

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

In the Matter of)	
)	
Amendment of the Commission's Rules Concerning Maritime Communications)	PR Docket No. 92-257
)	
Petition for Rule Making filed by Regionet Wireless License, LLC)	RM-9664
)	

SECOND ORDER ON FURTHER RECONSIDERATION

Adopted: April 7, 2009

Released: April 8, 2009

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us a petition filed by Warren C. Havens (Havens)¹ and associated parties² for reconsideration of the *Order on Further Reconsideration* in this proceeding,³ which dismissed as repetitious Havens's petition for reconsideration⁴ of the *Third Memorandum Opinion and Order* in this proceeding,⁵ which denied Havens's petition for reconsideration of the dismissal of certain Automated Maritime Telecommunications System (AMTS) applications. For the reasons set forth below, we also dismiss the instant petition for reconsideration as repetitious.

2. *Background.* Havens filed the applications at issue in 2000.⁶ Mobex Communications, Inc. (Mobex) filed applications that the Wireless Telecommunications Bureau (Bureau) deemed to be mutually exclusive with the Havens applications.⁷ The Commission subsequently suspended the

¹ Petition for Reconsideration (filed February 13, 2008). We will refer herein to an erratum version of the petition filed on February 14, 2008, which is limited to corrections and clarifications of the initial petition. See Petition for Reconsideration, Errata Copy (filed February 14, 2008) (2008 Petition). Maritime Communications/Land Mobile, LLC filed an opposition. Havens filed a reply, and an erratum version of the reply.

² AMTS Consortium LLC, Intelligent Transportation & Monitoring Wireless LLC, Telesaurus VPC LLC, and Skybridge Spectrum Foundation. AMTS Consortium LLC is now known as Environmental LLC. See, e.g., FCC File No. 0003653183.

³ Amendment of the Commission's Rules Concerning Maritime Communications, *Order on Further Reconsideration*, 23 FCC Rcd 329 (WTB MD 2008) (*Order on Further Reconsideration*).

⁴ Petition for Reconsideration (filed December 18, 2003) (2003 Petition).

⁵ Amendment of the Commission's Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391 (2003) (*Third Memorandum Opinion and Order*).

⁶ FCC File Nos. 853032-042, 853044-046, 853057-060, 853070-072, 853175-176, 853190-193, 853252-258, 853460-461, 853562-576, 853578-581, 853611, 853615, 853667-677, 855043. Havens subsequently withdrew the 2003 Petition with respect to FCC File Nos. 853036-37 and 853070-72. See Letter dated October 26, 2007 from Scot Stone, Deputy Chief, Mobility Division, to Warren Havens.

⁷ The applications actually were filed by Mobex, Regionet Wireless License, LLC (Regionet), and Waterway Communications System, LLC (Watercom). Because both Regionet and Watercom later came to be controlled by Mobex, we refer herein to applications filed by these three entities as "Mobex applications."

processing of pending mutually exclusive AMTS applications pending the resolution of its proposal to transition the AMTS service from site-based licensing to geographic licensing.⁸

3. In the *Second Memorandum Opinion and Order* in this proceeding, the Commission denied Havens's petition for reconsideration of the processing suspension, concluding that the suspension was warranted in order to facilitate the orderly and effective resolution of the proceeding.⁹ It also denied Havens's request for dismissal of certain Mobex applications that Havens contended were defective,¹⁰ reasoning that dismissing the Mobex applications and then processing Havens's mutually exclusive applications would be inconsistent with its processing suspension, and would undermine the suspension's purpose of preventing further license grants that could potentially conflict with the decisions ultimately made in the rulemaking proceeding.¹¹ In the concurrent *Fifth Report and Order*, the Commission determined that the public interest would be served by licensing AMTS spectrum through geographic area licensing,¹² and adopted a co-channel protection standard to protect incumbent AMTS stations against interference from geographic area licensee operations.¹³ The Commission also dismissed all AMTS applications the processing of which had been suspended.¹⁴

4. In the *Third Memorandum Opinion and Order*, the Commission denied Havens's petition for reconsideration of the denial of his previous petition for reconsideration, concluding that Section 1.934 of the Commission's Rules did not obligate the Bureau to dismiss applications that did not comply with the AMTS technical requirements prior to accepting them for filing.¹⁵ Consequently, it concluded that the Bureau did not err in accepting for filing the Mobex applications that were mutually exclusive with Havens's applications.¹⁶ The Commission did grant other petitions for reconsideration, however, and modified the AMTS incumbent co-channel interference protection standard.¹⁷

5. In the *Order on Further Reconsideration*, the Bureau's Mobility Division (Division) dismissed Havens's petition for reconsideration of the *Third Memorandum Opinion and Order* as repetitious pursuant to Section 1.106(k)(3) of the Commission's Rules¹⁸ because the petition was not

⁸ See Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 15 FCC Rcd 22585, 22599-600 ¶ 30, 22622 ¶ 78 (2000) (*Third Further Notice*).

⁹ See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6692 ¶ 15 (2002) (*Second Memorandum Opinion and Order and Fifth Report and Order*, respectively).

