

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

In the Matters of:)	
)	
<i>Order on Further Reconsideration</i>)	DA 08-87, in PR Docket 92-257
)	
<i>Third Memorandum Opinion And Order, Released 11/18/03</i>)	In PR Docket No. 92-257
)	
Amendment of the Commission’s Rules Concerning Maritime Communications)	PR Docket No. 92-257
)	
Petition for Rule Making filed by Regionet Wireless License, LLC)	RM-9664
)	
Applications ¹ of Warren C. Havens for New AMTS Systems Dismissed Per <i>Second Memorandum Opinion, And Order, PR Docket No. 92-257</i>)	In PR Docket No. 92-257 7

To: Office of the Secretary
Attn: Chief, Wireless Telecommunications Bureau

Petition for Reconsideration of the Order on Further Reconsideration
Based on New Facts,
And Related Petition for Reconsideration of the Third MO&O
Based on Said New Facts
Errata copy [*]

Summary and Introduction

Warren C. Havens (“Havens”), AMTS Consortium LLC (“ACL”), Intelligent Transportation & Monitoring Wireless LLC (“ITL”), Telesaurus VPC LLC (“TVL”) and

¹ 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. Warren Havens’s 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 *Petition for Reconsideration* appeals only the other remaining applications.

* [*] Herein, changes are in strikethrough and red, some line spacing and margins adjusted, citations added that was inadvertently left off. and the Exhibits integrated.

Skybridge Spectrum Foundation (“SSF”) (together, “Petitioners”), hereby submit, based on new facts, this filing seeking reconsideration (the “2008 Recon”) of: (1) the *Order on Further Reconsideration*, DA 08-87, (the “OFR”) that dismissed Havens’ previous Petition for Reconsideration (the “2nd Recon”)² and (2) the **other issue in** above-captioned Third MO&O to the extent presented below: **increasing incumbent protection**. The new facts presented herein, mostly those in the two Exhibits, have arisen since the last opportunity.³ These new facts, shown in the two Exhibits (separately filed) include: (i) the new fact that the FCC staff never had any means to determine **either** mutual exclusivity, **or said protection increase**, since it had and used no engineering required for said determinations, and (ii) the new fact that the FCC staff never deleted the AMTS coverage rule lawfully, by public notice and comment, which clearly demonstrates **the underlying** prejudicial intent and action to provide windfall unlawful benefits to incumbent licensees at the expense of Petitioners as geographic licensees (and prior to that time, in attempts as competitors for site-based AMTS licenses) **manifested**: (a) by ~~this~~ **said** rule deletion, **and** (b) by ~~the~~ **said** extension of incumbent interference protection, and (c) by the **preceding** artificial finding of mutual exclusivity in the applications indicated above, while by the same review **finding** exercise, refusing to find the facial defects in the applications of Mobex used deliberately to create mutual exclusivity (as previously demonstrated).

In addition, ~~however~~, Petitioners seek reconsideration for the reason that the OFR failed to address the facts and arguments in the petition it addressed. A reading of the two shows this. The Bureau staff alleges that Petitioners are merely and impermissibly repetitive; however, that is not correct. Repetition on appeal is required: except for certain new facts or relevant new law, one must base an appeal on past presented facts and law, but also show how the decision being appealed was in error. Where the decision does not deal at all or not squarely with facts and

² Petition for Reconsideration (filed Dec. 18, 2003) (the “2nd Recon”).

³ The last opportunity to present facts was at the last pleading deadline in this proceeding which was December 18, 2003.

arguments presented, the appeal can point to that err and ask for reconsideration on that basis alone (and any other basis permitted in FCC rules and the Administrative Procedures Act. In the case of the OFR, the Bureau erred in not fully or squarely addressing the facts and arguments presented, and Petitioners appeal on that basis also. They need not repeat each error in this regard, since the subject petition and the OFR were each short, but point to some below.

Also, Petitioners assert herein clear prejudice by Bureau Staff as a basis of appeal. This was indicated in past filings of Petitioners leading to this 2008 Recon, and ~~is~~ shown by the two Exhibits hereto. It is ~~also~~ further shown by the actions of the Bureau employee who signed the OFR, Mr. Scot Stone, by his impermissible ex parte email exchanges with counsel to Paging Systems Inc. (“PSI”) Audrey Rasmussen, advising her how PSI could maintain maximum service contour from its NYC areas AMTS site-based license by taking no action to construct/reconstruct for a period of six or more years until a new World Trade Center was constructed: this was in an exchange where Ms. Rasmussen cited a restricted proceeding of Petitioners that included challenging that very alleged-valid PSI AMTS license for being permanently discontinued or never constructed (with ample evidence). That was clear unlawful prejudicial action: the same that has pervaded many AMTS decisions including the two subject of this 2008 Recon. It is not possible to get a fair hearing initially or on appeal, in the face of such prejudice. Thus, Petitioners can and do appeal here on that basis alone, along with the other reasons given herein.

Regarding Standing and Interest: Havens already is a party to this proceeding and thus has standing to file this 2008 Recon. ACL, ITL, TVL and SSF have standing and interest to file in this proceeding since this is the first time that they could provide these new facts, they have an interest in seeing the FCC’s rules applied correctly in AMTS, since they each hold AMTS geographic licenses (see ULS records) adversely affected by the subject two decisions, and because they have an agreement with Havens on the Applications as successors in interest.

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New Facts and Arguments, and Request for Relief

See the two Exhibits for the new facts. These new facts and related arguments require integration with the facts and arguments previously submitted in the subject matter.

