

**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

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 PETITION TO DENY
MARITIME-CHOCTAW TRANSCRIPT CONFIDENTIALITY DESIGNATIONS

Environmental LLC (“ENL”) and Verde Systems LLC (“VSL”), through their undersigned counsel and pursuant to the Protective Order herein and Section 0.459 of the Commission’s Rules, hereby petition to deny the joint transcript confidentiality designations filed by Maritime-Choctaw, and in support hereof respectfully show as follows.

Maritime-Choctaw filed a Joint Designation of transcript pages and lines. The Presiding Judge, *sua sponte*, required Maritime-Choctaw to justify some, but not all, of their designations. Maritime-Choctaw then withdrew the bulk of the designations questioned by the Presiding Judge. However, ENL-VSL petition to deny every line and every page of the Maritime-Choctaw designations, including the ones not questioned by the Presiding Judge.

I. The Applicable Legal Standard

Under Section 3 of the Protective Order, the Presiding Judge may consider a petition to reject the transcript confidentiality designations. The Designating Party bears the burden of establishing that the information is entitled to protection under Section 3(c). In order to meet this burden, the Designating Party first has to establish that the information is confidential, and therefore not in the public domain, under Section 3(a). Second, where the information is confidential and not in the public domain, then the designating party also has to demonstrate that the harm of disclosure would outweigh the public interest in disclosure under Section 3(b).

All of these same principles apply under Section 0.459 of the rules, namely that the burden is on the Designating Party, the information must be shown to be confidential and not public domain, and the harm of disclosure must outweigh the public interest in open proceedings. Favor of open proceedings, prohibits agencies from designating as confidential information that is in the public domain, and puts the burden on the party seeking to withhold information to demonstrate harm from disclosure, as shown in the memoranda previously filed herein.

II. The Information Is In The Public Domain

Maritime-Choctaw have failed to meet the first prong of the two part test under the Protective Order and Section 0.459 of the Rules. They have failed even to assert, much less show, that the designated information is confidential and not in the public domain. The pleading filed by Maritime-Choctaw on January 26 in response to the Order of the Presiding Judge *does not claim* that the information is confidential and not in the public domain. The pleading skips

over the first prong of the test, confidentiality, and discusses only competition, the second prong of the test. Competition is not even reached, unless the information is first shown to be confidential.

The burden is not on ENL-VSL to prove the information is in the public domain. The burden is on Maritime-Choctaw to make an affirmative representation to the Presiding Judge that the information is confidential and not in the public domain, according to the clear language of the Protective Order, Section 3(c). Maritime-Choctaw have not validly designated the transcript as confidential where they have not made an affirmative statement on the record that the information is confidential, because that is the requirement that Maritime agreed to in the Protective Order, and public domain information is barred from confidential treatment under the Protective Order and Section 0.459 of the Rules.

It is a matter of record herein that Maritime filed bankruptcy and that Maritime and Choctaw disclosed their business and financial information and plans in that proceeding. The Commission is fully aware of the Maritime bankruptcy proceeding since the reason for filing bankruptcy was to seek to use the *Second Thursday* doctrine to avoid the consequences of the HDO. In addition, the Commission as a creditor of Maritime is a party to the bankruptcy proceeding. Accordingly, under the circumstances, the absence of an affirmative representation of Maritime-Choctaw that the designated information has not been made public in the bankruptcy proceeding can only be taken as an admission that the information has been made public in that proceeding.

The Commission denied the Maritime-Choctaw *Second Thursday* petition in a public order. After the denial, they petitioned for reconsideration and sought to designate their pleadings as confidential. On the contrary, however, in response to an FOIA request, the Commission determined to release those pleadings. Thus, the Commission has already

determined that Maritime-Choctaw's alleged business activities and plans are not entitled to confidential treatment because of the public disclosures in the bankruptcy.

The disclosure of the information in the bankruptcy proceeding was not accidental. An intentional decision was made by Maritime-Choctaw to seek to use the proceeding to avoid the consequences of the HDO. Accordingly, Section 15 of the Protective Order, which states that accidental disclosure of confidential information shall not be deemed to be a waiver of rights, is not applicable to the disclosure of information in the bankruptcy proceeding. On the contrary, under Section 15 of the Protective Order, it must be concluded that the waiver of rights under the Protective Order was intentional and binding because Maritime-Choctaw chose to file bankruptcy and to disclose their business information and plans in that proceeding.

