

# Telesaurus Holdings GB LLC

& Affiliates

Warren Havens

AMTS Consortium LLC

Intelligent Transportation & Monitoring Wireless LLC

Telesaurus VPC LLC

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July 20, 2006

Note to Bureau:

The above-listed entities ("Petitioners") hereby file in this NPRM docket, WT Docket No. 06-49, the following:

- 1) Petition for Reconsideration Errata Version of *Memorandum Opinion and Order*, DA 06-1094, regarding Progeny LMS LLC's Request for Extension of Time to Construct LMS licenses, File Nos. 0002049041-0002049297. Filed by Petitioners.
- 2) Progeny Opposition to Petition for Reconsideration with Amended Certificate of Service
- 3) Reply to Opposition to Petition for Reconsideration Amended and Supplemented. Filed by Petitioners.

These pleadings concern a petition for reconsideration of the grant by the Bureau of a request by Progeny to extend the construction deadline for all of its LMS-M licenses in the nation. The Petitioners opposed this request (in a private proceeding the Bureau set up, rather than, as Petitioners asked, place the request on Public Notice), and filed for reconsideration of this grant.

These pleadings are being filed since principal facts and issues of law in these pertain directly to those in this NPRM. In addition, it is the position of Petitioners, for good cause given in the above listed documents (and in Petitioners' NPRM Comments) that Progeny improperly used RM-10403, that resulted in this NPRM, to obtain grant of its extension request, and that the Bureau improperly accepted the baseless Progeny assertions in its extension request that were essentially the same in RM-10403.

In contrast, after using its assertions to get the licenses extended and the closely related NPRM, Progeny is now changing its position in the NPRM. In RM-10403 and its extension request, Progeny asserted LMS-M (PMRS required terrestrial location service with permitted voice and data) was obviated by GPS, CMRS, etc. could not succeed, but if it was given "flexibility" to not be restricted to the just-defined LMS-M conditions, then it would give up allowed power and time of use. Now, in the NPRM, Progeny asserts that it can indeed provide terrestrial location for private service, even "Homeland Security," and it no longer is willing to tradeoff any power or time.

Besides this position switch undermining credibility, at minimum, there is nothing in the

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current rules that prevents Progeny from doing what it now asserts it wants to do with its licenses.

I hereby certify that I have on this 20<sup>th</sup> day of July 2006, provided, by placing it into the USPS mail system with first-class postage affixed, a copy of this cover letter to counsel for Progeny LMS, LLC at the following:

Progeny LMS, LLC  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004

Respectfully,

[ Filed Electronically. Signature on File.]

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Warren C. Havens

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

In the Matter of )  
 )  
Request of Progeny LMS, LLC for a Three- ) File Nos. 0002049041-  
Year Extension of the Five-Year Construction ) 0002049297  
Requirement for its Multilateration Location )  
and Monitoring Services Economic Area )  
Licenses )

To: FCC Secretary  
Attention: Chief, Wireless Bureau

Filed on ULS

Petition for Reconsideration

Errata Version\*

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The entities, listed on the execution page below (“Petitioners”) request reconsideration and overturn of the Bureau MO&O decision to deny their Petition to deny, and to grant, the above-captioned request by Progeny LMS LLC (“Progeny”) (the “Extension Request”) (the “Order”). Petitioners request on reconsideration that their petition to deny the Extension Request be granted and to revoke the subject Progeny LMS-M licenses.

These licenses should be recaptured and re-licensed for the sole high-public-interest purpose the Commission intended—widearea ITS wireless services—which Progeny clearly rejected in both this proceeding and in the related RM-10403.

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\* Errata changes shown in standard MS Word “redline.” (Red in some numbered footnote references is in the original.) This Errata will be filed and served electronically prior to the start of the business day following the date of filing of the original.

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1. Introduction & Summary  
Including Appeal of Denial of Pleading Extension Request

Background. Section ~~86~~ below discusses the essential background of this Petition and the underlying proceeding which the Order failed to disclose. The objections raised by Petitioners in Section ~~86~~ are alone sufficient for the Order to be rejected on administrative or judicial appeal. However, apart from Petitioners assertions in Section ~~86~~, the other sections of this Petition by themselves show sufficient good cause for rejection of the Order and grant of this Petition in said process of appeal. The FCC and WTB require licensees to be candid.

The WTB was not lawful, fair, or candid in the concurrent and inter-related Order, in “terminating” RM-10403 and in putting out the LMS-M NPRM. These three are inter-related, procedurally unlawful, anti-competitive, and lack candor that competitors before the FCC are due. Any reasonable study of the record leads to the just-stated conclusion.

Petitioners’ Request to Extend the Pleading Cycle. Petitioners hereby object to and appeal the effective denial of their request to extend the pleading cycle in this Petition for Reconsideration. The Bureau staff did not respond to this timely submitted request, and by such effectively denied the request. Petitioners believe the request was clearly within precedent, and *was especially appropriate* given (i) the clearly prejudicial procedures utilized by the same staff in “terminating” RM-10403 yet adopting Progeny’s position from that RM as the basis of the LMS-M NPRM (this greatly benefited Progeny and damaged all other parties in these proceedings, and evidenced abuse of process), and (ii) Progeny’s position in this extension proceeding, and in RM-10403, and in the LMS-NPRM, and the FCC position in the same matters and in the Order, that there is nothing that can be done on any near-term basis to utilize LMS-M licenses for any actual service: thus, Progeny can not assert prejudice and the FCC cannot assert

“public interest” concerns over grant of the requested short pleading cycle extension. Petitioners thus assert procedural prejudice in this matter for reasons just noted (as well as others described below).

Summary. The Contents above gives a complete summary of this filing. Detailed sections headings were employed for this purpose.

2. Progeny’s Asserted “Diligence” Failed to Even Allege Seeking & Expenditure for the One LMS-M Construction Requirement

As the Petition argued, Progeny did not assert that it sought and made or offered any expenditure for the one type of equipment required to satisfy the construction obligation: FCC-defined terrestrial multilateration equipment. Progeny’s “white papers” submitted in RM-10403 that sketched possible wireless service using LMS-M licenses, as related to Part 15 device operation, also failed to describe this one required type of LMS-M equipment. This alone renders Progeny’s baldly asserted diligence defective. The Order failed to demonstrate that the above argumentassertion, based on the simple record in this matter, was not correct and dispositive. The Order is thus in error and must be overturned on this basis alone.

3. (i) The Order Failed Required Expert FCC Diligence;  
(ii) the Rule-Waiver Diligence Standard Cannot Escape Rule-Compliance Diligence Standard and Proof; and  
(iii) Progeny’s and FCC’s Manifest Lack of Diligence and Expertise By Lack of Knowledge and Treatment of ITS

The leeway given to agencies including the FCC by Congress, and upheld by the US Supreme Court, to act in the “public interest” using a flexible standard has never included authority to accept bald assertions by parties the agencies regulate of fulfillment of their duties under rules, what to speak of bald assertions of diligence sufficient to waive such rule obligations. First, the flexibility granted to the FCC to apply the fundamentally amorphous or flexible “public interest” standard underlying many of its licensing rules and procedures,

including under Section 1.925, is granted based upon the FCC alleged expertise and actual use of such expertise in various applications. This expertise must be more than the “special” or expert due diligence summarily discussed in the definition summarizing this term, ~~noted on page 12 below in the footnote above~~ that FCC licensees must use for rule compliance and in justifying rule waivers, since the FCC is the superior, regulating authority. The Order evidences no such expert diligence by the FCC whatsoever; the Order merely accepts the Progeny bald assertions, where such deficient assertions themselves were directly contradicted by both Progeny and by the Bureau itself in coming out with the LMS-M NPRM (namely, the LMS-M was a failure and thus the “marketplace” would not cook and serve up equipment to Progeny).<sup>1</sup> Second, where fulfillment of construction obligation requires specific demonstrable acts (the licensees must assert timely construction on ULS, but must in fact have done it and have records to prove it)—specific demonstrable expert or special diligence, the FCC may not apply a more lax standard in granting waiver of such obligation. If anything, it must use its asserted expertise to require a higher standard of diligence, including suitable proof. The Order entirely failed in these matters: to use its required expert diligence, and to apply at least the same demonstrable diligence to grant the extension waiver as the rules required for satisfaction of construction and proof of it if ever called upon.

Further, as described in the Introduction above, the failure of the FCC to act within this trust and discretion is made further starkly plain in this proceeding by the lack of any recognition by the Bureau both in the Order and in the related concurrent LMS-M NPRM of the Commission’s clear allocation purpose of LMS-M—wide area wireless for Intelligent Transportation System (“ITS”) services nationwide. ITS involves the largest infrastructure

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<sup>1</sup> And further where that was contradicted by Havens demonstrations of equipment development in his extension request proceeding as accepted in the Bureau Order granting such.

industry in the US and in the World, the transportation infrastructure. ITS is a major development worldwide, and ITS wireless is more advanced in EU nations and Korea, Japan, and Singapore than in the US. ITS America is the US trade association for ITS in this nation. These are all matters that any novice “expert” would know of. And these involve public interest needs that could not be more clear and important to the nation’s safety, health, workplace productivity, environmental protection, and quality of life. That both Progeny and the FCC staff handling this proceeding and the related LMS-NPRM are virtually devoid of any knowledge (at least of any expression of knowledge) of ITS worldwide, in the US, and as the purpose of LMS-M, could not more clearly demonstrate that both the Order and Progeny in seeking the Extension Request fell short of the required expert due diligence. In fact, Progeny consistently asserted in RM-10403 and in its essentially same arguments in its Extension Request that LMS-M was “obviated” and not viable to pursue under the rules that were formulated specifically to delimit LMS-M to ITS wide area wireless (by the permitted-use rules that, primarily, (i) restrict service to vehicles, only allow ancillary services to other animate things, and restrict interconnection except for emergencies and store and forward data, and (ii) require competition by setting a 8 MHz spectrum cap).

4. Order Erred in Finding Sufficient Diligence

And

5. Order Violated APA, Was Arbitrary, Capricious and

I. The Order is arbitrary and capricious and violates Section 706 of the APA because it alters prior FCC precedent on extension requests (*see following subsection 64*) without a reasoned explanation. The Progeny Order constitutes abandonment, without any explanation, of a longstanding policy requiring significant diligence efforts by licensees prior to the grant of a construction extension. Courts have repeatedly rejected such unexplained policy changes by

agencies.<sup>2</sup> As the First Circuit has stated, “The standard of review applicable to both original agency action and agency rescission or modification of a prior standard requires the agency action to be ‘rational [and] based on consideration of the relevant factors . . . .’” *Com. of Mass. v. Secretary of Health and Human Services*, 899 F.2d 53 (1<sup>st</sup> Cir. 1990) (citations omitted). As the D.C. Circuit explained to the FCC over thirty years ago:

[R]easoned decision-making remains a requirement of our law. . . . An agency’s view of what is in the public interest may change . . . . [b]ut an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

*Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (“*Greater Boston*”).

The Ninth Circuit agrees that prior standards cannot be “casually ignored” as they were here:

[A]lthough the standard of review [of an agency decision] is deferential, it may not be uncritical. A reviewing court, therefore, may require the agency to provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . . Moreover, if the record reveals that the agency has . . . ‘offered an explanation for its decision that runs counter to the evidence before it,’ the court must find the agency in violation of the APA.

*People of State of California v. FCC*, 4 F.3d 1505 (9<sup>th</sup> Cir. 1993) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43-44 (1983) and *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983)).<sup>3</sup>

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<sup>2</sup> See, e.g., *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989) (remanding FCC decision for further proceedings where FCC “gave no indication that the FCC was planning to abandon” a “longstanding policy”).

<sup>3</sup> See also *Reservation Tel. Coop. v. F.C.C.*, 826 F.2d 1129, 1135 n. 4 (D.C.Cir.1987) (“we have held simply that an agency must supply a persuasively reasoned explanation for modifying its earlier position that is itself rationally grounded in the evidence before the agency” (emphasis added; citations omitted)); *Japan Air Lines Company, Ltd., et al., v. Dole*, 801 F.2d 483 (D.C. Cir. 1986) (“there exists a presumption against unexplained changes in agency interpretations”);

II. To the extent the Order can be read to find that Progeny has satisfied its diligence requirement to develop equipment for the band,<sup>4</sup> such a finding cannot be supported by the evidence in the record. See the facts in Petitioners' prior pleading in this extension-request proceeding. See Petitioners' prior pleadings in this proceeding that describe the paucity of Progeny's badly-alleged activities to find LMS-M equipment (and not even the "multilateration" equipment that is solely required to satisfy FCC construction requirements). This paucity cannot be avoided by review of the actual documents Progeny produced alleging diligence which are in the record, being produced under Petitioner's FOIA request. Progeny and the Bureau agreed that Progeny would produce all of these records, redacting only some names that would have no decisional significance in the extension request.

Construction extensions based on findings that are inconsistent with the proceeding record are subject to remand by the courts. See *Press Broadcasting Co. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995) (remanding the FCC's grant of an MDS construction extension where the FCC's conclusion was "so flatly inconsistent with the clear import of [petitioner's] representation as to require further proceedings.").

III. The Order is arbitrary and capricious because it applied a less rigorous standard to Progeny than to Havens. It is well-established by the DC Circuit that the FCC must treat similarly-situated parties in a similar manner. As the court explained to the FCC in *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975), an agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways, and we remanded litigation to the agency when it did not

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*Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1324 (D.C. Cir. 1991) ("Where the agency has failed to . . . explain the path that it has taken, we have no choice but to remand for a reasoned explanation for the conclusion.").

<sup>4</sup> The Order does not explicitly make such a finding but concludes that Progeny "sought to develop equipment," based solely on Progeny's assertion of certain phone calls and meetings with equipment vendors.

take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike.” Prior court decisions “vividly reflect the underlying principle that agency action cannot stand when it is ‘so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.’” *Id.* (citations omitted).

*See also, Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169, 180 (D.C. Cir. 1997) (remanding an FCC decision where it had “applied a newly developed (and questionable) interpretation of its pioneer preference rules only to the merits of Qualcomm’s preference application” and therefore “failed to apply this interpretation consistently”)

At a minimum (to meet any threshold for a valid decision), the FCC must explain the reason for any disparate treatment. *See Chadmoore Communications, Inc. v FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997) (“We have long held that an agency must provide an adequate explanation before it treats similarly situated parties differently. This rule was developed to prevent an agency from, *inter alia*, ‘vacillating without reason in its application of a state or the implementing regulations.’” (citations omitted)).

Moreover, as the court held in *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965), the FCC “must explain its reasons and do more than enumerate factual differences, it any, between appellant and the other cases; it must explain the relevance of those differences to the purpose of the Federal Communications Act.” (emphasis added) The Order did attempt to distinguish the precedent cited by Havens (see Order at ¶¶ 14-15), but it did so in a summary fashion by only citing some factual difference between each case and the Progeny situation. Factual distinctions can almost always be found between two cases, but it does not mean that the Commission can ignore the central holdings and underlying policy of the earlier cases. It must

explain how those differences justify a different result in terms of the policy objectives of the Communications Act.

