

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

In particular, see Exhibit 1 to below Reply to Comments that contains SCRRRA documents regarding it not needing the entire 1 MHz of AMTS and that AMTS is not required. Items in blue-lined boxes, blue highlight, and red text are additions to the original Exhibit 1.

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”), Environmental 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 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, 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 MHz³ 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

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 SCRRRA 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.⁴⁵ 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 HTML also available online at:

http://docs.google.com/viewer?a=v&q=cache:SgbfKWeBy7wJ:www.aar.org/-/media/AAR/PositionPapers/PTC%2520Oct%252002009.ashx+positive+train+control+mandate&hl=en&gl=us&pid=bl&srcid=ADGEEsGfwQ7S3HmxNoWZPZOr8ovsZFxxiGykWk7Y0gULxz02XUjSfIQUlkFSUxbNytYNQtNAUrRotDstRuZjdBPY97W8w6haTBy3CBXOo7QIYLw9IY5_pWs8ruqt9mvBnv4BWqVHtEJ2&sig=AHIEtbQGMqQqMP7wA1SvVgzE2JGJK7CcQ

⁵ In the Application and SCRRRA internal documents related to the Application, SCRRRA 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 SCRRRA 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 SCRRRA and the breadth of the waiver requests, coupled with SCRRRA'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 SCRRRA 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. SCRRRA 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 Telecommunications 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,

Environmental 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:

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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



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

Seek radio spectrum to "support SCRRA's operations and" provide for PTC. Thus, the AMTS spectrum is not just for PTC use by SCRRA but also for its operations.

Addition to original Exhibit 1: Does not say only AMTS can be used, but says generally "RF spectrum". Also, Verde Systems and Skybridge Spectrum Foundation were not contacted about their AMTS. And SCRRA has not shown it contacted other spectrum holders, besides AMTS licenses.

Addition to original Exhibit 1: Do not state that Federal legislation mandated AMTS.

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.

Addition to original exhibit 1: Robert Guss with this firm was prior legal counsel to Mobex (the predecessor to MCLM)

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.

Addition to original Exhibit 1: Not true (see above), and there were other spectrum options. SCRRA has not shown its due diligence to the FCC that it contacted all licensees with spectrum that it could use for PTC. AMTS is not the only spectrum that can be used for PTC. SCRRA admits here that it does not need all of the 1 MHz of AMTS for PTC, but that given the price it is worthwhile to purchase all of it and that remainder not used for PTC can be used for other purposes.

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



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 SCRRRA. 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

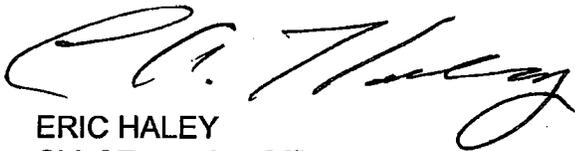
proposed spectrum, which valuation set forth the price of all recent analogous spectrum purchases. Based on all of the above information, Metrolink's consultants have advised that the proposed purchase price is within industry standards and is fair and reasonable. Staff has validated that determination.

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

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 TIIH materials once the mandate becomes effective. This makes no sense.

- Likewise, regulatory flexibility is appropriate in cases where only very small amounts of TIIH traffic are carried. Approximately 9,500 miles of Class I rail main line average just one or two TIIH 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

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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.

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