ACCEPTED/FILED

NOV 25 2014

Federal Communications Commission
Office of the Secretary

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

In re	)	
	)	
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 CORPORATION, INC.; ATLAS PIPELINE – MID CONTINENT, LLC; DENTON COUNTY ELECTRIC COOPERATIVE, INC., DBA COSERV ELECTRIC; AND SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY**	)	

DOCKET FILE COPY ORIGINAL

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

ENFORCEMENT BUREAU'S TRIAL BRIEF

No. of Copies rec'd 0+9
List ABCDE

TABLE OF CONTENTS

I. Procedural Background And Summary 1

II. Legal Standard For Permanent Discontinuance Of Part 80 AMTS Licenses 2

III. The Bureau's Direct Case 5

A. Summary Of The Bureau's Direct Written Testimony 5

B. Summary Of The Bureau's Evidentiary Case 6

WHG750 6

WRV374 (Locations 35 and 40) 11

WRV374 (Locations 14, 15, 16, 18, 25, and 33) 12

KAE889 (Locations 4, 20, 30, 34, and 48) 14

KAE889 (Locations 3 and 13) 15

IV. The Bureau's Direct Case Demonstrates That Operations At 14 Of The Remaining Site-Based Facilities Have Not Permanently Discontinued 15

WHG750 16

WRV374 (Locations 35 and 40) 16

WRV374 (Locations 14, 15, 16, 18, 25, and 33) and KAE889 (Locations 4, 20, 30, 34, and 48) 17

V. The Bureau's Direct Case Demonstrates That Operations At KAE889 (Locations 3 and 13) Have Permanently Discontinued 18

Conclusion 19

I. Procedural Background And Summary

1. This case arises from the Commission's release of an Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (HDO).[1] Issue (g) of the HDO placed upon the Enforcement Bureau (Bureau) the burden of proof to demonstrate: (a) whether 169 site-based Automated Maritime Telecommunications System (AMTS) facilities licensed to Maritime Communications/Land Mobile, LLC (Maritime) were constructed within two years of their grant, as required by Section 80.49(a)(3) of the Commission's rules; and (b) whether operations of any of these site-based facilities had been *permanently* discontinued pursuant to Section 1.955(a) of the Commission's rules.[2] As discussed below, the record in this case demonstrates by a preponderance of the evidence that Maritime took concrete steps to ensure that the discontinuance of operations at 14 of the 16 site-based facilities at issue in the hearing was not permanent.

2. By way of background, in December 2013, after considering the evidentiary record that the Bureau developed on Issue (g) through an extensive review of thousands of pages of documents and responses to multiple sets of interrogatories served on Maritime and its lessees, depositions of Maritime's principals and employees, and a review of the record developed before the U.S. Bankruptcy Court for the Northern District of Mississippi (Case No. 11-13463), the Bureau moved for a summary decision that 16 site-based facilities licensed to Maritime had been timely constructed and had not been permanently discontinued.[3]

---

[1] *See Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, 26 FCC Rcd 6520 (2011) (HDO).

[2] *See* HDO at ¶ 62(g).

[3] *See* Joint Motion of Enforcement Bureau and Maritime for Summary Decision On Issue G, filed Dec. 2, 2013.

3. In June 2014, the Presiding Judge granted summary decision on the timely construction aspect of Issue (g) as to these 16 site-based facilities,[4] but denied summary decision on the permanent discontinuance aspect.[5] The Presiding Judge found that "[s]ignificant factual questions still need to be resolved as to whether service will resume at the licensed facilities [and] [f]or that reason, the taking of further evidence at hearing is necessary."[6] The Presiding Judge later adopted a joint stipulation that the Bureau had reached with Maritime that operations at 153 of the 169 site-based facilities had been permanently discontinued.[7]

4. Thus, 16 site-based AMTS facilities remain at issue for the hearing that commences on December 9, 2014: WHG750, KAE889-3 (Livingston Peak), KAE889-4 (Rainier Hill), KAE889-13 (Portland), KAE889-20 (Mount Constitution), KAE889-30 (Gold Mountain), KAE889-34 (Capital Peak), KAE889-48 (Tiger Mountain), WRV374-14 (Selden), WRV374-15 (Verona), WRV374-16 (Allentown), WRV374-18 (Valhalla), WRV374-25 (Perrinville), WRV374-33 (One World Trade Center), WRV374-35 (Rehobeth), and WRV374-40 (Hamden).

