

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

In the Matter of)	
)	
Petition for Reconsideration of Various Auction 87 Public Notices)	AU Docket No. 09-205
)	
Petition to Deny Long-Form License Application of Silke Communications, Inc. (Auction 87))	File No. 0004355886
)	
Petition to Deny Long-Form License Application of Two Way Communications (Auction 87))	File No. 0004359102

**PETITION FOR RECONSIDERATION OF BUREAU'S
APRIL 27, 2012 MEMORANDUM OPINION AND ORDER**

Warren Havens and certain entities managed by Warren Havens his (collectively, "Petitioners")¹ hereby file this Petition for Review of the Memorandum Opinion and Order adopted April 27, 2012, FCC 12-676 (the "Order"). For this petition's substance, first, Petitioners agree with and incorporate and reference herein the text of the Application for Review of the Order they filed today. In addition, the Petitioners present the following.

I. INTRODUCTION

In its April 27, 2012 Memorandum Opinion and Order ("Order") the Mobility Division and Auctions and Spectrum Access Division, Wireless Telecommunications Bureau ("Bureau") erroneously dismissed the Petitioners' petition for reconsideration of the Auction 87 public

¹ V2G LCC, Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, Verde Systems LLC and Environmental LLC.

notices and the petitions to deny the license applications. Petitioners are filing contemporaneously herewith an Application for Review of the Bureau's Order.

In its Order, the Bureau presents new facts when it issues its Admonishment to Petitioners. Namely, the Bureau cites to the Commission's "**recently imposed** sanctions against Warren Havens for submitting repetitious and frivolous filings in an unrelated proceeding."² Order at p. 15 (emphasis added). The Bureau notes that "[t]he Commission specifically has warned Havens that, **although the restrictions at issue concern only the specific license application proceedings involved in that case**, the Commission would not hesitate to take action in other proceedings when there are additional abusive or frivolous pleadings."³ *Id.* (emphasis added). The Bureau continues by pronouncing its unfounded belief that "Havens, and the other Havens Parties, may be using the instant proceeding in Auction 87 to pursue issues that they have raised, and continue to pursue, in other unrelated proceedings involving different parties." *Id.* In support of this conclusion the Bureau cites to an argument made in the Petition for Reconsideration that "the long form application filed by an Auction 61 winning bidder is 'unlawful and must be reversed.'"⁴ The Bureau continues by declaring that this fact along with the fact that Petitioners have raised some of the "same overly broad arguments from his"⁵ challenge in Auction 61 ... could be characterized as a misuse of process." *Id.* The Bureau then concludes by threatening Petitioners that "such action may rise to the level described in the

² Warren C. Havens, Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas, and Applications to Provide Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado, *Memorandum Opinion and Order*, FCC 12-26 (2012) (*Havens Sanctions Order*).

³ *Havens Third Order on Reconsideration*, 26 FCC Rcd at 10893 ¶ 14.

⁴ *See* Petition for Reconsideration at 4.

⁵ Presumably "his" refers to the Petitioners and not only Mr. Havens.

Havens Sanctions proceeding imposing sanctions against Havens.” *Id.* That is, a pre-filing injunction that, like the *Havens Sanctions* relied on by the Bureau flies in the face of the United States Constitution and directly conflicts with federal statute, regulation, case precedent and established Commission policy.

With its “Admonishment” the Bureau raises and addresses new facts, namely the *Havens Sanctions*.

ARGUMENT

However, the most outrageous aspect of the Order is found in the Bureau’s final words threatening Petitioners. The Bureau’s “admonishment” flies in the face of Petitioners’ First Amendment and Due Process Rights and will not be tolerated.

ADMONISHMENT IS AN EGGREGIOUS VIOLATION OF LAW AND PETITIONERS’ RIGHTS

In the most appalling fashion the Bureau concludes its Order by threatening Mr. Havens. *See* Order at p. 15-16 (the “Admonishment”). As set forth below, the Bureau’s Admonishment is wrong on so many levels. Fundamentally, the bullying Bureau neglects to consider two key facts: (1) the Petitions were filed before the Commission’s imposition of the “Havens Sanction” and (2) the Commission explicitly limited its pre-filing injunction to filings made related to or in connection with Application File Nos. File Nos. 852997-853009 and 853010-853014.⁶ Notwithstanding these facts the Bureau argues that “The Commission’s actions in that proceeding [FCC 12-26] are relevant here to the extent that Havens, and the other Havens Parties, may be using the instant proceeding in Auction 87 to pursue issues that they have raised, and continue to pursue, in other unrelated proceedings involving different parties.” Relevant

