

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

In the Matter of)	
)	
Request of Progeny LMS, LLC for a Three-Year)	File Nos. 0002049041-0002049297
Extension of the Five-Year Construction)	
Requirement for its Multilateration Location and)	
Monitoring Services Economic Area Licenses)	

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2006

Released: May 24, 2006

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

1. For the reasons stated below, the Mobility Division (Division) hereby grants Progeny LMS, LLC (Progeny) a three-year extension of time, until July 19, 2008, to meet the five-year construction requirement for its multilateration Location and Monitoring Service (M-LMS) Economic Area (EA) licenses.¹

2. *Background.* Progeny holds 228 M-LMS licenses, which have a five-year construction deadline of July 19, 2005.² On February 15, 2005, Progeny filed a request for a limited waiver of the requirement that M-LMS licensees construct and operate a sufficient number of base stations to serve one-third of an EA's population within five years of initial license grant (Extension Request).³ Specifically, Progeny requests three additional years to meet this requirement because no M-LMS equipment exists for it to meet the five-year milestone.

3. Warren Havens, an M-LMS licensee, and three entities in which he is the majority interest holder and serves as President—Telesaurus Holdings GB, LLC (THL, an M-LMS licensee), Telesaurus VPC, LLC (TVL), and the AMTS Consortium LLC (ACL) (collectively,

¹ There are two types of LMS systems: multilateration systems and non-multilateration systems. Multilateration systems are licensed on a geographic area basis and track and locate objects over a wide area (e.g., tracking a bus fleet) by measuring the difference in time of arrival, or difference in phase, of signals transmitted from a unit to a number of fixed points, or from a number of fixed points to the unit that is to be located. Non-multilateration systems transmit data to and from objects passing through particular locations (e.g., automated tolls), and are licensed on a site-by-site basis.

² Progeny acquired its licenses in Auction No. 21. See "Location and Monitoring Service Auction Closes, Winning Bidders in the Auction of 528 Multilateration Licenses in the Location and Monitoring Service," *Public Notice*, 14 FCC Rcd 3754 (1999).

³ See Request for Waiver (filed Feb. 15, 2005). See also 47 C.F.R. § 90.155(d). An M-LMS licensee must cover two-thirds of an EA's population within ten years of initial license grant. *Id.*

with Mr. Havens, the “Havens Group”)—oppose Progeny’s request.⁴ Specifically, on May 2, 2005, the Havens Group filed a request under Section 1.41 of the Commission’s rules,⁵ asking the Commission to place Progeny’s Extension Request on public notice for comment. That filing also included a discussion of “facts and arguments” regarding the Extension Request, which the Havens Group asked the Commission to consider as “an informal petition to deny under Section 1.41” in the event that the Commission did not place the Extension Request on public notice. On June 2, 2005, Progeny filed an Opposition to Request for Public Notice or Alternative Action and an accompanying Motion to Accept Late-Filed Opposition.⁶ On June 14, 2005, Havens filed an Informal Reply to Opposition to Request for Public Notice or Alternative Action.

4. The Havens Group and Progeny subsequently filed related pleadings, including Progeny’s Reply to Opposition dated December 6, 2005, and the Havens Group’s Reply to Response to Opposition dated December 13, 2005.⁷ The parties also filed various pleadings relating to a Freedom of Information Act (FOIA) request of the Havens Group filed on June 14, 2005 regarding Progeny’s request for confidential treatment of an attachment to its Extension Request. The Mobility Division granted in part and denied in part Progeny’s request for confidential treatment and granted in part and denied in part the Havens Group’s FOIA request.⁸ In its pleadings, the Havens Group principally argues that Progeny did not make sufficient efforts to develop M-LMS equipment and that its request therefore should be denied.⁹

5. We note that in 2004, the Mobility Division granted Mr. Havens a three-year extension of time to meet the five-year construction requirement for his M-LMS licenses¹⁰ and, in

⁴ We also note that Intelligent Transportation & Monitoring Wireless LLC (ITM) joined in various pleadings filed by the Havens Group in November 2005 and thereafter. Mr. Havens is the majority interest holder, and serves as President, of ITM.

⁵ 47 C.F.R. § 1.41.

⁶ See 47 C.F.R. § 1.45(b) (“oppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed”); 47 C.F.R. § 1.45(c) (“the person who filed the original pleading may reply to opposition within 5 days after the time for filing opposition has expired”).