II. Legal Standard For Permanent Discontinuance Of Part 80 AMTS Licenses

5. Pursuant to Section 1.955(a)(3) of the Commission's rules, "[a]uthorizations automatically terminate, without specific Commission action, if service is permanently discontinued. The Commission authorization or the individual service rules govern the

---

[4] *See Memorandum Opinion and Order*, FCC 14M-18 (ALJ, rel. Jun. 17, 2014) (6/17/14 *Memorandum Opinion and Order*) at 18, ¶ 50.

[5] *See, e.g., id.* at 21-22, ¶¶ 61 and 62.

[6] *Id.* at 22, ¶ 61. *See also id.* at 20, ¶ 57 (recognizing that there remain substantial questions of material fact "regarding efforts to resume operations at 14 of the 16 facilities").

[7] *See Order*, FCC 14M-31 (ALJ, rel. Oct. 9, 2014). Given the Presiding Judge's adoption of the legal conclusion that operations at the 153 site-based facilities had been permanently discontinued, it is no longer necessary to consider the question of their timely construction.

definition of permanent discontinuance for purposes of this section."[8] Although neither the Commission's authorizations nor the Commission's individual service rules provide a definition of permanent discontinuance for the Part 80 AMTS licenses at issue here, AMTS precedent provides guidance for what constitutes permanent discontinuance.[9]

6. In *Northeast Utilities Service Co.*,[10] the Wireless Bureau concluded that permanent discontinuance of Part 80 AMTS licenses should be evaluated on a *case-by-case* basis.[11] In that case, the licensee suspended operations at the licensed location – the World Trade Center in New York City – when it was destroyed by the September 11, 2001 terrorist attack. Although operations at the licensed location were discontinued, the Wireless Bureau concluded that the licensee's construction and operation of fill-in sites and its due diligence to secure a new space to operate demonstrated that the discontinuance was not permanent.[12] In reaching that conclusion, the Wireless Bureau credited evidence of communications beginning in 2005, four years after the destruction of the World Trade Center, between the licensee and the entity administering the Freedom Tower antenna concerning the licensee's request to operate on the new tower.[13] That is, the evidence showed that the licensee was making reasonable efforts to resume operations at the site.

---

[8] 47 C.F.R. § 1.955(a)(3).

[9] *See, e.g.*, *Memorandum Opinion and Order*, FCC 13M-16 (ALJ, rel. Aug. 14, 2013) (8/14/13 *Memorandum Opinion and Order*) at 11, ¶ 27.

[10] *In the Matter of Applications of Northeast Utilities Service Co.*, Order, 24 FCC Rcd 3310 (WTB 2009) (*Northeast Utilities*).

[11] *Id.* at 3314, ¶ 10.

[12] *See id.*

[13] *See id.*; *id.* at 3316 n.19 and n.40.

7. In the 2010 *Mobex Network Services, LLC* case,[14] the Commission again addressed the question of permanent discontinuance of AMTS operations, considering factors such as the presence of equipment and the provision of electricity to the licensed location. Specifically, in finding that operations were permanently discontinued, the Commission concluded that evidence showing that a licensee had removed equipment from the licensed location in August 2003, nearly seven years earlier, and thus had not received electric power supply at that location after that date "is sufficient to demonstrate permanent discontinuance of operation."[15] Taken together, *Mobex* and *Northeast Utilities* show the Commission's willingness to consider "a range of evidence" in determining whether an AMTS licensee intended to permanently abandon operations of the licensed spectrum.[16]

8. Consistent with the Commission's AMTS precedent, the Bureau is prepared to present evidence at the hearing regarding: whether operations at the 16 licensed sites have been discontinued, and if so, when; the steps Maritime (or any other entity) has taken to resume operations at any of these locations; whether Maritime (or any other entity) is currently providing service within the coverage parameters of the spectrum licensed to Maritime at these locations, and if so, how that spectrum is being used; and whether there is equipment at these locations that is capable of operating and providing service.

9. This evidence will demonstrate that Maritime did not intend to permanently

---

[14] *In the Matter of Mobex Network Services, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 3390 (2010) (*Mobex*).

[15] *Id.* at 3395, ¶ 10.