Petitioners did not have knowledge of these new facts until after the deadline to file the 2nd Recon had passed. Consideration of this 2008 Recon is required due to the new facts and because it is clearly in the public interest that these new facts be addressed and that a new hearing on the matter be held. Petitioners request here as relief that the FCC overturn its previous **two decisions findings** in this proceeding, **noted above**, conduct a new hearing of facts and arguments (since the new facts reveal prejudice in the proceeding, so a rehearing is required), and ultimately grant the relief previously requested by Havens and now Petitioners including: that the Havens applications (the “Applications”) subject of this proceeding that were dismissed by the *Second Memorandum Opinion and Order* in this docket released April 8, 2002 (the “*Second MO&O*”), dismissal of which was subsequently upheld in the *Third Memorandum Opinion and Order* in PR Docket No. 92-257, released November 18, 2003 (the “*Third MO&O*”) (which denied the Havens May 8, 2002 Petition for Reconsideration (the “May 8th Petition”))⁴ be processed and granted, **and that the incumbent protection extension rescinded**. The Applications

⁴ 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 MO&O*”).

were dismissed because the FCC alleged them to be mutually exclusive with applications of Mobex Communications, Inc. (“Mobex”) (the “Mobex Applications”).^{5/6}

Petitioners may raise the noted new facts for the reasons given in *Butterfield v. FCC*, where DC Circuit Court held:

....In these circumstances nothing in the language of sections 310(b) and 405 deprived the Commission of power to receive the new evidence and to reconsider or redecide the case....

Delay in seeking reopening of the record is a factor to be weighed in the exercise of the Commission's discretion. Here, however, it was excusable. The only reason the appellants' effort to reopen was not made earlier in the proceedings was that the new events which occasioned it were kept secret by WJR for several months.⁷ Such a circumstance would have called for reopening the record even under the dissenting opinion in *Enterprise*. That opinion pointed out that 'there was no concealment', because the successful applicant had disclosed the option agreement a few days before the argument of the petition for rehearing. Our dissenting brother added, however, that 'had it withheld the information until after the (denial of the petition for rehearing) notwithstanding the execution of the agreement (earlier), a very different situation might well be said to have arisen. That is this case.

.... Moreover, appellants should be readmitted to the contest, even if that would serve to prolong it. The new evidence here goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants....

.... The Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will reconsider its grant to WJR in the light of the differences thus disclosed.⁷ [*Underlining added. Footnotes deleted.*]

⁵ The applications were actually filed by Mobex, Regionet Wireless Licensee, LLC (Regionet), and Waterway Communications System, LLC (Watercom). Since Mobex eventually took control of Regionet and Watercom, Petitioners herein refer to all of them together as “Mobex” and all of the applications as the “Mobex Applications”.

⁶ Petitioners are serving legal counsel for Mobex with this 2008 Recon. In proceedings before the FCC (see Auction No. 61 proceedings), Maritime Communications/Land Mobile LLC (“MCLM”) has alleged that it is not operating Mobex, but that it only acquired Mobex’s assets. Thus, Petitioners do not believe that MCLM has any interest in this proceeding and that it has to be served. However, Petitioners note that legal counsel for both Mobex and MCLM is Dennis Brown.

⁷ *Butterfield v. FCC*, 99 U.S. App. D.C. 71; 237 F.2d 552 (1956),

As in *Butterfield*,⁸ in the instant case essential facts, those in the Exhibits below, were “kept secret” and are “new evidence [that] goes to the foundation of the Commission’s decision” on the subject license applications and subject rule change: interference-protection extension. These essential new facts may be brought now as the basis of this Petition, whether under 47 USC §309(d) or §405 or other basis. The court in *Butterfield* properly noted the Commission’s authority (cited above and elsewhere in the decision) to rehear a matter and change its decision based on new evidence. It has this authority under and should exercise it regardless of how the evidence came to it, as provided in 47 USC § 312(a)(1) and (2).

The OFR states (footnotes ~~deleted~~ in original):

Havens’s most recent petition fails to support his arguments with any new facts or changed circumstances.⁹ 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.¹⁰ 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.¹¹ Thus, this is not a new fact or changed circumstance.¹²

⁸ Also see: (i) *Re Beacon Broadcasting Corporation*, FCC FCC96-66 (adopted 2/21/96): reconsideration is appropriate where petitioner shows either material error or omission in original order, or raises additional facts not known or not existing until after petitioner's last opportunity to present such matters, and (ii) *Re Armond J. Rolle* (1971) 31 FCC2d 533: proceedings will be remanded and reopened by newly discovered evidence relied on by petitioner that could not with due diligence have been known at time of hearing, and if proven true, is substantially likely to affect outcome of proceeding. These also apply in to the instant case.

⁹ See, e.g., *Allnet Communications Services, Inc. v. Wisconsin Bell, Inc.*, *Memorandum Opinion and Order*, 7 FCC Rcd 932, 932-33 ¶ 6 (CCB 1992).

¹⁰ See Petition at 2-3.

¹¹ 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.

¹² 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*.

In a footnote, the OFR supports the above by citing one of the Bureau's other decision's that the footnote admits is pending on appeal. It is not a final Commission order, and even if it was, it is not persuasive or controlling when it is shown as incorrect. The Bureau erred in the above cited decision since, as noted above, it avoided the actual arguments of Petitioners and actual facts. It is not relevant to the argument that Petitioners made whether or not the Bureau was "well aware" of what Mobex had not done. Mobex had simply allowed its applications' dismissals to become final. Havens maintained his on appeal, and as Havens argued previously, under law a decision of the FCC is not final, **and this underlying applications are preserved for potential processing**, until all administrative and judicial appeals are exhausted. That is well established law, e.g., *Ashbacker*, 326 US 327, and *McElroy*, 301 U.S. App. D.C. 81. The OFR did not cite any law to the contrary.

The OFR further states (footnotes deleted):

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*.

As described above, the new facts in exhibit 1 show that it was impossible for the Bureau to determine mutual exclusivity. Further, there was no **service-contour or** incumbent protection rule as all when the Bureau found the Mobex applications mutually exclusive. It had no rule, and it had no engineering to use under any rule to determine mutual exclusivity.

