

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of the Commission's Rules)
Concerning Maritime Communications)
)
Petition for Rule Making filed by)
Regionet Wireless License, LLC)
)

PR Docket No. 92-257

RM-9664

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Warren C. Havens ("Havens") hereby replies to the Opposition to Petition for Reconsideration filed in the above-captioned proceeding ¹ by Mobex Communications, Inc. and its subsidiary Mobex Network Services, LLC (collectively, "Mobex"). ² As demonstrated in the Havens Petition for Reconsideration of May 8, 2002, ³ the Commission's obligations under Section 309(j) of the Communications Act of 1934, as amended, ⁴ in conjunction with its rules and practice, make clear the agency's obligation to dismiss those license applications that do not

¹ Amendment of the Commission's Rules Concerning Maritime Communications and Petition for Rule Making filed by Regionet Wireless License, LLC, FCC 02-74 (rel. Apr. 8, 2002) ("April 8 Order").

² Opposition to Petition for Reconsideration, PR Docket No. 92-257 (filed May 15, 2002) ("Mobex Opposition").

³ Petition for Reconsideration, PR Docket No. 92-257 (filed May 8, 2002) ("Havens Petition").

⁴ 47 U.S.C. §§ 151 *et seq.* ("the Act").

meet its minimum standards. As discussed below, the Mobex Opposition failed to overcome the substantive arguments raised in the Havens Petition. Moreover, Mobex's procedural arguments are without merit. For these reasons, the Commission should reject the Mobex Opposition and reconsider its actions in the subject proceeding pursuant to the Havens Petition.

I. Mobex Failed To Overcome The Substantive Arguments Raised In The Petition For Reconsideration

The Havens Petition demonstrates that Section 309(j)(6)(E) of the Act requires the Commission to avoid mutual exclusivity where possible⁵ and makes plain the Commission's obligation to use its existing rules and policies to dismiss facially-defective strike applications such as those submitted by Mobex.⁶ The Mobex Opposition does not overcome these arguments. Mobex generally argues that the Commission's definition of mutual exclusivity does not include a determination of acceptability of an application for filing – that two applications are mutually exclusive “from the moment that the second application is filed if the grant of one would effectively preclude the other.”⁷ Indeed, Mobex baldly asserts that “even their [the applications'] lack of compliance with basic requirements does not affect whether they are mutually exclusive, because, upon processing, it is always within the Commission's power to

⁵ Havens Petition at 12-14; *See also* Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, *Report & Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22713 (2000) (“Section 309(j)(6)(E) also made clear that the Commission was not relieved of its obligation in the public interest to continue to use engineering solutions, negotiation, *threshold qualifications*, service regulations and other means to avoid mutual exclusivity.”) (Emphasis added). Although it included a discussion of mutual exclusivity, citing this very language, the Mobex Opposition omitted this relevant sentence. *See* Mobex Opposition at 2.

⁶ *Id.* at 14-16.

⁷ Mobex Opposition at 5.

waive defects in an application.”⁸ In short, Mobex makes the astonishing claim that any application – no matter how defective – automatically (and conclusively) manufactures mutual exclusivity. This is absurd, as is Mobex’s conclusion that Section 309(j)(6)(E) of the Act “is not applicable to the instant matter.”⁹ If anything, Mobex’s points flaunt the Commission’s rules and lend credibility to Havens’ prior argument that the Mobex applications were submitted to the Commission in a haphazard manner with the sole intent to falsely create mutual exclusivity.

Mobex fails to address the fact that FCC Rule 1.934 sets forth the Commission’s ability to dismiss an application because it is defective¹⁰ or if the spectrum is not available.¹¹ Specifically, the rule provides that the Commission “may dismiss ... an application that it finds to be defective ...if ... it is incomplete with respect to required answers to questions, informational showings, or other matters of a formal character.”¹² The Commission also “may dismiss applications that request spectrum which is unavailable because ... [i]t was previously assigned to another licensee on an exclusive basis[.]”¹³ Indeed, as discussed in the Havens Petition,¹⁴ the text and corresponding footnote of the *Third FNPRM* established the Commission’s policy on how it would treat AMTS applications that were filed prior to

⁸ *Id.*

⁹ Mobex Opposition at 8.

¹⁰ 47 C.F.R. § 1.934(d)(1).

¹¹ 47 C.F.R. § 1.934(e)(2).

¹² 47 C.F.R. § 1.934(d)(1).

¹³ 47 C.F.R. § 1.934(e)(2).

¹⁴ Havens Petition at 4, 8.