[16] *See* 8/14/13 *Memorandum Opinion and Order* at 11, ¶ 27. *See also Buchbinder* Letter, 2014 WL 5138916 (PSHSB Oct. 14, 2014) (recognizing that the use of the licensed spectrum for public safety communications is a factor in considering permanent discontinuance of Part 90 wireless licenses).

abandon the licensed spectrum and has instead taken concrete steps to ensure that it is being used or will be used at the following 14 site-based locations: WHG750, WRV374 (locations 14, 15, 16, 18, 25, 33, 35 and 40), and KAE889 (locations 4, 20, 33, 34, and 48).

III. The Bureau's Direct Case

A. Summary Of The Bureau's Direct Written Testimony

10. Evidence that the Presiding Judge has already admitted in this case[17] – namely the written direct testimony of Sandra DePriest, the president and director of Maritime,[18] and two former Maritime managers, John Reardon and Tim Smith – demonstrates ongoing efforts by Maritime (and its lessees) to operate its AMTS spectrum at 14 of the 16 stations at issue. In addition, the written direct testimony of representatives of Maritime's lessees – Larry Allen, a director at Pinnacle Wireless USA, Inc. (Pinnacle); Lee Pillar, a Senior Communications Engineer at Duquesne Light Company (Duquesne); and William Thackeray, a Manager of Accounting and Purchasing for Evergreen School District (Evergreen) – addresses the operational status of 9 of the 16 site-based stations. Lastly, the written direct testimony of Patrick Trammell, the Chairman and Chief Executive Officer of Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (collectively, Choctaw),[19] explains [redacted].

[17] *See Order on Evidentiary Rulings*, FCC 14M-34 (ALJ, rel. Nov. 14, 2014).

[18] The Bureau recognizes that there are outstanding Issues in the HDO that relate to whether Sandra DePriest is the sole director of Maritime. *See, e.g.*, HDO at ¶¶ 62(a) and (b). The Bureau does not waive its right, after a thorough investigation of the remaining Issues in the HDO, to challenge Mrs. DePriest's identification as the sole director.

[19] Choctaw is the entity which, pursuant to the Plan of Reorganization approved by the United States District Court for the Northern District of Mississippi (Case No. 11-13463), will assume Maritime's obligations under the AMTS authorizations.

B. Summary Of The Bureau's Evidentiary Case

11. At the hearing, the Bureau intends to demonstrate that Maritime acquired authorizations for the 16 site-based facilities at issue through an asset purchase agreement executed between Mobex Network Services (MNS) and Maritime, effective as of December 31, 2005.[20] John Reardon, a former manager at Maritime, and previously the president and chief executive officer (CEO) of MNS' parent company, Mobex Communications, Inc. (Mobex), executed the asset purchase agreement on behalf of MNS.[21] Sandra DePriest executed the asset purchase agreement on behalf of Maritime.[22]

WHG750

12. When Maritime acquired site-based facility WHG750 in December 2005, it was being operated as part of the Watercom System, providing communications services to barges and other vessels on the Mississippi and Ohio Rivers and the Great Lakes.[23] The demand at that time in the towboat industry for a wireless terrestrial service was low.[24] Instead, the towboat industry had turned to cellular providers such as Sprint and Verizon and to commercial satellite systems such as Globalstar.[25] As a result of these market forces, Maritime discontinued providing service to end user customers via the Watercom stations, including via station

---

[20] Maritime's acquisition of these licenses is not in dispute. *See* Written Direct Testimony of John Reardon (Reardon), admitted as EB Exhibit No. 1A, at ¶ 4; Written Direct Testimony of Sandra DePriest (DePriest), admitted as EB Exhibit No. 1D, at ¶ 4. *See also* EB Exhibit No. 72.

[21] *See* Reardon at ¶ 4. *See also* EB Exhibit No. 72.

[22] *See* DePriest at ¶ 4. *See also* EB Exhibit No. 72.

[23] *See* Written Direct Testimony of Robert Timothy Smith (Smith), admitted as EB Exhibit No. 1C, at ¶ 3. *See also* Reardon at ¶ 6.

[24] *See* Reardon at ¶ 6.