At minimum, the new facts require that the FCC proceed to rehear **these entire matters** since it is now apparent that proper engineering was never conducted to determine if their actually was any mutual exclusivity with the Mobex Applications, **or was any basis for extending incumbent protection**, and **due to** ~~for~~ the prejudice noted herein **shown by** ~~based upon~~ the lack of engineering, **the** unlawful attempts to eliminate the coverage requirements of §80.475(a) and the

other reasons given herein. The proceeding up to this point has been corrupted for those reasons and thus Petitioners request and should be given a rehearing of matters.

Conclusion

This petition should be granted for reasons given-- the Havens applications (footnote 1) should be processed and granted and the extension of incumbent interference granted in the Third MO&O rescinded.

Respectfully submitted,

[Filed Electronically. Signature on File.]

Warren Havens
Individually, and as President for each of the LLC's within the defined
"Petitioners"

February 13, 2008

2649 Benvenue Avenue, #2-6
Berkeley, CA 94704
Phone (510) 841 2220
Fax (510) 841 2226

Exhibit 1: FOIA Request 2007-177 and FCC Response re: Engineering Studies
(Note the attachment referenced in the FCC response, the Eckert Report, is not included here).

[Documents are attached at end] -- They were prepared in a separate PDF file, and were originally filed on ULS concurrently with the original filing, but are directly attached below in this Errata copy.

Exhibit 2: FOIA Request 2007-178 and FCC Responses re: Deletion of §80.475(a)
Coverage Requirements

[Documents are attached at end] -- They were prepared in a separate PDF file, and were originally filed on ULS concurrently with the original filing, but are directly attached below in this Errata copy.

Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing Petition for Reconsideration of *Order on Reconsideration*, DA 08-87, including exhibits, was prepared pursuant to my direction and control and that all of the factual statements and representations contained therein are true and correct.

[Filed Electronically. Signature on File.]

Warren C. Havens

February 13, 2008

Petition for Reconsideration. 92-257. submitted 2.13.2008
Underlining and highlight added: not in original.

Exhibit 1: Part 1—FOIA Request 2007-177 **Engineering**

From: Patricia Quartey [Patricia.Quartey@fcc.gov] on behalf of FOIA
[FOIA@fcc.gov]
Sent: Wednesday, February 21, 2007 5:09 AM
To: wchavens@aol.com
Cc: Shoko Hair; Patricia Quartey
Subject: RE: Electronic FOIA (E-FOIA) Request Form

Dear Mr. Havens:

This acknowledges receipt of your Freedom of Information Act (FOIA) request filed with the Federal Communications Commission (FCC). Your request has been assigned FOIA control number 2007-177. Agencies are allowed 20 working days to respond to your request, extending this period for an additional 10 working days under certain circumstances. See 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B)(i). We anticipate responding to your request on 03/20/07. If additional time is needed to respond to your request you will be notified.

If you have any questions concerning this notice, please call the FOIA Office at 202-418-0440.

FCC FOIA Office

*** Non-Public: For Internal Use Only *** -----Original Message-----

From: Intelligent Transportation & [see item 12] [mailto:wchavens@aol.com]
Sent: Saturday, February 17, 2007 12:05 AM
To: FOIA
Subject: Electronic FOIA (E-FOIA) Request Form

Intelligent Transportation & [see item 12]
2649 Benvenue Ave
2-3
Berkeley, CA USA
94704

Phone Number: 510.841.2220
Fax Number: 510.841.2226
Email Address: wchavens@aol.com

Date of Request: 16 February 2007

Intelligent Transportation & [see item 12] Requests:

7. All records in written (paper or electronic form) that pertain to: (1) all FCC "engineering" (defined below [*]) that was used to consider or determine coverage and other technical requirements stated in FCC Rule Section 80.475(a) in the form of said rule set forth below and any

predecessor or successor form of said rule that applies to site-based AMTS (the "Rule"), for any license application or license matter (any original, renewal, amendment, assignment or other licensing application, or any challenge or complaint regarding any such application or any granted license, or any other licensing related matter). (2) all formal and other education and experience of all FCC staff persons who performed such "engineering," the identification of all computer software used in the "engineering" noted above, and the authority of such persons to perform such engineering for the licensing matters involved, (3) the identification and description of the document filing, storage, location, and maintenance system employed in item '1' in this sentence above, and (4) the FCC person who made the recommendations and the ultimate decision of all such licensing matters identified in item '1' in this sentence above.

The Rule:

Sec. 80.475 Scope of service of the Automated Maritime Telecommunications System (AMTS).

(a) AMTS applicants proposing to serve inland waterways must show how the proposed system will provide continuity of service along more than 60% of each of one or more navigable inland waterways. Inland waterways less than 240 kilometers (150 miles) long must be served in their entirety. AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline must define a substantial navigational area and show how the proposed system will provide continuity of service for it. A separate Form 503 is not required for each coast station in a system. However, the applicant must provide the technical characteristics for each proposed coast station, including transmitter type, operating frequencies, emissions, transmitter output power, antenna arrangement and location.

(1) Applicants proposing to locate a coast station transmitter within 169 kilometers (105 miles) of a channel 13 television station or within 129 kilometers (80 miles) of a channel 10 television station or with an antenna height greater than 61 meters (200 feet) must submit an engineering study clearly showing the means of avoiding interference with television reception within the grade B contour. See Sec. 80.215(h).

[*] "Engineering" definition: (1) any determination of any sort by any means-- including by use of manual or computer aided mathematical calculations, and including by use of computer generated depictions or descriptions of estimated radio-signal propagation contours or levels-employed to consider or determine "continuity of coverage" "proposing to serve" "technical characteristics," "proposing to locate," "engineering study" or any other matter of a technical nature in the "Rule" defined above.

Item 7 above is clear.

Maximum Fee: \$1,000.00

Listed In CFR 47:

If Yes Give Reasons for Inspection:

Is the requester entitled to a restricted fee assessment? No If Yes Give Reasons for Inspection:

Any Additional Information and/or Comments: 12. Requesting parties ("Requestors"): (1) Skybridge Spectrum Foundation, (2) Intelligent Transportation & Monitoring Wireless LLC, (3) AMTS Consortium LLC, (4) James Stobaugh, and other interest holders in and joint-venture contractors of entities 1, 2, and 3 above. All Requestors may be contacted via the contact information supplied above.

