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

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JAN 17 2008

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

PR Docket No. 92-257

RM-9664

ORDER ON FURTHER RECONSIDERATION

Adopted: January 14, 2008

Released: January 14, 2008

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* In this *Order on Further Reconsideration*, we address a petition¹ filed by Warren C. Havens (Havens) for reconsideration of the *Third Memorandum Opinion and Order* in this proceeding.² The *Third Memorandum Opinion and Order* denied Havens's petition for reconsideration of the dismissal of certain Automated Maritime Telecommunications System (AMTS) applications filed by Havens.³ For the reasons set forth below, we dismiss the instant petition for reconsideration.

2. *Background.* Havens filed the applications at issue in 2000. Mobex Communications, Inc. (Mobex) then filed applications that the Wireless Telecommunications Bureau (Bureau) deemed to be mutually exclusive with the Havens applications.⁴ While the applications were pending, the Commission released the *Third Further Notice of Proposed Rule Making* in this proceeding, which proposed to transition the AMTS service from site-based licensing to geographic licensing.⁵ The Commission consequently suspended the processing of pending mutually exclusive AMTS applications, and stated that such applications would be held in abeyance until the conclusion of the proceeding, whereupon it would determine how best to resolve such applications.⁶

¹ Petition for Reconsideration (filed Dec. 18, 2003) (Petition).

² Amendment of the Commission's Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391 (2003) ("*Third Memorandum Opinion and Order*").

³ FCC File Nos. 853032-042, 853044-046, 853057-060, 853070-072, 853175-176, 853190-193, 853252-258, 853460-461, 853562-576, 853578-581, 853611, 853615, 853667-677, 855043. Havens's subsequent request to withdraw the Petition with respect to FCC File Nos. 853036-37 and 853070-72 was granted on October 26, 2007. See Letter dated October 26, 2007 from Scot Stone, Deputy Chief, Mobility Division, to Warren Havens. Consequently, the present *Order on Further Reconsideration* addresses the Petition only with respect to the other applications.

⁴ The applications actually were filed by Mobex, Regionet Wireless License, LLC (Regionet), and Waterway Communications System, LLC (Watercom). Because both Regionet and Watercom later came to be controlled by Mobex, we will hereinafter refer to applications filed by these three entities as "Mobex applications."

⁵ See Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 15 FCC Rcd 22585, 22599-600 ¶ 30 (2000).

⁶ *Id.* at 22622 ¶ 78.

3. In a petition for reconsideration of the processing suspension, Havens argued that the Commission should dismiss any mutually exclusive applications that did not comply with the AMTS service coverage⁷ and broadcast television interference protection⁸ requirements. Havens also requested that the Commission dismiss certain Mobex AMTS applications that Havens contended were defective.

4. In the *Second Memorandum Opinion and Order* in this proceeding, the Commission denied the Havens petition for reconsideration, concluding that suspension of processing of AMTS applications was warranted in order to facilitate the orderly and effective resolution of the matters pending in the proceeding.⁹ It also denied the request that the Mobex applications be dismissed, reasoning that dismissing these Mobex applications, and then processing Havens's mutually exclusive applications, would be inconsistent with its processing suspension, and would undermine one of the purposes of the processing suspension (*i.e.*, to prevent further license grants under the current rules that could potentially lead to results inconsistent with the decisions ultimately made in this rulemaking proceeding).¹⁰ In the concurrent *Fifth Report and Order*, the Commission determined that the public interest would be served by licensing AMTS spectrum through geographic area licensing,¹¹ and adopted a co-channel protection standard to protect incumbent AMTS stations against interference from geographic area licensee operations.¹² The Commission also concluded that it would be contrary to the public interest to continue to process site-based applications,¹³ so it dismissed all AMTS applications the processing of which had been suspended.¹⁴

5. Havens filed a petition for reconsideration, arguing that the Bureau was obligated under Section 1.934 of the Commission's Rules¹⁵ to avoid mutual exclusivity by ensuring that the applications complied with certain threshold qualifications before accepting those applications for filing. He asserted that if the Bureau had closely examined the Mobex applications before accepting them for filing, it would have dismissed them for non-compliance with the AMTS service coverage and broadcast television interference protection requirements, thereby avoiding mutual exclusivity and enabling Havens's applications to be processed. Separately, other petitioners sought reconsideration of the co-channel interference protection standard adopted in the *Fifth Report and Order*.

6. In the *Third Memorandum Opinion and Order*, the Commission denied Havens's petition for reconsideration, concluding that Section 1.934 did not obligate the Bureau to dismiss applications that did not comply with the AMTS technical requirements prior to accepting them for filing.¹⁶ Consequently, it

⁷ 47 C.F.R. § 80.474(a).

⁸ 47 C.F.R. § 80.215(h).

⁹ See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6692 ¶ 15 (2002) ("Second Memorandum Opinion" and "Fifth Report and Order").

¹⁰ *Second Memorandum Opinion*, 17 FCC Rcd at 6694 ¶ 20.

¹¹ *Fifth Report and Order*, 17 FCC Rcd at 6696 ¶ 24.

¹² *Id.* at 6700-01 ¶¶ 32-33.

