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

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| In the matter of | ) | |
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| Request by Progeny LMS, LLC for Waiver of Certain Multilateration Location and Monitoring Service Rules | ) | WT Docket No. 11-49 |
| | ) | FCC 13-78 |
| | ) | |
| and | ) | |
| | ) | |
| Progeny LMS, LCC Demonstration of Compliance with Section 90.353(d) of the Commission's Rules | ) | |

To: Office of the Secretary Attention: the Commission

**Petition for Reconsideration, and**
**Petition to Deny**

Skybridge Spectrum Foundation ("SSF" or "Skybridge"), Warren Havens ("Havens") and V2G LLC, (collectively, "SSF Petitioners" or "Petitioners") hereby file this petition of the Commission's Order, FCC 13-78, released on June 6, 2013 (the "Order" or "2013 Order").

And

Telesaurus Holdings GB LLC ("THL"), Intelligent Transportation & Monitoring Wireless LLC ("ITL"), Environmentel LLC ("ENL"), Environmentel-2 LLC ("ENL-2"), and Verde Systems LLC ("VSL"), (collectively, "THL Petitioners" and "Petitioners") hereby file this petition of the Commission's Order, FCC 13-78, released on June 6, 2013 (the "Order" or "2013 Order"). Also, Petitioners refer to themselves at times in this filing as "Skytel". In a separate filing, SSF Petitioners and THL Petitioners will identify the parts below that are filed by them.

**Reference and Incorporation**

Petitioners fully support the petition being concurrently filed today by Skybridge Spectrum Foundation et al. (the "SSF Petition"), and hereby reference and incorporate herein the substance of the SSF Petition.

**Contents**

**Introduction and Summary,**
**including the purpose of LMS, undermined by the Order**

The Contents above provides a substantial summary. This section provides an introduction and further summary. The undersigned entities, collectively known as SkyTel, hereby submit this petition under 47 U.S.C. § 405 and 47 C.F.R. § 1.106 for reconsideration of the Commission's Order in *Request by Progeny LMS, LLC for Waiver of Certain Multilateration Location and Monitoring Service Rules*, FCC 13-78, WT Docket No. 11-49 (June 6, 2013) [hereinafter *Commercial Operations Order*]. On March 8, 2011, Progeny submitted a "petition for waiver of the rules and request for expedited treatment" under 47 C.F.R. § 1.925. *See* http://apps.fcc.gov/ecfs/document/view?id=7021033901. On December 20, 2011, the Wireless Telecommunications Bureau and the Office of Engineering and Technology granted a limited waiver to Progeny. *Request by Progeny LMS, LLC for Waiver of Certain Multilateration Location and Monitoring Service Rules*, 26 F.C.C.R. 16,878 (2011) [hereinafter *Waiver Order*]. On January 27, 2012, Progeny submitted a letter claiming compliance with the interference testing requirements of 47 C.F.R. § 90.353(d) and seeking permission to commence commercial operations. *See* http://apps.fcc.gov/ecfs/document/view?id=7021857088. In response to this request by Progeny, the Commission's *Commercial Operations Order* of June 6 permits Progeny to commence commercial operations.

Two SkyTel entities are fellow licensees authorized to provide Multilateration Location and Monitoring Service (M-LMS) in the 902-928 MHz spectrum band. Collectively, the SkyTel entities are aggrieved, and their interests are adversely affected, *see* 47 U.S.C. § 405, by the Commission's successive decisions to grant Progeny's request for waiver of two rules governing M-LMS, 47 C.F.R. §§ 90.155(e) & 90.353(g), and to permit Progeny to commence commercial operation of its purported Wide Area Positioning System (WAPS) service. Inasmuch as Progeny's requests for Commission action have constituted "written application[s]" for "grant[s]

[of] construction permits and station licenses," or at a minimum have constituted applications for "modifications" of its M-LMS licenses, under 47 U.S.C. § 308,[1] the SkyTel entities, as "part[ies] in interest," further request that this petition be treated as a petition to deny under 47 U.S.C. § 309(d). In the alternative, SkyTel submits this petition as an informal request for Commission action under 47 C.F.R. § 1.41 to rescind Progeny's waivers and to restore the proper application of the Commission's Rules governing all M-LMS licensees, including SkyTel and Progeny alike.

This petition rests on four grounds. First, the Commission's *Commercial Operations Order* violates the Administrative Procedure Act, and possibly also due process. Second, the Commission should consider new evidence of the bad conduct of Progeny's agents in connection with Auction 21. Third, Progeny's tests purporting to detect interference with Part 15 devices fall woefully short of the *Waiver Order*, let alone the Commission's Rules governing M-LMS. Finally, the Commission has erred in withholding Progeny's data from the public.

The purpose of the LMS radios service is set forth in rule §90.351: Intelligent Transportation Systems, also made extensively clear in the rulemaking leading to the creation of LMS including M-LMS including the R&O discussed in Appendix 2 hereto. There is no other purpose. LMS is not CMRS subject to competitive regulatory "flexibility," indeed, the Commission created LMS, over many objections and concerns, solely due to the clear needs of ITS as the US DOT and others explained, firmly rejecting the creation of another general,

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[1] In *Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 63 Fed. Reg. 68,904 (Dec. 14 1998), the Commission made it clear that 47 U.S.C. § 308 requires "written application[s]" for all Commission "grant[s] [of] construction permits and station licenses, *or modifications or renewals thereof*" (emphasis added), inasmuch as Commission practice historically allowed "licensees in some wireless services to request certain actions by letter instead of with a formal application filing." 63 Fed. Reg. at 68,906. A primary objective of the Universal Licensing System was to streamline these written applications even further by "eliminat[ing] letter filings for applications, modifications, renewals, amendments, extensions, cancellations, special temporary authorizations, and name and address changes." *Id.; see also* 47 C.F.R. § 1.903 (confirming that the grant of a waiver or other request operates as an authorization, which 47 U.S.C. § 301 requires as the prerequisite for any lawful transmission of energy over radio waves).

flexible mobile radio service. As shown herein, the decisions in the Order directly undercut this sole purpose of LMS.[2] Waivers that undercut, instead of fulfill, the purpose of the subject rules cannot be granted. Particular rules have "purpose" only to the degree that they support the purpose of the entire radio service, especially where it is not a "flexible" general, CMRS radio service, as in this case. The two rules waived in this matter, especially §90.353(g), undercut the entire purpose of LMS and well as the subsidiary purpose of the particular rules.

Petitioners reference and incorporate herein their past pleadings in the captioned proceeding in full (the "Past Pleadings"). The test of the instant Petition is supplementary, as frame the issues as required for both a petition for reconsideration and a petition to deny.

**1. The Commission's Order Violates the Administrative Procedure Act, Related FCC Rules, and Possibly Due Process**

The Commission's *Commercial Operations Order* granted Progeny permission to "commence commercial operations of its position location service network." *Commercial Operations Order*, slip op. at 1. Fundamentally, this decision is based upon the FCC's conclusion that Progeny's "commercial operations will not cause 'unacceptable levels of interference' to unlicensed devices operating under Part 15 of the Commission's rules in the 902-928 MHz band." *Id.* However, the criteria relied on by the Commission in coming to this determination cannot satisfy the Administrative Procedure Act (APA) and potentially raises due process issues. First, the Commission's test of "unacceptable levels of interference" is potentially void for vagueness. Second, there is a logical disconnect between the supposed purpose of Progeny's test — to promote the coexistence of M-LMS and unlicensed operations in the band by "minimizing" the potential for M-LMS interference — and the Commission's actual test that "unacceptable levels of interference" will not occur. Third, the Commission's *Waiver Order* and

[2] For over ten years, Progeny has mislead the FCC in three proceedings to divert LMS spectrum from ITS use: first, RM-10403, then NRPM 06-49, and failing on both of those (by the entirely false assertion that "GPS obviates M-LMS" and the like [any laymen in the relevant fields could see those assertions were comically false]), Progeny then did an about face and pretends, in the current proceeding, to now be pursuing solely what it rejected –location and monitoring—but not for ITS and not even for vehicles, and with technology that could not possibly be competitive and successful in the market (see exhibits hereto), and that use only a small fraction of the Progeny licenses' spectrum, its plans for the rest being hidden (this is further misrepresentation and lack of candor). While the waiver of §90.353(g) provided for "equal" vehicle and nonvehicle location services, "equal" (by itself) has no meaning, and in any case, Progeny did not test in a vehicle environment. This is further discussed herein. Thus has held the entire LMS hostage, and severely damaged Petitioners, and the US ITS developments.

*Commercial Operations Order* are not supported by reasoned decisionmaking and substantial evidence because they ignore the fundamental purpose of LMS and misstate the meaning of the Commission's rules. Fourth, the Commission's finding that "Progeny's M-LMS system (technology and system) has been designed in a manner that reasonably minimizes the potential for interference to Part 15 operations" raises APA issues. Finally, the Commission did not sufficiently explain why it chose to attach greater significance to Progeny's evidence, rather than conflicting evidence articulated by the SkyTel entities, in making its findings of fact that led to the grant of a limited waiver to Progeny.

a. The FCC's test of "unacceptable levels of interference" is potentially void for vagueness.

The Supreme Court has noted that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters… for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. In this case, 47 C.F.R. § 90.353(d)'s provision that "[Economic Area] multilateration LMS licenses will be conditioned upon the licensee's ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to 47 CFR part 15 devices" raises substantial vagueness concerns. Fundamentally, "unacceptable" is a term couched in subjectivity, with the determination of whether an action is acceptable or not bearing entirely on the feelings and attitudes of the person or group towards which that action is directed. Thus, although the unconstitutionality of this standard is by no means a given, its inherent subjectivity and the potential for abuse and discriminatory application to various parties who may be seeking waiver will necessarily be given due consideration by any reviewing court, should the *Commercial Operations Order* ultimately be appealed.

b. There is a logical disconnect between the supposed purpose of Progeny's test — to promote the coexistence of M-LMS and unlicensed operations in the band by "minimizing" the potential for M-LMS interference — and the FCC's actual test that "unacceptable levels of interference" will not occur

Section 706(2) of the APA states that reviewing courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law," or "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. §§ 706(2)(A) & (E). Section 706(2)(A) "imposes a general "procedural" requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). Fundamentally, the arbitrary and capricious standard is concerned with ensuring that agencies engage in "reasoned decision-making." *City of Kansas City v. HUD*, 923 F.2d 188, 189 (D.C. Cir., 1991). Commission decisions that fail to give adequate "consideration of the relevant factors" or commit a "clear error of judgment" cause the decision-making to be arbitrary and capricious. *Citizens To Preserve Overton Park, Inc v. Volpe*, 401 U.S. 402, 416 (1971).