Expedited action requested: This FOIA request pertains to some matters now pending, and others to be pending, in formal proceedings before the FCC and US Courts, and the information sought by the request is or may be of decisional importance in said proceedings. Such proceedings include challenges of site-based licenses and license transactions and matters, as well possible prejudicial and unlawful action by FCC staff that also may be of such decisional importance as well as procedural importance in said pending or to be pending matters. The FCC is aware of all existing challenges of site based AMTS licenses and license transactions. In addition, the FCC is aware that its staff has asserted that it employed "engineering" as defined above in consideration and decisions of applications under and rulemaking related to the Rule defined above, yet is has never indicated any evidence thereof, nor upon past requests by parties involved with Requestors has FCC staff produced any such evidence. Also, Requestors include a nonprofit Foundation pursuing plans for use of AMTS for nonprofit charitable, scientific and educational purposes in the public interest including in Intelligent Transportation Systems and environmental protection. Further, Requestors seek to mitigate their damages caused by the prejudicial action noted below. For all these reasons, Expedited Action is requested.

Prejudice and waiver asserted. Requestors assert (and in past and pending FCC proceedings have asserted) that FCC staff involved in consideration and determination of matters that should be reflected in documents requested by this FOIA request have, in formal and informal FCC proceedings and matters, acted toward Requestors with prejudice, with unfair and unequal treatment, and to block or hamper their rights to petition the government under FCC rules, the Communications Act, and the First Amendment, and also have in such matters engaged in prohibited ex parte communications in restricted proceedings in violation of FCC rules and the Administrative Procedures Act with results that have seriously damaged Requestors in the past and on an ongoing bases. Due to these acts of its staff, Requestors assert that the FCC has waived its right to withhold documents based on the FOIA exemption in 47 CFR Sec. 0.457(e) "(e) Interagency and intra-agency memorandums or letters, 5 U.S.C. 552(b)(5). . . ." Citing the US DOJ website on FOIA:

" [W]here . . . [prior related] disclosure is made not in furtherance of a legitimate governmental purpose, especially where it is not authorized under agency regulations, courts have been particularly unsympathetic to agencies and have readily found that a waiver has occurred. See, e.g., Cooper v. Department of the Navy, 594 F.2d 484, 487-88 (5th Cir. 1979); State of North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) ("selective disclosure" found to constitute waiver); Education/Instruccion, Inc. v. HUD, 471 F. Supp. 1074, 1081-82 (D. Mass. 1979)."

Response: any withheld documents explained. Requestors ask that the response to this FOIA include a letter (1) that identifies clearly all documents within the scope of this request that were found, or that are know or believed to exist but not searched, and that are not provided based on an

exemption the FCC believe applies: without this, Requestors can not consider an appeal, and (2) that identifies the exemption that the FCC believes applies and that considers the waiver position that Requestors describe above.

Requestors have retained a copy of this FOIA request.

Server protocol: HTTP/1.1
Remote host: 192.104.54.5
Remote IP address: 192.104.54.5



Federal Communications Commission
Washington, D.C. 20554

April 3, 2007

Mr. Warren Havens
Intelligent Transportation
2649 Benvenue Avenue, 2-3
Berkeley, CA 94704

Re: FCC FOIA Control No. 2007-177

Dear Mr. Havens:

This letter responds to the Freedom of Information Act (FOIA) request of Intelligent Transportation (Transportation), by e-mail message dated February 17, 2007 (Transportation Submission), which was received by the Commission's FOIA Control Staff on February 20, 2007, and assigned the above FCC FOIA number. While initially that Submission was to be acted upon by March 20, 2007, in an e-mail message on that date, our Division extended that date ten working days to April 3, 2007, in light of the unusual circumstances cited in that message.

Claiming the information sought may be of decisional importance in matters now pending or that may be pending before the Commission and the courts, Transportation applied for expedited treatment of its Submission. In support of that application, Transportation also contends that the requestors include a foundation that plans to use its Automated Maritime Telecommunications System (AMTS) for nonprofit, charitable, scientific, and educational purposes and that expedited action is needed on the Submission to mitigate certain alleged damages.

Under section 0.461(h)(2) of the Commission's rules, expedited processing is granted to a requestor demonstrating a compelling need that is certified by the requestor to be true and correct to the best of his or her knowledge and belief.¹ We dismiss the Transportation application for such processing because it did not include the required certification.²

¹ 47 C.F.R. § 0.461(h)(1). For purposes of this section "compelling need" means that "the failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual" or "[w]ith respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public concerning actual or alleged Federal Government activity." See sections 0.461(h)(3)(i)-(ii) of the Commission's rules, 47 C.F.R. §0.461(h)(3)(i)-(ii).

² We also note Transportation did not either identify any imminent threats to an individual or establish that it was primarily engaged in disseminating information. Under section 0.461(h)(4)(ii) of the rules, 47 C.F.R.

While the scope of the Transportation Submission is broad and it lacks specificity in some areas, we understand it to include five general requests for Commission records related to section 80.475 of the Commission's Rules.³ After summarizing the parts of each request below, we provide our responses.

1. Engineering Employed. Records were requested regarding the engineering employed "to consider or determine coverage and other technical requirements" in segments of what is now section 80.475⁴ of the rules⁵ and with reference to "any predecessor or successor form of said rule that applies to site-based AMTS" for any license application or "any other licensing related matter[s]."

Accordingly, we searched for records pertaining to the engineering employed to "consider or determine" those matters in the course of the Commission's processing of AMTS license applications or "any other licensing related matter[s]." In the course of these searches, we found one document in response to this part of the Transportation Submission. Regarding the interference potential from AMTS systems to TV reception, we found and have enclosed a copy of the July 1982 study of that potential which the Commission noted in its *AMTS Rules First R&O*.⁶ We did not locate other documents that respond to this part of the Submission.

