

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

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

To: Chief, Wireless Telecommunications Bureau and
Chief, Office of Engineering and Technology

**OPPOSITION OF
PROGENY LMS, LLC**

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SUMMARY

Progeny urges the Commission to deny the Petition for Reconsideration of Warren Havens that was filed against the Commission's order granting waivers to Progeny of two of the Commission's rules for M-LMS licensees ("*Waiver Order*"). Specifically, Progeny requests that the Commission deny each of the petition's three main arguments as factually incorrect, legally unfounded, and grossly untimely. With regard to Havens' arguments regarding the underlying vehicular purpose of M-LMS, facts already present in the record show that Progeny's M-LMS network can advance the state of M-LMS for all mobile devices, including vehicles, and that Progeny has made demonstrable and continuing progress on the development of a functioning M-LMS system.

Havens' arguments regarding the propriety of the Bureau's exercise of waiver authority are legally unfounded, as waivers are common practice and the conditional waiver granted by the Bureau is consonant with the waiver standard and the Commission's rationale for adopting its rules for M-LMS. Finally, Progeny urges the Commission to disregard as grossly untimely and previously settled Havens' repeated arguments regarding Progeny's status as an M-LMS licensee. In sum, the Commission should deny Havens' petition for reconsideration because Havens has raised no arguments that have not already been duly considered by the Commission, either in its *Waiver Order* or repeatedly over the past decade.

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I. INTRODUCTION

Progeny LMS, LLC (“Progeny”), by its attorneys, and pursuant to Section 1.429(f) of the Commission’s rules, 47 C.F.R. § 1.429(f), hereby opposes the petition for reconsideration (“Petition”)¹ that was filed by Warren Havens, Skybridge Spectrum Foundation, Telesaurus Holdings GB, LLC, and other affiliated petitioners (collectively “Havens”) addressing the Commission’s grant to Progeny of waivers of two of the Commission’s M-LMS rules.²

To promote administrative efficiency and in empathy with the Commission staff, Progeny summarizes Havens’ arguments and explains how they are factually incorrect, legally

¹ See *Petition for Partial Reconsideration and Clarification User Rule Sections 1.106, 1.2 and 1.41*, Warren Havens, Skybridge Spectrum Foundation, Telesaurus Holdings GB, LLC (filed Jan. 19, 2012) (“*Havens Petition*”).

² *Request by Progeny LMS, LLC for Waiver of Certain Multilateration Location and Monitoring Service Rules*, Order, DA 11-2036 (rel. Dec 20, 2011) (“*Waiver Order*”).

unfounded, and grossly untimely as a matter of administrative procedure. Havens makes three major arguments.³ First, Havens argues that the underlying purpose of the M-LMS rules is to ensure that the spectrum is preserved for the Intelligent Transportation Service (“ITS”) and that the Bureau lacked delegated authority to waive this purpose or the rules that support this purpose.⁴

Second, Havens opposes the Bureau’s waiver of two M-LMS rules and its imposition of a condition in the form of a modified Part 15 test requirement, arguing that by doing so the Bureau has replaced one rule with another and thereby acted outside of its delegated authority.⁵ Third, Havens renews his allegations regarding the original issuance of M-LMS licenses to Progeny and the dispute that existed at the time the licenses were granted between the individuals that were originally involved in Progeny.⁶

In brief, Havens’ first argument disregards the fact that the Bureau amply addressed the vehicular service issue in the *Waiver Order*, finding waiver consistent with the purposes of the rules. His second argument misstates the Bureau’s action and ignores the routine granting of conditional waivers by the FCC’s various bureaus. His third argument reiterates arguments that are both untimely and have been tacitly rejected as either moot or unavailing by the Commission a decade ago.

³ See *Havens Petition* at 2.

⁴ *Id.* at 6.

⁵ *Id.* at 9-10.

⁶ *Id.* at 11.

