

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

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

FOURTH MEMORANDUM OPINION AND ORDER

Adopted: April 22, 2010

Released: April 26, 2010

By the Commission:

I. INTRODUCTION

1. This item affirms the dismissal of a repetitious petition for reconsideration. We have before us an application for review,¹ filed by Warren Havens (Havens) and associated parties (collectively, Petitioners),² repeating arguments previously raised and denied in two prior orders in this proceeding.³ For the reasons set forth below, we deny these arguments in the application for review.

II. BACKGROUND

2. In 2000, the Commission suspended the processing of pending mutually exclusive site-based Automated Maritime Telecommunications System (AMTS) applications, pending the resolution of its proposal to transition the AMTS service to geographic licensing.⁴ Consequently, the Wireless

¹ Application for Review (and for reasons stated, Petition for Reconsideration on New Facts if the Commission Chooses[]) (filed May 8, 2009) (AFR). On May 11, 2009, an erratum to the AFR was filed to correct typographical errors and delete unintended text. Page citations herein are to the erratum version of the AFR. On May 18 and 26, 2009, respectively, Paging Systems, Inc. (PSI), and Maritime Communications/Land Mobile LLC (MC/LM) filed separate oppositions. Opposition to Application for Review or Petition for Reconsideration on New Facts (filed May 18, 2009) (PSI Opposition); Opposition to Application for Review (and for Reasons Stated, Petition for Reconsideration on New Facts if the Commission Chooses[]) (filed May 26, 2009) (MC/LM Opposition). A reply was filed on June 11, 2009. Reply to Opposition to Application for Review or Petition for Reconsideration on New Facts (filed June 11, 2009) (Reply). References herein are to the erratum version of the Reply, filed later that day.

² The AFR does not identify the Petitioners other than Havens, but the Reply clarifies that they are the other parties to the petition for reconsideration of the *Second Order on Further Reconsideration* in this proceeding – i.e., AMTS Consortium LLC (now known as Environmental LLC), Intelligent Transportation & Monitoring Wireless LLC, Telesaurus VPC LLC, and Skybridge Spectrum Foundation. See Reply at 2.

³ Amendment of the Commission's Rules Concerning Maritime Communications, *Second Order on Further Reconsideration*, PR Docket No. 92-257, 24 FCC Rcd 4150 (WTB MD 2009) (*Second Order on Further Reconsideration*); Amendment of the Commission's Rules Concerning Maritime Communications, *Order on Further Reconsideration*, PR Docket No. 92-257, 23 FCC Rcd 329 (WTB MD 2008) (*Order on Further Reconsideration*).

⁴ 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).

Telecommunications Bureau (Bureau) did not process certain applications filed by Havens⁵ that the Bureau deemed mutually exclusive with applications filed by Mobex Communications, Inc. (Mobex).⁶ In 2002, the Commission denied Havens's petition for reconsideration of the processing suspension, concluding that the suspension was warranted in order to facilitate the proceeding's orderly and effective resolution.⁷ Concurrently, the Commission adopted geographic licensing rules for AMTS spectrum,⁸ and dismissed the suspended applications.⁹ Havens filed a petition for reconsideration.¹⁰

3. In 2003, the Commission denied Havens's petition for reconsideration, concluding that the Bureau did not err in accepting the Mobex applications for filing.¹¹ Havens petitioned for reconsideration.¹² The Bureau's Mobility Division (Division) dismissed the petition in 2008 as repetitious, because it was not supported by any new facts or changed circumstances.¹³ Petitioners then

⁵ 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.

⁶ 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."

