

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Request by Progeny LMS, LLC)	
)	
For Waiver of Certain Multilateration Location and Monitoring Service (LMS) Rules)	WT Docket No. 11-49

To: Chief, Wireless Telecommunications Bureau

OPPOSITION OF PROGENY LMS, LLC

Progeny LMS, LLC (“Progeny”), by its attorneys, hereby opposes the requests of Skybridge Spectrum Foundation and Telesaurus Holdings GB LLC (hereinafter “Havens”) for the Commission to issue a new public notice and restart the comment cycle for Progeny’s above-captioned Petition for Waiver,¹ or for an extension of the deadline for comments and reply comments in this proceeding.²

Havens pleadings requests two potential forms of remedy. First, he requests that the Commission issue a second public notice establishing a new and lengthier comment cycle for Progeny’s Petition for Wavier and coupling Progeny’s waiver request with an ongoing rulemaking proceeding. Apparently recognizing that no justification or precedent exists for such a request, Havens alternatively requests that the comment period for Progeny’s Petition for

¹ Petition for Waiver of the Rules and Request for Expedited Treatment of Progeny LMS, LLC, WT Docket No. 11-49, at 7 (filed Mar. 8, 2011) (“*Petition*” or “*Petition for Wavier*”).

² See *Request to Reissue Public Notice and Place in Existing Relevant Docket and Request to Extend Deadlines for Comments and Reply Comments*, Skybridge Spectrum Foundation and Telesaurus Holdings GB LLC (filed March 25, 2011) (“Havens Request”). A copy of this Opposition is being sent to Havens by email today.

Waiver be doubled in length. As explained herein, neither of these requests is justified or appropriate, and both would ill-serve the public interest.

Further, Havens appears to acknowledge in his pleading that he has known about Progeny's Petition for Waiver and the Commission's public notice for some time, stating that he has "spent substantial time" preparing comments on the matter, including consulting (or trying to consult) with old and new technical experts.³ Despite these facts, Havens waited until the day of the comment deadline to seek changes or an extension of the public notice period. Havens' actions in this regard provide yet another example of what the Commission has described as Havens' "abusive and harassing pleadings."⁴ The Commission should not condone the use of its public notice process as a weapon to deter competition and the introduction of new wireless services. Instead, the Commission should admonish Havens for intentionally waiting until the eleventh hour to file a request for extension of this proceeding.

I. HAVENS PROVIDES NO BASIS FOR HIS CLAIM THAT THE COMMISSION'S PUBLIC NOTICE SHOULD BE REISSUED IN RULEMAKING DOCKET 06-46

The Commission's March 10, 2011 public notice seeking comment on Progeny's Petition for Waiver was issued in full compliance with the Commission's rules and the Communications Act, and Havens makes no claim to the contrary. Further, Havens saw the public notice and has "spent substantial time" preparing comments on Progeny's waiver request.⁵

³ *Havens Request* at 2.

⁴ See *Mobex Network Services, LLC, to Renew Licenses for Automated Maritime Telecommunications System (AMTS) Stations in Various Locations in the United States*, Order on Reconsideration, DA 07-148, 22 FCC Rcd 665, 672 (¶ 16) (2007).

⁵ *Id.* at 2.

Despite these facts, Havens now claims that the Commission somehow acted in a “questionable” manner by failing to reference rulemaking docket 06-46 in the public notice and by not filing a copy of the public notice in the rulemaking docket.⁶ Havens fails to cite any rule that would require such action.

In fact, a request for waiver of the Commission’s rules is inherently different than a rulemaking proceeding and must be treated in a different manner pursuant to the Administrative Procedure Act (“APA”). The requirements for notice and comment rulemaking are addressed under 5 U.S.C. Section 553, and are reflected in Part 1, Subpart C of the Commission’s rules. In contrast, applications for waiver of the Commission’s rules are adjudications of individual rights and are governed by entirely different procedures. Attempting to combine the two processes would be inconsistent with APA requirements.

Havens claims that there are novel or unusual legal issues related to Progeny’s Petition for Waiver that are similar to those addressed in the pending rulemaking. The Commission and its Bureaus, however, routinely act on requests for waivers of rules that are concurrently related to the subject of pending rulemaking proceedings. As an example, eight requests for temporary waiver of the power limits applicable to telemetry operations in the 450-470 MHz band were granted last year pending the outcome of a rulemaking proceeding.⁷ In another case, the Town of New Haven, Vermont sought to modify its license from using wideband to narrowband

⁶ *Id.* at 3.