⁶ With its Admonishment the Bureau raises new facts that form the basis for a Petition for Reconsideration being filed contemporaneously with this Application.

how? According to the Bureau, the Petitioners' legitimate exercise of their First Amendment and due process rights "could be characterized as a misuse of process and takes away from limited Commission resources." As a result, the Bureau "take[s] this opportunity **to warn Havens and the entities he controls** that such action may rise to the level described in the *Havens Sanctions* proceeding imposing sanctions against Havens." *Id.* (emphasis added). Again, what "action" is the Bureau referring to? The filing of a Petition to Deny? A Petition for Reconsideration? An Application for Review? It is well-settled that the right to petition government, protected by the First Amendment to the United States Constitution, applies to petitions to government agencies such as the Commission. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1962); U.S. Const. 1st Amendment. The Bureau's recent attempt to silence Havens through threats will not be tolerated.

The filings made have all been in accordance with the Commission's rules and fully within Petitioners' rights. As an official agency of the United States government, the FCC is bound to adhere to fundamental principles of due process.⁷ The Fifth Amendment's Due Process Clause embodies the basic guarantee of fair treatment and rational decision-making. The *Havens Sanction* cited by the Bureau had no basis in the record and amounts to completely arbitrary agency action. That action alone was bad enough – but now, the Bureau uses the ill-conceived "Havens Sanction" to stifle Mr. Havens' rights by threatening him in a completely unrelated proceeding and based on pleadings that were filed *before the issuance of the Havens Sanction*. The Bureau's gall is mind blowing. The Bureau's "admonishment" simply cannot be squared with the Due Process Clause or the First Amendment.

⁷ The Supreme Court has held that: "Due process, unlike some legal rules, is not a technical concept unrelated to time, place and circumstances. Due process is flexible and calls for such procedure protections as the situation demands." *Matthews v. Eldridge*, 424 U.S. 319 (1976).

In the instant proceeding there is no rule prohibiting the filings made by Havens. Quite the opposite. The Petitioners had a right to file the pleadings they did. If for some reason the Bureau believed any filing was merely repetitive or without merit, it could have summarily dismissed it - thus preserving the valuable resources the Bureau alludes were wasted by the Petitioners' filings. Indeed such an action would simultaneously afford Petitioners their rights and lawful opportunity to supplement the record with new facts and arguments, pursue a final agency action, and preserve a complete record for eventual appeal.⁸ The Bureau did not do that. Instead it tries to squelch Petitioners' rights through a completely arbitrary, capricious, and chilling "warning" (aka, threat).

Moreover, such a warning runs against the public interest. Congress has clearly established a party's right to file petitions for reconsideration and petitions to deny. While the Bureau not like to have its policies challenged, threatening a party from exercising his rights runs afoul of the Constitution and undercuts the public interest purpose underlying the public's right to petition.

The Bureau's attempt to muzzle Havens via an admonishment unjustifiably depriving Havens of his due process rights, stifles his freedom of speech and tarnishing his ability to prosecute claims before the FCC. It is the Bureau that should be admonished. As stated, Petitioners will not tolerate its threats and intends to fully expose the abusive nature of the Bureau's tactics.

New Fact

⁸ Or just ignored: it is well known that the FCC hardly ever rules within the 90 days set in 47 USC 405, but rules whenever it chooses with no explanation given as to timing beyond the 90 days.

In FCC 11-64, the full Commission recognized Petitioners facts and arguments in their petitions and Application for Review (then and now still pending) challenging the MCLM (Maritime Communications/ Land Mobile LLC) long form in and aspects of Auction 61. FCC 11-64 effectively granted these aspects of these petitions (but not all of the issues and relief requested in said petitions).⁹ FCC 11-64, in par. 64 (and elsewhere) makes clear that the full Commission finds that a bidder that violates Section 1.2105 including by certifying a bidder DE “size” and using obtained bidding credits, that it did not deserve, should have the licenses revoked. That is the same as finding that the short form is defective and cannot be remedied, and auction participation barred or rejected -- due that false certification and unlawful obtaining and use of bidding credits (which Congress instructed the FCC to only give to *actual* qualified small entities, by a larger entity — and denying that party rights to be in the auction, or to get the results thereof by dismissing the short form or dismissing or denying the long form). The only difference is that in the MCLM case, the FCC did not recognize (as it should have) these facts and apply the requirements of Section 1.2105 timely, at the post-short form/ pre action stage, or at least the time of deciding on the long form, but instead the FCC allowed this unlawful use of undeserved bidding credits to go on for years, by issuing the licensing and not acting on Petitioners’ petitions—thus, all the FCC is now, under FCC 11-64, acting to “revoke” the unlawfully procured licenses.

