

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

In the Matter of)	
)	
Maritime Communications/Land Mobile, LLC	)	EB Docket No. 11-71
	)	File No. EB-09-IH-1751
Participant in Auction No. 61 and Licensee of	)	FRN: 0013587779
Various Authorizations in the Wireless Radio)	
Services)	
	)	Application File Nos.
Applicant for Modification of Various	)	0004030479, 0004144435,
Authorizations in the Wireless Radio Services	)	0004193028, 0004193328,
	)	0004354053, 0004309872,
Applicant with Encana Oil and Gas (USA), Inc.;	)	0004310060, 0004314903,
Duquesne Light Company, DCP; Midstream, LP;	)	0004315013, 0004430505,
Jackson County Rural Membership Electric	)	0004417199, 0004419431,
Cooperative; Puget Sound Energy, Inc.; Enbridge	)	0004422320, 0004422329,
Energy Company Inc.; Interstate Power and Light	)	0004507921, 0004153701,
Company; Wisconsin Power and Light Company;	)	0004526264, and 0004604962
Dixie Electric Membership Corporation, Inc.;)	
Atlas Pipeline-Mid Continent, LLC; and Southern;)	
California Regional Rail Authority)	
)	
For Commission Consent to the Assignment of)	
Various Authorizations in the Wireless Radio)	
Service)	

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 2018

Released: November 29, 2018

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we deny the Environmental LLC (Environmental) and Verde Systems LLC (Verde Systems) Interlocutory Appeal as of Right, filed April 29, 2015, and dismiss the Interlocutory Appeal, filed April 29, 2015 (as corrected April 30, 2015), by Warren Havens (Havens).¹ These pleadings seek review of a memorandum opinion and order by Chief

¹ See also Motion to Strike and Opposition to Interlocutory Appeals, filed May 6, 2015 (as corrected May 7, 2015), by Maritime Communications/Land Mobile, LLC; the Enforcement Bureau's Opposition to Interlocutory Appeals, filed May 6, 2015; and Environmental and Verde System Opposition to Motion to Strike, filed May 20, 2015. The Office of General Counsel granted leave to supplement the appeals. Letter from Linda Oliver to Jeffrey Blumenfeld (Aug. 12, 2015). We have received the following supplemental pleadings: Supplement to Interlocutory Appeals, filed September 11, 2015, by Warren Havens *et al.*; Maritime's Opposition to Supplement to Interlocutory Appeals, filed September 30, 2015; Reply to Oppositions to Supplement to Interlocutory Appeals, filed October 8, 2015, by Warren Havens *et al.*; Supplement to Maritime's Opposition to Supplement to Interlocutory Appeals, filed October 20, 2015.

Administrative Law Judge Richard L. Sippel (the Judge) that excluded Havens and six affiliated entities from further participation in this hearing proceeding, and took other related actions.² We find that the record amply supports the Judge's exercise of his discretion in excluding Havens and his companies based on findings that Havens's conduct in this proceeding has been disruptive and that he has consistently flouted or ignored the Judge's rulings and directives. In light of this conclusion, we dismiss as moot several procedural requests that are also pending before us.

II. BACKGROUND

2. To place these matters in context, we must examine the complicated history of this proceeding. Our examination indicates that, although Havens and his companies are not the subject of the issues designated for hearing, a substantial amount of time and effort have been devoted in this proceeding to questions about Havens's conduct. In particular, more than once, questions concerning Havens's conduct have previously come to the full Commission for review. Given the complexity of the matters referred to in the *Dismissal Order*, which is the subject of this appeal, we will describe these circumstances in detail.

3. **Initiation and early phases of the proceeding (April 19, 2011 to March 31, 2013).** On April 19, 2011, the Commission initiated EB Docket No. 11-71 (Maritime Proceeding) by adopting an order that designated for hearing before an administrative law judge whether wireless radio licenses held by Maritime Communications/Land Mobile, LLC (Maritime) should be revoked and its related wireless radio applications should be denied.³ The Commission designated as parties Havens and six affiliated entities, including Environmentel and Verde Systems,⁴ because they had previously filed petitions to deny certain Maritime applications, based on Maritime's alleged misconduct. Havens, although at various times represented by his own counsel or by himself, was the manager and controlling principal of the six entities, and thus was the point of contact for these entities and was directing their counsel.

4. On November 15, 2012, in response to controversies that arose early in the proceeding and the relationship between Havens and the six entities, the Judge required Havens and counsel for the companies to coordinate their participation. To the extent they took identical positions, they were required to file joint pleadings. To the extent Havens and his companies took different positions, they could file separate pleadings, provided they explained why they could not agree (since it was not apparent how Havens and companies he owned and controlled could have different interests).⁵

5. On March 31, 2013, the Judge stayed the Maritime Proceeding, with the exception of one issue.⁶ The Judge issued the stay after Maritime declared bankruptcy, and the bankruptcy court approved a reorganization plan calling for Maritime to assign its authorizations to an entity consisting of Maritime's creditors.⁷ The one issue still in hearing, Issue (g), concerned whether some of Maritime's licenses had automatically cancelled.

6. **Questions regarding Havens's legal representation (May 14, 2013 to June 17, 2014).** On May 14, 2013, the Judge issued an order that placed further conditions on the legal representation of

² Memorandum Opinion and Order, FCC 15M-14 (Apr. 22, 2015) (*Dismissal Order*).

³ See *Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd 6520 (2011) (*HDO*).

⁴ The six affiliates are Environmentel LLC, Verde Systems LLC, Intelligent Transportation and Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, and V2G LLC.

⁵ See 13M-11; Order, 12M-52 (Nov. 15, 2012).

⁶ See Order, FCC 13M-6 (Mar. 31, 2013).

⁷ See *id.* See also *Public Notice*, 28 FCC Rcd 3358 (WTB 2013). Under the *Second Thursday* doctrine, a bankrupt licensee, the qualifications of which are subject to a hearing proceeding, may sell its stations where alleged wrongdoers would not benefit from the sale and the proceeds would be used to reimburse innocent creditors. See *Second Thursday Corp.*, 22 FCC 2d 515, *recon. granted on other grounds*, 25 FCC 2d 112 (1970).

Havens and his companies in the Maritime Proceeding.⁸ In particular, the Judge found that “changes and bifurcations” in the representation of Havens and his companies had caused confusion and delay in the proceeding.⁹ The Judge found that the original notice of appearance filed in the Maritime Proceeding had indicated that Havens and his companies were represented by the same attorney but that subsequently Havens had attempted to: (1) represent himself, (2) speak for some of his companies (with an attorney speaking for the others), and (3) speak for all of his companies. Additionally, the Judge found that, on occasion, counsel for Havens’s companies had attempted to speak for Havens personally. The Judge further found that the situation was aggravated by Havens’s questionable insistence that he and his companies, which he managed and controlled, had distinct interests.¹⁰

7. In response to these concerns, the Judge placed further conditions on the representation of Havens and his companies in the Maritime Proceeding, including litigation over Issue (g). He held that Havens could participate *pro se* provided that he filed a notice of appearance making it clear that he was representing himself. In order to allow Havens and his companies to speak with separate voices if they chose, but to avoid inconsistent pleadings and confusion, the Judge required Havens’s companies to obtain representation by an attorney and prohibited Havens (who is not an attorney and claimed to have interests distinct from his companies) from representing them. Havens filed an interlocutory appeal of the Judge’s order.¹¹

8. The Commission upheld the Judge’s order and found that the record amply supported the Judge’s exercise of his discretion to prevent “confusion and delay on questions having nothing to do with the merits of this complex litigation.”¹² The Commission further found that “the Judge acted reasonably in concluding that the parties should not have to spend time and effort puzzling over who did or should represent [Havens’s companies] and that “action was necessary to resolve the situation.”¹³ The Commission found Havens’s arguments on appeal to be without merit.

9. The conditions imposed by the Judge and affirmed by the Commission did not, however, prevent further issues relating to Havens’s legal representation in the Maritime Proceeding from coming before the full Commission. The controversy addressed in this order arose from Maritime’s attempts to obtain summary decision on Issue (g) and Havens’s opposition to these efforts. On August 14, 2013, the Judge granted in part and denied in part Maritime’s May 8, 2013 Motion for Summary Decision on Issue (g).¹⁴ In partially denying the motion, the Judge noted that Havens was appearing *pro se*, and that, generally, pursuant to Commission policy, summary decision should not in fairness be used against

⁸ See Order, FCC 13M-11 (May 14, 2013), *affirmed by Maritime Communications/Land Mobile, LLC*, 28 FCC Rcd 11596 (2013) (*Procedural Order*).

⁹ See *id.*

¹⁰ See *id.*

¹¹ There are five types of rulings appealable as a matter of right under the Commission’s rules: (1) a ruling that denies or terminates a person’s right to participate as a party, (2) a ruling that requires testimony or the production of documents over a claim of privilege, (3) a ruling that denies a motion to disqualify the presiding judge, (4) a ruling that grants a settlement without terminating the proceeding, and (5) a ruling that removes a counsel from the hearing. 47 CFR § 1.301(a). With respect to other rulings, a party may ask the judge for leave to file an interlocutory appeal upon a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would likely require remand should the appeal be deferred and raised as an exception. *Id.* § 1.301(b).

¹² See *Procedural Order*, 28 FCC Rcd at 11600, para. 11 (footnote omitted).

¹³ *Id.* The Commission recognized that administrative law judges must be given broad discretion to regulate the course of a proceeding to achieve the effective and expeditious dispatch of Commission business. See also *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, para. 3 (1986).

¹⁴ See Memorandum Opinion and Order, FCC 13M-16 (Aug. 14, 2013).

parties who appear *pro se*.¹⁵ (Havens's companies had no attorney of record and did not participate in this phase of the proceeding.) In response to Maritime's continuing efforts to seek summary disposition, Havens subsequently, on December 2, 2013, filed a motion asking the Judge to reject further summary disposition of Issue (g). In that motion, Havens indicated that his "actions in this hearing on a *pro se* basis have been informed by assisting counsel as to procedure and substance."¹⁶ On the same day, Maritime filed a further motion for summary disposition, in which the FCC's Enforcement Bureau joined.¹⁷ On December 16, 2013, responding to that joint motion, Havens (despite his earlier representations about "assisting counsel") renewed his argument that summary decision should not be used against him because he was participating in the proceeding *pro se*.¹⁸

10. In response to Havens's December 16 filing, the Judge took several actions to inquire into whether and to what extent Havens's pleadings reflected the assistance of counsel. The Judge first required all counsel who had provided assistance to Havens to file notices of appearance.¹⁹ This resulted in filings by members of two firms, Copeland, Cook, Taylor & Bush, P.A., and Technology Law Group, LLC, as well as individual attorney James Ming Chen.²⁰ The filings indicated that one or more of these attorneys assisted Havens at the time the Judge partially denied Maritime's motion for summary decision (noting that Havens was a *pro se* litigant), and at the time of the December 16 filing in which Havens claimed special treatment as a *pro se* litigant.

11. The Judge then scheduled a prehearing conference on January 17, 2014, to examine Havens's assisting counsel regarding the nature and scope of the services they had provided Havens, in particular, whether they had participated in drafting pleadings that Havens submitted *pro se*.²¹ In advance of the prehearing conference, Havens objected to any possible examination of assisting counsel, asserting that the Judge's proposal to question them as to their services was barred because that topic is privileged.²² At Havens's direction, assisting counsel declined at the hearing to answer any of the Judge's questions.²³ In an oral ruling at the prehearing conference and in a subsequent written ruling, the Judge rejected Havens's claim of attorney-client privilege.²⁴

12. Havens responded to the Judge's actions by filing five interlocutory appeals. In addition to appealing the Judge's ultimate denial of attorney-client privilege, Havens appealed the order requiring assisting counsel to file notices of appearance and the order scheduling the prehearing conference. He also appealed the Judge's orders denying Havens's requests to the Judge for leave to file discretionary appeals of those same two orders.

¹⁵ See 13M-16 at 7-9, paras. 17-20. See also *Summary Decision Procedures*, 34 FCC 2d 485, 488, para. 6 (1972) ("[A] motion for summary decision should not in fairness be used against parties who appear without counsel [except where the issues are more simple than complex and the *pro se* party has personal knowledge of the facts].").

¹⁶ Havens-SkyTel First Motion Under Order 13M-19 to Reject Settlement, Proceed With the Hearing and Provide Additional Relevant Discovery, filed December 2, 2013, at 1 n.1.

¹⁷ See Joint Motion of Enforcement Bureau and Maritime Summary Decision on Issue G, filed December 2, 2013.

¹⁸ See Havens Opposition to Joint Motion for Enforcement Bureau & Maritime for Summary Decision on Issue G, filed December 16, 2013, at 104-05, *quoting* 13M-16 at 7, para. 18.

¹⁹ See Order, FCC 13M-22 (Dec. 19, 2013).

²⁰ See Notice of Limited or Special Appearance, filed January 6, 2014, by James Ming Chen; Notice of Limited, Special Appearance, filed January 6, 2014, by Danny E. Ruhl and Timothy J. Anzenberger, Copeland, Cook, Taylor & Bush, P.A.; Letter from Neil S. Ende, Technology Law Group, L.L.C. to Ms. Marlene Dortch, Secretary (Jan. 6, 2014).

²¹ See Order, 14M-1 (Jan. 8, 2014).

²² See Motion for Relief Regarding Order FCC 14M-1 (the "Order"), filed January 15, 2014, at 2, para. 2.