⁷ See Havens Opposition Erratum Version (Nov. 30, 2005). The Havens Group filed numerous additional pleadings, including: Email to FCC Secretary (March 30, 2005), also filed via ECFS in RM-10403 (March 30, 2005); Request under Section 1.41 to Place on Public Notice or Alternative Action (May 2, 2005) (Havens Public Notice Pleading); Email to FCC Secretary (May 15, 2005), also filed via ECFS in RM-10403 (May 16, 2005); Informal Reply to Opposition to Request for Public Notice or Alternative Action (June 14, 2005); Opposition (Nov. 29, 2005); Reply to Response to Opposition (Dec. 13, 2005); a two-part Email, “Request to Progeny” and “Informal Request to Accept Possibly Late Filed Filing” (Dec. 13, 2005); Reply to Response to Opposition Erratum Version (Dec. 14, 2005) (Havens Reply Erratum Version); and a Request to Accept Possibly Late Filing of Reply to Response to Opposition (Jan 7, 2006). Progeny filed various responsive pleadings, including: Motion to Accept Late-Filed Opposition (June 2, 2005); Opposition to Request for Public Notice or Alternative Action (June 2, 2005); Response to Reply to Opposition Request (June 24, 2005); Reply to Opposition to Motion to Accept Late Filing (June 24, 2005); Motion to Withdraw Portions of Confidential Attachment (Nov. 18, 2005); and Reply to Opposition (Dec. 6, 2005).

⁸ See Letter dated October 31, 2005, from Roger S. Noel, Chief, Mobility Division to Janice Obuchowski, counsel to Progeny, and Ari Q. Fitzgerald, counsel to the Havens Group (FOIA 2005-449 Letter Ruling).

⁹ See, e.g., Havens Reply Erratum Version at 6, 8.

¹⁰ See 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*, 19 FCC Rcd 23742 (WTB MD 2004) (*Havens M-LMS Order*).

2005, granted FCR the same relief for certain of its M-LMS licenses.¹¹ We also note that the Commission recently released a notice of proposed rulemaking, partly in response to a petition for rulemaking filed by Progeny in 2002,¹² in which it has requested comment on possible refinements of the M-LMS rules.¹³

6. *Discussion.* We resolve three procedural matters before addressing the substance of Progeny's Extension Request. First, we note that Progeny and the Havens Group each filed one or more untimely pleadings in this proceeding.¹⁴ Although the Commission generally does not accept late-filed pleadings, we find that for the sole purpose of adjudicating this matter, the public interest would be served by our consideration of the full record and therefore accept such pleadings.

7. Second, we reject the Havens Group's request under Section 1.41 of the Commission's rules to place the Extension Request on public notice.¹⁵ Under Section 1.933(d)(5) of the Commission's rules, requests for extensions of time to complete construction need not be placed on public notice prior to grant.¹⁶ We note that Mr. Havens request in 2003 was the first request of any M-LMS licensee for an extension of time to meet the M-LMS construction requirements. At that time, the Commission had limited information before it upon which to make an informed judgment regarding the state of M-LMS equipment availability and placed Haven's request on public notice for comment.¹⁷ By contrast, in this proceeding there is an extensive record, which is sufficient to resolve all issues before us, and there is no compelling need to request comment on the Extension Request via public notice as the Havens Group urges. Finally, we note that the Havens Group's filing of numerous pleadings¹⁸ demonstrates that the lack of a public notice has not hindered its participation in this proceeding. Accordingly, we reject the Havens Group's request for public notice of the Extension Request.

8. Third, we note that Progeny requested confidential treatment of Attachment B to its Extension Request, which enumerates various efforts to develop M-LMS equipment and applications. The Mobility Division determined that certain information in Attachment B was subject to disclosure under the FOIA, while the remainder was exempt from disclosure.¹⁹ The

¹¹ See also Request for Extension of Five-Year Construction Requirement Call Signs: WPOJ871, WPOJ872, WPOJ873, WPOJ874 and WPOJ875, *Letter*, 20 FCC Rcd 4293 (WTB MD 2005) (*FCR M-LMS Letter*), *petition for reconsideration pending*.

¹² See "Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Location and Monitoring Service Rules," *Public Notice*, RM No. 10403, 17 FCC Rcd 6438 (2002).

¹³ See In the Matter of Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Docket No. 06-49, *Notice of Proposed Rulemaking*, FCC 06-24, 2006 WL 543059 (F.C.C.) (rel. March 7, 2006),

¹⁴ See *supra* note 7.

¹⁵ See 47 CFR § 1.41; Havens Public Notice Pleading at 3 (noting that the request of Mr. Havens for similar relief was placed on public notice).

¹⁶ 47 CFR § 1.933(d)(5).

¹⁷ See "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*, 19 FCC Rcd 4802 (WTB MD 2004).

¹⁸ See *supra* note 7.

¹⁹ See FOIA 2005-449 Letter Ruling.