[25] *See id.*

WHG750, as of December 31, 2007.[26]

13. Before it ceased providing service, Maritime realized that it had to re-purpose its AMTS spectrum.[27] In 2006, Maritime pursued the possibility of using the spectrum for tracking cargo ship containers and for digital billboards.[28] Maritime discovered, however, that it could not compete against companies like Sprint in this market.[29] In 2007, Maritime hired a third-party consultant to investigate using Maritime spectrum with the Automatic Identification System (AIS), which is a Coast Guard public safety system. Maritime also partnered with a company that owns AIS Class B patents, with the goal of launching Maritime's spectrum for the enhanced AIS maritime industry.[30] Maritime discovered, however, that there was no market for this solution on the AMTS frequencies because the Maritime spectrum was not allocated internationally for AIS.[31] In March 2008, Maritime decided to sell or lease the spectrum to companies that would use it for their own internal communication systems, including smart grid, Positive Train Control (PTC), SCADA/telemetry, two way radio, and similar forms of internal communications.[32]

14. In September 2008, Maritime hired a third-party broker, Spectrum Bridge, and engaged the services of the National Rural Telecommunications Cooperative (NRTC) to market its spectrum.[33] The NRTC has a number of members who are rural electric cooperatives, such as

---

[26] *See* Smith at ¶ 3.
[27] *See, e.g.*, Reardon at ¶ 6.
[28] *See* Reardon at ¶ 7.
[29] *See id.*
[30] *See id.*
[31] *See id.*
[32] *See id.* at ¶ 9.
[33] *See id.* at ¶ 10.

Dixie Electric, Jackson County Electric, Denton County Electric, to whom they successfully marketed Maritime spectrum.[34] Maritime also worked with Alan Polivka, a representative of the railroad industry and government's testbed in Pueblo, Colorado, on rail-related technologies such as PTC.[35] Mr. Polivka referred potential customers, such as Southern California Regional Rail Authority (Metrolink), who were interested in using Maritime spectrum for PTC.[36]

15. As the result of these marketing efforts, Maritime successfully marketed spectrum to Duquesne Light Company (Duquesne). Effective February 18, 2010, Duquesne entered into an Asset Purchase Agreement with Maritime [redacted].[37] On April 21, 2010, Duquesne and Maritime jointly filed a complete Application for Assignment of Authorization WHG750 to Duquesne.[38] Duquesne leased the spectrum from Maritime while waiting for the Commission to act on the assignment application.[39] That lease remains in effect.

16. Duquesne is an investor-owned electric utility serving approximately 584,000 residents, businesses, government institutions, and hospitals throughout Allegheny and Beaver Counties in southwestern Pennsylvania, including the city of Pittsburgh.[40] Duquesne's business mission is to deliver safe and reliable electric power service to its customers through an extensive network of 45,000 miles of overhead power lines, 250,000 distribution poles, and

---

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See, e.g., id.* at ¶ 12; Smith at ¶ 9; DePriest at ¶ 7. *See also* Written Direct Testimony of Lee Pillar (Pillar), admitted as EB Exhibit No. 1E, at ¶ 4; EB Exhibit No. 38.

[38] *See* Pillar at ¶ 4.

[39] *See id.*

[40] *See* Pillar at ¶ 2.

103,000 transformers.[41] These operations rely upon a radio communications system that allows voice communications between and amongst Duquesne's fixed and mobile storm recovery units and other utilities, municipalities, police and fire departments, and first responders; internal data communications; and supervisory control and data acquisition (SCADA).[42] Duquesne uses its radio spectrum to facilitate communications that promote public safety during storm and disaster recovery efforts, including communications between utility crews and between those crews and its storm recovery and communications centers and data communications and communications with local governments, first responders, and other utility crews involved in the recovery efforts.[43]

17. Pennsylvania House Bill 2009, commonly known as Act 129 of 2008, required all electric distribution companies having more than 10,000 customers to submit to the Pennsylvania Public Utility Commission (PAPUC) for approval a smart meter procurements and installation plan, including a full schedule for deployment and a statement of the total cost for implementation.[44] Duquesne investigated smart meter spectrum options in the 900 MHz licensed and unlicensed bands, as well as Wi-Max and other alternatives.[45] No solution proved as resilient – or as having as good a range – across the Duquesne service area as spectrum in or near the 220 MHz band.[46] In addition, equipment was readily available, proven and affordable in this

[41] *See id.*
[42] *See id.*
[43] *See id.*
[44] *See id.* at ¶ 3.
[45] *See id.*
[46] *See id.*

band.[47] Duquesne concluded that the 217 MHz and 219 MHz bands, in which WHG750 operated, offered the best smart meter capabilities for the company.[48]