¹⁰ Havens argued that the applications failed to comply with the AMTS service coverage, 47 C.F.R. § 80.475(a), and broadcast television interference protection, 47 C.F.R. § 80.215(h), requirements.

¹¹ See *Second Memorandum Opinion and Order*, 17 FCC Rcd at 6694 ¶ 20.

¹² See *Fifth Report and Order*, 17 FCC Rcd at 6696 ¶ 24.

¹³ *Id.* at 6700-01 ¶¶ 32-33.

¹⁴ *Id.* at 6720 ¶ 83, 6721 ¶ 90.

¹⁵ See *Third Memorandum Opinion and Order*, 18 FCC Rcd at 24398 ¶ 17. The Commission explained that an application may be accepted for filing, then dismissed as defective later upon subsequent review and processing. *Id.* (citing 47 C.F.R. § 1.933(b) ("Acceptance for filing shall not preclude the subsequent dismissal of an application as defective")).

¹⁶ *Id.*

¹⁷ *Id.* at 24401 ¶¶ 23-24.

¹⁸ 47 C.F.R. § 1.106(k)(3) ("A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious.").

supported by any new facts or changed circumstances.¹⁹ The Division concluded that the fact that Mobex did not file a petition for reconsideration of the dismissal of its pending applications, while Havens did, was not a new fact because the Commission was aware of that at the time of the *Third Memorandum Opinion and Order*.²⁰ The Division also rejected Havens's suggestion that his dismissed applications remained "pending" for processing purposes, and thus could be granted in light of the purported lack of mutual exclusivity, by virtue of his petitions for reconsideration.²¹ Finally, the Division found that the argument that the Havens and Mobex applications should have been reviewed in light of the new AMTS incumbent co-channel interference protection standard in order to determine whether they were truly mutually exclusive was not new, given that the Commission first adopted an interference protection standard in the *Fifth Report and Order*, not in the *Third Memorandum Opinion and Order*.²²

6. *Discussion.* Havens then filed the instant petition for reconsideration. First, Havens states that the Division's response to a 2007 Freedom of Information Act (FOIA) request establishes that the Bureau was unable to determine mutual exclusivity at the time of the submission of Havens's applications, because the Bureau had no engineering that could be used for such determinations.²³ Assuming *arguendo* that evidence discovered through a FOIA request that the petitioner did not file until after his last opportunity to present such matters should be deemed to have been previously unavailable to him, we conclude that this evidence, which pertains to the former coverage requirements rather than to standards for determining mutual exclusivity, is irrelevant to the instant proceeding.²⁴ Even if it were relevant, the time for Havens to first question the correctness of the Bureau's initial conclusion that the 2000 Havens and Mobex applications were mutually exclusive has long passed. Moreover, the lack of records responsive to Havens's FOIA request would not establish the lack of a means of determining mutual exclusivity, only a lack of existing records documenting how the Bureau evaluated site-based

¹⁹ See *Order on Further Reconsideration*, 23 FCC Rcd at 331 ¶ 8. Havens also appealed the *Third Memorandum Opinion and Order* to the U.S. Court of Appeals for the D.C. Circuit, which dismissed the appeal as premature in light of the pendency of the 2003 Petition. See *Havens v. FCC*, Nos. 03-1446, 03-1447 (rel. Apr. 22, 2004) (*per curiam*).

²⁰ See *Order on Further Reconsideration*, 23 FCC Rcd at 331 ¶ 8.

²¹ See *id.* at 331 n.26 (citing Warren C. Havens, *Order*, 19 FCC Rcd 23196, 23199-200 ¶¶ 9-10 (WTB PSCID 2004), *recon. dismissed*, *Order on Reconsideration*, 20 FCC Rcd 3995 (WTB PSCID 2005), *recon. denied*, *Order on Further Reconsideration*, 21 FCC Rcd 3553 (WTB 2006), *review denied*, *Memorandum Opinion and Order*, 23 FCC Rcd 3210 (2008), *recon. pending*).

²² See *id.* at 332 ¶ 9.

²³ See 2008 Petition at 2, 7.

²⁴ Havens sought records pertaining to the engineering that was used to determine whether AMTS applications satisfied the coverage requirements in former Section 80.475(a) of the Commission's Rules, including the education and experience of Commission personnel who performed such engineering, computer software and other documents used in the engineering, and the Commission officials who made recommendations and ultimate decisions regarding whether AMTS applications satisfied the coverage requirements. See *id.*, Ex. 1 Part 1 at 1-2. In response, Commission staff identified a study pertaining to the interference potential from AMTS systems to television reception and the comments in the rulemaking proceedings pertaining to the coverage requirements, but otherwise located no records identifying the engineering, the personnel who performed the engineering, the software or other documents used in the engineering, or the individuals who made recommendations and ultimate decisions regarding whether AMTS applications satisfied the coverage requirements. See *id.*, Ex. 1 Part 2 at 2-5.

