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

In the Matter of	)	
	)	
Maritime Communications/Land Mobile LLC	)	DA 10-556
and Southern California Regional Rail	)	WT Docket No. 10-83
Authority Applications to Modify License and	)	File Nos. 0004153701, 0004144435
Assign Spectrum for Positive Train Control	)	Call Sign: WQGF318
Use, and Request Part 80 Waivers	)	File No. 0002303355
Relating to a License Granted Per an Auction	)	
No. 61 Form 601 Application	)	

To: Office of the Secretary Attn: Wireless Telecommunications Bureau

Reply to Oppositions[1]

VSL, ITL and THL (together, for purposes of this Reply, "Petitioners") hereby reply to the Maritime Communications/Land Mobile LLC ("MCLM") and Southern California Regional Rail Authority ("SCRRA") oppositions (the "MCLM Opposition", the "SCRRA Opposition", together the "Oppositions") to their and their affiliates' Petition of the Applications (a Modification and an Assignment) and the associated Waivers.

[1] The defined terms used herein having the same meaning they had in the Petition.

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1. Summary

Petitioners show herein that the Oppositions fail to refute the facts and arguments of the Petition, avoid addressing certain facts and arguments, and make general bald assertions of fact that are insufficient to refute the facts in the Petition. This reply shows that the Oppositions' attempts are to have the FCC overlook defects in the Applications and Waivers and more importantly in the underlying License and MCLM in order to grant the subject spectrum to SCRRA for an alleged overwhelming public good that only AMTS can fulfill. This includes by overlooking the defects that are now being investigated in two separate FCC investigations, the Section 308 Proceeding and Enforcement Proceeding, which both Oppositions fail to address. This reply refutes the SCRRA and MCLM bald assertions that this is the only suitable and available spectrum for SCRRA's PTC needs and that lives are at risk if the subject AMTS spectrum is not assigned immediately to SCRRA regardless of Petitioners' and their affiliate's Petition and facts which show that grant of the Applications is clearly not in the public interest, including MCLM is not qualified to be a Commission licensee.

Further, Petitioners show that SCRRA has failed to conduct sufficient due diligence and provide it to support its allegations of the subject spectrum being its only solution, and that in fact, SCRRA's own internal documents show it does not need all of the spectrum subject of the Assignment or the Waivers granted for all of it since it intends to use the excess spectrum for other speculative purposes such as resale, lease, etc.

In addition, Petitioners provide facts from public records, including from the Association of American Railroads, showing that the benefits of PTC alleged by SCRRA and MCLM are being called into question, that it is costly and is an unproven technology.

This reply shows that the MCLM Opposition's Exhibit 1 is defective and fails to refute the Petition's facts that MCLM has impermissibly used its FCC licenses as collateral. At minimum, it means that the FCC should request the loan agreements between MCLM and those

creditors identified in Exhibit 1 and make additional inquiries of those individuals about MCLM under penalty of perjury.

Petitioners also respond to the SCRRA Opposition's arguments in support of the Waivers and show that the Waivers fail to meet the requirements of Section 1.925, that SCRRA's Section 20.9(b) certification is misleading in that it does not need all of the spectrum of the Assignment for PTC, and that SCRRA has failed to demonstrate any real-life situation warranting grant of its Waivers or that it has attempted to mitigate the need for its Waivers by communicating with affected co-channel and adjacent channel licensees. The SCRRA Opposition fails to refute the Petition's showing that the Waivers will cause harmful interference or show that Dr. Reudink's analysis in the BREC Proceeding is incorrect. Also, SCRRA does not show it needs a waiver of maritime priority. Further, its Waivers are not similar to those submitted by NUSCO, including that NUSCO did not seek waivers of power limits but actually intended to construct a lower power system that is more spectrally efficient than is being proposed by SCRRA.

Petitioners show that their Petition's relief should be granted and at minimum a hearing must be held.

2. Reply of Affiliates SSF, ENL and Havens

In addition to the content of this reply, Petitioners agree with, and fully reference herein, the reply filed by SSF, ENL and Havens in the above-captioned matter, also filed today in WT Docket No. 10-83.

3. Reference and Incorporation

Petitioners fully reference and incorporate herein their and their affiliates' Reply Comments filed in WT Docket No. 10-83 on May 10, 2010 (the "Reply Comments"). Those Reply Comments support the Petition and refute the Oppositions' arguments. Petitioners reiterate some of the items in the Reply Comments herein for convenience.

4. The Oppositions

Both Oppositions fail to address the Petition's facts and arguments regarding the Section 308 Proceeding and Enforcement Proceeding. Contrary to the Opposition's arguments that the Petition's facts and arguments regarding the Auction No. 61 Proceedings being repetitive, unsupported or rejected by the FCC, the FCC itself has commenced two investigations of MCLM, the Section 308 Proceeding and the Enforcement Proceeding, that upon a cursory review are based upon Petitioners' and their affiliates' petition to deny and subsequent appeals of the MCLM Auction No. 61 Form 61 application that is captioned above. Those two investigations have effectively granted the petitions in the Auction No. 61 Proceedings. The Oppositions neglect to mention either of the two investigations or to refute their relevance and impact on the Applications. Clearly, these two FCC investigations have shown that there are sufficient facts to call into question MCLM's representations to the FCC in the Auction No. 61 Proceedings. Since the License stems from Auction No. 61, it necessarily means that those same facts being investigated by the FCC in the two investigations are directly relevant to the instant proceeding and the Applications.

The MCLM and SCRRA position boils down to one stated part and one hidden but obvious one:

The stated part: The defects in the License and MCLM, and the fact that SCRRA is attempting to launder those, should be overlooked for the suggested greater good: that is acceptable to sacrifice the law for their alleged greater good; and effectively that a pile of wrongs can end up making a right- not for the common person or business—but for government, the alleged protector and administrator of the law. That is nonsense: it is standing on its head the law, and what government must stand for. It merely shows that SCRRA is violating its own internal legal standards and duties as a governmental agency to first follow public law. Indeed, SCRRA's internal documents on the Applications and the License that pretend to show due

diligence and compliance with applicable law, instead show it manufactured false statements for that purpose. Those are only partially discussed below, referencing Exhibit 1 (the "Internal Documents"), since SCRRA failed to provide a full response to Petitioners' request under California law for the public records involved. These call into question the character and fitness of SCRRA to be granted the Applications, as discussed herein and in the reply by their affiliates noted above and referenced herein.

The hidden but obvious part: MCLM and the Depriests are under a mountain of evidence as to violations of FCC rules and the US criminal code, and court judgments in the $15 million dollar range, multiple newly filed court cases (other than the two court cases by Petitioners), violations of FCC Rule Section 80.385(b) and the two declaratory rulings on that rule, and in other trouble shown in the public record. MCLM is in a fire sale of all of its AMTS. That is enticing to the railroads. They first bought 220 MHz[2] on the cheap, now they like the look of this MCLM fire sale. That, however, is not a reason for the FCC to overlook the reasons for the fire sale under the false pretense noted in 'a' above.

The MCLM position (that SCRRA and various commenters support, is contradicted by MCLM controllers. These controllers, led by Donald Depriest, took the exact opposite position with regard to the VPC Public Coast spectrum (the sister to AMTS spectrum) of their other Public-Coast spectrum company, Maritel. There, Donald Depriest asserted that the US Coast

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[2] The FCC has to this day not responded to the last petition of Petitioners as to the bogus rule "waivers" asked and almost instantly granted to Access 220: they were clearly bogus since they did not ask for waivers at all but replacement of a number of core 220 MHz rules for other rules. The FCC responds more to influence then law.

It has far too much assumed discretion since the Communications Act has paltry guidance as to what the heck it means by instructing the FCC to regulate in the "public interest, convenience and necessity."

With little guidance, the FCC does what it likes or what it is most politically beneficial for particular staff members and Commissioners to decide upon. Indeed, that is how the FCC has handled the MCLM long form application in Auction No. 61 and Petitioners' and their affiliates' petitions to deny and for reconsideration of that application. Petitioners will be taking that and related matters to court, not in an appeal of any FCC final order, but on the basis that the FCC deliberately violates its own and other law, repeatedly and clearly.

Guard should in no case be allowed to used even one slim Public Coast channel for critical maritime safety-of-life communications under AIS—why? -- simply because Maritel staked a specious claim to that and wanted to financially profit from that: profit over life it argued, even invoking a Fifth Amendment Unconstitutional "taking" argument. (Depriest- Maritel lost on that in the US Courts, then gave up.) Here the same party argues the opposite—that its spectrum must go to an asserted high-public interest use. The only consistency is that in both cases the real Donald Depriest argument was: he had to make a lot of money by the position—that had nothing to do with any greater public good.

If Donald Depriest and his companies, Maritel and MCLM, want to serve the public good, they should give away the spectrum to government or a nonprofit organization legally constrained to solely use its assets, including FCC licenses, only for support of government entities (legitimate, not rogue: there are plenty of the latter) or in support of the same public interest goals government serves but inadequately or inefficiently serves (that is the primary domain of nonprofit 501(c)(3) public charities and private foundations, as accepted by the IRS). Petitioners have done exactly that. MCLM has not.

Contrary to the Oppositions assertions that PTC is critical and in the public interest, the public record shows that many parties question whether taxpayer funds will be well spent on PTC as it is now conceived. See, e.g., Exhibit 2 to the Reply Comments.[34] This exhibit, from

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[3] Copy in HTLM also available online at:
http://docs.google.com/viewer?a=v&q=cache:SgbfKWeBy7wJ:www.aar.org/~/media/AAR/PositionPapers/PTC%2520Oct%25202009.ashx+positive+train+control+mandate&hl=en&gl=us&pid=bl&srcid=ADGEESgfwQ7S3HmxNoWZPZOr8ovsZFxxiGykWk7YOgULxz02XUjSflQULkFSUxbNytYNQtNAUrRotDstRuZjdBPY97W8w6haTBy3CBXOo7QlYLw9lY5_pWs8ruqt9mvBnv4BWqVHtEJ2&sig=AHIEtbQGMqQqMPr7wA1SvVgzE2JGJK7CcQ

[4] In the Assignment and SCRRA internal documents related to the Assignment, SCRRA suggests it should have PTC on lower 200 MHz to use the same as US freight railroads. This Exhibit 2 to the Reply Comments, however, shows why PTC is at best "not ready for prime time" for those railroads, as partly indicated in the quotes above. Moreover, the SCRRA internal documents, of which one is Exhibit 1 hereto, shows that SCRAA does NOT seek the 1 MHz of AMTS for PTC only, but to get excess spectrum for other speculative reasons. PTC itself is speculative, but SCRRA seeks to buy excess spectrum for other potential speculative reasons also.

the Association of American Railroads (and sources it drew upon) contains, among other relevant parts (underlining added):

> Even at its most basic level, the PTC mandate will cost freight railroads (and ultimately their customers) more than **$5 billion** in initial start-up costs and **hundreds of millions more in annual maintenance costs**, according to FRA estimates of the most likely railroad cost scenarios. The FRA admits that railroads' actual PTC-related costs could end up being much higher, and that the safety benefits of PTC will be only a small fraction of those costs. The FRA's proposed regulations regarding PTC implementation include several provisions over and above the statutory mandate that would add hundreds of millions of dollars to railroads' costs but **would not improve safety** in any meaningful way. The greater the unnecessary costs imposed on railroads, the less they will be able to provide the safe, cost-effective, and environmentally-friendly freight transportation service that America needs now and in the future.
> * * * *
> Railroads have spent hundreds of millions of dollars developing PTC, but it's still an **emerging technology**. To ensure the technology is fully functional and completely safe, much more development and testing are needed.
> * * * *
> The $5 billion that Class I freight railroads will have to spend just to install PTC by 2015 is roughly equal to a **full year's worth** of their infrastructure-related **rail capital spending**. 2 Because railroads have limited funds to devote to infrastructure projects, **expenditures on PTC will necessarily mean reduced expenditures on other projects** that would increase rail capacity, improve service, provide environmental benefits, and enhance safety.
> • PTC will be tremendously expensive, but will provide benefits significantly lower than its costs. The FRA estimates that, under the most likely scenario, the aggregate value of PTC-related rail safety benefits over 20 years will be $600 million to $900 million. In other words, railroads will incur at least **$15 in PTC costs for each $1 of PTC benefits**.
> Nor will PTC make rail operations faster or more reliable. Based on experience to date and the need for railroads to rush PTC implementation in the face of the 2015 deadline, it is more likely that PTC will make rail operations **less efficient and reliable**, not more so.
> * * * *
> However, the PTC mandate threatens railroads' unparalleled potential to lower shipping costs, make our economy more efficient, take trucks off the highway, save fuel, and reduce harmful emissions. The reality is, money railroads spend on PTC can't be spent on other safety measures or capacity, environmental, or service improvements.

Contrary to the SCRRA Opposition's arguments that they are not seeking a rulemaking, what SCCRA and MCLM are really proposing is that AMTS should be reallocated for railroad use. In fact, MCLM states as much in their petition for reconsideration of the Commission's

Memorandum Opinion and Order, FCC 10-39, (*25 FCC Rcd 3390)* regarding why MCLM seeks to regain AMTS spectrum that automatically terminated for permanent discontinuance at the John Hancock Tower in Chicago. In that petition MCLM asserted that AMTS service should be "repurposed" for railroad/PTC use. The position of MCLM and SCRRA and the breadth of the waiver requests, coupled with SCRRA's lack of even an attempt at a serious showing for the need to waive the rules to better meet the purpose of the rules (not to add SCRRA's own internal documents showing that it does not intend to use all of the AMTS for PTC—see Exhibit 1), represents, as MCLM itself argued, a proposal to "repurpose" AMTS—which is a request for more than a rule change. It is actually a request for wholesale change in the AMTS radio service from a Part 80 maritime service, which accommodates a variety of land mobile, to one form of land mobile service, namely whatever the railroads would like it to be (PTC, which is not well-established yet, and whatever else they may decide—as Exhibit 1 shows SCRRA has speculative uses for the spectrum in mind too). They should approach that squarely with the FCC in a request for rule change or a request to move AMTS from Part 80 to a special new part of Part 90. That procedure, at least, would fit the actual nature of these parties' position.

Both MCLM and SCRRA had years of opportunity to comment in the AMTS rulemaking, including in the last decision of the FCC in PR Docket 92-257, where it decided to what degree to change AMTS rules and allow forms of private land mobile radio service. Railroad needs for spectrum, including for PTC, existed in that period of time (to the degree any such needs truly existed—as shown by the quote above, AAR call that false). These parties simply chose not to participate in that proceeding where they could have asserted a public interest case for "repurposing" AMTS for railroad/PTC purposes. The only reason that MCLM is now making these arguments is not for a public interest reason to support its alleged repurposing, but since it seeks a multi-million dollar payment for the sale as part of its efforts to sell all of its AMTS spectrum (see the Petition that shows MCLM is offering all of its AMTS

spectrum for sale and MCLM's own admissions in FCC records that it is doing so). Sale of one's entire spectrum is not repurposing. The only reason the railroads are now seeking this repurposing is because they did not tend to their needs in a timely fashion during the years of the AMTS rulemaking in PR Docket No. 92-257.

SCRRA or any other party, cannot change the character and any defects in the License (and the subject spectrum being assigned) and assignor simply by the asserted suitability of the spectrum for a railroad purpose. The Oppositions baldly assert that the AMTS spectrum is the only solution for SCRRA's PTC needs. However, SCRRA has failed to demonstrate that there are no other suitable bands for it to provide PTC or that it needs all of the spectrum subject of the License (actually Exhibit 1 shows it does not need all of the spectrum and that it is being insincere with the FCC on that point—if SCRRA is misleading the FCC on that point, then it calls into question what else it may be misleading the FCC on regarding the Waivers). The Applications contain no showings of due diligence or analysis of why other spectrum bands are unsuitable. This is because they cannot show this. Instead, the Applications and the Oppositions rely on bald assertions on this point. They have also failed to demonstrate that there is not ample suitable spectrum for SCRRA's purposes or that it needs the quantity of spectrum involved for PTC. In fact, it is well known that PTC-220, LLC purchased far less than 1 MHz of spectrum, well under ½ of 1 MHz and in some areas of the country far less than that for PTC. They have not asserted that that was a futile purchase that could not support PTC. Even assuming several times of the spectrum needed so that the same channels would not be used in an immediately adjacent site, the quantity is still only several times that which is in the range of 1/5 of the amount that SCRRA is seeking to purchase. The fact is that SCRRA has failed to show it needs 1 MHz for PTC and Exhibit 1 shows its real purpose for seeking 1 MHz—to sell, lease or use for other speculative purposes, but not PTC.

The Internal Documents "Item 17" dated 11/9/2009 states:

> The 1 MHz held by MC/LM is probably more than will be necessary for SCRRA's short and mid- term PTC needs. As SCRRA will not immediately need the entire 1 MHz for PTC, it may use excess spectrum for other communications needs, for instance a system maintenance voice channel or may sell or lease any excess spectrum, or may determine not to purchase the entire 1 MHz in the first instance.

Clearly, contrary to the Oppositions, grant of the Waivers and of the Applications is not in the public interest so that SCRRA can sell or lease excess spectrum or use it as a maintenance voice channel. SCRRA does not need any waivers to do these items and it lacks candor for the SCRRA not to have told the FCC this.

Also, the Internal Documents show, contrary to the SCRRA Opposition's and SCRRA's assertions elsewhere that it has conducted due diligence and significant studies, that in fact SCRRA did not only not do due diligence and demonstrate it (See Exhibit 1 hereto), SCRRA rejected any discussion with Petitioners' regarding the matters discussed at section 6 of the Petition. SCRRA never contacted Petitioners regarding their spectrum nor about the Waivers they were seeking that would affect those of Petitioners that are co-channel or adjacent channel licensees (see the Petition's discussion regarding ENL's contract rights to the A-block mountain license in areas bordering the area subject of the Assignment). That is simply not due diligence and does not comply with the spirit and letter of Section 80.70 or the FCC decision cited by Petitioners and their affiliates as to why the FCC would not grant higher power due to adjacent channel interference concerns.

Further, Petitioners note here that the Internal Documents show that SCRRA says that MCLM was the single sole source for the spectrum. That is demonstrably false. The SCRRA document "Item 9" of January 4, 2010 (a certain memo to the SCRRA Board of Directors) states:

> As was set forth in the report authorizing entering into the LOI, as of the second and third quarter of 2009, the spectrum is available only from a single source. This conclusion has been confirmed both by Metrolink's staff and consultant, and also independently by Spectrum Bridge, the leading broker of radio frequencies in the needed bandwidth. The APA therefore must conform to Policy CON-19, Sole Source and Non-Competitive Negotiated Procurements. Pursuant to .that policy,

> as well as CON-5, staff, in conjunction with Metrolink's consultants, has conducted a cost and price analysis on the negotiated price with MCLM.

There has always been B-block AMTS spectrum in the area subject of the Assignment. VSL clearly held spectrum in the area that SCRRA needed, but it was never contacted by SCRRA or its alleged advisors that helped it to conduct the due diligence that made it conclude, as it asserts in its opposition, that it must use AMTS. Thus, SCRRA appears to have failed to follow its own internal policies and potentially state laws for making its purchase of the MCLM spectrum. Petitioners will bring this up with the SCRRA Board and any other appropriate authorities. As Petitioners note herein and in the Petition, SCRRA's counsel, Robert Gurss, could not be objective, Metrolink's staff never attempted contact with VSL and Spectrum Bridge is a party with an agreement with MCLM whereby it gets paid and therefore could not be objective in assessing values of AMTS or pointing out other alternative sources (Spectrum Bridge never contacted VSL about its spectrum on behalf SCRRA and it has never talked with those of Petitioners that have sold AMTS in the past per FCC records—the only actual closed transactions of geographic AMTS sold spectrum. Thus, there was no way Spectrum Bridge could provide a sincere valuation of AMTS).

SCRRA did not demonstrate in its due diligence (see e.g. Exhibit 1) why alternative spectrum is not available from the AMTS B-block (which VSL holds). Without discussing with VSL SCRRA could not have understood if VSL would provide use of the spectrum or whether or not the incumbent spectrum holder in the subject area had complied with FCC rules and declaratory rulings required for it to maintain any asserted valid incumbent stations. These are matters of public record including as explained in two FCC orders (See (1) *Letter* of April 8, 2009 from Scot Stone, Deputy Chief, Mobility Division, Wireless Telecommunicaitons Bureau to Dennis Brown, counsel for Maritime Communications/Land Mobile LLC, DA 09-793, *24 FCC Rcd 4135*, at footnote 7 (the "MCLM Ruling") and (2) *Order on Reconsideration*, DA 10-

664, Released 4/19/10 (the "2nd MCLM Ruling") (together the "Two Orders") with regard to Rule Section 80.385(b) that requires AMTS incumbents to provide to Petitioners, as co-channel geographic licensees, the actual technical parameters of the incumbent's site-based (alleged valid and operating) stations). Anyone who actually conducted reasonable due diligence would have seen the Two Orders, calculated or at least estimated the deficiencies and seen good cause to discuss with VSL as holder of geographic spectrum available for use in the SCRRA area. In addition, it is clear in the public record that Petitioners and their affiliates are all engaged in acquiring and using FCC licenses for Intelligent Transportation Systems, with some uses at no cost to the public. Given all of the above, contrary to the SCRRA Opposition's assertions of due diligence and studies, it is apparent that SCRRA and its alleged outside expert had some undisclosed purpose in ignoring the alternative spectrum, rejecting communications with Petitioners and solely pursuing the MCLM spectrum. It is especially questionable when MCLM itself and its affiliates and their qualifications to hold any spectrum and even their potential criminal conduct (as cited in the FCC's letters of investigation under Section 308 and by the Enforcement Bureau—see Petition's discussion of these) were clear in the public record.

One of the alleged advisors to SCRRA was Robert Gurss, an attorney who has formally served Mobex Network Services LLC ("Mobex"), predecessor-in-interest to MCLM, including to speciously inform the FCC that Mobex had validly constructed and operating stations throughout the country with continuity of coverage. Mobex was fully aware at that time, and it should be assumed that its counsel, Robert Gurss and Dennis Brown, were also fully aware at that time that those were fraudulent statements by Mobex. That is demonstrated in Petitioners' and affiliates Petition in the subject proceeding, including the component that referenced the FCC audit in 2004, where Mobex admitted to maintaining and renewing stations they had never constructed and that therefore had automatically terminated (See e.g. Section 4 of the Petition). Mobex and MCLM also share the same President and CEO, John Reardon. Thus, Mr. Reardon

and Mr. Gurss were well acquainted with each other and Mobex-MCLM's AMTS spectrum years before the Applications and apparently before Mr. Gurss's firm began representing SCRRA. Therefore, Mr. Gurss is not an objective legal counsel in this matter, contrary to what is indicated by SCRRA in the Internal Documents at Exhibit 1 hereto, as such it is not believable in the SCRRA Oppositon and elsewhere in this proceeding when its claims that it conducted substantial due diligence and determined that MCLM's AMTS spectrum was SCRRA's only option.

Petitioners have not gotten a complete answer to their FOIA request to SCRRA for certain records. SCRRA has said they have gotten certain documents and are still working on providing the rest. The most recent response from SCRRA says that it will have additional documents by June 10, 2010. In addition, Petitioners have not gotten any substantive answer on their FOIA request, FOIA Control No. 2010-379, regarding copies of responses of MCLM and its affiliates to 6 letters of investigation from the FCC. Therefore, Petitioners assert that they have the right to submit additional comments and further supplement their reply in response to the Oppositions once the information from those FOIA requests is obtained.

5. The MCLM Opposition

Regarding the MCLM Opposition's assertion that its License was not granted per a private proceeding, Petitioners refer to their appeals in the Auction No. 61 Proceedings that clearly show the FCC conducted a private proceeding without Petitioners and their affiliates in order to grant the MCLM Auction No. 61 Form 601, captioned above. In that proceeding, the FCC in their order denying Petitioner's original petition to deny said that they would deal with the Sandra DePriest and husband affiliation in separate proceeding, even though Petitioners' raised the issue and facts in their petition to deny. Then MCLM filed a major amendment under Section 1.2105, bidder status and control, for its Form 601 and then the FCC issued an order granting that major amendment and deciding upon facts raised by Petitioner's petition to deny,

but not allowing Petitioners' to participate at the petition to deny stage. The FCC could not deny Petitioners' petition to deny and then proceed to allow filing of the MLCM amendment and grant it. However, now the FCC is investigating MCLM based on the facts in Petitioners' and their affiliates' original petition to deny that was denied by the Bureau. The private arrangement between MCLM and FCC staff resulted in the denial of Petitioners' petition to deny, but on the very same basis that was the essence of that petition to deny re: change in bidder size due to undisclosed affiliates and undisclosed control (a spouse who was co-controller), the FCC and MCLM arranged that MCLM would submit an "amendment" to speciously get around those fatal defects. The fact that an "amendment" had to be submitted and granted shows that the denial of Petitioners' petition to deny was deliberately unlawful. The same decisional facts were involved. If Petitoners' and their affiliates' petition to deny had insufficient facts to call into question the grant of the MCLM Form 601 application and thus for the petition to be granted and a formal hearing required, then there would have been no need for the amendment, as a devious remedy for the fatal defects. In addition, Section 1.2105 clearly describes change in bidder size (designated entity bidder discount level) and/or change in control as an impermissible major amendment after the deadline for the Form 175. Both of those things happened, which is why the devious amendment arrangement was made between FCC staff and MCLM. However, at minimum, waivers would have been required to get around those clear impermissible major changes stated in Section 1.2105. In fact, MCLM submitted a waiver request essentially admitting the defects and seeking relief since the alleged sole controller, Sandra DePriest, was an alleged minister of a church and a woman, but with no good cause shown for its rule violations. In addition, MCLM continued to falsely assert that a large numbers of affiliates, and their gross revenues, were not affiliates and not attributable. After that time, MCLM has admitted that its previous sworn statements were incorrect in the two ongoing FCC investigations: Section 308 Proceeding and the Enforcement Proceeding. To this day, MCLM has not amended its Form 175

or Form 601 and disclosed its affiliates and attributable gross revenues or the actual control. It's initial amendment failed to do that.

Regarding the MCLM Opposition's arguments that the Applications' certifications were not false and that it has never had a license revoked or an initial, modification or renewal application denied, Petitioners show the following:

Contrary to the MCLM Opposition's arguments that past licensing actions of Mobex do not extend to it, MCLM has asserted in the WCB Proceeding that it is taking over the assets of Mobex and is stepping in the place of Mobex regarding Mobex's past licensing activities before the FCC including for refunds of any fees paid to USAC for USF by Mobex. Since MCLM is seeking to benefit form Mobex's past licensing activities, it is also subject to past Mobex liabilities. In addition, the FCC has determined that the liabilities of a license or licensee cannot be laundered or removed by an assignment (see *Order*, DA 04-4051, released December 28, 2004. *19 FCC Rcd 24939).*

It is established in law that you cannot acquire assets of this kind without the associated liabilities because those liabilities cannot be remedied simply by monetary payments to parties injured by the liabilities. The remedy or relief is the invalidation of the asset itself. That is the meaning of not being able to launder defects in licenses by an assignment. One cannot get rid of the defect/liability by the assignment. It stays with the license.

In addition, the Mobex-MCLM Chicago station had a modification application, which MCLM continued to uphold and still does before the FCC (for Sears Tower), that was denied by the FCC when it found the Chicago station that it was seeking to modify was permanently discontinued. However, at not time has MCLM updated the Applications under Section 1.65 to disclose this denial of its modification application.

Regarding non-tax debt, the question on the Applications is not that an applicant has been informed of a non-tax federal debt. The MCLM Opposition is misconstruing the requirement.

MCLM had an obligation to disclose non-tax debt it owed and it is cheating the FCC by not submitting the proper filings to show the debt it owes, namely timely and accurate Forms 499-A. The WCB Proceeding and the FOIA Control No. 2009-089 show that MCLM failed to file Forms 499-A for certain years and that it has not reported and paid USF fees for years since it has maintained that its AMTS licenses have been operated as PMRS, when they are only authorized for CMRS.

When citizens and companies have an obligation on a debt and it is there obligation to know that debt and state it and pay it, then they still have that debt whether or not they are informed of it by the Federal agency. However, the MCLM position is that it does not have to report any debts it knows it owes or that it has avoided paying by not filing correct Forms 499-A, but that the FCC must catch it not reporting operations or filing Forms 499-A and then inform MCLM of any obligations there under. That is absurd and clearly warrants further investigation by the FCC into MCLM's non-tax debt owed since the Petition also already provided ample evidence to indicate MCLM, with hundreds of operating AMTS stations around the country, has not been paying taxes and other regulatory fees per Form 499-A (e.g. MCLM's undisclosed, late assertion in the WCB Proceeding that Mobex did not operate interconnected, CMRS AMTS stations, but some other type of PMRS service, which was illegal).

If AMTS can be operated as PMRS as MCLM is stating that Mobex did through its history, then there is no need for the Assignment or the Modification that contain Section 20.9(b) certifications since an AMTS licensee can operate AMTS at any time as PMRS without permission from the FCC. In any case, MCLM has admitted that it did not file the Forms 499-A for years or any of the fees required. As stated above, MCLM has necessarily assumed the liabilities for its AMTS licenses when they were obtained from Mobex.

As shown in the Petition, MCLM was delinquent in payment of Auction No. 61 sums since it knew all along, per the facts in the Auction No. 61 Proceedings and the Section 308

Proceeding and Enforcement Proceeding, that it did not qualify for the bidding credit level that it had applied for in Auction No. 61. MCLM deliberately failed to disclose over 30+ affiliates and their gross revenues in its Form 175 and Form 601 and Mr. DePriest as a co-controller (as a spouse and as the Petition shows the actual controller, Manager and Director of MCLM). At all times, MCLM had FCC legal counsel, its alleged owner, Sandra DePriest, is an attorney and has managed FCC licensees with her husband, MCLM's co-controller, Donald DePriest, who has owned and controlled other FCC licensees, including MariTel, Inc. that participated in FCC auctions; MCLM's CEO and President, John Reardon, who was one of MCLM's authorized bidders in Auction No. 61, is also an FCC-practice attorney and managed Mobex, another FCC licensee. Thus, there is no way that MCLM did not know it had to list Donald DePriest's affiliates and that those affiliates' revenues disqualified it from the applied for bidding credit.

As the Petition showed, MCLM's actual control is not disclosed on its Form 602 since it fails to list Donald DePriest. The facts in the Petition, Section 308 Proceeding, Enforcement Proceeding and Auction No. 61 Proceedings clearly show that Donald DePriest is at least a co-controller with Sandra DePriest, if not the sole controller of MCLM (see e.g. the Petition's Exhibits A-D that include written, signed agreements for MCLM by Donald DePriest and the State of Mississippi Annual Reports for Communications Investments, Inc. that were certified as truthful and accurate by Sandra DePriest that list Donald DePriest for several years, starting in 2005 as the sole Director).

Regarding non-compliance with Section 80.385(b), the MCLM Opposition refers to its Comment; however, that Comment did not fulfill the requirements of the Two Orders and if anything shows that MCLM is willfully violating Section 80.385(b). It is not in the public interest to grant the Applications of an entity that refuses to follow FCC rules.

Regarding the MCLM Opposition's Exhibit 1, Petitioners point out the following:

All the attached statements are defective and as such cannot refute the evidence provided by Petitioners. First, none of the statements contains a sworn statement under penalty of perjury that they are accurate and truthful. Each statement only says that it is that person's "understanding" that FCC license assets are not included in the collateral. That is evasive language. The statements don't refer to any specific agreements (so that the FCC can identify them and obtain them for the Section 308 Proceeding and Enforcment Proceeding) and they don't definitively state that the agreements do not include FCC licenses as collateral. To say it is their understanding is meaningless. These people have agreements with MCLM that must clearly state what is being provided as collateral and what is not. Since they cannot state under penalty of perjury that the MCLM FCC licenses are not be used as collateral, then it must be assumed that they are. Not to add, the UCC filing for the debt between MCLM and Pinnacle states that part of the collateral is all rights MCLM has under its purchase agreement with Mobex. That purchase agreement, per MCLM, only involved the Mobex licenses. Thus, Pinnacle National Bank must necessarily have as collateral the AMTS incumbent licenses once held by Mobex and now by MCLM. That UCC also mentions all general intangibles, leases (which only pertain to MCLM's licenses), proceeds, etc.

Pinnacle National Bank's statement is directed, not to Sandra DePriest, but to "John S. Reardon, Chief Executive Officer" of MCLM, even though MCLM continues to maintain the position that Mr. Reardon is not an officer. This is yet further evidence that Mr. Reardon is an officer of MCLM.

Pinnacle National Bank's statement says the agreement with them is dated 1/27/10; however, the UCC filing was from 2005 and the credit facility admitted to by MCLM is from 2005. Thus, the statement is not addressing the UCC filing presented by Petitioners and thus the Pinnacle National Bank statement is defective or misleading. In addition, the Pinnacle National Bank statement does not contain printed name of the Senior Vice President, only his signature.

Thus, it is hard to know who actually signed the document since the name is not clear from the signature.

Regarding the MCLM Opposition's comment on Mr. Gurss, Petitioners discuss above further the relevance of Mr. Gurss and his firm to the proceeding.

Petitioners have not made slanderous comments. Facts and law support all of Petitioners' statements and arguments in the Petition. The Petition and its facts speak for themselves including regarding criminal conduct by MCLM and its co-controllers. Just because the FCC has not yet found MCLM to have deliberately and willfully violated its rules and to have misrepresented facts and made false certifications, does not mean that MCLM has not taken such actions or that its actions were not criminal, or that the FCC or a court will not ultimately find its actions criminal or fraudulent.

It is not believable that MCLM would have misstated its agreement with Eagle Communications in the sale contract between it and SCRRA. The FCC should investigate this matter, especially considering MCLM's lack of candor in the Auction No. 61 Proceedings.

6. The SCRRA Opposition

The SCRRA Opposition fails to respond to any of the specific facts and law in the Petition. In addition, it is not correct that the FCC has disposed of any facts and law in the Petition because: (1) all of Petitioners and its affiliates' challenges regarding the License and MCLM and MCLM qualifications to have obtained and maintained the License are still pending before the FCC. In fact, the two FCC investigations discussed at length in the Petition could not more clearly constitute effective grant of the petition to deny and petitions for reconsideration in the pending Section 309 Proceeding regarding MCLM's Form 175 and Form 601 in Auction No. 61. It is entirely spurious to suggest that the FCC has decided upon and rejected the core facts and arguments in those pending challenges when they are the very matters of the FCC's two investigations.

The SCCRA Opposition's statements that SCRRA conducted significant studies are bald assertions. SCRRA could not have possibly determined that in good faith with any due diligence. The Petition showed that Petitioners presented an alternative that SCRRA would not even discuss. There is nothing whatsoever in Federal law regarding PTC, including the "Rail Safety Improvement Act of 2008," Public Law 110-432. October 16, 2008, that requires use of any particular spectrum band.

The SCRRA's arguments about mitigating differences with Petitioners and its affiliates don't make sense. It is SCRRA's obligation to show that they meet the waiver standard of Section 1.925. One of the criteria they have to meet, they totally failed to meet, is that operations under the Waivers would not cause harmful interference to co-channel bordering licensees (ENL) and adjacent channel licensees (VSL, SSF and ENL). The core purpose of the Communications Act was to establish federal regulation to allocate use of radio spectrum to mitigate harmful interference (National Broadcasting Co. v. United States 319US 190, 227 (1943)).

In addition, the Waivers entirely failed to demonstrate lack of harmful interference to the Navy SPASUR system. MCLM-Mobex are well aware of that potential. For example, see NTIA document RIN0660-AA14 (Mandatory Reimbursement Rules for Frequency Band for Geographic Relocation of Federal Spectrum Dependent Systems--Exhibit 4 hereto), section at the start of the document on AMTS 216-220 MHz. The Petition cited an FCC decision concerning the reason it restricted power to current levels in the rules, including to not cause adjacent channel interference. The Oppositions did not show why the FCC was incorrect in that decision. Petitioners gave additional reasons why the FCC was correct, especially that are well-known to modern radio engineers if spectrum efficient technology and system architecture is used. For these reasons the Oppositions entirely failed to refute the Petition as to the technical failures of the Waivers.

The Oppositions, including the SCRRA Opposition, also failed to refute the Petition's showing by reference and incorporation of the analysis by Dr. Douglas Reudink in the BREC Proceeding including, but not limited to, why a wavier of the AMTS power limits and allowing use of both transmit and receive channels for transmit would be detrimental to adjacent and co-channel licensees.

The SCRRA Opposition assertion that the Waivers will allow intensive use of AMTS is absurd. To Suggest that higher power and higher height and other changes they seek will result in greater usage can only mean the following: that instead of building more spectrum efficient system architecture with shorter spaced sites, more spectrum reuse, higher capacity per amount of spectrum per area, SCCRA instead wants less spectrum efficiency, which means less amount of capacity per given amount of spectrum per area because that is cheaper to build. Intensive is simply an adjective that has no particular technical basis.

The SCRRA Waivers are not the same as their Section 20.9(b). The NUSCO waivers did not include technical changes, including higher power, as included in the Waivers. In fact, all of the NUSCO site applications show less power than rules currently allow, and the NUSCO border agreement with ENL informed the FCC that the parties agreed to less power at the borders than allowed under FCC rules. That is because NUSCO and ENL sought only to build spectrum efficient systems with appropriate modern technology and system designs.

Regarding priority to maritime, first, SCRRA's own internal documents, obtained under FOIA, show that they do not need the whole band. As Exhibit 1 and Exhibit 3 hereto show (Reply Comments by Petitioners and their affiliates in WT Docket No. 10-83) by citing internal documents of SCRRA, SCRRA does not seek 1 MHz of AMTS for PTC, but are buying surplus spectrum for speculative purposes. Therefore, it is misleading for SCRRA to state that this entire A-block must be taken away from maritime service, including the minimum of priority to maritime. SCRRA's position is that they need the waiver of maritime priority in addition to

their Section 20.9(b). There is nothing in any law saying that railroads must use AMTS for PTC. There is nothing whatsoever in Federal PTC-related regulations (including Rail Safety Improvement Act of 2008) that legally or effectively prohibits any railroad operating along critical maritime traffic areas from using AMTS spectrum in accordance with the rules to give priority to maritime traffic.

The US Coast Guard does not regulate or is not directly involved with AMTS public coast radio services (as it is with certain aspects of VHF Public Coast radio service that pertain to AIS). In fact, the US Coast Guard did oppose the real party in interest in MCLM, Donald DePriest, in his actions directing MariTel, Inc. to attempt to take away use from the US Coast Guard of certain VPC spectrum channels allocated for AIS.

SCRRA is turning the waiver standard on its head. Contrary to the SCRRA Opposition, the standard is not that the waiver will be granted if requested unless an opponent defends the rule with a real-life example. Instead, it is the party seeking the waiver that must not only show a concrete real-life reason for the waiver that will not prejudice other licensees abiding by the rules, but must show that there is no other good alternative. It is clear in the Petition, that the BREC Proceeding was referenced because it sought technical waivers very similar to those of SCRRA, thus the arguments in that proceeding against the BREC waivers are applicable to the Waivers. The fact that the SCRRA Opposition says that it cannot provide a real-life situation, and that it cannot show it has tried to work with co-channel and adjacent channel licensees that would be affected by its Waivers, along with the fact that its own Internal Documents evidence that it does not need all of the subject AMTS spectrum, clearly show that the Waivers are premature and defective, and thus should not be granted.

As stated above, the SCRRA Section 20.9(b) certification is shown to be false by its own Internal Documents at Exhibit 1 that show it does not need all of the subject AMTS spectrum in the Assignment for PTC. SCRRA has lacked candor with the FCC in its true intentions.

7. Conclusion

For the reasons given herein, the relief previously requested by Petitioners' should be granted including dismissal of the Applications, revocation of the License and disqualification of MCLM as a licensee. At minimum, a hearing must be held under Section 309(d) and (e) since sufficient prima facie evidence has been presented calling into question grant of the Applications.

Respectfully,

Verde Systems LLC, by

[Filed electronically. Signature on file.]
Warren Havens
President

Intelligent Transportation & Monitoring Wireless LLC, by

[Filed electronically. Signature on file.]
Warren Havens
President

Telesaurus Holdings GB LLC, by

[Filed electronically. Signature on file.]
Warren Havens
President

Each of Petitioners:

2649 Benvenue Ave., Suites 2-6
Berkeley, CA 94704
Ph: 510-841-2220
Fx: 510-740-3412

Date: May 17, 2010

Attached: Exhibits follow the Certificate of Service

Declaration

I, Warren Havens, as President of Petitioners, hereby declare under penalty of perjury that the foregoing Reply, including all attachments and exhibits, was prepared pursuant to my direction and control and that all the factual statements and representations contained herein are true and correct.

/s/ Warren Havens
[Submitted Electronically. Signature on File.]

Warren Havens

May 17, 2010

Certificate of Service

I, Warren C. Havens, certify that I have, on this 17th day of May 2010, caused to be served, by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Reply, including all exhibits and attachments, unless otherwise noted, to the following:[5]

Jeff Tobias, Mobility Divison, WTB
Federal Communications Commission
Via email only to: jeff.tobias@fcc.gov

Lloyd Coward, WTB
Federal Communications Commission
Via email only to: Lloyd.coward@fcc.gov

Gary Schonman, Special Counsel
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
Via email only to: gary.schonman@fcc.gov

Brian Carter
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
Via email only to: brian.carter@fcc.gov

Dennis Brown (legal counsel for MCLM and Mobex)
8124 Cooke Court, Suite 201
Manassas, VA 20109-7406

Fletcher Heald & Hildreth (Legal counsel to SCRRA)
Paul J Feldman
1300 N. 17th St. 11th Fl.
Arlington, VA 22209

Southern California Regional Rail Authority
ATTN Darrell Maxey
700 S. Flower St. Suite 2600
Los Angeles, CA 90017

Russell Fox (legal counsel for MariTel, Inc.)
Mintz Levin
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

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

Jason Smith
MariTel, Inc.
4635 Church Rd., Suite 100
Cumming, GA 30028

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. (counsel to PSI)
Audrey P Rasmussen
1120 20th Street, N.W., Suite 700 North
Washington, DC 20036

Joseph D. Hersey, Jr.
U.S. National Committee Technical Advisor and,
Technical Advisory Group Administrator
United States Coast Guard
Commandant (CG-622)
Spectrum Management Division
2100 2nd Street, S.W.
Washington, DC 20593-0001
Via email only to: joe.hersey@uscg.mil

[Filed Electronically. Signature on File]

_____

Warren Havens

EXHIBIT 1

METROLINK

SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY

TRANSMITTAL DATE: **November 9, 2009**

MEETING DATE: **November 13, 2009** **ITEM 17**

TO: **Board of Directors**

FROM: **Chief Executive Officer**

SUBJECT: **Contract No. PO370-10 – Letter of Intent to Purchase Radio Frequency Licenses Necessary for Positive Train Control from Maritime Communications/Land Mobile LLC**

Issue

Radio frequency (RF) spectrum is required in order to support SCRRA's operations and provide for the deployment of Positive Train Control (PTC) on Metrolink trains. Absent this critical communications component, PTC cannot be deployed.

Recommendation

Staff recommends the Board authorize the Chief Executive Officer to (1) enter into a Letter of Intent to Purchase Radio Frequencies with Maritime Communications/Land Mobile, LLC, for the purchase of Federal Communications Commission licenses in the 220 MHz band, subject to the fundamental business terms set forth in this report, and (2) make a deposit into escrow of $$60,000 to secure the Letter of Intent which funds shall be returned to SCRRA upon execution of the subsequent purchase agreement, with the understanding that any subsequent purchase agreement will be brought to the Board for approval.

Alternatives

The Board may direct staff to seek alternate sources of RF spectrum. Investigation to date has not located any such alternative source.

Background

Federal legislation (the Rail Safety Improvement Act of 2008) requires SCRRA to implement an interoperable PTC system by December 31, 2015. SCRRA is aggressively pursuing its goal of equipping all of its locomotives and cab cars for PTC by the earlier deadline of 2012. PTC systems require a substantial amount of dedicated RF spectrum. UP and BNSF both will use the 220 MHz spectrum on their PTC systems with which SCRRA's PTC must interoperate. It is therefore necessary for SCRRA to

obtain enough suitable spectrum in the 220 MHz band in order to implement an interoperable PTC system as required. SCRRA has obtained the services of a consultant, Alan Polivka of Transportation Technology Center, Inc., as well as special legal counsel for Federal Communications Commission (FCC) related issues at the law firm Fletcher, Heald & Hildreth to advise it in the procurement of the necessary spectrum licenses.

220 MHz spectrum frequencies are licensed by FCC. While the FCC does sometimes make Public Safety/Government-only spectrum available directly to government agencies like SCRRA for purposes like PTC, SCRRA's consultant and legal counsel have determined that such spectrum, in sufficient quantities to allow for PTC, is not available without requiring federal rules changes and/or waivers from the FCC that might not be forthcoming at all, and that in any event may not be finalized until after any other alternatives no longer exist. SCRRA's only low risk option to ensure that PTC can be deployed, therefore, is to purchase frequency licenses on the open market. Even when purchased on the open market, the acquisition of such a license involves an FCC transfer and approval process.

SCRRA's consultant has made considerable efforts to research all known spectrum licenses for sale on the open market and has advised that based on best available information, only one source is selling sufficient quantities of radio frequency licenses that are suitable for use in Metrolink's geographical territory. The single source is Maritime Communication/Land Mobile, LLC, and (MC/LM), which is offering for sale 1 MHz of spectrum from the 217-222 MHz band. SCRRA is still in the process of determining exactly how much spectrum is necessary for its PTC system. The 1 MHz held by MC/LM is probably more than will be necessary for SCRRA's short and mid-term PTC needs. As SCRRA will not immediately need the entire 1 MHz for PTC, it may use excess spectrum for other communications needs, for instance a system maintenance voice channel or may sell or lease any excess spectrum, or may determine not to purchase the entire 1 MHz in the first instance. At this time, staff anticipates purchasing the entire 1 MHz as the pricing for that quantity reflects a volume discount such that there will be only a limited financial benefit to purchasing less than the entire 1 MHz.

The business terms of any Asset Purchase Agreement (APA) with MC/LM will be complex, and the approval of that agreement will be brought back to the Board. There are a number of issues relative to the licenses that will need to be resolved in order for the FCC to approve SCRRA's acquisition. These issues include jurisdictional waivers that may be needed from both the United States Coast Guard and the Mexican government, as well as legal challenges that are currently pending before the FCC that may not substantively affect SCRRA's rights, but that could delay the actual transfer of the RF license to SCRRA. In addition, MC/LM has previously leased, or otherwise obligated, a portion of the spectrum and SCRRA will need to ensure that these obligations either are terminated, or do not interfere with its use of the spectrum for PTC.

Because of these complexities and the potential loss of the needed spectrum because it is anticipated that there are other potential buyers, staff proposes a preliminary step of entering into a Letter Of Intent (LOI) with MC/LM in order to ensure the availability of the RF while obligating both parties to negotiate exclusively with each other in good faith the details of the APA. The LOI requires that SCRRA make a $60,000 deposit into an escrow account in order to secure the frequency availability. SCRRA will forfeit this deposit if it decides not to enter into the subsequent APA within 90 days.

Staff intends to negotiate the business terms of the APA with MC/LM to provide SCRRA with protections against the possibility that the transfer of the license will be delayed, or even prohibited by the FCC. Pursuant to the LOI, the purchase price of the RF will be $7,178,000. SCRRA will make a deposit of 10% of the total purchase price into escrow upon execution of the APA. This deposit essentially reserves the spectrum for SCRRA while the process of transferring the license by the FCC is underway. SCRRA will then pay the remaining sums due only upon successful assignment and transfer of the licenses to SCRRA by the FCC. If assignment by the FCC does not occur within a specified time, likely to be six months, SCRRA may re-claim its deposit from escrow and terminate the APA.

As indicated above, the spectrum for the geographic area and in the quantity required is currently available only from a single source. The APA therefore must conform to Policy CON-19, Sole Source and Non-Competitive Negotiated Procurements. Pursuant to that policy, and in accordance with SCRRA's Contract and Procurement Administration's CON-5, a cost and price analysis must be performed on the negotiated price with MC/LM prior to entering into the APA. Staff, in conjunction with SCRRA's consultants, has closely analyzed MC/LM's proposed purchase price and has compared it to similar procurements by other entities, including a recent procurement of spectrum by the freight operators that share tracks with SCRRA. SCRRA's consultant has also analyzed MC/LM's original purchase price. This research has confirmed that MC/LM's offered price is within industry norms. While radio frequencies are not the kind of goods or services susceptible to a traditional cost or price analysis, Staff's extensive research indicates that MC/LM's proposed price is fair and reasonable.

Staff recommends authorizing an LOI with MC/LM, and the deposit of $60,000, leading to the acquisition of 1 MHz of spectrum from the 217-222 MHz band subject to the business terms described in this report. The actual acquisition of the license pursuant to an APA will be brought to the Board for approval. Frequency licenses are rarely on the open market for any length of time, and so the opportunity to purchase the necessary bandwidth from MC/LM is likely only available for a very short period. Absent entering into this LOI with MC/LM now, it is unknown how and if SCRRA will be able in the future to acquire the spectrum necessary to implement its PTC system as required.

Budget Impact

Funding for the spectrum purchase is available within the Positive Train Control (PTC) program utilizing a combination of Federal, State and Local grants

Prepared by: Darrell Maxey, Director Engineering and Construction

DAVID SOLOW
Chief Executive Officer

METROLINK

SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY

TRANSMITTAL DATE: **January 4, 2010**

MEETING DATE: **January 8, 2010** **ITEM 9**

TO: **Board of Directors**

FROM: **Chief Executive Officer**

SUBJECT: **Purchase Order No. 370-10 Authorize CEO to Execute Asset Purchase Agreement for Radio Frequency Licenses Necessary for Positive Train Control from Maritime Communications/Land Mobile, LLC**

Issue

Radio frequency (RF) spectrum is required in order to support Metrolink's operations and provide for the deployment of an interoperable Positive Train Control (PTC) System. Absent this critical communications component, PTC can not be deployed.

Recommendation

Staff recommends the Board authorize the Chief Executive Officer to (1) enter into an Asset Purchase Agreement (APA) with Maritime Communications/Land Mobile, LLC (MCLM), for the purchase of Federal Communications Commission (FCC) licenses in the working range of 220 MHz band (the AMTS band), subject to the fundamental business terms set forth in this report, and (2) make the payments called for in the APA, including a deposit into escrow upon execution of the APA of $717,800, representing 10% of the maximum purchase price, which funds shall be returned to Metrolink unless the license transfer is approved by the FCC within a specified period of time.

Alternatives

The Board may direct staff to continue to negotiate terms of the APA with subsequent Board approval prior to executing the APA, or to terminate negotiations and seek alternate sources of RF spectrum. Investigation to date has not located any acceptable alternative source that fits the needs and requirements of SCRRA. Metrolink has already entered into a Letter of Intent to purchase the RF and will forfeit a $60,000 deposit if it does not enter into the APA by February 8, 2010.

Background

Federal legislation (RSIA'08) requires Metrolink to implement an interoperable PTC system by December 31, 2015. Metrolink is aggressively pursuing an implementation

strategy to meet an earlier deadline of 2012. PTC systems require a substantial amount of dedicated RF spectrum. UP and BNSF both will use the 220 MHz spectrum on their PTC systems with which Metrolink's PTC must interoperate. It is therefore necessary for Metrolink to obtain enough suitable spectrum in the working range of the 220 MHz band in order to implement an interoperable PTC system as required. Metrolink has obtained the services of a consultant, Alan Polivka of Transportation Technology Center, Inc., as well as legal counsel at the law firm Fletcher, Heald & Hildreth in Washington DC to advise it in the purchase of the necessary RF.

Pursuant to Board action on November 13, 2009, SCRRA has entered into a Letter of Intent (LOI) to purchase the RF from MCLM. The fundamental business terms of the acquisition were set forth in the LOI and approved by the Board:

1. Purchase Price. The purchase price is $7,178,000, assuming that Metrolink purchases the full 1 MHz of spectrum. Under the APA, Metrolink may determine to purchase less spectrum if it determines, pursuant to an analysis that is presently underway, that it needs less RF to operate its PTC System. The full purchase price represents a volume discount and the unit price may therefore be higher if Metrolink purchases less than 1MHz, although the total price will be less than $7,178,000.

2. Initial Deposit. Metrolink will make a deposit of $717,800, representing 10% of the maximum purchase price, into escrow upon execution of the APA. This deposit essentially reserves the spectrum for Metrolink while the process of transferring the license by the FCC is underway.

3. Final Payment. Metrolink will pay the remaining sums due only upon a final order from the FCC assigning the license to Metrolink.

4. Opt-Out. If assignment of the license by the FCC does not occur within 12 months of filing the assignment application at the FCC, Metrolink may re-claim its entire deposit from escrow and terminate the APA. Metrolink also retains the right to continue with the transaction at that time, if it so chooses.

As was set forth in the report authorizing entering into the LOI, as of the second and third quarter of 2009, the spectrum is available only from a single source. This conclusion has been confirmed both by Metrolink's staff and consultant, and also independently by Spectrum Bridge, the leading broker of radio frequencies in the needed bandwidth. The APA therefore must conform to Policy CON-19, Sole Source and Non-Competitive Negotiated Procurements. Pursuant to that policy, as well as CON-5, staff, in conjunction with Metrolink's consultants, has conducted a cost and price analysis on the negotiated price with MCLM. MCLM's proposed purchase price was compared to similar procurements by other entities, including a recent procurement of spectrum by the freight operators that share tracks with Metrolink. In addition, Metrolink commissioned Spectrum Bridge to provide a fair market valuation of the

proposed spectrum, which valuation set forth the price of all recent analogous spectrum purchases. Based on all of the above information, Metrolink's consultants have advised that the proposed purchase price is within industry standards and is fair and reasonable. Staff has validated that determination.

The LOI requires the APA be entered into by February 8th. The fundamental business terms of the APA have been negotiated, and indeed were set forth in the LOI. While there does not appear to be any significant disagreement between the parties, the time necessary in the ordinary course of business for finalizing the APA terms and conditions does not allow for Board action at a regularly scheduled meeting in time to meet the February 8th deadline. Staff is therefore asking the Board to authorize the CEO, upon conclusion of negotiations with MCLM, to (1) execute the APA on terms consistent with this Report and in a form approved by Legal Counsel, and (2) make the necessary payments called for in the APA, including the initial escrow deposit due upon execution and any additional payments due upon closing.

Budget Impact

Funding for the spectrum purchase is available within the Positive Train Control program utilizing combination of Federal, State and Local grants

Prepared by: Darrell Maxey, Director Engineering and Construction

ERIC HALEY
Chief Executive Officer

EXHIBIT 2

November 10, 2009

Mr. John Reardon
CEO
Maritime Communications/Land Mobile, LLC
218 N. Lee Street, Suite 318
Alexandria, Virginia 22314

Letter of Intent for Acquisition of MCLM AMTS License

Dear Mr. Reardon:

The purpose of this Letter of Intent is to evidence the desire of SCRRA/Metrolink (herein "Metrolink") to purchase from Maritime Communications/Land Mobile, LLC (herein "MCLM") all or a portion of the spectrum of the Federal Communications Commission ("FCC") license WQGF 318 in the Metrolink service area designated by the attached spreadsheet.

Metrolink understands that Station WQGF 318 is the "A Block" of AMTS frequencies purchased in Auction 61 for the Southern Pacific service area. Metrolink further understands that MCLM owns an incumbent license for many of these same areas (as set forth in Exhibit B hereto), and that this incumbent license or portions thereof will be cancelled by MCLM and any customer commitments associated therewith similarly cancelled or, in the case of the Spectrum Tracking, Inc. lease, assigned to Metrolink as part of conveyance of the license for Station WQGF 318 to Metrolink.

With the exception of the existing Spectrum Tracking, Inc. lease to be assigned to Metrolink, MCLM agrees to deliver the Station WQGF 318 license spectrum free and clear of any incumbents, liens or other restrictions making the spectrum unusable by Metrolink (to be identified prior to executing an Asset Purchase Agreement), and that Metrolink's preliminary evaluation that the spectrum is usable for Metrolink's purposes is a condition to Metrolink's execution of an Asset Purchase Agreement. The parties will negotiate provisions in the Asset Purchase Agreement to ensure that Metrolink's operations on the purchased spectrum will not receive interference from facilities that remain or become licensed to MCLM. MCLM agrees to cooperate with Metrolink to negotiate in good faith an Asset Purchase Agreement to effectuate the purpose of this Letter of Intent. MCLM understands that a condition of Metrolink's executing an Asset Purchase Agreement will be approval of that Agreement by the SCRRA Board of Directors. The Asset Purchase Agreement shall contain customary terms regarding this transaction, including a provision allowing Metrolink to opt-out of the purchase of the WQGF 318 license (with the return of its entire Deposit) if the FCC does not approve the assignment of the license to Metrolink within a specific period of time, to be set forth in the Asset Purchase Agreement. The Asset Purchase Agreement will also provide that one condition of closing will be that the FCC's grant of the assignment of license includes grant of

various waiver requests necessary to properly use the spectrum for Metrolink's purposes.

MCLM and Metrolink further agree to the following terms:

a) Purchase Price. Metrolink agrees to pay to MCLM Seven Million One Hundred and Seventy-Eight Thousand Dollars ($7,178,000.00) (the "Purchase Price") for the entire A Block License. MCLM will be responsible for separately paying any "unjust enrichment" penalty to the FCC, and for separately paying any brokerage fees associated with this transaction. The Asset Purchase Agreement will include provision for a Deposit of Ten Percent (10%) paid into escrow at the execution of that Agreement. The balance of the purchase price shall be paid upon Closing.

b) Adjustments to Purchase Price. MCLM agrees that Metrolink, in its discretion, may determine to purchase less than all the 1 MHz of spectrum available. Metrolink agrees that, at a minimum, it will purchase 500 kHz of spectrum. In that event, Metrolink will send MCLM written notice, and MCLM will adjust the purchase price accordingly.

   i. Metrolink agrees that MCLM has provided a discounted bulk purchase offer of $0.35 cents per MHz/pop in calculating the Purchase Price in Section (a) above, based on the population figures contained in the attachment below.
   ii. In the event Metrolink determines to purchase less than the entire amount of spectrum, the Purchase Price for all spectrum purchased by Metrolink shall be based on the higher amount of $0.45 cents per MHz/pop.

c) Deposit and Exclusivity. Upon execution of this Letter of Intent, Metrolink shall pay an Initial Deposit of Sixty Thousand Dollars ($60,000.00) into escrow with the law firm of Fletcher, Heald and Hildreth, PLC. In exchange for the Deposit, MCLM agrees to take the Station WQGF 318 License off the market and exclusively reserve the License for Metrolink. The Exclusivity Period shall expire upon the earlier of (i) the mutual termination of this Letter of Intent by both parties, (ii) the termination of the Asset Purchase Agreement; and (iii) the ninety-first day after execution of this Letter of Intent, if the Asset Purchase Agreement has not been executed by that date, and the Parties have not extended this Letter of Intent. MCLM agrees that, from the date of mutual execution of this Letter of Intent and for ninety (90) days thereafter, MCLM will not, nor will it permit any affiliate, employee, attorney, accountant, financial adviser, broker or other representative of MCLM to negotiate with, or solicit or encourage submission of any proposal or offer from, any third party other than Metrolink with respect to the sale or lease of WQGF 318, or any of the frequencies authorized in WQGF 318.

d) Initial Deposit upon Termination for Metrolink's Convenience. In the event that the parties fail to enter into an Asset Purchase Agreement after ninety (90) days,

or in the event that Metrolink determines not to move forward with this transaction for any reason, other than MCLM's failure to negotiate in good faith or otherwise comply with the terms of this Letter of Intent, then Metrolink shall forfeit to MCLM the Initial Deposit. In that event, Metrolink shall instruct the escrow agent to release the Initial Deposit to MCLM. MCLM shall be free to market the spectrum to third parties, and shall retain the Initial Deposit as its sole remedy for damages. Otherwise, the Initial Deposit shall be returned to Metrolink.

e) Expenses. Each Party shall separately bear its own expenses incurred in connection with this Letter of Intent, regardless of whether or not the Asset Purchase Agreement is executed.

f) Entire Agreement. This Letter of Intent is intended to be a binding commitment between the Parties, and it constitutes the entire understanding between the Parties and supersedes all prior discussions between the Parties on the subject matter hereof. Except as otherwise provided herein, this Letter of Intent may be amended or modified only by a writing executed by each of the Parties.

g) Counterparts; Facsimile. This Letter of Intent may be executed in one or more counterparts, all of which when fully executed and delivered by both Parties and taken together shall constitute a single agreement, binding against each of the Parties. To the maximum extent permitted by law or by any applicable governmental authority, any document may be signed and transmitted by facsimile or other electronic means with the same validity as if it were an in signed document.

[Remainder of page intentionally left blank]

We look forward to working with you toward the successful conclusion of the Asset Purchase Agreement within the next ninety days. Please evidence your agreement to this Letter of Intent by signing below, and sending me an original copy of this Agreement by overnight mail or via email in PDF format.

Sincerely,

Darrell J. Maxey 11/13/09

Darrell Maxey
Director Engineering and Construction
SCRRA/Metrolink

David Solow
CEO
SCRRA/Metrolink

Agreed to by:

John Reardon
CEO

Date: 11/10/09

Exhibit A

The A Block Frequencies are to be assigned to Metrolink in the area designated below:

Pricing of Proposed Spectrum

#	County	State	Bandwidth	2000 Pops	2009 Estimated Pops	2009 MHz Pops
1	Ventura County	CA	1 MHz	753,197	791,247	791,247
2	Los Angeles County	CA	1 MHz	9,519,338	9,826,493	9,826,493
3	San Bernadino, County	CA	1 MHz	1,709,434	1,981,696	1,981,696
4	Orange County	CA	1 MHz	2,846,289	2,970,485	2,970,485
5	San Diego County	CA	1 MHz	2,813,833	2,937,023	2,937,023
6	Riverside County	CA	1 MHz	1,545,387	2,000,816	2,000,816

Total MHz Pops: 20,507,760

Exhibit B

Incumbent MCLM AMTS Licenses to Be Cancelled

KAE889: Sites 14 (Orange County), 40 (San Diego County), and 44 (Los Angeles, County)

EXHIBIT 3

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

In the Matter of	)	
	)	
Maritime Communications/Land Mobile LLC	)	DA 10-556
and Southern California Regional Rail	)	WT Docket No. 10-83
Authority Applications to Modify License and	)	File Nos. 0004153701, 0004144435
Assign Spectrum for Positive Train Control	)	File No. 0002303355
Use, and Request Part 80 Waivers	)	Call Sign: WQGF318
	)	

To: Office of the Secretary Attn: Wireless Telecommunications Bureau

Reply to Comments

Warren Havens ("Havens"), Environmentel LLC ("ENL"), Verde Systems LLC ("VSL"), Intelligent Transportation & Monitoring Wireless LLC ("ITL"), Telesaurus Holdings GB LLC ("THL") and Skybridge Spectrum Foundation ("Skybridge") (together "Petitioners") hereby file reply comments to the 5 comments filed to date in the above-captioned proceeding (the "5 Comments" or the "Comments") by various commenters (the "Commenters")[1] regarding the above-captioned applications (together the "Applications") of Maritime Communications/Land Mobile LLC ("MCLM"), one of which seeks to modify (the "Modification") the above-captioned license (the "License") and another that seeks to partition and assign (the "Assignment") part of the License, along with associated rule waiver requests (the "Waivers"), to Southern California Regional Rail Authority ("SCRRA").[2]

1. Petitioners have reviewed the 5 Comments. The 5 Comments give conclusory allegations in support of the position of MCLM and SCRRA that the Applications should be granted. These allegations fail under the only applicable standards—those of the FCC under Sections 309 and 308 of the Communications Act since the Comments do not provide any

[1] The 5 Commenters per ECFS records to date are: (1) The Riverside County Board of Supervisors, (2) the Ventura County Transportation Commission, (3) the Board of Supervisors of Los Angeles County, (4) PTC-220, LLC and (5) the Federal Railroad Administration.
[2] Petitioners are filing these reply comments in accord with the above-captioned *Public Notice*, DA 10-556, released March 29, 2010.

analysis of fact in law that support of the conclusory allegations, especially faced with the mountain of factual evidence and law that show why the Applications should not be granted under those standards: that evidence was appended to the License subject of the Applications and thus clearly available to each Commenter. Thus, the Comments should be summarily rejected.

2. The MCLM and SCRRA position that the Commenters support boils down to one stated part and one hidden but obvious one:

a. The stated part: The defects in the License and MCLM, and the fact that SRCAA is attempting to launder those, should be overlooked for the suggested greater good: that is acceptable to sacrifice the law for their alleged greater good; and effectively that a pile of wrongs can end up making a right- not for the common person or business—but for government, the alleged protector and adminitrator of the law. That is nonsense: it is standing on its head the law, and what government must stand for. It merely shows that SCRRA is violating its own internal legal standards and duties as a governmental agency to first follow public law. Indeed, SCRRA's internal documents on the Applications and the License that pretend to show due diligence and compliance with applicable law, instead show it manufactured false statements for that purpose. Those are only partially discussed below, referencing Exhibit 1, since SCRRA failed to provide a full response to Petitioners to their request under California law for the public records involved. These call into question the character and fitness of SCRRA to be granted the Applications. Petitions will expand upon this in their petition to deny proceeding of the Applications.

b. The hidden but obvious part: MCLM and the Depriests are under a mountain of evidence as to violations of FCC rules and the US criminal code, and court judgments in the $15 million dollar range, multiple newly filed court cases (other than the two court cases by Petitioners) violations of FCC Rule Section 80.385(b) and the Declaratory Rulings on the rule, and in other trouble shown in the public record. MCLM is in a fire sale of all of its

AMTS. That is enticing to the railroads. They first bought 220 MHz[3] on the cheap, now they like the look of this MCLM fire sale. That, however, is not a reason for the FCC to overlook the reasons for the fire sale under the false pretense noted in 'a' above.

3. This MCLM position (that SCRAA and the Commenters support), summarized above, is contradicted by MCLM controllers. These controllers, lead by Donald Depriest, took the exact opposite position with regard to the VPC Public Coast spectrum (the sister to AMTS spectrum) of their other Public-Coast spectrum company, Maritel. There, Depriest asserted that the US Coast Guard should in no case be allowed to used even one slim Public Coast channel for critical maritime safety-of-life communications under AIS—why? -- simply because Maritel staked a specious claim to that and wanted to financially profit from that: profit over life it argued, even invoking a Fifth Amendment Unconstitutional "taking" argument. (Depriest-Maritel lost on that in the US Courts, then gave up.) Here the same party argues the opposite—that its spectrum must go to an asserted high-public interest use. The only consistency is that in both cases the real Depriest argument was: he had to make a lot of money by the position—that had nothing to do with any greater public good.

4. If Depriest and his companies, Maritel and MCLM, want to serve the public good, they should give away the spectrum to government or a nonprofit organization legally constrained to solely use its assets, including FCC licenses, only for support of government

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[3] The FCC has to this day not responded to the last petition of Petitioners as to the bogus rule "waivers" asked and almost instantly granted to Access 220: they were clearly bogus since they did not ask for waivers at all but replacement of a number of core 220 MHz rules for other rules. The FCC responds more to influence then law.

It has far too much assumed discretion since the Communications Act has paltry guidance as to what the heck it means by instructing the FCC to regulate in the "public interest, convenience and necessity."

With little guidance, the FCC does what it likes or what it is most politically beneficial for particular staff members and Commissioners to decide upon. Indeed, that is how the FCC has handled the MCLM long form application in Auction 61 and Petitioners petitions to deny and for reconsideration of that application. Petitioners will be taking that and related matters to court, not in an appeal of any FCC final order, but on the basis that the FCC deliberately violates its own and other law, repeatedly and clearly.

entities (legitimate, not rogue: there are plenty of the latter) or in support of the same public interest goals government serves but inadequately or inefficiently serves (that is the primary domain of nonprofit 501(c)(3) public charities and private foundations, as accepted by the IRS). Petitioners have done exactly that. MLCM has not.

5. Commenters support of the Applications suggest that the subject spectrum is important for SCRRA and for Positive Train Control ("PTC"). However, none of the Comments discuss and prove up the economic, technical and other case for PTC in the first place. Indeed, there the public record shows that many parties question whether tax payer funds will be well spent on PTC as it is not conceived. See, e.g., Exhibit 2 hereto.[4][5] This exhibit, from the American Railroad Association (and sources it drew upon) contains, among other relevant parts (underlining added):

> Even at its most basic level, the PTC mandate will cost freight railroads (and ultimately their customers) more than **$5 billion** in initial start-up costs and **hundreds of millions more in annual maintenance costs**, according to FRA estimates of the most likely railroad cost scenarios. The FRA admits that railroads' actual PTC-related costs could end up being much higher, and that the safety benefits of PTC will be only a small fraction of those costs. The FRA's proposed regulations regarding PTC implementation include several provisions over and above the statutory mandate that would add hundreds of millions of dollars to railroads' costs but **would not improve safety** in any meaningful way. The greater the unnecessary costs imposed on railroads, the less they will be able to provide the safe, cost-effective, and environmentally-friendly freight transportation service that America needs now and in the future.
> * * * *

[4] Copy in HTLM also available online at:
http://docs.google.com/viewer?a=v&q=cache:SgbfKWeBy7wJ:www.aar.org/~/media/AAR/PositionPapers/PTC%2520Oct%25202009.ashx+positive+train+control+mandate&hl=en&gl=us&pid=bl&srcid=ADGEESgfwQ7S3HmxNoWZPZOr8ovsZFxxiGykWk7YOgULxz02XUjSflQULkFSUxbNytYNQtNAUrRotDstRuZjdBPY97W8w6haTBy3CBXOo7QlYLw9lY5_pWs8ruqt9mvBnv4BWqVHtEJ2&sig=AHIEtbQGMqQqMPr7wA1SvVgzE2JGJK7CcQ

[5] In the Application and SCRRA internal documents related to the Application, SCRRA suggests it should have PTC on lower 200 MHz to use the same as us freight railroads. This Exhibit 2, however, shows why PTC is at best "not ready for prime time" for those railroads, as partly indicated in the quotes above. Moreover, the SCRAA internal documents, of which one is Exhibit 1 hereto, shows that SCRAA does NOT seek the 1 MHz of AMTS for PTC only, but to get excess spectrum for other speculative reasons. PTC itself is speculative, but SCRRA seeks to buy excess spectrum for other potential speculative reasons also.

> Railroads have spent hundreds of millions of dollars developing PTC, but it's still an **emerging technology**. To ensure the technology is fully functional and completely safe, much more development and testing are needed.
> * * * *
> The $5 billion that Class I freight railroads will have to spend just to install PTC by 2015 is roughly equal to a **full year's worth** of their infrastructure-related **rail capital spending**. 2 Because railroads have limited funds to devote to infrastructure projects, **expenditures on PTC will necessarily mean reduced expenditures on other projects** that would increase rail capacity, improve service, provide environmental benefits, and enhance safety.
> • PTC will be tremendously expensive, but will provide benefits significantly lower than its costs. The FRA estimates that, under the most likely scenario, the aggregate value of PTC-related rail safety benefits over 20 years will be $600 million to $900 million. In other words, railroads will incur at least **$15 in PTC costs for each $1 of PTC benefits**.
> Nor will PTC make rail operations faster or more reliable. Based on experience to date and the need for railroads to rush PTC implementation in the face of the 2015 deadline, it is more likely that PTC will make rail operations **less efficient and reliable**, not more so.
> * * * *
> However, the PTC mandate threatens railroads' unparalleled potential to lower shipping costs, make our economy more efficient, take trucks off the highway, save fuel, and reduce harmful emissions. The reality is, money railroads spend on PTC can't be spent on other safety measures or capacity, environmental, or service improvements.

6. Moreover, the Comments do not provide any facts and arguments in support of the large number of waivers of fundamental AMTS rules, which SCRRA states are required in order for its application to be granted. Neither the Application nor the Comments provided any technical or other analysis of why those waivers, which together constitute a wholesale change in the nature of AMTS, and are really a request for rulemaking, should be granted. It is obvious that those rules have a critical purpose, which was explained by the FCC in the orders promulgating those rules, and in subsequent orders upholding them. In Petitioners' petition to deny of the Applications filed in this docket (the "Petition"), Petitioners provided technical and other reasons why the waiver requests should be denied. Nothing in the Comments shows otherwise. The essence of the comments is that because they are public agencies asserting an important need that the FCC should overlook defects in the spectrum and the assignor currently

under investigation and the lack of a showing required under Section 1.925 for grant of a waiver request.

7. What these Commenters, along with SCCRA and MCLM, are really proposing is that AMTS should be reallocated for railroad use. In fact, MCLM states as much in their petition for reconsideration of the Commission's *Memorandum Opinion and Order*, FCC 10-39, (*25 FCC Rcd 3390)* regarding why MCLM seeks to regain AMTS spectrum that automatically terminated for permanent discontinuance at the John Hancock Tower in Chicago. In that petition MCLM asserted that AMTS service should be "repurposed" for railroad/PTC use. The position of Commenters, MCLM and SCRRA and the breadth of the waiver requests, coupled with SCRRA's lack of even an attempt at a serious showing for the need to waive the rules to better meet the purpose of the rules, represents, as MCLM itself argued, a proposal to "repurpose" AMTS—which is a request for more than a rule change. It is actually a request for wholesale change in the AMTS radio service from a Part 80 maritime service, which accommodates a variety of land mobile, to one form of land mobile service, namely whatever the railroads would like it to be (PTC, which is not well-established yet, and whatever else they may decide). They should approach that squarely with the FCC in a request for rule change or a request to move AMTS from Part 80 to a special new part of Part 90. That procedure, at least, would fit the actual nature of these parties' position.

8. However, any such proposal is not supported in these Comments or in the Applications, nor is it reflected in any Commission decision on AMTS. Both MCLM and SCRRA and all of the Commenters had years of opportunity to comment in the AMTS rulemaking, including in the last decision of the FCC in PR Docket 92-257, where it decided to what degree to change AMTS rules and allow forms of private land mobile radio service. Railroad needs for spectrum, including for PTC, existed in that period of time (to the degree any such needs truly existed—as shown by the quote above, AAR call that false). These parties

simply chose not to participate in that proceeding where they could have asserted a public interest case for "repurposing" AMTS for railroad/PTC purposes. The only reason that MCLM is now making these arguments is not for a public interest reason to support its alleged repurposing, but since it seeks a multi-million dollar payment for the sale as part of its efforts to sell all of its AMTS spectrum (see Petitioners' Petition that shows MCLM is offering all of its AMTS spectrum for sale and MCLM's own admissions in FCC records that it is doing so). Sale of one's entire spectrum is not repurposing. The only reason the railroads are now seeking this repurposing is because they did not tend to their needs in a timely fashion during the years of the AMTS rulemaking in PR Docket No. 92-257.

9. In addition, there is no information in the Comments that is relevant to Petitioners' core arguments in the Petition. The Public Notice in the instant matter (the "PN") allowed comments and petitions to deny at the same time. Petitioners filed their Petition. Others filed comments. Initially, it is Petitioners' position that none of the information in the Comments is relevant to the core facts and arguments in Petitioners' Petition.

10. The Comments generally supported the idea of spectrum for PTC and why the subject AMTS spectrum is suitable or especially suitable. Those have nothing to do with whether or not the License is defective and should be revoked and whether MCLM is a sham legal entity or not and whether it has qualifications to hold the License and assign spectrum of it, or whether the Applications were authorized by the actual control in MCLM and whether that actual control has ever been accurately disclosed to the FCC. Facts regarding those issues were filed in Petitioners' Petition.

11. SCRRA and any supporting railroad or governmental entity, or any other party, cannot change the character and any defects in the License (and the subject spectrum being assigned) and assignor simply by the asserted suitability of the spectrum for a railroad purpose. The Commenters have failed to demonstrate that there is not ample suitable spectrum for

SCRRA's purposes or that it needs the quantity of spectrum involved for PTC. In fact, it is well known that PTC-220, LLC purchased far less than 1 MHz of spectrum, well under ½ of 1 MHz and in some areas of the country far less than that for PTC. They have not asserted that that was futile purchase that could not support PTC. Even assuming several times of the spectrum needed so that the same channels would not be used in an immediately adjacent site, the quantity is still only several times that which is in the range of 1/5 of the amount that SCRRA is seeking to purchase. The fact is that SCRRA nor the Commenters in support have shown why in this case SCRRA needs 1 MHz for PTC.

12. In fact, the Internal Documents (defined below) show that SCRRA itself has admitted to not needing the full 1 MHz of AMTS spectrum. The Internal Documents "Item 17" dated 11/9/2009 states:

> The 1 MHz held by MC/LM is probably more than will be necessary for SCRRA's short and mid- term PTC needs. As SCRRA will not immediately need the entire 1 MHz for PTC, it may use excess spectrum for other communications needs, for instance a system maintenance voice channel or may sell or lease any excess spectrum, or may determine not to purchase the entire 1 MHz in the first instance.

13. Clearly, grant of the Waivers and of the Applications is not in the public interest so that SCRRA can sell or lease excess spectrum or use it as a maintenance voice channel. SCRRA does not need any waivers to do these items and it lacks candor for the SCRRA not to have told the FCC this. Also, this shows why Commenters support for the Applications is at best bald assertion not based on actual direct knowledge of SCRRA's actual intended uses.

14. Commenters apparently do not know, contrary to SCRRA's asserted due diligence and its alleged outside experts, (see Exhibit 1 hereto, the "Internal Documents", highlighting of some relevant items has been done for convenience) that SCRRA did not only not do due diligence and demonstrate it (See Exhibit 1 hereto), SCRRA rejected any discussion with Petitioners' regarding the matters discussed at section 6 of the Petition. SCRRA never

contacted Petitioners regarding their spectrum nor about the waivers they were seeking that would affect those of Petitioners that are co-channel or adjacent channel licensees (see the Petition's discussion regarding ENL's contract rights to the A-block mountain license in areas bordering the area subject of the Assignment). That is simply not due diligence and does not comply with the spirit and letter of Section 80.70 or the FCC decision cited by Petitioners as to why the FCC would not grant higher power due to adjacent channel interference concerns. Petitioners object to Commenters supporting something without proper knowledge of the background facts and law simply because they are in the same industry. That sort of uninformed support is not in the public interest.

15. Further, Petitioners note here that the Internal Documents show that SCRRA says that MCLM was the single sole source for the spectrum. That is demonstrably false. The SCRRA document "Item 9" of January 4, 2010 (a certain memo to the SCRRA Board of Directors) states:

> As was set forth in the report authorizing entering into the LOI, as of the second and third quarter of 2009, the spectrum is available only from a single source. This conclusion has been confirmed both by Metrolink's staff and consultant, and also independently by Spectrum Bridge, the leading broker of radio frequencies in the needed bandwidth. The APA therefore must conform to Policy CON-19, Sole Source and Non-Competitive Negotiated Procurements. Pursuant to .that policy, as well as CON-5, staff, in conjunction with Metrolink's consultants, has conducted a cost and price analysis on the negotiated price with MCLM.

16. There has always been B-block AMTS spectrum in the area subject of the Assignment. VSL clearly held spectrum in the area that SCRRA needed, but it was never contacted by SCRRA. Thus, SCRRA appears to have failed to follow its own internal policies and potentially state laws for making its purchase of the MCLM spectrum. Petitioners will bring this up with the SCRRA Board and any other appropriate authorities. As Petitioners note herein and in the Petition, SCRRA's counsel, Robert Gurss, could not be objective, Metrolink's staff never attempted contact with VSL and Spectrum Bridge is a party with an agreement with

MCLM whereby it gets paid and therefore could not be objective in assessing values of AMTS or pointing out other alternative sources (Spectrum Bridge never contacted VSL about its spectrum on behalf SCRRA and it has never talked with those of Petitioners that have sold AMTS in the past per FCC records—the only actual closed transactions of AMTS sold spectrum. Thus, there was no way Spectrum Bridge could provide a sincere evaluation of AMTS value).

17. In addition, SCRRA did not demonstrate in its due diligence (see e.g. Exhibit 1), nor did the Commenters show why alternative spectrum is not available from the AMTS B-block (which VSL holds). Without discussing with VSL SCRRA could not have understood if VSL would provide use of the spectrum or whether or not the incumbent spectrum holder in the subject area had complied with FCC rules and declaratory rulings required for it to maintain any asserted valid incumbent stations. These are matters of public record including as explained in two FCC orders (See (1) *Letter* of April 8, 2009 from Scot Stone, Deputy Chief, Mobility Division, Wireless Telecommunicaitons Bureau to Dennis Brown, counsel for Maritime Communications/Land Mobile LLC, DA 09-793, *24 FCC Rcd 4135*, at footnote 7 (the "MCLM Ruling") and (2) *Order on Reconsideration*, DA 10-664, Released 4/19/10 (the "2nd MCLM Ruling") with regard to Rule Section 80.385(b) that requires AMTS incumbents to provide to Petitioners, as co-channel geographic licensees, the actual technical parameters of the incumbent's site-based (alleged valid and operating) stations). Anyone who actually conducted reasonable due diligence would have seen the MCLM Ruling, calculated or at least estimated the deficiencies and seen good cause to discuss with VSL as holder of geographic spectrum available for use in the SCRRA area. In addition, it is clear in the public record that Petitioners are all engaged in acquiring and using FCC licenses for Intelligent Transportation Systems, with some uses at no cost to the public. Given all of the above, it is apparent that SCRRA and its alleged outside expert had some undisclosed purpose in ignoring the alternative spectrum, rejecting communications with Petitioners and solely pursuing the MCLM spectrum. It is especially

questionable when MCLM itself and its affiliates and their qualifications to hold any spectrum and even their potential criminal conduct (as cited in the FCC's letters of investigation under Section 308 and by the Enforcement Bureau—see Petition's discuss of these) were clear in the public record.

18. One of the alleged advisors to SCRRA was Robert Gurss, an attorney who has formally served Mobex Network Services LLC ("Mobex"), predecessor-in-interest to MCLM, including to speciously inform the FCC that Mobex had validly constructed and operating stations throughout the country with continuity of coverage. Mobex was fully aware at that time, and it should be assumed that its counsel, Robert Gurss and Dennis Brown, were also fully aware at that time that those were fraudulent statements by Mobex. That is demonstrated in Petitioners' Petition in the subject proceeding, including the component that referenced the FCC audit in 2004, where Mobex admitted to maintaining and renewing stations they had never constructed and that therefore had automatically terminated (See e.g. Section 4 of the Petition). Therefore, Mr. Gurss is not an objective legal counsel in this matter, contrary to what is indicated by SCRRA in the Internal Documents at Exhibit 1 hereto.

19. Petitioners have not gotten a complete answer to their FOIA request to SCRRA for certain records. SCRRA has said they have gotten certain documents and are still working on providing the rest. In addition, Petitioners have not gotten any substantive answer on their FOIA request, FOIA Control No. 2010-379, regarding copies of responses of MCLM and its affiliates to 6 letters of investigation from the FCC. Therefore, Petitioners assert that they have the right to submit additional comments and further supplement their Petition once the information from those FOIA requests is obtained.

Respectfully,

Environmentel LLC, by

[Filed electronically. Signature on file.]
Warren Havens
President

Verde Systems LLC, by

[Filed electronically. Signature on file.]
Warren Havens
President

Intelligent Transportation & Monitoring Wireless LLC, by

[Filed electronically. Signature on file.]
Warren Havens
President

Telesaurus Holdings GB LLC, by

[Filed electronically. Signature on file.]
Warren Havens
President

Skybridge Spectrum Foundation, by

[Filed electronically. Signature on file.]
Warren Havens
President

Warren Havens, an Individual

[Filed electronically. Signature on file.]
Warren Havens

Each of Petitioners:

2649 Benvenue Ave., Suites 2-6
Berkeley, CA 94704
Ph: 510-841-2220
Fx: 510-740-3412

Date: May 10, 2010

Declaration

I, Warren Havens, as President of Petitioners, hereby declare under penalty of perjury that the foregoing Reply Comments, including any exhibits, were prepared pursuant to my direction and control and that all the factual statements and representations contained herein are true and correct.

/s/ Warren Havens
[Submitted Electronically. Signature on File.]

Warren Havens

May 10, 2010

EXHIBIT 1

METROLINK

SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY

TRANSMITTAL DATE: **November 9, 2009**

MEETING DATE: **November 13, 2009** **ITEM 17**

TO: **Board of Directors**

FROM: **Chief Executive Officer**

SUBJECT: **Contract No. PO370-10 – Letter of Intent to Purchase Radio Frequency Licenses Necessary for Positive Train Control from Maritime Communications/Land Mobile LLC**

Issue

Radio frequency (RF) spectrum is required in order to support SCRRA's operations and provide for the deployment of Positive Train Control (PTC) on Metrolink trains. Absent this critical communications component, PTC cannot be deployed.

Recommendation

Staff recommends the Board authorize the Chief Executive Officer to (1) enter into a Letter of Intent to Purchase Radio Frequencies with Maritime Communications/Land Mobile, LLC, for the purchase of Federal Communications Commission licenses in the 220 MHz band, subject to the fundamental business terms set forth in this report, and (2) make a deposit into escrow of $$60,000 to secure the Letter of Intent which funds shall be returned to SCRRA upon execution of the subsequent purchase agreement, with the understanding that any subsequent purchase agreement will be brought to the Board for approval.

Alternatives

The Board may direct staff to seek alternate sources of RF spectrum. Investigation to date has not located any such alternative source.

Background

Federal legislation (the Rail Safety Improvement Act of 2008) requires SCRRA to implement an interoperable PTC system by December 31, 2015. SCRRA is aggressively pursuing its goal of equipping all of its locomotives and cab cars for PTC by the earlier deadline of 2012. PTC systems require a substantial amount of dedicated RF spectrum. UP and BNSF both will use the 220 MHz spectrum on their PTC systems with which SCRRA's PTC must interoperate. It is therefore necessary for SCRRA to

obtain enough suitable spectrum in the 220 MHz band in order to implement an interoperable PTC system as required. SCRRA has obtained the services of a consultant, Alan Polivka of Transportation Technology Center, Inc., as well as special legal counsel for Federal Communications Commission (FCC) related issues at the law firm Fletcher, Heald & Hildreth to advise it in the procurement of the necessary spectrum licenses.

220 MHz spectrum frequencies are licensed by FCC. While the FCC does sometimes make Public Safety/Government-only spectrum available directly to government agencies like SCRRA for purposes like PTC, SCRRA's consultant and legal counsel have determined that such spectrum, in sufficient quantities to allow for PTC, is not available without requiring federal rules changes and/or waivers from the FCC that might not be forthcoming at all, and that in any event may not be finalized until after any other alternatives no longer exist. SCRRA's only low risk option to ensure that PTC can be deployed, therefore, is to purchase frequency licenses on the open market. Even when purchased on the open market, the acquisition of such a license involves an FCC transfer and approval process.

SCRRA's consultant has made considerable efforts to research all known spectrum licenses for sale on the open market and has advised that based on best available information, only one source is selling sufficient quantities of radio frequency licenses that are suitable for use in Metrolink's geographical territory. The single source is Maritime Communication/Land Mobile, LLC, and (MC/LM), which is offering for sale 1 MHz of spectrum from the 217-222 MHz band. SCRRA is still in the process of determining exactly how much spectrum is necessary for its PTC system. The 1 MHz held by MC/LM is probably more than will be necessary for SCRRA's short and mid-term PTC needs. As SCRRA will not immediately need the entire 1 MHz for PTC, it may use excess spectrum for other communications needs, for instance a system maintenance voice channel or may sell or lease any excess spectrum, or may determine not to purchase the entire 1 MHz in the first instance. At this time, staff anticipates purchasing the entire 1 MHz as the pricing for that quantity reflects a volume discount such that there will be only a limited financial benefit to purchasing less than the entire 1 MHz.

The business terms of any Asset Purchase Agreement (APA) with MC/LM will be complex, and the approval of that agreement will be brought back to the Board. There are a number of issues relative to the licenses that will need to be resolved in order for the FCC to approve SCRRA's acquisition. These issues include jurisdictional waivers that may be needed from both the United States Coast Guard and the Mexican government, as well as legal challenges that are currently pending before the FCC that may not substantively affect SCRRA's rights, but that could delay the actual transfer of the RF license to SCRRA. In addition, MC/LM has previously leased, or otherwise obligated, a portion of the spectrum and SCRRA will need to ensure that these obligations either are terminated, or do not interfere with its use of the spectrum for PTC.

Because of these complexities and the potential loss of the needed spectrum because it is anticipated that there are other potential buyers, staff proposes a preliminary step of entering into a Letter Of Intent (LOI) with MC/LM in order to ensure the availability of the RF while obligating both parties to negotiate exclusively with each other in good faith the details of the APA. The LOI requires that SCRRA make a $60,000 deposit into an escrow account in order to secure the frequency availability. SCRRA will forfeit this deposit if it decides not to enter into the subsequent APA within 90 days.

Staff intends to negotiate the business terms of the APA with MC/LM to provide SCRRA with protections against the possibility that the transfer of the license will be delayed, or even prohibited by the FCC. Pursuant to the LOI, the purchase price of the RF will be $7,178,000. SCRRA will make a deposit of 10% of the total purchase price into escrow upon execution of the APA. This deposit essentially reserves the spectrum for SCRRA while the process of transferring the license by the FCC is underway. SCRRA will then pay the remaining sums due only upon successful assignment and transfer of the licenses to SCRRA by the FCC. If assignment by the FCC does not occur within a specified time, likely to be six months, SCRRA may re-claim its deposit from escrow and terminate the APA.

As indicated above, the spectrum for the geographic area and in the quantity required is currently available only from a single source. The APA therefore must conform to Policy CON-19, Sole Source and Non-Competitive Negotiated Procurements. Pursuant to that policy, and in accordance with SCRRA's Contract and Procurement Administration's CON-5, a cost and price analysis must be performed on the negotiated price with MC/LM prior to entering into the APA. Staff, in conjunction with SCRRA's consultants, has closely analyzed MC/LM's proposed purchase price and has compared it to similar procurements by other entities, including a recent procurement of spectrum by the freight operators that share tracks with SCRRA. SCRRA's consultant has also analyzed MC/LM's original purchase price. This research has confirmed that MC/LM's offered price is within industry norms. While radio frequencies are not the kind of goods or services susceptible to a traditional cost or price analysis, Staff's extensive research indicates that MC/LM's proposed price is fair and reasonable.

Staff recommends authorizing an LOI with MC/LM, and the deposit of $60,000, leading to the acquisition of 1 MHz of spectrum from the 217-222 MHz band subject to the business terms described in this report. The actual acquisition of the license pursuant to an APA will be brought to the Board for approval. Frequency licenses are rarely on the open market for any length of time, and so the opportunity to purchase the necessary bandwidth from MC/LM is likely only available for a very short period. Absent entering into this LOI with MC/LM now, it is unknown how and if SCRRA will be able in the future to acquire the spectrum necessary to implement its PTC system as required.

Budget Impact

Funding for the spectrum purchase is available within the Positive Train Control (PTC) program utilizing a combination of Federal, State and Local grants

Prepared by: Darrell Maxey, Director Engineering and Construction

DAVID SOLOW
Chief Executive Officer

METROLINK

SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY

TRANSMITTAL DATE: **January 4, 2010**

MEETING DATE: **January 8, 2010** **ITEM 9**

TO: **Board of Directors**

FROM: **Chief Executive Officer**

SUBJECT: **Purchase Order No. 370-10 Authorize CEO to Execute Asset Purchase Agreement for Radio Frequency Licenses Necessary for Positive Train Control from Maritime Communications/Land Mobile, LLC**

Issue

Radio frequency (RF) spectrum is required in order to support Metrolink's operations and provide for the deployment of an interoperable Positive Train Control (PTC) System. Absent this critical communications component, PTC can not be deployed.

Recommendation

Staff recommends the Board authorize the Chief Executive Officer to (1) enter into an Asset Purchase Agreement (APA) with Maritime Communications/Land Mobile, LLC (MCLM), for the purchase of Federal Communications Commission (FCC) licenses in the working range of 220 MHz band (the AMTS band), subject to the fundamental business terms set forth in this report, and (2) make the payments called for in the APA, including a deposit into escrow upon execution of the APA of $717,800, representing 10% of the maximum purchase price, which funds shall be returned to Metrolink unless the license transfer is approved by the FCC within a specified period of time.

Alternatives

The Board may direct staff to continue to negotiate terms of the APA with subsequent Board approval prior to executing the APA, or to terminate negotiations and seek alternate sources of RF spectrum. Investigation to date has not located any acceptable alternative source that fits the needs and requirements of SCRRA. Metrolink has already entered into a Letter of Intent to purchase the RF and will forfeit a $60,000 deposit if it does not enter into the APA by February 8, 2010.

Background

Federal legislation (RSIA'08) requires Metrolink to implement an interoperable PTC system by December 31, 2015. Metrolink is aggressively pursuing an implementation

strategy to meet an earlier deadline of 2012. PTC systems require a substantial amount of dedicated RF spectrum. UP and BNSF both will use the 220 MHz spectrum on their PTC systems with which Metrolink's PTC must interoperate. It is therefore necessary for Metrolink to obtain enough suitable spectrum in the working range of the 220 MHz band in order to implement an interoperable PTC system as required. Metrolink has obtained the services of a consultant, Alan Polivka of Transportation Technology Center, Inc., as well as legal counsel at the law firm Fletcher, Heald & Hildreth in Washington DC to advise it in the purchase of the necessary RF.

Pursuant to Board action on November 13, 2009, SCRRA has entered into a Letter of Intent (LOI) to purchase the RF from MCLM. The fundamental business terms of the acquisition were set forth in the LOI and approved by the Board:

1. Purchase Price. The purchase price is $7,178,000, assuming that Metrolink purchases the full 1 MHz of spectrum. Under the APA, Metrolink may determine to purchase less spectrum if it determines, pursuant to an analysis that is presently underway, that it needs less RF to operate its PTC System. The full purchase price represents a volume discount and the unit price may therefore be higher if Metrolink purchases less than 1MHz, although the total price will be less than $7,178,000.

2. Initial Deposit. Metrolink will make a deposit of $717,800, representing 10% of the maximum purchase price, into escrow upon execution of the APA. This deposit essentially reserves the spectrum for Metrolink while the process of transferring the license by the FCC is underway.

3. Final Payment. Metrolink will pay the remaining sums due only upon a final order from the FCC assigning the license to Metrolink.

4. Opt-Out. If assignment of the license by the FCC does not occur within 12 months of filing the assignment application at the FCC, Metrolink may re-claim its entire deposit from escrow and terminate the APA. Metrolink also retains the right to continue with the transaction at that time, if it so chooses.

As was set forth in the report authorizing entering into the LOI, as of the second and third quarter of 2009, the spectrum is available only from a single source. This conclusion has been confirmed both by Metrolink's staff and consultant, and also independently by Spectrum Bridge, the leading broker of radio frequencies in the needed bandwidth. The APA therefore must conform to Policy CON-19, Sole Source and Non-Competitive Negotiated Procurements. Pursuant to that policy, as well as CON-5, staff, in conjunction with Metrolink's consultants, has conducted a cost and price analysis on the negotiated price with MCLM. MCLM's proposed purchase price was compared to similar procurements by other entities, including a recent procurement of spectrum by the freight operators that share tracks with Metrolink. In addition, Metrolink commissioned Spectrum Bridge to provide a fair market valuation of the

proposed spectrum, which valuation set forth the price of all recent analogous spectrum purchases. Based on all of the above information, Metrolink's consultants have advised that the proposed purchase price is within industry standards and is fair and reasonable. Staff has validated that determination.

The LOI requires the APA be entered into by February 8th. The fundamental business terms of the APA have been negotiated, and indeed were set forth in the LOI. While there does not appear to be any significant disagreement between the parties, the time necessary in the ordinary course of business for finalizing the APA terms and conditions does not allow for Board action at a regularly scheduled meeting in time to meet the February 8th deadline. Staff is therefore asking the Board to authorize the CEO, upon conclusion of negotiations with MCLM, to (1) execute the APA on terms consistent with this Report and in a form approved by Legal Counsel, and (2) make the necessary payments called for in the APA, including the initial escrow deposit due upon execution and any additional payments due upon closing.

Budget Impact

Funding for the spectrum purchase is available within the Positive Train Control program utilizing combination of Federal, State and Local grants

Prepared by: Darrell Maxey, Director Engineering and Construction

ERIC HALEY
Chief Executive Officer

The Need for Reasonable Implementation of the Positive Train Control Mandate

ASSOCIATION OF AMERICAN RAILROADS OCTOBER 2009

WHAT SHOULD BE DONE?	Implement **common-sense regulations** regarding the federal statutory mandate that freight railroads install positive train control (PTC) systems by year-end 2015 on tracks that carry passengers or toxic-by-inhalation (TIH) materials.
WHY?	Even at its most basic level, the PTC mandate will cost freight railroads (and ultimately their customers) more than **$5 billion** in initial start-up costs and **hundreds of millions more in annual maintenance costs**, according to FRA estimates of the most likely railroad cost scenarios. The FRA admits that railroads' actual PTC-related costs could end up being much higher, and that the safety benefits of PTC will be only a small fraction of those costs. The FRA's proposed regulations regarding PTC implementation include several provisions over and above the statutory mandate that would add hundreds of millions of dollars to railroads' costs but **would not improve safety** in any meaningful way. The greater the unnecessary costs imposed on railroads, the less they will be able to provide the safe, cost-effective, and environmentally-friendly freight transportation service that America needs now and in the future.

What is Positive Train Control?

- "Positive train control" (PTC) describes technologies designed to **automatically stop or slow a train** before certain accidents occur. In particular, PTC is designed to prevent train-to-train collisions, derailments caused by excessive speed, unauthorized incursions by trains onto sections of track where repairs are being made, and movement of a train through a track switch left in the wrong position.
- A fully-functional PTC system should be able to precisely determine the location and speed of trains; warn train operators of potential problems; and take action if the operator does not respond to a warning. For example, if a train operator fails to stop a train at a stop signal, the PTC system would apply the brakes automatically.
- Railroads have spent hundreds of millions of dollars developing PTC, but it's still an **emerging technology**. To ensure the technology is fully functional and completely safe, much more development and testing are needed. Most critical is developing sophisticated, reliable software that can take into account the complexities of rail operations. The length and weight of a train, train braking system performance, track curvature, the grade (slope) of the tracks, track conditions, the location of other trains — all of these and more must be taken into account by a properly-functioning PTC system.

- The Rail Safety Improvement Act of 2008 (RSIA), which became law in October 2008, requires Class I freight railroads to install PTC systems on their tracks that carry passengers or toxic-by-inhalation (TIH) materials.[1] Railroad PTC systems must be in place and fully functional **by the end of 2015**.

PTC Will Provide Safety Benefits Equal To Only a Small Fraction of its Costs

- According to the Federal Railroad Administration (FRA), Class I freight railroads will have to spend more than **$5 billion** to install PTC systems, plus **hundreds of millions of dollars more each year** thereafter to maintain them. The FRA estimates that total costs of PTC to railroads over 20 years will be **$10 billion to $14 billion**.

- The $5 billion that Class I freight railroads will have to spend just to install PTC by 2015 is roughly equal to a **full year's worth** of their infrastructure-related **rail capital spending**.[2] Because railroads have limited funds to devote to infrastructure projects, **expenditures on PTC will necessarily mean reduced expenditures on other projects** that would increase rail capacity, improve service, provide environmental benefits, and enhance safety.

- PTC will be tremendously expensive, but will provide benefits significantly lower than its costs. The FRA estimates that, under the most likely scenario, the aggregate value of PTC-related rail safety benefits over 20 years will be $600 million to $900 million. In other words, railroads will incur at least **$15 in PTC costs for each $1 of PTC benefits**. Nor will PTC make rail operations faster or more reliable. Based on experience to date and the need for railroads to rush PTC implementation in the face of the 2015 deadline, it is more likely that PTC will make rail operations **less efficient and reliable**, not more so.

- Why is the PTC cost-benefit analysis so one-sided? The types of accidents that PTC systems are designed to prevent are rare. In 2008, for example, of the approximately 2,400 total train accidents (most of which were minor), just 27 — or about **1 percent** — would likely have been prevented had PTC systems been in place.

Regulatory Flexibility is Needed

- When a law is passed, a regulatory agency — in PTC's case, the FRA — typically writes regulations implementing the law. America's freight railroads will comply with the PTC mandate, but they need **common-sense implementing regulations** that do not impose unnecessary costs over and above the statutory mandate.

- For example, the FRA has proposed that if a rail main line carried TIH materials in 2008, PTC must be installed on it. But Congress mandated that PTC be installed on rail lines carrying TIH traffic by **December 31, 2015, not 2008**. Some rail lines that carry TIH materials today won't carry them in 2015, and some lines that don't carry this traffic today might in 2015. Thus, it is unreasonable to use 2008 as the baseline year for a mandate that doesn't become effective for seven years, when traffic patterns could be very

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[1] TIH materials are liquids, such as chlorine and anhydrous ammonia, that are especially hazardous if released. Under the RSIA, all freight rail tracks that carry passengers must be PTC-equipped, and all Class I freight rail tracks over which 5 million or more gross tons of rail traffic is transported and carry TIH must be PTC-equipped.

[2] From 1999-2008, Class I railroads spent an average of $5.5 billion each year on infrastructure capital spending.

different. Basing PTC implementation on 2008 traffic patterns could force railroads to spend hundreds of millions of dollars to install PTC on routes that will not be used to carry TIH materials once the mandate becomes effective. This makes no sense.

- Likewise, regulatory flexibility is appropriate in cases where only very small amounts of TIH traffic are carried. Approximately 9,500 miles of Class I rail main line average just one or two TIH cars per week. The already relatively small benefits of PTC installation would be even smaller for these lines. Not having to install PTC on them would avoid some **$475 million** in PTC installation costs and **tens of millions of dollars more** in annual maintenance costs. In return for this "de minimus" exemption, railroads would pledge to adopt operational or other measures that would provide the same or greater safety benefit as PTC implementation on these lines but in a more cost-effective manner.

- Finally, regulatory flexibility is needed regarding how PTC information is displayed in a locomotive. The FRA has proposed that locomotives have two separate display screens, ostensibly so that both an engineer and a conductor (if both are present) have their own. However, because a conductor cannot (under FRA regulations) participate fully in operating a train and has no PTC-related responsibilities, a second display would serve no useful purpose. There is no operating experience using two PTC displays, and there have been no studies to support a two-display requirement. In contrast, on Amtrak's very busy, PTC-required Northeast Corridor, only one cab display is provided, and on thousands of freight trains on which early versions of PTC have been tested, only one display has been provided — with no negative safety effects. At $8,000 per extra display, an unnecessary two-display requirement would cost railroads more than $200 million.

Assisting With the Extraordinary Costs of the PTC Mandate

- America's demand for freight and passenger transportation will surge in the years ahead. Railroads are the most **affordable** and **environmentally-responsible** way to meet this demand. They've been re-investing record amounts back into their networks, creating the world's best freight transportation system.

- However, the PTC mandate threatens railroads' unparalleled potential to lower shipping costs, make our economy more efficient, take trucks off the highway, save fuel, and reduce harmful emissions. The reality is, money railroads spend on PTC can't be spent on other safety measures or capacity, environmental, or service improvements.

- Given the rail industry's limited investment capital and the tremendous demands the PTC mandate imposes on railroads' investment capabilities, Congress should consider various funding mechanisms to offset PTC's huge costs. Options include:

  - ✓ Enact a 25 percent infrastructure tax incentive to help offset the initial start-up costs of PTC installation;
  - ✓ Fully fund and expand the RSIA's Rail Safety Technology Grant program.

- Funding assistance would help the railroads continue to expand needed capacity to meet both freight and passenger demands while still complying with the PTC mandate. The benefits to our economy and environment are real, measurable, and well worth it.

Certificate of Service

I, Warren C. Havens, certify that I have, on this 10th day of May 2010, caused to be served, by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Reply Comments, including all exhibits, unless otherwise noted, to the following:[6]

Jeff Tobias, Mobility Divison, WTB
Federal Communications Commission
Via email only to: jeff.tobias@fcc.gov

Lloyd Coward, WTB
Federal Communications Commission
Via email only to: Lloyd.coward@fcc.gov

Gary Schonman, Special Counsel
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
Via email only to: gary.schonman@fcc.gov

Brian Carter
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
Via email only to: brian.carter@fcc.gov

Dennis Brown (legal counsel for MCLM and Mobex)
8124 Cooke Court, Suite 201
Manassas, VA 20109-7406

Fletcher Heald & Hildreth (Legal counsel to SCRRA)
Paul J Feldman
1300 N. 17th St. 11th Fl.
Arlington, VA 22209

Southern California Regional Rail Authority
ATTN Darrell Maxey
700 S. Flower St. Suite 2600
Los Angeles, CA 90017

Russell Fox (legal counsel for MariTel, Inc.)
Mintz Levin
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

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

Jason Smith
MariTel, Inc.
4635 Church Rd., Suite 100
Cumming, GA 30028

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. (counsel to PSI)
Audrey P Rasmussen
1120 20th Street, N.W., Suite 700 North
Washington, DC 20036

Joseph D. Hersey, Jr.
U.S. National Committee Technical Advisor and,
Technical Advisory Group Administrator
United States Coast Guard
Commandant (CG-622)
Spectrum Management Division
2100 2nd Street, S.W.
Washington, DC 20593-0001
Via email only to: joe.hersey@uscg.mil

Marion Ashley, Chairman
Riverside County Board of Supervisors, District 5
County Administrative Center
4080 Lemon Street, 5th Floor
Riverside, CA 92501

Darren M. Kettle, Executive Director
Ventura County Transportation Commission
950 County Square Drive, Suite 207
Ventura, CA 93003

Don Knabe, Supervisor
Board of Supervisors County of Los Angeles
822 Kenneth Hahn Hall of Administration
Los Angeles, CA 90012

Edwin F. Kemp
President
PTC-220, LLC
1400 Douglas Street, STOP 0640
Omaha, NE 68179

Joseph C. Szabo, Administrator
U.S. Department of Transportation
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

[Filed Electronically. Signature on File]

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Warren Havens

Exhibit 4:

DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
[001206341-2027-02]
RIN 0660-AA14
Mandatory Reimbursement Rules for Frequency Band or Geographic Relocation of Federal Spectrum-Dependent Systems
AGENCY: National Telecommunications and Information Administration, Commerce.
ACTION: Final Rule

* * * *

a. 216 - 220 MHz band

7. Federal assignments within the 216 - 220 MHz band are eligible for reimbursement for relocation or modification costs pursuant to BBA-97 and NDAA-99.

8. Mobex, an Automated Telecommunications Systems (AMTS) operator, states that it presently operates on a secondary basis to the United States Navy's SPASUR system in the 216.880 MHz to 217.080 MHz band.(15) Mobex maintains that in more than 15 years of operation, it has encountered no difficulty in sharing use of the band with the SPASUR system and does not anticipate any difficulty if it obtains additional AMTS licenses.(16) Mobex states that there may be no other spectrum suitable for the SPASUR purpose. Thus, Mobex submits that if the Navy has no intention of relocating the SPASUR system, the Navy should so inform the Administration so that the 216-220 MHz can be severed from this proceeding.(17) We anticipate that SPASUR will remain in the band at specified locations on a primary basis, and we anticipate that other Federal systems will maintain secondary status in the band and not seek reimbursement costs. As noted in paragraph 6 above, the FCC recently released a Report and Order adopting service and competitive bidding rules for these bands to accommodate new licensees. Accordingly, the 216-220 MHz band will not be severed from this proceeding as Mobex suggests.