II. THE BUREAU'S WAIVER DOES NOT UNDERMINE THE UNDERLYING PURPOSE OF THE M-LMS RULES

Havens first seeks reconsideration of the *Waiver Order* on the grounds that it shifts Progeny's use of its licensed spectrum away from the "stated ITS purpose" of the M-LMS.⁷ Contrary to Havens' assertion, waiver of Section 90.353(g) does not waive or otherwise undermine the Commission's purpose in adopting the M-LMS allocation. Indeed, the *Waiver Order* not only fully explains how it is consistent with both the purposes of the M-LMS band and the public interest, it also supports the development of more viable M-LMS service to the benefit of handheld and vehicular uses alike.

Havens' arguments that the waiver undermines the ITS purpose of M-LMS posit an exclusivity of use that is not stated in the Commission's rules. The Commission did not limit, and did not intend to limit, M-LMS use to strictly vehicular traffic or strictly ITS use. The 1993 *LMS NPRM* recognized the flexibility of LMS systems, and proposed to take advantage of it by "expand[ing] the permissible uses of LMS to include the location of all animate and inanimate objects."⁸ When transportation-affiliated commenters objected to this expansion, even arguing that "LMS should remain primarily a vehicle-oriented service, with an emphasis on ITS-related communications," the Commission declined to so restrict LMS.⁹ To the contrary, the Commission observed in the *LMS Report and Order* – and the Bureau reiterated in the *Waiver Order* – that the "expansion of permissible LMS uses recognizes the general capability of

⁷*Id.* at 6.

⁸ *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, PR Docket No. 93-61, Notice of Proposed Rulemaking, 8 FCC Red 2502, 2503 (1993) ("*LMS NPRM*").

⁹ *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, PR Docket No. 93-61, Report and Order, 10 FCC Rcd. 4695 at 4708 ("*LMS Report and Order*") (citing comments of IVHS America and the Department of Transportation).

multilateration systems to cover a wide area and perform location determinations for any type of object within that area.”¹⁰

The primary limiting factor on the expansion of LMS use was not, as Havens argues, an affirmative intent to preserve an underlying LMS purpose. The broad expansion originally considered in the *LMS NPRM* contradicts this argument, and the Commission declined to limit LMS to an ITS purpose when explicitly invited to do so.¹¹ Instead, the “equitable balance” struck by the Commission’s limited expansion of the permissible purpose of the LMS service was motivated by concern regarding potential interference with amateur services and part 15 devices.¹² As discussed below, Progeny’s M-LMS system coexists exceedingly well with existing users,¹³ and provides location capabilities and technologies not considered – perhaps not even conceivable – by the Commission in 1995, and does so without upsetting the equitable spectrum sharing balance struck by the Commission in its M-LMS rules.

LMS technology today is not the same as that considered by the Commission in its early proceedings. As stated in the *Waiver Order*, “[p]osition location technology has evolved significantly since the M-LMS rules were adopted in 1995.”¹⁴ The Commission’s original 1995 rulemaking and subsequent orders addressing petitions for reconsideration of the 1995 rules clearly envisioned this evolution, indicating intent to “afford M-LMS licensees flexibility so that

¹⁰ *Waiver Order* at ¶ 22, citing *LMS Report and Order*, 10 FCC Rcd at 4708 ¶ 24.

¹¹ *See LMS Report and Order* ¶ 21 (citing comments of IVHS America and the Department of Transportation).

¹² *Id.* at ¶ 23.

¹³ *See* note 51 *infra* and accompanying text (discussing Progeny’s Part 15 Test Report).

¹⁴ *Waiver Order* at ¶ 15.

they could develop a variety of technology options in providing multilateration service.”¹⁵ The Commission’s waiver of Section 90.353(g) serves the public interest by promoting this evolution and permitting the development of a functioning M-LMS service for vehicles, handsets, and other devices where none currently exists.

