

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

In the Matter Of

MARITIME COMMUNICATIONS/LAND MOBILE, LLC

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

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

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

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

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

**ENL-VSL RESPONSE TO ENFORCEMENT BUREAU, MARITIME
AND PSE OBJECTIONS**

Environmental LLC (“ENL”) and Verde Systems LLC (“VSL”), through their undersigned counsel, and pursuant to the scheduling Order in FCC 14M-27, hereby respond to the Enforcement Bureau Written Objections to EVH Written Direct Testimony, EVH Additional Witnesses, and EVH Witnesses for Cross-Examination (“Bureau Witness Objections”); the Enforcement Bureau Written Objections to EVH Direct Case Exhibits (“Bureau Exhibit Objections”); the Maritime Objections to Direct Case Exhibits and Testimony (“Maritime

Objections”); and the Response of Puget Sound Energy, Inc. to ENL-VSL List of Witnesses with Explanations (“PSE Objections”). Mr. Havens joins in this response (together “EVH”).

I. Introduction

On October 26, 2014, EVH filed a motion for summary decision on Issue (g) based on the facts alleged in the Bureau/Maritime direct cases and the applicable law. EVH’s motion should be granted, the Issue (g) hearing should be dispensed with, and we should move on to the basic qualifications issues. It also is possible that the Presiding Judge will decide to grant summary decision as to some of the 16 stations and the hearing issues will be narrowed accordingly. In the event that the Presiding Judge denies the EVH summary decision motion, in whole or in part, and proceeds with a hearing on Issue (g), then evidentiary rulings on EVH exhibits should be made at the hearing. In order to have witnesses available for hearing, some decisions on witnesses will need to be made within a reasonable time before the hearing. However, the Presiding Judge should consider the motion for summary decision before deciding what witnesses are required.

Based on the direct case submitted by the Bureau, it is apparent that the Bureau has decided not to prosecute a revocation hearing against Maritime with regard to the 16 site-based stations that are the subject of Issue (g). The Bureau has decided to allow Maritime to keep those 16 stations, based on an alleged exercise of “prosecutorial discretion”. Consistent with its decision to allow Maritime to keep the 16 stations, the Bureau seeks to exclude any contradictory witnesses or evidence from EVH. The Bureau’s efforts to exclude the EVH witnesses and documents are not well-founded because the Bureau’s alleged exercise of prosecutorial discretion is not well-founded. As shown in EVH’s motion for summary decision, even the Bureau’s direct case, taken at face value, shows that the 16 authorizations are permanently discontinued and automatically cancelled. To the extent that the Bureau disputes this, then Maritime should be required to face the witnesses and evidence that EVH offers.

In fact, Maritime concedes that it discontinued operation of the stations by no later than 2009 and as long ago as 2007. This is an admission that the stations have not been operating for the past *five to seven* years, far beyond any reasonable test for discontinuance. Maritime's theory of the case is based solely on alleged fill-in operations of contract purchasers/lessees Puget Sound Energy ("PSE"), Evergreen School District ("Evergreen"), Duquesne Light Company ("Duquesne") and Pinnacle Wireless USA, Inc. ("Pinnacle"). The fill-in theory of this case simply does not hold any water. PSE, Evergreen, Duquesne and Pinnacle all testify that they never operated any of the 16 stations, so those stations have been dormant since 2007-2009. This testimony alone demolishes Maritime's fill-in theory of the case because fill-in stations can only be operated within the actual service contour of an existing station.

Moreover, PSE admits it operates geographic area licensed stations, not fill-in stations, and Evergreen and Duquesne admit they have ceased using any Maritime spectrum. So even if there was some viable legal theory of fill-in stations, Maritime still has no case as to KAE889 and WHG750 because PSE, Evergreen and Duquesne aren't operating fill-in stations, according to their sworn direct case testimony. There does not seem to be any cognizable factual or legal theory to support allowing Maritime to keep the seven authorizations on KAE889 in the Pacific Northwest and the WHG750 license in the Pittsburg, Pennsylvania. EVH has identified relevant witnesses and documents with regard to KAE889 and WHG750, but in doing so EVH reserves its position that the Bureau and Maritime have not offered any coherent theory of the case as to those eight authorizations.