²³ See, e.g., tr. 992, 1009-10.

²⁴ See 14M-3 (Jan. 17, 2014); tr. at 1063-64.

13. The Commission never reached the merits of any of these appeals. During the pendency of the appeals, in a decision released June 17, 2014, the Judge granted in part and denied in part Maritime and the Enforcement Bureau's joint motion for summary decision.²⁵ In so doing, the Judge rejected the argument of Havens's December 16 opposition that Havens is entitled to lenient treatment as a *pro se* litigant. The Judge reached that decision without the benefit of responses to the questions that Havens's assisting counsel refused to answer at the prehearing conference concerning the nature of their assistance to Havens. The Commission therefore dismissed as moot Havens's appeal of the denial of attorney-client privilege, because the Judge no longer needed to inquire into the nature of Havens's legal assistance to rule on the joint motion for summary decision.²⁶ The Commission also dismissed the other four interlocutory appeals as not within the scope of rulings that may be appealed as of right.²⁷

14. **Havens's conduct in the period immediately before the evidentiary hearing on Issue (g) (July 15, 2014 to December 3, 2014).** On July 15, 2014, the Judge rejected Havens's request for authorization to file an interlocutory appeal of several aspects of the Judge's ruling that denied in part the joint motion for summary decision.²⁸ The Judge held that none of the issues that Havens raised constituted the type of new or novel questions that would warrant discretionary review by the full Commission.

15. Turning to procedure, the Judge ruled in a companion order that he would entertain no further motions for summary decision, inasmuch as efficiency would not be served by a further motion.²⁹ He did, however, indicate that he would consider "well-crafted" stipulations that would obviate the need to examine particular factual matters at hearing, but only if those stipulations were joined by all of the parties. He directed the parties to submit a proposed calendar of prehearing procedural dates and an estimated hearing time. Specifically, with respect to Havens, the Judge held "by July 30, 2014, counsel representing Mr. Havens shall have filed and served a Notice of Appearance."³⁰

16. Havens filed an interlocutory appeal of this last requirement. Although the Judge had previously ruled that Havens could represent himself, Havens interpreted the requirement that his counsel file a Notice of Appearance as prohibiting him from proceeding *pro se*. In a subsequent order, the Commission disagreed with this interpretation and dismissed the appeal as beyond the scope of rulings appealable as of right.³¹ In so doing, the Commission noted that by July 30, 2014, no attorney had filed a notice of appearance on behalf of Havens but that attorney James A. Stenger (Stenger) of the firm Chadbourne & Parke, LLP, had filed a notice of appearance on behalf of Environmental and Verde Systems. The Commission also noted that Havens had joined in filings by Environmental and Verde Systems.³²

17. On August 11, 2014, the Judge rejected Environmental, Verde Systems, and Havens's proposed procedural schedule because it "fails to set any firm dates for the hearing or any essential

²⁵ See Order, 14M-18 (Jun. 17, 2014).

²⁶ See *Maritime Communications/Land Mobile, LLC*, 29 FCC Rcd 12856, 12859, para. 8 (2014) (*Privilege Order*); 14M-18 at 12-14, paras. 33-37.

²⁷ See *Privilege Order*, 29 FCC Rcd at 12859-61, paras. 9-14. Havens's petition for reconsideration of the Commission's ruling is currently pending and as discussed below, is dismissed as moot. See *infra* para. 86.

²⁸ See Order, FCC 14M-23 (Jul 15, 2014).

²⁹ See Order, FCC 14M-22 (Jul. 15, 2014).

³⁰ 14M-22 at 3.

³¹ See *Privilege Order*, 29 FCC Rcd at 12860-61, para. 13.

³² See *id.* at 12861, para. 14.

prehearing activities, but instead [creates] an intricate schedule of extrapolated deadlines.”³³ He termed the proposal “a mess of convoluted and confusing deadlines, unnecessary motions, and proposed delays with no timely filed justification.”³⁴ In the same order, the Judge expressed concerns about Havens’s continued intention to represent himself, despite his association with Stenger. Citing his earlier directives, the Judge held that Havens and Stenger were required to submit prehearing submissions jointly. He also ruled that “(1) ‘double teaming’ of witnesses will not be permitted; (2) objections made at hearing must be coordinated to avoid duplication and/or confusion, especially for the court reporter; and (3) additional management of Mr. Havens’ *pro se* participation may be necessary if the integrity and decorum of the hearing require it.”³⁵

18. Havens filed an interlocutory appeal of these requirements, arguing that they effectively denied his right to participate as a party. The Commission disagreed that the requirements had that effect and dismissed the appeal as beyond the scope of matters that may be appealed as of right.³⁶

19. Despite this apparent discord, in an order issued on August 21, 2014, the Judge expressed satisfaction that the Enforcement Bureau, Maritime, Environmental, Verde Systems, and Havens now seemed to be working together to propose similar procedural schedules and narrow the scope of the issues.³⁷ He noted that, while he adhered to his previous ruling that no further motions for summary decision would be considered, he was encouraged that the parties were “coalescing” on litigating only 16 of the 89 authorizations subject to Issue (g), while treating the other 73 authorizations as cancelled without hearing. He reiterated that he would consider “well-crafted” stipulations joined in by all of the parties that would obviate the need to examine factual matters.

20. Anticipating, however, that the hearing would go forward, the Judge adopted a procedural schedule.³⁸ Among other dates, the Judge set September 16, 2014, as the date for exchanging direct cases and September 30, 2014, as the date for exchanging witness notifications. He also scheduled an evidence admission session for November 4, 2014.

21. On September 16, 2014, Environmental, Verde Systems, and Havens exchanged their direct case, including 444 exhibits and three witnesses.³⁹ Subsequently, on September 30, 2014, Environmental, Verde Systems, and Havens filed their witness notification, which, in addition to listing the three witnesses previously disclosed, requested the Judge to direct Maritime and the Enforcement Bureau to make 30 additional witnesses available for examination.⁴⁰

22. The parties, however, were not able to agree on a stipulation concerning the 73 authorizations. The Judge found on October 9, 2014, that the Enforcement Bureau, Maritime, and Environmental, Verde Systems, and Havens all agreed to the cancellation of 73 of the 89 authorizations, but that Environmental, Verde Systems, and Havens disagreed with the joint stipulation of facts proposed

³³ Order, FCC 14M-25 (Aug. 11, 2014) at 2.

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ See *Privilege Order*, 29 FCC Rcd at 12861, para. 14.

³⁷ See Order, FCC 14M-27 (Aug. 21, 2014) at 3.

³⁸ See *id.* at 4-5.

³⁹ See Environmental, Verde Systems, and Havens Direct Case Exchange, filed September 16, 2014.

⁴⁰ See Environmental and Verde Systems Witness Notification, filed September 30, 2014. In the November 14, 2014, order following the evidence admission session, the Judge rejected 376 of Environmental, Verde Systems, and Havens’s 444 exhibits, admitted 36, admitted in part 17, deferred ruling on 17, and admitted two for the purpose of cross examination only. See Order on Evidentiary Rulings, FCC 14M-34 (Nov. 14, 2014). The Judge also admitted the written testimony of one of Environmental, Verde Systems, and Havens’s three witnesses, Steve Calabrese.

by the Enforcement Bureau and Maritime.⁴¹ The Judge noted that Maritime admitted that the 73 facilities were not operational and that if Environmental, Verde Systems, and Havens “will not accept even self-evident factual concessions by Maritime . . . requiring any further negotiating of the facts would be fruitless.”⁴² To avoid further delay and uncertainty without prejudicing Environmental, Verde Systems, and Havens, the Judge accepted the facts presented in the proposed joint stipulation, but only with respect to the 73 authorizations that would be deemed cancelled, so that the hearing would proceed with respect to the remaining 16 authorizations.

23. On October 27, 2014, despite the parties’ previous difficulties in agreeing about the facts and notwithstanding the exchange of the parties’ direct cases, Environmental, Verde Systems, and Havens submitted a motion for summary decision (October 27 Motion).⁴³ The motion proposed that the remaining 16 authorizations could be found to have cancelled, without hearing.

24. The Judge and the parties discussed the situation on November 4, 2014, at the prehearing conference that had previously been scheduled as an evidence admission session. Stenger attended the conference. The Judge denied Havens’s request to participate by speakerphone because the 2012 procedural order required Havens, as a *pro se* litigant, to attend conferences in person, and because the issues to be discussed were too complex to permit participation by phone.⁴⁴ Havens did not participate in the conference.

25. At the conference the Judge reiterated his intention not to consider further motions for summary decision.⁴⁵ He noted, however, indications by the parties that Issue (g) might be fully resolved by motions practice.⁴⁶ He directed the parties to file a joint submission as to whether they agreed to suspend the hearing schedule and proceed by motion.⁴⁷

26. That evening, Havens sent an e-mail to the Judge’s office stating “[s]ince I was not permitted to attend the conference yesterday by phone, I would appreciate it if the Judge issues an order (and circulates that by email) or puts instructions in an email, as soon as possible (since there is not much time) making it clear what must be reported to him. . . .”⁴⁸ In subsequent e-mail correspondence over the next day, Havens rejected the Judge’s suggestion that he obtain the information he sought from Stenger.⁴⁹ On November 7, 2014, Havens filed a pleading stating his intention to file an interlocutory appeal of the denial of his request to participate by speakerphone and the Judge’s refusal to issue the requested written order.⁵⁰ Havens stated, “I may be entitled to compensation, including potentially under the Equal Access to Justice Act, Federal Tort Claims Act, and Bivens-Action law.”⁵¹ On November 13, 2014, Havens filed

⁴¹ See Order, FCC 14M-31 (Oct. 9, 2014).

⁴² See *id.* at 3-4.

⁴³ See Environmental and Verde Systems Motion for Summary Decision on Issue (g), filed October 27, 2014, indicating that “Mr. Havens joins in this filing” See *id.* at 1.

⁴⁴ See FCC 14M-34 at 2 n.2; 12M-52 at 4 n.10. The Judge noted that he also denied another party, Pinnacle Wireless, the opportunity to participate by speakerphone.

⁴⁵ See tr. at 1161.

⁴⁶ See tr. at 1165, 1221 (Enforcement Bureau counsel), 1170, 1178, 1216-17 (Stenger).

⁴⁷ See tr. at 1222; *Dismissal Order* at 2, para. 5.

⁴⁸ See Response to Oral Orders, filed November 7, 2014, by Havens, Exhibit 1 at 5.

⁴⁹ See *id.*, Exhibit 1 at 4 (“I communicate with Mr. Stenger when possible, but he is not counsel to me as a party as the record shows. . . . I do not want to act on the recollection of any attendee of what the [the Judge] instructed.”)

⁵⁰ *Id.*

⁵¹ *Id.* at 2.

an interlocutory appeal.⁵²

27. At the same time, the Enforcement Bureau and Maritime, and Environmental and Verde Systems (not joined by Havens) filed separate responses to the Judge's directive regarding the possibility of resolving the issue by motions practice.⁵³ The Enforcement Bureau and Maritime proposed to suspend the November 25, 2014 deadline for filing trial briefs and the December 9 date for commencing the hearing. They further proposed a schedule for responding to Environmental, Verde Systems, and Havens's motion for summary decision and for any reply pleadings. They indicated, however, that they had been unable to reach agreement with Environmental, Verde Systems, and Havens. Environmental and Verde Systems, by contrast, argued that the hearing dates should not be suspended and that the Enforcement Bureau and Maritime should not be permitted to file further motions. In view of the foregoing conflict, the Judge abandoned the idea that motions practice might be used and ruled, on November 24, 2014, that he would defer ruling on Environmental, Verde Systems, and Havens's motion for summary decision until after the hearing.⁵⁴

28. Shortly before the hearing, on December 3, 2014, Havens filed a pleading in which he argued that the Judge should strike the direct cases of both Maritime and the Enforcement Bureau in their entirety. The next day, the Judge denied the pleading as "frivolous," noting in part that the pleading was effectively another motion for summary decision.⁵⁵ The Judge also requested that Havens, Environmental, Verde Systems, and their counsel stop e-mailing him about procedural and other matters and stop arguing about the procedures to be followed in deleting the cancelled Maritime authorizations from the Commission database.⁵⁶

29. **Questions regarding Havens's conduct at the evidentiary hearing on Issue (g) (December 9, 2014 to January 14, 2015).** The hearing began on December 9, 2014, as scheduled. At the hearing session on December 10, Stenger represented that the sole witness for his clients Environmental and Verde Systems, Steve Calabrese, was not present at the hearing because a Maritime witness named John Reardon had caused police to issue an arrest warrant against him.⁵⁷ Counsel for the Enforcement Bureau stated that he had information that Calabrese had threatened Reardon and two other witnesses and that Maritime's counsel had a copy of the relevant police report.⁵⁸ Calabrese did not testify.

30. That night, Havens sent an e-mail to Enforcement Bureau counsel stating: "You two . . . represented at the hearing today that you have factual records of some kind that your client or supported party in this case, Mr. Reardon, has filed a police report and has arranged for some sort of arrest authority over Mr. [Calabrese]. However, you failed to provide any details or copies of the documentation. You obviously had this on hand to assert at the hearing, but you kept it hidden until Mr. [Calabrese] raised this. . . . I have no reasonable choice but to: **Demand that you send me immediately all documents and non-written information you have to support your representation indicated above.**"⁵⁹

⁵² The appeal is currently pending before the Commission and will be dismissed as moot as discussed below. *See infra* para. 86.

