Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter Of

MARITIME COMMUNICATIONS/LAND MOBILE, LLC	EB Docket No. 11-71
Participant in Auction No. 61 and Licensee of Various Authorizations in the Wireless Radio Services	File No. EB-09-IH-1751 FRN: 0013587779
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	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 MOTION FOR RECONSIDERATION

Environmental LLC ("ENL") and Verde Systems LLC ("VSL"), through their undersigned counsel, hereby request that the Presiding Judge reconsider the decision to postpone the pending ENL-VSL Motion for Summary Decision and grant EVH summary decision now that the Maritime and the Enforcement Bureau ("Bureau) Trial Briefs are on file. Mr. Havens joins in this motion (together "EVH").

The Trial Briefs of Maritime and the Bureau offer no authority to support the notion that Maritime could discontinue operation of all 16 stations for five to seven years, as admitted and undisputed in this case, yet somehow retain the authorizations based upon an "intention." Both Briefs are misdirected to Maritime's alleged intention with regard to *the spectrum*. The HDO requires Maritime and the Bureau to address *the stations*, not *the spectrum*. Accordingly, EHV requests that the Presiding Judge reconsider the decision to delay action on the pending EVH motion for summary decision.

I. Maritime Shows No Basis For A Hearing

Maritime admits all 16 stations have been off the air for five to seven years. Nevertheless, Maritime claims that it can be off the air indefinitely subject only to an analysis of "the licensee's subjective intent".[1] Even if the Presiding Judge determines that this case turns on Maritime's "subjective intent", that *subjective intent must relate to the stations, not the spectrum*. Maritime admits that the HDO issue is, "*whether operation of any of the incumbent, site-based AMTS stations has been permanently discontinued*."[2] Maritime claims that it did not permanently abandon the spectrum, that it has leased some of it, that it has contracts to sell some of it and that it is trying to sell or lease more of it. All of that is completely irrelevant to Issue (g) which requires a determination as to abandonment of the stations, not the spectrum.

Maritime's repeated claims as to its efforts to sell the spectrum directly contradict any claim that Maritime is ever going to resume operation of any of the stations. Maritime does not allege that any of the buyers or lessees will ever operate any of the stations. The buyers/lessees simply want to use the spectrum to operate what they call "fill-in stations." What this really

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[1] Maritime Trial Brief at 7.

[2] Maritime Trial Brief at 2 (emphasis added).

means is they want to use the spectrum as if they were leasing or buying geographic area spectrum from Maritime. But that is contrary to the geographic licensing regime in which site-based spectrum is forfeited to the geographic area licensee where the site-based station is turned off. Maritime's Brief offers no legal authority that Maritime can retain indefinitely and market the spectrum of turned-off site-based stations.

Because the Maritime brief addresses intention only as to spectrum and not stations, it is not responsive to the HDO and EVH is entitled to summary decision on Issue (g).

II. The Bureau Shows No Basis For A Hearing

Like Maritime, the Bureau also claims that this case turns on Maritime's subjective intent with regard to the spectrum, not the stations.[3] The Bureau states, "Maritime did not intend to permanently abandon *the licensed spectrum*…."[4] **This is not responsive to the HDO**. Of course Maritime did not abandon the spectrum. Maritime is intentionally, willfully and repeatedly engaging in spectrum warehousing, contrary to the Commission's rules and policies. If intent to warehouse spectrum was a good thing, the Commission would not have repeatedly criticized and done everything possible to prevent spectrum warehousing. The issue in the HDO is whether Maritime abandoned *the site-based stations*. As to each of the 16 stations, the Bureau Brief fails to offer any authority that would support a hearing or any delay in ruling on the EVH motion for summary decision.

WHG750 Maritime discontinued operation of WHG750 "as of December 31, 2007" according to the Bureau.[5] Maritime did not enter into an agreement to sell/lease spectrum to

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[3] Bureau Trial Brief at para. 9.

[4] *Id.* (emphasis added).

[5] Bureau Trial Brief at para. 12.

Duquesne until "February 18, 2010."[6] Admittedly, then, WHG750 was off the air for over two years while Maritime was attempting to sell/lease the spectrum. Regardless of what the Bureau claims that Duquesne did or would do with the spectrum, the undisputed facts are that WHG750 was off the air and the spectrum was completely unused, even for so-called "fill-in stations", for over two years before Maritime made any deal with Duquesne.