Moreover, "[w]hen the arbitrary or capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a "nonarbitrary" factual judgment supported only by evidence that is not substantial in the APA sense." *Association of Data Processing v. Fed. Reserve*, 745 F.2d 677, 683-84 (D.C. Cir. 1984). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938). "[I]t 'must do more than create a suspicion of the existence of the fact to be established … it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). "[S]upport of finding of facts by [substantial] evidence… should, obviously we think, mean support of all findings of fact, including inferences and conclusions of fact, upon the whole record." *Id.* at 481 n.14. Further, agencies must explain why they chose to attach greater significance to certain evidence, rather than other presented evidence, in the process of making a finding of fact. *See generally Dia v. Ashcroft*, 353 F.3d 228 (3d Cir, 2003).

In addition to raising due process concerns, the Commission's test of whether Progeny's services would cause "unacceptable levels of interference," also raises concerns under the APA.

Specifically, this rule provides that "[Economic Area] multilateration LMS licenses will be conditioned upon the licensee's ability to demonstrate through actual field tests that their systems do not cause unacceptable levels of interference to 47 CFR part 15 devices." 47 C.F.R. § 90.353(d). However, as applied in this case, this subjective and immeasurable standard cannot withstand scrutiny under the APA and relevant case law. As the Commission itself has made clear, no definition of "unacceptable levels of interference" exists, and in fact, "no uniform field testing method is appropriate considering the great array of devices that the Part 15 industry deploys in the 902-928 MHz, which are designed to address different needs and thus have no common design." *Commercial Operations Order*, slip op. at 10, ¶ 18. As such, the Commission's finding that "unacceptable levels of interference" would not occur, as well as the underlying field test conducted by Progeny, must be based upon and account for the full and unique set of facts presented in this particular situation. To ensure its decision is in the public interest and will survive review by a court, both reasoned decision-making and supporting conclusions with substantial evidence are fundamental.

Yet, both of these aspects are severely lacking. For example, the FCC concludes that "the purpose of the field test is to promote the coexistence of M-LMS and unlicensed operations in the band by "minimizing" — not eliminating — the potential for M-LMS interference to Part 15 operations overall so that the band can continue to be used for unlicensed operations without significant detrimental impact, consistent with their Part 15 status." *Id.* ¶ 19. [3] Further, it finds that "[t]his conclusion strikes a sensible policy balance and rests on a reasonable interpretation of the Commission's rules and prior orders." *Id.* Besides this summary conclusion, the Commission provides no reasoning or explanation as to why minimizing the potential of interference has the

[3] Further, in paragraph 11, the Commission explained that "[i]n the 1997 *LMS MO&O*, in response to a petition by an M-LMS licensee, the Commission reiterated that Part 15 devices were not entitled to protection from interference from M-LMS systems and noted that the purpose of the testing condition is to ensure that M-LMS licensees, when designing and constructing their systems, take into consideration a goal of minimizing interference to existing deployments or systems of Part 15 devices, and to verify this through cooperative testing."

effect of making that level of interference acceptable. Rather, on its face, this conclusion cannot be considered reasoned. It is entirely possible that even the most extensive efforts to minimize interference could fail, resulting in continuing levels of interference that are "unacceptable." However, under the Commission's test, these minimizing efforts would be enough to make the level of interference "acceptable," even if the amount of interference remains at levels the FCC would otherwise find "unacceptable." As such, there is a glaring logical disconnect between the showing that is required to be made under the Commission's rules — that unacceptable levels of interference will not be caused – and the actual mere showing that a goal of minimizing interference has been taken into consideration, which fundamentally prevents the FCC's decision-making from being qualified as "reasoned."

c. The *Commercial Operations Order*, as well as the decision to grant waivers of rules 90.155(e) and 90.353(g), was not supported by reasoned decisionmaking and substantial evidence

Moreover, the *Waiver Order* and the *Commercial Operations Order* gut the purpose of Location and Monitoring Services ("LMS"), without providing adequate reasoning or substantial evidence justifying this result. 47 C.F.R. § 90.135, the first rule on LMS, makes clear that "LMS systems utilize non-voice radio techniques to determine the location and status of mobile radio units." Further, the Commission has found that "[u]nfettered interconnection and messaging in the LMS could not only increase the potential for harmful interference to other users of the band, but detract from the intended purpose of the LMS allocation," which led to its decision to "allow non-vehicular location services to be rendered only by multilateration LMS systems whose primary operations involve the provision of vehicle location services." *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, 10 F.C.C.R. 4695, 4708-09 (1995); *see also* 47 C.F.R. § 90.353(g).

However, the Commission fails to adequately consider this purpose of LMS in the *Commercial Operations Order*. Instead, it relies on its *Waiver Order* of December 20, 2011,

which granted Progeny a limited waiver of Rules 90.155(e) and 90.353(g), and notes that the waiver "relieved Progeny of the requirement that it provide service primarily to vehicles and allowed it to provide service to any device anywhere, a change that would have no appreciable effect on the number or deployment of Progeny's transmitters, and which is central to Progeny's ability to offer its location service via mobile devices to compute more precisely a user's indoor or outdoor location for E 911 and other purposes." *Commercial Operations Order*, slip op. at 7, ¶ 14. These rationales, however, take Progeny's claims about the advancement of their system at face-value, with only comparisons to the least advanced services currently being deployed, and focus too heavily on the perceived benefits of Progeny's service, namely its ability to offer more precise location services. They fail though, to adequately consider the effects that Progeny's services may have on the overall LMS environment, and the underlying purpose of the LMS allocation. Further, the FCC fails to elaborate why its decision to grant Progeny these waivers, which thereby creates an uneven regulatory playing field in the LMS space, will lead to a better outcome than strict application of the rules, or point to actual and substantial evidence that would "justify, if the trial were to a jury, a refusal to direct a verdict." *Universal Camera*, 340 U.S. at 477. Potentially, these failures stem from the Commission's expertise being radio *communications*, not radiolocation, and bear significantly upon the deference a reviewing court may give these decisions.

To add insult to injury, the FCC's statement that granting Progeny's request for waiver will allow Progeny "to provide service to any device anywhere" is not even factually correct. *Commercial Operations Order*, slip op. at 7, ¶ 14. Even without a waiver, Progeny may provide service to any device, so long as it is the secondary service and the primary service is to vehicles. This incorrect application of its rules further demonstrates that the FCC has failed to apply reasoned decisionmaking and develop substantial evidence to support its conclusions.

d. The Commission's finding that "Progeny's M-LMS system has been designed in a manner that reasonably minimizes the potential for interference to Part 15 operations" raises APA issues

Additionally, the Commission's finding that "Progeny's M-LMS system has been designed in a manner that reasonably minimizes the potential for interference to Part 15 operations" raises APA issues. First, the Commission found that Progeny's different submitted sets of field testing "provide significant and sufficient data for us to evaluate the potential for interference." *Commercial Operations Order*, slip op. at 11, ¶ 21. However, as a variety of commenters rightly noted, all of Progeny's field tests were "conducted around San Jose." *Id.* at 9, ¶ 17. Second, the Commission acknowledged concerns that "Progeny's system (higher power levels, duty cycle, and beacon density) would effectively reduce the amount of spectrum available for Part 15 operations in the 902-928 MHz band, require redesign of unlicensed devices or systems, and increase the potential for interference among Part 15 users," but failed to adequately explain why these concerns were rejected. *Id.* Further, the Commission recognized that "in certain instances a particular Part 15 device may not be able to operate in close proximity to a Progeny beacon and…[s]uch devices may therefore require replacement with a device that operates on a different frequency." *Id*. at 13, ¶ 28.

These factors together, despite the Commission's strained assertion to the contrary, create a substantial doubt as to whether Progeny's system can reasonably minimize potential interference. Progeny has a natural incentive to pick a test market that is least likely to produce results of interference; however, the FCC found that testing one of the nation's plethora of markets was sufficient without elaborating on why it believed this to be so. Moreover, and most importantly, the FCC rejected substantial evidence that interference to Part 15 devices is occurring. Here, the FCC's decision simultaneously threatens the viability of companies who manufacturer devices that receive interference from Progeny's system, hinders the ability of consumers to consistently rely upon these devices, and creates future uncertainty in LMS by

uprooting previously consistent application of the FCC's long-standing regulatory rules. This type of decisionmaking, which fundamentally rejects evidence contrary to its conclusion without offering a reasoned explanation, flouts the APA.

e. The Commission did not sufficiently explain why it chose to attach greater significance to Progeny's evidence, rather than conflicting evidence articulated by the Havens-controlled entities, in the process of making their findings of fact regarding granting waiver

Finally, in granting Progeny its waiver of rules 90.155(e) and 90.353(g), and ultimately granting the Commercial Operations Order, the FCC failed to adequately explain why it rejected the evidence and assertions presented by the SkyTel entities, in favor of those made by Progeny. In its *Waiver Order* of December 21, 2011, the Wireless Telecommunications Bureau ("WTB") rejected a variety of assertions made by the Havens-controlled entities in their Comments and Further Comments Opposing Progeny's Petition.[4] For example, the WTB noted that it was "not persuaded by Havens' assertion that Progeny's proposal 'for a one-way broadcast technology for M-LMS would limit the benefit of the M-LMS band for ITS networks'" because "Progeny's proposal offers the potential for the use of the spectrum in a way that would serve the public interest," such as "offer[ing] the potential for significantly improved location based services that provide for vehicle location services as well as other mobile units, particularly for use in challenging locations such as urban canyons or inside buildings" and "the opportunity for enhanced position location for emergency 911 services." *Waiver Order*, 26 F.C.C.R. at 16,885, ¶ 18. In other paragraphs, the WTB rejected "Havens' claims regarding the potential for increased interference with other users in the event that Progeny elects to place its antennas at higher heights as not relevant, because the Commission's rules do not provide antenna height restrictions for M-LMS operations" and summarily rejected "Havens' argument that Progeny's proposal would increase licensed 'spectrum use in space and time' with unlicensed use, 'as

[4] *See* Comments in Opposition, WT Docket No. 11-49 (March 25, 2011); Comments in Opposition Errata Copy, WT Docket No. 11-49 (March 28, 2011); Further Comments in Opposition, WT Docket No. 11-49 (April 11, 2011).

compared to vehicle ITS services under the current rules.'" *Id.* at 16,887-88, ¶¶ 24 & 27.