⁵³ *See* Joint Status Report Concerning Summary Decision Motions Practice on Issue (G), filed November 7, 2014, by the Enforcement Bureau (indicating Maritime's concurrence); Environmental and Verde Systems Response Regarding Suspension of the Hearing Schedule, filed November 7, 2014, by Environmental and Verde Systems.

⁵⁴ *See* Order, FCC 14M-36 (Nov. 24, 2014).

⁵⁵ *See* Order, FCC 14M-40 (Dec. 4, 2014).

⁵⁶ *See* Order, FCC 14M-39 (Dec. 3, 2014).

⁵⁷ *See* tr. at 1514.

⁵⁸ *See id.*

⁵⁹ *See* email from Warren Havens to Michael Engel and Pamela Kane (Dec. 11, 2014) (emphasis in the original). At the hearing, Enforcement Bureau counsel objected to other language in the e-mail. *See* tr. at 1647 ("Ms. Kane: . . .

31. At the next hearing session, Enforcement Bureau counsel explained that his information had come from other counsel and that he had no first-hand evidence about the matter.⁶⁰ Later, in response to a Freedom of Information Act (FOIA) Request from Havens, the Enforcement Bureau disclosed documents it had obtained from other counsel.⁶¹

32. At the close of the hearing,⁶² Stenger executed a declaration that allowed him access to confidential information submitted by Maritime and related parties pursuant to the protective order adopted by the Judge in this proceeding, for the purpose of preparing proposed findings.⁶³ The same day, Havens filed a pleading asking the Judge to find that three confidential exhibits should be deemed to be in the public domain.⁶⁴ Under the terms of the protective order Havens's counsel, but not Havens himself, could obtain access to confidential material by executing a non-disclosure declaration.⁶⁵ The protective order did, however, permit Havens to ask the Judge to consider whether documents should be deemed confidential.⁶⁶

33. The next day, Stenger asked the Judge for guidance as to whether Havens would be required to file separate proposed findings because Stenger would have access to confidential material withheld from Havens. The Judge indicated that, consistent with earlier rulings, Havens would not be permitted to file proposed findings separate from those of Environmental and Verde Systems. The Judge, however, went a step further and held that Stenger was, in effect, Havens's counsel and that Havens would therefore not be permitted to proceed *pro se*.⁶⁷ Havens's interlocutory appeal of that ruling is pending before the Commission.⁶⁸ Further, the Judge held that Havens's request for review of the confidential exhibits was moot, because his counsel (Stenger) had access to the confidential material, and also untimely, because Havens, throughout the proceeding, had failed to exercise his rights under the protective order and had instead filed a series of FOIA requests for confidential information.⁶⁹ On January 14, 2015 (more than a month after the close of the hearing), Environmental and Verde Systems filed a request for a status conference to determine whether confidential material should be made publicly

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. there are accusation in here that the Bureau has acted inappropriately and that we somehow impeded Mr. Havens' ability to act as a party in this case. And we vehemently oppose that").

⁶⁰ See tr. at 1651.

⁶¹ See Letter from William Knowles-Kellett to Warren Havens (Nov. 17, 2015) (FOIA Control No. 2015-132).

⁶² See Order, FCC 14M-44 (Dec. 19, 2014).

⁶³ See Protective Order, FCC 11M-21 (Jul. 20, 2011) (Protective Order).

⁶⁴ Memo on Documents Alleged Confidential Under the Protective Order But Lawfully in the Public Domain, filed December 10, 2014, by Havens.

⁶⁵ See Protective Order at 5-6, para. 6. The rationale for this distinction is, as noted above, that Havens and his companies are competitors of Maritime and other parties and should therefore not have access to competitively sensitive information. See 12M-52 at 4 ("As a *pro se* litigant, Mr. Havens will not be permitted to access confidential material under the Protective Order.").

⁶⁶ See Protective Order at 4, para. 3.

⁶⁷ See 14M-44 at 1-2.

⁶⁸ See *infra* para. 86.

⁶⁹ See 14M-44 at 4. The Protective Order does not purport to govern whether material should be disclosed pursuant to a FOIA request. See Protective Order at 1-2, para. 1, 9, para. 12. The Protective Order does not address the propriety of a party's (as opposed to other members of the public) using the FOIA instead of the Protective Order to seek confidential information.

available.⁷⁰

34. **Issuance of the Judge's *Dismissal Order* in response to Havens's conduct (April 22, 2015).** On April 22, 2015, the Judge issued a memorandum opinion and order striking the October 27 Motion, finding it to have been filed in bad faith and in violation of the Judge's prior ruling barring further motions for summary decision.⁷¹ In addition, citing "the contemptuous and disruptive conduct" of Havens and his companies in the proceeding, the Judge barred them from future participation in the Maritime Proceeding.⁷²

35. In striking the October 27 Motion for the reasons above, the Judge also found that Havens and his companies had presented inconsistent and contradictory arguments.⁷³ The Judge further expressed his concern that Environmental and Verde Systems had mischaracterized an Enforcement Bureau pleading in an attempt to misinform the Judge. Environmental and Verde Systems had stated that the Enforcement Bureau planned to file a motion identical to an earlier Enforcement Bureau motion.⁷⁴ The Enforcement Bureau disputed this characterization, asserting that the second motion would merely argue for the same legal conclusions.⁷⁵ The Judge concluded that Environmental and Verde Systems had not fairly characterized the Enforcement Bureau's second motion. The Judge noted that two motions can be filed at different times and argue for the same legal outcome but not be identical, especially in these circumstances, where new evidence had come to light since the first motion was filed.⁷⁶ In light of these findings, the Judge concluded that the October 27 Motion for summary decision was made in violation of section 1.52 of the Commission rules, which states that by signing a pleading, counsel represents "that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."⁷⁷ The Judge determined that, given his prior order prohibiting further motions for summary decision and the mischaracterization of the Enforcement Bureau's pleading, the parties could not have reasonably believed there was good ground to support the filing.⁷⁸ For all of these reasons, the Judge struck the October 27 Motion as frivolous and submitted in bad faith.⁷⁹

36. In addition to the issues related to the October 27 Motion, the Judge noted a number of occasions on which the conduct of Havens and his companies had delayed, disrupted, or disrespected the Maritime Proceeding or the Judge. The Judge cited a pattern of harassing e-mails;⁸⁰ unfounded, conflicting, or repetitious filings and arguments;⁸¹ and unnecessarily burdensome discovery and evidentiary production.⁸² Furthermore, the Judge found that these issues were compounded by ongoing

⁷⁰ See Environmental and Verde Systems Request for Status Conference to Make Records Public, filed January 14, 2015.

⁷¹ *Dismissal Order* at 1-2, para. 2; see also *supra*, paras. 23-28 (discussing the October 27 Motion).

⁷² *Id.* at 2, para. 3.

⁷³ *Id.* at 2-3, paras. 4-7.

⁷⁴ *Id.* at 3-4, paras. 8-10.

⁷⁵ *Id.*

⁷⁶ *Id.* at 4, para. 10.

⁷⁷ *Id.* at 4, para. 12; 47 CFR § 1.52.

⁷⁸ *Dismissal Order* at 4-5, para. 12.

⁷⁹ *Id.* at 5, para. 13.

⁸⁰ *Id.* at 5-6, paras. 14-17.

⁸¹ *Id.* at 7-9, paras. 18(b), 18(e), 18(k).

⁸² *Id.* at 8-9, para. 18(f), 18(g), 18(j).

uncertainties regarding Havens's *pro se* status⁸³ and the "murky relationship" between Havens and his companies.⁸⁴

37. The Judge observed that due to the conduct of Havens and his companies, Issue (g), a relatively minor portion of a complex proceeding, had taken over a year to litigate.⁸⁵ The Judge was concerned that allowing Havens and his companies to continue to participate in the proceeding would lead to further delay and disruption.⁸⁶ The unauthorized filing of the October 27 Motion, along with the ongoing pattern of disruptive conduct, led the Judge to conclude that Havens and his companies should be removed from the Maritime Proceeding.⁸⁷

38. In addition to excluding Havens and his companies from further participation in the hearing, the Judge certified questions to the Commission as to whether a separate proceeding should be initiated to determine the qualifications of Havens and his companies to be Commission licensees.⁸⁸ The Judge found that Commission rule 1.251(f)(3) authorizes certification of character issues upon a finding that a motion for summary decision was filed in bad faith, and that the Commission should also consider that Havens and his companies had "engaged in patterns of egregious behavior."⁸⁹

39. **The pleadings before us appealing the Judge's *Dismissal Order* – Environmental and Verde Systems's interlocutory appeal (Environmental and Verde Systems Appeal) (April 29, 2015).** Environmental and Verde Systems filed an interlocutory appeal as of right of the *Dismissal Order* pursuant to 47 CFR § 1.301(a)(1).⁹⁰ Environmental and Verde Systems argue that without Havens and his companies acting as whistleblowers in this matter and bringing Maritime's alleged violations to light, the Maritime Proceeding would never have taken place.⁹¹ They further argue that the Judge's *Dismissal Order* is arbitrary and capricious, as well as an abuse of discretion. Environmental and Verde Systems contend that they did not mischaracterize the Enforcement Bureau's second motion when noting that the motion was "identical" to an earlier motion; Environmental and Verde Systems argue that, while "identical" can mean "being the same," it can also mean "having the same cause or origin."⁹² Environmental and Verde Systems contend that it used the word in the latter sense when they termed the two Enforcement Bureau motions "identical."⁹³ Environmental and Verde Systems also argue that the Judge could not have relied on this mischaracterization to his detriment, as the Enforcement Bureau challenged Environmental and Verde Systems's characterization of the motion, thereby eliminating any risk the Judge would be misled.⁹⁴

40. Environmental and Verde Systems also claim that the October 27 Motion was legitimately filed. Environmental and Verde Systems argue that the Judge's order prohibiting the filing of additional motions for summary decision was directed at the Enforcement Bureau and Maritime (which had filed three unsuccessful motions for summary decision) and did not apply to Environmental and

⁸³ *Id.* at 10-11, paras. 18(n), 18(o), 18(p), 18(s); *see also supra* paras. 9-13.

⁸⁴ *Dismissal Order* at 9, 12, paras. 18(h), 18(r), 18(s), 20.

⁸⁵ *Id.* at 12, para. 22.

⁸⁶ *Id.* at 12-13, para. 22.

⁸⁷ *Id.*

⁸⁸ *Id.* at 13, para. 23.

⁸⁹ *Id.*

⁹⁰ Interlocutory Appeal as of Right, filed April 29, 2015, by Environmental and Verde Systems. *See supra* note 11.

⁹¹ *Id.* at 1-2.

⁹² *Id.* at 2-3.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

Verde Systems (which had only filed one previous motion).⁹⁵ Even if Environmental and Verde Systems misinterpreted the Judge's order, Environmental and Verde Systems contend that their motion cannot be viewed as disruptive, as the Judge later directed the parties to try and resolve the case by motions practice, as suggested by the October 27 Motion.⁹⁶

41. Lastly, Environmental and Verde Systems contend that the list of alleged incidents of disruptive conduct by Havens and his companies does not merit dismissal. According to Environmental and Verde Systems, because the Judge allowed Havens to engage in extensive *pro se* actions, the Judge is prohibited from barring Havens from the proceeding for engaging in "conduct typical of . . . *pro se* litigants that are not attorneys."⁹⁷ Even if the conduct was disruptive, Environmental and Verde Systems argue that the Judge had ample opportunities to admonish or sanction Environmental and Verde Systems and/or Havens during the course of the proceedings and "[i]t is unreasonable now, after [the Judge] has allowed these allegedly disruptive or contemptuous acts to occur over months and years, to punish [Havens and his companies]" by removing them from the Maritime Proceeding.⁹⁸

42. **Havens's separate interlocutory appeal (Havens Appeal) (April 29, 2015).** Havens also filed an interlocutory appeal, separate from the appeal of his companies, Environmental and Verde Systems.⁹⁹ Havens argues that the *Dismissal Order* is improper and untimely, as many of the alleged acts of misconduct occurred months or years ago.¹⁰⁰ Havens further points out that the *Dismissal Order* in no way addresses alleged misconduct by Maritime, which was only brought to the attention of the Commission through the efforts of Havens and Environmental and Verde Systems.¹⁰¹

43. **Maritime opposition and motion to strike the appeals (May 6, 2015).** Maritime filed an opposition to the Environmental, Verde Systems, and Havens appeals.¹⁰² Maritime contends that Environmental and Verde Systems's argument regarding the definition of "identical" is meritless. Supporting the Judge's argument that two motions can have the same legal conclusion but rely on different facts, Maritime notes that the actions of the Enforcement Bureau made clear that the Enforcement Bureau intended to rely upon new facts in making its arguments, and thus the motions were not "identical."¹⁰³ Maritime also responds to some of the allegations Havens made regarding Maritime's conduct and urges that the appeals are procedurally defective and should be stricken. Specifically, Maritime argues that the appeals exceed the allotted five-page limit. Maritime highlights that the Environmental and Verde Systems appeal is five pages and has a one page "Exhibit 1," which, if counted would raise the total page count up to six pages, in excess of what is allowed under section 1.301(c)(5) of the Commission's rules.¹⁰⁴ Additionally, Maritime argues that, for purposes of filing an appeal, Environmental and Verde Systems is effectively just an alter ego of Havens, and "[t]he submission of two separate appeals challenging the same ruling on the same grounds has the practical effect, if not the

⁹⁵ *Id.* at 3-4.