⁷ See *Requests for Waivers For End-of-Train Devices to Exceed Power Limit for Telemetry Operations in the 450-470 MHz Band*, File No. 0004348068, 0004352165, 0004371962, 0004374293, 0004398594, 0004401558, 0004421093, 0004437389, Order, DA 10-2293 (2010).

technology, which required a frequency coordination under the applicable rules.⁸ New Haven was granted a waiver of the frequency coordination requirement even though there was an open rulemaking considering the extent to which frequency coordination is necessary when licenses are modified.⁹

Given these and many other available examples, no basis exists for Havens' claim that the Commission should attempt to combine Progeny's waiver request with the ongoing rulemaking proceeding by submitting a copy of Progeny's public notice in the rulemaking docket. Havens is simply trying to create delay in order to deter the construction and public availability of Progeny's proposed position location services, a service that Havens acknowledges is needed for public safety.¹⁰

II. HAVENS ALSO PROVIDES NO JUSTIFICATION FOR DOUBLING THE LENGTH OF THE PUBLIC COMMENT PERIOD

Apparently recognizing that no justification exists for issuing a second public notice, Havens alternatively requests that the comment period be doubled from 15 days to 30 days. It is a well-established policy of the Commission that extensions of time shall not be routinely granted.¹¹ As an example, the Commission's General Counsel dismissed a motion for extension of time pursuant to the Commission's policy when a party asserted that an extension was

⁸ See *Town of New Haven, Vermont Request for Waiver of Section 90.175 of the Commission's Rules to Modify Station WPMP419, New Haven, Vermont, Operating on Narrow Bandwidth Emissions*, File No. 0002937722, Order, 24 FCC Rcd 2925, DA 09-548 (2009).

⁹ See *id.*, ¶ 11.

¹⁰ See *Havens* at 6.

¹¹ See *Application of Nameloc, Inc. and ABC, Inc. for Assignment of License of Station KDIS-FM, Little Rock, Arkansas*, File No. BALH-20030319AEZ, Memorandum Opinion and Order, 23 FCC Rcd 14295 (2008).

necessary to “collect a complete record on the issues set forth in the Notice.”¹² The Commission’s General Counsel determined that reason to not be “good cause” for an extension of time under the Commission’s policy.¹³ Similarly, it has been determined that failure to learn of a proposed assignment until two weeks after public notice was not good cause to grant an extension of time.¹⁴

For the reasons set forth herein, Havens has not set forth good cause to extend the time for filing comments in this proceeding. Although Havens makes several arguments in an effort to justify this request, none of them are persuasive.

A. Havens is Incorrect in Claiming that Progeny’s Wavier Request is an Impermissible *Ex Parte* Presentation

There is no merit to Havens’ argument that Progeny’s Petition was an impermissible *ex parte* presentation. First, the proceedings that Havens cites to are separate and independent from the instant proceeding to consider Progeny’s Petition for Waiver of Sections 90.155(e) and 90.353(g) of the Commission’s rules. The 2006 M-LMS rulemaking proceeding is separate from Progeny’s granted request for extension of the construction deadlines, and both are separate from the instant proceeding. Havens’ status as a party to the other proceedings does not make him a party to the instant proceeding until he has filed a pleading in this proceeding.¹⁵ Progeny had no

¹² *Framework for Broadband Internet Service*, GN Docket No. 10-127, Order, DA 10-1296, ¶ 2 (2010).

¹³ *Id.*, ¶ 2.

¹⁴ *See Application of Repeater Communications Corporation of California for Partial Assignment of Licenses for Station WPOM425 and WRW245 to the County of Monterey, California*, File No. 0003736834, Order, 25 FCC Rcd 14485 (2010).

¹⁵ *See* 47 C.F.R. § 1.1202(d).

obligation to serve a copy of its Petition for Waiver on anyone. Parties, including Havens, were notified of the Petition by the Bureau's Public Notice and given an opportunity to comment.

Second, Progeny's Petition was not an *ex parte* presentation because it did not advocate any position in the other proceedings mentioned by Havens. An *ex parte* presentation by definition must be directed to the merits or outcome of a proceeding.¹⁶ Progeny's Petition was not directed to the merits of the 2006 M-LMS rulemaking or Progeny's request for extension and therefore was not an *ex parte* presentation with respect to those proceedings. Progeny therefore had no obligation under the Commission's *ex parte* rules to serve its Petition on Havens.