IV.: Progeny and the Division's Order failed to demonstrate that an extension would be in the public interest and would not undermine the purpose of the rule. *See* §1.925 (waiver applicants must establish that the underlying purpose of the rule would not be served by application to the instant case and that grant would be in the public interest). Progeny's lack of serious effort to construct its system evidences an intent to warehouse the spectrum until the service rules are changed and/or until it can sell the licenses: see Petitioners' pleadings in this proceeding. By granting Progeny's extension request in the face of so little diligence, the Division undermines the purpose of the construction deadline, which is to prevent the warehousing of spectrum. As the Commission explained in *Northstar II*:

We also disagree with Northstar's argument that application of the construction requirement would serve no purpose. The Commission's construction requirements are intended to ensure that spectrum is used effectively .... Our construction requirements were promulgated pursuant to the Communications Act's mandate that the Commission set performance requirements, such as appropriate deadlines and penalties for performance failures to ensure the speedy delivery of service to the public, and to prevent stockpiling or warehousing of spectrum by licensees. We continue to believe that the Commission's construction requirements serve these public policy purposes ....

*Northstar II* at ¶ 12.

V. Importance of public interest over private interests. The Commission cannot grant decisions that, as here, serve only a private interest at the expense of the public interest. Rather, the Commission must make its decision based on the public interest. It may not "gloss over" the public interest, but must specifically identify what that interest is. *See National Association of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249, 257-58 (2d Cir. 1974) ("*NAITPD*") ("The Commission must place the public interest above private

interests in carrying out its duties, and must identify the public interest basis for its actions. ...

[I]t may not simply [consider private interests] and gloss over the more fundamental public interest.”) (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970), cert. denied, 406 U.S. 950 (1971)). As the courts have also explained, “the right of the public must receive active and affirmative protection at the hands of the Commission.” *NAITPD*, 502 F.2d at 257 (citing *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), cert denied, 384 U.S. 941 (1966)).

VI. The FCC's Order to grant the extension Request and deny the Petition is unlawful and must be overturned since it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U. S. C. §706(2)(A) of the Administrative Procedures Act (“APA”). Under court precedents on APA standards, a federal agency's decision involving interpretations of its rules must be given substantial deference and controlling weight "unless it is plainly erroneous or inconsistent with the regulation" *Rocky Mountain Radar, Inc. v. FCC*, Petition for Review (FCC No. 97-404) before US Court of Appeals, Tenth Circuit, No. 97-9579 (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512, quoting *Udall v. Tallman*, 380 U.S. 1, 17 (1965)) or unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson* at 512 (quoting *Gardebring v. Jenkins*, 485 U. S. 415, 430 (1988)).

In this case, as shown herein, the Order's interpretation of what is the required level of "diligence" sufficient to relieve Progeny of its "public interest" obligation to commence public service with its licenses, and for such relief to be in the "public interest," are "plainly erroneous and inconsistent with the regulation" and also an "alternative reading is compelled by . . . [these terms] plain language." When the FCC uses in its decisions terms of decisional importance such

as "diligence" "in the public interest," these terms must have meanings understood in legal circles and past precedent.<sup>5</sup> The US Supreme Court has many times defined such "public interest" and never in a way that would find a construction extension waiver grant in the public interest in a case as deficient as the instant Progeny Extension Request grant.

Duties to meet FCC license construction requirements at deadlines, especially here, where near-nationwide licenses are involved in a unique ITS radio service, must involve such "special" or "expert" diligence" since such duties involves special actions to be performed at specific dates, and special expertise to understand the FCC rules, the technologies involved, and other details, and also, merely considering the sums paid for the Progeny licenses (in the multimillion dollar range), no sensible licensee businessperson would, absent wanton negligence, not exert a high level of such special diligence.

Thus, a waiver of an extension deadline based upon "due diligence" to meet the deadline in pursuance of the "public interest" obligations of the licensee to commence public service with public property (the spectrum underlying the FCC license) necessarily implies a high level of special due diligence.

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<sup>5</sup> Elsewhere herein, we discuss past applicable precedent ~~regarding~~ including with regard to terms, "diligence" and "public interest." In addition, and in accord, Blacks Law Dictionary (Revised Forth Edition) ("BLD") gives various distinct meanings for "diligence," and the only one that could possibly apply in this and similar FCC licensing cases, is "special diligence" which is: "The measure of diligence and skill exercised by a good business man in h is particular specialty which must be commensurate with the duty to be performed and the individual circumstances of the case; not merely the diligence of an ordinary person or non-specialist," and for "public interest" which is: "Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. . . . If by public permission [as by FCC licenses] one is making use of public property . . . , his business is affected with a public interest that requires him to deal with the public on reasonable terms . . . ." In this regard, the reasonable terms at issue here are timely construction, or good cause for waiver, per demonstrated (not baldly asserted) "diligence" of an expert as described above.

An extension grant is a waiver under Section 1.925 and each waiver criterion~~a~~ turns ultimately on whether the grant is in the "public interest" as described above. The "public interest" basis of the many Communication Act sections ~~where it is used~~ that govern FCC licensing was derived from Congress's adoption of the public interest standards that had applied to regulation of public utilities prior to the original Communications Act<sup>6</sup> and "public interest" in these Act sections meant and still means the type of special obligations to the public as indicated in the BLD definition footnoted above and its cited cases. As noted above, Congress in establishing and the US Supreme court in interpreting this public interest standard has never given the FCC authority to do less than ~~assert~~ wield the standard with actual agency expertise and to hold its license applicants ~~ions~~ to suitable expert demonstrable diligence. The Order is a clear impermissible departure from and violation of this trust the Congress and Courts placed in the FCC by allowing it a flexible expert-based "public interest" decision making "supple instrument." Allowing such discretion increases the agencies duties to use it expertly and in demonstrable fashion and is not a license for arbitrary and capricious (or private and hidden: see Section 8 below) decision making. The Order is a clear abuse of such discretion.

6. Order Accepted Bald Assertions and Applied Unjustifiable Lax Waiver Standard, Including As Compared to Havens Extension

(This section further discusses this ~~one captioned~~-argument ~~from commenced in~~ the preceding section.) Section 1.946(e) of the Commission's rules provides that a license construction extension request may be granted if the applicant shows that failure to meet the construction deadline is due to "causes beyond its control." Moreover, under Section 1.925 a waiver of a construction deadline may be granted if the applicant establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the

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<sup>6</sup> See, e.g.,

instant case, and that grant of the waiver would be in the public interest; or (2) where the applicant establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.

In applying Sections 1.946(e) and 1.925, the Bureau has made clear that the absence of available equipment alone is insufficient to warrant the grant of a construction deadline extension. See *In the Matter of Request for Extension of Time to Construct a 900 MHz SMR Station, Call Sign KNNY348*, DA 04-321, 19 FCC Rcd. 2209, 2211 ¶6 (holding that the absence of equipment alone is “insufficient” to justify the extension of a construction deadline) (WTB: Mobility Division, 2004), (“*McCart Order*”); *In the Matter of Request for Extension of Time to Construct an Industrial/Business Radio Service Trunked Station, Call Sign WPNZ964*, DA 03-3343, 18 FCC Rcd. 22055, 22057 ¶8 (holding that the absence of equipment alone is “insufficient” to justify the extension of a construction deadline) (WTB: Mobility Division, 2003) (“*Hilltop Order*”); *Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses*, Memorandum Opinion and Order, DA 04-3864, 19 FCC Rcd. 23742, 23745 ¶9 (WTB: Mobility Division, 2004) (“*Havens Order*”).

The Mobility Division has inappropriately broken with this long-standing precedent twice recently in decisions granting extensions of the deadline to construct Multilateration Location and Monitoring Service (“M-LMS”) licenses. See *Request for Extension of Five-Year Construction Requirement Call Signs: WPOJ871, WPOJ872, WPOJ873, WPOJ874 and WPOJ875*, DA – 541, Letter, 20 FCC Rcd 4293 (WTB: Mobility Division, 2005), *reconsideration pending* (“*FCR Order*”); *In the Matter of Progeny LMS, LLC for a Three-Year*

*Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses*, Memorandum Opinion and Order, DA 06-1094, \_\_\_\_\_ FCC Rcd, \_\_\_\_\_ (WTB: Mobility Division, May 24, 2006) (“*Progeny Order*”). Like its previous decision in the *FCR Order*, the Mobility Division’s *Progeny Order* should not be allowed to stand.

By applying a significantly less rigorous standard in evaluating the *Progeny* extension request than was applied to the *Havens* extension request, and by failing to impose any discernable standard for evaluating *Progeny*’s efforts to secure M-LMS equipment, the Mobility Division has applied drastically different standards to similarly-situated M-LMS construction extension applications in violation of Sections 1.946(e) and 1.925, and the APA.

In the *Havens Order*, the Commission applied a four-pronged test to determine whether the standard for securing an extension of the M-LMS construction deadline, pursuant to Sections 1.946(e) and 1.925, had been met, finding that an extension was warranted on account of the fact that: (1) *Havens*’ situation was unique because no equipment was available;<sup>7/</sup> (2) the construction requirement came due “well in advance of the first [license] renewal deadline;”<sup>8/</sup> (3) the 902-928 MHz band presents a unique, challenging and complex sharing situation<sup>9/</sup> and (4) *Havens* had “performed adequate due diligence and . . . provided evidence of several executed contracts reflecting that he [had] been actively exploring options for the deployment of LMS systems.”<sup>10/</sup>

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<sup>7/</sup> *Havens Order* at 23744, ¶7.

<sup>8/</sup> *Id.*

<sup>9/</sup> *Id.*

<sup>10/</sup> *Id.* at 23755, ¶8 (emphasis added).

In contrast to this rigorous standard, the Mobility Division, in granting Progeny's extension request, neglected to assess or evaluate the quality of Progeny's due diligence efforts and, instead, based its decision to grant the extension request merely on the three prongs of the standard used in the *Havens Order* which had nothing to do with the applicant's due diligence efforts.<sup>11/</sup>

Instead of assessing and evaluating the breadth and quality of Progeny's efforts to develop and secure M-LMS equipment, as it did with respect to Havens' efforts in the *Havens Order*, the Mobility Division merely noted conclusory assertions made by Progeny regarding its "discussions with an array of U.S. manufacturers"<sup>12/</sup> and its "discussions with the Department of Homeland Security as well as other potential users of its M-LMS spectrum."<sup>13/</sup> The Mobility Division also expressly rejected Havens' claims that a more definitive showing, either through the filing of affidavits or evidence of nondisclosure agreements with potential equipment vendors, had to be made by Progeny so that the Mobility Division could assess the sufficiency of Progeny's efforts.<sup>14/</sup> Instead of requiring such proofs and scrutinizing Progeny's efforts, the Mobility Division chose merely to accept at face value Progeny's assertions, essentially giving it a pass on its obligations to foster the development of M-LMS equipment.<sup>15/</sup>

While the Mobility Division dedicated several passages of the *Havens Order* to evaluating and making findings regarding Havens' efforts to develop and secure M-LMS

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<sup>11/</sup> See *Progeny Order* at ¶¶12-13.

<sup>12/</sup> *Id.* at ¶10.

<sup>13/</sup> *Id.*

<sup>14/</sup> See *Progeny Order* at ¶12.

<sup>15/</sup> See *id.* at ¶12 (noting that Progeny indicated in its extension request that it had "retained third parties to explore equipment and applications development, contacted numerous entities itself regarding such development, and consulted various equipment vendors and developers.")

equipment, *see, e.g.*, Havens Order at ¶ 8 (“we find that Havens has performed adequate due diligence and has provided evidence of several executed contracts reflecting that he has been actively exploring options for the deployment of LMS Systems”); *Havens Order* at ¶ 10 (“[W]e find that Havens has demonstrated a commitment to develop equipment.”), no such findings were made in the *Progeny Order*.

The *Progeny Order* is also inconsistent with the Wireless Bureau’s treatment of construction extension requests in other services. In *Northstar II*, the Mobility Division clarified FCC policy on construction extension requests, explaining the importance of the licensee’s diligence in granting such requests:

We find, however, that Northstar’s equipment problem was insufficient by itself to warrant waiver or extension of its construction obligations. Northstar is incorrect that in *Northstar Technology, LLC*, the Division found that Northstar’s equipment vendor issue constituted a circumstance beyond Northstar’s control. Instead, *the Division viewed Northstar’s diligence in seeking to build out its Middlesboro and Somerset BTAs, despite its equipment problem, as demonstrating Northstar’s commitment to constructing its markets. ... The Division did not find that the equipment issue itself was a circumstance out of Northstar’s control that prevented Northstar from complying with its buildout obligation.*<sup>16/</sup>

Likewise, in *PinPoint Wireless*, the Commercial Wireless Division also emphasized the importance of licensee diligence in granting construction extension requests.<sup>17/</sup> It denied PinPoint’s request, finding that it had not done enough to ensure the installation of required facilities prior to the construction deadline. PinPoint had only engaged in negotiations with vendors prior to the deadline (similar to Progeny), but had not entered into any definitive agreements because it found the costs too high. ~~Warren~~ ~~can you~~ (Petitioners indicated in

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<sup>16/</sup> *Northstar Technology*, Order on Reconsideration, 19 FCC Rcd 3015 (WTB: Mobility Division., 2004) at ¶ 10 (emphasis added) (“*Northstar II*”).

<sup>17/</sup> *PinPoint Wireless, Inc.*, Order, 18 FCC Rcd 1904 (WTB: Commercial Wireless Division, 2003).

~~their pleadings in this matter, and re assert argue~~ here that, had Progeny been willing to spend more resources, like ~~you Havens, they-it should may~~ have been able show ~~a~~ concrete contracts for ~~and progress in~~ equipment development.]<sup>27</sup> The Division found this to “be the result of the exercise of [PinPoint’s] own business judgment,” and held that “PinPoint’s actions lack the requisite level of diligence expected from licensees in constructing their markets. ... [In other cases,] we granted extensions ... and found that the licensees acted diligently in constructing their markets. In contrast, PinPoint failed to act with sufficient diligence ....”<sup>18/</sup>

In granting requests to extend the five-year broadband PCS service construction deadline to allow for the use of advanced equipment under development but not yet available at the time of the construction deadline, the Bureau has sought to determine whether the applicant had adequately demonstrated a commitment to deploy such equipment. *See Leap Wireless International, Inc. Request for Waiver and Extension of Broadband PCS Construction Requirements*, Memorandum Opinion and Order, 16 FCC Rcd 19573 (WTB, Commercial Wireless Division, 2001) (discussing as evidence of Leap’s commitment its site planning, market research and deployments, and granting an extension of time so that Leap might deploy “high data rate” wireless technology that was not available in time to meet the five-year construction requirement); *Monet Mobile Networks, Inc. Request for Waiver and Extension of the Broadband PCS Construction Requirements*, Order, 17 FCC Rcd 6452 (WTB, Commercial Wireless Division, 2002) (discussing as evidence of Monet’s commitment the fact that Monet had entered into supply contracts and had taken significant steps, even before acquiring its PCS licenses, to develop its network, and granting Monet an extension of time so that it might deploy “high data rate” wireless technology that was not available in time to meet the five-year construction

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<sup>18/</sup> *Id.* at ¶¶ 7, 9.

requirement). The same standards that were used to assess the applicants' efforts at securing equipment not yet available in these broadband PCS decisions should also have been applied with respect to Progeny.