2. Engineering Staff. Regarding "all FCC staff persons who performed certain 'engineering,'" records were requested on "all [their] formal and other education and experience" and for records explaining "the authority of such persons to perform such engineering for the licensing matters involved."

a. We were not able to find records identifying those who performed engineering in connection with the licensing activities outlined in the Transportation

§0.461(h)(4)(ii), Transportation may file with the General Counsel an application for review within five (5) working days of this dismissal of its application. *See also* section 1.115 of the Commission's rules, 47 C.F.R. §1.115.

³ 47 C.F.R. §80.475.

⁴ Specifically, Transportation first identifies a version of section 80.475(a) of the Commission's rules, 47 C.F.R. §80.475(a), that, based on an earlier version, became effective in 1991 and that the Commission partially deleted in 2002 (First Segment). *See* Amendment of Parts 2 and 80 of the Commission's Rules Applicable to the Automated Maritime Telecommunications System (AMTS), Gen. Docket No. 88-372, RM-5712, *First Report and Order*, 6 FCC Rcd 437 (1991) ("*AMTS Rules First R&O*") and Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92-257, *Fifth Report and Order*, 19 FCC Rcd 9918 (2002). Second, Transportation identifies a version of section 80.475(a)(1) that, based on an earlier version, became effective (as 80.475(b)(1)) in 1986 and that, for the most part, remains in effect (Second Segment). *See* Reorganization and Revision of Parts 81 and 83 of the Rules to Provide a New Part 80 Governing the Maritime Radio Services, PR Docket No. 85-145, *Report and Order*, 68 Rad. Reg. 2d (P&T) (1986).

⁵ 47 C.F.R. §80.475.

⁶ *See AMTS Rules First R&O*, 6 FCC Rcd at 437.

[FN 4 is incorrect. The FCC never modified the rule lawfully, under notice and comment: see Exhibit 2 below.] Page 17 of 30

Submission. Even if we could identify those who did such engineering work, we would likely only find records of their education and experience in their Official Personnel Folder or similar personnel files which are not routinely available for public inspection under section 0.457(f) of the rules, 47 C.F.R. §0.457(f). If Transportation seeks to inspect such personnel files, the request must contain a statement of the reasons for such inspection and the facts in support thereof. See section 0.461(c) of the rules, 47 C.F.R. § 0.461(c).

b. Because we could not determine which, if any, of the identified staff persons did the engineering involved, we were not able to search for records authorizing such work. Under the Commission's rules, however, we note that chief of the relevant licensing bureau generally has delegated authority to perform certain functions including advising the Commission on such engineering and technical matters.

3. Computer Software. Records were requested regarding the "identification of all computer software used in the 'engineering'" referred to in the first request above. While the Commission makes available to its engineers and other staff computer software, we could not find records of the software actually used for the engineering referred in the first request above.

4. Document Systems. Records were requested with an "identification and description of the document filing, storage, location, and maintenance system[s] employed" for records covered by the first request above.

Commission records regarding the First and Second Segments of section 80.475, their predecessor rules and their successor rules can be found in the files related to the following three Commission proceedings: Private Radio (PR) Docket No. 85-145, General Docket No. 88-372, and PR Docket No. 92-257.

(1) PR Docket No. 85-145. Such docketed materials are generally available on the Commission's website and for inspection and copying at the Commission's offices. In accordance with the Commission's records retention schedule, however, the PR Docket No. 85-145 materials were forwarded for storage to a Federal records center. With the passage of time, the PR Docket No. 85-145 materials are now under the exclusive possession and control of the National Archives and Records Administration (NARA), 8601 Adelphi Road, College Park, Maryland 20740. Because these materials are neither in our possession or our control, they are not accessible pursuant to an FOIA request directed to this

agency. See *Forsham v. Harris*, 445 U.S. 169 (1980) and Sidney Gelb on Request for Records, FOIA Control No. 9-232, *Memorandum Opinion and Order*, 78 FCC 2d 395 (1980). Should Transportation wish to access these materials through the Civilian Record Branch of NARA, arrangements can be made by contacting that office in writing or by telephone at (301) 837-3480.

(2) General Docket No. 88-372. Such docketed materials are generally available on the Commission's website and for inspection and copying at the Commission's offices. In accordance with Commission's records retention schedule, however, these materials were forwarded for storage to the National Records Holding Center (NRHC) in Suitland, Maryland. In view of the Transportation Submission, however, we arranged for the NRHC to return these materials temporarily to the Commission's headquarters at 445 12th Street, S.W., Washington, D.C. 20554. At that address and by advance appointment for not more than thirty (30) calendar days from the date of this letter, we will make those files available for inspection and copying at applicable rates by Transportation or its representative. Because such files are now available for inspection and copying by Transportation or its representative under section 0.455 of the rules, 47 C.F.R. §0.455, we need not provide them in response to the Transportation Submission under section 0.461 of those rules, 47 C.F.R. § 0.461.

(3) PR Docket No. 92-257. Members of the public can find and duplicate files in this open docket by visiting the Commission's offices or by using the Electronic Comment Filing System (ECFS) on its web site (www.fcc.gov). Thus, the comments and other materials in such docketed proceedings are records that are "routinely available" for inspection under section 0.453 of the Commission's rules. Because these materials are available under section 0.453, section 0.461 of the Commission's rules excludes them from those records that must be provided under FOIA. Accordingly, we are not providing them in response to the Transportation Submission.

Commission records relevant to the routine processing of administrative licensing matters are available to the public at the Commission's website (www.fcc.gov) or through the Universal Licensing System (<http://wireless.fcc.gov/uls>) under section 0.453 if the Commission's rules, 47 C.F.R. § 0.453. Records of licensing matters under Part 80 and its predecessors prior to 1999 (such as earlier records related to AMTS licensing) can be found in other databases that are available to the public under either 0.453 or 0.455 of the Commission's rules, 47 C.F.R. §§ 0.453, 0.455.