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 5.

⁹⁸ *Id.*

⁹⁹ Interlocutory Appeal, filed April 9, 2015, by Havens (Havens Appeal). The appeal was filed on behalf of Havens and "for all Havens managed companies but for [Environmental and Verde Systems], which submitted their own appeal." *Id.* at 4.

¹⁰⁰ *Id.* at 1-2, para. 2.

¹⁰¹ *Id.* at 2-5, paras. 3-7.

¹⁰² Motion to Strike and Opposition to Interlocutory Appeals, filed May 6, 2015, by Maritime (Maritime Opposition).

¹⁰³ *Id.* at 2-3.

¹⁰⁴ 47 CFR § 1.301(c)(5).

intentional design, of exceeding the page limit.”¹⁰⁵ In addition to issues with the page limit, Maritime contends that Havens violated the Judge’s order prohibiting Havens from acting *pro se* on behalf of his companies, as the Havens Opposition is filed not just by Havens, but also by four of his companies (Intelligent Transportation & Monitoring Wireless LLC, Telesaurus Holdings GB LLC, V2G LLC, and Skybridge Spectrum Foundation).¹⁰⁶

44. In its opposition, Maritime points out that this is just the latest in “a long-standing pattern of such abuse by the appellants,” and notes that the Commission has warned or sanctioned Havens for repetitious or frivolous filings in other proceedings.¹⁰⁷ Maritime argues that these previous acts demonstrate a pattern of disruptive behavior that Havens has no intention of changing; the only appropriate remedy in this proceeding is removal. Maritime therefore contends that the Environmental and Verde Systems Appeal and the Havens Appeal should be denied.¹⁰⁸

45. **Enforcement Bureau opposition to the appeals (May 6, 2015).** The Enforcement Bureau has also filed an opposition to the appeals of Environmental, Verde Systems, and Havens.¹⁰⁹ The Enforcement Bureau supports the Judge’s contentions that Havens and Environmental and Verde Systems have delayed and disrupted the proceeding, and argues that the Judge “plainly has the discretion to manage the proceedings before him in a manner that serves the interests of efficiency and expediency.”¹¹⁰ The Enforcement Bureau also notes procedural flaws with the filings of Environmental, Verde Systems, and Havens. Like the Maritime Opposition, the Bureau notes that the Environmental and Verde Systems Appeal contains a one-page exhibit that, the Bureau contends, should count against the five-page limit, which would make the Environmental and Verde Systems Appeal exceed the allowed number of pages. The Bureau also raises the fact that the Havens Appeal is unsigned and contains no proof of service. For these reasons, the Enforcement Bureau argues that the appeals of Environmental, Verde Systems, and Havens should be denied.¹¹¹

46. **Environmental and Verde Systems’s and Havens’s joint supplement to their appeals (September 11, 2015).** In their initial appeals, Environmental, Verde Systems, and Havens requested the opportunity to supplement their filings, noting that they could not respond to all of the *Dismissal Order*’s allegations in the provided page limit.¹¹² The Office of General Counsel permitted Environmental, Verde Systems, and Havens to file a single joint supplement.¹¹³

47. In the Joint Supplement, Environmental, Verde Systems, and Havens argue that the October 27 Motion was properly filed.¹¹⁴ Specifically, Environmental, Verde Systems, and Havens contend that the filing of the October 27 Motion was explicitly authorized by the Judge in a prehearing

¹⁰⁵ Maritime Opposition at 1.

¹⁰⁶ *Id.* at 2. Environmental and Verde Systems denies that these are defects. Environmental and Verde Systems Opposition to Motion to Strike, filed May 20, 2015. We do not need to address these arguments by Maritime given our resolution of the ultimate issues herein.

¹⁰⁷ *Id.* at 3-4.

¹⁰⁸ Maritime Opposition at 1.

¹⁰⁹ Enforcement Bureau’s Opposition to Interlocutory Appeals, filed May 6, 2015.

¹¹⁰ *Id.* at 3 (internal quotations omitted).

¹¹¹ *Id.* at 4.

¹¹² Environmental and Verde Systems Appeal at 5; Havens Appeal at 1.

¹¹³ Letter from Linda Oliver, Associate General Counsel, Federal Communications Commission, to Dana Frix, Chadbourne & Parke LLP, 30 FCC Rcd 7199 (July 8, 2015).

¹¹⁴ Supplement to Interlocutory Appeals, filed September 11, 2015, by Warren Havens et al. (Joint Supplement).

conference.¹¹⁵ They point to an exchange in which counsel for Environmental and Verde Systems stated, “I really think on October 28 I may have to file a motion to strike the Government’s entire case,” and the Judge responded, “Well, you’re free to file any motion you care to, as long as you do it in a professional manner.”¹¹⁶ Environmental, Verde Systems, and Havens propose that by stating that Environmental and Verde Systems were “free to file any motion they care[d] to,” the Judge was acknowledging that the prior ban on summary decision motions did not apply to Environmental, Verde Systems, or Havens.¹¹⁷

48. Environmental, Verde Systems, and Havens also state that the Judge acted arbitrarily and capriciously by certifying to the Commission a question regarding the qualifications of Havens and his companies to hold Commission licenses. They contend that their earlier arguments demonstrate there was no filing in bad faith related to the October 27 Motion.¹¹⁸ To the extent that the Judge certified the question based on the allegation that Havens and his companies “engaged in patterns of egregious behavior,” the parties contend that such conduct is not a valid reason to certify a question to the Commission under Commission rule 1.251(f)(3), which only provides for certification of a question based on “a finding of bad faith on the part of a party to the proceeding.”¹¹⁹

49. Environmental, Verde Systems, and Havens also address the allegations regarding the conduct of Havens and his companies in the proceeding. Several of these arguments either restate or build upon contentions raised either in the initial Environmental and Verde Systems Appeal or the Havens Appeal.¹²⁰ They contend that in addition to the latitude granted to *pro se* litigants, the conduct of Havens and his companies is understandable because the Enforcement Bureau “switched sides” during the proceeding, “moving from enforcing against Maritime to defending it.”¹²¹ Additionally, in response to allegations about burdensome evidentiary filings, Environmental, Verde Systems, and Havens state that while Environmental and Verde Systems did in fact file 400 exhibits, the Judge found that only six of the exhibits were duplicative and admitted at least 50 of the exhibits.¹²² Environmental, Verde Systems, and Havens contend that, given these facts, there is no factual or legal basis for certifying a character question to the Commission. They further argue that excluding Havens and his companies from the hearing unfairly punishes them for zealously pursuing this matter.¹²³

50. **Maritime opposition to the supplement from Environmental, Verde Systems, and Havens (September 30, 2015).** Maritime filed an opposition to the Joint Supplement.¹²⁴ Maritime responds to the Joint Supplement’s claim that the Judge authorized the filing of the October 27 Motion, stating that Environmental, Verde Systems, and Havens are not credible; if they truly believed that the Judge’s statement had explicitly authorized the filing, the conversation would have been cited to in the October 27 Motion or other later filings. Given that the argument only appears at this late stage, Maritime

¹¹⁵ *Id.* at 14.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 15-16.

¹¹⁹ *Id.*

¹²⁰ The Joint Supplement reiterates Environmental and Verde Systems’s earlier argument that “identical” can also mean arguing for the same legal conclusion. *Id.* at 16-17; Environmental and Verde Systems Appeal at 2-3. Similarly, as in Environmental and Verde Systems’s initial appeal, the Joint Supplement contends that Havens’s conduct is within the bounds of what is expected for a *pro se* litigant. Joint Supplement at 17-22; 23-25; Environmental and Verde Systems Appeal at 5.

¹²¹ Joint Supplement at 9-13.

¹²² *Id.* at 22-23.

¹²³ *Id.* at 24-25.

¹²⁴ Maritime’s Opposition to Supplement to Interlocutory Appeals, filed September 30, 2015 (Maritime Supplement).

contends that it is nothing more than “a post-hoc rationalization.”¹²⁵

51. Maritime also argues that the Enforcement Bureau did not “switch sides,” but rather acted properly upon review of the evidence uncovered in the course of the hearing.¹²⁶ Even if the Enforcement Bureau had “switched sides,” Maritime contends such circumstances would not justify the conduct of Havens or his companies in the proceeding.¹²⁷

52. Maritime also addresses the argument by Environmental, Verde Systems, and Havens that Commission rule 1.251(f)(3) only applies to matters of bad faith and cannot apply to other issues of unacceptable conduct. Maritime argues that this reading of the regulation is too narrow, but that, even if the alternative reading were accepted, the regulation does not preclude the Judge from referring other questions to the Commission, even if those questions are not explicitly referenced in section 1.251.¹²⁸

53. In response to the contention by Environmental, Verde Systems, and Havens that they had not engaged in abusive litigation practice because at least 50 of their exhibits were accepted into evidence, Maritime points out that this means approximately 90% of their exhibits were rejected.¹²⁹ Maritime adds that, in terms of page count, only 461 out of 17,000 pages of exhibits offered by Environmental, Verde Systems, and Havens were admitted into evidence—a yield of less than 3%.¹³⁰

54. Maritime also raises arguments related to Havens’s *pro se* status. In addition to issues discussed in its earlier filing and the *Dismissal Order*,¹³¹ Maritime argues that *pro se* status in formal hearing proceedings is not a right, but rather is available at the discretion of the Judge, based on whether the *pro se* litigant has separate and independent interests from those of the other parties in the proceeding.¹³² Maritime argues that Havens has failed to demonstrate any interests separate and independent from those of his companies that would justify *pro se* status and its accompanying latitude.¹³³ To the extent Environmental, Verde Systems, and Havens argue that the Judge should have resorted to a less extreme sanction than expulsion from the proceeding, Maritime highlights that the Judge has previously attempted such lesser measures, including directing Havens to retain legal counsel.¹³⁴

55. **Reply of Environmental, Verde Systems, and Havens to Maritime’s opposition to the supplement (October 8, 2015).** Environmental, Verde Systems, and Havens filed a joint reply to the Maritime Supplement.¹³⁵ In the Joint Reply, Havens and his companies further argue that the Judge’s ban on further motions for summary judgment did not apply to the October 27 Motion, as the prohibition was directed only at Maritime and the Enforcement Bureau.¹³⁶ They also continue to press their contention that the complained-of conduct by Havens and his companies was justified by the Enforcement Bureau’s

¹²⁵ *Id.* at 4-5.

¹²⁶ *Id.* at 5-6.

¹²⁷ *Id.* at 5.

¹²⁸ *Id.* at 11-12.

¹²⁹ *Id.* at 12.

¹³⁰ *Id.*

¹³¹ *Id.* at 14-15, citing *Black Television Workshop of Los Angeles*, 7 FCC Rcd 6868 (1992) (holding that an individual party is not allowed to simultaneously exercise the rights of self-representation and corporate representation by counsel).

¹³² Maritime Supplement at 15.

¹³³ *Id.*

¹³⁴ *Id.* at 17.

¹³⁵ Reply to Oppositions to Supplement to Interlocutory Appeals, filed October 8, 2015, by Warren Havens et al., (Joint Reply).

¹³⁶ *Id.* at 1-2.

“switching sides” during the course of the proceeding.¹³⁷ Lastly, Havens and his companies reiterate their position that Haven’s conduct was within the expectations for a *pro se* litigant and does not serve as grounds for exclusion from the hearing or referral to the Commission.¹³⁸

III. DISCUSSION

56. We uphold the Judge’s removal of Havens and his companies as parties to this proceeding. We first find that Havens’s separate appeal of the Judge’s *Dismissal Order* is procedurally defective and therefore subject to dismissal. We next find that the applicable legal standard warrants upholding the Judge’s ruling if he reasonably exercised his discretion in concluding that removal is justified by conduct that was contemptuous or otherwise disruptive. In this regard, we agree that the record supports such a conclusion here. We find three matters of particular significance: (1) the circumstances surrounding the filing of a motion for summary decision by Havens and his companies on October 27, 2014, contrary to the Judge’s instructions; (2) Havens’s assertion of attorney-client privilege to block inquiry into his legal assistance in preparing pleadings; and (3) Havens’s filing of Freedom of Information Act requests for material he was prohibited from examining by a protective order in this proceeding. We find that Havens’s misconduct in earlier Commission and judicial proceedings is relevant to the appropriateness of sanctions here. Finally, we refer to the Enforcement Bureau questions concerning Havens’s basic character qualifications. We address these matters in turn.

57. **Procedural matters.** Initially, we examine the allegations of Maritime and the Enforcement Bureau that the Havens Appeal and the Environmental and Verde Systems Appeal should be stricken as procedurally defective. The Havens Appeal states that: “[p]etitioners agree with the interlocutory appeal filed by [Environmental and Verde Systems] . . . and state the following in addition to the matters addressed in the [Environmental and Verde Systems Appeal].”¹³⁹ The Havens Appeal also indicates that it was filed on behalf of “Warren Havens (‘Havens’) *Pro Se* and for the Havens-managed entity parties on the signature page. . . .”¹⁴⁰ In both respects, the Havens Appeal violates the Judge’s rulings placing conditions on Havens’s representation that were approved by the Commission’s 2013 Procedural Order.¹⁴¹ The rulings required Havens to file joint pleadings with his companies to the extent they took identical positions or to give reasons why they could not agree, and prohibited Havens from representing his companies. The Havens Appeal violates the first condition in that Havens and Environmental and Verde Systems filed separate appeals without explaining why they could not agree on a single pleading and violates the second condition by purporting to represent the four companies not represented by counsel. It is therefore stricken.¹⁴²

58. On the other hand, we see no reason to strike the Environmental and Verde Systems Appeal. The one-page Exhibit 1, appended to the appeal, contains the text of quotations relied on by the appeal. It can fairly be described as factual material supporting the appeal, which does not count in

¹³⁷ *Id.* at 2-4.

