV, W, D, SB	7/6/00	2
29 Charlotte, NC	A	Catawba	853252	Ceasar's Head, SC	A	Cooper, etc.***	853259	NTV, W, D, AB, O	7/6/00	2
30 Charlotte, NC	A	Catawba	853253	Lugoff, SC	A	Cooper, etc.***	853260	NTV, W, D, AB, O	7/6/00	2
31 Conover, NC	A	Catawba	853254	Cedar Creek, SC	A	Cooper, etc.***	853261	NTV, W, D, AB, O	7/6/00	2
32 Blackstock, SC	A	Catawba	853255	Orangeburg, SC	A	Cooper, etc.***	853262	NTV, W, D, AB, O	7/6/00	2
33 Asheville, NC	A	Catawba	853256	Gastonia, NC	A	Cooper, etc.***	853263	NTV, W, D, AB, O	7/6/00	2
34 Heath Springs, SC	A	Catawba	853257	Little Mountain, SC	A	Cooper, etc.***	853264	NTV, W, D, AB, O	7/6/00	2
35 Linville, NC	A	Catawba	853258	Stokes, NC	A	Cape Fear & Haw	853265	NTV, W, D, AB, O	7/6/00	2
				Hillsborough, NC	A	Cape Fear & Haw	853266	NTV, W, D, AB, O	7/6/00	2
				Fayetteville, NC	A	Cape Fear & Haw	853267	NTV, W, D, AB, O	7/6/00	2
				Lumberton, NC	A	Cape Fear & Haw	853268	NTV, W, D, AB, O	7/6/00	2
36 Honolulu, HI	A	Hawaiin Islands	853460	Maui, HI	A	Hawaiin Islands	853502	S, W, NM, O	11/9/00	3
37 Maui, HI	A	Hawaiin Islands	853461							
38 Macy, NE	A	Missouri RBSNP	853562	Big Spring, MO	AB	Missouri RBSNP	853627	NTV, W, D, AB, O	12/8/00	4
39 Soldier, IA	A	Missouri RBSNP	853563	Jefferson City, MO	AB	Missouri RBSNP	853628	NTV, W, D, AB, O	12/8/00	4
40 Glenwood, IA	A	Missouri RBSNP	853564	Huntsdale, MO	AB	Missouri RBSNP	853629	NTV, W, D, AB, O	12/8/00	4
41 Randolph, IA	A	Missouri RBSNP	853565	Concordia, MO	AB	Missouri RBSNP	853630	NTV, W, D, AB, O	12/8/00	4
42 Craig, MO	A	Missouri RBSNP	853566	Lexington, MO	AB	Missouri RBSNP	853631	NTV, W, D, AB, O	12/8/00	4
43 Gower, MO	A	Missouri RBSNP	853567	Kansas City, MO	AB	Missouri RBSNP	853632	NTV, W, D, AB, O	12/8/00	4
44 Kansas City, MO	A	Missouri RBSNP	853568	Purcell, KS	AB	Missouri RBSNP	853633	NTV, W, D, AB, O	12/8/00	4
45 Orrick, MO	A	Missouri RBSNP	853569	Alma, NE	AB	Missouri RBSNP	853634	NTV, W, D, AB, O	12/8/00	4
				Watson, MO	AB	Missouri RBSNP	853635	NTV, W, D, AB, O	12/8/00	4
				Tabor, IA	AB	Missouri RBSNP	853636	NTV, W, D, AB, O	12/8/00	4
				Omaha, NE	AB	Missouri RBSNP	853637	NTV, W, D, AB, O	12/8/00	4
				Soldier, IA	AB	Missouri RBSNP	853638	NTV, W, D, AB, O	12/8/00	4
				Sioux City, IA	AB	Missouri RBSNP	853639	NTV, W, D, AB, O	12/8/00	4
46 Little Rock, AR	A	MCKARNS	853570	Pine Bluff, AR	AB	MCKARNS	853620	NTV, W, D, AB, O	12/8/00	4
47 High Point Mtn, AR	A	MCKARNS	853571	Little Rock, AR	AB	MCKARNS	853621	NTV, W, D, AB, O	12/8/00	4
48 Muskogee, OK	A	MCKARNS	853572	Russellville, AR	AB	MCKARNS	853622	NTV, W, D, AB, O	12/8/00	4
49 Nimrod, AR	A	MCKARNS	853573	Ozark, AR	AB	MCKARNS	853623	NTV, W, D, AB, O	12/8/00	4
50 Spiro, OK	A	MCKARNS	853574	Fort Smith, AR	AB	MCKARNS	853624	NTV, W, D, AB, O	12/8/00	4
51 Paris, AR	A	MCKARNS	853575	Muskogee, OK	AB	MCKARNS	853625	NTV, W, D, AB, O	12/8/00	4
52 Paris, AR	A	MCKARNS	853576	Tulsa, OK	AB	MCKARNS	853626	NTV, W, D, AB, O	12/8/00	4
53 Gore, OK	A	MCKARNS	853578		AB	MCKARNS				
54 Fayetteville, AR	A	MCKARNS	853579		AB	MCKARNS				