18. Duquesne constructed multiple facilities within the coverage area of call sign WHG750, which began operating as early as May 2010.[49] Specifically, Duquesne constructed and placed into operation the following towers on the following dates: Dravosburg Tower 5/13/2010; Hopewell Tower 6/22/2010; Mt. Washington Tower 5/25/2010; North Tower 5/14/2010; Plum Tower 5/10/2010; Wilmerding Tower 5/18/2010; Shippingport Tower 7/30/2010; Valley Tower 5/3/2010; Clinton Tower 5/28/2010; and Raccoon Tower 6/15/2010.[50] As of September 2012, Duquesne was still operating these facilities in the 217-219 MHz band except for the Mt. Washington, Clinton, and Valley sites.[51] In response to this hearing proceeding, and the uncertainty it caused Duquesne's operations, Duquesne replaced its 217-219 MHz antennas at the Mt. Washington, Clinton, and Valley sites in February 2012 with 900 MHz antennas which Duquesne operates pursuant to other operating authority.[52]

19. Due to the critical infrastructure needs and the requirements of the PAPUC, Duquesne later decided that it could not risk operating on call sign WHG750 at any of its sites until this proceeding is resolved and the risk of losing access to the spectrum is removed. As a result, Duquesne *temporarily* turned off its towers operating within the 217-219 MHz coverage

[47] *See id.*
[48] *See id.*
[49] *See id.* at ¶ 5.
[50] *See id.*
[51] *See id.* at ¶ 6.
[52] *See id.*

of call sign WHG750.[53] Duquesne is leasing other spectrum from another company to fill in its coverage requirements within the coverage parameters of call sign WHG750. All of the equipment necessary to operate call sign WHG750 remains in place and capable of operation.[54]

20. The 220 MHz band provided by call sign WHG750 provides the best smart meter capabilities for Duquesne in terms of range, coverage over the unique terrain of southwestern Pennsylvania, and the cost and availability of equipment.[55] As soon as the regulatory uncertainty regarding call sign WHG750 is resolved, Duquesne intends to resume operations at WHG750.[56] In addition, [redacted].[58]

WRV374 (Locations 35 and 40)

21. Pursuant to a management agreement between MNS and Motorola, Motorola built for MNS a number of Passport format systems offering land mobile radio service.[59] At the time Maritime acquired site-based facilities WRV374 (locations 35 and 40), MNS was operating PassPort systems in the Chicago, New York/New Jersey, Philadelphia, and

[53] *See id.* at ¶ 7.
[54] *See id.*
[55] *See id.* at ¶¶ 3, 8.
[56] *See id.* at ¶ 8.
[57] *See* Written Direct Testimony of Patrick Trammell (Trammell), admitted as EB Exhibit No. 1B, at ¶ 5.
[58] *See id.*
[59] *See* Reardon at ¶ 15.

Baltimore/Washington, D.C. markets.[60] Maritime considered expanding the already existing PassPort systems to include call signs WRV374-35 (Rehobeth) and WRV374-40 (Hamden).[61] The demand for both traditional AMTS and the PassPort services had dwindled, however, so Maritime instead actively marketed these locations through the use of multiple third-party consultants and brokers.[62] In particular, Maritime marketed WRV374-35 (Rehobeth) and WRV374-40 (Hamden) to AMTRAK, the MetroNorth Rail Road, and the Massachusetts Bay Transportation Authority (MBTA) for use with PTC.[63] [redacted].[64] [redacted].[65] In the meantime, at each of these locations equipment is in place and transmitting signals; the equipment can provide service as soon as Maritime is able to lease or assign these locations.[66]

WRV374 (Locations 14, 15, 16, 18, 25, and 33)

22. Until late 2007, site-based facilities WRV374 (locations 14, 15, 16, 18, 25, and 3) were operating at the licensed locations as part of the PassPort system.[67] Pursuant to spectrum

---

[60] *See id. See also* Smith at ¶ 5; DePriest at ¶ 10.

[61] *See* Reardon at ¶ 15.

[62] *See id.*

[63] *See id.*

[64] *See* Trammell at ¶ 3.

[65] *See id.*

[66] *See* Reardon at ¶ 15; DePriest at ¶ 10. *See also* EB Exhibit Nos. 49 and 50.