Havens Group and Progeny waived their rights to appeal that determination and Progeny filed a request to withdraw Sections 3, 4, and 5 of Attachment B.²⁰ Accordingly, we do not consider Section 3, 4, or 5 of Attachment B in this proceeding.

9. We now turn to the substance of Progeny's Extension Request. Under Sections 1.946(c) and 1.955(a)(2) of the Commission's rules,²¹ an M-LMS license will terminate automatically as of the construction deadline if the licensee fails to meet the construction requirement, unless it obtains an extension of time to construct under Section 1.946(e) of the Commission's rules,²² or a waiver of the construction requirement under Section 1.925 of the Commission's rules.²³

10. Progeny states that through its employees and consultants, it has conducted discussions with an array of U.S. manufacturers of telecommunications equipment, including both established suppliers and entrepreneurial firms.²⁴ It states that despite such efforts, it has been unable to secure M-LMS equipment and that no equipment is available to meet the construction requirement. Progeny notes that it has had discussions with the Department of Homeland Security as well as other potential users of its M-LMS spectrum, and that an extension of time could foster the development of applications and equipment, including for public safety and homeland security, and thereby put this spectrum to productive use.²⁵

11. The Havens Group contends that Progeny's efforts to develop M-LMS equipment and applications do not warrant an extension of time to construct.²⁶ As a threshold matter, we reject their claim that Progeny's filing of a petition for rulemaking seeking more flexible M-LMS rules in 2002²⁷ undercuts Progeny's demonstrable efforts to develop M-LMS equipment and applications.²⁸ Progeny, in fact, agrees that its filing of the petition did not relieve the company of its responsibilities and it therefore sought to develop M-LMS equipment and applications.²⁹

12. The Havens Group also argues that Progeny must provide evidence of in-person

²⁰ See Motion to Withdraw Portions of Confidential Attachment.

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

²² An extension of time to complete construction may be granted where the licensee demonstrates that the failure to complete construction is due to causes beyond its control. 47 C.F.R. § 1.946.

²³ Under Section 1.925 of the Commission's rules, a waiver may be granted provided 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. 47 C.F.R. § 1.925.

²⁴ See, e.g., Extension Request at iii.

²⁵ See *id.* at 3, 9, 13.

²⁶ See Havens Reply Erratum Version.

²⁷ See *supra* note 12.

²⁸ See, e.g., Havens Opposition Erratum Version at 3.

²⁹ See Extension Request at 5; Reply to Opposition at 5. We note that the Commission has invited interested parties to comment on possible changes to the M-LMS rules in WT Docket No. 06-49. Comments and reply comments in that proceeding currently are due May 30 and June 30, 2006, respectively.

meetings, file affidavits regarding its efforts to development equipment, and provide evidence of nondisclosure agreements with potential equipment vendors.³⁰ There is no requirement that Progeny submit such information in support of its Extension Request. The record, moreover, demonstrates that Progeny sought to develop equipment and applications for its M-LMS spectrum but, like Mr. Havens and FCR, has been unsuccessful.³¹ For example, Progeny retained third parties to explore equipment and applications development,³² contacted numerous entities itself regarding such development,³³ and consulted various equipment vendors and developers.³⁴

13. Our analysis of whether Progeny has justified its Extension Request, moreover, is not limited to its efforts to develop M-LMS equipment and applications. We agree with Progeny that three factors that supported our decision to grant Mr. Havens a three-year extension of time to construct his M-LMS licenses apply equally to Progeny.³⁵ First, the lack of available M-LMS equipment continues to make construction impossible.³⁶ Second, the five-year construction requirement substantially precedes the initial renewal deadline of the M-LMS licenses.³⁷ And third, spectrum sharing in the M-LMS band—among government radiolocation systems; Industrial, Scientific, and Medical (ISM) devices; amateur radio operations; unlicensed devices; and licensed M-LMS operations—has hindered the ability of licensees to secure equipment.³⁸

14. Lastly, we reject the Havens Group's claim that precedent requires denial of Progeny's Extension Request. The cases they cite are inapposite. For example, unlike the licensees in *McCart* and *Hilltop*, whose extension requests were denied,³⁹ Progeny has actively

³⁰ See Havens Reply Erratum Version at 8-11.

³¹ See Extension Request at 13 (noting that Progeny has had “discussions with the Department of Homeland Security, businesses with location monitoring requirements, equipment makers and critical infrastructure entities”).

³² See FOIA 2005-449 Letter Ruling at 3 (the redacted material following the eight bullet points after paragraph 3 on page one of Attachment B identifies such entities). The Havens Group mistakenly asserts that Progeny did not identify its intermediaries with would-be vendors, manufacturers or end users. See Havens Reply Erratum Version at 9.