This Auction 87 Order is at odds with FCC 11-64 for those reasons. In the Order, the Bureaus find and suggest that an auction participate is permitted to use said undeserved bidding

⁹ What was not effectively granted included the issue of the licenses issued to MCLM being void ab initio, and two of the Petitioners being the lawful high bidders who, under applicable court precedent, had the sole rights to the licenses. However, these issues are not needed for purposes of the assertion herein that FCC 11-64 is a relevant new fact of decisional importance in the instant proceeding, sufficient to support this Petition for Reconsideration.

credits as long as that arose in connection with affiliates (that may not be under actual de jure or de facto control of the applicant)¹⁰ change in “size” (gross revenue size as it related to a DE [Designated Entity] bid discount level) after the short form deadline, and that change in DE size was not due to a change in applicant (applicant-only) size. However, said FCC 11-64 license revocation issue and the underlying facts ascertained and referenced therein, find otherwise, including that a change in MCLM size (or in its controlling interest) can lead to disqualification (here, by revocation as noted above), whether or not that also involved any change in affiliates’ size. In fact, FCC 11-64 does not get into any such breakdown as in the Order at all (that a change in DE size is permissible under Section 1.2105 if caused only by a change in affiliates size, or the like). Nor could the full Commission have made any such argument in FCC 11-64: it would make no sense, since an applicant can never know and certify, and stand by, the gross revenue figures of non-controlled affiliates. FCC 11-64 does not go astray as does the Order, as just noted. FCC 11-64 is a new fact that supports this petition for reconsideration. A new decision by the full Commission is superior to Bureau authority, and is clearly a new relevant fact.

¹⁰ Many if not most of all DE applicants have affiliates that they do not have legal control of: they cannot requires these affiliates to provide gross revenues at all, or accurate ones that support the applicants Section 1.2105 certification (and long form certification of all attributable gross revenues). But the applicant can certify its own gross revenues (if any) and any of any entity it controls (that would be an affiliate, but a controlled one). The Order shows this glaring defect in the entire FCC DE program and sets of rules, and all auctions thereunder. The total DE attributable gross revenues can never be certified or otherwise known to be accurate but for the applicant itself and any affiliates it controls. This causes unfair and unequal DE program, and a DE regulatory environment in which similarly situated competitors get different results, and bidders that may have qualified for DE bidding credits cannot get them and others that do not deserve them, certify the gross revenues of affiliated that they do not control that are incorrect, and by that get an undeserved bidding credit. A similarly situated company that also has non controlled affiliates but that cannot get from them, their gross revenues, may then properly (and in fact, would then have to, to be lawfully acting) not apply for any DE bidding credit. These are a few of many easy to see examples of why this DE bidding credit program, and series of rules, are defective and contrary to principals of law, indicated herein.

- Again, we have to give the DA the opportunity to piss on our arguments in this Auc 87 proceeding, as to this new fact not available when we challenged auc 87.

CONCLUSION

The new fact and related argument herein should be considered and granted. The Order should be reversed for that basis alone, but also based on the other referenced and incorporated facts and arguments.

Also, the Admonishment and threats contained in the Order represent a rather unprecedented and bold-faced abuse of discretion. It is undeniable that Petitioners had a right to file their petition for reconsideration and petitions to deny. Notwithstanding this, the Bureau has taken it upon itself to find a way to establish a “Havens’ law” in an attempt to muzzle Havens and his companies. In doing so, the Bureau has over-stepped its authority and is acting in a manner that may unjustifiably deprive Petitioners of their property rights, stifle their freedom of speech and tarnish their ability to prosecute future claims before the FCC and elsewhere. For all the reasons given above, Petitioners respectfully ask that that Bureau reconsider its Order and strike the Admonishment and threats aimed toward the Petitioners.

Dated: May 29, 2012

Respectfully submitted,

/s/

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