⁷ 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). The *Second Memorandum Opinion and Order* also denied Havens's separate motion to dismiss the Mobex applications, which Havens contended were defective. The Commission reasoned that dismissing the Mobex applications and then processing Havens's mutually exclusive applications would undermine the suspension's purpose of preventing further license grants that could conflict with the ultimate decisions in the rulemaking proceeding. See *Second Memorandum Opinion and Order*, 17 FCC Rcd at 6694 ¶ 20. In addition, the *Second Memorandum Opinion and Order* denied Havens's request for declaratory ruling that pending mutually exclusive applications cannot be dismissed without addressing any pending petitions to deny, because grant of the petitions could resolve the mutual exclusivity and thus allow the surviving applications to be processed. The Commission reasoned that it was obligated to attempt to avoid mutual exclusivity only to further its public interest goals, but it had determined that the public interest would be served by licensing AMTS spectrum through geographic licensing rather than continued site-based licensing. *Id.* at 6693-94 ¶ 18.

⁸ See *Fifth Report and Order*, 17 FCC Rcd at 6696 ¶ 24.

⁹ *Id.* at 6720 ¶ 83, 6721 ¶ 90.

¹⁰ Petition for Reconsideration (filed May 8, 2002).

¹¹ See Amendment of the Commission's Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391, 24398 ¶ 17 (2003) (*Third Memorandum Opinion and Order*). The Commission explained that an application may be accepted for filing, then dismissed as defective upon subsequent review. *Id.* (citing 47 C.F.R. § 1.933(b)). The *Third Memorandum Opinion and Order* also dismissed as untimely two separate requests for reinstatement of the dismissed Havens applications. *Id.* at 24398 ¶¶ 14-15.

¹² Petition for Reconsideration (filed Dec. 18, 2003). Havens also filed a judicial appeal, which was dismissed as premature in light of the pendency of the petition for reconsideration. See *Havens v. FCC*, Nos. 03-1446, 03-1447 (rel. Apr. 22, 2004) (per curiam).

¹³ See *Order on Further Reconsideration*, 23 FCC Rcd at 331 ¶ 8. The Division concluded that the fact that Mobex did not seek reconsideration of the dismissal of its applications was neither new (because the Commission knew it at the time of the *Third Memorandum Opinion and Order*) nor relevant (because Havens's reconsideration petition did not keep his applications "pending" for processing purposes). *Id.* (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. denied*, *Order on Reconsideration*, 25 FCC Rcd 511 (2010) (*Havens 2010 Order on Reconsideration*), *recon. dismissed*, *Order on Further Reconsideration*, 25 FCC Rcd 2123 (WTB MD 2010), *recon. pending*). The Division also found that the contention that the Havens and Mobex applications should be reviewed for mutual exclusivity pursuant to the new standard for

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filed a petition for reconsideration of the 2008 decision, which the Division also dismissed as repetitious. The Division rejected as both untimely and unsupported Petitioners' challenge to the Bureau's conclusion in 2000 that the Havens and Mobex applications were mutually exclusive.¹⁴ The Division also rejected Petitioners' assertion that reconsideration was merited by evidence of bias by Bureau staff, noting that these allegations had been previously addressed.¹⁵ Petitioners then filed the instant application for review.

III. DISCUSSION

4. We conclude that the Division properly dismissed the two petitions as repetitious. The petition for reconsideration of the *Order on Further Reconsideration*, as well as the petition for reconsideration of the *Third Memorandum Opinion and Order*, was not supported by any new facts or changed circumstances. Dismissal of such petitions is appropriate under Section 1.106(k)(3) of the Commission's Rules, which states, "A petition for reconsideration of an order which has previously been denied on reconsideration may be dismissed by the staff as repetitious."¹⁶ We therefore deny the application for review.¹⁷

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co-channel interference protection between geographic licensees and site-based incumbents did not rely on new facts, given that the Commission adopted the standard earlier, in the *Fifth Report and Order*. See *id.* at 332 ¶ 8.

¹⁴ See *Second Order on Further Reconsideration*, 24 FCC Rcd at 4152 ¶ 6. Petitioners based their argument on the Division's response to a Freedom of Information Act (FOIA) request for records pertaining to the process for determining whether site-based AMTS applications satisfied the coverage requirements in former Section 80.475(a) of the Commission's Rules, 47 C.F.R. § 80.475(a). The response identified only a study regarding interference from AMTS systems to television reception, and certain comments in the rulemaking proceeding. The Division rejected Petitioners' inference that the Bureau had no means of determining mutual exclusivity, noting that the FOIA request pertained to coverage requirements rather than mutual exclusivity, and that in any event a lack of responsive records would establish only a lack of existing records rather than a former lack of a means of determining mutual exclusivity. See *Second Order on Further Reconsideration*, 24 FCC Rcd at 4152-53 ¶ 6. The Division also noted that "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." *Id.* at 4152 ¶ 6.