³³ See FOIA 2005-449 Letter Ruling at 3 (the redacted material following the 35 bullet points on page two of Attachment B identifies such entities).

³⁴ *Id.* (the redacted material following the 13 bullet points after the first sentence on page three of Attachment B identifies such entities).

³⁵ See Reply to Opposition at 6.

³⁶ *Havens M-LMS Order*, 19 FCC Rcd at 23744 ¶7. According to the Commission's equipment authorization records, there is no M-LMS equipment available for use in the United States at this time.

³⁷ *Id.*

³⁸ *Id.* M-LMS operations may not cause interference to and must tolerate interference from ISM devices and radiolocation Government stations that operate in the 902-928 MHz band. 47 C.F.R. § 90.353(a). M-LMS licensees, moreover, are required to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to Part 15 devices. 47 C.F.R. § 90.353(d). See also *FCR Letter*, 20 FCC Rcd 4293 (noting that “the unique sharing constraints presented by the M-LMS band have resulted in a lack of M-LMS equipment leaving FCR unable to fulfill its five-year construction requirement”).

³⁹ See, e.g., Havens Opposition Erratum Version at 8, citing 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

sought to develop M-LMS equipment and applications.⁴⁰ In *McCart*, equipment was available, but it was unclear whether the licensee could not deploy it for technical reasons or chose not to deploy it for business reasons.⁴¹ In *Hilltop*, the licensee filed its extension request after its license automatically cancelled for failure to construct.⁴² Progeny, by contrast, timely filed its Extension Request and its licenses are active.

15. The Havens Group's reliance on the *Redwood* and *Eldorado* orders, where extensions of time to construct PCS systems were denied, also is misplaced.⁴³ The lack of equipment in *Redwood* resulted from the licensee's disputes with a management company that it had retained to construct a system⁴⁴ while, in *Eldorado*, the licensee elected to deploy GSM equipment but failed to meet its deadline.⁴⁵ By contrast, notwithstanding Progeny's efforts (and those of Mr. Havens) to develop M-LMS equipment and applications, there is no M-LMS equipment available that would enable Progeny to satisfy its construction obligations. Finally, the *Motient* case does not support the Havens Group's assertion.⁴⁶ There, the licensee argued that declining general economic conditions should excuse its failure to construct and conceded that it did not have the resources to construct its licenses.⁴⁷ Progeny makes no such contentions in this proceeding. At bottom, none of the cases cited by the Havens Group is dispositive to our determination in the instant matter.

16. *Conclusion.* Based on the totality of the record and for the reasons stated above, we find that the failure to complete construction is due to causes beyond Progeny's control⁴⁸ and that the public interest would be served by granting it a three-year extension of time to construct its M-LMS licenses.⁴⁹ Further, based on the totality of the record and for the reasons stated above, we also find that strict application of the construction requirement would be contrary to the public interest, and that granting Progeny's request will serve the public interest.⁵⁰

17. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's

Trunked Station Call Sign WPNZ964, *Memorandum Opinion and Order*, 18 FCC Rcd 22055 (WTB CWD 2003) (*Hilltop Order*).

⁴⁰ See *supra* paras. 10 and 12.

⁴¹ See *McCart Order*, 19 FCC Rcd at 2211 ¶6.

⁴² See *Hilltop Order*, 18 FCC Rcd at 2207 ¶6.

⁴³ See Havens Opposition Erratum Version at 7, citing In the Matter of Redwood Wireless Minnesota, L.L.C. and Redwood Wireless Wisconsin, L.L.C., *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (*Redwood Order*) and In the Matter of Eldorado Communications, L.L.C., *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (*Eldorado Order*).

⁴⁴ See *Redwood Order*, 17 FCC Rcd at 22419 ¶6.

⁴⁵ See *Eldorado Order*, 17 FCC Rcd at 24616 ¶7.

⁴⁶ See Havens Opposition Erratum Version at 7, citing In the Matter of Motient Communications Inc., *Order*, 19 FCC Rcd 13086 (WTB MD 2004) (*Motient Order*).

⁴⁷ See *Motient Order*, 19 FCC Rcd at 13092 ¶13.

⁴⁸ See also *Havens M-LMS Order*, 19 FCC Rcd at 23746 ¶10 ("failure to complete construction was due to causes beyond" the control of Havens).

⁴⁹ See 47 C.F.R. § 1.946.

⁵⁰ See 47 C.F.R. § 1.925.

rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), that the request of Progeny LMS, LLC, filed on February 15, 2005, for a three-year extension of time to meet the five-year construction requirement for its multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0002049041-0002049297, IS GRANTED, and that the construction deadline is HEREBY EXTENDED until July 19, 2008.

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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