Once information enters the public domain, the Designating Party cannot cause the Commission to attempt to "put the toothpaste back in the tube". *E.g., In the Matter of Station KNRK(FM)*, 18 FCC Rcd 25484, 2003 WL 22763780 (November 24, 2003). The failure of Maritime-Choctaw in their January 26 pleading to address the public disclosure of their business plans and information in the bankruptcy proceeding is fatal to the purported transcript confidentiality designations. The issue of competition is not even reached because the information is in the public domain. Nevertheless, ENL-VSL also address what are insufficient competition claims.

III. No Competitive Harm Exists

Even if the information were confidential, that would not end the inquiry. The Designating Party has to show that disclosure would "significantly disadvantage the current or future negotiating or competitive position of the Designating Party," under Section 3(b) of the Protective Order. Maritime-Choctaw fail to show any such disadvantage.

Maritime-Choctaw make two claims in their pleading filed on January 26. First, Maritime-Choctaw argue that they are competing with SkyTel entities for an Amtrak contract.

Second, Maritime-Choctaw argue that Pinnacle may be harmed by litigation that may be initiated by SkyTel entities in some other forum. Both of these claims fail to satisfy the requirements of the Protective Order, Section 3(b) as to a demonstration of harm.

With regard to Amtrak, there is no competition between Maritime-Choctaw and SkyTel entities to sell spectrum to Amtrak for positive train control. This allegation is simply inaccurate. This public filing is not the appropriate place to address this. ENL-VSL reiterate their request for a status conference to discuss the alleged confidentiality designations.

With regard to Pinnacle, the suggestion appears to be that Maritime-Choctaw are seeking to protect information of Pinnacle, and they are seeking to protect this information not because Pinnacle competes with SkyTel entities, but because Pinnacle fears litigation from SkyTel entities in other forums. None of this complies with the Protective Order. If Pinnacle has information to protect, Pinnacle was required to make its own confidentiality assertions. Pinnacle failed to do so by the deadline.

Furthermore, alleged fear of litigation is not a valid basis for withholding information. There is nothing in the Protective Order or in Section 0.459 of the rules that permits a party to withhold information because another party might use it to seek redress for some injury in litigation. And, of course, it should be noted that the SkyTel entities would not have been required to be involved in litigation but for the fact that Maritime violated the Commission's auction rules and failed to report the abandonment of site-based stations.

Beyond the illusory nature of the Maritime-Choctaw claims regarding Amtrak and Pinnacle, there is simply nothing in the testimony that could cause any competitive harm to them or affect their negotiating position. All of the information that is relevant to competition and negotiations is required to be disclosed to the Commission in public filings in order to comply with the rules.

It is explicitly set forth in the Commission's rules that site-based licenses must be kept in operation or they will be forfeited and the spectrum will revert to the geographic area licensee. It also is explicitly set forth that site-based licenses cannot be relocated, their contours cannot be expanded from what they were at the time of the freeze and if their contours are reduced, they cannot be returned to what they were prior to the reduction. The law also is clear that fill-in stations can only be operated within the actual service contour of an existing site-based system.

It is public knowledge based on the rules that whatever Maritime-Choctaw are doing or planning to do must fit within these regulatory parameters and these regulatory parameters fully determine the "negotiating or competitive position" of a site-based licensee. Furthermore, the public, including other licensees, are entitled to know whether Maritime-Choctaw are in compliance with the rules. Maritime-Choctaw are not entitled to enhance or preserve their "negotiating or competitive position" by concealing from the public and other licensees information that is required to be reported to comply with the AMTS rules. *E.g., RCA Global Communications, Inc. v. F.C.C.*, 524 F.Supp. 579 (D. Del. 1981).

The competitive and negotiating position of Maritime-Choctaw is impacted by their own actions, including that they discontinued operation of the site-based stations, forfeited the spectrum and are engaging in transactions that seek to use unlawful "fill-in" stations contrary to the rules. Concealment of the details of these deals unlawfully enhances the competitive and negotiating position of Maritime-Choctaw because the public and other licensees are deprived of relevant information required to be disclosed to the Commission to comply with the rules. Such concealment also delays and complicates completion of the hearing ordered by the HDO.

IV. Conclusion

Wherefore, for the foregoing reasons, the Presiding Judge should deny the transcript confidentiality designations Maritime-Choctaw.

Respectfully submitted,

 /s/
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January 28, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this 28th day of January, 2015, arranged to be mailed by first class United States mail copies of the foregoing Motion to:

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