[67] *See* Smith at ¶ 8.

lease agreements between MNS and Pinnacle, and then Maritime and Pinnacle, [redacted].[68] Each of these networks operates within the combined footprint of call sign WRV374, locations 14, 15, 18, 25, and 33.[69]

23. Pinnacle is not operating its networks for the NJTA and the NJSEA (and has not operated at any time) from the locations listed on the WRV374 license.[70] Instead, Pinnacle constructed its networks using fill-in locations within the combined footprint of WRV374, locations 14, 15, 18, 25, and 33 because that strategy provided better coverage, more efficient spectrum utilization and reuse, and a more robust service to users than if Pinnacle had operated from the licensed locations.[71] With regard to site-based facility WRV374 (location 16), Pinnacle requested that Maritime not operate from this licensed location because its operation would interfere with the efficient operations of Pinnacle's networks.[72]

24. Pinnacle's networks serve critical public safety interests, and a loss of this spectrum could jeopardize the NJSEA's ability to perform medical, security, crowd control, and maintenance tasks at the Meadowlands Sports and Entertainment Complex and could endanger

---

[68] *See* Reardon at ¶ 14. *See also* Written Direct Testimony of Larry Allen (Allen), admitted as EB Exhibit No. 1G, at ¶ 2; DePriest at ¶ 10; EB Exhibit Nos. 51-53.

[69] *See* Allen at ¶ 2.

[70] *See id.*

[71] *See id.* at ¶ 3.

[72] *See, e.g.*, EB Exhibit No. 84 at 2-3.

the NJTA's ability to coordinate road closures, snow removal, driver assistance, and other activities on the New Jersey Turnpike.[73]

25. Although Pinnacle has not taken any steps to resume operations at the locations listed on the WRV374 license, and has no specific plan to do so,[74] Choctaw [redacted].[75] [redacted].[76]

KAE889 (Locations 4, 20, 30, 34, and 48)

26. As a result of Maritime's efforts to market its AMTS spectrum, as described above, Maritime successfully marketed incumbent spectrum to Puget Sound Energy (PSE). Effective May 2010, Maritime leased KAE889-4 (Rainier Hill), KAE880-20 (Mount Constitution), KAE889-30 (Gold Mountain), KAE889-34 (Capital Peak), and KAE889-48 (Tiger Mountain) to PSE, effective May 20, 2010.[77] PSE has constructed a private mobile radio (PMR) network system that operates within, or has signal contours that overlap with, the AMTS spectrum it leases from Maritime.[78] Using that system, together with AMTS spectrum PSE

[73] *See id.* at ¶¶ 4-7.
[74] *See id.* at ¶ 3.
[75] *See* Trammell at ¶ 3.
[76] *See id.*
[77] *See* Reardon at ¶ 13; DePriest at ¶ 9. *See also* EB Exhibit No. 60.
[78] *See* EB Exhibit No. 62 at 6.

leases from Mr. Havens' companies (Environmental, LLC and Skybridge Spectrum Foundation), PSE provides "PMR service to approximately 2,000 vehicular and portable radio units used by PSE's employees and contractors for critical communications related to the construction, operation and maintenance of PSE's electric and gas utility operations."[79] As of August 2010, there was equipment installed at KAE889 (Locations 4, 20, 30, 34 and 48) that was operating.[80]

KAE889 (Locations 3 and 13)

27. As the result of Maritime's efforts to market its AMTS spectrum, Maritime entered into an agreement with Evergreen School District (ESD), effective October 30, 2008, whereby Maritime agreed to lease certain of its spectrum to ESD.[81] Between October 20, 2008 and September 2014, ESD used or operated the Maritime spectrum in connection with a 2-site 3-Channel Motorola/Trident Passport radio system that was used to coordinate student transportation and safety, as well as ESD emergency communications with all schools and key personnel.[82] As of September 7, 2014, however, ESD ceased all operations in the 220 MHz band covered by the Maritime spectrum.[83]

IV. The Bureau's Direct Case Demonstrates That Operations At 14 Of The Remaining Site-Based Facilities Have Not Permanently Discontinued

28. The record in this proceeding demonstrates by a preponderance of the evidence that Maritime did not intend to permanently abandon the use of the licensed spectrum and has instead taken concrete steps to ensure that the licensed spectrum is being used or will be used at

[79] *Id.*; *see also* EB Exhibit No. 65 at 6; EB Exhibit No. 66 at 5-6.

