

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re	)	
	)	
<b>MARITIME COMMUNICATIONS/LAND MOBILE, LLC</b>	)	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,
Applicant with <b>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.;</b>	)	0004144435, 0004193028,
<b>INTERSTATE POWER AND LIGHT COMPANY; WISCONSIN POWER AND LIGHT COMPANY; DIXIE ELECTRIC MEMBERSHIP CORPORATION, INC.; ATLAS PIPELINE – MID CONTINENT, LLC; DENTON COUNTY ELECTRIC COOPERATIVE, INC., DBA COSERV ELECTRIC; AND SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY</b>	)	0004193328, 0004354053, 0004309872, 0004310060, 0004314903, 0004315013, 0004430505, 0004417199, 0004419431, 0004422320, 0004422329, 0004507921, 0004153701, 0004526264, 0004636537 & 0004604962

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

**MARITIME’S TRIAL BRIEF ON  
REMAINING ISSUE G MATTERS**

Maritime Communications/Land Mobile, LLC (“Maritime:”), by its attorney, hereby submits its trial brief in the above-captioned matter.

The hearing currently scheduled to commence on December 9, 2014, is limited to the remaining unresolved aspects of Issue G. As framed in the hearing designation order, Issue G is “[t]o determine whether Maritime constructed or operated any of its stations at variance with sections 1.955(a) and 80.49(a) of the Commission's rules.” *Maritime Communications/Land*

*Mobile*, LLC, 26 FCC Rcd 6520, 6548 ¶ 62(g) (2011). There are two distinct aspects of Issue G:<sup>1</sup> (a) whether the incumbent, site-based AMTS stations were initially timely constructed,<sup>2</sup> and (b) whether operation of any of the incumbent, site-based AMTS stations has been permanently discontinued.<sup>3</sup>

Issue G issue is now entirely moot as to all but sixteen of the facilities originally included in the hearing designation order. *Memorandum Opinion and Order* (FCC 14M-18; rel. June 17, 2014), *Order* (FCC 14M-31; rel. Oct. 9, 2014). With regard to these 16 incumbent, site-based authorizations,<sup>4</sup> the Presiding Judge has granted summary decision in Maritime's favor on the timely initial construction aspect of Issue G. *Memorandum Opinion and Order* (FCC 14M-18; rel. June 17, 2014). Accordingly, the issue of timely construction has been resolved and this trial brief and the scheduled December 9, 2014, hearing are limited to the permanent discontinuance aspect of Issue G as to the remaining 16 incumbent, site-based AMTS authorizations.

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<sup>1</sup> *Id.* at ¶ 61 (the designated issue asks “whether the licenses for any of Maritime's site-based AMTS stations have canceled automatically for lack of construction or permanent discontinuance of operation”).

<sup>2</sup> Section 80.49(a)(3) of the Rules provides: “For site-based AMTS coast station licensees, when a new license has been issued or additional operating frequencies have been authorized, if the station or frequencies authorized have not been placed in operation within two years from the date of the grant, the authorization becomes invalid and must be returned to the Commission for cancellation.” 47 C.F.R. § 80.49(a)(3).

<sup>3</sup> Section 1.955(a)(3) of the Rules provides” “Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued. The Commission authorization or the individual service rules govern the definition of permanent discontinuance for purposes of this section. A licensee who discontinues operations shall notify the Commission of the discontinuance of operations by submitting FCC Form 601 or 605 requesting license cancellation.” 47 C.F.R. § 1.955(a)(3).

<sup>4</sup> The remaining stations are WHG750-Freq. Block B, KAE889-Loc 3, KAE889-Loc 4, KAE889-Loc 13, KAE889-20, KAE889-Loc 30, KAE889-Loc 34, KAE889-Loc 48, WRV374-Loc 14, WRV374-Loc 15, WRV374-Loc 16, WRV374-Loc 18, WRV374-Loc 25, WRV374-Loc 33, WRV374-35, and WRV374-Loc 40. *Id.*

Set forth below are the items prescribed by the Presiding Judge for trial briefs and communicated to the parties by the November 4, 2014, email message from the Presiding Judge's clerk.

**A. Concise Statement of What Maritime Intends to Prove**

The evidence will show that operation of the sixteen stations has not been permanently discontinued; that Maritime constructed and operated the facilities; that demand for end users of traditional AMTS services migrated to alternative technologies for marine communications; that Maritime offered land mobile services but was unable to attract a sufficient customer base from cellular and other mobile alternative; that these factors led to operation of some of the facilities to be temporarily suspended; that Maritime never intended to permanently discontinue operation of any of these facilities but always intended to and made considerable effort to resume operations; that Maritime made continuous efforts to repurpose the spectrum and reestablish operations; that Maritime leased spectrum to third party entities that established operations on the spectrum; and that any discontinuance of operations was temporary, not permanent.

**B. Brief Summary of Testimony Supporting Maritime's Position**

The proffer set forth in the preceding section is demonstrated by the witness testimony and documentary evidence tendered by the Enforcement Bureau and admitted into evidence by the Presiding Judge at the November 4, 2014 admissions session.