Because these materials are available under either section 0.453 or section 0.455, section 0.461 of the Commission's rules excludes them from those records that must be provided under FOIA. Accordingly, we are not providing them in response to the Transportation Submission.

5. Commission Personnel. Records were requested that identify "the FCC person[s] who made the recommendations and the ultimate decision[s]" regarding "all such licensing matters identified" in the first request above.

Specifically, records were requested on the "FCC person[s] who made the recommendations and the ultimate decision[s]" regarding the engineering "employed to consider or determine" the "coverage and other technical requirements" stated in "any predecessor or successor form" of the First and Second Rule Segments "that applied to site-based AMTS" in connection with the handling of license applications and "other licensing related matter[s]." We were not able to find records on those who made such recommendations. Those making "ultimate decisions" on these matters include members of the Commission and others acting pursuant to authority delegated by the Commission including groups of such persons. We were not able to find records on the specific individuals or groups that made such decisions.

Pursuant to Section 0.470(a)(1) of the Commission's rules, 47 C.F.R. §0.470(a)(1), commercial use requesters, such as Transportation, are to be assessed charges that recover the full direct cost of searching for, reviewing, and duplicating records sought pursuant to FOIA. The search cost associated with FOIA Control No. 2007-177 amounts to \$ 431.52, the fee for six hours of time spent by a GS-15 Attorney, pursuant to Section 0.467(a) of the Commission's Rules, 47 C.F.R. §0.467(a). There are no other charges associated with your request. Accordingly, the total charge for processing your FOIA request is \$ 431.52. The Financial Management Division, Office of Managing Director, Federal Communications Commission, will send you a bill for that amount in the near future. Payment by your remittance made payable to the Federal Communications Commission is due 30 days after receipt of the bill.

If you believe this to be a denial of your request, you may file an application for review with the FCC's Office of General Counsel within 30 days of the date of this letter. 47 C.F.R. §§ 0.461(j) and 1.115.

Questions regarding the foregoing may be referred to Allen A. Barna (202-418-1536) of the Mobility Division.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom Derenge', written in a cursive style.

Thomas P. Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

Enclosure

Exhibit 2, Part 1: FOIA Request—2007-178 Deletion of Section 80.475(a)

From: Patricia Quartey [Patricia.Quartey@fcc.gov] on behalf of FOIA [FOIA@fcc.gov]
Sent: Wednesday, February 21, 2007 5:14 AM
To: wchavens@aol.com
Cc: Shoko Hair; Patricia Quartey
Subject: RE: Electronic FOIA (E-FOIA) Request Form

Dear Mr. Havens:

This acknowledges receipt of your Freedom of Information Act (FOIA) request filed with the Federal Communications Commission (FCC). Your request has been assigned FOIA control number 2007-178. Agencies are allowed 20 working days to respond to your request, extending this period for an additional 10 working days under certain circumstances. See 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B)(i). We anticipate responding to your request on 03/20/07. If additional time is needed to respond to your request you will be notified.

If you have any questions concerning this notice, please call the FOIA Office at 202-418-0440.

FCC FOIA Office

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

From: Skybridge Spectrum Foundation, others (see #12) [mailto:wchavens@aol.com]
Sent: Saturday, February 17, 2007 1:05 AM
To: FOIA
Subject: Electronic FOIA (E-FOIA) Request Form

Skybridge Spectrum Foundation, others (see #12)
2649 Benvenue Ave
2-3
Berkeley, CA USA
94704

Phone Number: 510.841.2220
Fax Number: 510.841.2226
Email Address: wchavens@aol.com

Date of Request: 16 February 2007

Skybridge Spectrum Foundation, others (see #12) Requests:

7. All records in written (paper or electronic form) that pertain to: (1) all considerations, decisions, and actions by the Federal Communications Commission itself, any delegated authority, and any

individual employee or agent of the FCC, that were or may have been of decisional importance or that reflect the procedures employed in the deletion of a the portion of FCC rule section 80.475(a) set forth below (the "Deleted Rule"), or any part of the Deleted Rule, (2) the identification and description of the document filing, storage, location, and maintenance system employed in keeping the documents described item '1' in this sentence above, and (3) the names and positions of the FCC employees who made any recommendations or the ultimate decision to delete the Deleted Rule, or who are involved in maintaining the records described in item '2' of this sentence above.. Above, "deletion," "deleted," and "delete" mean removal or disregarding of the Deleted Rule from use for FCC licensing and other purposes regardless of the process used but including by removal of the Deleted Rule from the official lists of FCC rules in effect published by the FCC and the Government Printing Office.

The "Deleted Rule" is the portion of the following rule placed in triple brackets "[[[]]."

Sec. 80.475 Scope of service of the Automated Maritime Telecommunications System (AMTS).

(a) [[[AMTS applicants proposing to serve inland waterways must show how the proposed system will provide continuity of service along more than 60% of each of one or more navigable inland waterways. Inland waterways less than 240 kilometers (150 miles) long must be served in their entirety. AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline must define a substantial navigational area and show how the proposed system will provide continuity of service for it.]]] A separate Form 503 is not required for each coast station in a system. However, the applicant must provide the technical characteristics for each proposed coast station, including transmitter type, operating frequencies, emissions, transmitter output power, antenna arrangement and location.

Above is clear.

Maximum Fee: \$1,000

Listed In CFR 47:

If Yes Give Reasons for Inspection:

Is the requester entitled to a restricted fee assessment? No If Yes Give Reasons for Inspection:

Any Additional Information and/or Comments: 12. Requesting parties ("Requestors"): (1) Skybridge Spectrum Foundation, (2) Intelligent Transportation & Monitoring Wireless LLC, (3) AMTS Consortium LLC, (4) James Stobaugh, and other interest holders in and joint-venture contractors of entities 1, 2, and 3 above. All Requestors may be contacted via the contact information supplied above.