Taking a site-based station off the air for over two years while the spectrum is marketed cannot be countenanced under any reasonable reading of the Commission's geographic area licensing rules and policies. Under geographic licensing, where a licensee reduces its service contour, it cannot re-inflate the contour later to reclaim its former contour. Nor can it relocate its contour.[7] The Bureau offers no authority for the proposition that WHG750, a legacy site-based station, admittedly turned off for over two years, with no actual service contours, could be sold to Duquesne. This is spectrum warehousing, contrary to the HDO which focuses on abandonment of the stations, not the spectrum, and therefore the Presiding Judge should grant the EVH motion for summary decision as to WHG750.

WRV374 (Locations 35 and 40) According to the Bureau, "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."[8] The assertion that the stations are "transmitting signals" is directly contradicted by the statement that Maritime "can provide service as soon as Maritime is able to lease or assign these locations." But this is not a factual dispute that requires a hearing because Maritime admits it discontinued providing service at all

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[6] Bureau Trial Brief at para. 15.

[7] Second Memorandum Opinion and Order and Fifth Report and Order, 17 FCC Rcd 6685 (2002) ("Fifth Report and Order"), paras. 23-26 and 34.

[8] Bureau Trial Brief at para. 21.

16 locations in 2007 or 2009, including these two locations. Unlike some of the other 16 stations, there is no claim that there are any "fill-in stations" being operated within the former service contours of these two stations.

The Bureau assertion that Maritime hopes to sell or lease the spectrum to railroads for PTC is not responsive to the HDO.[9] The Bureau does not, and cannot assert that the railroads will use the site-based stations for PTC, because PTC uses small transmitters along the track. Again, the Bureau misdirects the Presiding Judge to contentions about the sale of spectrum, whereas the HDO asks whether Maritime abandoned the stations. Because the Bureau offers no authority for the proposition that Maritime can convert site-based licenses into geographic area licenses that can be used for PTC, EVH is entitled to summary decision as to these two locations.

WRV374 (Locations 14, 15, 16, 18, 25, and 33) The Bureau Brief admits that these stations have been off the air since "late 2007."[10] The Bureau further admits that, "Pinnacle is not operating its networks…(and has not operated at any time) from the locations on the WRV374 license."[11] The Bureau previously claimed that the stations were off the air because they would interfere with Pinnacle's so-called fill-in stations. Now the Bureau admits that only one of the five locations, number 16, would cause interference.[12] So even if the bizarre interference theory were accepted, the Bureau now admits the excuse could only apply to one of the five stations. And, again, the Bureau fails to offer any authority for its interference excuse theory.

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[9] *Id*.

[10] Bureau Trial Brief at para. 22.

[11] Bureau Trial Brief at para. 22.

[12] Bureau Trial Brief at para. 23.

Improperly, the Bureau repeats the argument that the WRV374 spectrum is being for public safety. The Presiding Judge rejected this argument in a section of the June 17, 2014 ruling titled, ***Public Safety and the Public Interest***, in bold and italics in the original. The ruling clearly states, "Public safety interests served by the use of the licensed spectrum are not relevant to deciding that issue. Further, the Commission has not delegated the authority to waive any Commission rules to the Presiding Judge." FCC 14M-18 at para. 66. The Bureau did not seek reconsideration of the ruling. The Bureau has no good faith basis to repeat this argument.

Also *res judicata* is that Choctaw cannot acquire the spectrum, according to the Commission's decision on September 11, 2014. Yet the Bureau includes in its Trial Brief redacted allegations as to what Choctaw intends to do with the spectrum.[13] Allegations regarding Choctaw's intentions are contrary to the law of this case, as decided by the Commission, and must be stricken from the Bureau Brief.

At bottom, the Bureau Brief admits that neither Maritime nor Pinnacle have operated any of the five stations on WRV374 for *seven years* and have no plans to operate any of them again in the future. The Bureau Brief is misdirected to an argument that Maritime has not abandoned *the spectrum* and that Pinnacle wishes to use *the spectrum*, non-cognizable under the plain language of the HDO, so EVH is entitled to summary decision as to WRV374.[14]

KAE889 (Locations 4, 20, 30, 34, and 48) The Bureau claims that Maritime "successfully marketed incumbent spectrum to" PSE…[e]ffective May 2010."[15] Again, the Bureau Brief argues that Maritime marketed "spectrum." And, again, this argument must be

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[13] Bureau Trial Brief at para. 25.