**C. Points and Authorities**

1. Temporary discontinuance of operations does not trigger automatic termination of an AMTS site-based authorization.

Section 1.955(a)(3) of the Commission's Rules states: "Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued." 47 C.F.R. § 1,955(a)(3) (emphasis added). An authorization thus automatically terminates pursuant

to this rule in the event of *permanent* discontinuance. Temporary discontinuance does not trigger automatic license termination.

2. The Commission has not defined permanent discontinuance for purposes of ATMS licenses.

Section 1.955(a)(3) of the Commission's Rules further states:

The Commission authorization or the individual service rules govern the definition of permanent discontinuance for purposes of this section.

47 C.F.R. § 1.955(a)(3). Neither the AMTS authorizations here at issue nor any service rule defines permanent discontinuance of AMTS stations for purposes of Section 1.955(a)(3). There are such rules for other radio services,<sup>5</sup> but there is no provision governing Maritime Services, including AMTS. See *Mobex Network Services, LLC*, 18 FCC Rcd 12309, 12311 ¶ 8 (WTB 2003) (“Although some Commission-licensed services require a certain loading level as a condition of continued licensing, AMTS is not one of them.”).<sup>6</sup>

3. Due process considerations prohibit retroactive application of an ad hoc definition of permanent discontinuance.

The Commission has proposed to adopt an objective definition for of permanent discontinuance for AMTS and other services. *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, WT Docket No. 10-112, *Notice of Proposed Rulemaking and Order*, 25 FCC Rcd 6996

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<sup>5</sup> For example, in the Private Land Mobile Radio Services, discontinuance is considered permanent after one year of non-operation. 47 C.F.R. § 90.157(a). Similar, but not identical, provisions govern Fixed Microwave Services. 47 C.F.R. §§ 101.65. & 101.305. In the Public Mobile Radio Services, by contrast, discontinuance is deemed permanent if service has not been provided to subscribers for 90 days, unless the licensee notifies the Commission of temporary discontinuance. 47 C.F.R. § 22.317. Part 80 of the Commission's Rules, governing the Maritime Services (including AMTS) has no such provision.

<sup>6</sup> See, e.g., 47 C.F.R. § 90.155(c) (requiring service to at least one mobile unit for a Part 90 system to be deemed “in operation.”)

(2010). The Commission has expressly recognized the harshness of terminating authorizations under Rule 1.955(c)(3) in the absence of a clear definition: “Because an authorization will ‘automatically terminate’ ... it is imperative that our rules provide a clear and consistent definition of permanent discontinuance of operations; they do not.” 25 FCC Rcd at 7017. Thus, “it would be inappropriate to, retroactively and without notice, apply to Part 80 stations the definition of permanent discontinuance set forth in other rule parts.” *Northeast Utilities Service Co.*, 24 FCC Rcd 3310, 3314 (WTB 2009). The Commission must therefore “evaluate claims of permanent discontinuance on a case-by-case basis.” *Id.*

Such ad hoc adjudication, however, does not entirely eliminate the danger of the unlawful retroactive imposition of a severe penalty, namely, license termination. A licensee is legally entitled to prior notice of any definition or standard that is to be the basis for terminating an authorization. In *Trinity Broadcasting*, the D.C. Circuit reversed the Commission’s decision to deny a television license renewal application on the grounds that the applicant did not have adequate notice as to how the Commission was interpreting its minority preference regulations.

The court explained that:

Because “[d]ue process requires that parties receive fair notice before being deprived of property,” we have repeatedly held that “[i]n the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.”

*Trinity Broadcasting*, 211 F.3d at 628 (alterations in original) (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (“*GE*”). Thus, the court ruled that the Commission may deprive a regulated entity of a license only if:

... “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform. . . .”

*Id.* at 628 (quoting *GE*, 53 F.3d at 1329).

Based on these same fundamental principles, the U.S. Supreme Court, in *Fox Television Stations, Inc. v. FCC*, 132 S. Ct. 2307 (2012), invalidated a forfeiture imposed on broadcast stations due to a lack of prior notice. The Court opined:

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou v. Jacksonville*, 405 U. S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939) (alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v. Williams*, 553 U. S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650.

132 S. Ct. at 2317.

The Court clarified that these principles are not limited to free speech infringements:

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. City of Rockford*, 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

*Id.* Thus, the Court held that the Commission could not change the rules of the game, and then apply the revised rules to conduct that occurred prior to the change. If a penalty or other serious consequence is to flow, then the penalized party has a Constitutional right to know the requirements and standards in advance.

The Fox Television opinion has obvious and inescapable implications for the instant matter. The Commission has no objective standard for defining permanent discontinuance of an AMTS station. But if a license is to be terminated for permanent discontinuance, the licensee must first be given fair notice of what will trigger termination. The Commission has expressly acknowledged both the lack of any clear standard, as well as its paramount importance, precisely because of the severity of the consequence involved.

