

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter Of

MARITIME COMMUNICATIONS/LAND MOBILE, LLC

Participant in Auction No. 61 and Licensee of  
Various Authorizations in the Wireless Radio Services

Applicant for Modification of Various  
Authorizations in the Wireless Radio  
Services

Applicant with ENCANA OIL AND GAS (USA), INC.;  
DUQUESNE LIGHT COMPANY;  
DCP MIDSTREAM, LP;  
JACKSON COUNTY RURAL MEMBERSHIP  
ELECTRIC COOPERATIVE;  
PUGET SOUND ENERGY, INC.;  
ENBRIDGE ENERGY COMPANY, INC.;  
INTERSTATE POWER AND LIGHT COMPANY;  
WISCONSIN POWER AND LIGHT COMPANY;  
DIXIE ELECTRIC MEMBERSHIP CORP., INC.;  
ATLAS PIPELINE—MID CONTINENT, LLC;  
DENTON COUNTY ELECTRIC COOPERATIVE,  
INC., d/b/a COSERV ELECTRIC; and  
SOUTHERN CALIFORNIA REGIONAL RAIL  
AUTHORITY

EB Docket No. 11-71  
File No. EB-09-IH-1751  
FRN: 0013587779

Application File Nos.  
0004030479, 0004144435,  
0004193028, 0004193328,  
0004354053, 0004309872,  
0004310060, 0004314903,  
0004315013, 0004430505,  
0004417199, 0004419431,  
0004422320, 0004422329,  
0004507921, 0004153701,  
0004526264, 0004636537,  
and 0004604962.

To: Marlene H. Dortch, Secretary  
Attention: Chief Administrative Law Judge Richard L. Sippel

**ENL-VSL OBJECTIONS TO DIRECT CASE TESTIMONY AND EXHIBITS  
AND MOTION TO STRIKE**

Environmental LLC (“ENL”) and Verde Systems LLC (“VSL”), through their undersigned counsel, and pursuant to the scheduling Order in FCC 14M-27, hereby make their Objections to the Direct Case Testimony and Exhibits filed by the Enforcement Bureau (“Bureau”) and Maritime Communications/Land Mobile, LLC (“Maritime”) on September 16, 2014, and move to strike the testimony and documents filed by the Bureau. Mr. Havens joins in this motion (together “EVH”).

## **I. Introduction**

The Presiding Judge likely expected that the Bureau would put on a direct case consisting of witnesses independent of Maritime and Choctaw, such as Commission field office inspectors, local site owners and managers and others knowledgeable about Maritime and the industry. The Presiding Judge also likely expected that Maritime would put on a direct case and be cross-examined by the Bureau. None of this is not to occur.

Inexplicably, the Bureau decided to represent Maritime at the hearing. The Bureau is offering, as the Bureau direct case, written testimony of Maritime/Choctaw witnesses, Sandra DePriest, John Reardon, Patrick Trammel and Tim Smith, and contract counterparties of Maritime/Choctaw, namely Evergreen School District, Duquesne Power and Light and Pinnacle. (collectively, “Bureau Direct Case Testimony”). The Bureau cannot cross-examine its own witnesses. The Bureau has hamstrung itself by presenting the testimony of Maritime/Choctaw and related party witnesses as the Bureau’s witnesses. EVH objects to and moves to strike in its entirety the Bureau Direct Case Testimony for this very reason.

Also notable is what the Bureau’s direct case fails to contain, no witness from the Wireless Telecommunications Bureau (“WTB”) to testify about the WTB investigation of Maritime’s construction and operation of the stations, or lack thereof, no witness from the FCC Field Offices which taxpayers pay to maintain, and no testimony of any witness adverse to Maritime. In short, this is not going to be the hearing ordered by the Commission in the HDO and the Presiding Judge in the June 17 Order.<sup>1</sup>

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<sup>1</sup> EVH has just moved for summary decision on Issue (g). That motion shows that even if the Presiding Judge accepts all of the allegations in the Bureau/Maritime direct case as true, for purposes of summary decision, it must be concluded as a matter of law that all 16 stations are permanently discontinued and terminated. As a minor erratum, on page 22 of that motion we reference a letter to the FCC from the New Jersey Turnpike Authority with regard to

Apparently, the Bureau expects the Presiding Judge to approve a revocation hearing wherein the Bureau puts on Maritime's witnesses, the Bureau does not cross-examine Maritime's witnesses, and the Presiding Judge writes a decision on revocation based on testimony of Maritime that is not challenged by the Bureau. That does not qualify as a revocation hearing as ordered by the Commission. The Presiding Judge must strike the Bureau Direct Case Testimony and admonish the Bureau to cross-examine the Maritime witnesses as counsel to the Commission.