Havens’ argument is not only incorrect regarding the proper interpretation of the Commission’s rules and decisions, but it is also inconsistent with reality. Specifically, Progeny is currently developing and testing an M-LMS network that can provide location services to both vehicles and other mobile devices. Pursuant to the requirement in Part 90.353(d), Progeny has conducted actual field tests, and pursuant to the waiver condition in the *Waiver Order*, it has filed with the Commission a report that provides details of the M-LMS system design and technical characteristics as prerequisites to commencing “commercial operations.”¹⁶ In stark contrast, there is no evidence in the Commission’s records that Havens has made progress in these or any other steps toward the development of a functioning M-LMS network to serve vehicles or anything else. Progeny is therefore unique in the development of an M-LMS network that can and will provide new position location services for vehicular and non-vehicular markets.

¹⁵ *Id.*, citing *Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, PR Docket 93-61, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 13942 at 13965 ¶ 61 (1997) (“*LMS MO&O*”) (declining to prohibit wideband forward links because to do so would “preclude certain LMS technology options from being developed”); *see also LMS Report and Order*, at ¶ 89 (“Allowing any types of emissions will enable any type of location or monitoring technology or ancillary service to develop without restrictions.”).

¹⁶ *Waiver Order* at ¶ 29. Havens also takes issue with the Bureau’s use in the *Waiver Order* of the term “commercial operations,” expressing concern that it may exempt operations that may be provided to consumers on a not-for-profit basis. *See Havens Petition* at 9, Note 4. Progeny herein assures the Bureau that it understood the intent of the condition that was included in the *Waiver Order*.

III. THE BUREAU'S EXERCISE OF DELEGATED AUTHORITY TO GRANT A CONDITIONAL WAIVER WAS PROPER

In addition to questioning the Bureau's interpretation of the M-LMS rules, Havens' petition appears to argue that the Bureau lacked authority to impose the conditional waiver. Havens' petition correctly notes that the "'testing' requirement in Section 90.353(d) . . . does not contain the specific requirements of the Condition that was involved in the *Waiver Order*."¹⁷ Havens asserts that "there does not appears [sic] to be authority under Section 1.935 to both waive a rule and replace that with some rule particular to the requesting part on the same matter. [Havens] request [sic] that the Bureau clarify the authority for this practice...."¹⁸

The clarification requested by the Havens' petition is straightforward. First, as Havens alludes, conditional waivers are a matter of "common practice at the FCC."¹⁹ The Commission and its bureaus routinely attach conditions to grants, waivers, mergers, and other transactions.²⁰ Section 1.925 provides the standard for waivers whether they are considered by a Bureau or by

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 13.

²⁰ *See, e.g., Shelby County Alabama Request for Waiver of Sections 90.35(a) and 90.205(d)(2) of the Commission's Rules*, Order, DA 12-76 (PS, rel. Jan 12, 2012) (Public Safety and Homeland Security Bureau waiver to operate public safety radio system at greater power, conditioned on power limits at certain locations to avoid interference); *Avista Corporation Applications to Modify Licenses for Automated Maritime Telecommunications System Stations WQKP817, WQKP819, and WQKP820*, Order, DA 12-45 (WTB, rel. Jan 13, 2012) (Wireless Telecommunications Bureau grant of application to modify licenses, conditioned upon applicant avoiding causing interference); *T.A. Resources N.V Application for International Section 214 Authorization and Determination that Aruba Provides Effective Competitive Opportunities to U.S. Carriers*, IB Docket No. 10-228, Order and Authorization, DA 11-1907 (IB, rel. Nov, 17, 2011) (International Bureau decision conditioning grant of Section 214 authority on provision of reasonable and non-discriminatory interconnection).

the Commission: waiver is appropriate when to do so would be in the public interest,²¹ or, stated conversely, when strict application of the rules would be contrary to the public interest.²² Although the grant of a waiver or imposition of a condition by its nature modifies the effect of Commission rules, the Commission has repeatedly affirmed that its bureaus possess delegated authority to grant such conditional waivers as long as their action accords with the waiver standard in Section 1.925.²³