[14] Not only has Maritime not operated the stations, it has failed even to apply to the FCC to modify its licenses to enable it to operate, for example, to relocated from the World Trade Center site that was destroyed over a decade ago.

[15] Bureau Trial Brief at para. 26.

rejected because the HDO does not ask whether Maritime abandoned spectrum, it asks whether Maritime abandoned stations. The Bureau does not claim that Maritime "successfully marketed" the stations, so its Brief as to KAE889 offers nothing responsive to the HDO.

The Bureau Brief improperly asserts that in August 2010 "equipment was installed at KAE889…that was operating," citing PSE's answers to Bureau interrogatories. But the Brief offers no authority for the proposition that the Presiding Judge can accept this allegation where the witness is not presented for cross-examination. The Presiding Judge can rule on summary decision based on Maritime's admission that it discontinued operations in 2007-2009 and the fact that, even if there were operations in 2010, that is still four years ago.

The Bureau also incorrectly alleges that PSE "leases" from Mr. Havens' companies geographic area licenses that cover the PSE utility service territory.[16] EVH has said and the ULS database shows that PSE bought geographic area spectrum and PSE is the geographic area licensee, not a lessee. As such, PSE has no need for the Maritime site-based authorizations and agreed to buy them simply so that PSE will be able to merge them into its geographic area licenses.

The Bureau mischaracterization of PSE as a geographic area licensee suggests the PSE right to the geographic area spectrum is limited to a lease term that may expire and PSE may need the Maritime authorizations. The Bureau should be required to submit an erratum to correct the inaccurate statement in its Brief. PSE is the geographic area *licensee* and, like any other geographic area licensee, PSE will *never* need any site-based authorizations within its geographic area service contour.

Furthermore, EVH respectfully directs the attention of the Presiding Judge to the fact that the Bureau Brief provides no authority for the proposition that a site-based authorization confers

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[16] Bureau Trial Brief at para. 26.

greater rights at the Canadian border than a geographic area license. PSE claimed it would cost PSE money to adjust its stations at its northern geographic area licensee border (which also happens to be the Canadian border). The Presiding Judge should order the Bureau to strike these claims from the Bureau exhibits, given that the Bureau had until November 25 to file a Brief with supporting authority and failed, again, to do so.

In any case, the Presiding Judge must rule that the undisputed facts show abandonment because even according to the Bureau's allegations, Maritime only marketed "the spectrum" and not the stations under KAE889, so EVH is entitled to summary decision on KAE889.

Conclusion

The Maritime and Bureau Trial Briefs fail to offer legal authority to address the issue set forth in the HDO, namely whether Maritime permanently abandoned the stations. Both briefs misdirect the Judge's attention to Maritime's alleged intention with regard to the spectrum. In view of the failure of those parties to present pertinent legal authority, the Presiding Judge should grant the EVH summary decision motion.

Respectfully submitted,

/s/

James A. Stenger
Chadbourne & Parke, LLP
1200 New Hampshire Avenue, NW
Washington, DC 20036
(202) 974-5682

November 28, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this 28th day of November, 2014, arranged to be mailed by first class United States mail copies of the foregoing Motion to:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Pamela S. Kane
Deputy Chief
Investigations and Hearings Division Enforcement Bureau
Federal Communications Commission
445 12th Street SW, Room 4-C330
Washington, DC 20554

Sandra DePriest
Maritime Communications/Land Mobile LLC
206 North 8th Street
Columbus, MS 39701

Dennis C. Brown
8124 Cooke Court
Suite 201
Manassas, VA 20109
Counsel for Maritime Communications/Land Mobile LLC

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

Wesley Wright
Jack Richards
Keller & Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
Counsel for Atlas Pipeline — Mid Continent LLC; DCP Midstream, LP; Enbridge Energy Co., Inc.; EnCana Oil and Gas (USA), Inc.; and Jackson County Rural Membership Electric Cooperative

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.

Paul J. Feldman
Harry F. Cole
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street, 11th Floor
Arlington, VA 22209
Counsel for Southern California Regional Rail Authority

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

Albert J. Catalano
Keller & Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
Counsel for Dixie Electric Membership Corp.

Robert J. Keller
Law Offices of Robert J. Keller, P.C.
PO Box 33428
Washington, DC 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
Atlis Wireless & Companies
2509 Stuart Street
Berkeley CA 94705
Attn: Jimmy Stobaugh

/s/
Lisa C. Colletti