Maritime in its direct case incorporates by reference the Bureau Direct Case Testimony. The Maritime/Choctaw and related party testimony belongs in Maritime's direct case, not in the Bureau's case. Maritime should be presenting the testimony of the Maritime, Choctaw and related party witnesses, so that the Bureau can cross-examine them.<sup>2</sup> At this point, no one but EVH has presented their own direct case and only EVH is in compliance with the June 17 Order.

EVH also objects and moves to strike all of the documents proffered by the Bureau as Exhibits, given that the Bureau has no proper testimony to support the introduction of such exhibits.

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construction of its own statewide communications network that does not use any Maritime/Pinnacle spectrum. For ease of reference, please note that copies of the NJTA letter may be found in ULS under the referenced calls signs in the administrative tab.

<sup>2</sup> The Bureau needs to act to dispel any question of conflict as to the Bureau's behavior. If Maritime is permitted to keep the 16 Stations, it may obtain income from their sale and lease under current contracts, as least if Maritime is not disqualified as a licensee under Issue (h) and the other issues. The Commission has a major multi-million dollar claim against Maritime in the Maritime bankruptcy. In this regard, the FCC's economic interests *are aligned with* those of Maritime and Choctaw which poses a conflict to which the Bureau should be sensitive. Instead, the Bureau unabashedly chose to put in Maritime's witnesses as the Bureau's direct case.

## **II. The Bureau And Maritime Direct Cases Do Not Comply With The June 17 Order Of The Presiding Judge**

It is painfully obvious that the Bureau and Maritime direct cases are filed in blatant disregard of the Presiding Judge's Order of June 17, 2014, FCC 14M-18 ("June 17 Order"). The background to that Order is clear in the record.

The Bureau and Maritime filed a Joint Motion for Summary Decision on Issue G on December 2, 2013 ("Joint Motion"). The Bureau candidly stated in the Joint Motion that "the Bureau and Maritime have reached an agreement on the material facts related to the construction and operational status of the ...16 site-based AMTS facilities...." Joint Motion, para. 6. The Bureau asserted that the undisputed facts showed that the facilities "were timely constructed." Joint Motion, para. 8. The Bureau further asserted that the undisputed facts "demonstrate that operations at the 16 remaining site-based facilities have not been permanently abandoned." Joint Motion, para. 21.

Havens opposed the Joint Motion and demonstrated that the assertions of the Bureau and Maritime as to both construction and operation were false and unreliable.<sup>3</sup> In the June 17 Order, the Presiding Judge concluded that a hearing was not needed as to construction. However, that portion of the Order was not based on any facts stipulated to or alleged by the Bureau and Maritime. Rather, that portion of the ruling was based solely on prior decisions of the Commission concerning Watercom and Mobex.

EVH have pointed out the flaw in that reasoning. The HDO came after the Watercom and Mobex decisions. In the event that the Commission believed that its prior decisions resolved the construction issue, the Commission would not have included construction as part of Issue

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<sup>3</sup> Some of the Havens' opposition, filed in early 2014, as permitted by the Judge in FCC 14-M9, was subject to a Bureau and Maritime motion to strike, alleging it contained materials beyond what was permitted, which the Presiding Judge granted. By the same token, the Presiding Judge should strike the Bureau case because it contains materials, namely the testimony of Maritime and Choctaw witnesses that should be subject to cross-examination by the Bureau.

(g).<sup>4</sup> To date, the Presiding Judge has not reconsidered that portion of the ruling, although it should be reconsidered.

On the issue of discontinuance of operations, the Presiding Judge sided with EVH and rejected the claim of the Bureau/Maritime that there is no disputed issue of material fact as to discontinuance of operation of the 16 stations, and ordered a hearing on that issue. The Bureau Direct Case Testimony disregards this clear ruling in the June 17 Order and fails to give the Presiding Judge the hearing on discontinuance that was ordered.

