

**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

Participant in Auction No. 61 and Licensee of  
Various Authorizations in the Wireless Radio Services

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

**REPLY TO FCC ENFORCEMENT BUREAU OPPOSITION  
TO PETITION SEEKING RECONSIDERATION  
OF APRIL 22, 2015 ORDER ON THE BASIS OF MISTAKE**

Environmental LLC and Verde Systems LLC (together “ENL-VSL”) hereby reply to the Enforcement Bureau’s (“Bureau”) June 1, 2015 opposition (“Opposition”) to ENL-VSL’s Petition for Reconsideration (“Recon Petition”) of your Honor’s April 22, 2015 Order (“Order”).

The Bureau argues that the Presiding Judge did not authorize ENL-VSL to file a motion for summary decision (“Summary Dec. Motion”) when he said that it could file “any motion;” also

that the alleged violation of the summary decision rule was not the only legal basis for referring Mr. Havens' qualifications to the full Commission.

The Bureau is wrong. "Any" means any. And as the Order reflects, the violation of the summary decision rule is the only legal basis for referral. We take this issue up first.

**I. The Alleged Violation of the FCC's Summary Decision Rule Is the Only Legal Basis for Referring Mr. Havens' and ENL-VSL's Character Qualifications to the FCC Commissioners; as that Rule Was Not Violated, There Is No Legal Basis for Referral**

**A. The Summary Decision Rule Requires an Administrative Law Judge to Refer to the Commission Abuses of the Summary Decision Rule**

The Order is very simple. It refers to the FCC Commissioners the question of whether Mr. Havens and ENL-VSL have the requisite character qualifications to hold or control FCC radio licenses based upon the fact that ENL-VSL (joined by Mr. Havens in his *pro se* capacity) filed the Summary Dec. Motion after the Presiding Judge instructed parties to not file such a motion. Order, paras. 4-13, 23, and 25. The FCC's Summary Decision Rule, 47 C.F.R. Section 1.251(f) (3), requires a Judge to make such a referral in the event of abuse of the Commission's Summary Dec. Rule. The Order cites no other authority for the referral, though it does discuss other concerns the Presiding Judge had, most of which relate to *pro se* activities by Mr. Havens.

The Opposition argues (at para. 6) that even if this is true, these other issues provide "ample" additional basis for the Order. This is simply inaccurate as a matter of law. An Administrative Law Judge has only the authority granted to him by law; he does not have general jurisdiction to refer any matter that may come to his attention to the Commission. And the Order is clear about this, when it cites the rule and no other authority.

**B. The Order Is Ultra Vires**

The Order is ultra vires. First, the jurisdiction of Administrative Law Judges is limited to "hearing and conducting all adjudicatory cases designated for any evidentiary hearing...." 47

C.F.R. § 0.151. Similarly a Judge may conduct “such other hearings as the Commission may assign.” *Id.* Under this rule, ALJs only have authority to preside over proceedings designated and assigned to them by the Commission and have no general jurisdiction, including no general jurisdiction to initiate new proceedings on their own initiative.

Second, the Summary Dec. Rule only allows a Presiding Judge to request that the FCC Commissioners add an issue against a party in a proceeding before the Judge. *See* 47 C.F.R. §1.251(f) (3) “...whether the facts warrant addition of an issue as the character qualifications of that party.” (emphasis supplied) The rule does not allow a Judge to ask the Commission to commence a new proceeding.

In this instance the Order ejects ENL-VSL and Mr. Havens from the Maritime proceeding. Order, paras. 24 and 26. ENL-VSL and Mr. Havens are no longer “parties” to the proceeding, thus there is no legal basis for the referral.

Even if ENL-VSL and Havens were still parties to the proceeding, there is no basis for referring Mr. Havens’ character qualifications to the FCC Commissioners, because it was filed by counsel for ENL-VLS and simply joined in by Mr. Havens as a *pro se* litigant.<sup>1</sup> Any litigant, much less a *pro se* one, is entitled to rely upon the advice of counsel with regard to the appropriateness of particular filings.

Lastly, in this case the Judge lacks basis to find that any motion or action by Havens and ENL-VSL was frivolous, in bad faith or interposed for delay. Maritime’s bad actions, which caused the Commission to issue the HDO against Maritime, were brought to the attention of the Commission by Mr. Havens and ENL-VSL, and the Commission issued the HDO *four years*

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<sup>1</sup> The jurisdiction of Administrative Law Judges is limited to “hearing and conducting all adjudicatory cases designated for any evidentiary hearing....” 47 C.F.R. § 0.151. Similarly a Judge may conduct “such other hearings as the Commission may assign.” *Id.* Under this rule, ALJs only have authority to preside over proceedings designated and assigned to them by the Commission and have no general jurisdiction, including no general jurisdiction to initiate new proceedings on their own initiative.

ago, and the case is only half complete. This delay is unreasonable, and *directly harms only ENL-VSL*. For it is ENL-VSL who holds competing licenses that are infringed upon by Maritime until such time as the HDO hearings are complete and Maritime's fraudulent behavior is adjudicated. To argue that the delay is due to the parties that most desire completion of the proceeding is flatly unreasonable, and will be borne out by the appeals filed by each of Mr. Havens and ENL-VSL.