¹³⁸ *Id.* at 5.

¹³⁹ *See* Havens Appeal at 1.

¹⁴⁰ *See id.* The listed parties are Intelligent Transportation & Monitoring Wireless LLC, Telesaurus Holdings GB LLC, V2G LLC, and Skybridge Spectrum Foundation. *See id.* at 4.

¹⁴¹ *See Procedural Order*, 28 FCC Rcd at 11598, para. 5, n.12, and at 11600, para. 11.

¹⁴² The Enforcement Bureau indicates additional respects in which the Havens Appeal is defective. *See supra* para. 45. Additionally, on April 5, 2016, Havens filed a pleading titled “Petition for Expedited Declaratory Ruling Regarding § 1.251(f)(3).” This pleading is essentially an untimely and unauthorized appeal from the Judge’s *Dismissal Order*, and therefore is dismissed. Similarly, Havens’s Letter to the Office of General Counsel on October 18, 2017, also contains untimely arguments appealing the *Dismissal Order* and is dismissed.

computing whether the appeal conforms to the applicable page limitation.¹⁴³

59. **Legal standards.** As discussed below, an administrative law judge may remove a party from a hearing and exclude that party from future participation for contemptuous conduct or for otherwise disrupting the proceeding. Such a decision may be appealed to the Commission, and we review such action to determine whether the administrative law judge abused his discretion in removing the party.

60. It is well established that an administrative law judge has authority to regulate the course of a hearing. This authority is expressly set forth in both the Administrative Procedure Act and the Commission's rules¹⁴⁴ and is "functionally comparable" to that of a trial judge's inherent authority to manage trials and maintain the decorum of the courtroom.¹⁴⁵ Indeed, just as a trial judge has inherent authority to remove a party or dismiss a suit due to a litigant's misconduct, the administrative law judge has authority to remove a party for disruptive or dilatory conduct in administrative proceedings.¹⁴⁶ In particular, Commission rule 1.243(f) authorizes the presiding judge to exclude from the hearing a party "engaging in contemptuous conduct or otherwise disrupting the proceeding."¹⁴⁷ Court and FCC precedent confirm that failure to comply with an administrative law judge's order and dilatory conduct are sufficient grounds to find contempt meriting exclusion from a proceeding.¹⁴⁸

61. In reviewing the Judge's exclusion of Havens from this proceeding, we examine whether

¹⁴³ See *Amendment of Section 73.606(b), Table of Allotments Television Broadcast Stations*, 5 FCC Rcd 6566, 6577 n.6 (1990); 47 CFR § 1.48(a).

¹⁴⁴ 5 U.S.C. § 556(c)(5) ("Subject to the published rules of the agency and within its powers, employees presiding at hearings may . . . regulate the course of the hearing."); 47 CFR § 1.243(f) (providing that an administrative law judge has the authority to "[r]egulate the course of the hearing [and] maintain decorum").

¹⁴⁵ See *Butz v. Economou*, 438 U.S. 478, 513 (1978) ("There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, *regulate the course of the hearing*, and make recommendations or decisions." (emphasis added)).

¹⁴⁶ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) ("[t]he power to punish for contempt is inherent in all courts. . . . This power reaches both conduct before the court and that beyond the court's confines. . . . A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process")

¹⁴⁷ 47 CFR § 1.243(f). Commission regulations clearly anticipate an administrative law judge's authority to permanently exclude a party from a hearing. Section 1.301 provides a right of appeal where "the presiding officer's ruling denies or terminates the right of any person to participate as a party to a hearing." 47 CFR § 1.301(a)(1). Section 1.243(f) gives Commission judges authority comparable to that of judges at other federal agencies. See *Carolyn D. Shockness*, 2010 WL 2024522 (Fed. Cir. 2010) (upholding Merit Systems Protection Board judge exclusion of attorney for "contumacious misconduct," in this case sending insulting e-mails); *Olsen v. Triple A Machine Shop, Inc.*, (Ben. Rev. Bd. 2003) (Department of Labor judge may exclude party or representative for refusal to comply with directives, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, and failure to act in good faith); *Jenli John Hsieh v. PMC-Sierra, Inc.*, 2003 WL 1440487 (Exec. Off. Immig. Rev. 2003) (Department of Justice judge may exclude parties for failure to comply with standards of conduct). Cf. *Xtreme Caged Combat v. Cage Fury Fighting Championships*, Civil Action No. 14-5159 (E.D. Penn. May 29, 2015), reported at 2015 WL 3444274 at *11 ("Appropriate sanctions for contempt may include dismissal of the complaint with prejudice.")

¹⁴⁸ *Communi-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1555 (D.C. Cir. 1988) (upholding dismissal for failure to file timely proposed findings and conclusions, reflecting a pattern of casual and dilatory conduct); *Independent Music Broadcasters, Inc.*, 68 FCC 2d 1412, 1418 (1978) (failure to respond to judge's inquiry regarding prior involvement in the matters before the administrative law judge when person was an attorney at the Commission would warrant exclusion); *Lorraine Walker Arms*, 5 FCC Rcd 7013 (1990) (finding that "willful defiance of the judge's lawful order" qualified as contemptuous conduct and warranted dismissal); see also *Community Coalition for Media Change v. FCC*, 646 F.2d 613, 616 n.3 (D.C. Cir. 1980) (noting that removal/dismissal may be warranted in cases "in which conspicuous disregard is shown for case-processing rules").

the Judge abused his discretion in determining that Havens should be removed for engaging in contemptuous or otherwise disruptive conduct. An administrative law judge's exercise of discretion is reviewed only for abuse to permit him or her the latitude required to regulate the course of administrative proceedings and carry out the Commission's business.¹⁴⁹

62. **Motion for Summary Decision.** In excluding Havens and his companies from the Maritime Proceeding, the Judge placed principal emphasis on the October 27 Motion.¹⁵⁰ The Judge found that Havens and his companies had filed this pleading "defiantly," in contravention of the Judge's order prohibiting the filing of additional motions for summary decision, and that the motion was filed in bad faith.¹⁵¹ We have examined the circumstances surrounding the filing of this pleading and agree with the Judge that these circumstances reveal the kind of contemptuous and disruptive conduct that constitutes a reasonable basis for excluding a party from a hearing proceeding.

63. Following his partial denial of the joint motion for summary decision by Maritime and the Enforcement Bureau on June 17, 2014, the Judge gave the following directive to the parties:

The parties are cautioned that the Presiding Judge will not entertain a further motion for summary decision. As three summary decision motions have been filed and considered in this proceeding and substantial issues of fact still remain to be heard, the Presiding Judge does not see how efficiency could be served by a fourth motion.¹⁵²

The Judge added: "[t]he Presiding Judge . . . may rule in advance of a motion that the proceeding is not appropriate for summary decision, and may take such other measures as are necessary to prevent any unwarranted delay."¹⁵³ While, given the circumstances, the Judge may well have had a fourth motion by Maritime primarily in mind, his language gives no indication that he would be more receptive to a motion by other parties, having decided that the proceeding was not appropriate for summary decision.

64. The October 27 Motion did not acknowledge the Judge's directive, which is consistent with the Judge's finding in the *Dismissal Order* that the October 27 Motion was filed in defiance of the directive. The motion did, however, offer a justification for its filing, which, if sincere, might arguably be seen as an attempt to rebut the inference that the filing simply ignored the Judge's instructions. The motion states: "this motion is based on new information and could not have been filed earlier, namely the direct case filed by [the Enforcement Bureau] and [Maritime]."¹⁵⁴ If Environmental, Verde Systems, and Havens had prosecuted their motion on this theory in a consistent and straightforward manner, this might

¹⁴⁹ See, e.g., *Procedural Order*, 28 FCC Rcd at 11599-600, para.10 ("[W]e would overturn the ALJ's Ruling [requiring corporations to be represented by an attorney] only if we concluded that it reflected an abuse of discretion."); *Ruth Payne Carmen*, MM Docket No. 84-816 *et al.*, Decision, 1 FCC Rcd 46 (Rev. Bd. 1986) ("Here the record establishes that the no abuse of [the judge's] broad discretion [to reopen the record to receive additional evidence].") *Wind River Communications*, MM Docket No. 83-763 *et al.*, Memorandum Opinion and Order, 96 FCC 2d 1251, 1252, para. (Rev. Bd. 1984) ("It is well established that the ALJ's interlocutory rulings in this regard [disqualifying counsel from the proceeding] will not be disturbed unless they are arbitrary, capricious, or an abuse of discretion.").

¹⁵⁰ Havens joined in the Environmental and Verde Systems October 27, 2014 Motion for Summary Decision.

¹⁵¹ See *Dismissal Order* at 2, 5, paras. 4, 13.

¹⁵² See 14M-22 at 3.

¹⁵³ See *id.* at 3, n.9; 47 CFR § 1.251(f).

¹⁵⁴ Environmental and Verde Systems Motion for Summary Decision on Issue (g) at 1. The motion also states: "[n]ow that the direct cases, including evidence, has been submitted, it is an appropriate time for this motion for summary decision." *Id.* at i. The motion cited a case involving readily distinguishable facts. There, the parties requested leave from the presiding judge to file a joint motion for summary decision and related settlement agreements. See *Telephone and Data Systems, Inc.*, 10 FCC Rcd 10518, 10520, para. 14 (I.D. 1995); *La Star Cellular Telephone Co.*, 11 FCC Rcd 1059, 1060, para. 7 (1996). Here, by contrast, the Judge expressly prohibited filing further motions for summary decision and the parties were in manifest disagreement on the relevant facts.

have shown that they were proceeding in good faith and not in defiance of the Judge's directive. The parties' actual conduct, however, was anything but consistent and straightforward. As discussed below, the parties' subsequent conduct attempting to justify the filing supports the Judge's conclusion that the motion was filed in disregard of his directive and that it was made in bad faith.¹⁵⁵ As explained below, we conclude that the Judge acted reasonably in finding that such conduct by the parties showed contempt for the Judge and disrupted the orderly litigation of the proceeding, both in making the October 27 Motion and in the parties' subsequent conduct with respect to that motion.

65. Specifically, at the prehearing conference on November 4, which was attended by Stenger, but not Havens, Stenger seemed to develop the theory stated in the October 27 Motion. He said:

I filed [the motion for summary decision] after I saw their direct case. And what I believe we can agree on is the facts. We may disagree as to what the law is, but I think we can agree on the facts.¹⁵⁶

. . . .

And what I was suggesting about the motion for summary decision, not that we can all agree on the facts, but that cross motions for summary decision should be a fairly simple matter for your honor to rule upon and to go forward with because my motion for summary decision assumes as true and correct everything that they've put in their direct case. So if they were to file a motion on those¹⁵⁷

. . . .

I would propose that Your Honor modify your order banning summary decision motions and say that you will entertain summary decision motion from any party as long as they're filed, you know, by such and such a day. . . . You know, if they wanted to file a cross, they could file a cross.¹⁵⁸

66. Later in the prehearing conference, the Judge gave the parties the opportunity to formally state whether they had agreed to proceed by an exchange of motions. Environmental, Verde Systems, and Havens subsequently responded as if Stenger had never made the foregoing representations at the November 4 prehearing conference. First came Havens's e-mail correspondence with the Judge's office, beginning the evening of the prehearing conference, in which Havens not only seemed to deny awareness of what counsel for his companies had said at the prehearing conference but insisted that he could not—or would not—learn the facts from counsel for his companies.¹⁵⁹ Then, Environmental and Verde Systems filed a submission on November 7 that was strikingly inconsistent with the position that its own counsel expressed at the November 4 prehearing conference. In this pleading, Environmental and Verde Systems argued that the Judge should not suspend the hearing dates while ruling on the motion for summary decision,¹⁶⁰ contradicting not only the Judge's clearly stated view at the November 4 prehearing

¹⁵⁵ *Dismissal Order* at 2-5, paras.4-13.

¹⁵⁶ *See* tr. at 1170.

¹⁵⁷ *See id.* at 1178.

¹⁵⁸ *See id.* at 1216.

¹⁵⁹ *See supra* para. 26. We note that at the December 11, 2014 hearing session, counsel for Environmental and Verde Systems referred to Havens as "my client." *See* tr. at 1707. As noted above (para. 3), Havens could reasonably be expected to know what counsel was doing. Havens therefore had a means of being aware of what transpired at the prehearing conference whether or not the Judge correctly denied him the right to participate by teleconference.