November 16, 2000 “provided that they are not mutually exclusive with any other applications”¹⁵ “or would otherwise not satisfy the technical requirements in our AMTS rules.”¹⁶ Mobex incorrectly states that this policy refers to “a limited situation in which an application ... might be determined to be not mutually exclusive to any application or group of applications to which the system was otherwise mutually exclusive.”¹⁷ However, when taken in its proper context, the language clearly illustrates that the Commission established a policy that properly set forth its intent to dismiss defective applications, under either scenario, pursuant to its authority under FCC Rule 1.934.¹⁸

The fact that the Commission initially accepted defective applications does not imply that it waived the defects, as Mobex tries to claim. When an application is rotely deemed "acceptable for filing," it does not mean that the Commission will ultimately find the application to be “acceptable” in substance. Simply put, an application that is “accepted for filing” is not necessarily “acceptable.” This distinction is clearly manifested in the Commission’s policy with respect to license applications. In public notices released regularly each week, the Commission routinely accepts applications upon "initial review,"¹⁹ but this does not mean that the

¹⁵ Amendment of the Commission’s Rules Concerning Maritime Communications; Petition for Rulemaking filed by Regionet Wireless License, LLC, *Fourth Report & Order and Third Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22585, 22622 (2000).

¹⁶ *Id.* at n.266 (emphasis added).

¹⁷ Mobex Opposition at 6.

¹⁸ Indeed, the Commission followed this course and dismissed certain defective AMTS license applications. *See* Havens Petition at 5.

¹⁹ *See, e.g.*, Cable Television Relay Service (CARS) Applications, Report No. 1574, Applications Accepted For Filing, *Public Notice* (rel. May 8, 2002); Satellite Communications Services, Report No. SES-00390, Satellite Radio Applications Accepted For Filing, *Public Notice* (rel. May 8, 2002).

applications are “acceptable for filing” under the rules. The Commission always “reserves the right to return any application if, upon further examination, it is determined to be defective and not in conformance with the Commission’s Rules, Regulations, and its Policies.”²⁰ This is *precisely* the policy that the Commission should have applied to the pending AMTS applications. The Commission’s own disclaimer reveals its practice of returning applications that do not meet its “Rules, Regulations, and its Policies.” In addition, the Commission’s previously-articulated policy against prejudging applications²¹ bolsters the Commission’s obligation to go beyond the mere acceptance of an application to ensure compliance with existing policies and consistency with respect to the licensing process.

Mobex suggests that Havens “was on notice ... that mutually exclusive applications might be dismissed[]” while ignoring that it was equally on notice that defective applications would be dismissed.²² If the Commission had applied its threshold qualifications uniformly, the false mutual exclusivity problem disappears. In support of its argument, Mobex improperly cites the Commission’s order that established the rules for maritime communications.²³ But it fails to point out that the language it cites is located deep within footnote 3 of the ruling, and it omits the critical qualifier that “[a]pplications for that spectrum [high seas and AMTS] *will be governed by current procedures ...*.”²⁴ Even if Mobex had

²⁰ *Id.*

²¹ Amendment of the Commission’s Rule Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report & Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18,600, n.167 (1997).

²² Mobex Opposition at 6.

²³ Amendment of the Commission’s Rules Concerning Maritime Communications, *Third Report & Order and Memorandum Opinion & Order*, 13 FCC Rcd 19853 (1998).

²⁴ *Id.* at 19855, n.3 (emphasis added).

properly cited this so-called notice provision, its point is irrelevant to the matter at hand. Mere notice of the possibility of dismissal due to mutual exclusivity does not obviate the Commission's duty to follow its well-established processing rules. If an application is “defective and not in conformance with the Commission's Rules, Regulations, and its Policies,” it is not acceptable for filing and thus could not cause mutual exclusivity.

Finally, Mobex argues that the Commission was not required to review the applications for acceptability before it suspended processing AMTS applications.²⁵ Relatedly, Mobex asserts that the Commission's blanket dismissal conveniently resolves the issues raised by Havens. Mobex is wrong on both counts. The Commission's blanket dismissal does not allow the agency to curtail or completely forego its duty to license applicants. At a minimum, all applicants have a right to know whether the Commission, after review, found any given application to be either acceptable and thus ripe for further consideration or defective and therefore dismissible. Nor are important licensing issues equitably resolved by one broad act that collectively dismisses an entire body of applications -- as Mobex suggests is the proper remedy.²⁶ Instead, the Commission must apply its established procedures to determine whether the Mobex applications were acceptable for filing in the first instance.²⁷

²⁵ Mobex Opposition at 6.

²⁶ “Any complaint which Havens has had concerning alleged disparate treatment with respect to his above captioned applications was resolved by the dismissal of the applications of both Mobex and Havens by the Second MO&O.” Mobex Opposition at 7. “[W]here Havens had alleged the filing of strike applications, the Second MO&O gave him the relief he requested by the dismissal of Mobex's mutually exclusive applications.” *Id.* at 8.

²⁷ Havens Petition at 15.

