

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

In the Matter of
Request of Warren C. Havens for Waiver of
the Five-Year Construction Requirement
for his Multilateration Location and Monitoring
Service Economic Area Licenses

MEMORANDUM OPINION AND ORDER

ADOPTED: December 8, 2004

RELEASED: December 9, 2004

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On December 3, 2003, Warren C. Havens (Havens) filed a Request to Waive the five-year construction requirement for his multilateration Location and Monitoring Service (M-LMS) Economic Area (EA) licenses. For the reasons stated below, we find that the public interest would be served by granting Havens a three-year extension of the five-year construction requirement.

II. BACKGROUND

2. In 1995, the Commission established rules governing the Location and Monitoring Service (LMS) in the 902-928 MHz frequency band. The LMS is intended to support the nation's transportation infrastructure and to facilitate the growth of Intelligent Transportation Systems through the use of location and transmitter tracking technologies. There are two types of LMS systems - multilateration (M-LMS) and non-multilateration. M-LMS systems are designed to locate vehicles or other objects by measuring the difference in time of arrival, or difference in phase, of signals transmitted from a mobile unit to a number of fixed receive points, or from a number of fixed transmitter points to the receiving unit to be located. Non-multilateration systems are those that employ any technology other

1 See Request for Partial Waiver (Waiver of the Five-Year Construction Benchmark) (filed Dec. 3, 2003) (Waiver Request). On July 14, 2004, Havens filed an Amended Request, in which he is seeking a three-year extension of the construction deadline. See Request for Partial Waiver, Amended Request (filed July 14, 2004).

2 Amendment of Part 90 of the Commission's Rules to Adopt Regulation for Automatic Vehicle Monitoring Systems, Report and Order, 10 FCC Rcd 4695 (1995) (LMS Report and Order).

3 The term "Intelligent Transportation Systems" refers to the collection of radio technologies that, among other things, is intended to improve the efficiency and safety of our nation's highways. LMS Report and Order at 4698 ¶5.

4 See LMS Report and Order at 4703 ¶14.

5 Id.

than multilateration technology to transmit information to and from vehicles.⁶

3. In 1998, the Commission modified the M-LMS rules to allow more time for auction winners to satisfy their construction requirements.⁷ The Commission concluded that a one-year build-out period was insufficient for M-LMS licensees because the one-year requirement was based on rules for site-based systems and it would be difficult for licensees to meet the deadline without raising a prohibitive amount of initial capital, and thus determined that such licensees would be required to construct and place in operation a sufficient number of base stations to provide M-LMS to one-third of an EA's population within five years of initial license grant and two-thirds of the population within ten years.⁸ Havens holds fifty-two M-LMS licenses,⁹ which he acquired in Auction No. 21. The licenses were granted on July 14, 1999, and had five-year construction deadlines expiring on July 14, 2004.

4. On December 3, 2003, Havens filed a request to waive the five-year construction requirement for his M-LMS Economic Area licenses in its entirety. On July 14, 2004, Havens amended his request to seek a three-year extension of the five-year construction requirement. On March 18, 2004, we sought comment on Havens' Waiver Request.¹⁰ We received a single opposing comment from Mobex Network Services, LLC (Mobex), and a reply comment from Havens.¹¹

III. DISCUSSION

5. Pursuant to Sections 1.946(c) and 1.955(a)(2) of the Commission's rules,¹² a M-LMS license will terminate automatically as of the construction deadline if the licensee fails to meet the construction requirements for its license, unless the Commission grants an extension request or waives the LMS construction requirements. A waiver may be granted, pursuant to Section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹³ Additionally, we may grant an extension of time to

⁶ *Id.*

⁷ *See* In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182, 15197-98 ¶30 (1998) (*LMS Second Report and Order*).

⁸ *Id.* We note that section 90.155(d) of the Commission's rules, 47 C.F.R. § 90.155(d), provides that M-LMS systems must be constructed within twelve months from the date of grant. This section was not amended to reflect the Commission's decision in the *LMS Second Report and Order*, which applied to LMS auction winners. However, the five-year and ten-year construction requirements for these authorizations are listed on the licenses.