B. Havens is Also Incorrect in Claiming that the Comment Period is Especially Short Given the Subject Matter

Progeny requested expedited processing for its Petition for Waiver of the Commission's rules. In making this request, Progeny highlighted the growing and critical need that exists for more accurate position location services to support E911 emergency response to uses of wireless devices.

Havens openly acknowledges that there "is such a need," but then tries to claim that Progeny "cannot credibly argue" that this need should be addressed on an expedited basis.¹⁷ In fact, the Commission frequently uses comments cycles that are shorter than 30 days to address issues that are either time sensitive, or simply do not justify a 30-day pleading cycle.

For example, Havens acknowledges that "License applications involving auctioned spectrum are often on shorter public notice periods."¹⁸ In addition, the Commission has

¹⁶ See 47 C.F.R. § 1.1202(a).

¹⁷ *Havens Request* at 6.

¹⁸ *Id.* at 5 n.4.

frequently placed petitions for waiver of Commission rules on shorter pleading cycles.¹⁹ In this case, a shorter pleading cycle was clearly justified by the critical need for more accurate position location services and also given the deadlines that Progeny faces in constructing its M-LMS network in compliance with the Commission's rules.

C. Havens is Further Incorrect in Claiming that Serious Technical Issues are Raised by Progeny's Waiver Request

Finally, Havens attempts to justify his extension request by claiming that “[s]erious technical issues” are raised by Progeny’s waiver request that “will take the requested time above to properly address.”²⁰ Specifically, Havens tries to identify several potential technical issues, including (1) adjacent channel issues, (2) whether a full duty cycle would be used, (3) and compliance with existing power levels.²¹

In each case, Havens is attempting to obfuscate Progeny’s clear and unequivocal request for relief. Progeny expressly stated in its waiver petition that it “is requesting at this time a waiver of only Sections 90.155(e) and 90.353(g) of the Commission’s rules and not any other

¹⁹ See *Expedited Comment Dates Established for Requests for Waiver of Certain TV Tuner Requirements in Order to Import and Distribute Mobile DTV Receivers without Analog Tuners*, Public Notice, DA 10-873 (rel. May 20, 2010) (establishing a 15-day period for comments and a 7-day period for replies to the “delays inherent in electronics manufacturing and distribution, and consumer electronics manufacturers” and the “need for ‘sufficient lead time’ to develop products for release to market”); see also *Pleading Cycle Established for Comments on Windstream Petition for Limited Waiver Relief*, Public Notice, DA 11-357 (rel. Feb. 24, 2011) (establishing a 15-day comment period and a 10-day reply period); *Wireless Telecommunications Bureau Seeks Comment on National Railroad Passenger Corporation (AMTRAK) Request for Waiver of Certain Part 80 Automated Maritime Telecommunications System (AMTS) Rules to Implement Positive Train Control (PTC)*, Public Notice, DA 11-322 (rel. Feb. 18, 2011) (establishing a 21-day comment period and a 10-day reply period).

²⁰ *Havens Request* at 6.

²¹ See *id.* at 6.

rule applicable to M-LMS licensees.”²² Progeny is not seeking to exceed the out of band emissions limits that exist for M-LMS licensees. Progeny is also not requesting any waivers of the Commission’s rules regarding M-LMS duty cycles and power limits.

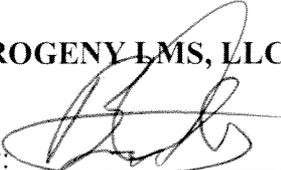
Therefore, each of the technical issues that Havens identifies does not exist and Havens has no basis for claiming that additional time is warranted to prepare his comments. His request for an extension of the comment period should therefore be promptly denied.

III. CONCLUSION

The Commission should deny Havens’ request for extension of time because the Progeny Petition for Waiver because Havens has provided no valid justification for such an extension. Further, the Commission should deny Havens’ request for the release of a second public notice seeking comment on Progeny’s waiver request. Finally, the Commission should admonish Havens for attempting to misuse the Commission’s public notice process by intentionally filing his extension request on the final day of the public notice comment period.

Respectfully submitted,

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²² *Petition for Waiver* at 7.