55 Keota, OK	A	MCKARNS	853580	AB	MCKARNS	
56 Tulsa, OK	A	MCKARNS	853581	AB	MCKARNS	
57 Keota, OK	A	MCKARNS	853611	AB	MCKARNS	

Notes

* Waterways listed are: for the Havens applications, the navigable portion of rivers or lakes which the Havens applications defined and demonstrated; and for Mobex, the rivers or lakes which the Mobex applications indicated service to, but did not define or demonstrate navigability.

** Petition numbers are for reference only: for use in this Petition for Reconsideration.

*** Cooper, Congaree, Broad and Saluda

Exhibit 2

FCC Letters, Orders, and MO&Os with Regard to Dismissal of AMTS Applications as Defective Under §1.934 and §80.475(a) and §80.215(h).

See text for relevance of the below sections, including the discussion in the text of Exhibit 1.

In the below, "MX" means "mutually exclusive."

A. Regarding applications that consitituted single-site applications, or or multiple station applications where the subject waterway could be served by a single-site.

Mobex Inland Applications (would have been MX with granted Havens Licenses)

1) Letter of April 14, 2000 to Mobex Communications from Mary M. Shultz of the Bureau (PS&PWD, PS&PWD-LTAB-666)
    a. Dismissed Mobex Applications for Provo River as untimely and single-site (once one application was dismissed as untimely), South Platte River as untimely, Lake Mohave as untimely and single-site (once one application was dismissed as untimely), Guadalupe River as untimely and single-site (once one application was dismissed as untimely), and Brazos River as untimely and for lack of continuity of service (once one application was dismissed as untimely there existed a gap in service).
    b. Dismissals were done pursuant to sections 1.934(d) and 80.475(a) of the Commission's Rules.

Orion Telecom Inland Applications

2) Memorandum Opinion and Order, released 7/29/98, DA 98-1507
    a. Bureau denied Orion Telecom applications at Denver, CO and Tucker and Mountain Park, GA for being single-site systems.
    b. Bureau decided that AMTS rules do not allow for construction and operation of single-site AMTS stations (Denver to serve Chatfield Lake), or of multiple, redundant stations (Tucker and Mountain Park to serve Lake Acworth) to provide service to a waterway that can be served by one station.
    c. Contrary to this MO&O and other FCC decisions regarding single-site systems, the Division held as mutually exclusive with various Havens applications, Mobex applications which proposed service to waterways that could be served by a single Mobex proposed station—Mobex's Lake Mead (File Nos. 853126-127), Great Salt Lake (File Nos. 853128-129), Truckee River (File Nos. 853146-147), Carson River (File Nos. 853148-149), and San Antonio River (File Nos. 853124-125).

3) Letter of August 5, 1998 to Fred Daniel/Orion Telecom from Mary M. Shultz of the PS&PWD, PS&PWD-LTAB-666

a. Due to the decision in the 7/29/98 MO&O (DA 98-1507) denying Orion applications as single-site, the Division decided that various Orion Telecom applications, proposing service to inland waterways, could not be granted because they were single-site stations or multiple stations to serve a waterway that could be served by a single station.
b. The Division dismissed the applications pursuant to Section 1.958 of the Commission's Rules (Section 1.958: Defective Applications—is now Section 1.934 of the Commission's Rules).
c. Orion Telecom had applied for stations at Dayton, OH; Worthington, OH; Indianapolis, IN; Minneapolis, MN; Nashua, MO; Pittsville, TX; Dallas, TX; Ft. Worth, TX; San Antonio, TX; El Paso, TX; Henderson, NV; Phoenix, AZ; Yuma, AZ; Tucson, AZ; Pineridge, CA; Magna, UT; Danbury, NC; Gastonia, NC; Albuquerque, NM; Bosifort, WA; Modesto, CA; Brevard, NC; and Hillsborough, NC.