⁹ *See* Waiver Request at Appendix A.

¹⁰ Wireless Telecommunications Bureau, Mobility Division Seeks Comment on Warren C. Havens' Request for Waiver of Multilateration Location and Monitoring Service Five-Year Construction Requirement, *Public Notice*, DA 04-731 (Mar. 18, 2004).

¹¹ On April 30, 2004, Mobex filed a Motion to Accept Untimely or Supplemental Filing, along with Reply Comments, and, on June 10, 2004, Havens filed a Request for Leave to Late-File Table of Contents and Summary to Reply Comments. We hereby accept Mobex's late-filed Reply Comments and Havens' late-filed Table of Contents and Summary to his Reply Comments.

¹² 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

¹³ 47 C.F.R. § 1.925.

complete construction pursuant to Section 1.946(e) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.¹⁴ The Commission has also stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving construction requirements on a case-by-case basis.¹⁵ As discussed below, we find the circumstances set forth in Havens' Request warrant grant of an extension of time to meet the five-year construction requirement.

6. Havens contends that good cause exists to grant an extension. Specifically, Havens argues that M-LMS systems are unique because they must operate within particular technological parameters, such as co-existing with unlicensed devices and amateur radio service operations authorized under Parts 15 and 97 of the Commission's rules, respectively. Therefore, he notes that the development of multilateration location technology to operate commercially viable M-LMS systems has progressed slowly, and that no such equipment is currently available.¹⁶ Havens contends that there has been no M-LMS equipment available in the market since he obtained his licenses in 1999. Havens states that he has undertaken substantial due diligence to fulfill construction obligations by attempting to develop advanced equipment for M-LMS systems.¹⁷ Havens also contends that the unique attributes of M-LMS are similar to other services for which the Commission has not adopted an intermediate five-year construction requirement (*e.g.*, Wireless Communications Service) and only adopted a ten-year requirement.¹⁸ Havens asserts that M-LMS shares certain characteristics with such services, including an undeveloped equipment market, unique operating requirements, and the promise of new and innovative services and, therefore, warrants similar treatment.¹⁹

7. We find that an extension of time of the five-year coverage requirements for the subject stations is warranted. Based on the totality of the record before us, we conclude that Havens has presented unique factual circumstances and that strict application of the construction requirement would be contrary to the public interest. We also agree that, in light of these circumstances, there is good cause to grant the request and that doing so will serve the public interest. First, we note that Havens' situation is unique in that no equipment is available, making it impossible for construction to occur at this time. Second, we note that the requirement in question is a five-year construction requirement, well in advance of the first renewal deadline for the licenses. Third, we note that the 902-928 MHz band is a unique spectrum sharing situation because it is available to multiple operations, including Government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and licensed M-LMS operations. We believe this situation has contributed to the difficulty of M-LMS licensees in obtaining equipment, and are persuaded that the unavailability of M-LMS equipment is due to causes beyond Havens' control. We note that Progeny, another holder of numerous M-LMS licenses, has filed a Petition for Rule Making to change the M-LMS rules arguing that

¹⁴ 47 C.F.R. § 1.946. Section 1.946(e) also enumerates specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

¹⁵ *See, e.g.*, Amendment of the Commission's Rules To Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994) (*PCS MO&O*), *citing WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁶ Waiver Request at 3-5. Havens reports that, in order to remedy this situation, he and a company he controls, Telesaurus Holdings GB, LLC (Telesaurus), have undertaken efforts to develop equipment for M-LMS systems. Waiver Request at 5.

¹⁷ *See Request for Partial Waiver to Allow Ancillary Fixed Service*, ULS No. 0001529701 (filed Nov. 26, 2003).

¹⁸ Waiver Request at 6-9.

¹⁹ *Id.* at 8.

the rules designed to promote sharing with other services are overly constraining and have contributed to the lack of equipment development.²⁰ For the reasons stated above, we believe the public interest is served by granting a three-year extension of Havens' five-year construction requirement. We believe that a three-year extension of the deadline will require Havens to actively pursue equipment development in the near term. Accordingly, we grant Havens' requests and extend the five-year construction deadline for the subject M-LMS Economic Area licenses from July 14, 2004, to July 14, 2007.

