

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

In the Matter of)	
)	
Amendment of Part 15 of the)	ET Docket No. 99-231
Commission's Rules Regarding)	
Spread Spectrum Devices)	
)	
Amendment of Part 90 of the Commission's)	RM-10403
Regarding the Location and Monitoring)	
Service to Provide Greater Flexibility)	

To: The Commission

**Opposition to Petition for Reconsideration in ET Docket 99-231
and Ex Parte Comments in RM-10403**

Agere Systems ("Agere") hereby submits its Opposition to the Petition for Reconsideration filed by Warren C. Havens and Telesaurus Holdings GB, LLC, d/b/a LMS Wireless ("LMSW") in ET Docket No. 99-231 ("the LMSW Petition") and simultaneously offers its Ex Parte Comments in RM-10403, a related Petition for Rulemaking ("the Progeny Petition") filed on March 5, 2002 by Progeny LMS, LLC ("Progeny") another LMS licensee.

As a major manufacturer of devices, and components for devices, that operate under Part 15 of the Commission's rules, as well as components for CMRS equipment, and one of the originators of the petition upon which the changes to the Commission's rules of which LMSW seeks reconsideration were based, Agere is an interested party in this proceeding.

According to the Notice published in the Federal Register on August 13, 2002, the deadline for filing oppositions to the LMSW Petition is September, 5, 2002. Therefore Agere's Opposition to the LMSW Petition is timely-filed and comments herein with respect to the Progeny Petition are filed as Ex Parte Comments.

INTRODUCTION

1. In the LMSW Petition, Petitioner requests reconsideration (or deferral) of the changes to Part 15.247 of the Commission's rules adopted by the Commission in its Second Report and Order in ET Docket 99-231 ("the R&O"),¹ which was adopted on May 16, 2002 and published in the Federal Register on July 25, 2002.

2. LMSW asserts, without any supporting evidence, that its request to defer the "premature" changes in Part 15.247 of the Commission's rules, as enacted in the R&O, is "necessary" because these changes allegedly would "jeopardize important developments" (to LMS services) that it contends are forthcoming and dependent on deferral of the subject changes to Part 15.247 of the Commission's rules.

3. In essence, the LMSW Petition and the Progeny Petition are part and parcel of the same package ... an attempt by LMS licensees to radically change the LMS from what it was intended to be when it was established by the Commission.

4. The requests in the Progeny Petition, and the requests alluded to be forthcoming in a yet to be filed Petition from LMSW, would fundamentally alter the nature of the LMS, effectively converting it into another CMRS-like service,² and the impending requests alluded to by LMSW sound quite similar in effect.³

¹ See FCC 02-151, Second Report and Order (Proceeding Terminated), in ET Docket 99-231

² Progeny requests that the Commission make several sweeping changes in its LMS rules, specifically:

- a) eliminate or modify the "spectrum cap," allowing a single LMS licensee to hold all of the licenses in an EA
- b) eliminate or modify the restrictions on real-time interconnection to the public switched telephone network ("PSTN")
- c) eliminate or modify the restrictions on types of communications or services that LMS operators may provide (and)
- d) eliminate or modify the "safe harbor" provision that creates a presumption of non-interference for secondary users of the band

³ LMSW's proposals for changes, while not completely evident since the "forthcoming" Petition that LMSW alludes to has not yet been made public, would appear, based on LMSW's statements in the instant Proceeding, to be at least as sweeping as those proposed by Progeny in its Petition and perhaps even more so.

5. Progeny freely admits in its Petition that, when it established the LMS, the Commission “... created a ‘niche’ radio service, intended to serve a narrow portion of the public – those persons or entities desiring only location and monitoring services.”⁴

6. Progeny admits “equipment is not available for deployment of LMS services and under the current constraints is unlikely to become available.” Progeny also admits that manufacturers have stated that “the narrow ‘market’ for a stand-alone location and monitoring service ... will not be sufficient to justify the time and expenses necessary to develop equipment for that market,” and furthermore that others had offered the opinion that “GPS had ‘rendered the LMS band antiquated’.”⁵

7. Progeny further complains “... deep-pocketed competitors (CMRS carriers who are now required to incorporate location capabilities into their systems) make it unlikely that LMS will develop under the current limitations.”

8. We find these arguments for such sweeping changes unconvincing, because, LMS licensees knew, or should have known, the nature of their business and the market they were entering when they made the decision to obtain LMS licenses.

9. It should not be the function of the Commission to bail out ill-conceived, unsuccessful business plans that are based on an apparent lack of due diligence on the part of the licensees, by changing its rules to convert their business to something radically different, and very much like, existing, successful competitive services (of which there are no scarcity).⁶

10. To do so would be fundamentally unfair, in that it would effectively provide a windfall or shortcut, circumventing the rules and procedures that were followed by successful, competitive service providers in acquiring their licenses.