The Mobility Division's failure to apply the same legal standards in evaluating the Havens and Progeny construction extension requests violated Sections 1.946(e) and 1.925, and the APA.

7. Order Erred under 47 CFR 309(d)(2) for Failure to Address Arguments of Petitioners, Including Progeny's Contradictory Rejection of LMS-M Viability, and Progeny's Failure to Approach the One Known Source of LMS-M Equipment Development.

The Order is in error and must be reconsidered since it did not substantively address Petitioners' arguments that Progeny did not undertake any genuine diligence to develop equipment or find equipment under current rules (that it suggest may have miraculously been made by vendors for Progeny even faced with Progeny's public assertions in RM-10403 that LMS-M and such equipment under current rules were doomed) since (i) Progeny rejected in the public RM-10403 and its public Extension Request the current LSM-rules and service and equipment based thereupon, including the only required equipment, multilateration equipment, and (ii) Progeny did not seek equipment or equipment development from the one known source, Havens and Telesaurus Holdings GB LLC (known since Havens presented this in his Extension Request and had in direct meetings with Progeny sought their participation). [Erratum note: the preceding erratum additional language is elsewhere contained in this pleading as originally filed, and thus is not an addition. This addition is also stated clearly in Petitioners past pleadings in this matter opposing the Extension Request.]

8. Background & Undisclosed Factors

Apart from the Order being against precedent and otherwise in error for reasons given in ~~later~~ sections above, Petitioners do not believe that the Order candidly disclosed the decisive background and factors involved in this proceeding, but mischaracterized relevant facts in attempt to support a decision that was outside of applicable waiver standards and precedent and the facts of this case. Thus, for purposes of administrative and potential judicial appeal, Petitioners outline these at this time, and reserve the right to expand upon this in this proceeding based on the evidence in the records not fully discussed below.

As the Order partly discussed, Petitioners challenged the Extension Request, first informally (since the Bureau did not place the Extension Request on Public Notice), then in a formal pleading cycle the Bureau agree to based on its desire for the parties to forgo any challenge to its ruling on Petitioners FOIA request. For the above reasons, this Petition should be granted.

8.a. Progeny, the Bureau, & Order Avoid Purpose & Requirements of LMS-M

This is discussed in above Sections.

8.b. RM-10403 “termination” and the LMS-M NPRM

Petitioners reference and incorporate herein their Amended Comments in the LMS-M NPRM, including their request for extension of the pleading cycle in that NPRM<sup>19</sup> that was included within these Comments. Therein, Petitioners discuss the unlawful and prejudicial procedures involved in the “termination” of RM-10403 within the NPRM, yet ~~its~~ it's the NPRM's adoption as its foundation -of the fundamental Progeny position and rationale in RM-

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<sup>19</sup> Which, like the filing deadline extension request made regarding this Petition for Reconsideration, was never responded to. Such total lack of response on reasonable and timely requests within accepted FCC procedure, twice now, evidences unlawful prejudice, especially in the circumstances as outline in Section 1 above.

10403. This benefited only Progeny, to the prejudice of Petitioners and all other parties involved in RM-10403 and now involved in the NPRM proceeding. The record evidences that the FCC staff involved undertook this unlawful “termination” yet effective grant of the Progeny request for rulemaking ~~proceeding~~-based on undisclosed reasons, but clearly to advantage Progeny over Petitioners and others parties. Had it properly concluded RM-10403 it would have had to address the other parties’ positions opposing Progeny and no such decision would have withstood any public interest test. Clearly, the NPRM was based upon grant of the Progeny Extension Request, otherwise there would be no basis for pursuit in the NPRM of the position that Progeny originated and sustained in RM-10403. The Order is defective for this reason alone: this undisclosed and unlawful foundation of the Extension Request grant.

8.c. Bureau Decision on “No New Issues” and Related—  
Order Rationale for Lack of Public Notice Scrutiny

The Order erred in suggesting that the Extension Request need not have been placed on public notice as was the Havens request since, after the Havens request, the underlying questions were basically settled. (That is in fact what FCC staff advised Havens by email when he first inquired on this matter and asked for such public notice placement. See the earlier filings by Petitioners in this proceeding including their Section 1.41 request where they attach such email.) Likewise, the Order erred in suggesting in its initial comments that the grant of the extension request to Havens was the same relief as the grant of the Progeny Extension Request. Lawful ~~G~~grants of relief are based on applicable legal standards, and the applicant’s meeting such standard. Grant of deserved relief is not the same as grant of undeserved relief, which clearly is what the Order erroneously suggests, and in fact leads off with.

8.d. Progeny Impermissible Ex Parte Presentations

Petitioners submitted written objections in this proceeding, as well as in the related RM-10403, as to Progeny's dozens of ex parte presentations prior to and after it submitted the subject Extension Request which failed to disclose the substance of the presentations required under applicable rules. These presentations after the Extension Request was filed clearly (based on the nominal description given in the ex parte presentation notices filed with the FCC) included central arguments of Progeny in the Extension Request, a restricted proceeding, including that LMS-M was obviated, not viable, etc. Petitioners thus hereby assert procedural prejudice in this matter.

9. Order Spuriously Noted Havens Extension Grant as Precedent Without Progeny Case Being Analogous

As partly discussed in Section 8.c above, the Order lead off with noting the grant of the Havens extension request, and by such suggesting that any other LMS-M extension request is valid. The Order obviously errs in such suggestion since the waiver standards in Section 1.925 must be applied to each particular case, and since the Havens and Progeny cases could not be more at odds in terms of presented diligence documentation, in terms of Havens direct pursuit of LMS-M including the required (and clearly valuable, to anyone who knows the wireless location market) multilateration equipment and service, and the Commission-designated widearea ITS wireless.

10. Other Matters, Including Impermissible Progeny Assertions and Order Findings.

The Order finds:

. . . . Progeny notes that it has had discussions with the Department of Homeland Security as well as other potential users of its M-LMS spectrum, and that an extension of time could foster the development of applications and equipment, including for public safety and homeland security, and thereby put this spectrum to productive use. . . .

This is merely another bald assertion by Progeny, and its acceptance another failure of the Bureau to exercise required expert-agency diligence and apply waiver standards. Further, when in this case Progeny had clearly rejected the high public-interest ITS purpose of LMS (which Federal agencies do have interest in),<sup>20</sup> and when it seeks general flexibility directly away from focused private wireless, it cannot at the same time credibly suggest that it intends to pursue the difficult very long-term route of service for or under the approval of federal agencies such as DHS. It is absurd for the FCC to accept such bald and contradictory assertions. Further, Progeny did not make any such assertion in this proceeding until after the construction deadline had passed when, lacking compliance with the extension waiver standards, its licenses automatically terminated. After that, it is too late to assert new reasons to extend the licenses. Progeny is migrating its position from RM-10403 and its original extension request, to positions it believes more defensible as Petitioners and Part 15 interests (and vendors such as Motorola) point out its contradictions and failures. This demonstrates lack of credibility and sincerity. In any case, such “Homeland Security” bald assertions are not diligence and do not satisfy any waiver criterion.

[Execution on next page.]

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<sup>20</sup> See, e.g., references in Petitioners’ filed (Amended) Comments and forthcoming Reply Comments in the LMS-M proceeding. ITS wireless is recognized by US and other nations’ public agencies as essential for core national security purposes and other high public interest purposes.

Conclusion

For reasons given above individually and in the aggregate, this Petition should be granted and the subject grant of the Progeny Extension Request should be rescinded.

Respectfully,

[\[Submitted Electronically. Signature on File\]](#)

Warren C. Havens, Individually and as President of  
Intelligent Transportation & Monitoring Wireless LLC  
AMTS Consortium LLC  
Telesaurus VPC LLC  
Telesaurus Holdings GB LLC

2649 Benvenue Ave., # 2 and 3  
Berkeley, CA 94704  
Ph: 510-841-2220  
Fx: 510-841-2226

June 23, 2006

Declaration

I, Warren C. Havens, hereby declare under penalty of perjury that the foregoing *Opposition* including all Attachments and referenced incorporated documents were prepared pursuant to my direction and control and that all the factual statements and representations contained herein attributed to my knowledge, as the text or context makes clear, are true and correct.

[Submitted Electronically. Signature on File.]

---

Warren C. Havens  
Date: June 23, 2006

Certificate of Service

I, Warren Havens, hereby certify that I have, on this day, June 23, 2006, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Petition for Reconsideration*, with First-class postage prepaid affixed, to the following:

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554  
(Filed on ULS, and email to [WTBSecretary@fcc.gov](mailto:WTBSecretary@fcc.gov))

Richard Arsenault  
Wireless Telecommunications Bureau  
445 12<sup>th</sup> St., SW, Room 4-B408  
Washington, D.C. 20554  
(Via email only to [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov) )

Progeny LMS, LLC  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004  
(Also via email to [JO@ftidc.com](mailto:JO@ftidc.com))

*[Filed electronically. Signature on file.]*

---

Warren Havens

Certificate of Service for  
*Petition for Reconsideration Errata Version*

I, Warren Havens, hereby certify that I have, on this day, June 24, 2006\*, filed electronically, via email pursuant to FCC 01-345, a copy of this *Petition for Reconsideration Errata Version* to the following:

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554  
(via email to [WTBSecretary@fcc.gov](mailto:WTBSecretary@fcc.gov))

Richard Arsenault  
Wireless Telecommunications Bureau  
445 12<sup>th</sup> St., SW, Room 4-B408  
Washington, D.C. 20554  
(Via email to [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov) )

Progeny LMS, LLC  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004  
(via email to [JO@ftidc.com](mailto:JO@ftidc.com))

*[Filed electronically. Signature on file.]*

---

Warren Havens

\* Sent at 11:36 pm Pacific Time on June 23, 2006

I, James Stobaugh, an employee of Petitioners, hereby certify that I have, on this day, June 26, 2006, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Petition for Reconsideration Errata Version*, with First-class postage prepaid affixed, to the following:

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554  
(filed via ULS only under lead File #0002049041 and only this Errata Version Certificate of Service via email to [WTBSecretary@fcc.gov](mailto:WTBSecretary@fcc.gov))

Progeny LMS, LLC  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004

*[Filed electronically. Signature on file.]*

---

James Stobaugh

**HALPRIN TEMPLE**  
1317 F STREET, N.W., 4TH FLOOR  
WASHINGTON, D.C. 20004  
(202) 371-9100 TELEFAX (202) 371-1497

ALBERT HALPRIN  
RILEY K. TEMPLE  
JOEL BERNSTEIN

JANICE OBUCHOWSKI  
OF COUNSEL

July 5, 2006

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Washington, DC 20554

Re: *Progeny LMS, LLC*, File Nos. 0002049041-0002049297

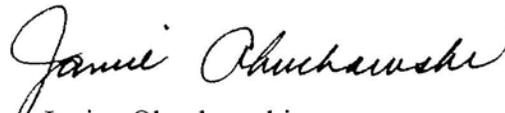
**Opposition To Petition for Reconsideration, Amended Certificate of Service**

Dear Ms. Dortch:

Counsel for Progeny LMS, LLC hereby requests that the enclosed Amended Certificate of Service for its Opposition to Petition for Reconsideration be filed in the record of the above-captioned Universal Licensing System proceeding, in accordance with Section 1.47(g) of the Commission's Rules.

In accordance with Section 1.1206(b) of the Commission's Rules, please accept this original and one copy for submission. Should you have any questions or concerns in connection with this submission, please contact Mary Greczyn at (202) 371-2220.

Respectfully,

  
Janice Obuchowski

Cc: Thomas Derenge  
Richard Arsenault  
Ari Fitzgerald

Amended Certificate of Service

I, Jay Chauhan, hereby certify that I have, on this 5th day of July 2006, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Opposition*, with First-class postage prepaid affixed, to the following:

Marlene H. Dortch  
Office of the Secretary  
Federal Communications  
Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554

Thomas Derenge  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau  
445 12<sup>th</sup> St., SW, Room 4-B408  
Washington, D.C. 20554

Richard Arsenault  
Chief Counsel – Mobility Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room 6405  
Washington, D.C. 20554

Warren Havens,  
Individually and as  
President of:  
Telesaurus Holdings GB, LLC  
2649 Benvenue Ave., Suite 2  
Berkeley, CA 94704

Jimmy Stobaugh  
Telesaurus Holdings GB, LLC  
2649 Benvenue Ave., Suite 2  
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Mike McMains  
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1317 F Street NW  
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Ari Fitzgerald  
Matthew Wood  
David Martin  
Hogan & Hartson  
555 Thirteenth Street, NW  
Washington, DC 20004

  
\_\_\_\_\_  
Jay Chauhan

**HALPRIN TEMPLE**

1317 F STREET, N.W., 4TH FLOOR  
WASHINGTON, D.C. 20004  
(202) 371-9100 TELEFAX (202) 371-1497

ALBERT HALPRIN  
RILEY K. TEMPLE  
JOEL BERNSTEIN

JANICE OBUCHOWSKI  
OF COUNSEL

July 3, 2006

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Washington, DC 20554

Re: *Progeny LMS, LLC*, File Nos. 0002049041-0002049297

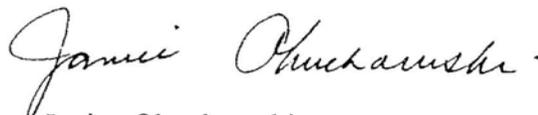
Opposition To Petition for Reconsideration

Dear Ms. Dortch:

Counsel for Progeny LMS, LLC hereby requests that the enclosed Opposition to Petition for Reconsideration be filed in the record of the above-captioned Universal Licensing System proceeding.

In accordance with Section 1.1206(b) of the Commission's Rules, please accept this original and one copy for submission. Should you have any questions or concerns in connection with this submission, please contact Mary Greczyn at (202) 371-2220.

Respectfully,



Janice Obuchowski

Cc: Thomas Derenge  
Richard Arsenault

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

_____ )	
In the Matter of )	
Request of Progeny LMS, LLC for a Three-Year )	File Nos.
Extension of the Five-Year Construction )	0002049041-
Requirement for its Multilateration Location and )	0002049297
Monitoring Services Economic Area Licenses )	
_____ )	

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Under Section 1.106(g) of the Commission’s rules, Progeny LMS, LLC (“Progeny”) hereby opposes the petition for reconsideration (“Petition”) filed by Warren C. Havens, Telesaurus Holdings, GB, LLC, Telesaurus, VPC, LLC (“Havens”). The FCC’s Wireless Telecommunication Bureau’s (“WTB”) Mobility Division granted Progeny’s limited construction extension waiver request on May 24, 2006.<sup>1</sup> Havens filed his Petition on June 23, 2006.<sup>2</sup> Progeny opposes this Petition on two grounds. First, under the Commission’s rules governing petitions for reconsideration, Havens lacks standing to file this Petition. Havens has not satisfied the procedural requirements of Section 1.106(b)(1). Havens was not a party to the contested proceeding and Havens’s Petition fails to state how his interests are affected by the Mobility Division’s decision.

<sup>1</sup> See Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses, *Memorandum Opinion and Order*, File Nos. 0002049041-0002049297, rel. May 24, 2006 (*Progeny Construction Extension Request Decision*).

<sup>2</sup> See Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses, *Petition for Reconsideration*, File Nos. 0002049041-0002049297, rel. June 23, 2006 (*Havens’s Petition*).

Second, even if the WTB deems that Havens's interests are adversely affected by the grant, Havens has not provided legally valid reasons why the Mobility Division should reverse itself.<sup>3</sup> Havens's Petition is simply his latest attempt to obstruct and delay action in this proceeding.<sup>4</sup>

Finally, Progeny observes that extensive argumentation in the Petition is, in fact, addressed to the Commission's M-LMS rulemaking.<sup>5</sup> This rulemaking was not at issue in the Progeny Construction Extension Request Decision. Therefore, Progeny does not respond to the assertions directed at that rulemaking here.

#### **A. Havens Petition Should Be Denied for Procedural Defects**

As the Petition does not cite under what regulatory authority the filing is authorized, Progeny will assume Havens intended to invoke Section 1.106 of the Commission's rules. Section 1.106(b)(1) of the Commission's rules provides that any party to the proceeding or a party adversely affected by the Commission or the division on delegated authority's (in our case, the WTB's Mobility Division) action may file an extension request. If the petitioner is *not* a party to the proceeding, Section 1.106(b)(1)

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<sup>3</sup> 47 C.F.R. §1.106(d).

<sup>4</sup> *See* Havens Opposition Erratum Version (Nov. 30, 2005). The Havens Group filed numerous additional pleadings, including: Email to FCC Secretary (March 30, 2005), also filed via ECFS in RM-10403 (March 30, 2005); Request under Section 1.41 to Place on Public Notice or Alternative Action (May 2, 2005) (Havens Public Notice Pleading); Email to FCC Secretary (May 15, 2005), also filed via ECFS in RM-10403 (May 16, 2005); Informal Reply to Opposition to Request for Public Notice or Alternative Action (June 14, 2005); Opposition (Nov. 29, 2005); Reply to Response to Opposition (Dec. 13, 2005); a two-part Email, "Request to Progeny" and "Informal Request to Accept Possibly Late Filed Filing" (Dec. 13, 2005); Reply to Response to Opposition Erratum Version Dec. 14, 2005) (Havens Reply Erratum Version); and a Request to Accept Possibly Late Filing of Reply to Response to Opposition (Jan 7, 2006).

<sup>5</sup> *Havens's Petition* at 3, 20-21.

requires that that party shall state with *particularity* the manner which the designated authority's action adversely affects the party's interests and provide good reason why it could not participate earlier in the proceeding.<sup>6</sup>

**1. Havens is not a party to the proceeding.**

Havens is challenging the WTB's Mobility Division decision granting Progeny's construction extension request.<sup>7</sup> Progeny and the Commission are the only two valid parties to this proceeding. Havens's participation in this proceeding does not make him a party to it under Section 1.106. "In order to qualify as a party to the proceeding, a petitioner for reconsideration generally must have filed a valid petition to deny the application that is the subject of the licensing action of which the petitioner seeks reconsideration."<sup>8</sup> Havens requested that the Mobility Division place this proceeding on public notice. In that request, Havens asked the Mobility Division, in the event that the Public Notice request were not approved, to consider the proffered facts and arguments as an informal petition to deny under Section 1.41.<sup>9</sup> This informal petition to deny improperly piggybacked on his request to place this proceeding on public notice and does not constitute as a valid petition to deny. Havens' multiple requests in the same pleading was among the reasons this first, informal petition was procedurally flawed. Section 1.44

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<sup>6</sup> 47 C.F.R. §1.106(b)(1).

<sup>7</sup> *Progeny Construction Extension Request Decision* ¶ 1.

<sup>8</sup> *See In the Matter of Application of REGIONET WIRELESS LICENSE, LLC; For Renewal of License for Station WRV374 to Provide Automated Maritime Telecommunications System Service to the Atlantic Coast, Order on Reconsideration*, 16 FCC Rcd 19375, 19376 ¶ 5 (2001), *affirmed* 17 FCC Rcd 21269 (2002).

<sup>9</sup> *See Warren Havens et al., In the Matter of Request of Progeny LMS, LLC for a Three-Year Extension of the Five--Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses, Request to Place on Public Notice*, File Nos. 0002049041-0002049297, rel. May 2, 2005.

of the Commission's rules requires separate pleadings for different requests. Specifically, Havens violated Section 1.44(c)<sup>10</sup> by combining a request to place this proceeding on public notice with a request to consider that request an informal petition to deny. Even though the Commission ruled on this informal petition, the Commission should not view it as a valid petition which makes Havens a party to this proceeding. The Commission should not consider this basis to consider the validity of Havens's Petition.

**2. Havens' interests are not adversely affected.**

Havens must state with particularity the manner in which his interests are adversely affected by the grant of the construction extension request.<sup>11</sup> Havens's petition fails to do so. Havens does not substantiate in any way how the grant of Progeny's request adversely affected his interests. The grant of the construction extension request does not impede Havens' current or future business operations. Nor does the filing provide proper legal citations that support its position.

Additionally, Havens had ample opportunity to provide input into the proceeding.<sup>12</sup> The Commission even accepted procedurally deficient filings to provide Havens with every opportunity to supplement the record.<sup>13</sup> After examining both Progeny and Havens' filings in this matter, the Commission properly rejected Havens' claims and granted Progeny's request for relief from its construction build-out

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<sup>10</sup> 47 C.F.R. 1.44(c) (2006) (states that requests requiring action by persons with delegated authority cannot be combined with requests for action by other persons with delegated authority).

<sup>11</sup> *Id.*

<sup>12</sup> *See supra* note 4.

<sup>13</sup> *Progeny Construction Extension Request Decision* ¶ 7.

requirement.<sup>14</sup> In granting Progeny’s construction extension request, the Mobility Division stated that the three factors that supported the decision to grant Havens a three-year construction extension for his M-LMS licenses “apply equally to Progeny.”<sup>15</sup>

**3. The Commission should reject the Petition on procedural grounds for failing to meet Section 1.106(b)(1) requirements**

The Petition fails to fulfill the procedural requirements for filing a petition of reconsideration under the Commission’s rules. Havens’s extensive opposition to this proceeding does not satisfy the party to the proceeding requirements under Section 1.106(b)(1). As a non-party to the proceeding, Havens must show how his interests were adversely affected by the Mobility Division’s decision. Havens fails to provide any basis how the decision adversely affected his interests. The WTB should deny the Petition for these procedural defects.

**B. Even if the Petition were not Procedurally Defective, the Petition Fails Based on Havens’ Unsupported Conclusions of Fact and the Law**

The Petition relies on a misreading of case law and regulatory rules to contend that the Mobility Division should reverse itself. Havens extracts a series of statements

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<sup>14</sup> *Id.* ¶ 7-15.(The Commission specifically noting that in rejecting Havens petition to place this request on Public Notice that it did not impede Havens from commenting on the validity of the proceeding).

<sup>15</sup> *Id.* ¶ 16, n.48. *See* In the Matter of Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses, *Memorandum Opinion and Order*, 19 FCC Rcd 23742 (WTB MD 2004). (*Havens M-LMS Order*). The three factors cited by the Mobility Division include the lack of available M-LMS equipment, the extent to which the five-year construction requirement substantially precedes the initial renewal deadline of the M-LMS licenses and the fact that spectrum sharing in the M-LMS band—among government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and licensed M-LMS operations—“has hindered the ability of licensees to secure equipment.”

from cases that were made in highly fact-dependent situations to attack the validity of the Progeny Order. For example, Havens invokes the D.C. Circuit Court's ruling in *Press Broadcasting Co. v. FCC (Press Broadcasting)* to contest the grant of Progeny's request where the FCC's decision was inconsistent with the record in the instant proceeding.<sup>16</sup> *Press Broadcasting* involves facts that led to a denial of a licensee's extension request much different than Progeny's. In *Press Broadcasting*, the D.C. Circuit rebuked the Commission for ignoring a key element of the case, the licensee's litigation over a broadcast tower dispute.<sup>17</sup> It is this rebuke that Havens cites. Havens does not draw any parallels between *Press Broadcasting* and Progeny that warrant overturning the grant.

Other examples of Havens's unsound legal analysis fail to provide any compelling reason for the Bureau to revisit the grant of Progeny's construction extension request. Havens's implied heightened "special" diligence requirement for licensees is not supported by any case law or statutory standard. Havens's interpretation of the public interest standard is similarly unsupported by case law, statute, or regulation. His reliance on the *McCart* and *Hilltop* cases has already been rejected by the Commission.<sup>18</sup> Havens claims that the Commission did not have a proper basis to conclude that Progeny's efforts to develop and secure equipment were sufficient.<sup>19</sup> The Mobility Division already pointed out that this claim was false in the Progeny Order.<sup>20</sup> Among

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<sup>16</sup> *Havens's Petition* at 8.

<sup>17</sup> *Press Broadcasting Co. v. FCC*, 59 F.3d 1365, 1371 (D.C. Cir. 1995).

<sup>18</sup> *Progeny Construction Extension Request Decision* ¶ 14.

<sup>19</sup> *Havens's Petition* at 17.

<sup>20</sup> *Progeny Construction Extension Request Decision*, n 32.

other efforts that Progeny made, the Mobility Division noted a specific list of potential vendors, manufacturers and end users that Progeny contacted.<sup>21</sup>

Havens's reliance upon *Pinpoint* case is unwarranted. The *Pinpoint* proceeding bears no resemblance to Progeny's. *Pinpoint* requested its extension two days prior to its deadline and did not face unavailability of equipment.<sup>22</sup>

Havens asserts that the grant of the construction extension request is arbitrary and capricious under Section 706 of the Administrative Procedure Act (APA). However, Havens has no right to review of the agency action under Section 702 of the APA. Section 702 states that only a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review. Havens does not meet this criteria and would lack standing to sue on judicial review. As demonstrated by this sampling of a web of legal arguments, Havens's Petition does not contain any basis to overturn the Commission's decision.

**C. The Commission properly granted the Extension Request Under Sections 1.925 and 1.946.**

Section 1.925(b)(3) and 1.946(e)(1) of the Commission's rules governs the Commission's decision making in granting a request for a waiver of a licensee's construction requirement.<sup>23</sup> The Commission found ample evidence on the record that

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<sup>21</sup> *Progeny Construction Extension Request Decision* ¶ 12. (The Commission notes that the record supports Progeny diligence efforts).

<sup>22</sup> See *In the Matter of PinPoint Wireless, Inc.; Request for a Waiver and Extension of the Broadband PCS Construction Requirements, Order*, (2003). (Pinpoint's primary argument was a delay in getting a T1 connection installed by its local telco).

<sup>23</sup> Section 1.925(b)(3) allows for a grant of a construction extension waiver if "(i) the underlying purpose of the rules would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public

supported Progeny's request for relief on these grounds.<sup>24</sup> This record clearly demonstrates that the Commission did not err. The Commission's determination that Progeny satisfied its due diligence in trying to obtain M-LMS equipment meets the requirements of Section 1.925 or 1.946.

Continued advocacy by Havens consumes Commission resources best devoted to other matters. Further, this persistent, repeated invocation of the Commission's processes also burdens parties such as Progeny unfairly. Havens has repeatedly attacked the Commission's decision-making capabilities throughout his Petition.<sup>25</sup> These vituperative attacks coupled with Havens's unsound legal assertions warrant swift dismissal of this petition. Thus, the Commission should deny this petition on both procedural and substantive grounds. Progeny respectfully requests that the Commission do so.

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interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." See 47 CFR § 1.925(b)(3). Section 1.946 (e)(1) states that the Commission may grant an extension request "if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control." See 47 CFR § 1.946(e)(1).

<sup>24</sup> *Progeny Order*, ¶ 16.

<sup>25</sup> *Havens's Petition* at 3 (attacking the Wireless Telecommunications Bureau as "not lawful, fair, or candid", 5 (alleging an FCC failure in its due diligence), 6 (attacking the FCC for not knowing what a novice expert knows), 23 (attacking the FCC for allegedly accepting bald assertions).

Respectfully submitted,

A handwritten signature in black ink that reads "Janice Obuchowski". The signature is written in a cursive style with a horizontal line drawn through the middle of the name.

Janice Obuchowski  
Of Counsel

Halprin Temple  
1317 F Street NW  
Fourth Floor  
Washington, DC 20004

Certificate of Service

I, Janice Obuchowski, counsel, hereby certify that I have, on this 3<sup>rd</sup> day of July 2006, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Opposition*, with First-class postage prepaid affixed, to the following:

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554

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Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau  
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Richard Arsenault  
Chief Counsel - Mobility Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room 6405  
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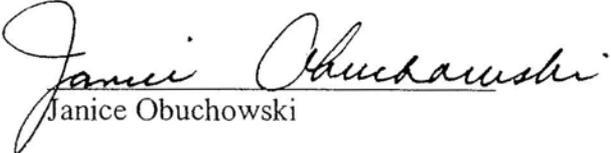
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Janice Obuchowski

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

In the Matter of	)	
	)	
Request of Progeny LMS, LLC for a Three-	)	File Nos. 0002049041-
Year Extension of the Five-Year Construction	)	0002049297
Requirement for its Multilateration Location	)	
and Monitoring Services Economic Area	)	
Licenses	)	

To: FCC Secretary  
Attention: Chief, Wireless Telecommunications Bureau

Filed under FCC 01-345  
& Filed via ULS

Reply to Opposition to Petition for Reconsideration  
Amended and Supplemented

*This filing supplements, amends, and replaced the earlier filed Reply, and is filed on or before the deadline for filing of this Reply.* The entities, listed on the execution page below (“Petitioners”) hereby reply to the Opposition to Petition for Reconsideration (the “Opposition”) filed by Progeny LMS LLC (“Progeny”) in this proceeding. Herein, “Petitioners” means all or any one or more of the Petitioner entities as particular contexts make clear. In some places, “Havens Group” is used to mean the same thing as Petitioners.

Progeny’s Procedural Arguments  
Appeal Rights, Party Status, Standing, Form of Petition, etc.

By describing (as cited below) Petitioners as “Havens” and the like, Progeny appears to attempt to misrepresent Petitioners as alter egos of Warren Havens which they are not, as reflected in FCC records including Forms 602 and granted licensing Forms 601 of each entity. Each Petitioner is a distinct legal entity and each has standing in this matter including since each holds FCC licenses in many of the geographic areas of the subject Progeny licenses. In addition, as is clear in FCC records, earlier this year the FCC granted the pro forma assignment from Warren Havens to Telesaurus Holdings GB LLC of the LMS-M licenses that Mr. Havens

formerly held. This Telesaurus LLC is thus the successor of Mr. Havens in proceedings in which he had standing based on these LMS-M licenses, including in this proceeding. All of the other Petitioner LLCs were formed, capitalized, and obtained FCC licenses in the LMS, MAS, AMTS, and 220 MHz services to supplement and support these LMS-M licenses in nationwide dual-band (900 and 200 MHz) wide-area services for Intelligent Transportation System applications, as the Commission intended for the LMS-M service. Individually, Mr. Havens holds scores of geographic 220 MHz licenses, and has pending before the FCC assignment to himself of 127 other geographic 220 MHz licenses, all of which are in geographic areas of the subject Progeny licenses. All of Petitioners' non-LMS-M licenses were obtained to support this dual-band ITS service in which the LMS-M licenses are the core spectrum. Grant of the Progeny extension request without good public interest reasons, as Petitioners argue in this proceeding, severely damages the LMS-M service, is unfair and unequal treatment, and otherwise causes severe injury to each Petitioner entity.

In its Opposition, Progeny first asserts that the Petitioners (the "Havens Group" entities) lack standing to file the Petition for Reconsideration under Section 1.106(b) of the Commission's rules because "Havens was not a party to the contested proceeding and Havens's Petition fails to state how his interests are affected by the Mobility Division's decision." (Opposition at 1). The Opposition makes the pronouncement that "Progeny and the Commission are the only two valid parties to th[e] proceeding" in which the Division granted the Extension Request, and concludes that "Havens's participation in this proceeding does not make him a party to it under Section 1.106." *Id.* at 3.

Progeny cites in support of its sweeping argument a single, general statement made by the Public Safety and Private Wireless Division in a decision issued almost five years ago, in

which that Division opined: “[i]n order to qualify as a party to the proceeding, a petitioner for reconsideration *generally* must have filed a valid petition to deny the application that is the subject of the licensing action of which the petitioner seeks reconsideration.” (Italics added.) *Id.* (quoting *Regionet Wireless License, LLC, For Renewal of License for Station WRV374 to Provide Automated Maritime Telecommunications System Service to the Atlantic Coast*, Order on Reconsideration, 16 FCC Rcd 19375, ¶ 5 (2001)). While this “general” statement may generally be true, it came in the context of a proceeding in which a formal procedure to file petitions to deny had been available to interested parties. The *Regionet* decision and other similar Commission decisions describe what third parties “generally” must do to claim party status when such a formal process is available. See generally *Sagittarius Broadcasting Corp., Application for Renewal of License WXRK*, Memorandum Opinion and Order, 18 FCC Rcd 22551, ¶ 4 (2003) (explaining that “a person generally does not have standing to seek further redress thereafter unless he was a formal participant at the initial stage” in a license renewal proceeding in which the party appealing renewal failed to file a formal petition to deny).

Such Commission precedents are easily distinguishable from the present case, and are inapplicable in the instant proceeding – one in which the Division chose not to place Progeny’s Extension Request on public notice due in part to a finding that “the lack of a public notice has not hindered [Petitioners’] *participation* in this proceeding.” (Italics added.) *Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses*, Memorandum Opinion and Order, DA 06-1094, ¶ 7 (WTB rel. May 24, 2006) (the “*Progeny Extension Request Order*” or the “*Order*”). An entity who “participates” is a party. It would be ironic, to say the least, for the Division to first refuse placement of the Extension Request on public notice – due

to the fact that informal pleadings allowed for full and fair participation by Petitioners – and then to dismiss a Petition for Reconsideration for no other reason than the fact that the Division initially refused to open a formal proceeding in the matter of the Extension Request, in spite of Petitioners written request for such notice including so that the Progeny Extension Request would be treated equally, and receive the same public scrutiny, as was the Havens LMS-M extension request (which was put on public notice and did receive a resultant petition to deny challenge).

Furthermore, despite that initial decision not to place the Extension Request on public notice, the Mobility Division did eventually establish a formal pleading cycle prior to issuance of the *Progeny Extension Request Order* for the purpose of allowing the Petitioners a formal challenge to the Extension Request. Indeed, this was established with the agreement of Progeny, in exchange for consideration, involving, as the record makes clear, Petitioner’s giving up, to Progeny’s benefit, the right to appeal a decision by the Bureau at the request of Progeny to not release to Petitioners under their Freedom of Information Act (“FOIA”) request certain information allegedly exempt under a FOIA exemption, which Petitioners disputed. The agreement was that the Petitioners could formally challenge the Extension Request, and any decision by the FCC in any formal proceeding can be appealed. Progeny’s assertion that the Petitioners lack standing is an effective repudiation of this agreement. The Bureau should not only reject this Progeny repudiation, but also rebuke Progeny for the attempt.<sup>1</sup>

In settling the FOIA claims mentioned in paragraph 4 of the *Order*, the Chief Counsel of the Mobility Division established a “Pleading Cycle” granting Progeny and the Havens Group the right to file certain responsive pleadings with respect to Progeny’s underlying Extension

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<sup>1</sup> See Attachment 1: Progeny has a history of switch and bait. That is the sum and substance of its LMS-M licensing proceedings before the FCC.

Request. *See* Electronic Mail Message from Richard Arsenault, Chief Counsel, Mobility Division, to Ari Fitzgerald and Janice Obuchowski (Nov. 14, 2005). The Mobility Division thus accorded the Havens Group a formal right to participate in the Extension Request proceeding, and later recognized the level of that participation in the *Progeny Extension Request Order*.

Progeny next makes the empty claim that the original informal Petition to Deny filed pursuant to Section 1.41 in some way violated Section 1.44(c) of the Commission's rules. The Opposition claims that the informal Petition to Deny violated this rule section because it "improperly piggybacked" on the Havens Group's request to place the Extension Request of public notice. *See* Opposition at 3. Section 1.44(c) states that "[r]equests requiring action by any person or persons pursuant to delegated authority shall not be combined in a pleading with requests for action by any *other* person or persons acting pursuant to delegated authority." 47 C.F.R. § 1.44(c) (emphasis added).

The plain text of the rule makes clear the obvious fallacy in Progeny's argument. The rules do not allow for the combination of a request made to one delegated authority with a different request made to *another* person or persons acting pursuant to delegated authority. As Progeny is well aware, both the request for issuance of a public notice and the informal Petition to Deny were directed to the Mobility Division of the Wireless Telecommunications Bureau. *See* Opposition at 3 ("*Havens requested that the Mobility Division place this proceeding on public notice. In that request, Havens asked the Mobility Division, in the event that the Public Notice request was not approved, to consider the proffered facts and arguments as an informal petition to deny under Section 1.41.*") (emphasis added).

It is customary, and fully permissible under the rules, to combine in one pleading multiple requests made to the *same* delegated authority. Thus, the Havens Group's initial

informal Petition to Deny did not violate Section 1.44(c), which may be invoked only to dismiss pleadings that bundle together requests for two different delegated authorities. *See, e.g., Regionet Wireless License, LLC Application for Renewal of WRV374, AMTS Stations along the Atlantic Coast*, Memorandum Opinion and Order, 18 FCC Rcd 23068, ¶ 6 (2003) (dismissing petition and complaint where two separate requests were under the jurisdiction of two different bureaus – the Wireless Telecommunications Bureau and the Enforcement Bureau); *see also Darrell Spann For Renewal of License of Station WSVE Jacksonville, FL*, Memorandum Opinion and Order, 6 FCC Rcd 5944, ¶ 14 n.4 (1991).

Petitioners’ Interests Are Adversely Affected by the Order

Petitioners, the Havens Group, may file a petition for reconsideration under Section 1.106(b)(1), even if the Division decides that Petitioners are not parties to this proceeding for purposes of the Commission’s reconsideration standing rules. *See* 47 C.F.R. § 1.106(b)(1) (“If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.”).

As explained above, the “good reason” – and indeed, the only reason – that it was not possible for Petitioners to participate even more formally in the earlier stages of the proceeding was the Mobility Division’s decision not to issue a public notice seeking comment on Progeny’s Extension Request. Furthermore, the informal Petition to Deny and other pleadings filed in this proceeding clearly articulate with the requisite particularity the manner in which Petitioners’ interests would be adversely affected by grant of Progeny’s Extension Request. As explained in the informal Petition to Deny and the Petition for Reconsideration, when the Commission grants

waivers of M-LMS construction requirements too readily and freely to Progeny and others it undermines the Havens Group's efforts to facilitate the development of equipment consistent with the existing rules. The easy grant of waivers to parties that have not demonstrated their diligence in complying with the Commission's existing rules also undermines the rules themselves. *See, e.g., Constellation Communications Holdings, Inc. Application for Authority to Construct, Launch and Operate a Low-Earth Orbit Mobile Satellite System in the 1610-1626.5/2483.5-2500 MHz Bands*, Memorandum and Opinion, 18 FCC Rcd 18822, ¶ 9 (2003) ("Finally, we uphold the Bureau's determination that waiving the milestone rules . . . would undermine the policy objective of the rules, and therefore a waiver of our milestone rules was not appropriate.").

Progeny Also Fails in its Attempts to Distinguish Precedents Cited in the informal  
Petition to Deny and the Petition for Reconsideration

The Opposition dashes through what it derisively labels a "web of legal arguments" made by Petitioners, *see* Opposition at 7, as Progeny substitutes for genuine argumentation of its own nothing more than a quick "sampling" of the many Commission precedents cited by Petitioners in prior pleadings in this proceeding. Simply labeling the legal analysis in these prior pleadings unsound without further explanation does little or nothing to refute these arguments. The Opposition does note that the *Progeny Extension Request Order* rejected certain arguments raised previously by the Havens Group – although, of course, the very purpose of the Petition for Reconsideration is to respectfully request that the Division reconsider those earlier determinations. The *Order* distinguished *McCart*, for example, on the ground that equipment was available to the party requesting an extension in that proceeding whereas it is not available to Progeny in the M-LMS service. *See Progeny Extension Request Order*, ¶ 14 (citing *Request for Extension of Time to Construct a 900 MHz Specialized Mobile Radio Station and Request for*

*Waiver of the Automatic License Cancellation of Call Sign KNNY348*, 19 FCC Rcd 2209 (WTB 2004) (“*McCart*”). However, as the *McCart* decision explains, the petitioner in that case “argue[d] principally that it could not meet its construction deadline . . .because of ‘the lack of digital technology for deployment in 900 MHz systems.’” *McCart*, ¶ 6. The Mobility Division in *McCart* found that such arguments regarding lack of equipment and economic hardship were “insufficient to allow *McCart* to hold the spectrum until equipment finally becomes available.” *Id.* Noting that some equipment was available, the Mobility Division nonetheless denied the open-ended request for waiver because it was “unclear from his application whether *McCart* cannot deploy [this] equipment due to technical reasons or will not deploy such equipment due to business reasons.”

#### Progeny Obtained the Grant via Impermissible Ex Parte Communications

In the LMS NPRM (WT Docket No. 06-49), Progeny is regularly having ex parte meetings, as it did in RM-10403. Progeny asserts the same arguments in support of its Extension Request as it did in RM-10403 and now asserts in the NPRM (no equipment since rules failed to make vendors excited and so forth). This involves prohibited ex parte presentations in the restricted Extension-Request proceeding. The question of whether a communication made in a permit-but-disclose rulemaking proceeding constitutes an impermissible ex parte presentation in a restricted proceeding requires a fact-intensive inquiry that focuses on the statements made by the parties involved in the communication and their intent. The FCC has stated that its ex parte rules “are not intended to interfere with the participation by parties to a restricted proceeding in other proceedings of a general or specific nature pending before the Commission. Nor are they intended to bar normal communication between decisionmaking personnel and attorneys (or other persons) who are pursuing the interests of the same or other clients in nonrestricted

proceedings or in other restricted proceedings." In the Matter of Rules Governing Ex Parte Communications in Hearing Proceedings, Docket No. 15381, 1 FCC.2d 49, paragraph 22 (July 7, 1965). On the other hand, "Parties to a restricted proceeding and other interested persons . . . are subject to higher standards and have a special responsibility with respect to [their communications with Commission personnel], if they relate to the restricted proceeding in which they are participating . . . [I]nterested persons are entitled to pursue other legitimate interests before the Commission, but must not use the pendency of other matters as a pretext for ex parte communications going to the merits of the outcome of a restricted proceeding." *Id.* at par. 25 (citing *WHDH, Inc.*, 29 FCC 204, 20 Rad. Reg. 395 (1960)).

Based on the precedent cited above, Petitioners believe that in this case Progeny's communications in the FCC's proceeding to consider whether to modify the LMS-M rules veered over the line that the FCC has drawn between permissible and impermissible communications, and that such ex parte communications served as a "pretext" for engaging in impermissible ex parte presentations on the merits of issues that were resolved in a restricted proceeding in violation of the FCC's rules. The records in these matters support this conclusion.

#### The Grant Effectively and Impermissibly Repeals Construction Requirement

Contrary to the Opposition, and as Petitioners have shown, the Progeny Extension Request did not meet the Commission's requirements for grant, including Sections 1.925 and 1.946. There is no meaning to construction requirements, and they are affectively repealed, under the subject Progeny extension precedent, a major precedent involving virtually nationwide spectrum, where the requirement is waived without demonstration of diligence [only bald assertions with no details, no support, and no way to objectively verify] and where the licensee states that the service to be constructed is not viable, and would fail if constructed. This amounts

to a waiver simply since the licensee did not believe the current rules, including on construction, were viable. This is a dangerous precedent since any other licensee, at least competitors (and there are many competitors nationwide of any LMS-M service: Progeny even uses this as an excuse as to why LMS-M will fail) who have rights to rely upon such precedent and obtain equal treatment. Thus, this precedent, contrary to the Opposition's assertions, does hurt Petitioners and creates a double standard between LMS-M licensees since Petitioners did undertake and provide extensive due diligence showings in their own extension request, and Petitioners did not receive an open-ended extension grant as Progeny has in the instant matter.

#### Equipment Development Was Clearly Available

Contrary to the Opposition, it was entirely clear that Progeny could have participated in equipment development and by such perform due diligence sufficient for an extension. As previously presented by Havens and the other Petitioners in this proceeding, Havens and the other Petitioners were engaged in equipment development and in fact had invited Progeny to participate (and FCR, Inc.). Both chose not to participate in the equipment development. In addition, it was easy to determine that many equipment companies had products available in the general 900 MHz range for multilateration and communication, including virtually all two-way radio companies,<sup>2</sup> and terrestrial location system companies that regularly advertised in principle communication industry magazines (e.g. MRT). Such equipment required appropriate modifications and integration to operate in the LMS-M bands and under the LMS-M rules; however, that's part of appropriate due diligence within a new radio service. Progeny admits in this proceeding there has been no equipment from the beginning; therefore, when it bought the licenses it knew it would have to engage in appropriate due diligence. It simply failed to do so.

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<sup>2</sup> A simple check of OET equipment records will verify this.

Conclusion

For reasons given by Petitioners in this proceeding, the Petition should be granted and the subject grant of the Progeny Extension Request should be rescinded.

Respectfully,

[\[Submitted Electronically. Signature on File\]](#)

Warren C. Havens, Individually and as President of  
Intelligent Transportation & Monitoring Wireless LLC  
AMTS Consortium LLC  
Telesaurus VPC LLC  
Telesaurus Holdings GB LLC

2649 Benvenue Ave., # 2 and 3  
Berkeley, CA 94704  
Ph: 510-841-2220  
Fx: 510-841-2226

July 19, 2006

Declaration

I, Warren C. Havens, hereby declare under penalty of perjury that the foregoing *Reply to Opposition to Petition for Reconsideration, Supplemented and Amended* including all Attachments and referenced incorporated documents were prepared pursuant to my direction and control and that all the factual statements and representations contained herein attributed to my knowledge, as the text or context makes clear, are true and correct.

[Submitted Electronically. Signature on File.]

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Warren C. Havens

Date: July 19, 2006

Progeny has a practice of “bait and switch” in FCC licensing matters, including:

1. The agreement to accept to allow Petitioners to formally challenge the Extension Request, and then renege on that by alleging the Petitioners do not have the appeal rights that are inherent in such a formal proceeding—as noted in the Reply text above.

2. Before item 1, Progeny asserted in the Extension Request and the closely related RM-10403, that LMS-M and the required multilateration location were “obviated” by GPS and E911. Thereafter-- after that manifestly false assertion (to anyone who knows the relevant wireless fields) succeeded as a ploy to obtain a grant the Extension Request and the related effective grant of Progeny’s rulemaking request in RM-10403 by the LMS-M NPRM—Progeny now asserts in the NPRM that it is indeed undertaking a “ELP” location service with its LMS-M licenses for public-safety purposes. This is another “bait and switch.” It also seeks flexibility to not have to do any location and to allow any sort of service, yet asserts that it will indeed do location and specific public-safety-entity service. This is of course a further attempt to have the cake and eat it too.

3. Progeny offered in RM-10403 and affectively in its Extension Request (the same logic was involved, and the same FCC staff that Progeny lobbied for years), to give up authorized transmit power and time, in exchange for grant of “flexibility” which tradeoff the NPRM then indeed proposed. It is also clear that the Extension Request grant was coordinated with and based on the same FCC staff rationale that resulted in the NPRM. Then, after being lured into the NPRM and the Extension grant by this Progeny tradeoff proposal, Progeny now retracts the proposal: its Comments in the NPRM make clear that it does not want to give up anything. This is also a bait and switch, and is also self-contradictory.

4. Even more objectionable is how the current Progeny controlling party obtained the licenses in the first place, per information Petitioners recently obtained. Initially, Progeny filed its long form to obtain grant of the LMS-M licenses with a certain person listed as the clear majority interest holder and person in control (same as on its short form). Then, a new person, Otto Frenzel--an experienced banker of a regional bank-- asserted that, all along, he was the person in control and filed a waiver request to have his competing long form accepted. Progeny’s waiver was granted and the initially received designed-entity bidding credit was maintained. However, according to public records recently obtained, Mr. Frenzel had a number of major businesses as affiliates, including by directorship positions in financial institutions, and if these affiliates gross revenues were attributed, then Progeny did not qualify for the bidding credits. Such abuse of DE bidding credits is the subject of recent FCC inquiry, as well as the case, *Taylor v. Gabelli*, No. 03 Civ 8762 (PAC) (SDNY) that the US DOJ prosecuted and settled for a large sum. Havens and his affiliates were damaged by the unfair competition of Progeny in obtaining and maintaining its licenses, if as it now appears Progeny bid with bidding credits it did not qualify to have. Havens bid against Progeny in this auction, and bid for many additional LMS-M licenses in the second LMS-M auction.

## Attachment 2

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The following is the agreement between Havens, Progeny, and the Bureau with regard to settling the FOIA proceeding, what material Progeny submitted to the FCC alleging due diligence to meet the LMS-M multilateration-system-equipment construction requirement would be considered in the Bureau's decision on the Progeny Extension Request, and a formal proceeding whereby the Progeny Extension Request could be challenged.

---

MessageFrom: Fitzgerald, Ari Q. [AQFitzgerald@HHLAW.com]  
Sent: Monday, November 14, 2005 11:20 AM  
To: Richard Arsenault; Janice Obuchowski  
Cc: wchavens@aol.com; jstobaugh@telesaurus.com  
Subject: RE: Proposed Settlement of FOIA Control No. 2005-449

Richard, the terms as you describe them are acceptable to Mr. Havens.

---

From: Richard Arsenault [mailto:Richard.Arsenault@fcc.gov]  
Sent: Monday, November 14, 2005 1:55 PM  
To: Fitzgerald, Ari Q.; Janice Obuchowski  
Cc: wchavens@aol.com; jstobaugh@telesaurus.com; Richard Arsenault  
Subject: RE: Proposed Settlement of FOIA Control No. 2005-449  
Importance: High

November 14, 2005

Ari and Janice,

Please confirm, by return email today, your client's agreement to the terms enumerated in Ari's email below as modified in the following five respects.

1. Pleading Cycle. Mr. Havens shall file an opposition to Progeny's extension request on or before Tuesday, November 29, 2005; Progeny shall file a response on or before Tuesday, December 6, 2005; Mr. Havens shall file a reply on or before Tuesday, December 13, 2005.
2. No Extension of Pleading Deadlines. The Mobility Division will not extend any of the filing deadlines specified in item 1, above.
3. Progeny Withdrawal Request. Progeny shall file the withdrawal request specified in Ari's email below on or before Monday, November 21, 2005.
4. Section 1.935 Certifications. Each party shall file a Section 1.935 certification, executed by one of its principals, that essentially states: It has received no financial consideration in exchange for Mr. Havens' agreement not to appeal the October 31, 2005 Letter Ruling in FOIA 2005-449 and Progeny's related agreement to withdraw Sections 3, 4, and 5 of Attachment B. Progeny may file its certification with its Withdrawal Request.
5. Scope of Waiver. Mr. Havens waives the appeal rights of Telesaurus Holdings, GB LLC, Telesaurus Holdings-VPC, LLC, and the AMTS Consortium, each of which joined Mr. Havens in FOIA Request 2005-449.

Thank you.

Richard  
202 418-0920

-----Original Message-----

From: Fitzgerald, Ari Q. [mailto:AQFitzgerald@HHLAW.com]

Sent: Thursday, November 10, 2005 11:45 AM

To: Richard Arsenault

Cc: wchavens@aol.com; jstobaugh@telesaurus.com

Subject: Proposed Settlement of FOIA Control No. 2005-449

Richard, consistent with your request, following is an outline of Mr. Havens' proposal for settling the dispute arising under FOIA Control No. 2005-449:

Both parties to the dispute, Progeny and Mr. Havens, would waive all of their rights to appeal the Wireless Bureau's FOIA decision in this matter (Such waivers would not constitute acceptance of the validity of the decision under applicable FOIA law.)

In exchange, Mr. Havens would receive all of the information that the Wireless Bureau's FOIA decision indicated should be disclosed to him in its October 31, 2005 FOIA decision in this matter. In addition, Progeny would submit a filing into the Progeny M-LMS Extension Request proceeding, File Nos. 0002049041-0002049297, expressly requesting withdrawal from the record in that proceeding of all of the materials and information contained in Attachment B, Sections 3, 4 and 5, which Progeny filed under a request for confidential treatment and which were discussed on pages 4-5 of the Wireless Bureau's October 31, 2005 FOIA decision in this matter. This Progeny request would also request that the FCC not consider the information provided in Attachment B, Sections 3, 4 and 5 in its decision in response to the Progeny extension request. In addition, the Wireless Bureau would in a writing accept the Progeny withdrawal request. The withdrawal request and Wireless Bureau acceptance would be filed in ULS under the Progeny LMS licenses. Progeny would serve a copy of the request, and the Wireless Bureau would provide a copy of the acceptance, to Mr. Havens by e-mail per the procedure noted below.

Moreover, the Wireless Bureau would establish a formal pleading cycle in the underlying Progeny M-LMS Extension Request proceeding. Pursuant to such pleading cycle, Mr. Havens would be allowed to file an opposition to Progeny's extension request by December 9, 2005, Progeny would be allowed to file a response by December 16, 2005 and Mr. Havens would be

allowed to file a reply to Progeny's response by December 23, 2005.

Filing of the comment cycle pleadings would be by e-mail under the procedures set forth in FCC 01-345\* (e-mail to [wtbsecretary@fcc.gov](mailto:wtbsecretary@fcc.gov)) with a cc copy to Mr. Richard Arsenault at [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov) and to the other party (as noted below). Parties would serve each other on the date of the filing by providing a copy by US mail or private courier. The Certificates of Service would reflect the process described above. E-mailed copies to Progeny would be sent to Ms. Janice Obuchowski at [JO@ftidc.com](mailto:JO@ftidc.com), and e-mail copies to Mr. Havens would be sent to Counsel to Mr. Havens, Ari Fitzgerald, at [AQFitzgerald@hhlaw.com](mailto:AQFitzgerald@hhlaw.com), with copies to Mr. Havens at [wchavens@aol.com](mailto:wchavens@aol.com) and [jstobaugh@telesaurus.com](mailto:jstobaugh@telesaurus.com). In addition, on the same day as they are transmitted to the recipient, an electronic copy of the Progeny withdrawal request and Wireless Bureau acceptance, as noted above, would be transmitted by e-mail to Mr. Havens at the three e-mail addresses provided above.

\* In the Matter of Implementation of Interim Electronic Filing Procedures for Certain Commission Filings, Order, FCC 01-345, released November 29, 2001.

Please let me know if this proposal is acceptable. If you have any questions, please call me at 202-637-5423.

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Progeny’s statements: in (1) RM-10403, (2) Extension Request proceeding, (3) LMS-M NPRM. And (4): excerpts from the NPRM.

Assertion	Purpose	A. Progeny in RM-10403	B. Progeny in Extension Request	C. FCC in NPRM	D. Progeny in NPRM
<p><b>Phase 1:</b> Progeny tries years for NPRM, fails, and then submits extension request. Both assert same rationale. Progeny offers to tradeoff power and time for “flexibility” and asserts LMS-M under current rules—with required location, and no interconnect, etc.—is a certain failure. But that it, still, diligently tried to construct this failed service.</p>					
<p>1. LMS-M location private radio is obviated and will fail under current rules.</p>		<p><b>At page iii of Petition for Rulemaking:</b> “As Progeny demonstrates in its petition, however, the LMS licensees’ ability to develop and roll out effective LMS networks and services has been constrained by operational, content and aggregation restrictions that threaten the viability of the service. Because of these restrictions, Progeny and other licensees have been unable to secure sufficient capital or to engage manufacturers to develop equipment for LMS networks.”</p> <p><b>At page 1 of Petition for Rulemaking:</b> As Progeny demonstrates herein, the current restrictions have prevented the licensees and manufacturers from developing services, and equipment required for such services, that could be offered in this spectrum.</p> <p><b>At page 6 of Petition for Rulemaking:</b> “Notwithstanding the significant changes that have occurred, the 900 MHz LMS industry is saddled with service and technical limitations that have blocked the</p>	<p><b>At page 3:</b> “Progeny’s original business plan for the use of its LMS spectrum involved tracking vehicles using multilateration techniques. Unfortunately, the widespread introduction of low-cost, embedded GPS receivers in the last several years has obviated the market demand for such multilateration systems.”</p> <p><b>At page 20:</b> “As Progeny has previously told the Commission: “With E911 service now a mandate for cellular providers, and with GPS a globally available, free locational service, the narrow market for LMS, as earlier envisioned, does not exist.”</p>	<p><b>At Paragraph 11:</b> When the Commission adopted its LMS rules in 1995, it expected that both M-LMS and non-multilateration LMS systems would play an integral role in the development and implementation of advanced radio transportation-related services. Non-multilateration systems have flourished since 1995 with the Commission licensing more than 2,000 sites to state and local governments, railroads, and other entities in recent years. However, only two M-LMS licensees, Teletrac and Ituran, operate M-LMS systems, and these exist in only a small number of markets.... Moreover, none of the six license holders that received their licenses through these auctions or by subsequent transfer or assignment are providing vehicle location services (or any other Part 90 M-LMS compliant service) with their spectrum.</p> <p><b>At Paragraph 19:</b> This section seeks comment on whether the</p>	

		<p>licensees' ability to provide service successfully, and which, unless removed, may doom the service. It is critical to modify several of the rule limitations described herein so that a truly nationwide LMS system can develop, which in turn will allow LMS to become an effective competitor to other CMRS systems that also provide location and monitoring services.”</p> <p><b>At Pages 15 and 16 of Petition for Rulemaking:</b> “Another service provider opined that, given the onerous regulations that apply, Progeny would not find any company that would take the risk of developing LMS equipment. Other prospects concluded that the band would not be viable without “real time interconnectivity” to the public switched network. Further opinion was offered that GPS had “rendered the LMS band antiquated.”</p> <p><b>At page 16 of Petition for Rulemaking:</b> “The market is unproven at best, and as discussed herein, the severe service restrictions and emergence of deep-pocketed competitors (CMRS carriers who are now required to incorporate location capabilities in their systems) make it unlikely that LMS will develop under the current limitations. Thus, Progeny does not anticipate any solution to the current dilemma caused by the absence of equipment for LMS, absent changes to the Commission’s Rules.”</p> <p><b>At page 20 of Petition for</b></p>		<p>Commission can promote more efficient use of the M-LMS Band by modifying or eliminating M-LMS restrictions on types of permissible communications (<i>e.g.</i>, vehicle location as primary operation) and interconnection, while protecting other licensed and federal applications and minimizing interference to unlicensed users.</p> <p><b>At Paragraph 20:</b> As discussed above, the Commission adopted the M-LMS service and interconnection restrictions to promote a location-based service in 1995. We note, however, that more recent actions by the Commission have advanced the broader development of location-based services in other bands. Shortly after adoption of the M-LMS rules, the Commission adopted its initial E-911 rules, requiring all commercial mobile radio service (CMRS) carriers to meet standards for identifying the location of emergency callers and passing this information to the relevant public safety entities. In addition, there are several non-LMS service providers that offer location service to consumers and businesses, including satellite-based service providers Qualcomm (OmniTRACS® mobile communications service) and ORBCOMM (Little Low Earth Orbiting service). Under these</p>	
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		<p><b>Rulemaking:</b> “In short, the LMS licensees are confronted with a very difficult task in attempting to implement a niche service, induce manufacturers to make equipment for LMS, and then compete against established CMRS operators that do not face the same technical and operational constraints.”</p> <p><b>At pages 29 and 30 of Petition for Rulemaking:</b> “Thus, by dismantling the regulatory barriers to innovation in this band, the FCC could make possible not only the location and monitoring services it originally intended to authorize-and which licensees cannot offer economically in the band now...”</p> <p><b>At page 31 of Petition for Rulemaking:</b> “If LMS is to fulfill its potential as a viable service, changes are needed now to allow time for equipment development and service rollout. Further delay will only dampen incentives to invest in LMS further, eroding any likelihood that the existing LMS licenses will be put to use for the legitimate and worthwhile purpose for which they were intended.”</p> <p><b>At Page v of Reply Comments:</b> “Progeny believes that a rulemaking proceeding is the best, and only, way to reach a regulatory balance that will allow all users of the band to develop and deploy the services and equipment that the market demands. Therefore, Progeny urges the Commission to move expeditiously to open a</p>		<p>circumstances, we seek comment on whether there is any public interest benefit associated with continuing to limit M-LMS service flexibility to promote vehicle and other location-based services in the nation’s transportation infrastructure? Alternatively, should we maintain these restrictions to preserve M-LMS as essentially a location-based service, but provide licensees with some additional flexibility to offer their location-based services by, <i>e.g.</i>, eliminating spectrum aggregation constraints, testing conditions, or limits on non-vehicular offerings?</p> <p><b>Appendix at A.3:</b> In the decade since M-LMS was established there has been very limited development of M-LMS under the existing rules. Specifically, when the Commission adopted its LMS rules in 1995, it expected that both M-LMS and non-multilateration LMS systems would play an integral role in the development and implementation of advanced radio transportation-related services. However, only two M-LMS licensees, Teletrac and Ituran, operate M-LMS systems, and these exist in only a small number of markets. Given these present circumstances, the Commission initiates this proceeding to determine whether new approaches could produce</p>	
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		<p>proceeding to modify its Part 90 rules governing multilateration LMS.”</p> <p><b>At Page 6 of Reply Comments:</b> “Clear evidence from the marketplace indicates that further calibration is needed: there is not a single viable multilateration LMS system in operation, and no manufacturer has seen a sufficient opportunity to build equipment for this service. The Commission was correct in inaugurating the LMS service; in order to bring that vision to fruition, however, rule changes must be contemplated.”</p> <p><b>At Page 23 of Reply Comments:</b> “If the Commission does not act, it will have the effect of perpetuating the current, imbalanced situation, in which there is no market or viable service utilizing the licensed LMS spectrum and in which Part 15 operators have in essence gained a “virtual license” to operate within a preserve set aside for their unlicensed spectrum “rights”.”</p> <p><b>At Page 24 of Reply Comments:</b> “As the Commission itself has noted, its regulations were designed to set a finely crafted balance among the interests of all users of the band, licensed and unlicensed. If it was worth it to attempt to set this balance in the first place, and Progeny believes it was, it must be worth it now to follow through with rule modifications to re-calibrate that balance, which has clearly tilted in a way that now prevents multilateration licenses</p>		<p>more efficient and effective use of the 904-909.75 and 919.75-928 MHz spectrum band by LMS licensees.</p>	
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		<p>from building networks and deploying services.”</p> <p><b>Progeny LMS LLC, Oral Ex Parte Presentation, filed March 14, 2005, at Page 3:</b> “<i>End the LMS service requirement:</i> The service restriction confines licensees to a narrow definition of LMS. E911 service is a mandate for cellular providers; GPS is globally available. - Thus, the narrow market for LMS, as originally envisioned, does not exist.”</p> <p><b>Progeny LMS LLC, Ex Parte Presentation, filed November 8, 2004 at Page 1:</b> “Progeny remains steadfast in its positive outlook about the ability of LMS licensees to deliver critical public services, including much-needed homeland security applications, once the LMS rules are updated to reflect technology advances and market developments.”</p> <p><b>Progeny LMS LLC, Ex Parte Presentation, filed November 8, 2004 at Page 2:</b> “Finally, the suggestion that Progeny’s petition is creating delays in the Commission’s consideration of buildout extension requests for other licensees in this band is unwarranted<sup>1</sup>. Progeny supports buildout extension requests in this band. Its consistent point of view is that the LMS rules’ outdated use and technology limitations have impeded such buildout.”</p>			
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<p>2. Equipment makers will not make equipment due to current rules.</p>		<p><b>At page 1 of Petition for Rulemaking:</b> As Progeny demonstrates herein, the current restrictions have prevented the licensees and manufacturers from developing services, and equipment required for such services, that could be offered in this spectrum.</p> <p><b>Footnote 1 of Petition for Rulemaking:</b> "...Throughout the period of the late 1990s to the present, Progeny has worked with its employees, and several consultants and agents, as well as its investor group, to build a viable service. In fact, none of the many service providers and equipment suppliers approached by Progeny have followed through; their decisions not to support the LMS service have been based on the absence of any real equipment and on the built-in limitations on viable service provision imposed by licensing constraints."</p> <p><b>At Pages 15 and 16 of Petition for Rulemaking:</b> "Progeny has diligently been seeking to implement service, but it has been unable to do so because of, <i>inter alia</i>, the absence of suitable equipment. As a result of the various limitations which currently apply to LMS licensees, manufacturers apparently have been unwilling to commit the resources necessary to design and develop equipment that will support the narrow offerings LMS licensees can provide under the current rules. Manufacturers do not perceive that there is a market, given</p>	<p><b>At pages 3 and 4:</b> "Independent of Progeny's due diligence efforts within the parameters of the existing service rules, the company filed a Petition for Rulemaking at the FCC to overhaul outdated regulatory restrictions for this spectrum, as part of a larger effort to make M-LMS service deployment viable. Nonetheless, the Petition has remained unanswered at the FCC for nearly three years, creating further uncertainty among manufacturers about the return of any investment in time or capital to produce equipment for the band. Until these issues are resolved, this lack of closure concerning questions of necessary regulatory flexibility presents another impediment to convincing service providers or equipment makers about the usefulness of M-LMS spectrum."</p> <p><b>At page 23:</b> "Progeny filed its Petition for Rulemaking on March 2, 2002, demonstrating at that time that the regulatory restrictions in the band have prevented licensees and manufacturers from developing viable services and equipment that would provide substantial public benefits."</p>		
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		<p>current regulatory restraints, to justify such significant investments.</p> <p><b>At Pages 15 and 16 of Petition for Rulemaking:</b> “In an effort to move forward to provide service using its LMS licenses, Progeny has held discussions with a virtual “Who’s Who” of American manufacturers of telecommunications equipment. The response from several of the largest equipment suppliers, as well as from more entrepreneurial providers, has been consistent: the narrow “market” for a stand-alone location and monitoring service (particularly with the constraints imposed by the Commission) will not be sufficient to justify the time and expenses necessary to develop equipment for that market. The feedback has been uniform. For example, one equipment supplier said that both its regulatory team and its engineers had examined the possibility of manufacturing equipment and investing capital to develop the LMS spectrum. They concluded that, given the regulatory restrictions that govern the spectrum, the company could not justify any investment in LMS. Another service provider opined that, given the onerous regulations that apply, Progeny would not find any company that would take the risk of developing LMS equipment. Other prospects concluded that the band would not be viable without “real time interconnectivity” to the public switched network. Further opinion</p>			
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		<p>was offered that GPS had “rendered the LMS band antiquated.”</p> <p><b>At page 18 of Petition for Rulemaking:</b> “Because location requirements are mandated for CMRS providers, all of the systems will be deploying location capabilities. In light of this obligation and the large base of CMRS customers, equipment manufacturers have been assured of a significant market, thus justifying research and development expenditures. As a result, equipment has been developed for location capabilities (both system-based and handset-based) for CMRS bands. In contrast, as noted above, Progeny has been unable to locate any manufacturer willing to develop equipment for LMS.”</p> <p><b>At Page 21 of Petition for Rulemaking:</b> “As discussed above, however, Progeny’s efforts have been frustrated by the absence of equipment and capital, which in turn can be ascribed, at least in part, to the restrictive service rules for LMS. As a result, potentially valuable spectrum has lain fallow, and there is little likelihood that it will be put to productive use for these services (or others) unless there is a change in those rules.”</p> <p><b>At Page 22 of Petition for Rulemaking:</b> “Thus, the public has already been deprived of the potential benefits from use of the LMS spectrum, and it will continue to suffer that loss until the spectrum is put into</p>			
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		<p>use. That will not occur, however, unless and until the LMS rules are changed so that the licensees, the capital markets and the equipment manufacturers have sufficient incentives to invest in the development of these bands.”</p>			
<p>3. (Nevertheless) Progeny diligently tried to construct under current rules by seeking equipment (that had to include the required multilateration equipment).</p>		<p><b>Footnote 1 of Petition for Rulemaking:</b> “...Throughout the period of the late 1990s to the present, Progeny has worked with its employees, and several consultants and agents, as well as its investor group, to build a viable service. In fact, none of the many service providers and equipment suppliers approached by Progeny have followed through; their decisions not to support the LMS service have been based on the absence of any real equipment and on the built-in limitations on viable service provision imposed by licensing constraints.”</p> <p><b>At Pages 15 and 16 of Petition for Rulemaking:</b> “Progeny has diligently been seeking to implement service, but it has been unable to do so because of, <i>inter alia</i>, the absence of suitable equipment. As a result of the various limitations which currently apply to LMS licensees, manufacturers apparently have been unwilling to commit the resources necessary to design and develop equipment that will support the narrow offerings LMS licensees can provide under the</p>	<p><b>At pages 3 and 4:</b> “Independent of Progeny’s due diligence efforts within the parameters of the existing service rules, the company filed a Petition for Rulemaking at the FCC to overhaul outdated regulatory restrictions for this spectrum, as part of a larger effort to make M-LMS service deployment viable.”</p>		

		<p>current rules. Manufacturers do not perceive that there is a market, given current regulatory restraints, to justify such significant investments.”</p> <p><b>At Pages 15 and 16 of Petition for Rulemaking:</b> “In an effort to move forward to provide service using its LMS licenses, Progeny has held discussions with a virtual “Who’s Who” of American manufacturers of telecommunications equipment.</p> <p><b>At Page 21 of Petition for Rulemaking:</b> “The Commission envisioned LMS as fulfilling an important need for location and monitoring services that would aid the transportation industry and the economy in general. Progeny (and presumably the other licensees) shared this goal, and it has tried to implement a system that would deliver the promise of LMS. As discussed above, however, Progeny’s efforts have been frustrated by the absence of equipment and capital, which in turn can be ascribed, at least in part, to the restrictive service rules for LMS. As a result, potentially valuable spectrum has lain fallow, and there is little likelihood that it will be put to productive use for these services (or others) unless there is a change in those rules.”</p> <p><b>Progeny LMS LLC, Ex Parte Presentation, filed on March 11, 2005 at Pages 1 and 2:</b> “While awaiting Commission action, Progeny filed a Request for Waiver last month for a limited extension of the</p>			
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		<p>construction requirements for its licenses, citing circumstances beyond its control such as a lack of suitable equipment. The waiver request represents an ongoing effort by Progeny to put these licenses to productive use, amid continued exploration of opportunities with equipment-makers and service providers.”</p> <p>“But to maximize the public interest benefits of this spectrum, Progeny continues to believe that a rulemaking proceeding is needed to apply to M-LMS the kinds of flexible use and interference mitigation techniques that have fostered competitive applications for other services, including those at 900 MHz.”</p>			
<p>4. Progeny will tradeoff transmit power and time, in exchange for use flexibility, including no location requirement and no private-radio (not-interconnected) limitation.</p>		<p><b>At Pages 27 and 28 of Petition for Rulemaking:</b> “Progeny thus urges the Commission to substitute technical constraints, as necessary, for the service limitations now incorporated in the LMS rules. For spread spectrum operations, Progeny believes that a limit on the number of simultaneous users or on total power will afford sufficient protection to the primary users, while also limiting the adverse effects on the “secondary” users. For non-spread spectrum operations, Progeny believes that a duty-cycle limit, along with the current technical constraints, will provide sufficient protection for the other current users of the 902-928</p>		<p><b>Appendix at A.5:</b> The Commission also seeks comment on whether interference that might result from expanded service M-LMS offerings could be mitigated by adopting stricter power limits for M-LMS licensees, introducing frequency hopping, or altering digital modulation rules.</p> <p><b>At Paragraph 21:</b> Specifically, we seek comment on the extent to which stricter power limits, discussed in Section III-B below, or other technical restrictions, could limit the potential for interference between more flexible licensed use and existing</p>	

		<p>MHz band.”</p> <p><b>At Page 12 of Reply Comments:</b> “Interference mitigation techniques LMS systems can employ include using directional antennas for base station transmissions, power control algorithms and discontinuous transmissions. Utilizing directional antennas can provide up to 20 dB or more of interference protection to Part 15 devices that are not in the main beam of the antenna. Utilizing dynamic power control algorithms to maintain LMS transmissions at the minimum required power levels can reduce potential interference to Part 15 devices up to 15 dB or more. Discontinuous transmissions can gate off transmitters during even very brief moments when there is no information to send. Even brief lapses in transmissions provide a great interference benefit to other users of the band.”</p> <p><b>At Page 22 of Reply Comments:</b> “In addition, LMS licensees could agree to limits on the amount of spectrum they employ, or to alterations in duty cycles for transmission. In rare circumstances, reasonable power limitations could be negotiated.”</p>		<p>unlicensed use of the M-LMS Band.</p> <p><b>At Paragraph 28:</b> We therefore seek comment on the consequences of reducing the maximum permitted transmitter power in the three primary M-LMS band segments: 904.000-909.750 MHz, 919.750-921.750 MHz, and 921.750-927.250 MHz. We seek specific comment on whether reducing the maximum permitted transmitter power of M-LMS in these segments, from the current limit of 30 Watts ERP to a new lower limit of 6.1 Watts ERP (which equals 10 Watts EIRP), would result in an environment where M-LMS stations operate on far more comparable power levels with Part 15 devices, provided an appropriate minimum bandwidth or methodology is specified on how power would be measured for new flexible M-LMS operations. Under such a rule change, M-LMS licensees would be allowed to operate their stations with only 2.5 times as much power as Part 15 device users, rather than the 12.3 times now permitted under Commission rules.</p> <p><b>At Paragraph 29:</b> Each of the three M-LMS block licenses has an associated 0.25 megahertz channel (located in the 927.25 to 928 MHz portion of the band), which is subject to a</p>	
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				<p>current 300 Watts ERP (which equals 492 Watts EIRP) power limit per transmitter. We seek comment on reducing these limits to a maximum 10 Watts ERP power limit for each channel to mitigate the potential for unreasonable interference to existing Part 15 devices.</p> <p><b>At Paragraph 30:</b> For example, we seek comment on whether to adopt technical rules for M-LMS operations that are similar to the frequency hopping and digital modulation rules set forth in Section 15.247 of the Commission's regulations.</p> <p><b>At Paragraph 32:</b> Under such an adaptation to the M-LMS rules, we seek comment on whether the spectral power density limit of Section 15.247, adjusted for the power levels discussed above for M-LMS stations (<i>i.e.</i>, a 10 Watt EIRP limit for M-LMS stations, which represents a 4 dB increase over the existing 4 Watt EIRP limit for Part 15 devices), would satisfactorily eliminate unreasonable interference to Part 15 operations. Specifically, would a spectral power density limit of 12 dBm per 3 kHz be technically reasonable and</p>	
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				<p>appropriate? We also seek comment on a minimum bandwidth for digital modulation (including direct sequence spread spectrum). Would the 6 dB emission bandwidth of 500 kHz used in Section 15.247 also be technically reasonable and appropriate for M-LMS and permit Part 15 devices to continue to use the M-LMS Band without unreasonable interference? Section 15.247 also includes provisions regarding occupancy time, and separate power limits based on the number of hopping channels used for frequency hopping spread spectrum devices. If we were to adopt spread spectrum rules for M-LMS that are similar to those in Section 15.247, should M-LMS licensees be permitted to use frequency hopping spread spectrum modulation? If so, what power and other technical limits would be appropriate and enable users of Part 15 devices to continue to operate in the band without unreasonable interference?</p>	
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<p>FCC accepts above {  {  {  {</p>	<p>A. Issues  NPMR with  Progeny  tradeoff  proposal &amp;  rationale.  Released March  7, 2006.</p> <p>B. Grants  Extension May  24, 2006</p> <p>-- A &amp; B  inextricable --</p>			<p>NPRM issued, inextricable with grant of Extension Request. To accept Progeny bald (and spurious) assertion of non-viable LMS-M in the Extension Request, and to grant it, virtually required issuance of NPRM.</p> <p><b>At Paragraph 18:</b> The current M-LMS rules place significant restrictions on M-LMS operations that were designed in large measure to limit interference among the variety of users within this band. We inquire whether these restrictions might unnecessarily restrict the use of the band and impede more efficient use of spectrum.... A consequence of these restrictions, however, has been that M-LMS licensees may be unnecessarily prevented from providing other services, even as technical advances and market demands change what may be feasible within the interference parameters established for this band. Given the history of this band and our goal to provide rules that promote licensee flexibility while protecting other users, we seek comment on whether the existing restrictions may be impeding the development of more services of greater value to the public, as well as comment on the feasibility of changing certain rules to provide licensees additional flexibility.</p>	
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				<p><b>At Paragraph 19:</b> This section seeks comment on whether the Commission can promote more efficient use of the M-LMS Band by modifying or eliminating M-LMS restrictions on types of permissible communications (<i>e.g.</i>, vehicle location as primary operation) and interconnection, while protecting other licensed and federal applications and minimizing interference to unlicensed users.</p>	
<p><b>Phase 2:</b> After licenses extended, Progeny reverses positions used to get the grant. It (1) now retracts the tradeoff proposal, (2) now asserts it is going to provide LMS-M location service (a secret, unidentified, “ELP”), (3) now will do PMRS public safety (even “Homeland Security”). These 3 DO NOT NEED “flexibility,” they are fully permitted under current rules.</p>					
<p>5. Progeny withdraw’s tradeoff used to get grant of Extension and NPRM.</p>					<p><b>Comments at pages iv and v:</b> Progeny previously has demonstrated to the Commission that an LMS system operating at 30 Watts ERP (effective radiated power) would cause no more interference to Part 15 devices than would other Part 15 devices. Since submitting this assessment to the Commission four years ago, advancements in radio equipment point to a level of interference risk that is further diminished or even non-existent. Moreover, reducing the allowed output power from 30 Watts ERP to 6.1 Watts ERP would not reduce the risk of harmful interference. M-LMS systems</p>