In sum, there is no Commission Rule that would have allowed Maritime to determine with “ascertainable certainty” how long an AMTS station could remain out of service before its license would be held to have terminated. Further, consistent with the requirements of due process cited above, the Commission may not now develop a definition of permanent discontinuance and apply it retroactively and without notice to Maritime and deprive it of its AMTS licenses.

4. In the absence of a pre-established objective, the question of permanently discontinuance must be determined based on Maritime’s subjective intent.

Absent adequate prior notice of an objective definition, permanent discontinuation of an authorized facility can reasonably be determined only by the licensee’s subjective intent.

Directly on point is *Birt v. Surface Transportation Board*, 90 F.3d 580 (D.C. Cir. 1996). Birt desired the court to determine that the Union Pacific Railroad had abandoned a section of track and that rights to the land should revert to Birt. The court held for the railroad, declaring that a determination as to whether there is an "abandonment" should involve a more searching and functional inquiry about the actual intent of the parties to the transaction than bare formalities. As stated by the Eighth Circuit Court of Appeals, abandonment is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line.... It is the "intent" of the railroad--as evidenced by a spectrum of facts varying as appropriate from

case to case--that should be the pivotal issue, *id.* at 585, citing *Black v. ICC*, 762 F.2d 106, 113 & n.15, 246 U.S. App. D.C. 12 (D.C. Cir. 1985).

5. Operations pursuant to spectrum leases constitute operation of the underlying authorized facilities for purposes of Rule 1.955(c)(3).

In lieu of providing a communications service to end user mobile units by means of radio facilities, an AMTS licensee may lease the use of some or all of its authorized spectrum within some or all of its authorized service area to a third party. *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, WT Docket No. 00-230, *Policy Statement*, 15 FCC Rcd 24178 (2000); *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003); *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004). At the end of the lease term, or if the spectrum lease terminates or ends for any reason, the rights to the spectrum and geographic area under lease revert to the lessor/licensee.

An incumbent licensee is authorized to establish one or more “fill-in transmitters” within the footprint of the transmitter specified in the authorization. Additional Commission authorization is not required provided that the predicted interference contours of fill-in transmitters do not encompass any land area beyond the composite interference contour of the licensed AMTS system. 47 C.F.R. § 80.385(b)(1); see *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, 15 FCC Rcd 22585, 22593 (2000); *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685, 6705 (2002). Lessees’ operation of fill-in sites are thus authorized and, Maritime submits, constitute continued operation of the underlying licensed facility.

Both the Enforcement Bureau and the Havens interests, however, have pointed to Commission statements “that whether a station is in operation is determined with respect to the licensed facility; operation of fill-in sites does not render operative an inactive licensed transmitter.” *Northeast Utilities Service Co.*, 24 FCC Rcd 3310, 3315 n.5 (WTB MSD 2009); *Mobex Network Services, LLC*, 25 FCC Rcd 3390, 3395 n.48 (2010). But this is a misapplication of precedent. In both *Northeast Utilities* and *Mobex*, the ruling was based on a determination that operations previously licensed locations had been **permanently** discontinued. In *Mobex*, the Commission first held that the authorization for the licensed site had automatically terminated due to “permanent discontinuance of operation,” 25 FCC Rcd at 3395, and only then observed that the operation of a fill-in site did not “save” the authorized site. *Id.* at n.48. Similarly, the ruling in *Northeast Utilities* was premised on the fact that the licensed site had been permanently abandoned due to its destruction. 24 FCC Rcd at 3311. But an *authorized* facility does indeed validate a fill-in authorization, and under FCC regulation, a facility that is only *temporarily* discontinued remains validly authorized. Accordingly, neither *Mobex* nor *Northeast Utilities* justifies a determination that a temporarily discontinued station location may not provide underlying authorization for fill-in transmitters.

A distinction must be made between fill-in sites established by the AMTS licensee for its own operations under the license, versus fill-in sites established by third party users pursuant to a spectrum lease under the Commission’s Secondary Market Policies. In the latter case, the licensee leases spectrum capacity to a third party as an alternative to providing service itself directly to end user subscribers. In most cases, the service requirements of the spectrum lessee are such that it establishes one or more fill-in sites within the footprint of the licensee’s authorized location. Moreover, during the term of the spectrum lease, the AMTS licensee typically cannot operate from its licensed transmitter location, lest it cause interference to its spectrum lessee.

On either of two theories, therefore, the leased Maritime stations cannot be considered to have automatically cancelled. First, the Commission has clearly made provision for leasing spectrum capacity as an alternative to serving end users directly, so the provision of the lease is itself an “operation” and a provision of “service” pursuant to the license. Second, and even if that were not true, by its very nature the cessation of operations from the licensed transmitter site is temporary and not permanent. In leasing the spectrum rather than assigning the authorization, the licensee preserves the right to resume operations at the licensed site at the end of the lease term.

Respectfully submitted,



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Dated: November 25, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of November, 2014, I caused copies of the foregoing pleading to be served, by U.S. Postal Service, First Class postage prepaid, on the following:

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