4) Order on Reconsideration, released 1/21/99, DA 99-211
   a. Bureau upheld the Division dismissal of the Orion Telecom inland applications in the August 5, 1998 letter, and the denial of Orion Telecom inland applications in the 7/29/98 MO&O.
   b. Bureau referred to Section 1.958 of the Commission's Rules in their denial of the Orion Petitions for Reconsideration of the dismissals and denials.

5) Memorandum Opinion and Order by the Commission, released 11/24/99, FCC 99-358
   a. The Commission upheld the Division's decision to deny reconsideration of the dismissal of the Orion Telecom inland applications, and subsequently denied the Orion Application for Review.
   b. The Commission reiterated that the AMTS rules and related Commission decisions do not permit single-site stations or multiple stations to serve a waterway that can be served by a single station.
   c. The Commission stated that the dismissals were not done in order to maximize auction revenues.
   d. Contrary to this MO&O and other FCC decisions regarding single-site systems, the Division held as mutually exclusive with various Havens applications, Mobex applications which proposed service to waterways that could be served by a single Mobex proposed station—Mobex's Lake Mead (File Nos. 853126-127), Great Salt Lake (File Nos. 853128-129), Truckee River (File Nos. 853146-147), Carson River (File Nos. 853148-149), and San Antonio River (File Nos. 853124-125).

Regionet Applications for Georgia

6) Order, released 1/31/01, DA 01-240, Regionet Applications for south coastal region of California, Chesapeake Bay, Savannah River, Sacramento River Delta Area, Apalachicola and Chattahoochee Rivers.

   a. For the Savannah River, once one site was dismissed for not having the required TV protection showings, the remaining site was dismissed because it did not provide 60% coverage and represented a single-site system.

B. Regarding applications proposing coverage to less than 60% of a waterway longer than 150 miles.

Havens Arkansas Headwaters Dismissals

1) Order, released 11/15/00, DA 00-2580, Arkansas Headwaters
   a. Division concluded that Arkansas Headwaters is part of Arkansas River and not a distinct waterway, and dismissed the Havens applications as defective for not meeting the required 60% coverage.
   b. Dismissal was done pursuant to Sections 1.934(d) and 80.475(a) of the Commission's Rules.
   c. After this decision, the FCC continued to hold Mobex Applications proposing similar service to the Arkansas Headwaters as pending and mutually exclusive with Havens South Platte A-block applications. Had the FCC dismissed the Mobex Arkansas Headwaters applications pursuant to this Order (that Arkansas Headwaters is not a distinct waterway for AMTS purposes), then it would have removed this mutual exclusivity.

2) Order on Reconsideration, released 5/1/01, DA 01-1115, Arkansas Headwaters
   a. Bureau affirmed the Division's conclusion that Arkansas Headwaters is part of Arkansas River and not a distinct waterway, and that the Havens's applications were properly dismissed as defective for not meeting the required 60% coverage.
   b. Bureau continued to hold the Mobex Arkansas Headwaters (File Nos. 853119, 853121) as pending and mutually exclusive, although they reaffirmed that the Arkansas Headwaters is not eligible for AMTS service.

3) Order on Further Reconsideration, released 10/31/01, DA 01-2509, Arkansas Headwaters
   a. Bureau further affirmed the Division's conclusion that Arkansas Headwaters is part of Arkansas River and not a distinct waterway, and that the Havens's applications were properly dismissed as defective for not meeting the required 60% coverage.
   b. Bureau continued to hold the Mobex Arkansas Headwaters (File Nos. 853119, 853121) as pending and mutually exclusive, although they reaffirmed that the Arkansas Headwaters is not eligible for AMTS service.

Three Texas Waterways (Trinity, Lower Colorado and San Antonio Rivers)

4) Order, released 1/31/01, DA 01-241, Various Texas Waterways
   a. Division dismissed Havens's applications proposing service to the Trinity, Lower Colorado and San Antonio Rivers for not meeting the required 60% coverage for the entire waterway (Havens was proposing to serve 100% of the what he could after protecting the coastal incumbent, but this was less than 60% of the entire waterway).
   b. Dismissal was done pursuant to Sections 1.934(d) and 80.475(a) of the Commission's Rules.

c. After this decision, the FCC continued to hold Mobex Applications (File Nos. 853133-135, 853122-125) proposing similar service to these three Texas waterways as pending and mutually exclusive with the Havens Applications for the Brazos and Guadalupe Rivers (Mobex Applications also did not provide 60% coverage). If the FCC had dismissed the Mobex Texas applications pursuant to this Order, then it would have removed this mutual exclusivity.