With regard to the remaining eight authorizations on WRV374, Pinnacle claims to be operating fill-in stations within the alleged former contours of five of the locations. Since Pinnacle does even claim to be operating fill-in stations in relation to three of the locations, 16, 35 and 40, the Bureau and Maritime again offer no coherent theory with regard to Maritime keeping those three locations. As to the five locations (14, 15, 18, 25, and 33) that Pinnacle

claims to be relying upon for its alleged fill-in operations, Pinnacle admits that it is not operating the main stations and has no plans to operate them. Again, therefore, the so-called fill-in operations are not lawful and cannot provide a legal basis to allow Maritime to keep the main station authorizations.

Also, the Pinnacle fill-in station claims are simply not credible given that the Bureau and Maritime failed to provide even the minimal supporting evidence. Pinnacle claims it is using fill-in stations to support the New Jersey Turnpike Authority (“NJTA”) and New Jersey Sports and Exposition Authority (“NJSEA”). Yet neither the Bureau nor Maritime offer testimony from the NJTA and NJSEA to support Pinnacle’s claim. This is deeply suspicious. Even more suspicious is that when EVH suggested that witnesses be called from NJTA and NJSEA, the Bureau twice attacked EVH, once at the status conference and again in its objections. In both cases, the Bureau offered only a baseless objection, that EVH did not name witnesses from NJTA and NJSEA. EVH said that the witnesses should be designated by the agencies, a standard practice in requesting testimony from the government. The Presiding Judge must regard with skepticism Pinnacle’s claims regarding fill-in stations related to five of the WRV374 authorizations and must require testimony from NJTA and NJSEA and relevant documents to establish the facts.

II. The Bureau’s Objections Are Not Based On A Valid Exercise Of Prosecutorial Discretion

The HDO designates for hearing Issue (g), to determine whether Maritime permanently discontinued operation of the 16 stations and the licenses automatically cancelled.¹ The Bureau claims that it developed “through discovery a comprehensive record on the issue” and that it researched “the Commission’s precedent” and then exercised its “prosecutorial discretion” as to

¹ EVH omits discussion of the construction issue and reserves its right to appeal on that issue.

how to “present its case for hearing.”² The exercise of “prosecutorial discretion” resulted in a decision by the Bureau to allow Maritime to keep the 16 stations, a position the Bureau asserted in proposed stipulations and motions for summary decision and which the Bureau continues to assert in “its case for hearing”.

The Bureau objects to EVH’s proposed witnesses and documents because those witnesses and documents are inconsistent with the Bureau’s position that Maritime should be allowed to keep the 16 stations. The Bureau’s alleged exercise of prosecutorial discretion is invalid and, therefore, so are its objections to EVH’s witnesses and documents.

A. No Factual Support For Prosecutorial Discretion

The direct case testimony presented by the Bureau shows that its alleged exercise of prosecutorial discretion has no factual basis. What the Bureau presented as its case for hearing is testimony of Maritime/Choctaw witnesses (Sandra DePriest, John Reardon, Patrick Trammel and Tim Smith) and their alleged contract counterparties (Evergreen School District, Duquesne Light Company and Pinnacle Wireless USA). In doing this, the Bureau foreclosed itself from cross-examining Maritime, Choctaw and their contract counterparties. Exercising prosecutorial discretion to present the licensee’s testimony without any cross-examination by the Bureau deprives the Presiding Judge of any meaningful ability to review the Bureau’s decision to allow Maritime to keep the 16 stations.

Equally significant is what the Bureau omitted from its case. The witness list submitted by EVH shows there are numerous witnesses who have knowledge of Maritime’s operations or lack thereof, for the reasons set forth in the EVH explanations as to each witness. The Bureau

² Bureau Witness Objections at 5, note 16: “The Bureau retains prosecutorial discretion to develop through discovery a comprehensive record on the issues designated for hearing and, taking into consideration that factual record and the Commission’s precedent, to present its case for hearing.”

complains these witnesses are too numerous to be heard. That begs the question as to why the Bureau chose not call a single witness other than Maritime/Choctaw and their contract purchasers/lessees.