II. Mobex's Procedural Arguments Are Without Merit

The procedural arguments submitted by Mobex²⁸ are frivolous and need not detain the Commission from addressing the merits of the Petition for Reconsideration ("Petition"). Havens filed the Petition pursuant to FCC Rules 1.106 and 1.429 because the April 8 Order was issued as part of a notice and comment rulemaking proceeding (implicating the review provisions of Rule 1.429), but it also dismissed certain of Havens' applications for licenses (implicating Rule 1.106). Thus, submitting a petition for reconsideration pursuant to FCC Rules 1.106 and 1.429 is a perfectly reasonable course of action in this case. The process set forth in FCC Rules 1.106 and 1.4 governs the filing of petitions for reconsideration of licensing decisions made by the Commission in the context of a rulemaking proceeding.²⁹ Under these rules, the Havens Petition was properly filed on May 8, 2002. Rule 1.429 establishes a process for submitting petitions for reconsideration of rulemaking proceedings (*i.e.*, a rulemaking proceeding that does not contain a licensing decision). While this provision permits the filing of petitions for reconsideration 30 days after publication of the decision in the *Federal Register*, there is no basis for dismissing a petition filed before the deadline. Where, as here, the Havens Petition was submitted pursuant to both Sections 1.106 and 1.429, the

²⁸ Mobex Opposition at 2.

²⁹ "NOTE TO PARAGRAPH (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2)." 47 C.F.R. § 1.4(b)(1). "For non-rulemaking documents released by the Commission or staff, ... the release date[]" triggers the computation of time for filing related pleadings. 47 C.F.R. § 1.4(b)(2).

Commission should address the merits of Haven's argument, since it applies equally to the Commission's rulemaking order and licensing decisions.³⁰

Mobex's argument that the petition for reconsideration should have been addressed to the Bureau³¹ is equally wrong. FCC Rule 1.106(a)(1) expressly provides that "[p]etitions requesting reconsideration of a final Commission action will be acted on by the Commission."³² As discussed above, it was the Commission that issued the licensing decision in this case. Thus, a petition for reconsideration of a licensing decision made by the Commission is properly directed to the Commission itself.

Finally, Mobex asserts erroneously that the Commission should dismiss the Havens Petition for failure to comply with the agency's rules regarding page limits and type style.³³ This claim is utterly baseless: the Petition consisted of 17 substantive pages and included a 34-page exhibit in factual support of the petition. FCC Rules 1.106(f) and 1.429(d) provide that a "petition shall not exceed 25 double-spaced typewritten pages[]"³⁴ and the Commission has ruled that "[a]ttachments consisting of materials that factually support exceptions are not counted in determining the page limit."³⁵ Therefore, the Havens Petition fully complies with the

³⁰ In any event, there is no basis for dismissal of the Havens Petition under Section 1.429 as being premature. It would be pointless and wasteful to require Havens to refile the same Petition at a later date.

³¹ Mobex Opposition at 2.

³² 47 C.F.R. § 1.106(a)(1).

³³ Mobex Opposition at 4.

³⁴ 47 C.F.R. §§ 1.106(f) and 1.429(g).

³⁵ James A. Kay, *Decision*, 17 FCC Rcd 1834, para. 12 (2002), citing *Belo Broadcasting Corp.*, 61 FCC 2d 10, 11, para. 4 (1976) and *Gross Broadcasting Co.*, 65 FCC 2d 514, 514, para. 3 (Rev. Bd. 1977); 47 C.F.R. Section 1.48(a).

Commission's standards.³⁶ However, even if the Havens Petition exceeded the page limitations, as Mobex incorrectly claims, the Commission may nevertheless address the merits of the document.³⁷

Conclusion

For the reasons discussed above, the Commission should reject the Mobex Opposition and reconsider its actions in the subject proceeding pursuant to the Havens Petition for Reconsideration of May 8, 2002.

Respectfully submitted,



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May 30, 2002

³⁶ FCC Rule 1.49(a) cautions "against employing extended single-spaced passages ... to evade prescribed pleading lengths." 47 C.F.R. Section 1.49(a). However, in this case, there was no intent to evade the Commission's prescribed limitations. The exhibits were submitted, in good faith, to support the underlying 17-page petition.

³⁷ See Complaint of Michael Steven Levinson, *Memorandum Opinion & Order*, 9 FCC Rcd 3018, n.1 (1994). When a 41-page application for review with a 29-page attachment was filed in 1999, the Commission accepted the pleading *en toto*, with a caution that it may consider dismissing pleadings with procedural defects sometime in the future. Application of Greater Media Radio Co., Inc., *Order*, 15 FCC Rcd 7090, n.1 (1999). In the case at hand, the petition for reconsideration consists of a mere 17 pages with a 34-page exhibit, far less than those accepted and ultimately considered by the Commission in the *Greater Media Radio Order*.

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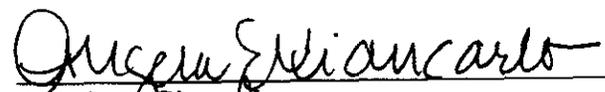
I, Angela E. Giancarlo, an attorney with Hogan & Hartson, L.L.P., certify that I have, on this 30th day of May 2002, caused to be delivered a copy of the foregoing "Reply to Opposition to Petition for Reconsideration" to the following:

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