¹³ *Second Memorandum Opinion*, 17 FCC Rcd at 6694 ¶ 18.

¹⁴ *Fifth Report and Order* at 6720 ¶ 83, 6721 ¶ 90.

¹⁵ 47 C.F.R. § 1.934.

¹⁶ See *Third Memorandum Opinion and Order*, 18 FCC Rcd at 24398 ¶ 17. The Commission explained that an application may be accepted for filing, then dismissed as defective later upon subsequent review and processing. *Id.* (citing 47 C.F.R. § 1.933(b) ("Acceptance for filing shall not preclude the subsequent dismissal of an application as defective")).

concluded that the Bureau did not err in accepting for filing the Mobex applications that were mutually exclusive with Havens's applications.¹⁷ The Commission granted the other petitions for reconsideration, however, and modified the AMTS incumbent co-channel interference protection standard.¹⁸

7. Havens then filed the instant petition for reconsideration.¹⁹ He also appealed the *Third Memorandum Opinion and Order* to the U.S. Court of Appeals for the District of Columbia Circuit, which dismissed the appeal as premature in light of the pending petition for reconsideration.²⁰

8. *Discussion.* We dismiss Havens's petition for reconsideration of the *Third Memorandum Opinion and Order*. Section 1.106(k)(3) of the Commission's Rules states that a "petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious"²¹ As the Commission has stated, "Absent extraordinary circumstances, '[i]f the "tacking" of petitions were permitted, Commission actions might never become final and the rule would become nugatory."²² Havens's most recent petition fails to support his arguments with any new facts or changed circumstances.²³ Havens argues that his applications should now be processed because Mobex did not file a petition for reconsideration of the dismissal of its pending applications while Havens did, so there is no longer any mutual exclusivity because only the Havens applications remain pending.²⁴ When the Commission released the *Third Memorandum Opinion and Order*, however, it was well aware that Mobex had not sought reconsideration of the dismissal of its applications.²⁵ Thus, this is not a new fact or changed circumstance.²⁶ In the alternative, Havens argues that the Havens and Mobex applications should be reviewed in light of the AMTS incumbent co-channel interference protection standard adopted in this proceeding in order to determine whether they were truly mutually exclusive, because there was no objective basis for determining mutual exclusivity prior to the *Third Memorandum Opinion and Order*.²⁷

¹⁷ *Id.*

¹⁸ *Id.* at 24401 ¶¶ 23-24.

¹⁹ Mobex filed an opposition. Opposition to Petition for Reconsideration (filed Dec. 30, 2003) (Opposition). Havens filed a reply. Reply to Opposition to Petition for Reconsideration (filed Jan. 12, 2004).

²⁰ See *Havens v. FCC*, Nos. 03-1446, 03-1447 (rel. Apr. 22, 2004) (per curiam).

²¹ 47 C.F.R. § 1.106(k)(3); see also 47 C.F.R. § 1.429(i) ("a second petition for reconsideration [regarding action taken in a rulemaking proceeding] may be dismissed by the staff as repetitious").

²² Great Lakes Broadcast Academy, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 11655, 11656 ¶ 5 (2004) (quoting Brainerd Broadcasting Company, *Memorandum Opinion and Order*, 25 Rad. Reg. 297, 298 (1963) (citation omitted)).

²³ See, e.g., Allnet Communications Services, Inc. v. Wisconsin Bell, Inc., *Memorandum Opinion and Order*, 7 FCC Rcd 932, 932-33 ¶ 6 (CCB 1992).

²⁴ See Petition at 2-3.

²⁵ Mobex asserts that it did not file a petition for reconsideration because it agreed with the Commission that the Mobex and Havens applications were mutually exclusive and should be dismissed. See Opposition at 3-4.

²⁶ Moreover, Havens's assumption that dismissed AMTS applications remain "pending" for processing purposes as long as an administrative or judicial appeal remains unresolved was rejected in a separate proceeding. See Warren C. Havens, *Order*, 19 FCC Rcd 23196, 23199-200 ¶¶ 9-10 (WTB PSCID 2004), *recon. dismissed*, *Order on Reconsideration*, 20 FCC Rcd 3995 (WTB PSCID 2005), *recon. denied*, *Order on Further Reconsideration*, 21 FCC Rcd 3553 (WTB 2006), *review pending*.

²⁷ See Petition at 5-6.

As set forth above, however, the Commission first adopted an AMTS incumbent co-channel interference protection standard in the *Fifth Report and Order*, not in the *Third Memorandum Opinion and Order*.²⁸

9. ACCORDINGLY, IT IS ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.106 and 1.429 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.429, that the petition for reconsideration filed by Warren C. Havens on December 18, 2003 IS DISMISSED.

10. This action is taken under delegated authority pursuant to Section 0.131 and 0.331 of the Commission's Rules, 47 C.F.R §§ 0.131, 0.331.

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²⁸ Moreover, the modification of the incumbent co-channel interference protection standard in the *Third Memorandum Opinion and Order* does not further Havens's case, as the modification made it more likely that applications would be deemed to conflict. See *Third Memorandum Opinion and Order*, 18 FCC Rcd at 24401 ¶¶ 23-24.