Expedited action requested: This FOIA request pertains to some matters now pending, and others to be pending, in formal proceedings before the FCC and US Courts, and the information sought by the request is or may be of decisional importance in said proceedings. Such proceedings include challenges of site-based licenses and license transactions and matters, as well possible prejudicial and unlawful action by FCC staff that also may be of such decisional importance as well as

procedural importance in said pending or to be pending matters. The FCC is aware of all existing challenges of site based AMTS licenses and license transactions. In addition, the FCC is aware that its staff have asserted that the Commission by due process has deleted the Deleted Rule, and that Requestors and related parties have disputed this assertion in formal restricted proceedings based on lack of evidence in rulemaking on AMTS of said deletion by due process. Also, Requestors include a nonprofit Foundation pursuing plans for use of AMTS for nonprofit charitable, scientific and educational purposes in the public interest including in Intelligent Transportation Systems and environmental protection. Further, Requestors seek to mitigate their damages caused by the prejudicial action noted below. For all these reasons, Expedited Action is requested.

Prejudice and waiver asserted. Requestors assert (and in past and pending FCC proceedings have asserted) that FCC staff involved in consideration and determination of matters that should be reflected in documents requested by this FOIA request have, in formal and informal FCC proceedings and matters, acted toward Requestors with prejudice, with unfair and unequal treatment, and to block or hamper their rights to petition the government under FCC rules, the Communications Act, and the First Amendment, and also have in such matters engaged in prohibited ex parte communications in restricted proceedings in violation of FCC rules and the Administrative Procedures Act with results that have seriously damaged Requestors' lawful interests in the past and on an ongoing bases. Further, Requestors allege that the statements of FCC staff as to the Deleted Rule in various FCC decisions and releases is for unlawful purposes since the Commission never authorized by due process said deletion, with results that have seriously damaged Requestors' lawful interests in the past and on an ongoing bases. Due to these acts of its staff, including the unlawful public disclosures noted above that relate to the deletion of the Deleted Rule, Requestors assert that the FCC has waived its right to withhold documents based on the FOIA exemption in 47 CFR Sec. 0.457(e) "(e) Interagency and intra-agency memorandums or letters, 5 U.S.C. 552(b)(5). . . ." Citing the US DOJ website on FOIA:

" [W]here . . . [prior related] disclosure is made not in furtherance of a legitimate governmental purpose, especially where it is not authorized under agency regulations, courts have been particularly unsympathetic to agencies and have readily found that a waiver has occurred. See, e.g., Cooper v. Department of the Navy, 594 F.2d 484, 487-88 (5th Cir. 1979); State of North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) ("selective disclosure" found to constitute waiver); Education/Instruccion, Inc. v. HUD, 471 F. Supp. 1074, 1081-82 (D. Mass. 1979)."

Response: any withheld documents explained. Requestors ask that the response to this FOIA include a letter (1) that identifies clearly all documents within the scope of this request that were found, or that are known or believed to exist but not searched, and that are not provided based on an exemption the FCC believe applies: without this, Requestors can not consider an appeal of such withholding, and (2) that identifies the exemption that the FCC believes applies and that considers the waiver position that Requestors describe above.

Requestors have kept a copy of this request.

Server protocol: HTTP/1.1

Remote host: 192.104.54.5
Remote IP address: 192.104.54.5



Federal Communications Commission
Washington, D.C. 20554

April 3, 2007

Mr. Warren Havens
Skybridge Spectrum Foundation
2649 Benvenue Avenue, 2-3
Berkeley, CA 94704

Re: FCC FOIA Control No. 2007-178

Dear Mr. Havens:

This letter responds to the Freedom of Information Act (FOIA) request of the Skybridge Spectrum Foundation (Skybridge), by e-mail message dated February 17, 2007 (Skybridge Submission), which was received by the Commission's FOIA Control Staff on February 20, 2007, and assigned the above FCC FOIA number. While initially the Skybridge Submission was to be acted upon by March 20, 2007, in an e-mail message on that date our Division extended that date 10 working days to April 3, 2007, in light of the unusual circumstances explained in that message.

Claiming that the information sought may be of decisional importance in matters now pending or that may be pending in proceedings before the Commission and the courts, Skybridge applied for expedited treatment of its FOIA request. In support of its application for expedited treatment, Skybridge also notes its plans to use its Automated Maritime Telecommunications System (AMTS) for nonprofit, charitable, scientific, and educational purposes and its desire to mitigate certain alleged damages.

Under section 0.461(h)(2) of the Commission's rules, expedited processing is granted to a requestor demonstrating a compelling need that is certified by the requestor to be true and correct to the best of his or her knowledge and belief.¹ We dismiss the Skybridge application for such processing because it did not include the required certification.²

¹ 47 C.F.R. § 0.461(h)(1). For purposes of this section "compelling need" means that "the failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual" or "[w]ith respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public concerning actual or alleged Federal Government activity." See sub-sections 0.461(h)(3)(i)-(ii), 47 C.F.R. § 0.461(h)(3)(i)-(ii).

² We also note Skybridge did not either identify any imminent threats to an individual or establish that it was primarily engaged in disseminating information. Under section 0.461(h)(4)(ii), 47 C.F.R. § 0.461(h)(4)(ii),

[The below is clear evidence that certain FCC staff deleted the subject rule section: the sine qua non of AMTS from its start, in a purported Commission decision with no previous notice and comment as required under the Administrative Procedures Act and related 47 USC and 47 CFR sections. Thus, the subject rule section was unlawfully deleted. In the context of many related FCC staff actions, that demonstrates egregious prejudice: windfall grants to incumbent AMTS licensees at expense of geographic licensees, other competitors, and governmental integrity and rule of law.]

We understand the Skybridge Submission to include three general requests for the Commission records. After summarizing the parts of each request below, we provide our responses.