The Presiding Judge ruled that fill-in stations “do not render operative the inactive facilities licensed to Maritime” and that further evidence is necessary:

Operations at the fill-in sites utilized by Pinnacle, Duquesne, Puget, and Evergreen do not render operative the inactive facilities licensed to Maritime by the Commission. Significant factual questions still need to be resolved as to whether service will resume at the licensed facilities. For that reason, the taking of further evidence at hearing is necessary.<sup>5</sup>

The Presiding Judge further explained what evidence was expected to be adduced at the hearing:

Clearly, significant factual questions remain that require proof by one or more of the following: documentation, testimony, cross-examination, or expert opinion (if available). Proposed evidentiary findings after hearing would also be required.<sup>6</sup>

The Bureau is not offering any “documentation, testimony, cross-examination, or expert opinion” to challenge Maritime and has foreclosed itself even from cross-examination of the

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<sup>4</sup> Indeed, the Commission cited to the Havens’ parties petitions throughout the HDO FCC 11-64 as the seminal cause of the HDO, including Issue (g) and those petitions show credible evidence that past FCC decisions indicating acceptance of alleged construction (which under law includes required coverage and service) are in error, and those decisions remain subject to administrative appeals. The HDO must be read to include the record evidence cited in the HDO, including information in the Havens parties’ petitions challenging MCLM and its predecessors, including Mobex, with regard to compliance with construction and operation requirements.

<sup>5</sup> June 17 Order, para. 61. The Presiding Judge was correct on this point and this is an important basis for the EVH motion for summary decision on Issue (g).

<sup>6</sup> June 17 Order, para. 62. The evidence adduced in the Bureau Direct Case Testimony, even if accepted as true, can only lead to the conclusion that all 16 stations were permanently discontinued and terminated, as shown in the motion for summary decision of EVH.

Maritime/Choctaw witnesses. It is shocking that the Bureau decided to cram down the Joint Motion for Summary Decision that the Presiding Judge denied, refusing to take the case to trial and instead adopting Maritime's case without challenge.

Even more surprising is that the Bureau filed Maritime's case as the Bureau's case on September 16, *after* the Commission rejected the Maritime/Choctaw *Second Thursday* application on September 11. The Presiding Judge must ask whether the Commission is to expect that the Bureau will represent Sandra and Donald DePriest at the Commission-ordered hearing on the basic qualification issues designated in the HDO. The Bureau fails to explain how the Bureau can put in direct testimony from Sandra DePriest, John Reardon, Patrick Trammel and Tim Smith on Issue (g), and then later prosecute a revocation hearing on Maritime's basic qualifications.

By putting forth the Maritime and Choctaw testimony as the Bureau's direct case, the Bureau is going on record that the Commission finds them to be credible witnesses, ones that the Bureau need not even cross-examine. It is painfully apparent how grossly prejudicial the Bureau's actions are with respect to the HDO and the public interest. The Bureau is adopting as the Commission's direct case the testimony of the very people the Commission ordered the Bureau to prosecute.

To hold a hearing on Issue (g) consistent with the June 17 Order, the Presiding Judge should grant this Objection and Motion to Strike and direct that the Bureau Direct Case Testimony be stricken. That testimony has been incorporated by reference in the Maritime case, and that is where it belongs. The Bureau should be directed to file competent direct case testimony and to cross-examine Maritime's witnesses.

### **III. The Bureau Direct Case Testimony Does Not Comply With The Act, The Rules And The HDO**

EVH anticipates that the Bureau's alleged excuse to put on the direct case of Maritime instead of a case for the Commission and the public interest is that the Bureau has the burden of proceeding and the burden of proof. But a purported justification that the Bureau has the burdens of proceeding and proof would misread and misapply the statute and rules.

The HDO states that the burden of proceeding with the introduction of evidence and the burden of proof is on the Bureau. HDO at ¶ 70. In saying this, the Commission certainly did not order or condone the Bureau to represent Maritime and Choctaw. The HDO follows the statutory provision on administrative sanctions in 47 U.S.C. § 312(d) which states that in license revocation and order to show cause proceedings, "the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission." The statute merely requires the Bureau to put on a *prima facie* case, at which point the licensee will respond and then be cross-examined by the Commission. Ultimately, the licensee is the one who is ordered to show cause why its licenses should not be revoked. Properly read, the HDO provides no justification for the Bureau to adopt the direct case of the licensee who is being investigated for revocation.<sup>7</sup>

The proper role for the Bureau to play is clearly spelled out in the rules that define the powers and duties of the Bureau. The Bureau is required to "[s]erve as trial staff in formal hearings conducted pursuant to 5 U.S.C. 556 regarding applications, revocation, forfeitures and other matters designated for hearing." 47 C.F.R. § 0.111(b). Thus, the Bureau is required to serve as trial staff for the Commission, not the party subject to disqualification and revocation. The Bureau serves as trial staff for the Commission and as such the Bureau inherits the

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<sup>7</sup> For example, the rules require the licensee to maintain station logs. Rule §80.409 places the burden on MCLM to maintain and produce for inspection its station logs, which are notably absent from both the Bureau and Maritime direct cases.

Commission's burden to introduce evidence to support the Commission's position, not Maritime's.<sup>8</sup>

The Bureau could have obtained witnesses from the WTB, the FCC Field Offices and elsewhere, including independent third parties with direct knowledge of Maritime's alleged construction and operation of the stations, including third-party antenna site owners and managers.