[80] *See* EB Exhibit No. 62 at 7-8, 10; *see also* EB Exhibit No. 65 at 3-4.

[81] *See* Thackeray at ¶ 3. *See also* EB Exhibit No. 47 at ¶ 3.

[82] *See* Thackeray at ¶¶ 5-6. *See also* EB Exhibit No. 47 at ¶¶ 2, 6.

[83] *See* Thackeray at ¶ 7. *See also* DePriest at ¶ 9.

the following 14 site-based locations: WHG750, WRV374 (locations 14, 15, 16, 18, 25, 33, 35 and 40), and KAE889 (locations 4, 20, 33, 34, and 48).

WHG750

29. This station was operated, first by Maritime as part of the Watercom System acquired from MNS and Mobex, and then by Duquesne, pursuant to a spectrum lease agreement with Maritime. In addition, Maritime "exercised due diligence in resuming operations"[84] at the site by first working to repurpose its AMTS spectrum and then by actively marketing it, successfully, to third-party lessees such as Duquesne. During the limited time when WHG750 has not operated, it has remained capable of operation, with equipment located on-site and utilities connected. Although Duquesne has presently suspended use of this location, it has invested considerable resources in building and maintaining this equipment and has every intention of resuming operations after the uncertainty of this hearing proceeding is resolved. In contrast, there is no evidence in the record demonstrating that Maritime (or Duquesne) intended to abandon use of this spectrum.

WRV374 (Locations 35 and 40)

30. Although Maritime has not operated these stations since acquiring them in late 2005, this failure to operate was not the result of a Maritime business decision.[85] Rather, the demand for use of these stations as part of an existing PassPort system dwindled shortly after Maritime acquired the stations. Since that time, Maritime has actively marketed these stations, and at various points in time, was in negotiations with AMTRAK, the MetroNorth Rail Road,

[84] 8/14/13 *Memorandum Opinion and Order* at 11, ¶ 27. *See also* 6/17/14 *Memorandum Opinion and Order* at 19, ¶ 53 and 22, ¶ 62.

[85] *Cf.* 6/17/14 *Memorandum Opinion and Order* at 21, ¶ 60.

and the Massachusetts Bay Transportation Authority (MBTA) to operate these stations for use with PTC. [redacted]. As with WHG750, there is no evidence in the record demonstrating that Maritime intended to permanently discontinue operations at these locations.

WRV374 (Locations 14, 15, 16, 18, 25, and 33) and KAE889 (Locations 4, 20, 33, 34, and 48)

31. The Commission has an interest in ensuring that the spectrum it licenses is being used and not simply warehoused.[86] Although the individual licensed locations of WRV374 (locations 14, 15, 18, 25, and 33) and KAE889 (locations 4, 20, 33, 34, and 48) are not currently being operated, the unrebutted evidence in the record shows that third-party lessees Pinnacle and PSE are using the licensed spectrum within the coverage area of these licensed locations to provide service that promotes public safety.[87] In fact, in the case of WRV374 (locations 14, 15, 18, 25, and 33), Pinnacle has used spectrum licensed to Maritime since 2006 to provide service along the Garden State Parkway and New Jersey Turnpike and at the Meadowlands Complex [redacted].[88] Similarly, PSE constructed a private

[86] *See, e.g.*, *Pacific Gas & Electric Co.*, Order, 26 FCC Rcd 3465, 3467 (WTB 2011) ("The purpose of the construction and permanent discontinuance rules is [to] ensure use of licensed spectrum, and prevent licensees from warehousing spectrum ...."); *Northstar Technology, LLC*, Memorandum Opinion and Order, 24 FCC Rcd 13476, 13479 (WTB 2009) ("We agree with the Applicants that a purpose of section 1.955(a)(3) is to ensure use of licensed spectrum and to prevent its warehousing by a licensee."); *Northstar Technology, LLC*, Order on Reconsideration, 19 FCC Rcd 3015, 3022 (WTB 2004) (recognizing that the Commission's performance requirements are intended "to ensure speedy delivery of service to the public, and to prevent stockpiling or warehousing of spectrum by licensees").

[87] *See, e.g.*, *Buchbinder* Letter, 2014 WL 5138916 (PSHSB Oct. 14, 2014) (granting extension to construct Part 90 stations, in part, because the spectrum will be used to enhance public safety communications).