¹⁶⁰ *See* Environmental and Verde Systems Response Regarding the Suspension of the Hearing Schedule, filed November 6, 2014 (Response) at 2-5.

conference that he would not consider further motions without staying the hearing,¹⁶¹ but Environmental and Verde Systems's counsel's own assertion that no hearing was necessary. Environmental and Verde Systems also specifically argued, contrary to the position stated by Mr. Stenger at the November 4 prehearing conference, that the Enforcement Bureau and Maritime should not be permitted to file cross motions, stating that doing so would pointlessly duplicate their earlier joint motion and because responding to a cross motion would place an undue burden on Environmental and Verde Systems.¹⁶² These contentions are irreconcilable with Stenger's representation that "cross motions for summary decision should be a fairly simple matter for your honor to rule upon and to go forward with." These inconsistencies negate any assertion that the parties' justification for filing was sincere. It was therefore reasonable for the Judge to find that the motion was filed in bad faith and represented contemptuous and disruptive conduct, both in the making of the filing and afterwards.

67. In its more recent pleadings, Environmental, Verde Systems, and Havens have offered an alternative justification for filing the motion for summary decision, namely, that it was explicitly authorized by the Judge.¹⁶³ Environmental, Verde Systems, and Havens rely on a statement by the Judge at the October 1, 2014 prehearing conference that "[w]ell, you're free to file any motion you care to, as long as you do it in a professional manner."¹⁶⁴ Environmental, Verde Systems, and Havens argue that the Judge "thus explicitly authoriz[ed] counsel for [Environmental and Verde Systems] to file any motion counsel chose to file, including a motion for summary decision"¹⁶⁵

68. An examination of the transcript, however, suggests nothing of the kind. The Judge made the cited comment in response to the statement by Environmental and Verde Systems's counsel that "I really think that on October 28 [the date set for responding to the parties' direct case exhibits and testimony], I may have to file a motion to strike the Government's entire case."¹⁶⁶ The Judge was clearly referring to the possibility of filing a motion to strike—an entirely different motion. We find that Environmental, Verde Systems, and Havens's reliance on the Judge's remark as explicit authorization for filing the motion for summary decision is untenable and further supports the Judge's conclusion that Environmental, Verde Systems, and Havens filed the motion in bad faith and proceeded in bad faith subsequent to the filing. We find that bad faith, and the related contemptuous and disruptive conduct, sufficient, in itself, to justify the removal from this proceeding of Havens and the companies that he owns and controls, including Environmental and Verde Systems with which he jointly filed the motion for summary decision.¹⁶⁷

¹⁶¹ See tr. at 1216 ("This is a bad time to be fooling around with summary decision. And [Enforcement Bureau counsel] is right, unless I hold the horses on everything else that's going on, and I'm very reluctant to do that"), 1218 (Judge awareness of undue burden if hearing preparation continued), 1221 (same).

¹⁶² See Response at 2-3. In view of the unreasonableness of this change in position, we need not parse the issues of whether Environmental and Verde Systems falsely characterized the Enforcement Bureau's position when it indicated that the Enforcement Bureau intended to file a motion "identical" to the earlier joint motion for summary decision (*Id.*) or whether it was a misrepresentation to state that Environmental and Verde Systems, as opposed to Havens *pro se*, had responded to the Enforcement Bureau and Maritime's earlier joint motion for summary decision (*Id.* at 3).

¹⁶³ See Supplement at 14. Environmental and Verde Systems made the same argument in a petition for reconsideration filed with the Judge. See Petition Seeking Reconsideration of April 22, 2015 Order on the Basis of Mistake, filed May 22, 2015, by Environmental and Verde Systems at 3.

¹⁶⁴ Tr. at 1127.

¹⁶⁵ Supplement at 14.

¹⁶⁶ Tr. at 1127.

¹⁶⁷ In this regard, Environmental, Verde Systems, and Havens makes two subsidiary arguments, both of which are without merit. Environmental, Verde Systems, and Havens points out that Stenger stated at the November 4, 2014 admission session: "[a]t the status conference that we had a month or so ago, I said that I was going to file a motion for summary decision, and no one objected at that point." Tr. at 1170. An examination of the October 1, 2014

69. **Additional conduct.** The Judge treated this incident as one of many that are characteristic of Havens and related parties in this proceeding. We need not review the entire litany of conduct that the Judge describes in his order. The record, as reflected in the background section above, confirms that much contention has resulted from Havens's conduct. We will focus on two matters that have already required rulings by the full Commission: Havens's assertion of attorney-client privilege and his FOIA requests. By themselves, these matters amply demonstrate that the behavior displayed in connection with the motion for summary decision is not an aberration but is typical. These matters demonstrate Havens's persistent inability, or unwillingness, throughout this proceeding to work with counsel in the customary manner and comply with the reasonable norms that govern conduct of administrative proceedings. Each provides a reasonable basis for the Judge to have exercised his discretion to exclude Havens from the proceeding.

70. **Attorney-client privilege.** The first issue involves Havens's assertion of attorney-client privilege in response to the Judge's inquiry into the nature of Havens's legal representation at a time when Havens was ostensibly proceeding *pro se*.¹⁶⁸ As discussed above, the problems posed by Havens's legal representation initially came to the Commission's attention when the Judge found it necessary, with the Commission's concurrence, to place conditions on Havens's representation to prevent confusion and delay.¹⁶⁹ Rather than resolving the problem, however, Havens's response to these conditions merely led to troubling questions about whether Havens was a bona fide *pro se* litigant.¹⁷⁰ We find that the facts before the Judge raised a serious question of whether, by representing himself as a *pro se* litigant, Havens induced the Judge to give him undeserved preferential treatment—and later affirmatively claimed entitlement to such treatment—when his pleadings may have been drafted with the assistance of counsel. We further find that Havens had no justification for interfering with the Judge's legitimate inquiry into these serious questions by asserting attorney-client privilege. As explained below, and in these circumstances, Havens cannot seek the benefits that our rules provide to *pro se* litigants and then, when serious questions have been raised about his *pro se* status, assert the attorney-client privilege to both preserve the benefits of his claimed *pro se* status and inhibit the reasonable inquiry into his status. Indeed, the assertion of attorney-client privilege itself tends to raise questions about the *bona fides* of Havens's claim of *pro se* status.

71. The Judge correctly recognized that a party asserting the attorney-client privilege bears the burden of establishing (1) the existence of an attorney-client relationship, (2) the existence of communications from the client to his or her attorney, (3) that the communication is legally related, and

(Continued from previous page) _____

conference transcript indicates, however, that Stenger said he might file a motion for summary decision in the upcoming phase of the proceeding relating to Maritime's basic qualifications, not with respect to Issue (g). *See* tr. at 1101 ("if you honor lifts the stay and proceeds with the hearing on basic qualifications, we may not get to a hearing. We may have a motion for summary decision that Maritime is not qualified and that may dispose of the entire matter without any hearing at all"). Environmental, Verde Systems, and Havens also suggests that, because the Judge in a colloquy referred to his disapproval of motions for summary decision as "dictum," he meant that it was not binding. *See* Reply at 2. But the Judge used the word "dictum" in the course of advising Enforcement Bureau counsel that she need not respond to Environmental, Verde Systems, and Havens's motion for summary decision. He stated "You [Enforcement Bureau counsel] don't have to respond [to the motion for summary decision]. I just said that." Tr. at 1179. He further stated, in this context "and by the way, I gave that dictum on summary decision July 15, 2014. This was not done yesterday, about no summary decisions." Tr. at 1180. This language indicates that the Judge understood his disapproval to be binding notwithstanding his use of the word "dictum."

¹⁶⁸ *See supra* paras 9-13.

¹⁶⁹ *See supra* paras 6-8. As noted above, Havens's appeal violates these conditions, because he purported to represent his companies and because he filed a pleading separate from Environmental and Verde Systems's. *See supra* para. 57.

¹⁷⁰ *See supra* paras. 9-13.

(4) that there is an expectation of confidentiality.¹⁷¹ In addition, a party generally must assert the privilege on a question-by-question basis.¹⁷² Here, as the Judge found, Havens did not assert the privilege on a question-by-question basis. Rather, at the prehearing conference, he either relied on a blanket claim of privilege or refused to say whether he was invoking the privilege at all (claiming that he could not address the question because he was not represented by counsel at the prehearing conference).¹⁷³ Accordingly, we agree with the Judge's finding that Havens did not provide the necessary information to satisfy his burden of establishing the elements of the attorney-client privilege, and we affirm the Judge's decision to overrule Havens's assertion of the privilege.

72. Moreover, to the extent the Judge's questions concerned the factual circumstances surrounding Havens's relationships and communications with counsel, and the nature and scope of the legal services he received, we note that questions of that kind do not implicate the attorney-client privilege. As set forth in factors (2), (3), and (4) above, only the communication itself, made in confidence between the attorney and the client, is privileged; the underlying facts, as well as the factual circumstances surrounding the attorney-client relationship, are not.¹⁷⁴ Courts have held that inquiries into the general nature of the services performed by the attorney, or the subject matter or purpose of the attorney-client communications, are not protected.¹⁷⁵ Indeed, some exploration of the attorney-client relationship is necessary to determine whether there is even a factual basis for applying the attorney-client privilege.¹⁷⁶ On facts similar to the case before us, the federal district court in *Monsky v. Moraghan*¹⁷⁷ rejected objections by a *pro se* litigant that mere inquiry into whether an attorney had participated in drafting a "professionally drawn" petition for *certiorari* violated attorney-client privilege.¹⁷⁸ Similarly, we find that Havens had no reasonable basis for relying on attorney-client privilege as grounds for

¹⁷¹ 14M-3 at 1-2, citing *WWOR-TV, Inc.*, 5 FCC Rcd 6261, 6262, para. 11 (1990). The privilege also extends to communications from the attorney to the client, at least to the extent that such communications might tend to reveal confidential facts disclosed by the client. See *id.* at 6262, para. 11. Another formulation of the privilege cited by the Commission clarifies factors (3) and (4) as follows: "the communication was made for the purpose of securing a legal opinion or legal services and with the expectation of confidentiality." See *Black Television Workshop of Los Angeles, Inc.*, 7 FCC Rcd 6868, 6869, para. 3 (1992).

¹⁷² *Black Television Workshop of Los Angeles, Inc.*, 7 FCC Rcd at 6869, para. 3. See also *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("A blanket assertion of the privilege will not suffice. Rather, '[t]he proponent must conclusively prove each element of the privilege.'").

¹⁷³ See 14M-3 at 2; *supra* para. 11; tr. 1017-22, 1034-3.

¹⁷⁴ See *Scott Paper Co. v. U.S.*, 943 F. Supp. 489, 499 (E.D. Pa. 1996). See also *In re Lindsey*, 158 F.3d at 1272 (the attorney-client privilege must be strictly confined within the narrowest possible limits consistent with the logic of its principle).

¹⁷⁵ See *U.S. v. Legal Services for New York City*, 249 F.3d 1077, 1081-82 (D.C. Cir. 2001) (upholding subpoena for the identity of legal services clients and the subject matter of their representation); *Roe v. Catholic Health Initiatives Colorado*, 281 F.R.D. 632, 636 (D. Colo. 2012) (information on attorney's billing statement that shows fee amount, general nature of services performed, and case is not privileged); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 707 (S.D. N.Y. 1979) (upholding interrogatory requiring disclosure of the purposes for which party retained attorneys); *Walker v. American Ice Co.*, 254 F. Supp. 736, 738-39 (D. D.C. 1966) (admitting into evidence letter containing attorney's opinion that he could represent party as a third-party defendant as well as a plaintiff).

¹⁷⁶ See *U.S. v. Kovel*, 296 F.2d 918, 923-24 (2d Cir. 1961) (a witness claiming the attorney-client privilege may not refuse to disclose to the judge the circumstances into which the judge must inquire to rule on the claim).

¹⁷⁷ 47 F.Supp.2d 280, 286 n.4 (D. Conn. 1999), *aff'd* 216 F.3d 1072 (2d Cir. 2000) (Table).

¹⁷⁸ Further, a party may waive attorney-client privilege by effectively placing at issue otherwise confidential attorney communications, for example, by asserting ineffective assistance of counsel. *U.S. v. Pinson*, 584 F.3d 972, 977-78 (10th Cir. 2009) (claim of ineffective assistance of counsel waives attorney-client privilege). Here, Havens may be deemed to have put attorney communications at issue insofar as he denies that assistance of counsel bars him from claiming preferential treatment as a *pro se* litigant and examination of the communications is essential to resolving the claim.

interfering with the Judge's inquiry into the factual circumstances of his relationships with counsel, and that his attempts to do so were disruptive and displayed a profound disregard for the Judge's authority to manage the proceedings.

73. **Freedom of Information Act requests.** Another matter that the Judge found to be indicative of the disruptive and disrespectful nature of Havens's conduct is his continued efforts to circumvent the protective order adopted in this proceeding by filing FOIA requests for confidential information. In this regard, the Judge found that: "[t]hroughout these prehearing activities, the Presiding Judge expected that Mr. Havens would move [pursuant to the Protective Order] for review of the confidentiality designations, but that motion never arrived. Instead, Mr. Havens opted to search for a solution outside of this proceeding by serially filing requests under the Freedom of Information Act. . . ."

¹⁷⁹

74. Whether or not these requests were permissibly filed under the FOIA, which gives rights to all members of the public, the requests reflect Havens's tendency, as a party to the Maritime Proceeding, to disregard the Judge's authority to regulate discovery through the issuance of protective orders. In this regard, the protective order represents a judgment that the interest of efficiency and fairness are best served by giving Havens's counsel, but not Havens himself, free access to confidential material, while giving Havens the opportunity to challenge the confidentiality of specific documents before the Judge.