8. Mobex argues that Havens failed to demonstrate that he made a legitimate effort to obtain equipment.²¹ Mobex further contends that the public interest will not be harmed by the denial of Havens' Waiver Request because the functional equivalent of M-LMS location service is presently available in the form of telematics,²² and that grant of the request would be contrary to the purpose of construction requirements to ensure that services are provided promptly to the public.²³ We find that Havens has performed adequate due diligence and has provided evidence of several executed contracts reflecting that he has been actively exploring options for the deployment of LMS systems.²⁴ We reject Mobex's argument that Havens should have anticipated having to design and manufacture his own equipment, rather than relying on the only existing manufacturer at the time Havens bid for the spectrum.²⁵ In fact, Havens has provided evidence that he sought to obtain M-LMS equipment after the lone vendor of M-LMS equipment ceased to produce such equipment within the first year of the license term. Notwithstanding the availability of telematics, we find that there is an important public interest benefit in ensuring the utilization of M-LMS spectrum and promoting a variety of services to the public.

9. Mobex's also asserts that Havens' Waiver Request is similar to the requests which were denied in the *McCart* and *Hilltop Orders*.²⁶ We disagree. We note that neither party in the *McCart* and *Hilltop* cases had attempted to obtain equipment or remedy the lack of equipment, and in *Hilltop*, the extension request was filed nearly one year after the deadline had passed and the license had

²⁰ See Petition for Rulemaking filed by Progeny LMS, Inc. (*Progeny Petition*), RM-10403 (filed March 5, 2002) at 15-16.

²¹ Mobex Comments at 5.

²² "Telematics" refers to vehicle navigation systems, such as OnStar, where drivers and passengers employ GPS to obtain directions, track their location, and obtain assistance when a vehicle is in an accident.

²³ Mobex Comments at 6-8.

²⁴ See Havens' Reply Comments at 1-2, referring to his Request for Partial Waiver to Allow Ancillary Fixed Service, which was filed Nov. 26, 2003. We note that Havens withdrew this filing on July 27, 2004. On July 22, 2004, Havens gave an *ex parte* presentation to staff of the Wireless Telecommunications Bureau, and, on July 30, 2004, he submitted documentation in support of his due diligence claims. This documentation includes evidence of consulting contracts, agreements for engineering studies, and memorandums of understanding which Havens entered into beginning in the first year of the license term for the purpose of developing a LMS system. We note that this documentation was submitted along with a request for confidential treatment in accordance with Sections 0.457 and 0.459 of the Commission's rules.

²⁵ See Mobex Comments at 5.

²⁶ Mobex contends that Havens' request is similar to two waiver requests which were denied by the Mobility Division of the WTB, and its predecessor, the Commercial Wireless Division, because, as in those situations, Havens cannot state when equipment will be available to construct his facilities. Mobex Comments at 6. Mobex cites In the Matter of Request for Extension of Time to Construct a 900 MHz Specialized Mobile Radio Station and Request for Waiver of the Automatic License Cancellation of Call Sign KNNY348, *Order*, 19 FCC Rcd 2209 (WTB, MD 2004) (*McCart Order*), and In the Matter of Request for Extension of Time to Construct an Industrial/Business Radio Service Trunked Station Call Sign WPNZ964, *Memorandum Opinion and Order*, 18 FCC Rcd 22055 (WTB, CWD 2003) (*Hilltop Order*).

automatically canceled. In contrast, Havens has undertaken efforts to develop M-LMS equipment. We also find that granting Havens' Waiver Request does not conflict with the Wireless Telecommunications Bureau's (WTB) decision in the *Nextel/Neoworld Order*,²⁷ as asserted by Mobex, where the WTB granted a sixteen-month extension of the construction deadline so that the affected licensees might deploy advanced digital systems that were not yet available. Specifically, licensees in the 900 MHz Specialized Mobile Radio (SMR) service could have used legacy equipment to meet construction requirements, but the construction of a more effective system would be possible by a certain date if an extension was granted.²⁸ We disagree with Mobex's assertion that the Commission has established a policy whereby requests for extensions of time to construct will not be granted unless the applicant has provided a "date certain" by which it will commence service.²⁹ In *Nextel/Neoworld*, legacy equipment was available and new equipment would be available by date certain. In this case, no equipment is available and Havens has provided the only evidence of possible equipment development.