¹⁵ See *Second Order on Further Reconsideration*, 24 FCC Rcd at 4153 ¶ 7. Specifically, Petitioners asserted that Bureau staff had unlawfully deleted the coverage requirements in former Section 80.475(a) in order to disadvantage Havens and other AMTS geographic licensees, but the Division noted that the Commission had explained how and why it amended the rule. *Id.* Petitioners also asserted that staff had displayed prejudice against Havens in other proceedings, but the Division noted that it had already rejected Havens's bias claims in those proceedings. *Id.* (citing *Northeast Utilities Service Co., Order*, 24 FCC Rcd 3310, 3312 n.22 (WTB MD 2009), *recon. pending*; *Mobex Network Services, LLC, Order on Reconsideration*, 22 FCC Rcd 665, 672 ¶ 15 (WTB MD 2007), *aff'd in pertinent part*, FCC 10-39 (rel. Mar. 16, 2010).

¹⁶ 47 C.F.R. § 1.106(k)(3); see *United Broadcasting Co. of Florida, Inc., Memorandum Opinion and Order*, 61 F.C.C. 2d 970, 972 ¶ 5 (1976) ("Our rules do not contemplate that we will entertain petitions for reconsideration of petitions for reconsideration."); see also, e.g., *Great Lakes Broadcast Academy, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 11655, 11656 ¶ 3 (2004) ("neither [Section 405 of the Communications Act of 1934, as amended, nor Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106] provides for the filing of a second petition for reconsideration should the original petition be denied") (quoting James J. McCluskey, *Letter*, Ref. 1800B3-MFW (MMB rel. May 1, 2002) (citing, e.g., *Iola Broadcasting Co., Memorandum Opinion and Order*, 2 F.C.C. 2d 439 (1966))) (footnotes omitted).

¹⁷ PSI and MC/LM argue that the AFR should be dismissed. Contrary to their assertions, see PSI Opposition at 3; MC/LM Opposition at 5, we find that Petitioners have set forth the issues as required by Section 1.115(b) of the Commission's Rules, 47 C.F.R. § 1.115(b). See *Mobex Network Services, LLC, Memorandum Opinion and Order*, 25 FCC Rcd 554, 557 n.33 (2010). We also reject MC/LM's suggestion, see MC/LM Opposition at 2, that the AFR conflicts with Section 1.104(b) of our Rules, 47 C.F.R. § 1.104(b), which prohibits filing a petition for

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5. Petitioners again challenge the Bureau's conclusion that the Havens and Mobex applications were mutually exclusive. We agree with the Division that such arguments are unsupported and, in any event, untimely. Petitioners again assert that the Bureau failed to employ an appropriate standard in deciding whether the applications were mutually exclusive, but this assertion has no more support than what the Division considered, and rejected, in the *Second Order on Further Reconsideration*.¹⁸ Moreover, as set forth above, Petitioners for years did not dispute the mutual exclusivity, and argued instead that the Mobex applications were defective and should be dismissed in order to resolve the mutual exclusivity. Petitioners cannot, after rejection of that theory, present a new argument later in the proceeding.¹⁹

6. Petitioners also argue that the Division did not address their allegations of bias by Bureau staff.²⁰ We conclude that the Division did address Petitioner's contentions; Petitioners simply disagree with the Division's conclusions.²¹

7. Finally, we deny Petitioners' request for an evidentiary hearing.²² A hearing is appropriate only when "a substantial and material question of fact is presented or the Commission is unable to make the finding [whether the public interest, convenience, and necessity will be served by

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reconsideration and application for review of the same action. Petitioners do not seek both review and reconsideration; rather, they filed only an application for review, but requested that we treat it as a petition for reconsideration if we conclude that it sets forth new questions of fact or law (which are prohibited in an application for review, *see* 47 C.F.R. §1.115(c)). *See* AFR at 6. Finally, we need not address MC/LM's assertion that the Petitioners other than Havens lack standing, *see* MC/LM Opposition at 5, because Havens clearly has standing. *See Havens 2010 Order on Reconsideration*, 25 FCC Rcd at 511 n.2.

