

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

In the Matters of:	)	
	)	
<i>Second Order on Further Reconsideration</i>	)	DA 09-798
	)	
<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 <sup>1</sup> 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

To: the Commission

Application for Review<sup>2</sup>  
(and for reasons stated, Petition for Reconsideration on New Facts if the Commission Chooses  
Errata copy<sup>[\*]</sup>

Petitioners hereby submit this application for review of the Wireless Telecommunication Bureau's Second Order on Further Reconsideration (the "Second Recon Order" or the "subject Order") that dismissed the Petitioners' Petition for Reconsideration, based on new facts, that sought reconsideration (the "2008 Recon") of: (1) the *Order on Further Reconsideration*, DA

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<sup>1</sup> 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.

<sup>2</sup> The defined terms used herein have the same meaning they had in the recently dismissed Petition for Reconsideration that is subject of this Application for Review appeal.

[\*] Additions in dark red and deletions in striketout.

08-87, (the “OFR”) that dismissed Havens’ previous Petition for Reconsideration (the “2<sup>nd</sup> Recon”)<sup>3</sup> and (2) the other issue in above-captioned Third MO&O to the extent presented below: increasing incumbent protection.

For the reasons given here, Petitioners request that the Commission review this matter, overturn the decisions in the Second Recon Order and remand the matter to the Bureau so that the relevant facts and law that Petitioners presented in this proceeding are properly addressed, or resolve these at the Commission level.

This is a proper matter for a full evidentiary hearing, due to the disputed facts, and also due to the magnitude of the decided matter: it involves a large amount of AMTS licensed spectrum territory in the nation, and its has severe negative impacts on the high public benefit purposes to which Petitioners are putting most all of their AMTS spectrum, along with their LMS, 220 MHz, and MAS spectrum: for advanced Intelligent Transportation Systems wireless in the nation, tightly integrated with public safety wireless and environmental protection wireless. These developments are reflected in part in the two attachments hereto.

As discussed below, the Second Recon Order (herein also called the “subject Order”) erred by not addressing squarely the 2008 Recon’s new facts presented along with the issues of law and authorities presented. That violates the Administrative Procedures Act (“APA”). Such facts and law were relevant and persuasive, contrary to the Second Recon Order’s facile findings.

In addition, the recent three FCC Orders discussed below demonstrate that fundamental facts and arguments of Petitioners, properly submitted in this proceeding but rejected in the subject Order (and past orders) were correct, and on that basis also, this appeal should be granted.

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<sup>3</sup> Petition for Reconsideration (filed Dec. 18, 2003) (the “2<sup>nd</sup> Recon”).

## Facts and Arguments on Appeal

### 1. Errors and Omissions in the Subject Order

The subject Order disposed of one of the main facts and arguments presented, and did not deal with it as it was presented or to any substantial degree: that the FCC never deleted rule 80.475(a), the rule that established the sine qua non of AMTS **and a required component to determine MX**: multi-site continuity of coverage. This, by itself, requires reversal of the subject Order. Petitioners presented unambiguous proof of this, and the Administrative Procedures Act requirement that was violated is also fundamental and unambiguous: that the FCC can make no rule change including deletion without noticing the public and allowing comments, and publishing a decision discussing the comments and the basis of its decision: none of that was done. The FCC staff merely made the rule disappear.

With regard to the **above and the** other facts and arguments raised, with detail and support, in the petition—**which they** were not mere repetitions, but instead **Petitioners** first repeated the past submitted facts and arguments, then submitted relevant new ones, and showed why the arguments based on both were correct under applicable law, and why the order being appealed erred. The subject Order erred, under the requirements of the Administrative Procedures Act, by misstating that Petitioners were simply repetitive, and the like, and in some cases simply refusing to deal with some fact and arguments **as presented** at all, such as with regard to the disappearing rule noted above, and the clear violation by the deciding FCC staff person of ex parte rules in advising one AMTS site based licensee, Paging Systems Inc. (“**PSI**”) as to how to warehouse spectrum for future years and **rebuild** to create the maximum encumbrance to Petitioners: in fact, this staff person recently made that advice effective in a recent Order, **DA 09-643**, granting that relief, **against** the evidence Petitioners submitted from the site controllers who stated that PSI never built the station at all. This is another new fact that is relevant to this appeal, since it further demonstrates that the subject Order erred on this ex parte

matter: that illustrated the pattern of prejudice that makes the appeal the subject Order disposed of futile, as evidenced in the Order not dealing squarely with the fact and arguments.

## 2. Recent Orders Demonstrate Errors in the Subject Order

Within the last two months the FCC has made it clear that a central Petitioners' arguments in this proceeding (an many other proceedings regarding AMTS still pending) were correct, and that the FCC decisions against Petitioners were incorrect as follows:

Petitioners refer to (1) *Letter*, DA 09-793, from Scot Stone, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Dennis Brown, legal counsel for Maritime Communications/Land Mobile LLC dated April 8, 2009 and (2) *Order*, DA 09-643, released March 20, 2009 (see footnote 12) (the "Two Orders"). These two decisions make it clear that the incumbent site-based licensees were under an obligation to provide co-channel station licensees or applicants with details of their *actual* stations so that the co-channel licensee or applicant can properly determine the amount of interference protection required under relevant rules including to minimize spectrum warehousing and more fully use the subject spectrum in the public interest.

The Two Orders cite Section 80.385(b) which deals with geographic and incumbent station co-channel matters; however, prior to the establishment of that rule an FCC rule Section 80.70(a) was in full force and effect regarding all co-channel AMTS station matters. That rule requires existing site-based AMTS licensees to provide the same information that is required under Section 80.385(b), including to other site-based AMTS applicants, ~~as in this proceeding.~~

Those recent Orders demonstrate that the standard (obvious under any reasonable ~~application~~ of engineering integrity and regulatory fairness) the must be used in AMTS licensing: that actual technical parameters of stations (including in this case, the actual ones submitted on the applications for the proposed stations) must be used in determining whether an AMTS license application may be granted: first and foremost, whether for the locations and parameters stated in any application, the spectrum is available for processing (a criteria under

section 1.934) and for grant. That standard, clarified in these two recent Orders, must also be used to determine mutual exclusivity (“MX”) including in this case, since this case involves determination of whether the Mobex *actual* applications, filed after the Havens *actual station* applications, were for spectrum that was *actually* available and thus not MX, or was *actually* MX with the Havens applications.

In the subject Order, and the preceding ones in this proceeding, the FCC erred in not applying that “*actual*” standard, or any standard, to determine MX. Indeed, the record shows that the FCC used no engineering, had not standard whatsoever in rules or otherwise to determine MX, and simply made such determinations arbitrarily and capriciously as best, and apparently out of deliberate prejudice against Petitioners as the record of AMTS licensing matters demonstrates.

Further on this matter regarding the recent two Orders: In the subject dismissed applications, the Mobex applications did not pose mutual exclusivity over all of Havens’ site contours: even by glancing at the Mobex applications this is clear. Further, the FCC subsequently determined, contrary to the clear meaning of the relevant rule, 80.475(a), that an AMTS site-based applicant or licensee did not need to cover ~~150 miles of~~ the applicant-defined *substantial* coastline or 60% of an inland navigable waterway *over 150 miles long*, as the rules 80.475(a) ~~previously~~ required (see *Order*, DA 04-4051, released 12/28/04, *19 FCC Rcd* 24939—Petitioners are appealing this Order and its conclusion on this point). In that regard, Havens’ application’s multiple sites were clearly not all subject to mutual exclusivity, applying any standard of using the *actual* station technical parameters, which is the point of the recent two Orders.

It is appropriate to make the above arguments with regard to Sections 80.385(b) and 80.70 in this appeal because the Two Order were merely proper interpretations of these rules that applied including in the mutual exclusivity period.

*However, in case the Commission considers the Two Orders, and the third Order noted above, to be “new facts”, Petitioners are also submitting this pleading as a petition for reconsideration on new facts. It may be deemed a new fact that after several decades of AMTS that the FCC has finally determined that actual stations (proposed or existing) technical parameters must be used.*

Respectfully submitted,

[ *Filed Electronically. Signature on File.* ]

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

May 8, 2009

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Certificate of Service

I, Warren Havens, certify that I have, on this 8<sup>th</sup> day of May 2009, caused to be served by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Application for Review to the following:<sup>4</sup>

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](mailto:d.c.brown@att.net))

*[ Filed Electronically. Signature on File. ]*

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Warren Havens

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<sup>4</sup> The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next business day.