The Bureau also could have asserted that it met its burden based on the evidence it obtained from Maritime in discovery. The Bureau obtained and could have relied upon the deposition testimony, interrogatory answers and other discovery as sufficient to show that station operations were discontinued and that neither Maritime, Choctaw or the lessees/contract purchasers has any cognizable basis to assert that the operations are not permanently discontinued. The evidence obtained in discovery is sufficient to meet the Bureau's burden to put on a *prima facie* case and shift the burden of proof to Maritime to put on a direct case. And the Bureau could have presented a case component for negative inferences, since MCLM failed of keep and provide proof of construction and operations-service.<sup>9</sup>

Thus, the Bureau use of Maritime, Choctaw and related party testimony as the direct testimony of the Bureau, and ultimately therefore, the direct testimony of the Commission itself, is improper and fails to comport with the HDO, 47 U.S.C. § 312(d), and 47 C.F.R. § 0.111(b).

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<sup>8</sup> 47 U.S.C. § 312(d).

<sup>9</sup> AMTS licensees as public coast station licensees have the burden to keep their station logs including throughout period of legal claims and cases. 47 C.F.R. §80.409. No one but the AMTS licensee has the burden or the means to create and hold the station records. This rule is for purposes of FCC investigations and rules enforcement. It is apparent that Maritime has not been investigated by the Bureau or has failed to comply, because it offers no logs to show proof of its asserted construction and operation-coverage-service.

#### **IV. The Bureau Direct Case Testimony Must Be Stricken Under The Discovery Schedule In This Case**

Truly ironic is that after doggedly opposing the efforts of EVH to obtain a brief 30 day extension to allow further discovery, the Bureau violated the discovery time limit by adducing new evidence after the close of discovery in the form of testimony from Maritime, Choctaw and business associate witnesses. The Bureau must have crafted direct case testimony in cooperation with or at the behest of Maritime and Choctaw after the close of discovery. EVH was excluded from their interaction. As such, the Bureau violated the discovery orders.

During the scheduled discovery period, the Bureau served two sets of interrogatories on Maritime, Pinnacle, PSE and Duquesne, and took depositions of Donald and Sandra DePriest, Reardon and Tim Smith. But then, after the close of discovery, the Bureau created direct testimony that allows Maritime, Choctaw and their contract parties to recast and reformulate the facts, after the Bureau elicited the facts from them in interrogatories and depositions. This occurred after the close of discovery.

Certainly, Maritime was entitled to formulate its direct case testimony after the close of discovery. But that is not what happened here. The Bureau offers the testimony which implies that the Bureau obtained the testimony together with the witnesses. None of the Bureau Direct Case Testimony is from government witnesses or witnesses hostile to Maritime. All of it is evidence obtained from Maritime in the form of new testimony. When the Bureau obtains testimony from Maritime, Choctaw and their counterparties, that is discovery.

Conducting discovery after the close of discovery and without participation by EVH is prejudicial to EVH and the public interest. The HDO and the public interest require an open investigation of the serious issues raised in the HDO, including Issue (g) which is expressly incorporated into Issues (h) and (i). That is why the Commission designated this matter for a

public hearing. Instead, the Bureau obtained testimony from Maritime/Choctaw behind closed doors and after the close of discovery.

**V. The Bureau Exhibits Also Must Be Stricken**

The Bureau was required to provide competent testimony to introduce and explain the relevance of its Exhibits. It did not. The Bureau improperly offers only testimony from Maritime/Choctaw and their counter-parties that should be stricken, as shown above, leaving no testimony to introduce any exhibits. Moreover, even if that testimony is not stricken, it is obvious that the testimony provides insufficient information to introduce and explain the relevance of the Bureau exhibits.

Certainly, EVH offers exhibits without supporting testimony to be used by EVH in cross-examination. But the Bureau cannot use this rationale. The Bureau cannot cross-examine its own witnesses. Thus, the Bureau has no basis to introduce its proffered exhibits other than through direct case testimony that must be stricken as shown above.

**VI. Conclusion**

For the foregoing reasons, the Objection and Motion to Strike of ENL-VSL should be granted and the direct case testimony of the Bureau should be stricken.

Respectfully submitted,

          /s/            
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October 28, 2014

**CERTIFICATE OF SERVICE**

The undersigned, a secretary at Chadbourne & Parke, LLP, hereby certifies that she has on this 28<sup>th</sup> day of October, 2014, mailed by first class United States mail copies of the foregoing Objection to Direct Case Testimony and Motion to Strike to:

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