AMTS applications.²⁵ Indeed, the Bureau routinely determined whether site-based AMTS applications were mutually exclusive.²⁶

7. Havens continues to assert that any mutual exclusivity between his and Mobex's applications was resolved when he filed a petition for reconsideration of the *Third Memorandum Opinion and Order* affirming the dismissal of the applications, and Mobex did not.²⁷ He cites two cases for the proposition that a dismissed application is "preserved for potential processing, until all administrative and judicial appeals are exhausted," but he does not explain how those cases, which appear to us to be inapposite, support that proposition.²⁸ He also suggests that it was improper for the Division to rely with respect to that issue on a decision of which Havens has a pending petition for reconsideration,²⁹ but he does not cite, and we are not aware of, any precedent providing that a decision that has not been reversed may not be followed until it is beyond any possible further review.

8. Havens also asserts "clear prejudice by Bureau Staff as a basis of appeal."³⁰ He bases this assertion on two allegations that have been addressed elsewhere.³¹ We will not discuss them further.

9. Finally, Havens appears to argue that it was improper for the Division to dismiss the prior petition for reconsideration as repetitious, because "[r]epetition on appeal is required: except for certain new facts or relevant new law, one must base an appeal on past presented facts and law."³² This contention overlooks the fact that the prior petition was not a petition for reconsideration of the dismissal of the applications at issue; rather, it was a petition for reconsideration of the denial of a petition for

²⁵ The FOIA does not require agencies to answer questions in connection with FOIA requests or to create documents or recreate formerly-existing documents, but only to provide access to existing documents. *See, e.g.*, Prof Bill Neill, *Memorandum Opinion and Order*, 18 FCC Rcd 24643, 24644 ¶ 3 (2003); Sidney Gelb, *Memorandum Opinion and Order*, 78 F.C.C. 2d 395, 397 ¶ 12 (1980).

²⁶ *See, e.g.*, Regionet Wireless Licensee, LLC, *Order on Further Reconsideration*, 16 FCC Rcd 22097, 22099 ¶ 7 (WTB PSPWD 2001), *review denied*, *Memorandum Opinion and Order*, 17 FCC Rcd 21263 (2002); Fred Daniel d/b/a Orion Telecom and Paging Systems, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 17474, 17474 nn.1-2 (WTB PSPWD 1998), *cited in, e.g.*, Maritime Communications/Land Mobile, LLC, *Order*, 21 FCC Rcd 8794, 8797 n.29 (WTB PSCID 2006), *recon. denied*, *Order on Reconsideration*, 22 FCC Rcd 4780 (WTB MD 2007), *recon. and review pending*.

²⁷ *See* 2008 Petition at 7.

²⁸ *Id.* (citing *Ashbacker Radio Corp. v. FCC*, 236 U.S. 327 (1945); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993)). At most, these decisions demonstrate only that an application that is the subject of further review may later be processed if the prior adverse action ultimately is reversed, not that the adjudicated application is processable pending review of the prior adverse action.

²⁹ *Id.*

³⁰ *See id.* at 3.

³¹ First, Havens asserts that Commission staff unlawfully deleted the coverage requirements in former Section 80.475(a) in order to disadvantage him and other AMTS geographic licensees. *See id.* at 2. The Commission has already explained how and why the rule was amended. *See* *MariTEL, Inc. and Mobex Network Services, LLC, Report and Order*, WT Docket No. 04-257, 22 FCC Rcd 8971, 8978 n.53 (2007) (citing *Third Memorandum Opinion and Order*, 18 FCC Rcd at 24400-01 n.84). Second, Havens states that "unlawful prejudicial action . . . has pervaded many AMTS decisions including the [*Third Memorandum Opinion and Order and Order on Further Reconsideration*]." 2008 Petition at 3. We previously have rejected Havens's allegations of staff bias against him. *See, e.g.*, *Northeast Utilities Service Co., Order*, DA 09-643, n.22 (WTB MD rel. Mar. 20, 2009); *Mobex Network Services, LLC, Order on Reconsideration*, 22 FCC Rcd 665, 672 ¶ 15 (WTB MD 2007), *recon. and review pending*.

³² *See* 2008 Petition at 2.

reconsideration of the dismissal of the applications at issue.³³ Dismissal of such a petition as repetitious is appropriate pursuant to Section 1.106(k)(3), for “[o]ur rules do not contemplate that we will entertain petitions for reconsideration of petitions for reconsideration.”³⁴

10. ACCORDINGLY, IT IS ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.106 of the Commission’s Rules, 47 C.F.R. §§ 1.106, that the petition for reconsideration filed by Warren C. Havens on February 14, 2008 IS DISMISSED.

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

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
Chief, Mobility Division
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³³ In fact, the 2003 Petition could also be characterized as a petition for reconsideration of the denial in the *Third Memorandum Opinion and Order* of the petition for reconsideration of the denial in the *Second Memorandum Opinion and Order* of the petition for reconsideration of the processing suspension in the *Third Further Notice*.

³⁴ United Broadcasting Company of Florida, Inc., *Memorandum Opinion and Order*, 61 F.C.C. 2d 970, 972 ¶ 5 (1976).