75. Most notably, we take official notice that on two occasions Havens filed FOIA requests for *all* documents designated as confidential and highly confidential under the protective order.¹⁸⁰ The Commission denied these blanket requests based on a finding that granting them would interfere with the hearing proceeding within the meaning of FOIA Exemption 7(A).¹⁸¹ In rejecting these requests, we found that such wholesale requests for documents subject to the protective order are especially disruptive and especially undermine the Judge's authority. As we explained:

The Protective Order represents a calibrated balancing, approved by the ALJ and agreed to by the parties, designed to facilitate the submission of, access to, and use of confidential information in order to permit the parties, including EB, to prepare their cases for the hearing without the distraction of having to litigate *ad hoc* objections to claims of confidentiality. Granting the FOIA requests would bring about a profound alteration of the long-established process for agency ALJs to determine the manner in which parties would have access to discovery materials in enforcement hearings. It potentially undercuts the ALJ's control of the discovery process, discourages the cooperation of the parties, and would occasion time-consuming separate litigation of the FOIA requests that would delay and disrupt the proceeding, thereby interfering with the fair and efficient resolution of the proceeding. While the hearing on Issue (g) has been completed, Issue (g) has not been resolved and grant of the FOIA request might well lead to disruptive attempts to reopen the record. Moreover, regardless of the status of this case, grant of the FOIA request would tend to chill the behavior of parties and the ALJ in future enforcement hearings, because they could not rely on the integrity of protective orders. Entertaining such

¹⁷⁹ 14M-44 at 4.

¹⁸⁰ *Id.*; see Letters from Skybridge Spectrum Foundation and Warren C. Havens to the Federal Communications Commission (Oct. 11, 2012) (FOIA Control Nos. 2013-021, 2013-022); Letter from Joel Kaufman, Associate General Counsel to Warren Havens (Dec. 5, 2012) (Kaufman Letter), *app. for rev. dismissed*, 28 FCC Rcd 13539 (2013); Letters from Warren Havens and Skybridge to FCC FOIA Office via e-mail to FOIA@fcc.gov (Sept. 11, 2014) (FOIA Control Nos. 2014-650, 2014-651); Letter from Gary Schonman, Special Counsel, Investigations & Hearing Division to Warren Havens (Jan. 30, 2015), *rev. granted in part and denied in part*, 31 FCC Rcd 10332 (2016).

¹⁸¹ See 5 U.S.C. § 552(b)(7)(A) (protecting from disclosure records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings).

FOIA requests could force parties to litigate objections to the confidential nature of discovery documents, even by non-parties, and require the wholesale reexamination of all confidential material filed in such proceedings, contrary to the authority of an ALJ to regulate the course of discovery in enforcement hearings.¹⁸²

76. **Summary.** We find that the behavior of Havens and his companies, as described above, constitutes contemptuous and disruptive conduct and that, based on this misconduct, the Judge did not abuse his discretion in excluding them from the proceeding. Indeed, the circumstances surrounding his filing of the October 27 Motion alone provide a basis for the Judge to take action against Havens and entities he owned and controlled. We disagree with Environmental, Verde Systems, and Havens's various attempts to justify this conduct. We do not deny that Havens played an important role in bringing questions about Maritime's conduct to our attention. But this does not excuse Havens and his companies from observing appropriate decorum and complying with the Judge's orders and directives in the resulting hearing proceeding.

77. In particular, we find no merit to the contention by Environmental, Verde Systems, and Havens that Havens's conduct falls within the acceptable bounds of *pro se* advocacy. The lenient treatment due a *pro se* party does not include condoning contemptuous or disruptive conduct. Moreover, despite his *pro se* status, Havens always has had counsel available to him and has, in relevant respects, participated jointly with counsel for his companies in objectionable conduct.

78. **Previous sanctions.** As the preceding discussion indicates, the record before us alone confirms that the Judge had ample grounds to exercise his discretion to exclude Havens from the hearing proceeding. We note, however, that we also observe a pattern of conduct on Havens's part in other proceedings that reinforces our conclusion that the Judge was fully justified here in exercising his discretion to impose sanctions against Havens and his companies. This is not, by any means, the first instance in which Havens has engaged in conduct that resulted in him facing or being threatened with sanctions. Rather, this is just the most recent instance in which the Commission and its staff, as well as courts, have had to consider action against Havens for abusing administrative and judicial processes. We take official notice of these actions.¹⁸³

79. *AMTS Licensing Matter.* In 2000 and 2001, staff dismissed two AMTS license applications filed by Havens because the license applications did not meet the regulatory standards in place at the time.¹⁸⁴ These denials spawned 12 years of appeals by Havens and resulted in no fewer than 15 Commission and Wireless Telecommunications Bureau (Wireless Bureau) orders, nearly half of which stemmed from a single Bureau decision dismissing a petition for reconsideration as late filed.¹⁸⁵ During these proceedings, the Commission described Haven's repeated filings as "beyond the point of abuse."¹⁸⁶ These repetitious filings ultimately led the Commission to ban Havens from making further filings in the

¹⁸² 31 FCC Rcd at 10335, para. 10. We emphasize that, while we would have applied Exemption 7(A) to such requests no matter who filed them, our further conclusions with respect the abusive nature of such requests apply only to Havens's conduct as a party to the Maritime proceeding.

¹⁸³ It is appropriate for us to take official notice of matters of public record. See *Entercom License, LLC*, 31 FCC Rcd 12196, 12207, para. 27 (2016) (materials from court records). See also *Davis v. Williams Communications, Inc.*, 258 F. Supp.2d 1348, 1352 (N.D. Ga. 2003) (court may take judicial notice of official public records); Fed. R. Evid. 201(b)(2) (court may judicially notice fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). The concept of official notice is even broader than that of judicial notice. *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3rd Cir. 1986).

¹⁸⁴ See *Warren C. Havens*, 15 FCC Rcd 22296 (Wireless Telecomm. Bur. 2000); *Warren C. Havens*, 16 FCC Rcd 2539 (Wireless Telecomm. Bur. 2001).

¹⁸⁵ For a full procedural history, see *Warren C. Havens*, 28 FCC Rcd 16261 (2013).

¹⁸⁶ *Warren C. Havens*, 28 FCC Rcd 16261, 16269-70, para. 20 (2013).

proceeding without prior approval from the Wireless Bureau.¹⁸⁷

80. *Auction 87 Proceeding.* In 2010, the Commission held an auction for certain paging band licenses. As part of that auction, two bidders were permitted to amend incomplete applications, and the Commission later allowed those bidders to participate in the auction.¹⁸⁸ Havens opposed the Commission allowing the two bidders to participate in the auction, filing a petition for review and emergency motion to stay with the U.S. Court of Appeals for the Ninth Circuit.¹⁸⁹ The court dismissed the case for lack of standing.¹⁹⁰ Seven of Havens's entities (including four that did not participate in Auction 87) then filed petitions for reconsideration of the public notice allowing the two bidders to participate and filed petitions for denial against the two bidders' long form applications. These petitions were denied by the Wireless Bureau, and the Wireless Bureau admonished Havens for misuse of process, concluding that he was attempting to use the Auction 87 proceeding to circumvent the Commission's ban on further filings in the AMTS licensing matter.¹⁹¹ The Wireless Bureau noted that "[s]uch action could be characterized as a misuse of process and takes away from limited Commission resources," warning that further filings could result in sanctions.¹⁹²

81. *MariTEL, Inc. Matter.* In 2012, Havens opposed the applications filed by MariTEL, Inc. to transfer, modify, and renew certain licenses. The Wireless Bureau denied Havens's opposition.¹⁹³ That denial resulted in multiple petitions for reconsideration, ultimately culminating in the Wireless Bureau's *Third Order on Reconsideration*. In describing the matter before it in the *Third Order on Reconsideration*, the Bureau stated, "We have before us a Petition for Reconsideration of New Facts, And Reservation of Rights filed by Warren C. Havens . . . , seeking reconsideration of a *Second Order on Reconsideration* by the Wireless Bureau's Mobility Division . . . , which dismissed Havens's Petition for Reconsideration Based on New Facts and Request under Section 1.41 . . . of the Division's *Order on Reconsideration and Order*, which denied Havens's petitions for reconsideration (and dismissed a related application for review) of a series of orders by the Division denying Havens's petitions to deny the captioned applications filed by MariTEL, Inc. . . ."¹⁹⁴ The Wireless Bureau concluded that "these repetitious and baseless petitions for reconsideration have imposed unnecessary burdens on MariTEL and Commission resources."¹⁹⁵ The Wireless Bureau further warned that "[s]hould Havens file another repetitious petition for reconsideration in this proceeding, we will pursue appropriate action."¹⁹⁶

82. *Speculative court litigation.* In 2012, a federal district court assessed Rule 11 sanctions against Telesaurus VPC, LLC, a company owned by Havens, for bringing baseless litigation against a

¹⁸⁷ *Warren C. Havens*, 27 FCC Rcd 2756, 2763, para. 9 (2012).

¹⁸⁸ *69 Bidders Qualified to Participate in Auction 87*, 25 FCC Rcd 5407 (Wireless Telecomm. Bur. 2010).

¹⁸⁹ *Petition, Skybridge Spectrum Foundation et al v. United States of America and the Federal Communications Commission*, No. 10-71808 (9th Cir. Jun. 8, 2010).

¹⁹⁰ *Order, Skybridge Spectrum Foundation et al v. United States of America and the Federal Communications Commission*, No. 10-71808 (9th Cir. Sept. 13, 2010).

¹⁹¹ *Petition for Reconsideration of Various Auction 87 Public Notices*, 27 FCC Rcd 4374, 4388-89, paras. 33-34 (Wireless Telecomm. Bur. 2012).

¹⁹² *Id.* at 4388-89, para. 34.

¹⁹³ *MariTEL, Inc.*, 27 FCC Rcd 3256 (Wireless Telecomm. Bur. 2012).

¹⁹⁴ *MariTEL, Inc.*, 30 FCC Rcd 3702 (Wireless Telecomm. Bur. 2012) (internal citations omitted).

¹⁹⁵ *Id.* at 3704, para. 4.

¹⁹⁶ *Id.*

VHF Public Coast radio operator.¹⁹⁷ The court held that “[g]roundless, speculative litigation such as that exhibited by Telesaurus brings the legal system into disrepute and must be discouraged.”¹⁹⁸ The court assessed attorney’s fees and costs of more than \$110,000 against Telesaurus.

83. *Receivership litigation.* We note that Havens’s companies are the subject of a receivership ordered by the California Superior Court of Alameda County in connection with a conflict between Havens and his business partner, Arnold Leong.¹⁹⁹ Conditions of the receivership prohibited Havens from “communicating with the FCC regarding the FCC licenses or Receivership Entities [*i.e.*, companies]” and from interfering with the receiver’s discharge of her duties.²⁰⁰ In December 2016, the court found that Havens’s conduct in that proceeding constituted contempt of court. Havens was sentenced to a \$1,000 fine and five days in jail.²⁰¹

84. *The Termination Order.* The Judge ultimately concluded, based on stipulations after Havens had been removed as a party, that the status of the issue (g) licenses was not in dispute. He found that no further inquiry into the licenses was needed and terminated the proceeding.²⁰² Havens filed separate appeals of the Judge’s *Termination Order*, both on his own and with Polaris PNT PBC (Polaris), an affiliated company that was never a party to the proceeding.²⁰³ Because we find that the Judge acted reasonably in removing Havens as a party to this proceeding, Havens has no standing to file an appeal of the Judge’s decision to terminate the proceeding.²⁰⁴ And Polaris has no standing to file an appeal because it was not a party to the proceeding. Accordingly, we dismiss Havens’s and Polaris’s appeals as unauthorized.

85. Alternatively, Havens asserts that the termination of the hearing proceeding moots the appeals of the Judge’s *Dismissal Order* and that the appeals therefore should be dismissed, and the

¹⁹⁷ *Telesaurus VPC, LLC v. Power*, 888 F. Supp.2d 963 (D. Ariz. 2012), *aff’d*, 584 Fed. Appx. 905 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 43 (2015).

¹⁹⁸ 888 F. Supp.2d at 975.

¹⁹⁹ Case No. 2002-070640. The receiver has filed a pleading indicating that she takes no position as to the merits of the appeals from the *Dismissal Order*. See Petition for Stay or Hold in Abeyance the Issuance of a Hearing Designation Order, filed March 18, 2016, by Susan L. Uecker, Receiver (Receiver Petition).

²⁰⁰ See Order, *Leong v. Havens*, Case No. 2002-070640 (Cal. Super. Alameda Dec. 14, 2016).

²⁰¹ See Order, *Leong v. Havens*, Case No. 2002-070640 (Cal. Super, Alameda Sept. 1, 2017) (partially vacating previous order and imposing new sanctions).

²⁰² Order of Dismissal, FCC 17M-35 (Sept. 28, 2017) (*Termination Order*).