5) Order on Reconsideration, released 10/12/01, DA 01-2359, Various Texas Waterways
   a. Bureau upheld Division's decision to dismiss Havens's applications proposing to serve various Texas waterways for not meeting the 60% coverage requirement.
   b. Past grants to Regionet, if incorrect, do not provide basis for granting less than 60% to Havens. Regionet is allowed to serve the waterways indicated by Havens in his Petition for Reconsideration because the Commission's rules allow service beyond the served waterway.
   c. FCC still continued to hold the Mobex Texas Applications as mutually exclusive with the Havens Brazos and Guadalupe applications, regardless of their own Orders.

Mobex Inland Applications (would have been MX with granted Havens Licenses)

6) Letter of April 14, 2000 to Mobex Communications from Mary M. Shultz of PS&PWD, PS&PWD-LTAB-666
   a. Dismissed one of the Mobex Applications (File No. 853160) for Brazos River as untimely. After dismissing this as untimely, they dismissed the remaining applications due to a lack of continuity of service along 60% or more of the waterway (once the one application was dismissed as untimely there existed a gap in service).
   b. Dismissals were done pursuant to sections 1.934(d) and 80.475(a) of the Commission's Rules.

Regionet Applications for Georgia

7) Order, released 1/31/01, DA 01-240, Regionet Applications for south coastal region of California, Chesapeake Bay, Savannah River, Sacramento River Delta Area, Apalachicola and Chattahoochee Rivers.
   d. For the Savannah River, once one site was dismissed for not having the required TV protection showings, the remaining site was dismissed because it did not provide 60% coverage and represented a single-site system.

C. <u>Applications whose TV interference contours involve at least 100 residences—"stringent" TV protection plan required, etc.</u>

Corona Order

1) Memorandum Opinion and Order, released 3/10/99, DA 99-480
   a. Bureau deals with an Orion Telecom proposed station at Corona, CA, that exceeds 100 residences and was Petitioned to Deny by KCOP.
   b. Bureau restated that when there are at least 100 residences within the interference contour inside the TV grade B contour an applicant must do the following: 1) show that the proposed site is the only suitable location, 2) develop a plan to control any interference its operations cause within the Grade B contour, and 3) agree to make any necessary adjustments to affected television receivers to eliminate such interference. (Paragraph 6).
   c. Bureau granted Orion Telecom's station at Corona, CA but only under the condition that it not exceed 10W ERP because the proposed station exceeded 100 residences and Orion Telecom did not fulfill the second requirement to develop a plan to control interference.
   d. In the Ordering Clauses the Bureau lists Sections 1.958 (now Section 1.934) and 80.215 and 80.475 of the Commission's Rules.
   b. The FCC has accepted several Mobex and Regionet applications, many of them mutually exclusive with various Havens applications, even though they did not contain the required TV protection showings under Section 80.215(h), or they exceeded 100 residences (as stated in the applications or as detected by a "cursory review" in the case of the Regionet Savannah River, Pacific Coast, etc. applications) without containing the required stringent plan to limit interference. If the FCC had applied the requirements of Section 80.215(h) to the applicable Mobex and Regionet applications, it would have removed the mutual exclusivity with Havens's applications (e.g. Havens's Catawba, MCKARNS, Missouri). The FCC, contrary to its decisions, has also granted Regionet B-block applications which far exceeded 100 residences without having the required plan to limit interference—Savannah River, Cape Fear and Haw Rivers, and Cooper, Broad, Saluda and Congaree Rivers.

Regionet Applications for Pacific Coast, Georgia, etc.