The essence of a waiver, and any conditions attached to it, is the Commission's pursuit of "more effective implementation of overall policy" in the context of specific facts.²⁴ Conditions on waivers are as much a part of the public interest analysis as waivers themselves.²⁵ In analyzing the public interest impact of an application, the Commission is permitted to consider the effect of "remedial conditions" that would offset any potential harms to the public interest from Commission approval of a request.²⁶ Conditions are permitted as a moderating or balancing

²¹ 47 C.F.R. § 1.925(b)(3)(i).

²² 47 C.F.R. § 1.925(b)(3)(ii).

²³ See, e.g., *MARITEL, INC. Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses*, File Nos. 0001252148, 0001252156, 0001252177, 0001252214, 0001252257, 0001252280, 0001252315, 0001252325, 0001252334, Order, DA 03-3614 (PS/WTB, rel. Dec. 4, 2003) (Public Safety and Wireless Bureau grant of a waiver of a construction requirement deadline); *aff'd on review MARITEL, INC. Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses and Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses*, Memorandum Opinion and Order, 22 FCC Rcd 14074, ¶ 8 (2003) (affirming the delegated grant of a waiver under the second prong of Section 1.925).

²⁴ *WAIT Radio v. FCC*, 413 F.2d 1153 at ¶ 19 (D.C. Cir. 1969) ("WAIT Radio").

²⁵ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, FCC 11-4 at ¶ 2 (rel. Jan. 20, 2007).

²⁶ *Id.*

factor to the effect of a waiver in the same way, and for the same reasons, that waivers themselves are permitted as a “safety valve” exception with the goal of preserving the affected rule.²⁷

The Bureau’s grant of the *Waiver Order* and the conditions within it are therefore consistent with Section 1.925 and with the Commission’s goals. The *Waiver Order* carefully considers the facts relevant to the potential waiver of each of the two rules addressed therein and in each case finds “particular facts [that] make strict compliance with [the] rule inconsistent with the public interest.”²⁸

Finally, even if the imposition of the condition were to exceed the authority of the Bureau, Progeny remains subject to the underlying rules with respect to Part 15 testing, which are largely identical.²⁹ The underlying purpose of the original testing condition was to “ensure that multilateration LMS licensees, when designing and constructing their systems, take into consideration a goal of minimizing interference to existing deployments or systems of Part 15 devices in their area, and to verify through cooperative testing that this goal has been served.”³⁰ Both the condition imposed in the *Waiver Order* and the original condition imposed by Section 90.353(d) accomplish this goal, and the condition in the *Waiver Order* arguably exceeds that contained in Section 90.353(d). Nonetheless, by filing its Part 15 Test Report and a detailed

²⁷ See *WAIT Radio* at ¶ 13; see also *id.* at ¶ 19 (observing that “[t]he limited safety valve permits a more rigorous adherence to an effective regulation”).

²⁸ *Waiver Order* at ¶ 13.

²⁹ 47 C.F.R § 90.353(d) (providing that “multilateration LMS licenses will be conditioned upon the licensee’s ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to 47 CFR part 15 devices”).

³⁰ *LMS MO&O* at ¶ 69.

description of its M-LMS network system design,³¹ Progeny has already fully complied with the *Waiver Order* condition, the Section 90.353(d) condition, and the underlying public interest rationale for both of them. Therefore, Havens' argument in this regard would appear to be moot.

IV. THE COMMISSION ALREADY CONCLUDED TEN YEARS AGO THAT PROGENY IS QUALIFIED AS AN M-LMS LICENSEE

The third argument in Havens petition renews Havens' repeated efforts to induce the Commission to address allegations regarding the issuance of M-LMS licenses to Progeny. This argument is repetitious, untimely, and has already been addressed by substantial Commission process. The Commission has given these issues ample consideration and repeatedly declined to take action that would contradict its previous finding that Progeny is fully qualified as an M-LMS licensee.