⁴ See the Progeny Petition, at pg. 7 and the beginning of pg. 8

⁵ *Id.* at “B”

⁶ The requests of the LMS licensees to change the fundamental nature of the LMS because their business plans were flawed is as unreasonable as those of a consumer, who bought a conventional analog television set some time ago, and later returns to the store demanding that the store exchange the analog television set for a new HTDV set (or even a newer model analog TV set with a larger screen and more features).

11. Additionally, the requests by LMS licensees to eliminate the “safe harbor” provision vis a vis devices that operate under the Commission’s Part 15 rules would be fundamentally unfair to Part 15 industry and the Part 15 users, who have relied on this provision in making significant investments in the development and purchase of equipment.⁷

12. Furthermore, the elimination of the “safe harbor” provision would be counter to the Commission’s determination in its *MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING* in PR Docket No. 93-61, released September 16, 1997 that:

“To accommodate the concerns of Part 15 interests regarding their secondary status *vis-a-vis* LMS, the *LMS Report and Order* adopted a "safe harbor" within which Part 15 devices may operate without fear of being deemed to cause interference to LMS operators. Specifically, a Part 15 device will, ***by definition***, (emphasis added) not be considered to be causing interference to a multilateration LMS system if it is otherwise operating in accordance with the provisions of Part 15 and meets at least one of the following conditions: ...”^{8, 9}

13. Clearly, the Commission determined that the “safe harbor” provision vis a vis LMS and Part 15 operations was necessary and in the public interest. The fact that LMS service has not been deployed due to an apparent lack of consumer interest (and the lack of investment and development of suitable equipment that stems from that lack of consumer interest) does not render the Commission’s determination in this aspect invalid.

⁷ Whereas, it would appear the the LMS licensees have made essentially no investment in equipment, nor have they deployed services, because, by their own accounts, no equipment is available because of the lack of demand for LMS services compared to competitive offerings.

⁸ See *MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING* in PR Docket No. 93-61, released September 16, 1997 (FCC 97-305)

⁹ See also 47 C.F.R. § 90.361

14. In its Petition, LMSW argues “... unlicensed *Part 15 operations* should not be granted increased flexibility in the 902-928 MHz band via the Second R&O if that is at the expense of licensed LMS operations. Under Part 15 rules, unlicensed devices may not cause harmful interference to licensed operations. Increased flexibility may lead to increased traffic, and this may lead to interference with LMS operations.”¹⁰

15. First, LMSW has made no convincing showing that the increased flexibility in modulation formats for Part 15 devices under Part 15.247 of the Commission’s rules, that were enacted by the Commission in FCC 02-151, the Second Report and Order in ET Docket 99-231, would have any adverse effect on LMS operations.

16. In fact, the Commission made the determination that the subject changes in Part 15.247 of its rules were in the public interest and that the subject changes presented no real potential for increased interference to other services.¹¹

17. Clearly, LMSW, like Progeny, is seeking, as part of the package of petitions from LMS interests, the removal of the “safe harbor” provision as one of the sweeping changes in LMS rules they seek in an effort to salvage a failed business plan by asking the Commission to overturn sound decisions that other users of the spectrum have relied on for years ... decisions which are still as sound, appropriate, and in the public interest as when they were enacted by the Commission in the first place.

18. The Commission should not permit LMS interests to circumvent the rules and procedures that were followed by successful CMRS licensees in an attempt to convert the LMS into a CMRS-like service. To do so would be fundamentally unfair to the CMRS licensees who played by the rules.

¹⁰ The last two sentences of this paragraph completely ignore the existence of the “safe harbor” provisions enacted by the Commission in 47 C.F.R. § 90.361 ... under the “safe harbor” provisions, Part 15 devices that comply with the Commission’s rules for such devices cannot, by definition, cause harmful interference to LMS operations (if, in fact, any exist).

¹¹ See FCC 02-151, Second Report and Order (Proceeding Terminated), in ET Docket 99-231, at 11.

19. Finally, to alter the LMS rules in such profound ways, as the LMS licensees request, and to “defer” the already-decided changes in Part 15.247 of the Commission’s rules would also be fundamentally unfair to Part 15 users and the Part 15 industry, who have relied on the nature of LMS services, including the “safe harbor” provisions, as the basis for making significant investments and promoting innovation in the use of the 902-928 MHz band for years, while LMS licensees have, by their own admission, accomplished little or nothing in the corresponding time frame.

SUMMARY AND CONCLUSION

20. On the basis of the arguments presented above, Agere Systems respectfully requests that the Commission deny and dismiss both the LMSW and Progeny Petitions and maintain the “safe harbor” provisions for Part 15 devices vis a vis LMS, as well as the other existing restrictions on LMS that those Petitions seek to remove.

21. Granting the Petitioners’ requests for such changes would, as we point out above, be fundamentally unfair to CMRS licensees who played by the rules, as well as to other users of the 902-928 MHz band, and the Part 15 industry that has a long history of technical innovation and, through the devices it produces in compliance with the Commission’s rules, provides significant public benefits to virtually all segments of society, as well as to the national economy.

Respectfully submitted,

/s/

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