10. We also note that the circumstances presented in this case are similar to previous instances in which we have granted extensions based upon equipment availability. For example, we have granted extensions of construction deadlines where licensees have demonstrated a commitment to deploying advanced technology under development and therefore unavailable in time to satisfy the licensee's construction benchmarks.³⁰ Similarly, we find that Havens has demonstrated a commitment to develop equipment and we also find Havens' failure to complete construction was due to causes beyond his control.

11. We find no merit in Mobex's argument that Havens' request is part of a pattern of delay in which he seeks to use his licenses in various bands for purposes other than those for which they are intended.³¹ Such a conclusion is mere speculation and Havens does not seek a waiver of the technical M-LMS rules.³² Further, we find that Mobex's argument that Havens' Waiver Request is in violation of

²⁷ See In the Matter of FCI 900, Inc. Expedited Request for Three-Year Extension of the 900 MHz Construction Requirements and Neoworld License Holdings, Inc. Request for Waiver of the 900 MHz Band Construction Requirements and Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (2001) (*Nextel/Neoworld Order*).

²⁸ Mobex essentially argues that relief was granted in the *Nextel/Neoworld* case due in part to the fact that they would obtain new equipment by a specific date, but Havens has not provided a date-certain guarantee of equipment. Mobex Comments at 5-6.

²⁹ *Id.* Mobex argues that the Commission has established this policy in the *McCart*, *Hilltop*, and *Nextel/Neoworld Orders*, as well as in the Matter of MARITEL, Inc. Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses, *Order*, 18 FCC Rcd 24670 (2003).

³⁰ See *Nextel/Neoworld Order*; Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (WTB, CWD 2001) ("*Leap Wireless*") (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); Monet Mobile Networks, Inc., Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 6452 ("*Monet Mobile*") (WTB, CWD 2002) (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); and Warren C. Havens, *et al.*, Request for Waiver or Extension of the Five-Year Construction Requirements for 220 MHz Phase II Licensees, *Memorandum Opinion and Order*, DA 04-2100 (adopted July 12, 2004) (granting extension of the five-year construction requirement for 220 MHz licensees to allow for the use of next-generation digital technology in the band).

³¹ Mobex Comments at 8-10.

³² In the event that Havens' future service violates our M-LMS rules, the Commission could take appropriate action.

Sections 1.946(e)(2) and 90.155(g) of the Commission's rules is misplaced.³³ These rules hold that extensions of time to construct or to commence service will not be granted for delays caused by the failure to timely order equipment; however, in this case there was no equipment available to order. We also reject Mobex's contention that a petition for rulemaking is needed for the requested extension.³⁴ Havens merely seeks an extension of the construction deadline for his licenses rather than global relief or wholesale change to the M-LMS rules.

12. Finally, Mobex contends that Havens' Reply Comments do not comply with Sections 1.49(b) and (c) of the Commission's rules and therefore should be dismissed.³⁵ Section 1.49(b) requires that all pleadings which exceed ten pages shall include a table of contents, and Section 1.49(c) requires that all such pleadings shall include a summary. As noted above, we have accepted Havens' belated filing of the required table of contents and summary, and we do not believe that his initial failure to comply warrants dismissal of the Waiver Request.³⁶

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that Warren C. Havens' request for an extension of the five-year construction deadline for his M-LMS EA licenses, filed on December 3, 2003 and amended on July 14, 2004, is GRANTED, and that the construction deadline is hereby extended until July 14, 2007.

FEDERAL COMMUNICATIONS COMMISSION

Thomas Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

³³ 47 C.F.R. §§ 1.946(e)(2), 90.155(g).

³⁴ Mobex Reply Comments at 3-4.

³⁵ *Id.* at 4-6. 47 C.F.R. §§ 1.49(b) and (c).

³⁶ *See supra* n.11.