Significantly, the Bureau did not include witnesses that EVH identified as witnesses to be designated by NJTA and NJSEA.³ It simply does not make any sense that the Bureau included testimony from Pinnacle claiming to use Maritime spectrum to serve NJTA and NJSEA, and yet the Bureau failed to include witnesses from NJTA and NJSEA. The omission of NJTA and NJSEA witnesses sandbags the Presiding Judge into accepting unverified testimony of Pinnacle and precludes EVH from cross-examining NJTA and NJSEA as to Pinnacle's claims. This is deeply suspicious given that NJTA holds numerous 800 MHz authorizations and has told the Commission that it is constructing its own statewide communications network, as pointed out in the EVH motion for summary decision.⁴

Even if the Presiding Judge is content to rely upon and accept at face value the carefully tailored case that the Bureau filed, based entirely on Maritime/Choctaw and related party witnesses, and devoid of any independent witnesses, the Presiding Judge must conclude no factual basis exists for the Bureau to exercise "prosecutorial discretion" to allow Maritime to keep the 16 stations. Indeed, Maritime, in Objections filed simultaneously with the Bureau, concedes, once again, that Maritime discontinued operation of the 16 stations as long as *five to seven* years ago:

To the extent Mr. Calabrese discusses matters within the scope of the permanent

³ It is commonplace for a state agency to designate the person that it wishes to present, yet the Bureau again complains that EVH failed to name the witnesses.

⁴ The motion for summary decision accepts the Pinnacle allegations on their face, although it does point out some information of record at the Commission. In the event that summary decision is denied, EVH will include in its trial brief complete information regarding the NJTA, NJSEA and Pinnacle's claims.

discontinuance aspect of Issue G for the sixteen remaining incumbent stations, he says nothing that is inconsistent with Maritime's position. He states, at paragraph 4 of his testimony, that operations of the WRV374 locations "were discontinued no later than 2009 ... [and] may have been discontinued as early as 2007 due to lack of customers." This is entirely consistent with Maritime's position, and his testimony therefore contributes nothing additional of relevance to Issue G.⁵

Thus, the admitted and undisputed facts are that none of the 16 authorized stations have been operated in years, since 2009 or even 2007, far beyond any reasonable test of station discontinuance. Given the admitted facts that the 16 stations were discontinued long ago, there is nothing to support an exercise of prosecutorial discretion to let Maritime keep the 16 stations.

B. No Legal Basis For Prosecutorial Discretion

It is not credible that the Bureau is exercising prosecutorial discretion based on "the Commission's precedent." The law is clear that fill-in operations cannot be used to preserve an authorization where the main station is not operating, and, moreover, fill-in operations are not even authorized, except within the actual contours of an existing station, as shown in the EVH motion for summary decision,. The Bureau simply has no legal basis in any of the "Commission's precedent" to exercise prosecutorial discretion to allow Maritime to keep 16 permanently discontinued and automatically terminated authorizations.

PSE is not operating fill-in stations but rather geographic area license stations and Evergreen and Duquesne are not operating any stations that use Maritime spectrum. Only Pinnacle claims to be operating fill-in stations, but this claim is contradicted by Pinnacle's own admission that none of the main stations are being operated and there are no plans to resume operations at the main stations. Under those circumstances, any alleged fill-in stations do not qualify as lawful fill-in stations and, if they exist, are simply rogue operations. The Bureau

⁵ Maritime Objections at 6.

cannot base prosecutorial discretion to allow Maritime to keep authorizations based on what amount to nothing more than unlawful, rogue operations.

Apparently, the Bureau made an agreement with Maritime that if Maritime would stipulate to give up most of its stations, then Maritime would be allowed to keep 16 stations. The Bureau proposed stipulations and moved for summary decision, but the Presiding Judge consistently refused to approve allowing Maritime to keep the 16 stations without a hearing before the Presiding Judge, as decided in the June 17, 2014 Order. The Bureau ignores the June 17 Order and continues to push an agreement to allow Maritime to keep 16 stations by filing testimony from Maritime/Choctaw and their contract purchasers as the Bureau's case and declining even to cross-examine them, much less call any independent witnesses. Now the Bureau seeks to preclude any of the witnesses listed by EVH from being called and to preclude any documentary evidence that might contradict the Bureau/Maritime joint case.