2) Order, released 1/31/01, DA 01-240, Regionet Applications for south coastal region of California, Chesapeake Bay, Savannah River, Sacramento River Delta Area, Apalachicola and Chattahoochee Rivers.

   a. Division dismissed as defective the Regionet applications because they exceeded 100 residences without 1) containing a plan on how they would control TV interference within the Grade B contour, 2) how they would make adjustments to control any interference and 3) showing that the site is the only suitable location.
   b. This was determined after only "a cursory review of the applications" found them to exceed 100 residences.
   c. For the Savannah River, once one site was removed for the above errors, the remaining site was dismissed because it did not provide 60% coverage and represented a single-site system
   d. The Division did grant identical B-block Savannah River applications, although they had the same defects and the B-block is even closer to the TV. This is entirely

contrary to this Order. No "cursory review" of Regionet's Savannah River B-block applications must have been done, otherwise they would not have been granted.

e. In this Order the Division decided not to process the entire Havens Petition to Deny against the A-block Regionet Applications for the Cape Fear and Haw Rivers and the Cooper, Broad, Saluda and Congaree Rivers, even though they were submitted at the same time as those they dismissed in this Order for lack of TV protection plans and showings. In so doing, the Division maintained these applications as mutually exclusive with Havens Applications proposing to serve the Catawba River. If the Division had done a "cursory review" of these applications also, they would have found the same TV defects and would have had to dismiss the applications, thus removing the mutual exclusivity with Havens. In addition, while maintaining this mutually exclusive situation, the Division granted identical Regionet B-block applications proposing to serve the Cape Fear and Haw and Cooper, etc. As with the Savannah River B-block applications, had the Division done even a "cursory review" of these applications they would not have been granted for not meeting Section 80.215(h) of the Commission's Rules (many of the sites were located next to large cities where they surely exceeded 100 residences).

f. The dismissals were done pursuant to sections 1.934(d) and 80.475(a) of the Commission's Rules.

3) Order on Reconsideration, released 1/21/99, DA 99-212, Orion Newport Beach and San Clemente Stations

a. Bureau denied Orion Telecom's Petition for Reconsideration of the Division's decision to conditionally grant the Newport Beach and San Clemente stations only at 10W ERP. They upheld the Division's decision to limit these stations, upon grant, to a maximum 10W ERP because they did not meet Section 80.215(h) requirements to have a plan to control interference when at least 100 residences are affected.

c. In the Ordering Clauses denying the Petition for Reconsideration, the Bureau lists Section 1.958 (now Section 1.934) of the Commission's Rules.

d. In the Order, the Bureau notes that KCOP Television had found that the proposed Orion Telecom stations at Newport Beach and San Clemente far exceeded 100 residences, and that Orion had not submitted a sufficient plan to control interference.

e. The Order also states that applications which exceed 100 residences will not be authorized routinely and will only be authorized if they contain a stringent plan to control interference with TV.

In Paragraph 7, the Bureau states:

> Prior to an editorial, non-substantive revision, the regulation provided that an AMTS station within 105 miles of a Channel 13 television station "will normally be authorized only" if the plan to limit interference to television reception limits the interference contour(s) to fewer than 100 residences, but that the Commission "*may*, in a *particular* case," authorize facilities

> not meeting this condition if the requirements now set forth in Section 80.215(h)(3) are met. In light of the history of the rule, the Division concluded that such applications should be granted only under exceptional circumstances, and the stringency of a proposed plan to control interference must correspond to the population within the predicted interference contour....We believe that the rule's insistence on "a plan to control any interference to TV reception" is indicative of a requirement that the plan be effective.

f. The FCC has accepted several Mobex and Regionet applications, many of them mutually exclusive with various Havens applications, even though they did not contain the required TV protection showings under Section 80.215(h), or they exceeded 100 residences (as stated in the applications or as detected by a "cursory review" in the case of the Regionet Savannah River, Pacific Coast, etc. applications) without containing the required stringent plan to limit interference. If the FCC had applied the requirements of Section 80.215(h) to the applicable Mobex and Regionet applications, it would have removed the mutual exclusivity with Havens's applications (e.g. Havens's Catawba, MCKARNS, Missouri). The FCC, contrary to its decisions, has also granted Regionet B-block applications which far exceeded 100 residences without having the required plan to limit interference—Savannah River, Cape Fear and Haw Rivers, and Cooper, Broad, Saluda and Congaree Rivers.

Exhibit 3

Regarding the Deemed MX Applications Being "Strike" Applications

See text for relevance of the following.

"Strike applications" are those filed by an FCC licensee or potential licensee, mutually exclusive or otherwise inconsistent with an application of a would-be competitor, for the purpose of impeding, obstructing or delaying the grant the prospective competitor's application. *See, e.g., Community Service Broadcasting, Inc.*, 7 FCC Rcd 5652 (1992) (citing *Grenco, Inc.*, 28 FCC 2d 166 (HDO 1971)). In addition, applications filed for other improper purposes unrelated to the applicant's desire to actually obtain and use an authorization, such as to restrict a competitor's legitimate expansion capabilities, can also be deemed "strike applications." *USA Mobile Communications, Inc.*, 7 FCC Rcd 4879 (1992). In determining if an application is a strike application, the crucial element is an intent to block another application. *Olivetti Int'l, Inc.*, 6 FCC Rcd 1224, ¶ 19 (CCB 1991) (citing *Millar v. FCC*, 707 F.2d 1530, 1536 (D.C. Cir. 1983)).

Strike application issues appear to still be a part of the FCC's jurisprudence. Even the threat of filing a strike application (or, presumably, the offer to withdraw one in exchange for concessions) is a matter that may be raised to the FCC. *See James C. Sliger*, 69 FCC 2d 277 (Rev. Bd. 1977). Before concluding that an abuse of process such as filing a strike application has taken place, though, the FCC must make a specific finding, supported by the record, of abusive intent. *See K.O. Communications, Inc.*, 14 FCC Rcd 1081, ¶ 23 (WTB 1998); *see also Edward C. Smith d/b/a Answerite Professional Answering Svc.*, 71 FCC 2d 379, ¶ 7 (1979) (while alleged strike applicant's statement that it filed in order to ensure initial applicant would not have time to file its own application may have been actionable, mere hearsay recital of statement, in absence of documentary or other evidence of the statement, was not sufficient to justify hearing on issue). In addition, the party asserting a strike application issue must "make a strong threshold showing" of improper purpose. *Stockton Mobilephone, Inc., and A. Michael Lipper*, 60 R.R.2d (P&F) 1482, ¶ 7 (CCB 1986). Assuming that burden can be met, however, strike application issues may be raised in AMTS licensing proceedings, *see Waterway Communications Sys., Inc.*, 2 FCC Rcd 241 (1987) (discussing strike application issue, but ultimately holding no strike application had been filed), and improper motives need not be the only intent behind a strike application – even if only one purpose of a party is to obstruct, impede or delay the grant of an application, that party may be found to have submitted a strike application, regardless of the merits of the other issues. *Nittany Communications, Inc.*, 63 FCC 2d 487, ¶ 36 (1977).

Whether there are frequencies available other than the one requested in a potential strike application is a factor used in evaluating evidence of an improper motive. *Community Service*, ¶ 7 (citing *Grenco*, 28 FCC.2d at 167). Other considerations regarding the frequency selected on an alleged strike application include (i) the desirability of the frequency to the alleged strike applicant absent its potential anti-competitive effects, *Answerite*, ¶ 8, and (ii) under certain circumstances, failure to conduct a frequency study. *Olivetti Int'l, Inc.* 7 FCC Rcd 7027, ¶ 8 (citing *Sumiton Broadcasting Co.*, 15 FCC 2d 400, 404 n.8 (Rev. Bd. 1968)).

The other three factors in strike application analyses are the timing of the application, the economic and competitive benefit occurring from filing the mutually exclusive application, and the good faith of the accused applicant. *Community Service*, ¶ 7. As to the timing factor, analyses have included examining when the alleged strike application was filed vis-à-vis the application to which it was mutually exclusive, such as, whether the alleged strike application was complete and ready for filing before or after the complaining party's application, whether the alleged strike applicant had taken other steps (such as securing a transmitter site) before the complaining party's application was filed. *See Answerite*, ¶ 8. Evidence of lack of anti-competitive intent has also been found where a competing application for an authorization was filed against one potential competitor, but not for other authorizations that would likewise lead to similar competition. *Rivertown Communications Co., Inc.*, 8 FCC Rcd 7828, ¶ 86 (ALJ 1993).

Another strike application argument for AMTS, although not found in the precedents discussed above, can be made given the FCC's relatively recent grant of authority to resolve mutually exclusive applications via auction (and the suggestion of a freeze and dismissal of pending applications upon transitioning to a new licensing scheme). Specifically, there is an argument that mutually exclusive applications filed since that date – particularly if they bear other indicia of strike applications – have been filed for the improper purpose of forcing prospective licensees to acquire AMTS licenses at auction, for a substantial payment, rather than through the previous licensing regime, which entailed only application preparation, filing and prosecution costs. *See Amendment of the Commission's Rules Concerning Maritime Communications*, 13 FCC Rcd 19853, ¶ 1 n.3 (1998),

With the above review in mind, the following presents evidence, in addition to that in the text, of the "strike application" nature of the Deemed MX Applications:

List of Mobex's FCC Filings Which
Argue Against Grant of Their Own Applications

1) Mobex Cover Letters to several AMTS Applications: In the cover letters to Mobex applications (that are mutually exclusive with Havens Applications), legal counsel for Mobex states:

> In the Commission's Maritime Rulemaking proceeding, PR Docket No. 92-257, the Commission initiated a comprehensive review of its maritime service rules. . In doing so, the Commission provided for nationwide licensing of . . . public coast station frequencies for generic commercial mobile radio . . . in areas other than the maritime service areas . . . . The Commission indicated in that rulemaking that it would address the scope of operation of the AMTS band at a later date. In the meantime, one party [Havens] is known to have recently filed AMTS applications to serve minor river systems in Georgia, Colorado and New Mexico.. . . . A *prima facie* review suggests those systems . . . may be utilized to serve non-maritime users. . . .

> Mobex believes that the preferred approach to expansion of the AMTS frequencies to non-maritime use is . . . through a rulemaking proceeding.23 Mobex certainly would support that approach, and . . . would . . . be amenable to subordinating its applications to consideration following [such] a rulemaking proceeding. On the other hand, to the extent the [Havens] applications filed will be considered as proper AMTS applications by the Commission, Mobex is prepared to similarly offer maritime service throughout those [Havens application] areas . . . . Accordingly, Mobex respectfully submits these applications in order to protect its opportunity to seek authorization on AMTS channels in western states [for the area Havens applied for]."24

In other words, because Havens applied for AMTS licenses for certain inland waterways, Mobex also applied to create mutually exclusive applications so that the Havens Applications could not be granted and Mobex could pursue its "opportunity to seek authorization on AMTS" in the areas and for the frequencies Havens applied for via "the preferable approach"-- via the noted rulemaking. Mobex's suggestion of sincere intent--that it is "prepared to similarly offer . . . service"--is flatly contradicted by the host of major defects in the Mobex Applications.

Arkansas Headwaters:

2) Mobex/Regionet Wireless Licensee, LLC, "Opposition of Regionet Wireless Licensee LLC to Petition for Reconsideration", filed 1/5/01, against Havens Petition for Reconsideration of dismissal of Applications to serve Arkansas Headwaters

By its Opposition, and an associated filing (together, the "Whole-River Requirement Filings"),25 Mobex is makes clear that many of its inland AMTS applications fail and must be dismissed, including applications for the Arkansas Headwaters, the Upper Rio Grande, the Upper Chattahoochee, the Lower Colorado, and the lower parts of the Arkansas and Missouri Rivers.26

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23 Mobex acquired Regionet and controls its AMTS licenses as reflected in Commission records. The statement above by Mobex is inconsistent with Mobex's current operation of the Regionet AMTS services which are marketed to non-maritime use: A review of the Regionet website (www.regionetwireless.com) gives no indication of any service to maritime users but states: "Regionet Wireless is a nationwide provider of networked, mobile radio, dispatch services" and describes land mobile services and products.

24 Cover letter from Martin W. Bercovici of Keller and Heckman LLP to the Federal Communications Commission dated May 15, 2000.

25 Mobex made another filing that, like the Opposition, took the effective position that many of its applications for inland waterways are not permissible under the rules due to not meeting the coverage requirement: "Opposition to Supplement" (File Nos. 853007 etc.) filed 12-13-2000 (opposing Havens's Supplement of his applications for the Highland Lakes and Lower Colorado River).

26 Others may include the Sacramento River and the Kanawah River.

In its Opposition, Mobex supports the Division's dismissal of the Havens Arkansas Headwaters applications for not meeting the 60% coverage. Mobex argues that the FCC may only grant AMTS licenses for a whole river, if the 100% or 60% coverage required for the whole river is provided for in the application. However, Mobex clearly did not provide such coverage in its own Arkansas Headwaters applications (File Nos. 853119/121).

That Mobex applied for these waterways, holding the opinion that the applications could not be granted, reveals its real, impermissible intent-- to block its competitor, Havens, via Mx'ing his applications for the same or nearby rivers.27

1) Mobex/Regionet Wireless Licensee, LLC, "Opposition to Petition for Review", filed 6/12/01, against Havens Petition for Review of Arkansas Headwaters dismissals.

   Mobex/Regionet continues to support the Division's dismissals of the Havens Arkansas Headwaters applications, although they hold applications proposing similar service.