¹⁸ Petitioners further assert that even if some applications were mutually exclusive, other (unspecified) applications were not, and should have been processed. *See* AFR at 4-5.

¹⁹ *See* Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Banks, Redmond, Sunriver and Corvallis, Oregon), *Memorandum Opinion and Order*, 19 FCC Rcd 10068, 10075 ¶ 20 (2004) ("Our allotment process cannot operate efficiently if we allow a party to sit back and hope for a decision in its favor and, then, when an adverse decision is rendered, proffer additional submissions or options.").

²⁰ *See* AFR at 2-3.

²¹ *See* Mobex Network Services, *Memorandum Opinion and Order*, FCC 10-39, ¶ 9 (rel. Mar. 16, 2010) (*Mobex*). As noted above, the Division specifically rejected Petitioners' contention that the staff had changed the AMTS coverage requirements without the notice and comment required by the Administrative Procedure Act. *See* note 15, *supra*. Petitioners continue to assert that former Section 80.475(a) was amended improperly, despite our having repeatedly explained the matter in proceedings involving these parties. *See Mobex*, FCC 10-39, at n.21; Warren C. Havens, *Memorandum Opinion and Order*, 23 FCC Rcd 3210, 3211 ¶ 3 (2008); MariTEL, Inc. and Mobex Network Services, LLC, *Report and Order*, WT Docket No. 04-257, 22 FCC Rcd 8971, 8978 n.53 (2007); *Third Memorandum Opinion and Order*, 18 FCC Rcd at 24400 n.84; Warren C. Havens, *Memorandum Opinion and Order*, 17 FCC Rcd 17588, 17591 n.37 (2002); *see also* Letter from Thomas P. Derenge, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Warren Havens (Apr. 3, 2007) (Division response to Havens's FOIA request regarding amendment of the rule), *discussed in* Warren Havens, *Memorandum Opinion and Order*, 24 FCC Rcd 12308 (2009). Bureau staff clearly did not "merely ma[k]e the rule disappear." *See* AFR at 3. In addition, the Division noted that it had addressed Petitioners' allegations of staff misconduct in the proceedings where the alleged misconduct occurred (of which applications for review and petitions for reconsideration were pending), and therefore did not discuss them at length in the *Second Order on Further Reconsideration*. *See* note 15, *supra*.

²² *See* AFR at 2.

grant of the application].”²³ We conclude, based on the foregoing discussion, that Petitioners have presented no such issues.²⁴

IV. CONCLUSION

8. Finding no new facts or exceptional circumstances that would compel or otherwise justify reconsideration of that *Second Order on Further Reconsideration*, we conclude based on the record before us that the Division acted properly in dismissing the petition for reconsideration of the *Order on Further Reconsideration* as repetitious. We therefore deny the application for review.

9. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, that the Application for Review filed by Warren Havens, AMTS Consortium LLC, Intelligent Transportation & Monitoring Wireless LLC, Telesaurus VPC LLC, and Skybridge Spectrum Foundation on May 8, 2009 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²³ 47 U.S.C. § 309(e); *see also, e.g.*, Brookfield Development, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 14385, 14390-91 ¶¶ 16-17 (2004). The grant of a hearing is not automatic, but rests in our discretion. *See AT&T v. FCC*, 539 F.2d 767, 774 (D.C. Cir. 1976).

²⁴ Moreover, the *Second Memorandum Opinion and Order* denied Havens’s request for a hearing, *see Second Memorandum Opinion and Order*, 17 FCC Rcd at 6693 ¶ 18, and Havens’s petition for reconsideration of that decision did not pursue the matter.