²⁰³ Notice of Appeal and Memo in Support of and Related to Notice of Appeal, filed October 6, 2017, by Havens and Polaris; Appeal of Order of Dismissal, FCC 17M-35 and Underlying Decisions and Actions in EB Docket 11-71, filed October 30, 2017, by Havens; Appeal of Order of Dismissal, FCC 17M-35 and Underlying Decisions and Actions in EB Docket 11-71, filed October 27, 2017, by Polaris. See also Joint Opposition to Appeal, filed November 14, 2017, by Maritime and Choctaw Holdings, LLC (Choctaw); Enforcement Bureau’s Opposition to Havens and Polaris Appeals of Order of Dismissal, filed November 14, 2017; Reply to Maritime-Choctaw Joint Opposition to Appeal of Order of Dismissal, FCC 17M-35, filed December 13, 2017, by Havens and Polaris; Reply to Enforcement Bureau Opposition to Appeal of Order of Dismissal, FCC 17M-35, filed December 13, 2017, by Havens and Polaris; Supplement to Joint Opposition to Appeal and Motion for Leave to File Supplement to Joint Opposition to Appeal, filed December 18, 2017, by Maritime and Choctaw; Enforcement Bureau’s Surreply to Havens and Polaris Appeals of Order of Dismissal and Enforcement Bureau’s Motion to File a Surreply to Havens and Polaris Appeal of Order of Dismissal, filed December 20, 2017; Reply to Enforcement Bureau Surreply, filed January 18, 2018, by Susan Uecker, Receiver.

²⁰⁴ See 47 CFR § 1.302 (giving parties to a proceeding the right to appeal an order by the presiding Judge terminating the proceeding); see also *Entercom License, LLC*, 32 FCC Rcd 7149, 7154, para. 16 (2017) (only parties may appeal a decision of a judge).

Dismissal Order vacated.²⁰⁵ We find that the *Dismissal Order* is not moot, in light of Havens's appeal of the Judge's decision to terminate the proceeding. Because such an appeal is authorized only if Havens has party status, the *Dismissal Order* is not moot. Moreover, the character certification issue discussed below also requires us to review the *Dismissal Order* despite the termination of the proceeding. The Judge's certification of a character question to us was based on the same conduct that resulted in Havens's exclusion and reflects the Judge's judgment that the circumstances justifying Havens's exclusion from the proceeding are so egregious that a character issue is also warranted.²⁰⁶ We therefore deny Havens's request.

86. To the extent that Havens raises other interlocutory matters in letters and appeals, they all relate to Havens's representation and participation in the proceeding. Inasmuch as Havens will not participate further in the proceeding, we need not resolve these matters and dismiss them accordingly as moot. We also note that consideration of these interlocutory matters is not necessary for us to reach the conclusions herein.

87. **Certified question.** The Judge certified to the Commission the question of whether a separate proceeding should be designated to determine if Havens and his companies lack the basic qualifications to be Commission licensees.²⁰⁷ As a procedural matter, we reject the contention by Havens and his companies that the Judge lacked authority to certify this question to the Commission. The Judge based his question on his finding that the October 27 Motion was filed in bad faith and also on his finding that Havens and his companies "engaged in patterns of egregious behavior."²⁰⁸ We agree with Havens and his companies that Commission rule 1.251(f)(3) applies only to questions arising from a motion for summary decision filed in bad faith and not to a more general "pattern of egregious behavior." We find, however, that the Judge has inherent authority to certify to the Commission any questions arising in the course of a hearing proceeding that are suitable for the Commission to address.²⁰⁹ Thus, in *James A. Kay, Jr.*,²¹⁰ the Wireless Bureau filed a motion arguing that some licenses included in a revocation proceeding might not be controlled by the subject of the proceeding and should be removed from the proceeding and subjected to a separate, nonadjudicatory investigation. The presiding judge found that he lacked the authority to take the recommended actions and certified the matter to the Commission, which granted the Wireless Bureau's motion. Based on the Wireless Bureau's investigation, the Commission subsequently designated a separate hearing with respect to those stations.²¹¹

88. We find that a similar approach is appropriate here. The fact that we affirm the Judge's exclusion of Havens and his companies from participation in the Maritime Proceeding does not imply that the conduct in issue necessarily raises basic qualifications questions. Although the conduct involved may be relevant to both inquiries, the applicable legal standards are different.²¹² We therefore refer the

²⁰⁵ See Letters from Warren Havens to Office of General Counsel (Oct. 10, 2017) and (Oct. 18, 2017).

²⁰⁶ See *Dismissal Order* at 13, para. 23.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ For example, administrative law judges have explicit authority to certify to the Commission *sua sponte* any question that would be acted on by the Commission if it were raised by the parties. 47 CFR § 0.341(c).

²¹⁰ 11 FCC Rcd 5324, 5324, paras. 5-7 (1996).

²¹¹ See *Marc Sobel*, 17 FCC Rcd 1872, 1873-74, paras. 3-4 (2002).

²¹² Questions of character qualifications are governed by the Commission's character policy statements. See *Character Qualifications*, 102 FCC 2d 1179 (1986), *recon. dismissed/denied*, 1 FCC Rcd 421 (1986); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1991), *further modified*, 7 FCC Rcd 6464 (1992).

matters arising in this proceeding to a separated Enforcement Bureau team²¹³ to conduct an appropriate inquiry, in conjunction with any other matters not discussed in this order that may come to its attention and bear on the basic qualifications of Havens and his companies to be licensees.²¹⁴ If, based on that inquiry, the Enforcement Bureau team determines that there are character qualifications questions, it may recommend that Havens's authorizations and/or applications be designated for hearing.

89. *Positive Train Control.* Finally, we recognize that spectrum licensed to the Havens's companies in the AMTS band may be suited to facilitating U.S. railroads' implementation of positive train control (PTC) systems as required by Congress in the *Rail Safety Improvement Act of 2008* (RSIA).²¹⁵ The RSIA requires all trains providing passenger service and freight trains operating on lines carrying toxic and poisonous-by-inhalation hazardous materials to implement interoperable PTC systems by December 31, 2018.²¹⁶ PTC systems are designed to reduce the risk of human-error rail accidents, by "prevent[ing] train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position."²¹⁷ The National Transportation Safety Board (NTSB) has underscored the life-saving potential of PTC, finding that an operational PTC system could have prevented a tragic accident near DuPont, Washington, where an Amtrak train derailed while reportedly traveling 78 MPH entering a 30 MPH curve, killing three and injuring scores.²¹⁸

90. The Commission has recognized the vital importance of facilitating the rail industry's

²¹³ Given that the conduct issues in this investigation overlap with issues in the Maritime Proceeding, we direct that the investigation be carried out by Enforcement Bureau staff (investigatory staff) separated from the staff that participated in the preparation or presentation of the Enforcement Bureau's case in the Maritime Proceeding (trial staff). Investigatory staff must not have engaged in the preparation or presentation of the Enforcement Bureau's case in the Maritime Proceeding and must not have discussed the case with trial staff. Going forward, investigatory staff will not communicate with trial staff about the investigation or about the Maritime Proceeding except to the extent permitted by the Commission's *ex parte* rules. 47 CFR §§ 1.1200-1.1216. Trial staff will not communicate with investigatory staff or with Commission decision-makers about the investigation or the Maritime Proceeding except to the extent permitted by the *ex parte* rules.

²¹⁴ The Receiver has asked us not to issue any hearing designation order based on Havens's alleged misconduct prior to the possible disposition of certain facilities licensed to Havens-related entities. See Receiver Petition, *supra* note 199. We will defer consideration of the Receiver's request pending the further investigation by the Enforcement Bureau into Havens's basic qualifications, as explained above.

²¹⁵ See Pub. L. No. 110-432, § 104, 122 Stat. 4848, 4857 (2008), amended by the Positive Train Control Enforcement and Implementation Act of 2015, Pub. L. No. 114-73, § 1302, 129 Stat. 568, 576 (2015). See also *Maritime Communications/Land Mobile, LLC*, 29 FCC Rcd 10871, 10884, para. 32, *recon. denied*, 31 FCC Rcd 13729 (2016), *pet. for recon. pending* (MCLM Order), (finding "AMTS spectrum particularly suitable for PTC use"); *id.* at 10885, para. 33 (citing the compelling public interest in permitting the assignment of AMTS spectrum to implement a life-saving PTC system as required by Congress). We note that the Wireless Bureau has already granted a number of applications to assign spectrum licensed to Havens's companies where that spectrum is expected to be used for PTC purposes.

²¹⁶ 49 U.S.C. § 20157(a)(1). The Federal Railroad Administration may grant a railroad additional implementation time up to a 24-month extension of the December 31, 2018, deadline—under limited circumstances. See 49 U.S.C. § 20157(a)(2)(B).

²¹⁷ 49 U.S.C. § 20157(i)(5).

²¹⁸ See NTSB, Preliminary Report, Railroad; Amtrak Passenger Train 501 Derailment, Accident ID RRD18MR001 at 3 (Dec. 18, 2017), available at <https://ntsb.gov/investigations/AccidentReports/Pages/RRD18MR001-prelim.aspx>. While spectrum had been obtained to deploy PTC in that area, the NTSB reports that a PTC system had not been fully implemented. *Id.*

compliance with the RSIA on numerous occasions.²¹⁹ This includes the hearing designation order in this proceeding, in which we held that the safety of life considerations presented by PTC could warrant removing from the ambit of the *HDO* a pending assignment application for PTC use.²²⁰ Consistent with Commission precedent facilitating PTC deployment, including our previous decision in the *HDO*, we wish to address the potential impact of the action we take herein on any attempt to pursue such assignments of licenses held by Havens's companies.

91. We recognize that, given our decision to refer potential character issues to the Enforcement Bureau for investigation, an application for assignment of spectrum licensed to Havens's companies could be subject to the *Jefferson Radio* doctrine, which generally bars the assignment of a license pending the resolution of questions regarding a licensee's character qualifications.²²¹ Assuming that the *Jefferson Radio* doctrine applies or would apply at some point to this investigation, we nonetheless find that, given the safety of life purpose of statutorily mandated PTC, the public interest is best served by directing the Wireless Bureau to review and process any such spectrum assignment application to implement PTC, whether pending now or filed in the future, notwithstanding *Jefferson Radio*.²²² We extend this relief solely for applications seeking to assign spectrum for the implementation of PTC, consistent with prior Commission action.²²³

IV. ORDERING CLAUSES

92. Accordingly, IT IS ORDERED that the Motion to Strike and Opposition to Interlocutory Appeals, filed May 6, 2015, by Maritime Communications/Land Mobile, LLC, IS GRANTED in part and DENIED in part; the Interlocutory Appeal, filed April 29, 2015, by Warren Havens, IS DISMISSED as unauthorized; and the Environmental and Verde Systems Interlocutory Appeal as of Right, filed April 29, 2015, IS DENIED.

93. IT IS FURTHER ORDERED that the Petition for Reconsideration and in the Alternative Request Under § 1.41, filed November 14, 2014, IS DISMISSED as moot; the Interlocutory Appeal Under § 1.301(a), filed November 13, 2014, by Warren Havens, IS DISMISSED as moot; the Interlocutory Appeal Under § 1.301(a), filed December 29, 2014, by Warren Havens, IS DISMISSED as moot; the Motion to Dismiss Oppositions to Interlocutory Appeal Under § 1.301(a), filed January 21, 2015, by Warren Havens IS DISMISSED as moot, and the Petition for Expedited Declaratory Ruling Regarding § 1.251(f)(3), filed April 5, 2016, by Warren Havens and Skybridge Spectrum Foundation, IS DISMISSED as unauthorized.

94. IT IS FURTHER ORDERED that the letter requests submitted on October 10, 2017 and October 18, 2017 by Warren Havens ARE DISMISSED and, in the alternative, DENIED.

95. IT IS FURTHER ORDERED that and the Motion for Leave to Supplement Joint Opposition to Appeal, filed December 18, 2017, by Maritime Communications/Land Mobile, LLC and Choctaw Holdings, LLC; and the Enforcement Bureau's Motion for Leave to File a Surreply to Havens

²¹⁹ See, e.g., *Metropolitan Transportation Authority*, 31 FCC Rcd 1436, 1439, para. 7 (2016) (facilitating implementation of PTC as "an important safety measure" that can "save lives, prevent injuries, and avoid extensive property damage"); *MCLM Order*, 29 FCC Rcd at 10882-83, para. 29 (recognizing the transformative potential of PTC to save lives, prevent injuries, and avoid extensive property damage).

²²⁰ *HDO*, 26 FCC Rcd at 6523, n.7.

²²¹ *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

²²² The Bureau's review of any such application should be consistent with applicable rules and precedent. See, e.g., *HDO*, 26 FCC Rcd at 6523, n.7; *MCLM Order*, 29 FCC Rcd at 10880-85, paras. 25-33; *Maritime Communications/Land Mobile, LLC*, Order, 31 FCC Rcd 9826 (WTB 2016).

²²³ See *MCLM Order*, 29 FCC Rcd at 10880-87, paras. 25-38 (recognizing special status of applications to acquire spectrum for purposes of deploying PTC and rejecting requests for similar treatment as to applications filed by critical infrastructure industry).

and Polaris Appeals of Order of Dismissal, filed December 20, 2017 ARE GRANTED; and the Appeal of Order of Dismissal, FCC 17M-35 and Underlying Decisions and Actions in EB Docket 11-71, filed October 27, 2017, by Polaris PNT PBC and October 30, 2017, by Warren Havens ARE DISMISSED as unauthorized.

96. IT IS FURTHER ORDERED that the Enforcement Bureau IS DIRECTED to conduct an inquiry as described herein.

97. AND IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, the Wireless Telecommunications Bureau is hereby directed to review and process applications for the assignment of spectrum to implement positive train control systems as required by Congress in the *Rail Safety Improvement Act of 2008*, amended by the *Positive Train Control Enforcement and Implementation Act of 2015*, consistent with paragraphs 89-91 of this *Memorandum Opinion and Order* and the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary