

**Subj: WT 06-49, LMS-M NPRM, Ex Parte: Lack of standing: Progeny, and Part 15 Coalition**  
**Date:** Wednesday, June 13, 2007 11:30:29 AM  
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**Telesaurus** (\*)

*Ex parte presentation.* Electronic submission. June 13, 2007.

Marlene Dortch, Secretary  
 Federal Communications Commission  
 Office of the Secretary  
 445 12th Street, SW  
 Washington, DC 20054

Re: **WT 06-49**: Procedural challenges: lack of standing:

- (1) Progeny LMS LLC -- re: legal dissolution of the Progeny high bidder, invalid licenses, and no showing of representation.
- (2) The Part 15 Coalition -- re: lack of legal-entity existence, lack of any license rights, and no showing of representation.

Secretary, Chairman, Commissioners, Staff,

This is hereby presented via email to FCC employees on below "distribution list," with copies to the alleged parties on the list including the Part 15 Coalition counsel, and Progeny LMS LLC counsel. A copy will be filed on ECFS in this docket.

This is also presented here for the record, in the case the undersigned LLCs, or others with standing, seek court review of the FCC final-action decision made in this NPRM proceeding, or seek court relief prior to said decision.

**1. Progeny LMS LLC ("Progeny") -- lack of standing.**

a. As shown in recent past filings in this docket by the undersigned entities (together, "**Telesaurus**") Progeny LMS LLC obtained its LMS-M licenses in violation of fundamental rules (it did not exist when it bid for the licenses, nor when it submitted its long form; and it did not qualify for the 35% discount; and it withheld all this information on rule violations to the FCC at all times, and to this day). *Progeny has provided nothing to refute the specific evidence presented, or the conclusions drawn thereupon.*

b. In addition, the legal entity that was in existence and that was used to apply for and bid in the auction, and submit auction payment, was Progeny Post LMS LLC ("Progeny Post")--not Progeny LMS LLC, which is a separate legal entity. (See Telesaurus 5.7.07 Ex Parte filing, exhibits, p. 23.) This entity, Progeny Post, was the only entity to which the FCC, under its rules and the Communication Act (including 47 USC §309(a)) may have granted LMS-M licenses. Progeny mislead the FCC into thinking that the auction participant was the same as the entity to which the FCC, eventually, granted the licenses. (See Telesaurus 5.7.07 filing.) Progeny lacks standing since: (i) its licenses are invalid for reasons noted, and (ii) the actual auction participant--Progeny Post--*dissolved in year 2002*: see attachment hereto.

c. Further, there is no evidence in filings by Janice Obuchowski and Freedom Technologies (together, "FT") in this docket that FT is an authorized agent of Progeny LMS LLC.

Accordingly, Progeny, and FT, lack standing to make presentations in this docket with regard to changing LMS-M rules. Thus, since this NPRM is based solely on Progeny's assertions and requests in RM-10403, this NPRM should be terminated with no changes made.

## 2. Part 15 Coalition ("Coalition") -- lack of standing.

a. The Coalition is not a legal entity. It is not a "person" or "party" that may make presentations to the FCC including under 47 CFR §§ 1.415, 1.21, or appeal any FCC decision to the courts under 47 USC § 402(b), or sue under 47 USC § 401(b).

b. Neither the Coalition, nor its attorneys, have demonstrated authority to act as agents on behalf of the commercial legal entities, and nonprofit trade association entities, that they purport to represent. Also, the Coalition does not, for itself, claim to use any Part 15 device, or plan to use any, in the LMS-M or any other spectrum.

c. No person, including the Coalition's alleged represented entities, has any vested right to use LMS-M band spectrum on a Part 15 basis (or any spectrum on a Part 15 basis). The Commission made clear in LMS-M rulemaking Orders that no entity that uses or may use such LMS-M spectrum on a Part 15 basis has any vested rights to use the spectrum-- even considering the rules that provide the "Safe Harbor" (§ 90.361) and for certain testing by LMS-M licensees (§ 90.353(d), end). The creation of the LMS-M ITS Radio Service, with the noted protections for use on a Part 15 basis, did not change the fundamental Part 15 rules and policies, which include that no person has spectrum rights for use of unlicensed devices.

Without legal rights at clear risk or in fact damaged, no person can be a "person aggrieved" with standing to pursue legal action with regard to FCC licenses and rights thereunder. *SunCom v. FCC*, 318 U.S. App. D.C. 377 (1996). This NPRM is considering rules changes that will substantially change LMS-M license rights.

Also, even if the Coalition were were a legal entity "person" that had members (which it is not), in order for it to meet the "associational standing test" to have legal standing on a representative basis it would have to demonstrate that at least one of its members satisfies the three elements that form the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). The Coalition cannot do this for reasons noted above: none of its suggested members have any legal rights at risk and cannot be a "person aggrieved."

Congress did not give the FCC authority in the Communications Act, and could not have given the FCC authority, to find that any person has standing to seek FCC action regard to FCC licenses when said party does not have standing under Article III of the Constitution to pursue its case to court. Otherwise, said parties could affect said license rights at the FCC level, when it has no such rights on judicial review: FCC administrative proceedings are not separate from and above judicial proceedings on the same subject, but are part of one legal process to adjudicate rights that commence at the FCC and end with the courts.

Thus, neither the Coalition, nor its alleged represented entities, nor any other entity, has standing to seek changes in LMS-M rules, by asserting use of LMS-M spectrum on a Part 15 basis.

d. The Coalition purports to represent trade organizations, such as United Telecom Counsel, which themselves have no power to legally bind their members (and which often express views on a "consensus" basis, or on the basis of the members with the most influence, and not in accord with views of many members or even the majority). The Coalition is thus at least twice removed from any actual "person" who may have standing to pursue rights in a license band-- if such "person" indeed had any vested rights (see '2(c)' above).

Further, Telesaurus has had communications with some of the entities which the Coalition attorneys allege to represent, including major US power utilities and railroads, and equipment vendors, and does not believe that the positions expressed by the Coalition recently-- that essential LMS-M technical rights should be reduced (authorized power, and no restriction as to time of use) reflect the positions of and interests of such specific entities. These entities-- the actual legal entity "persons" with possible standing (potential license rights), not their trade associations, and not an unincorporated "Coalition" layer on top said associations), are US infrastructure entities, use the highways extensively, and have good cause to support Intelligent Transportation Systems under Part 90: for the same reason they support their own Part 90 license rights for their own infrastructure wireless.

For all the above reasons ('a' to 'd'):

- The Coalition has no standing in this NPRM proceeding.
- Telesaurus believes that action in this NPRM to date, including acceptance of repeated presentations by the Coalition in ongoing debate with Progeny before FCC staff (which effectively constitutes a hearing) is unauthorized under the Communications Act.

### Conclusions

1. For reasons given above, the presentations of Progeny and the Part 15 Coalition should not be considered in this NPRM.

2. To the degree that the FCC considers in this NPRM proceeding the presentations of parties based on their current or projected future alleged use of LMS-M spectrum on a Part 15 basis (which Telesaurus intends to challenge, on appeal), the FCC cannot give those views priority over the vested interests and view of any LMS-M licensee (holding valid LMS-M licenses) since said valid LMS-M licensees have vested legal rights, whereas persons with only a Part 15 use have no such rights. [\*]

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[\*] In this regard, Telesaurus asserts here (as it has described in past filings in this docket, and RM-10403) that it plans to use 902-928 MHz on a Part 15 basis, in addition to LMS-M basis, for certain supplementation of the LMS-M basis, for ITS wireless. Thus, Telesaurus also speaks for the "Part 15" community. Indeed, ITS radio services as conceived by the Commission (and by US and State DOTs, and ITS America and its members) may include (and under Telesaurus' plans as reflected in its website, will include) virtually all the US public. Thus, ITS radio service's use of spectrum on a Part 15 basis is more clearly in the public interest than use by any segment. Unlike the Coalition, however, Telesaurus has shown in this proceeding that its use of LMS-M under its Part 90 licenses will not conflict with any entities use of said spectrum on a Part 15 basis, including due to separation in time and space (and for other reasons clearly explained and understandable on technical and economic bases).

Respectfully,

/s/ Warren Havens

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Name Searched On:  
PROGENY LMS LLC (Legal)

Current Information

Entity Legal Name:  
PROGENY POST LMS, LLC

Entity Address:  
20 N Meridian St, Ste 800, INDPLS, IN 46204

General Entity Information:

Control Number: 1996080786  
Status: Admin Dissolved  
Entity Type: Domestic Limited Liability Company (LLC)

Entity Creation Date: 8/13/1996  
Entity Date to Expire:  
Entity Inactive Date: 5/14/2002

Other Names for this Entity:

| Date       | Name (Type)                                  |
|------------|--|
| 8/13/1996  | NORTHSTAR (Assumed / Marion County )         |
| 12/14/1998 | PROGENY POST SPORTS MANAGEMENT, LLC (Former) |

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