

Reply to Opposition

I, Warren C. Havens (“Havens”), hereby Reply to the Mobex Network Services, LLC (“Mobex”) Opposition (the “Opposition”) to my December 18, 2003 Petition for Reconsideration (the “2nd Petition”) of the *Third Memorandum Opinion and Order* in PR Docket No. 92-257, released November 18, 2003 (the “*Third MO&O*”). Herein, “MX” means mutually exclusive or mutual exclusivity.

No Interference Rule Previous to *Third MO&O*

In its Opposition, Mobex argues that rule sections 80.751-80.773 were applicable at time of the submission of the alleged MX applications, and thus, these rule sections established an interference contour for determining mutually exclusive applications in AMTS. Mobex is wrong. The Commission reiterated in the Third MO&O that these Part 80 rules clearly only apply to the VHF Public Coast Stations and not to the AMTS service (see ¶22, page 10 of *Third MO&O*). Therefore, as Havens stated in the 2nd Petition, at the time of submission of both Havens’ and Mobex’s AMTS applications the Commission had no interference contour by which to determine geographic MX. Thus, the 2nd Petition’s arguments—made in the alternative—and its relief request related to this matter are valid.

The Alleged Mutually Exclusive Situation was Resolved

On this point, Mobex states that it was absurd for Mobex to have petitioned for reconsideration of the Commission dismissal of its applications since it viewed them as MX with those of Havens (see Page 4 of Opposition), and that Havens’ appeal somehow preserved the MX and, thus, the pending status of Mobex’s applications. First, the reason why Mobex did not file a petition for reconsideration (even if demonstrable, and it is not)

is simply irrelevant. What is relevant is the simple fact that Mobex simply did not file a petition for reconsideration of the dismissal of its applications, and therefore, those dismissals became final. On the other hand, Havens' applications remained pending per Commission rules and applicable law, due to his administrative appeals. This resolved the alleged MX situation, and the Commission must now process the Havens applications.

Further, as indicated in the 2nd Petition, it is not correct as Mobex suggests that an appeal by one party preserves the status *of the licenses* of another party in a restricted proceeding. For example, either Havens or Mobex was free at any time in this restricted MX-related proceeding (when both of their sets of applications were pending) to withdraw their applications and resolve the MX. This is, in effect, what has happened, not by withdrawal per se, but by Mobex's letting their applications dismissals become final by not appealing the dismissals, which had the same effect with regard to resolving the alleged MX.

Also, Mobex could have filed before--*or even (with leave) soon after*-- Havens filed his petition for reconsideration of the dismissal of his applications, its own petition for reconsideration of the dismissals of its applications in order to keep them pending and preserve the *alleged* MX situation. For whatever reason, it failed to do so.

Mobex speculates that Havens should have included the arguments contained under the above-titled section of the 2nd Petition, in his May 8th petition for

reconsideration, because he “could have foreseen” that Mobex would not file a petition for reconsideration. That assertion is speculative and irrelevant (and Havens denies it).¹

Timeliness

The 2nd Petition was timely filed and the arguments contained therein were timely. Mobex’s Opposition attempts to argue that Havens could have raised his arguments at an earlier date in the proceeding (see pages 4 and 5 of Opposition). The facts and arguments Havens raised in the 2nd Petition were all based on Commission rules and applicable law. The Commission’s rules and law are always in effect regardless of whether or not an applicant points them out at a particular time, and at any time a party subject to Commission rules and other applicable law may seek that the Commission act under such law, including to correct past action, and the Commission has an obligation to do so.

Havens could not have raised issue with the interference contour rule until now because the Commission only recently adopted the rule in the *Third MO&O*. Prior to the *Third MO&O* and still to date, Havens has always argued that the Commission’s position that the Mobex applications were mutually exclusive with those of Havens was wrong because, if the Commission had properly applied its own rules, there would never have

¹ Rather, the history of this proceeding indicates that, in the past, Mobex did what it could to block the Havens applications, and thus, there was every reason to believe this attempt would continue. When filing its applications, as noted in the 2nd Petition, Mobex boldly declared in a cover letter its intent, which was not to have its applications granted for their purpose (to serve the public), but to block the Havens applications and preserve the spectrum involved for a future auction Mobex hoped to participate in. Besides this admitting to false application certifications, it was an admission of the applications being strike applications, as any review of them for facial defects would support. Whether by design, or more likely by mistake, Mobex gave up in this attempt to block the Havens applications by not filing a petition to reconsider the dismissal of its applications, and the MX issue is now settled.

been the “alleged” mutually exclusive situation. In order for the Commission to determine mutual exclusivity prior to the *Third MO&O*, they would have had to process the Mobex applications under section 1.934 in order to determine geographic mutual exclusivity. Had the Commission done this Havens would have had the opportunity to raise the issue that there was no interference contour established for AMTS. But the Commission never processed the applications under section 1.934, so Havens, until now, never had to raise this argument regarding the interference contour.

Pending Court Cases

Mobex is wrong to assert in its Opposition that the Commission should request dismissal of the Havens Petition for Review and Notice of Appeal pending before the US Court of Appeals for the District of Columbia Circuit (the “Court”). Havens has a right to appeal to the Court the matters in the *Third MO&O* subject of the Court appeal. The facts and arguments raised in the 2nd Petition are different than those appealed to the Court, must be subject of the 2nd Petition, and are not ripe to appeal to the Court. It is up to the Court to decide whether or not it will hear those matters. Further, it is contradictory for Mobex to argue that Havens is untimely in his arguments in the 2nd Petition, but that for purposes before the Court, the 2nd Petition still keeps matters pending before the Commission.

Havens will be filing this month with the Court a motion to hold in abeyance the above-noted court appeals until the Commission decides on the 2nd Petition, since any affirmative decision by the Commission on the 2nd Petition will or may make the pending court cases moot.

Respectfully submitted,

*[Signature on file]**

Warren C. Havens

January 12, 2004

2509 Stuart Street
Berkeley, CA 94705
Fax: 510-841-2226
Ph: 510-841-2220

*[Filed Electronically via ECFS in PR Docket 92-257 and RM-9664]

Declaration

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

*[Signature on file]**

Warren C. Havens

*[Filed Electronically via ECFS in PR Docket 92-257 and RM-9664]

Certificate of Service

I, James Stobaugh, an employee of Warren C. Havens, certify that I have, on this 12th day of January 2004, caused to be placed into the United States Postal Service mailing system, with first-class postage affixed, a copy of the foregoing Reply to Opposition to Petition for Reconsideration to the following:

By US mail first class to:

Dennis C. Brown, Esq. (Counsel for Mobex)
126/B North Bedford Street
Arlington, VA 22201

*[Signature on file]**

James Stobaugh

*[Filed Electronically via ECFS in PR Docket 92-257 and RM-9664]