However, the WTB is merely reasserting the claims of Progeny regarding what it will do, and acknowledging its choice to support those claims over that of the Havens-controlled entities. The WTB neither addresses the more particular, elaborated explanation of Havens that "[a]n ITS network must be able to probe vehicles for their status and locations periodically" and that "[t]his can only be done reliably using a dedicated 2 way channels between vehicle and base stations as provided for under the current M-LMS rules," nor makes any effort to elaborate why its finding that Progeny's proposal is in the public interest serves to make it more significant than SkyTel's evidence and assertions.[5]

As in *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003), where the immigration judge's "conclusion [was] not based on a specific, cogent reason, but, instead, [was] based on speculation, conjecture, or an otherwise unsupported personal opinion," and thus would "not have been supported by substantial evidence," *id.* at 250, the WTB's decision similarly lacked the support of substantial evidence. The *Waiver Order* merely asserted that it would adopt the claims of Progeny regarding the public interest benefits of its proposal and the possibility that location based services could be significantly improved, but utterly failed to examine these claims by Progeny in light of, and as compared to, the claims of the Havens-controlled entities. This conduct is arbitrary and capricious, and the Commission should grant this petition for reconsideration so that it can either reverse or clarify its decision to accept the contentions of Progeny over those of SkyTel.

For these reasons, the Commission should grant this petition for reconsideration and reverse its decision in the *Commercial Operations Order* to grant Progeny permission to "commence commercial operations of its position location service network."

f. <u>Progeny misrepresented that its technology and systems are advanced, and by such, it fails this FCC-stated reason for granting the waivers in the public interest</u>

[5] Further Comments in Opposition. Exhibit 1 at 3.

Petitioners showed in the Past Pleadings that the Progeny technology and systems are inferior to intrinsic 4G LTE radio positioning by itself, and since that is integrated seamlessly with LTE radio communications that is unquestionably the dominant in the US and world, for commercial wireless as it is expanding, and for public safety and other "private" wireless systems. The FCC did not find otherwise, nor demonstrate ability to even understand advanced radio location and the integration needed with advanced radio communications for market viability. To accept the Progeny assertions to the contrary of Petitioners' evidence, including analysis by a PhD expert in LTE, is arbitrary and capricious. In addition, the Past Pleadings demonstrated that other radio location technologies and systems, also becoming firmly adopted, are also far superior Progeny's, including network RTK (now covering most all of the States in the nation- by federal, state and private entities combined) and the extremely accurate "Locata" system, recently adopted by the US Air Force and other federal agencies, with long term contracts. We present herein a number of exhibits that demonstrate the superiority, technically and in market adoption and trajectory, of these other location technologies and systems, as compared to Progeny's. This not a "close call." See footnote 2 above: the FCC appears to have insufficient, and in any case it shows insufficient, interest and capability in advanced radio location (and hybrid location using radio and non-radio techniques) to expertly decide on these matters, and until it has, uses, and shows this expertise, its decisions – including as to the successive Progeny requests (now 10 years and counting) to change, divert, and waive the rules, lack foundation and are defective and should be reversed. Because the Progeny technology and systems are inferior to these other location technologies, including in accuracy and market adoption and trajectory, grant of the waivers fails the public interest and other requirements of rule §1.925, for this reason alone.

**2. Both the Public Interest and the APA Require that the Commission Consider New Evidence of the Bad Acts of Progeny's Agents in Connection with Auction 21**

In granting Progeny permission to "commence commercial operation of its position service location network," as well as waiving the application of 47 C.F.R. § 90.155(e) and § 90.353(g), the Commission has failed to specifically address prior failures to disclose affiliates and misrepresentations by agents of Progeny to the Commission that have recently come to light. These issues, which have been

previously articulated by SkyTel remain pending insofar as the Commission has not acted on these entities' "Application for Review of Bureau's May 31, 2012 Order."[6]

In granting a waiver request, due consideration of all facts bearing upon the public interest is critical, as the Commission may grant a waiver only if the necessary public interest showing is made.[7] Further, in failing to fully consider new evidence of bad acts by Progeny when granting it permission to "commence commercial operation of its position service location network," the Commission's decisionmaking can neither be considered "reasoned" and "on the record,"[8] nor a giving of "'adequate consideration' to the evidence and analysis submitted by private parties,"[9] which conflicts with Commission obligations under the APA. Accordingly, the Commission should grant this petition for reconsideration and revisit its decision after giving due consideration to new evidence that has been placed before the Commission.

In its May 31, 2012, Order, the Commission found that the SkyTel entities' "objections to Progeny's conduct during Auction 21 and the validity of its Licenses are untimely and procedurally deficient."[10] Specifically, the Commission found that "[b]ecause Petitioners offer no evidence that would require the Bureau to reexamine its grant of the Progeny Licenses, the Petition must be viewed as an untimely petition to deny insofar as it deals with issues related to Auction 21." *May 31st Order*, slip op. at 9, ¶ 23. However, even aside from the merits of this decision, new facts have come to light and demonstrate misrepresentations by agents of Progeny to the Commission. These are facts upon which the

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[6] *See generally* Application for Review of Bureau's May 31, 2012 Order by Telesaurus Holdings GB LLC, Intelligent Transportation & Monitoring Wireless LLC, Verde Systems LLC, and Skybridge Spectrum Foundation, along with Warren Havens, FCC File Nos. 003250058 & 003274382 (Jul. 2, 2012) ("Application for Review of May 31st Order").

[7] "The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." 47 C.F.R. § 1.925(b)(3).

[8] *See Allentown Mack Sales v. NLRB*, 522 U.S. 359, 374 (1998).

[9] *Stephen G. Breyer, et al., Administrative Law and Regulatory Policy* 348 (6th ed. 2006).

[10] Application for Transfer of Control of Progeny LMS, LLC to Progeny LMS Holdings, LLC (ULS File No. 0003250058) and Notification of the Consummation of the Transfer of Control of Progeny LMS, LLC to Progeny LMS Holdings, LLC (ULS File No. 0003274382), Order, DA 12-851 at 6, ¶ 13 (rel. May, 31, 2012) ("May 31st Order").

Commission has neither acted nor given due consideration. For example, as alleged by SkyTel in its July 31, 2013, Reply to Opposition to Application for Review and Motion to Strike, and confirmed by Progeny in its Motion for Leave to File Sur-Reply and Sur-Reply in Further Opposition to Application for Review, new facts have arose regarding the failure of Otto N. Frenzel III ("Frenzel"), who was the owner and controlling party of Progeny LMS LLC, to properly disclose his affiliates on Form 601, including his son, Otto Frenzel IV, and his spouse.[11]

The Commission's rules and forms are clear on their face regarding the spousal and kinship disclosures that need to be made. In specific, section 1.2110(b)(4)(iii)(A), on spousal affiliation, notes that "[b]oth spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States."[12] Section 1.2110(b)(4)(iii)(B) on kinship affiliation, in turn, states that "[i]mmediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means…son…. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters." 47 C.F.R. § 1.2110(b)(4)(iii)(B). Progeny's Form 601, meanwhile, clearly requires that affiliates be disclosed, without granting any exception.[13]

As such, the spousal and kinship affiliations of Frenzel's son and spouse were required to be disclosed, but were not. Progeny's insistence otherwise — that Frenzel's disclosure of his

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[11] *See* Reply to Opposition to Application for Review and Motion to Strike of Telesaurus Holdings GB LLC, Intelligent Transportation & Monitoring Wireless LLC, Verde Systems LLC, and Skybridge Spectrum Foundation, along with Warren Havens, FCC File Nos. 0003250058 and 0003274382 at 11 (Jul. 31, 2012) ("Reply to Opposition to Application for Review"); Motion for Leave to File Sur-Reply and Sur-Reply in Further Opposition to Application for Review, FCC File Nos. 0003250058 and 0003274382 at 4 (Aug. 8, 2012) ("Progeny Sur-Reply in Further Opposition").

[12] 47 C.F.R. § 1.2110(b)(4)(iii)(A).

[13] *See* Progeny LMS, LLC, Form 601, ULS File No. 0000006894 (filed Mar. 18, 1999; amended Mar. 22, 1999) ("Progeny Long-form application for Auction 21").

wife and son was only required if they had separate holdings or affiliations that would be subject to disclosure, is absolutely unsustainable as at lacks any support in the Commission's rules and is not a criteria for rebutting the presumption of affiliation.[14] Further, section 1.2110(b)(4)(iii)(B) explicitly places the burden of rebutting the presumption of affiliation with the applicant, making insufficient as an excuse any failure to disclose affiliates based upon an erroneous belief that they do not need to be disclosed. *See* 47 C.F.R. § 1.2110(b)(4)(iii)(B).

Moreover, this failure by Progeny to disclose these affiliates of Frenzel necessarily affected the FCC's public interest calculation and the FCC was required to give these issues consideration before granting Progeny permission to "commence commercial operation of its position service location network." As the D.C. Circuit has noted, "a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation." *Northeast Cellular Tel. Co., LP v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). To properly "articulate the nature of the special circumstances," the Commission may not pick and choose the unique facts and special circumstances it will address, but rather must look at the underlying facts in their entirety. Here, Progeny's failure to disclose Frenzel's son and spouse as affiliates during Auction 21, where it won spectrum licenses affected by the Commission's June 5th Order, are relevant to a determination as to whether waiver of certain of the Commission's Rules is in the public interest because they reflect on the trustworthiness and truthfulness of Progeny, and are inherently the types of "special circumstances" that must be given due consideration when considering a request for waiver.

Additionally, the Commission's decision to grant Progeny permission to "commence commercial operation of its position service location network" without consideration of

[14] *See* Progeny Sur-Reply in Further Opposition at 4.

Progeny's failure to disclose material affiliate information on its Form 601 for Auction 21 will cause a reviewing court to question whether the FCC engaged in "reasoned decision-making" and gave "adequate consideration" to the evidence and analysis submitted by private parties that is required by the APA. "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998).

In the *May 31st Order* denying SkyTel's petition for reconsideration of the WTB's decision to approve of the transfer of control of Progeny LMS, LLC to Progeny LMS Holdings LLC, the WTB rested its decision on the failure of the SkyTel entities to "provide any new information in their pleadings…[or] offer evidence that any relevant documents were withheld from the Commission or concealed from the public," which necessitated "the Petition [to] be viewed as an untimely petition to deny insofar as it deals with issues related to Auction 21." *May 31st Order*, slip op. at 9, ¶¶ 22 & 23. Yet, in their Application for Review of this order, SkyTel makes exactly this assertion by challenging the initial award of the LMS licenses to Progeny based upon new information that "was kept hidden at the time of the grant of the Long Form Application and Licenses and for years thereafter," and which fundamentally aggrieved the SkyTel entities. *See* Application for Review of May 31st Order, at 3. Thus, on appeal of the Commission's *Commercial Operations Order*, a reviewing court will notice that substantial issues of fact surrounding the honesty and integrity of Progeny with regards to Auction 21 have been called into question in a procedurally correct manner based upon new facts, but were ignored by the Commission. And because these issues of honesty and integrity fundamentally bear on the Commission's decision to grant Progeny waivers of 47 C.F.R. §§ 90.155(e) & 90.353(g), and ultimately permission to "commence commercial operation of its position service

location network," substantial issues regarding whether the Commission's decision to ignore this information was insufficiently reasoned, failed to give adequate consideration to the legitimate concerns raised, and was thus arbitrary and capricious, will invite the court's review.

Further, the Commission's granting of the waiver request by Progeny LMS, LLC "of certain FCC application processing policies so that it may amend its application to seek FCC recognition that Otto N. Frenzel, III ("Frenzel") is the owner and controlling party of the Applicant" suffers from a similar lack of "reasoned decision-making."[15] Specifically, Progeny requested that the Commission "waive its rules and policies relating to real-party-in-interest, major changes to applications, post-auction filing procedures, and any other rules or policies that would otherwise preclude the agency from recognizing the Parties' settlement and Progeny LMS, L.L.C., with the ownership as described herein, as the Applicant."[16] In essence, Progeny requested waiver of nearly every relevant rule, explicitly noting that some would cover "major changes to applications." Yet on the Universal Licensing System website, the Commission recognizes that it completed its waiver review on July 18, 2000 and granted Progeny's application for file number 0000006894 on July 19, 2000, but the Commission never released a formal order providing even the most minimum explanation regarding its granting of Progeny's waiver request.[17] This is a far cry from "reasoned decision-making," as it is neither clear what rules were waived, nor why the Commission believed it necessary and in the public interest for them to be waived, which has a significant potential to be found arbitrary and capricious by a reviewing court. Accordingly, to avoid these issues on appeal, this petition for reconsideration should be granted so that adequate consideration of these issues can be given.

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[15] Progeny Long-form application for Auction 21, Exhibit F – Conditional Waiver Request.

[16] *Id.* at 1-2.

[17] *See* Universal Licensing System, Location and Monitoring Service, Multilateration (LMS) — 0000006894 - Progeny LMS, LLC, *available at* http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applAdmin.jsp?applID=314021#.

Finally, it is significant that this granting of Progeny's request for waiver comes while the Commission's 2006 Notice of Proposed Rulemaking to address amending the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands remains pending, *see Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands*, 21 F.C.C.R. 2809 (2006), which will cause a reviewing court to question whether the FCC engaged in the "reasoned decision-making" and gave "adequate consideration" to the evidence and analysis submitted by private parties that is required by the APA. In this NPRM, the Commission explicitly noted that it was "terminating RM No. 10403," a rulemaking initiated by Progeny, "and invite interested parties to submit new and/or updated comments and reply comments in WT Docket No. 06-49." *Id.* at 2810 & n.4; *see also id.* at 2827 n.5. This decision to terminate RM No. 10403 not only caused a large record, including detailed and helpful contributions from the Havens-controlled entities, to be entirely disregarded, but ultimately led to the *Commercial Operations Order*, which grants Progeny alone permission to "commence commercial operations of its position location service network," while other similarly situated entities are stuck in this long-pending rulemaking, cannot deploy commercially, and lose a significant competitive edge. Intentionally or not, the *Commercial Operations Order* deals a substantial blow to competition and Progeny's competitors. The Commission dealt this blow without "reasoned decision-making," substantial evidence, or any reliable showing that its granting is in the public interest.

### 3. Progeny's Part 15 Tests Fail to Satisfy the Conditions Imposed by the Waiver Order, Let Alone the Commission's Rules and Orders Governing M-LMS

The *Commercial Operations Order* authorizes Progeny to commence commercial operation of its position location service network, WAPS, upon Progeny's satisfaction of the *Waiver Order*'s requirement that Progeny "demonstrate through actual field tests that its M-LMS system will not cause unacceptable levels of interference to Part 15 devices." 26 F.C.C.R. at 16,887. In accordance with comments previously submitted by SkyTel and its engineering

expert, Dr. Nishith D. Tripathi,[18] in response to Progeny's Part 15 tests,[19] SkyTel now emphasizes how Progeny's tests fail to satisfy the *Waiver Order*, to say nothing of the Commission's Rules and Orders governing interference by M-LMS systems with Part 15 devices. These shortcomings are so extreme that the Commission's decision to approve commercial operations on the strength of Progeny's flawed tests may potentially operate as a Trojan horse, permitting Progeny to operate precisely the sort of two-way mobile communications network, wholly unhinged from location and monitoring services of any kind, that the Commission has never intended to support on the 902-928 MHz spectrum band.

In no uncertain terms, paragraph 25 of the *Waiver Order* conditions Progeny's limited waiver to test its WAPS network upon compliance with the undiluted requirements of the Commission's M-LMS Rules and the Orders that have implemented those Rules:

> In granting these waivers, we are not revising other interference-related requirements applicable to M-LMS operations. … In this band, … the Commission adopted specific interference rules designed to maintain coexistence of many varied users in the band, including Part 15 users. This order does not waive any of those rules. Included in these rules is the obligation, set forth in Section 90.353(d), that Progeny demonstrate through actual field tests that its M-LMS system will not cause unacceptable levels of interference to Part 15 devices. [47 C.F.R. § 90.353(d).] As the Commission noted, the purpose of the testing condition "is to insure that multilateration LMS licensees, when designing and constructing their systems, take into consideration a goal of minimizing interference to eisting deployments or systems of Part 15 devices in their area, and to verify through cooperative testing that this goal has been served." [*Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 13,942, 13,968 (1997).]

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[18] *See* SkyTel, *Comments on the Progeny Test Report and Request to Extend the Deadline for Replies to Comments* (March 15, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021901276; SkyTel, *Reply Comments on the Progeny Test Report* (March 31, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021905642; Nishith D. Tripathi, *Review of the "WAPS" and "Part 15 Test Report,"* http://apps.fcc.gov/ecfs/document/view?id=7021901267; Nishith D. Tripathi, *Reply Comments for "Progeny Test Report,"* http://apps.fcc.gov/ecfs/document/view?id=7021905598. In this petition to deny and petition for reconsideration, SkyTel incorporates by reference all of the foregoing submissions.

[19] Progeny LMS, LLC, *Co-Existence of M-LMS and Part 15 Devices* (Jan. 25, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021857089; Progeny LMS, LLC, *Demonstration of Compliance with Section 90.353(d) of the Commission's Rules*, http://apps.fcc.gov/ecfs/document/view?id=7021857088.

26 F.C.C.R. at 16,887, ¶ 25. The *Commercial Operations Order* confirmed the ongoing vitality of 47 C.F.R. § 90.353(d) as well as Progeny's obligations under the *Waiver Order* to test for interference, to submit a report describing its field testing, and to allow the Commission to subject that report to public notice and comment. Slip op. at 7-8, ¶ 15.

Progeny's Part 15 tests fall far short of satisfying the conditions imposed by the *Waiver Order*. Moreover, inasmuch as the *Waiver Order* took pains to emphasize the ongoing vitality and applicability of 47 C.F.R. § 90.353(d) and the Commission's 1997 order and notice of proposed rulemaking for M-LMS, Progeny's violations of the *Waiver Order* must be construed as violations of those sources of law as well. To reinforce previous filings by SkyTel and Dr. Tripathi, SkyTel now highlights no fewer than seven distinct respects in which Progeny's Part 15 tests fail to clear these legal hurdles.

First, as the *Commercial Operations Order* recognizes, Progeny's WAPS system (which its test calls NextNav), "only us[es] approximately half of Progeny's eight megahertz of licensed spectrum." *Commercial Operating Order*, slip op. at 2, ¶ 2; *cf. id.* at 7, ¶ 14 ("While the 1995 M-LMS rules envisioned two-way operations that could use all of the MLMS licensees [*sic*] spectrum bandwidth, under the limited waiver, Progeny would instead be utilizing substantially less of its licensed spectrum and would be doing so for one-way operations."); *id.* at 12, ¶ 23 ("Progeny is deploying a one-way beacon system that uses approximately half of its licensed spectrum (~four megahertz of its eight megahertz), which reduces the amount of spectrum its system uses and eliminates potential interference to Part 15 devices ….") . What the Commission perceives and purports to promote as a virtue of Progeny's system is actually one of NextNav's deepest vices. Progeny has conducted no testing whatsoever, to say nothing of verification through "cooperative testing," for unacceptable interference with Part 15 devices on half of its spectrum. Although Progeny tested no more than four of its eight megahertz in M-LMS licenses, the scope of the *Waiver Order* and the *Commercial Operations Order* is not comparably limited.

Approval of commercial operations on the strength of tests conducted at a duty cycle not exceeding 20 percent and covering only half of Progeny's licensed spectrum places few if any definite limits on Progeny's use of this spectrum. Indeed, these vague, misinformed Orders may serve as a Trojan horse, one that gives Progeny free rein over the rest of its electromagnetic capacity.

Second, as Dr. Tripathi and many other commenters in this proceeding have observed, Progeny has done nothing remotely resembling the sort of verification through "cooperative testing" that this Commission contemplated in its 1997 notice of further rulemaking on M-LMS. Not merely discrete Part 15 devices, but entire Part 15 systems, are operating throughout California. Dr. Tripathi identified Pacific Gas and Electric's Part 15 system in Silver Springs. CellNet, Itron, Kapsch, and members of the Wireless Internet Service Providers Association (WISPA) all expressed dismay that Progeny has made no efforts to cooperate with them in testing NextNav's interference with those commenters' Part 15 devices systems. This failure is a direct violation of the *Waiver Order* and consequently should serve, of its own force, as grounds for reconsidering the *Commercial Operations Order* and revoking the authorization granted by that Order.

Third, Progeny's report discloses no testing whatsoever on vehicles. In committing this egregious omission, Progeny flouts 47 C.F.R. § 90.353(g)'s solicitude for service to vehicles. Section 90.353(g), after all, limits the provision of "non-vehicular location services" to only those "[m]ultilateration LMS systems whose primary operations involve the provision of vehicle location services." In failing entirely to conduct tests involving vehicles, Progeny does not even pretend to honor the *Waiver Order*'s grant of a limited waiver — itself an arbitrary, capricious, and unjustified retreat from 47 C.F.R. § 90.353(g) — permitting Progeny "to make M-LMS services 'equally available' to track the location of both vehicular and non-vehicular mobile devices." 26 F.C.C.R. at 16,886. The complete absence of vehicular testing serves as a

particular affront to the overarching purpose of "Intelligent Transportation Systems radio service," which "includes the Location and Monitoring Service (LMS)" and serves "the purpose of integrating radio-based technologies into the nation's transportation infrastructure and … develop[ing] and implement[ing] the nation's intelligent transportation systems." 47 C.F.R. § 90.350. This shortcoming represents one of the most dramatic ways, though by no means the only way, in which Progeny has failed to demonstrate how the original *Waiver Order*, let alone the *Commercial Operations Order*, has served the "underlying purpose of the [M-LMS] rule(s)" and advanced the public interest. 47 C.F.R. § 1.925(b)(3)(i).

Fourth, Progeny tested for Part 15 interference on the apparent assumption that there would be no other licensed uses of 902-928 MHz spectrum besides its own WAPS system and competing Part 15 devices. This omission ignores three decades of rulemaking for this spectrum band permitting a multilayered set of uses on the 902-928 MHz spectrum band, from federal government radiolocation and industrial, scientific, and medical uses under Part 18 of the Commission's Rules as primary uses to unlicensed operations by Part 15 devices. *Authorization of Spread Spectrum and Other Wideband Emissions Not Presently Provided for in the FCC Rules and Regulations*, 101 F.C.C.2d 419 (1985); *Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License*, 4 F.C.C.R. 3493 (1989); *accord Commercial Operations Order*, slip op. at 7-9 & n.17, ¶¶ 7-8. The pitfalls of Progeny's testing are particularly acute in the 919.75-921-75 MHz band, which the Commission's Rules divide between "multilateration and non-multilateration systems … on a co-equal basis." 47 C.F.R. § 90.353(d).

Fifth, Progeny's testing falls far short of "demonstrat[ing] through actual field tests that [its] systems do not cause unacceptable levels of interference to 47 C.F.R. part 15 devices." *Id.* Progeny manipulated its tests in ways calculated not to report the full extent of potential interference with Part 15 devices from its WAPS operations. Progeny cherry-picked devices,

often isolating single devices at the expense of testing multiple devices, complex configurations, or even entire Part 15 systems, despite the apparent readiness and willingness of Part 15 system operators to engage in cooperative testing. Progeny's limited testing never provided satisfactory answers to serious questions about co-channel interference, where the impairment of Part 15 devices and systems would be greatest. Compounding its failure to test in vehicles, Progeny appears to have conducted all of its testing in a stationary environment, thereby producing no evidence on interference with mobile devices, whether vehicular or non-vehicular.

Sixth, Progeny provided the barest and sketchiest description of its own WAPS network configuration. In so doing, Progeny supplied the Commission with no firm basis for concluding, consistent with the overarching purpose of multilateration location and monitoring service, to patch performance gaps in the Global Position System (GPS) and other global navigation satellite systems (GNSS). Although Progeny purportedly aspires "to provide more precise location services" where GPS falls short, "particularly indoors and in urban canyons," *Commercial Operations Order*, slip op. at 2, ¶ 2, Progeny's report of test results omits any meaningful specifications of its WAPS platform. Part 15 interference is necessarily a function of the strength or weakness of WAPS beacon signals. Stronger, more accurate WAPS transmissions will generate more interference, while any reduction in WAPS signal strength to minimize interference will perforce reduce NextNav's accuracy in locating devices. Most perniciously, if interference is occurring at low levels of accuracy, such interference will worsen, perhaps beyond the level that the Commission's M-LMS Rules would tolerate, once Progeny adjusts the operation of its WAPS network to meet the demands of paying commercial customers. To know the precise balance between performance and interference, Progeny must disclose the full specifications of its WAPS network.

Progeny did no such thing. We do not even know whether NextNav's beacon transmissions are synchronous or asynchronous. Absent accurate and reliable network

specifications, location estimates cannot be evaluated. This is particularly true when receiving units are moving, especially at speeds associated with vehicles (which, it bears repeating, are a special concern of LMS). Most astonishingly, Progeny supplied no data on interoperability with nonproprietary networks or the integration of its WAPS technology into the physical and logical layer of user equipment. WAPS as a one-way broadcast system necessarily relies on non-WAPS networks, especially WiFi and cellular networks, to convey location and height data back to the WAPS network. The interface between user equipment and those non-WAPS networks will likewise prove vital in enabling a WAPS network to calculate location and height. In the glaring absence of interoperability information, the Commission cannot possibly evaluate the effectiveness of Progeny's proposed uses.

Seventh and finally, Progeny provides no comparative data on the effectiveness of WAPS relative to other methods for augmenting GNSS performance. There is no consideration of network real-time kinematics, inertial navigation systems, or other techniques for augmenting GPS. *See generally* http://www.gps.gov/systems/augmentations. Locata, arguably the leading terrestrial implementation of wide-area location technology, warrants nary a mention. Progeny's testing is devoid of references to established global positioning literature. Although debate rages on the standards that courts of general jurisdiction should use to admit expert testimony, *compare Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) *and* Fed. R. Evid. 702 *with Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), this sophisticated, specialized Commission and its resident engineers should look askance on any proposed technology that has not withstood the tests of peer review and the scientific method.

Most dramatically, perhaps, Progeny omits any discussion of what may be the most important technology promising improvements to GPS: the incorporation of advanced time-difference of arrival technological standards into Long-Term Evolution (LTE). LTE is the leading work-product of the Third Generation Partnership Project (3GPP), which "institutes

uniform technology standards for the telecommunications industry to ensure worldwide compatibility of cellular devices and systems. More than 260 companies belong to 3GPP, representing all levels of the cell phone industry. The 3GPP members are responsible for creating and developing the 3GPP standard, which means determining what technologies will be included in the standard as either mandatory or optional features." *Golden Bridge Technology, Inc. v. Motorola, Inc.*, 547 F.3d 266, 269 (5th Cir. 2008). LTE is "the 'gold standard' of wireless technology." *Corr Wireless Communications, L.L.C. v. AT & T, Inc.*, 893 F. Supp. 2d 789, 795 (N.D. Miss. 2012).[20] In implementing its "proposal to require use of a common air interface on the public safety broadband network," this Commission has recognized "a strong consensus … in support of a particular technology platform, namely Long Term Evolution (LTE), as a common technology platform for the public safety broadband network." *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 26 F.C.C.R. 733, 736-37 (2011). Notwithstanding this Commission's conventional insistence on technological neutrality, "the overwhelming record support for LTE among public safety organizations and other stakeholders, and the importance of ensuring that all public safety broadband networks adopt a common air interface in order to establish an important building block for interoperability" has led the Commission to "require that all networks deployed in the 700 MHz public safety broadband spectrum adopt LTE." *Id.* at 737. The specific question of *which* location protocol — the observed time-difference of arrival (OTDOA) standard favored by Ericsson or the uplink time-difference of arrival (UTDOA) standard favored by TruePosition — has taken center stage in ongoing antitrust litigation enmeshing 3GPP and a host of important players in this industry. *See TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571 (E.D. Pa. 2012); *TruePosition, Inc. v. LM Ericsson Tel.*

[20] The emergence of LTE over WiMAX (Worldwide Interoperability for Microwave) as the dominant global protocol for 4G communications has spurred securities litigation over financial losses incurred by investors in firms that build and/or support WiMAX systems. *See Johnson v. Sequans Communications S.A.*, Fed. Sec. L. Rep. ¶ 97,265 (S.D.N.Y. Jan. 17, 2013).

*Co.*, 2012-2 Trade Cases ¶ 78,024 (E.D. Pa. Aug. 21, 2012); *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 899 F. Supp. 2d 356 (E.D. Pa. 2012). Against these developments, Progeny has provided no credible evidence that WAPS can provide any meaningful improvements, relative to existing and anticipated competing technologies, that would warrant the Commission's departure from its longstanding and thorough framework for multilateration LMS.

To all of this, the Commission's response is abject abdication to the unsupported, internally contradictory assertions offered by Progeny. In reviewing and ultimately approving Progeny's request to operate its WAPS network on a commercial basis, the Commission offers no meaningful analysis of any of the foregoing weaknesses in Progeny's technical reports. Such unquestioning dependence on a regulated party's assessment of its own technology severely undermines the Commission's claim to scientific expertise and political independence. Even where the questions are principally legal rather than scientific or technological in nature — for instance, as in Progeny's glaring failure to conduct testing in vehicles (in proper vindication of 47 C.F.R. § 90.353(g)) or more generally to weigh the impact of NextNav on intelligent transportation systems and the nation's transportation infrastructure (as faithful discharge of 47 C.F.R. § 90.350 would require) — the Commission brings no detectable expertise of its own to bear.

The Commission's failure to demonstrate any independent, meaningfully competent mastery of radiolocation technology exposes a glaring, fatal flaw in the *Commercial Operations Order*. An agency exerting no expertise whatsoever, whether because it lacks such expertise or because it has shelved its expertise in favor of considerations beyond the proper reach of the law, might reach a substantively defensible, even correct, conclusion on the merits of a technologically complex question by sheer coincidence. But in that circumstance, no one would defend the agency's decisionmaking process as a reasoned exercise in law, worthy of respect from the judicial and political branches of government. What passes for law in such a situation is

a blind person's random walk, not an exercise in expert administration, and there is little more relation between the agency's evaluative process and the outcome of the case than in a game of poker. *Cf. FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 649 (1944) (separate opinion of Jackson, J.).

The overwhelming impression that SkyTel derives from Progeny's horribly flawed Part 15 tests — and from the Commission's failure to evaluate those tests, in accordance with its own Rules and with sound principles of administrative law and decisionmaking — is that Progeny does not seriously propose to launch a commercially viable location and monitoring service. Instead, this entire exercise appears to be a Trojan horse by which Progeny can persuade the Commission to waive its M-LMS Rules piecemeal, and then to authorize ever-larger increments of commercial operations, until Progeny can conduct yet another "fixed, point-to-multipoint or point-to-point messaging service." *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, 10 F.C.C.R. 4695, 4709 (1995). That is precisely what this Commission, in adopting its current framework for the 902-928 MHz spectrum band, did *not* want to achieve. The Commission's Rules "make adequate provision elsewhere" for "broad messaging and data service[s]" on other bands. *Id.* SkyTel therefore urges the Commission to reconsider its *Commercial Operations Order*, rescind the authorization provided therein for Progeny to operate on any basis besides the Commission's M-LMS Rules, and restore this spectrum to its intended purpose as the foundation of "the nation's transportation infrastructure and … the nation's intelligent transportation systems." 90 C.F.R. § 350.

**4. The Commission Has Improperly Withheld Progeny's Submission of Data from Public Disclosure**

SkyTel further objects to the Commission's *Commercial Operations Order* on the grounds that the Order relies on data that the Wireless Telecommunications Bureau improperly withheld from public disclosure. On October 31, 2012, Progeny requested confidential treatment

of its test data involving interference between its WAPS system and Part 15 devices. *See* Progeny LMS, LLC, *Request for Confidential Treatment, Ex Parte Letter on Part 15 Joint Test Reports* [hereinafter *Confidential Treatment Letter*], http://apps.fcc.gov/ecfs/document/view?id=7022037930. On November 20, 2012, the Wireless Telecommunications Bureau issued a Protective Order that "adopt[ed] procedures to limit access to proprietary or confidential information that have [*sic*] been filed in this proceeding." *Request by Progeny LMS, LLC for Waiver of Certain Multilateration Location and Monitoring Service Rules*, 27 F.C.C.R. 14,471, 14,471 (2012) [hereinafter *Protective Order*]. Because the *Protective Order* was improperly adopted, the *Commercial Operations Order* (and any other action based upon the *Protective Order*) must be subject to reconsideration after Progeny's data has been made available for public inspection and comment.

In its January 27, 2012, letter, Progeny requested confidential treatment under 47 C.F.R. §§ 0.457, 0.459. Under either of those rules, the standard for withholding information is supplied by the Freedom of Information Act, 5 U.S.C. § 552. Rule 0.457 identifies "records" that "are not routinely available for public inspection pursuant to 5 U.S.C. § 552(b)." Subsection (d) of that rule identifies eight distinct categories of materials that are "accepted… by the Commission on a confidential basis pursuant to 5 U.S.C. § 552(b)(4)." 47 C.F.R. § 0.457(d)(1). These categories include "[a]pplications for equipment authorizations … and materials relating to such applications" and "records, relating to coordination of satellite systems pursuant to" the regulations of the International Telecommunication Union. *Id.* § 0.457(d)(1)(ii), (vii).[21] In order to withhold materials beyond these categories "from public inspection under 5 U.S.C. §

[21] *See also Public Information, the Inspection of Records, and Implementation of Freedom of Information Act Amendments*, 74 Fed. Reg. 14,073, 14,075 (March 30, 2009) ("In setting forth nine FOIA disclosure exemptions, the FOIA recognizes that not all agency records may be available to the public. 5 U.S.C. 552(b)(1)-(9). Section 0.457 of our rules sets forth these exemptions and lists circumstances in which we have already determined that certain types of records are not routinely available for public inspection.").

552(b)(4)," a person must "submit a request for non-disclosure pursuant to § 0.459." 47 C.F.R. § 0.457(d)(2).

For its part, Rule 0.459 permits a person request that materials submitted to the Commission be withheld from the public. The standard that "the appropriate custodian of records" must apply in response to a Rule 0.459 request is a "demonstrat[ion] by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. § 552." 47 C.F.R. § 0.459(d)(2). The combined effect of Rules 0.457(d)(2) and 0.459 is that all requests to protect "trade secrets or privileged or confidential commercial, financial or technical data" must satisfy the standard for "with[holding] from public inspection under 5 U.S.C. § 552(b)(4)." 47 C.F.R. § 0.457(d)(2). Under either of the FCC Rules invoked in Progeny's October 31, 2012, request for confidentiality, the disclosure *vel non* of Progeny's test data hinges on the proper interpretation and application of FOIA.

Subsection (b)(4) of the Freedom of Information Act provides that FOIA "does not apply to matters that are — … trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Because FOIA "is designed to promote disclosure of information," the statute should be construed with a presumption favoring "disclosure, not secrecy." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 398 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985). Exemptions from FOIA "are to be narrowly construed." *Anderson v. Department of Health & Human Servs.*, 907 F.2d 936, 936 (10th Cir. 1990). This is especially true of subsection (b)(4), which must "be read narrowly in light of the dominant disclosure motif expressed in the statute." *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 865 F.2d 320, 324 (D.C.Cir.1989); *accord Anderson*, 907 F.2d at 943. It falls upon either Progeny, *see Sharyland*, 755 F.2d at 398 ("One who seeks to prevent disclosure … must prove that the material is within one of the FOIA exemptions."), or the Commission itself, *see Anderson*, 907 F.2d at 936 (observing that the "agency resisting disclosure bears the burden

of justifying nondisclosure"), to prove that any aspects of Progeny's Part 15 Test Report should be withheld from public disclosure.

In its October 31, 2012, request for confidential treatment, Progeny argued that certain portions of information it was submitting "would be protected from disclosure" under 5 U.S.C. § 552(b)(4) as "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Confidential Treatment Letter*, *supra*, at 2. Progeny further argued that its information "qualifies as material that 'would customarily be guarded from competitors' within the meaning of Section 0.457(d)(2) of the Commission's rules." *Id.*

Because Progeny committed a crucial error in its invocation of 47 C.F.R. § 0.457(d)(2), and because that error sheds illuminating light on the meaning of that Rule, as well as the meaning of FOIA's (b)(4) exemption, we first address Progeny's treatment of Rule 0.457(d)(2). Progeny's reference to "material that 'would customarily be guarded from competitors'" comes from the 1998 version of Rule 0.457(d)(2). As promulgated, the 1998 version of that Rule provided:

> Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, it is important for any person who submits materials which he wishes withheld from public inspection under 5 U.S.C. 552(b)(4) to submit therewith a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or commercial, financial or technical data *which would customarily be guarded from competitors*, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection. Ordinarily, however, in the absence of such a request, materials which are submitted will be made available for inspection upon request pursuant to § 0.461, even though some question may be present as to whether they contain trade secrets or like matter.

*Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 63 Fed. Reg. 44,161, 44,167 (Aug. 19, 1998) (emphasis added) (codified at 47 C.F.R. § 0.457(d)(2) (1999)).

But that is not the current, governing version of Rule 0.457. A reference to "material that 'would customarily be guarded from competitors'" is conspicuously absent from the version of Rule 0.457(d)(2) that the Commission adopted in 2009 and that remains in force today:

> Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, any person who submits materials which he or she wishes withheld from public inspection under 5 U.S.C. 552(b)(4) must submit a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or privileged or confidential commercial, financial or technical data, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection.

*Public Information, the Inspection of Records, and Implementation of Freedom of Information Act Amendments*, 74 Fed. Reg. 14,073, 14,082-83 (March 30, 2009) (codified at 47 C.F.R. 0.457(d)(2)). Although the Commission's preamble to this new version of Rule 0.457 provided no specific explanation for the changes in subsection (d)(2), it is readily inferred that the Commission, as it did when it "amend[ed] section 0.457(g), regarding law enforcement information," elected to revise 47 C.F.R. § 0.457(d)(2) "to more closely track the language of the FOIA." 74 Fed. Reg. at 14,075. Whatever the Commission's purpose in amending 47 C.F.R. § 0.457(d)(2), the indisputable fact remains that the operative version of this rule omits any reference to "commercial, financial or technical data which would customarily be guarded from competitors." That omission must be accorded proper weight. At the same time, Progeny's reliance on repudiated language undermines its case for nondisclosure.

The Commission's evident embrace of closer, even verbatim, adherence to the language of FOIA represents a salutary alternative to the otherwise "intolerable situation in which different agencies could adopt inconsistent interpretations of the FOIA and substantially complicate the administration of the Act." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Notwithstanding federal administrative law's general

admonition that courts should defer to federal agencies' reasonable interpretations of the statutes that they implement, *see*, *e.g.*, C*hevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), FOIA instructs federal courts to accord agencies no such deference, *see* 5 U.S.C. § 552(a)(4)(B) (directing a court receiving a FOIA complaint to "determine the matter *de novo*"); *accord Public Citizen*, 704 F.2d at 1288; *cf. Retired R.R. Workers v. Railroad Retirement Bd.*, 830 F.2d 331, 334 (D.C. Cir. 1987) ("No single agency is entrusted with FOIA's primary interpretation, and agencies are not necessarily neutral interpreters insofar as FOIA compels release of information the agency might be reluctant to disclose."). The Commission cannot alter the dictates of FOIA by promising confidentiality, either expressly or by implication, on terms contrary to those set by that statute. *Petkas v. Staats*, 501 F.2d 887, 889 (D.C. Cir.1974); *accord Public Citizen*, 704 F.2d at 1288.

On this rationale, the D.C. Circuit and the Tenth Circuit have both rejected the Food and Drug Administration's adoption of the First Restatement of Torts' definition of a "trade secret" as "any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Restatement (First) of Torts* § 757, comment b (1939); *accord* 12 C.F.R. § 20.16(a). In the place of the FDA's definition, these Courts of Appeals have adopted a narrower definition of "trade secret" as "a secret, commercially viable plan, formula, process, or device that is used for making, preparing, compounding or processing trade commodities and that can be said to be the product of either innovation or substantial effort." *Public Citizen*, 704 F.2d at 1288 (demanding a "direct relationship" between the trade secret and the productive process that it enables); *accord Anderson v. Department of Health & Human Servs.*, 907 F.2d 936, 943-44 (10th Cir. 1990); *Burnside-Ott Aviation Training Center, Inc. v. United States*, 617 F. Supp. 279, 285 (S.D. Fla. 1985).

The broader definition of "trade secret," as adopted by the FDA and the First Restatement of Torts, would render superfluous the rest of 5 U.S.C. § 552(b)(4) because any information conferring an advantage relative to competitors would qualify both as a trade secret and as "commercial or financial information obtained from a person and privileged or confidential." *See Anderson*, 907 F.2d at 944; *Public Citizen*, 704 F.2d at 1289. Congress itself has recognized this very tension:

> If a trade secret can be any information used in a business which gives competitive advantage, then there is little or no information left that could qualify as commercial or financial information under the second category of the exemption without also qualifying as a trade secret. This definition is therefore inconsistent with the language of the act, as well as with the general approach taken by the courts to the concept of confidential business information.

H.R. Rep. No. 1382, 95th Cong., 2d Sess. 16 (1978); *accord Public Citizen*, 704 F.2d at 1289.

The other basis under which Progeny and the Commission may shelter Progeny's section 15 test data from disclosure is subsection (b)(4)'s exemption for "commercial or financial information obtained from a person and privileged or confidential." The plain language of this exemption requires three conditions for nondisclosure: information must be (1) "commercial or financial," (2) obtained from a person," and (3) "privileged or confidential." *Getman v. NLRB*, 450 F.2d 670, 673 (1971). The pivotal question of confidentiality, however, is not settled by FOIA itself, which "contains no definition of the word 'confidential.'" *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). An appropriate definition recognizes that a private party's customary practice of not releasing information — as reflected in the language of 47 C.F.R. § 0.457(d)(2) before its amendment in 2009 — "is not the only relevant inquiry in determining whether that information is 'confidential' for purposes of section 552(b)(4)." *Id.* at 767. Rather, a "court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *Id.*

Progeny submitted its Part 15 test data under a direct order by the Wireless Telecommunications Bureau. As a condition of the limited waiver that it granted to Progeny, the *Waiver Order* "require[d] Progeny, once it has completed design of its M-LMS system but prior to commencing commercial operations, to file a report in this proceeding that provides details on the M-LMS system design … , describes the process by which it carried out the field testing, including the particular types of Part 15 devices tested, and demonstrates that its M-MS system will not cause unacceptable levels of interference to Part 15 devices that operate in the 902-928 MHz band." 26 F.C.C.R. at 16,889. The *Waiver Order* specifically declared that the Commission "will place [Progeny's] report on public notice for comment." *Id.*; *accord Commercial Operations Order*, slip op. at 8 & n.42.

The governing definition of "confidential" for commercial or financial information delivered at the direction of a federal agency asks whether "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause *substantial* harm to the competitive position of the person from whom the information was obtained." *National Parks*, 498 F.2d at 770 (footnote omitted and emphasis added); *see also* Executive Order No. 12,600, *Predisclosure Notification Procedures for Confidential Commercial Information*, 52 Fed. Reg. 23,781, 23.781 (June 23, 1987) (defining "confidential commercial information" as "records" whose "disclosure could reasonably be expected to cause *substantial* competitive harm" (emphasis added)). The D.C. Circuit has reaffirmed the applicability of this test "for determining the confidentiality of information submitted under compulsion." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc); *see also id.* at 872 (reaffirming *National Parks'* "two-part test for determining when financial or commercial information in the Government's possession is to be

treated as confidential under Exemption 4 of the Freedom of Information Act," where such information is drawn from "persons [who] are required to provide [it to] the Government").[22]

Neither the *Protective Order* of November 20, 2012, nor the *Commercial Operations Order* of June 6, 2013, made a determination that any portion of Progeny's Part 15 test data should be withheld from public disclosure on the grounds that such information represents "trade secrets [or] commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). These orders issued forth with nary a trace of evaluation. Neither the Commission or any of its bureaus has assessed whether Progeny's data contains "a secret, commercially viable plan, formula, process, or device that is used for making, preparing, compounding or processing trade commodities and that can be said to be the product of either innovation or substantial effort," much less identifying a "direct relationship" between those purported trade secrets and Progeny's WAPS platform. *Public Citizen*, 704 F.2d at 1288. Progeny's claim of confidentiality for commercial or financial information fares no better. Neither the Commission nor any of its bureaus has weighed whether full disclosure of the Part 15 test data would inflict *substantial* competitive injury on Progeny or any of its testing partners.

All that the Commission has done in this proceeding is to grant Progeny's request for confidential treatment without any analysis whatsoever of the claims underlying that request. As

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[22] The decision by *Critical Mass* to apply a more lenient test (whether information is "of a kind that would customarily not be released to the public by the person from whom it was obtained") to information that is "provided to the Government *on a voluntary basis*" does not apply here. 975 F.2d at 879 (emphasis added). The *Waiver Order* not only directed Progeny to provide its Part 15 test data, but also informed Progeny and the public at large that the Commission would "place [Progeny's] report on public notice for comment." 26 F.C.C.R. at 16,889. In any event, *Critical Mass*'s alternate, more lenient formulation for determining the confidentiality of voluntarily submitted information has been called into doubt. The Second Circuit has explicitly adopted the D.C. Circuit's *National Parks* formulation of confidentiality in all cases, without *Critical Mass*'s further distinction between voluntarily and involuntarily supplied information. *See Nadler v. FDIC*, 92 F.3d 93, 96 n.1 (2d Cir. 1996). When presented with a further opportunity to endorse *Critical Mass*, the Second Circuit declined and instead reaffirmed its earlier embrace of *National Parks* for all commercial and financial information, whether supplied voluntarily or under governmental compulsion. *See Inner City Press/Community on the Move v. Board of Governors of Federal Reserve System*, 463 F.3d 239, 245 n.6 (2d Cir. 2006).

the U.S. District Court for the District of Columbia observed in a factually comparable case involving animal studies conducted by the manufacturer of silicone gel breast implants, the proponents of nondisclosure "have simply not sustained their claim of substantial competitive injury with specific and direct evidence." *Teich v. FDA*, 751 F. Supp. 243, 254 (D.D.C. 1990). At most, the Commission's justification for sheltering Progeny's test data from public disclosure rests on Progeny's own "vague statements" regarding advances in location and monitoring technology and the state of competition in this industry, and on Progeny's "conclusory assertions" that its submission includes sensitive, confidential information. *McKinley v. FDIC*, 756 F. Supp. 2d 105, 114 (D.D.C. 2010). "Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings.... and generally frustrate the fair assertion of rights under the Act." *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976); *accord Teich*, 751 F. Supp. at 254.

Progeny entered the M-LMS auction fully aware of the purposes to which this spectrum band had been committed and of the conditions under which M-LMS licensees are expected to operate. It sought a waiver from rules that obstructed its plans; in granting Progeny's request in part, the *Waiver Order* required Progeny to submit test data and to subject that data to public scrutiny and comment. Any claim to "secrecy as to … compounds and processes" or any other industrial technology "must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the [technology] be fairly set forth." *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431-32 (1919); *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007-08 (1984); *Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n*, 555 F.2d 82, 95 (3d Cir. 1977). These are conditions under which the Commission should reaffirm its traditional stance "that 'public proceedings should be the rule' with exceptions granted 'only in those extraordinary instances where disclosure would

irreparably damage private, competitive interests and where such interests … outweigh the paramount of the public and the Commission in full public disclosure.'" *FCC v. Schreiber*, 381 U.S. 279, 293 (1965). The precise details of technical studies and data such as those underlying Progeny's Part 15 tests are the "safety valves" of legal cases relying on "sophisticated methodology." *Sierra Club v. Costle*, 657 F.2d 298, 397-98 & n.484 (D.C. Cir. 1981). Where, as here, the Commission has not merely elected but affirmatively *promised*, *see Waiver Order*, 26 F.C.C.R. at 16,889, to subject test data to public comment, the Commission cannot now renege on its pledge of "genuine interchange" on contestable scientific and technological assertions, in order instead "to play hide the peanut with technical information, hiding or disguising the information" it has used to justify the *Protective Order* and the *Commercial Operations Order*. *Connecticut Light & Power v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *accord American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008); *see also Chamber of Commerce v. SEC*, 443 F.3d 890, 899-900 (D.C. Cir. 2006).

**Standing and Interest**

Petitioners have standing to file this petition for all the reasons already given in their challenges that resulted in the FCC's Order, DA 12-851,[23] that is on appeal (the "2012 Order") (see Application for Review filed on July 2, 2012 by Telesaurus Holdings GB LLC et al., the "2012 ApRev") and in their petitions against the Progeny transfer of control applications, Progeny renewal applications and Progeny requests for extension of time. Those include that THL and SSF each hold M-LMS licenses in 80% of the US, and where Progeny is licensed, and thus, THL and SSF are competitors of Progeny.

In addition, Petitioners have shown standing in their filings and challenges to Progeny and its filings in Auction 21 matters (including re: Progeny's Form 601), RM-10403, 06-49, that

[23] *Order*, DA 12-851, *27 FCC Rcd 5871.*

all involved, and are based on, Progeny misrepresentations to the FCC, to first get its M-LMS licenses, then to attempt for a rulemaking for rule changes.

The other petitioner entities, besides SSF, have standing because they hold FCC licenses in VHF and low-band VHF that can offer services that can compete with the services that may be offered by the Progeny M-LMS licenses. The other petitioner entities are also in a joint venture with Telesaurus Holdings GB LLC ("THL"), another M-LMS licensee, for development of wireless systems nationwide to support ITS and related, synergistic other "intelligent" or "smart" infrastructure systems, such as "smart-grid", and environmental monitoring and protection. Because they are in said joint venture with THL, a M-LMS licensee, for purposes of wireless location and monitoring for ITS and for said related purposes (which is the subject of FCC rules on the LMS radio service in Part 90, subpart M) these other petitioners also have standing. Their core business is being seriously and adversely affected by Progeny's actions complained of herein.

In addition, each petitioning entity has standing, including under Article 3 of the Constitution for reasons made clear by these entities in previous challenges against Progeny that are in FCC records, including, but not limited to, their challenges of Progeny's transfer of control applications, its renewal applications, and its requests for extension of time. Petitioners do not believe it is required herein to again present further facts and arguments; however, for convenience, they submit additional material in Appendix 1 hereto.

Clearly, Petitioners are substantially and adversely affected by the decisions in the Order, and thus, have standing to file this petition.

**Conclusion**

For the foregoing reasons, SkyTel asks that the Commission reconsider its *Commercial Operations Order*, FCC 13-78, in WT Docket No. 11-49 and deny Progeny LMS, LLC,

authorization to operate on any basis other than that prescribed by the Commission's Rules governing multilateration location and monitoring service.

Dated: July 8, 2013

Respectfully submitted,

/s/ [Filed electronically.]

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**Appendix 1:**

This Appendix continues the discussion on legal standing. The below have largely already been presented to the FCC in other challenges of Progeny to show Petitioners' standing. If this Appendix 1 causes the petition to be over any FCC-deemed page limit, then Petitioners ask that the FCC only consider it up to the point at which the petition, after first counting the above text, would be at any such page limit.

Petitioners Have Standing under 47 USC §§ 309(d) and 405 as Persons Whose Interests Are Aversely Affected, and Facts Asserted Could Not Have Been Earlier Presented Due to

Progeny's Withholding. Petitioners have standing and interest to file this petition. First, as described by the DC Circuit Court in *High Plains v. FCC*:

> We have held that "[a] bidder in a government auction has a 'right to a legally valid procurement process'; a party allegedly deprived of this right asserts a cognizable injury." 232 F.3d at 232 (quoting *DirecTV, Inc. v. FCC*, 324 U.S. App. D.C. 72, 110 F.3d 816, 829 (D.C. Cir. 1997)). A disappointed bidder need not show that it would be successful if the license were auctioned anew, but only that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis. *See id.* The bidder may satisfy the requirement of redressability by showing that "'it is ready, willing, and able' to participate in a new auction should it prevail" in court. *Id.* (quoting *Orange Park Fla. T.V., Inc. v. FCC*, 258 U.S. App. D.C. 322, 811 F.2d 664, 672 (D.C. Cir. 1987)).[24]

Petitioner Havens was "able and ready to bid" since he *actually* bid against Progeny for most of the larger C-block licenses (and some others) that it obtained. Petitioners intend to, and are ready and able to, accept the relief requested in the petition and pending challenges of Progeny with regard to its LMS Licenses.[25]

Petitioners also have standing and interest since their current license holdings[26] may provide competitive services to the subject LMS Licenses held by Progeny.[27] As competitors, Petitioners were damaged and prejudiced by Progeny's actions complained of in this petition, since they

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[24] *High Plains v. FCC*, 349 U.S. App. D.C. 256 (2002).

[25] This may be with waiver of the LMS-M 8-MHz cap in some cases, and in others with no waiver since (i) Telesaurus Holdings GB LCC holds only 4 MHz of the LMS-M A block licenses originally issued to Havens, and can thus obtain the 2.25 MHz B block within this cap, and (ii) Spectrum Skybridge Spectrum Foundation, of which Havens is the controlling party (but with no legal economic interest since this Foundation is a nonprofit corporation barred from providing such private interests), which holds the rest, 2 MHz, of these original A block licenses, can obtain 5.75-MHz C-block licenses and still be within the spectrum cap. Telesaurus Holdings and this Foundation are successors in interest to Havens in said original A block licenses that Havens won in Auction 21, in competition with Progeny-1 that involved bidding on a large percentage of the licenses ultimately issued to Progeny-2.

[26] SSF holds LMS licenses, V2G holds low-band VHF licenses, and Havens holds VHF licenses, and 220-222 MHz licenses that were terminated, but are on appeal, all of which may provide competitive services to those of LMS, including location (either multilateration or by other techniques) and monitoring, dispatch communications, etc. In fact, Petitioners' V2G and Havens nationwide plans involve using Telesaurus Holding's LMS licenses along with other affiliates' licenses for nationwide ITS. All of these licenses can provide PMRS.

[27] The Commission has found this to be sufficient for standing previously. See for example, *Order*, DA 03-2065, released June 25, 2003, 18 FCC Rcd 12309.

involve major violations of FCC bidding and disclosure rules required for fair competition, equal treatment.

Petitioner may raise in this petition the new facts they are raising (re: Progeny affiliates), for the reasons given in *Butterfield v. FCC*, where DC Circuit Court held:

> ….In these circumstances nothing in the language of sections 310(b) and 405 deprived the Commission of power to receive the new evidence and to reconsider or redecide the case….
>
> Delay in seeking reopening of the record is a factor to be weighed in the exercise of the Commission's discretion. Here, however, it was excusable. The only reason the appellants' effort to reopen was not made earlier in the proceedings was that the new events which occasioned it were kept secret by WJR for several months. [7] Such a circumstance would have called for reopening the record even under the dissenting opinion in Enterprise. That opinion pointed out that 'there was no concealment', because the successful applicant had disclosed the option agreement a few days before the argument of the petition for rehearing. Our dissenting brother added, however, that 'had it withheld the information until after the (denial of the petition for rehearing) notwithstanding the execution of the agreement (earlier), a very different situation might well be said to have arisen. That is this case.
>
> …. Moreover, appellants should be readmitted to the contest, even if that would serve to prolong it. The new evidence here goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants….
>
> …. The Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will reconsider its grant to WJR in the light of the differences thus disclosed.[28] *[Underlining added. Footnotes deleted.]*

As in Butterfield,[29] in the instant case Progeny "kept secret" "the new evidence [that] goes to the foundation of the Commission's decision" on the subject license application, including, as the petition describes, including that Progeny's controlling interest holder had affiliates that were not disclosed; and that Progeny thus submitted false certifications under oath. Thus, these new

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[28] *Butterfield v. FCC*, 99 U.S. App. D.C. 71; 237 F.2d 552 (1956),

[29] Also see: (i) *Re Beacon Broadcasting Corporation,* FCC FCC96-66 (adopted 2/21/96): reconsideration is appropriate where petitioner shows either material error or omission in original order, or raises additional facts not known or not existing until after petitioner's last opportunity to present such matters, and (ii) *Re Armond J. Rolle* (1971) 31 FCC2d 533: proceedings will be remanded and reopened by newly discovered evidence relied on by petitioner that could not with due diligence have been known at time of hearing, and if proven true, is substantially likely to affect outcome of proceeding. These also apply in to the instant case.

facts may be brought now as the basis of this petition, whether under 47 USC §309(d) or §405 (or even if the petition is deemed a request for rehearing on the original application). The court in Butterfield properly noted the Commission's authority (cited above and elsewhere in the decision) to rehear a licensing matter and change its decision based on new evidence. It has this authority under and should exercise it regardless of how the evidence came to it, as provided in 47 USC § 312(a)(1) and (2).

Also, SSF has interest and standing since it holds LMS licenses in most all of the same geographic license areas as Progeny holds its LMS and is thus a competitor of Progeny.

Petitioners also have standing based on the criteria applied in US courts under Article II of the Constitution, **see** *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) ("*Lujan*").[30] Article III standing is obtained among other ways, including where—as in the instant petition for reconsideration (Section 1.106(f) allows for petitions of applications approved under immediate approval procedures) deals with petitions of —unfair competition antitrust law violation claims are asserted (and until disproven or dismissed), even where the existence of an matter or action that offends or arguably offends said law is the sole basis for standing, and where the challenger asserting standing is among the parties entitled to protection under said law (where, without said protection, injury in fact to the party asserting standing, and to the markets involved, is assumed, as it is under said antitrust law).[31] It is also clear that, to the degree (as the petition asserts herein) that Progeny did not comply with FCC rules and made misrepresentations, that Petitioners suffer competitive harm, and also that subject wireless

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[30] Federal administrative proceeding standing criteria, as summarized in the APA, is derived from Article III standing. Regarding *Lujan*, a well known case on Article III standing, Justice Scalia, who wrote for the majority in *Lujan*, later asserted that even a plane ticket to the affected geographic areas would have been enough to satisfy the future injury requirement. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982).

[31] See, e.g., *Ross v. Bank of Am., N.A.*, No. 06-4755, 2008 WL 1836640 (2d Cir. Apr. 25, 2008).

markets are harmed:[32] noncompliance with rules that are the basis of fair competition is obviously particularly harmful.

In addition, see the *Sherley* case, discussed below. It is clear Petitioners have standing, since to begin with (as further shown below) they have demonstrated violations by Progeny of major FCC rules required for fair competition by Petitioners against Progeny, including in FCC auctions bidding and commencing operations. *New World Radio v. FCC*, 294 F.3d 164 ("*New World*") is also further support that Petitioners have standing to file this petition. New World and its progeny support Petitioners. *New World supports* Petitioners, as do all other court cases on standing. In this case before the FCC, Petitioners assert standing due to many competitive reasons they present at length, with regard to Progeny clearly anti-competitive actions against Petitioners (and any predecessors). There could be no more clear case where the challengers are being not only subject to competition by the party they challenge, but to unlawful actions of the challenged part that continues to this day, including Progeny's over decade long failure to disclose affiliates on its Form 601. *New World* and other cases on standing support Petitioners' assertions that they are clearly in a competitive situation with Progeny and have been and are damaged by Progeny's actions. There is no question that competition in the relevant wireless market is not on a license-by-license basis. Progeny is one company. The same applies to each Petitioner. Petitioners compete with all of their respective licenses and licensing actions, including in obtaining and renewing licenses (in auctions or otherwise). Each such licensing action is an act of competition and can damage the other competitor if it is unlawful, and it is unlawful if the applicant is not qualified as a licensee, including due to its past, demonstrated behavior and violations of FCC rules and the Communications Act, as Petitioners have clearly shown.

[32] Skybridge as a nonprofit Foundation legally must and does solely serve public-interests and no private interests. It has standing on that basis also: to pursue protection for the wireless markets involved.

*New World* has been followed once, by the same court in *Sherley v. Sebelius*, 610 F.3d 69, DC Circuit Court, 2010 ("*Sherley*"). The court in this more recent *Sherley* case explains the controlling broad and complex competitive standing standard, that applied here clearly establishes standing for Petitioners. In *Sherley*, the same *New World* court makes clear Petitioners' standing, including since they are competitors of Progeny; the subject Progeny Licenses will increase competition; the FCC has taken steps (challenged in this Petition) to benefit Progeny by action that authorizes certain operations under its licenses; the FCC is lifting regulatory restrictions; and all these cause probability of injury-- rather cause clear injury if any semblance of economic reality is applied.

Petitioners also have standing to file the Petition based on the public interest test described in *Valley v FCC*, 336 F.2d 914 including by "pleading of facts which, if shown to be true, clearly point to an injury to the public sufficient to outweigh considerations of administrative orderliness."

In addition, in cases of fraud or concealment of facts a petition should be considered in the public interest. The below two cases are presented herein since they demonstrate prevailing law that a licensee's concealment, fraud, and like misrepresentation before the FCC disqualifies a licensee from holding or renewing a license. The US Supreme Court made clear that even if the misrepresentation was of a matter without decisional significance**,** the misrepresentation itself was disqualifying. If misrepresentation of a component of a licensing matter, where such component is not of decisional significance, is still disqualifying in that licensing action, then misrepresentation in any licensing matter disqualifies the licensee in any other licensing action. The principal the Court articulated is that licensee disqualification by fraud or misrepresentation to the FCC is not specific to the essential elements of the licensing action per se. However, in this Petition, the fraud and misrepresentation shown are of decisional importance. In fact, Progeny has now admitted it failed to disclose certain affiliates in its Form 601. (The FCC and

courts have found that even if fraud is not admitted**,** that actions that are equivalent to fraud, including actions that are at least grossly negligent, are treated the same as fraud (see e.g. the decision of the US District Court, Southern District of New York, in US. ex rel. Taylor v. Gabelli) ). See also, *FCC v. WOKO*,[33] and *Wallerstein* whose holdings support Petitioners' standing and presenting of new facts.[34]

In addition, even if the FCC finds that Petitioners lack standing, this petition should be processed under Section 1.41, including for consideration of the facts and arguments herein for a more full and complete record and determination in the public interest, especially since they deal with the fundamental character and fitness of a licensee and FCC rule violations. Further, the Petition should be considered for a more accurate and complete record in the public interest.

[33] *FCC v. WOKO.* 329 U.S. 223; 67 S. Ct. 213; 91 L. Ed. 204; 1946 U.S. LEXIS 3147 (1946).

[34] *In re Applications of Harry Wallerstein.* 1 F.C.C.2d 91; 1965 FCC LEXIS 390; 5 Rad. Reg. 2d (P & F) 811. July 28, 1965 ("*Wallerstein*"):

## Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing filing, including all Exhibits and Attachments, was prepared pursuant to my direction and control and that all the factual statements and representations of which I have direct knowledge contained herein are true and correct.

*/s/ [Submitted Electronically. Signature on File.]*

_____

Warren C. Havens

July 8, 2013

Certificate of Service

I, Warren Havens, certify that I have, on this 8th day of July 2013, caused to be served by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing filing to the following:[35]

Progeny LMS, LLC
ATTN Carson Agnew
2058 Crossing Gate Way
Vienna, VA 22181

Squire, Sanders & Dempsey L.L.P.
ATTN Bruce Olcott
1201 Pennsylvania Avenue, NW, 5th Floor
Washington, DC 20004

Progeny LMS Holdings, LLC
2058 Crossing Gate Way
Vienna, VA 22181
ATTN Carson Agnew

/s/ [Filed Electronically. Signature on File.]
_____
Warren Havens

[35] The mailed copy being placed into a USPS drop-box today may be after business hours, and therefore, not be processed by the USPS until the next business day.