2) Mobex/Regionet, "Opposition to Application for Review", filed 12/14/01, against Havens Application for Review of Arkansas Headwaters dismissals.

   Mobex/Regionet continues to support the dismissal of the Havens Arkansas Headwaters applications and asks that the Application for Review be dismissed or denied.

Various Texas Waterways

3) Mobex/Regionet Wireless Licensee, LLC, "Opposition of Regionet Licensee LLC to Petition for Reconsideration", filed 3/15/01, against Havens Petition for Reconsideration of the dismissal of Havens Applications proposing service to various Texas waterways.

   Mobex/Regionet supports the FCC's decision to dismiss several Havens applications proposing to serve various Texas waterways for not meeting the 60% coverage requirement established in 80.475(a). They argue against grant of Havens's applications and allowing less than 60% coverage.

   Mobex/Regionet holds applications proposing similar service to the same Texas waterways (File Nos. 853133-135, 853122-125). The Mobex/Regionet applications also do not meet the required 60% coverage.

4) Mobex/Regionet, "Opposition to Application for Review", filed 11/27/01, against Havens Application for Review of the dismissal of Havens Applications for various Texas waterways

   Mobex continues to support the FCC's decision to dismiss the Havens applications for not meeting the required 60% coverage, while still holding similar applications.

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27 See Past Filings where Havens gives much other evidence of "strike" intent and abuse of process.

5) Waterway Communications System, Inc. (Watercom), "Petition to Deny of Waterway Communications System, Inc.", filed 3/24/00, and "Reply to Opposition to Petition to Deny", filed 4/18/00, against the Havens applications proposing service to Texas waterways.

   Mobex now owns Watercom and has maintained the above two filings. Both filings ask the FCC to deny the Havens Texas applications and question whether the Havens applications will offer a maritime service. They also argue that the rivers do not merit AMTS service.

   In the Reply they state:

   > Merely because a body of water is fluid and thereby "navigable" under programs of other agencies and judicial precedent relating to environmental or other purposes does not create a need, or justification for a maritime communications service on that river or lake. (Page 5)

   While maintaining these Watercom filings, Mobex held applications for the same Texas waterways.

Missouri, Tennessee and Arkansas Rivers

6) Mobex Communications, Report of Ex Parte Meeting filed 4/19/01, re: PR Docket No. 92-257

   In this Ex Parte report, Mobex states in its summary of the meeting that the Missouri, Tennesee and Arkansas Rivers "have insufficient commercial traffic to support AMTS build-out" (Part IV of summary).

   Contrary to this position, Mobex filed applications for both the A and B blocks to serve the Missouri, Tennessee and Arkansas Rivers. Some of those applications blocked Havens applications for the Missouri and Arkansas rivers.

Rio Grande

7) Mobex/Regionet, "Opposition to Request for Waiver", filed 3/5/02, against Havens's Request for Waiver of 60% coverage requirement for his Rio Grande applications (File Nos. 853190-193).

   Among their arguments for dismissal, Mobex/Regionet argue that the Havens Rio Grande applications represent a similar situation to the Arkansas Headwaters, and that, since the applications do not provide service to 60% of the entire Rio Grande, the applications and the Request for Waiver should be dismissed.

Mobex/Regionet state in the Oppositoin:

> ....Havens could have chosen more than 60 percent of the Rio Grande River to serve. He simply chose to cover only 21.6 percent, far less than the required minimum....Havens simply proposed a system which did not meet the minimum coverage requirement of Rule Section 80.475(a). (Page 3)

Mobex/Regionet held applications proposing similar service to the Rio Grande. Their applications also did not meet the 60% coverage requirement.

South Platte

8) Mobex Communications, March 18, 2002 Letter from Dennis Brown to Ms. Kleppinger at FCC's Gettysburg location, regarding Havens's Request for Dismissal of South Platte Applications (File Nos. 853057 and 853058)

   In this letter, Mobex opposed Havens's Request to dismiss and withdraw his South Platte applications which were mutually exclusive with Mobex South Platte applications. They ask the FCC not to grant the Request and to "dismiss, deny or return" it.

   Had the FCC accepted Havens's request, the Mobex applications would have been processed. By this letter Mobex is essentially asking the FCC not to resolve the MX situation and process their applications.

Certificate of Service

I, Angela E. Giancarlo, an attorney with Hogan & Hartson, L.L.P., certify that I have, on this 8th day of May 2002, caused to be delivered a copy of the foregoing Petition for Reconsideration, including all attachments, to the following:

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