[88] As discussed above, although Pinnacle is not operating within the coverage area of WRV374 (location 16), Maritime suspended operation of that licensed location to avoid interference with Pinnacle's networks. *See, supra,* ¶

mobile radio (PMR) network system using the AMTS spectrum licensed to Maritime to provide service to approximately 2,000 vehicular and portable radio units used by PSE's employees and contractors for critical communications related to the construction, operation and maintenance of PSE's electric and gas utility operations. Although operation of fill-in sites – whether by Maritime or, as in the case here, by its lessees – cannot alone render operative Maritime's inactive licensed facilities,[89] the Presiding Judge should consider as one of the case-specific factors against permanent discontinuance the undisputed fact that Maritime's lessees are actively using the licensed spectrum at fill-in sites. The spectrum is not simply being warehoused for future use.

V. The Bureau's Direct Case Demonstrates That Operations At KAE889 (Locations 3 and 13) Have Permanently Discontinued

32. As discussed, above, Maritime entered into a spectrum lease agreement for KAE889 (Locations 3 and 13) with Evergreen School District (ESD) that has been in effect since October 30, 2008. As of September 7, 2014, however, ESD ceased operations of the Maritime spectrum. Neither Maritime nor any other party has provided evidence of concrete steps that it has taken (or intends to take) to resume operations at KAE889 (Locations 3 and 39). Accordingly, the record shows that operations at these stations have permanently discontinued.

---

23. No evidence in the record disputes that such interference would occur if Maritime, or another entity, resumed operations of WRV374 (location 16).

[89] *See Mobex*, 25 FCC Rcd at 3397 n.48; *Northeast Utilities*, 24 FCC Rcd at 3316 n.39. It is the Bureau's position that, under the facts of this case, the operation of fill-in sites that operate within the coverage parameters of the spectrum licensed to Maritime and whose interference contour is fully encompassed by the composite interference contour of the licensed transmitter is a factor to be considered in determining permanent discontinuance. *See, e.g.*, *Northeast Utilities*, 24 FCC Rcd at 3311, ¶ 2 and n.9.

Conclusion

33. For the foregoing reasons, the Bureau respectfully requests that the Presiding Judge find that operations at WHG750, WRV374 (locations 14, 15, 16, 18, 25, 33, 35 and 40), and KAE889 (locations 4, 20, 33, 34, and 48) have not been permanently discontinued, and that operations at KAE889 (Locations 3 and 13) have been permanently discontinued.

Respectfully submitted,

Travis LeBlanc
Chief, Enforcement Bureau

Pamela S. Kane
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

Michael Engel
Special Counsel
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street SW, Room 4-C366
Washington, D.C. 20554
(202) 418-7330

November 25, 2014

CERTIFICATE OF SERVICE

Rana Shuler, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 25th day of November, 2014, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S TRIAL BRIEF" to:

The Honorable Richard L. Sippel
Chief Adminstrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554 (by hand, courtesy copy)

Jeffrey L. Sheldon
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
Counsel for Puget Sound Energy, Inc.

Jack Richards
Albert J. Catalano
Wesley Wright
Keller & Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Counsel for Atlas Pipeline – Mid Continent LLC; Enbridge Energy Co., Inc.; EnCana Oil and Gas (USA), Inc.; and Jackson County Rural Membership Electric Cooperative, Dixie Electric Membership Corp.

Charles A. Zdebski
Gerit F. Hull
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for Duquesne Light Co.

Matthew J. Plache, Esq.
Law Office of Matthew J. Plache
5425 Wisconsin Avenue
Suite 600, PMB 643
Chevy Chase, MD 20815
Counsel for Pinnacle Wireless Corp.

Robert J. Keller
Law Offices of Robert J. Keller, P.C.
P.O. Box 33428
Washington, D.C. 20033
Counsel for Maritime Communications/Land Mobile LLC

Robert G. Kirk
Wilkinson Barker Knauer, LLP
2300 N Street, NW Suite 700
Washington, DC 20037
Counsel for Choctaw Telecommunications, LLC and Choctaw Holdings, LLC

Warren Havens
2509 Stuart Street
Berkeley, CA 94705

James Stenger
Chadbourne & Parke, LLP
1200 New Hampshire Avenue, NW
Washington, D.C. 20036
Counsel for Environmental LLC and Verde Systems LLC

Rana Shuler