The Bureau objections to EVH's witnesses and documents should be rejected. The Bureau should be directed that its purported exercise of prosecutorial discretion is disallowed and that the Presiding Judge expects the Bureau to mount an effective case against Maritime as to the discontinuance and automatic cancellation of the 16 authorizations. At a minimum, witnesses should be required from PSE, NJTA and NJSEA. The Bureau should be directed to work with EVH to select such additional witnesses as are warranted, depending upon how the Presiding Judge rules on the EVH motion for summary decision.

III. Maritime Concedes That Decisions On Admissibility Should Be Made At The Hearing

Maritime concedes that decisions on admissibility of documents should be made at the hearing:

The propriety of using such documents for cross-examination is not something that can be decided in advance and in a vacuum. It will depend on how the documents are to be

use and with what particular witness. Thus, any ruling on this should be deferred until such time as EVH actually seeks to use one or more of the documents.⁶

Although Maritime makes this statement with regard to EVH CE Exhibits 1-4, the same logic applies to all of the documents that EVH has submitted. Indeed, Maritime further states with regard to the rest of EVH's documents, "Maritime asks that the exhibits be rejected or, in the alternative, that any ruling on admissibility be deferred until trial."⁷ Maritime offers no sensible basis for rejecting documents prior to hearing, so only the option of addressing admissibility at the hearing makes sense. The purpose of the document exchange is to provide advance notice to the other parties, so they and their witnesses are not surprised at the hearing. Evidentiary rulings should be made at the hearing when a document is proffered for use.

Maritime's contention that EVH documents should be rejected in the event that EVH seeks to use the documents as part of its direct case mischaracterizes the HDO.⁸ EVH is not under any obligation to put on any direct case. This is a revocation hearing in which Maritime has been ordered by the full Commission to show cause why its licenses should not be revoked. EVH may put on a rebuttal case, to the extent that Maritime continues to dissemble. EVH is free to cite to any document that is part of the Commission's records, or the official records in other proceedings such as the Maritime bankruptcy or the New Jersey antitrust case. The Presiding Judge cannot accept Maritime's invitation to "reject" documents that are a matter of record at the Commission or the U.S. federal court system. Furthermore, where a document is shown to a witness on cross-examination and identified sufficiently for it to be introduced into evidence, it

⁶ Maritime Objections at 2.

⁷ Maritime Objections at 7.

⁸ Maritime Objections at 2.

should be, as Maritime concedes when it admits that evidentiary rulings should take place at the hearing.

With regard to PSE's objections to being called to testify, EVH has shown that summary decision is appropriate as to all seven locations on KAE889 and there is no basis for a hearing. However, if the Presiding Judge denies or does not rule on summary decision, then it is difficult to understand how the Bureau and Maritime can expect the Presiding Judge to allow Maritime to keep the KAE889 stations without hearing from PSE. The testimony from the Evergreen School District is that it stopped using any Maritime spectrum. PSE appears to be the only relevant witness, so it would appear that PSE would have to testify, in the event that summary decision has not been granted.

IV. Conclusion

For the foregoing reasons, the Presiding Judge should reject the Bureau's purported exercise of prosecutorial discretion to allow Maritime to keep the 16 authorizations and the objections based thereon, as well as the Maritime and PSE objections. Only after ruling on the EVH motion for summary decision and defining the scope of the hearing, should decisions on witnesses and documents be made, but pending such a decision, it is extremely difficult to understand why, at a bare minimum, PSE, NJTA and NJSEA should not have to appear and testify.

Respectfully submitted,

 /s/
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October 31, 2014

CERTIFICATE OF SERVICE

The undersigned, an attorney at Chadbourne & Parke, LLP, hereby certifies that he has on this 31st day of October, 2014, caused to be 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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