As Progeny has explained repeatedly over the years, prior to receiving its licenses, on November 3, 1999, Progeny filed an application with the Commission to amend its FCC Form 601 long-form application and to request a conditional waiver of the Commission's rules to permit the amendment.³² The need for such an amendment and waiver were explained fully in the waiver request and do not require repetition herein. The Commission responded by placing Progeny's amendment and waiver request on public notice.³³ In doing so, the Commission outlined in its public notice the factual circumstances that prompted Progeny to amend its long-

³¹ *Progeny LMS, LLC Demonstration of Compliance with Section 90.353(d) of the Commission's Rules*, WT Docket No. 11-49 (Filed Jan. 27, 2012) ("*Part 15 Test Report*"); see also note 50 *infra* and accompanying text.

³² Amendment to FCC Form 601 Long-Form Application and Conditional Waiver Request of Progeny LMS, LLC, FCC File No. 0000006894 (Nov. 3, 1999).

³³ See *Location and Monitoring Service, Application Accepted for Filing, Auction Event No. 21*, DA 99-2712 (Dec. 6, 1999).

form application and request a waiver of the Commission's rules.³⁴ No party opposed Progeny's requested waiver.

Pursuant to the pre-grant notice and petition procedures of Section 309 of the Communications Act, the Commission placed Progeny's long-form application as amended on public notice a second time three months later on March 15, 2000.³⁵ The Commission subsequently issued a third public notice on May 4, 2000 indicating that it was prepared to grant Progeny's amended M-LMS license application subject to the submission of its final auction payment.³⁶ The Commission then issued a fourth public notice on July 19, 2000 announcing the grant to Progeny of 228 M-LMS licenses.³⁷

Havens, and indeed any interested party, had ample opportunity to comment on Progeny's November 3, 1999 waiver and on the Commission's four public notices. Havens acknowledges in his petition, however, that he did not dispute the Commission's grant of M-LMS licenses to Progeny until May 7, 2007, nearly seven years after the opportunity for comment on this issue had closed.³⁸ Given that no comments were received, the Commission ultimately granted Progeny's licenses on July 19, 2000. In light of the Commission's extensive and conclusive record on this matter, and the apparent determination of the petitioner to continue

³⁴ *See id.* at 1-2.

³⁵ *See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing*, Report Number 475, Public Notice No. 98297 (March 15, 2000).

³⁶ *See Wireless Telecommunications Bureau Announces it is Prepared to Grant Location and Monitoring Service Licenses After Final Payment is Made*, DA 00-989, Report Number AUC-21-N (May 4, 2000).

³⁷ *See Wireless Telecommunications Bureau Grants 228 Location and Monitoring Service Licenses to Progeny LMS*, DA 00-1600, Report Number AUC-21-M (July 19, 2000).

³⁸ *See Havens Petition* at Exhibit 1 (claiming to have first raised his arguments on May 7, 2007).

to raise this unfounded and untimely complaint, Progeny requests that the Commission conclude that this argument was addressed and resolved a decade ago, and any future pleadings on the subject should be summarily dismissed as untimely and moot.

V. CONCLUSION

As explained herein, the arguments presented by Havens in his petition are factually incorrect, legally unfounded, and grossly untimely as a matter of administrative procedure. Further, certain of Havens' arguments have been specifically rejected by the Commission in previous proceeding involving nearly identical facts and allegations by Havens. The Commission should therefore reject Havens' petition and should summarily dismiss similarly repetitious arguments that are filed by Havens in the future as settled, untimely, and moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Claudia Darbie, do hereby certify that on this 1st day of February, 2012, I caused to be sent via First Class, postage prepaid US mail, a copy of the foregoing "Opposition to Petition for Reconsideration" to the following person:

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Claudia Darbie