1. Removed Sentences Request. Regarding the first three sentences of an earlier version of section 80.475(a) of the Commission's rules, 47 C.F.R. §80.475(a), that became effective in 1991 but that were later removed ("Removed Sentences"), records are requested of materials that were "decisionally important" or that reflect the procedures employed to remove these sentences or any part of them (a) "from the [published] official lists of FCC rules in effect" and (b) "from use for FCC licensing and other purposes."

a. Removal From Published Rules.

(1) The Commission deleted the Removed Sentences from Part 80 of its published rules in the Fifth Report and Order, PR Docket No. 92-257, 19 FCC Rcd 9918, adopted March 13, 2002, and released April 8, 2002 (*AMTS Fifth R&O*). On March 13, 2002, the Commission released a public notice describing the *AMTS Fifth R&O* (*Fifth R&O Notice*). Later that year, the Commission published a summary of that Order in the Federal Register, 67 FR 48560, July 25, 2002). Paragraphs 47-50 (and associated footnotes) of the *AMTS Fifth R&O* provide the basis for the Commission's removal of these sentences from Part 80 and the records considered by the Commission in connection with these changes to Part 80. While we could not identify any specific documents as being decisional in this proceeding, the *AMTS Fifth R&O* outlines the previous Commission Orders, the comments filed, and *ex parte* filing as materials that the Commission considered. We were not able to identify any further documents considered in this proceeding.

(2) PR Docket No. 92-257 remains open as of this date. Accordingly, the public can find and duplicate the comments filed in this docket at the Commission's offices or by using the Electronic Comment Filing System (ECFS) on its web site (www.fcc.gov). Thus, the comments and other materials filed in such docketed proceedings are "routinely available" for inspection under section 0.453 of the Commission's rules, 47 C.F.R. §0.453. Because these materials are

Skybridge may file with the General Counsel an application for review within five (5) working days of our dismissal of its application for expedited processing. See also section 1.115 of the Commission's rules, 47 C.F.R. §1.115.

available under section 0.453, section 0.461 of the Commission's rules, 47 C.F.R. § 0.461 excludes them from those records which must be provided under FOIA. Accordingly, we are not providing them in response to the Skybridge Submission.

b. Removal From Use in Licensing. We were not able to find records regarding the procedures employed by the staff to stop using the Removed Sentences in their processing of license applications or their handling of other licensing matters. Nevertheless, pursuant to section 1.427 of the Commission's Rules, 47 C.F.R. § 1.427, final rules are effective 30 days after publication of the rules in the Federal Register, unless otherwise noted.

2. Document Systems Request.

(a) Records are requested that pertain to the "identification and description of the document filing, storage, location, and maintenance system[s] employed" to keep the documents sought by the above "Removed Sentences Request."

(b) The Commission employs the ECFS to file and store documents in Private Radio Docket No. 92-257 and other open dockets. Members of the public can find records identifying and describing the ECFS on the Commission's website (www.fcc.gov). Because these records are available on our website, they are "routinely available" under section 0.453 of the Commission's rules. Because they are available under section 0.453, section 0.461 of the Commission's rules excludes them from those records which must be provided under FOIA. Accordingly, we do not provide them in response to the Skybridge Submission.

3. Commission Employees Request.

(a) Records are requested that identify "the names and positions of FCC employees" (1) "who made any recommendations or the ultimate decision to delete" the Removed Sentences or (2) "who are involved in maintaining the records" sought in the above Document System Request.

(b) Recommendations and Decisions. In our search, we were not able to identify the staff member that recommended deletion of the Removed Sentences to Commissioners or to other Commission officials. The ultimate decision to delete the Removed Sentences was made by those Commissioners who voted to adopt the *AMTS Fifth R&O*: Chairman Michael Powell, Commissioner Kathleen Abernathy,

Commissioner Michael Copps, Commissioner Kevin Martin, and Commissioner Jonathan Adelstein.

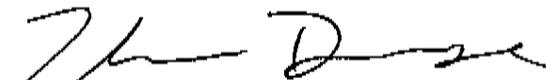
(c) Records Maintenance. Under section 0.231(i) of the rules, 47 C.F.R. §0.231(i), the Commission Secretary, acting under the supervision of the Managing Director, serves as the official custodian of the Commission's documents. The current Managing Director is Anthony Dale and the current Commission Secretary is Marlene Dorch. These persons are responsible for the maintenance of the ECFS described above.

Pursuant to Section 0.470(a)(1) of the Commission's rules, 47 C.F.R. § 0.470(a)(1), commercial use requesters, such as Skybridge, are to be assessed charges that recover the full direct cost of searching for, reviewing, and duplicating records sought pursuant to FOIA. The search associated with FOIA Control No. 2007-178 amounts to \$ 287.68, the fee for four hours of time spent by a GS-15 Attorney, pursuant to Section 0.467(a) of the Commission's Rules, 47 C.F.R. §0.467(a). There are no other charges associated with your request. Accordingly, the total charge for processing your FOIA request is \$ 287.68. The Financial Management Division, Office of Managing Director, Federal Communications Commission, will send you a bill for that amount in the near future. Payment by your remittance made payable to the Federal Communications Commission is due 30 days after receipt of the bill.

If you believe this to be a denial of your request, you may file an application for review with the FCC's Office of General Counsel within 30 days of the date of this letter. 47 C.F.R. §§ 0.461(j) and 1.115.

Questions regarding the foregoing may be referred to Allen A. Barna (202-418-1536) of the Mobility Division.

Sincerely,



Thomas P. Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

Certificate of Service

I, Warren Havens, certify that I have, on this 13th day of February 2008, caused to be served by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Petition for Reconsideration, including exhibits, to the following:¹³

Dennis Brown (legal counsel for Mobex & MCLM)
8124 Cooke Court, Suite 201
Manassas, VA 20109-7406
(Courtesy copy, not for purposes of service, via email to d.c.brown@att.net)

[Filed Electronically. Signature on File.]

Warren Havens

The Errata copy is served as noted above on February 14, 2008, by the means noted above.

[Filed Electronically. Signature on File.]

Warren Havens

¹³ The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next business day.