					<p>would be compelled to make up for this lower allowed output power by building more transmitters to cover the same geographic area. Thus, the lower output power would not reduce the potential interference risk to Part 15 devices and would increase network build-out and operational costs to a level that would continue to foreclose the deployment of viable systems in MLMS spectrum. In Progeny's view, the Commission should allow M-LMS systems using closed loop power control systems and sectorized antennas to operate above the 30 Watt ERP limit, commensurate with the interference reduction level facilitated by these technologies and in line with rules for other spectrum bands.</p> <p><b>See Comments at Section II. A., B., C., D., and E.</b></p> <p><b>Comments at Pages 23 and 24:</b> Progeny firmly believes that the proposed reduction in output power for M-LMS systems will have no meaningful impact on the interference environment. Meanwhile, it will cause the cost of M-LMS systems to become uneconomical to deploy and operate, will hinder useful inter-operation among licensed and unlicensed users of the band, and,</p>
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					<p>in short, will deny public safety and commercial users the opportunity to reap maximum benefits from this spectrum.</p> <p><b>Comments at Page 30:</b>  Progeny submits that M-LMS systems should be allowed to operate above the allowed 30 Watt ERP output power level under special circumstances, using well-documented advanced engineering techniques. In particular, Progeny believes M-LMS licensees should be allowed an additional 5 dB in output power when using closed loop power control systems, and an additional variable allowance based on the use of sectorized antennas.</p> <p>See various parts of Progeny Comments, Reply Comments and Ex Parte Presentations in WT Docket No. 06-49.</p>
<p>6. Clearly in technical ignorance, despite the preceding, Progeny suggests Power Spectral Density that would give up virtually all power.</p>					<p><b>See Comments at Section II. D.</b></p> <p>See various parts of Progeny Comments, Reply Comments and Ex Parte Presentations in WT Docket No. 06-49.</p>

<p>7. Progeny withdraws assertion that LMS-M for location will fail.</p> <p>Progeny baldly alleges development a location service using LMS-M, "EPL."</p>					<p><b>Comments at page ii:</b> Progeny currently is developing an Enhanced Position Location (EPL) service that will provide valuable enhancements for the public safety and homeland security markets.</p> <p><b>Comments at pages 10 and 11:</b> Proof that the Commission's proposals in this proceeding are on the right track can be found in recent efforts by Progeny to develop a technical and business case for a system called "Enhanced Position Location" (EPL). This planned system will use technology, for which a patent application has been filed, to locate devices in areas where GPS service does not function adequately. Examples include providing service deep inside buildings or in subterranean areas, and at remote disaster scenes. This service is intended for public safety users and other providers of critical infrastructure, as well as by a broad range of customers in crisis situations. Progeny envisions that EPL technology will be embedded into mobile radios used by public safety officials, and could, in fact, be embedded into ordinary wireless devices. EPL will deliver significant improvements over current location systems, serving areas where location data and related information are urgently needed but currently unavailable</p>
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					<p>on a broadband basis. Moreover, this service is aligned with the original scope and intentions of the Commission in this band.</p> <p>See various parts of Progeny Comments, Reply Comments and Ex Parte Presentations in WT Docket No. 06-49.</p>
<p>8. Progeny withdraws assertion that LMS-M needs flexibility for interconnect (CMRS).</p> <p>Progeny baldly alleged it will serve public safety (PMRS).</p>					<p><b>Comments at page ii:</b> Progeny currently is developing an Enhanced Position Location (EPL) service that will provide valuable enhancements for the public safety and homeland security markets.</p> <p><b>Comments at Page 2:</b> The lifting of service restrictions and other outdated regulations will pave the way for Progeny and other M-LMS licensees to pioneer advanced, location-based services that the market demands, particularly to meet vital homeland security and public safety needs.</p> <p><b>See Comments at pages 10 and 11 re: EPL.</b></p> <p><b>Comments at page 11:</b> Full service flexibility is needed and warranted to allow this and other, similar homeland security and public safety services to develop and reach their full market potential.</p> <p><b>Comments at page 44:</b> If the right rules are in place, M-</p>

					<p>LMS licensees such as Progeny will be able to offer advanced, location-based services, such as Progeny’s planned EPL offering, which will serve the public interest and promote economic growth, public safety and spectral efficiency.</p> <p>See various parts of Progeny Comments, Reply Comments and Ex Parte Presentations in WT Docket No. 06-49.</p>
<p>9. Progeny new position</p> <p>LMS-M CAN be viable for location.</p> <p>LMS-M CAN be viable for private radio.</p>					<p>Progeny alleges it is developing “EPL” location equipment and service.</p> <p>Progeny alleges it will serve public safety, which is private radio.</p> <p><b>Comments at page ii:</b> Progeny currently is developing an Enhanced Position Location (EPL) service that will provide valuable enhancements for the public safety and homeland security markets.</p> <p><b>Comments at Page 2:</b></p> <p>The lifting of service restrictions and other outdated regulations will pave the way for Progeny and other M-LMS licensees to pioneer advanced, location-based services that the market demands, particularly to meet vital homeland security and public safety needs.</p> <p><b>See Comments at pages 10 and 11 re: EPL.</b></p>

					<p><b>Comments at page 11:</b> Full service flexibility is needed and warranted to allow this and other, similar homeland security and public safety services to develop and reach their full market potential.</p> <p><b>Comments at page 44:</b> If the right rules are in place, M-LMS licensees such as Progeny will be able to offer advanced, location-based services, such as Progeny's planned EPL offering, which will serve the public interest and promote economic growth, public safety and spectral efficiency.</p> <p>See various parts of Progeny Comments, Reply Comments and Ex Parte Presentations in WT Docket No. 06-49.</p>
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## Attachment 4

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The entire Progeny due diligence to meet its extension request is set forth below. By agreement of Progeny with Havens and the Bureau (Attachment 2 above), only the following, and not the redacted information, was considered in the Bureau's decision.

As the Petition and Reply note: the Bureau could not rationally ignore Progeny's assertions in RM-10403 that no LMS-M constructed service could be viable under current rules. Thus, in somehow finding from the below that Progeny exercised the required due diligence, the Bureau rationally had to conclude that Progeny was diligently attempting to get equipment, to construct, only to fail. That is manifestly not in the public interest, not within the FCC's waiver criteria, and not within precedent.

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**Attachment B  
Confidential Filing  
Due Diligence Activities  
Progeny LMS, LLC**

The information contained herein provides further details concerning Progeny's due diligence efforts to deploy service on M-LMS spectrum, despite continued difficulties in obtaining equipment that would meet the relevant five-year build-out deadline on these licenses. In a separate letter, Progeny requests that the material contained in this Attachment, submitted in conjunction with this limited Request for Waiver to extend the construction timeline, be withheld from public inspection. This request is made pursuant to Sections 0.457(d) and 0.459 of the FCC's rules<sup>1</sup>. The material contains privileged information concerning pending efforts to reach partnership agreements or past contacts with equipment vendors, which could have a bearing on future agreements.<sup>2</sup> The confidential treatment of this document allows for the provision of information about Progeny's business development approach and/or research concerning available equipment.

**1. Communications with Service Providers, Equipment Makers**

Progeny has held communications with major end users, service providers and equipment manufacturers to further its goal of deploying services as rapidly as possible using the licenses in this band. The potential customers represent critical infrastructure providers and end users who have an immediate interest in the security and tracking applications that would be enabled by deployment of viable M-LMS services.

To this end, Progeny has utilized the services of consultants and technical experts to facilitate partnership and development opportunities with these entities. Progeny entered into consulting agreements to explore development opportunities for services and equipment as early as August 2000, just weeks after the licenses were granted by the FCC. In addition, to direct discussions by Progeny management, the services of the following consultants have been or are retained:

[REDACTED]

<sup>1</sup> 47 C.F.R. Section 0.457(d) and 0.459.

<sup>2</sup> To assist the Commission in its consideration of the instant request, Progeny has attached a copy of the referenced Request for Waiver.

Progeny and the consultants it has retained have contacted the following service providers and/or end users concerning development opportunities for its M-LMS licenses:

[REDACTED]

[REDACTED]

Progeny and the consultants it has retained have contacted the following equipment vendors and developers concerning the required equipment to commence construction for the M-LMS licenses:

[REDACTED]

Other firms and individuals with whom Progeny and its consultants have explored development opportunities include:

[REDACTED]

**2. Market Research/Survey of Equipment Makers**

Most recently, Freedom Technologies, Inc., consultants to Progeny, conducted research to refresh the record concerning the scope of equipment that may be available.

Progeny undertook this step out of an abundance of caution to again substantiate that which the Commission stated in the *Havens Order*, which is that "Havens' situation is unique in that no equipment is available, making it impossible for construction to occur at this time."<sup>3</sup>

As demonstrated herein, Progeny has continued to solicit interest and explore opportunities with equipment vendors and other partners to commence providing service on the M-LMS licenses. The survey of vendors was conducted to ensure that those discussions had not overlooked potential equipment that could be deployed on the M-LMS licenses. The survey indicated that there has been no change since 2000 regarding the lack of suitable equipment for the band.

Progeny has informed the Commission in numerous filings of its attempts to obtain equipment for the band. In the 2002 Petition for Rulemaking that Progeny filed to seek regulatory flexibility for the band, the company described a list of equipment vendors contacted for stand-alone location and monitoring service equipment. The feedback indicated that in several cases, engineers and regulatory experts at vendors had examined the possibility of manufacturing equipment for LMS spectrum but had concluded that given the regulatory restrictions in the band, the investment would not be justified.<sup>4</sup> In some cases, vendors suggested that the proliferation of GPS applications had overtaken the usefulness of the LMS band based on current regulations.

**Alcatel:** A review of Alcatel's product listings did not reveal equipment offerings that would be suitable for building out M-LMS networks. By comparison, the company has delivered wireless LMDS solutions for 900 MHz GSM networks in certain markets.

**Alvarion:** Alvarion does not market equipment that could be operated in M-LMS spectrum. For licensed spectrum, the company markets offerings for operations at 3.5 GHz, 10.5 GHz and 26 and 28 GHz.

**Cisco:** A comprehensive search of Cisco's Web site and other technical materials indicates that the company does not currently market a product for M-LMS applications at 902-928 MHz.

**IP Wireless:** IP Wireless does not presently provide equipment that could be used in M-LMS spectrum. For example, the company offers commercial products in the following bands: 1900 - 1920 MHz (IMT-2000 3G band); 2010 - 2025 MHz (IMT-2000 3G band); 2053 - 2082 MHz; 2500 - 2690 MHz (MMDS / ITFS band in US, IMT-2000 extension band internationally); and 3400 - 3600 MHz (international FWA

<sup>3</sup> See In the Matter of Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for His Multilateration Location and Monitoring Service Economic Area Licenses, Memorandum Opinion and Order, released December 9, 2004 (*Havens Order*), at page 3.

<sup>4</sup> See Petition for Rulemaking filed by Progeny, RM-10403 (filed March 5, 2002) at page 16 (*Progeny Petition*).

band). Products in development include 700 MHz (U.S.) and 2300-2400 MHz (China and Korea for TDD operations; U.S. for WCS operations and U.S. and Australia for MMDS).

**Lucent:** An extensive search of Lucent's online product listings indicated that no equipment that is presently marketed would be applicable to meeting Progeny's M-LMS build-out obligations.

**Motorola:** A complete search of Motorola's available product lines indicated that the company does not presently market products that would be suitable for deployment to meet the construction requirements of M-LMS licenses.

**Nokia:** Nokia does not currently market equipment that would be viable for meeting Progeny's construction obligations for its M-LMS licenses. The company, for example, offers TETRA network and related equipment for public safety networks, but does not provide configurations that would fall within the strict service restrictions and other operating requirements of the FCC's M-LMS rules.

**Nortel:** A survey of Nortel's online product listing did not turn up equipment that would be applicable to building out Progeny's licenses at 902-928 MHz.

**TrangoBroadband Wireless:** This firm offers a 900 MHz non-line-of-sight system for 900 MHz license-exempt spectrum to deliver up to 3 Mbps to end users. The company does not market offerings for licensed users in this band.

**WaveRider:** WaveRider makes non-line-of-sight 902-928 MHz broadband systems for license-exempt services, but not their licensed counterparts in the band.

In addition through agreements with consultant, Progeny has continued ongoing market research of applications for its M-LMS licenses, including those related to RFID. This research includes attendance at the FCC's October 7, 2004, RFID workshop and monitoring and assessments of RFID deployment in the commercial sector, including plans by Wal-Mart.

Certificate of Filing and Service

I, Warren Havens, hereby certify that I have, on this day, July 19, 2006, performed the following filing and service of the foregoing *Reply to Opposition to Petition for Reconsideration, Supplemented and Amended*:

Filing-- by filing on ULS and via the email listed below under FCC 01-345:

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> St., SW, Room TW-B204  
Washington, D.C. 20554  
Email: [WTBSecretary@fcc.gov](mailto:WTBSecretary@fcc.gov))

Service--by placing into the USPS mail system a copy of with first-class postage prepaid affixed, to the following, unless otherwise noted below:

Richard Arsenault  
Wireless Telecommunications Bureau  
445 12<sup>th</sup> St., SW, Room 4-B408  
Washington, D.C. 20554  
(Via email only to [Richard.Arsenault@fcc.gov](mailto:Richard.Arsenault@fcc.gov))

Progeny LMS, LLC  
Janice Obuchowski  
Halprin Temple  
1317 F Street NW  
Washington, DC 20004  
(Also\* via email to [JO@ftdc.com](mailto:JO@ftdc.com))

*[Filed electronically. Signature on file.]*

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Warren Havens

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\* This email copy is complementary and not for purposes of service.