## **II. "You Can File Any Motion" Means "Any Motion"**

The prehearing conference transcripts filed with the Recon Petition (at Exhibit 1) make clear that when Havens' counsel said he was inclined to file a motion seeking summary dismissal of the case on October 28, 2014 the Presiding Judge responded that he was free to file "any motion." "Any" means unlimited in kind, quantity, amount, number or extent. "Any" motion unequivocally includes the Motion. The Opposition argues (at 3) that the Judge's comments were "nothing more than an attempt to move the proceeding along." This is wrong, and the Motion was timely filed on October 27, 2014.<sup>2</sup>

## **III. The Bureau Is Wrong when It Argues There Was No "Order" Allowing ENL-VSL to File for Summary Decision**

The Bureau's Opposition (at para. 5) argues that the Judge's statement at the prehearing conference that ENL-VSL could file any motion does not constitute an "order" which ENL-VSL

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<sup>2</sup> The Opposition (at para. 3) states that "there was no discussion of whether ENL-VSL would be authorized to file an additional summary decision motion," suggesting that ENL-VSL has previously filed a summary decision motion which it had not. The Opposition (at 3) also suggests that there was no context for the Presiding Judge to believe that he was authorizing a summary decision motion. This is similarly incorrect, as counsel for ENL-VSL explicitly said he was thinking of filing such a motion, and as the context for this comment was approximately twenty minutes of discussion about the Bureau's direct case in relation to its previously denied summary decision motion. *See Exhibit 1* hereto, Transcript Excerpts.

could reasonably rely upon.<sup>3</sup> This is wrong. A party can rely upon the oral authorization of a judge at a prehearing conference.

#### **IV. The Summary Decision Motion Contains No False and Misleading Statements**

Perhaps recognizing that it is wrong on the arguments above, the Bureau's Opposition (at para. 5) attempts to save the Order by stating that the Judge also concluded that. "the [Motion] was 'presented in bad faith' because [it] included 'false and misleading statements.'" The Order simply says no such thing.

#### **V. Conclusion**

For the foregoing reasons, the Order should be reconsidered and withdrawn.

Respectfully submitted,

                  /s/                    
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June 8, 2015

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<sup>3</sup> Opposition at 4. Presumably this argument, expanded upon, would be that oral and written instructions of an ALJ may not be relied upon unless expressed in an ordering paragraph of a written decision, and that all else is non-binding dicta. If true, then there is no foundation for a claim that further summary judgments were forbidden in this case, as no such order exists. The July 15, 2014 order cited in the Order as instructing the parties to not file any more summary judgments contained no such ruling. See Exhibit 2, "Rulings" from July 15, 2014 Order in the Maritime proceeding, FCC 14M-22 in Dkt. 11-71.

**Exhibit 1**  
**Docket 11-71, October 1, 2014 Prehearing Conference Transcript Excerpts**  
**Discussing that the Bureau's Direct Case Was Essentially a Fourth Motion**  
**for Summary Decision**

<b>Tr. 9-1119</b>	“The Government has put in - - I don't know if you've had an opportunity to look at the direct testimony, but the Bureau has put in as its direct case the testimony of all of the Maritime and Choctaw witnesses.”
<b>Tr. 9-1119</b>	“The Government can't cross examine its own witness and so, Your Honor is expecting me without the help of the Bureau -- the Bureau is supposed to be the staff counsel for the Commission that's supposed to be pursuing the revocation and show cause hearing, but now the Bureau has put itself in the position where it's going -- when I try to ask Sandra DePriest a question, Ms. Kane is going to stand up and object to my questions on the grounds that Sandra DePriest is her witness.”
<b>Tr. 9-1126</b>	“The main problem, Your Honor, is that we were taken completely by surprise by the fact that the Bureau has chosen to submit Maritime's direct case as the Bureau's case. The Bureau is putting forth John Reardon and Sandra DePriest as witnesses for the Commission, and I don't see how Your Honor can allow that hearing to go forward on that basis and then we're going to have a later hearing where the Bureau is going to challenge the qualifications of Sandra DePriest and John Reardon.”
<b>Tr. 9-1127</b>	<p>“How can the Government have a hearing later on in March or April or May about the basic qualifications and challenge these people when the Government, in December, is going to be putting them on the stand as their witnesses? I don't understand how that's going to work.</p> <p>I really think that on October 28th, I may have to file a motion to strike the Government's entire case.</p> <p>JUDGE SIPPEL: Well, you're free to file any motion you care to as long as you do it in a professional manner.”</p>
<b>Tr. 1133-35</b>	<p>“...I don't know if Your Honor has looked at their direct case, but the Bureau only put in witnesses from Maritime and some of the counterparties of Maritime in the transaction that they're proposing.</p> <p>The Bureau hasn't put in any adverse witnesses whatsoever. The Bureau hasn't put in anyone from the Wireless Bureau to talk about audits that have been conducted. The Bureau hasn't put in anyone from the FCC Field Offices that the taxpayers are paying for to go out with the spectrum analyzer and see if something's on the air or not.</p> <p>The Bureau hasn't put any of these witnesses that we listed in our notification yesterday. People who have had business dealings. People who manage these sites. People who own the sites where these stations allegedly existed.</p> <p>These are all relevant witnesses that the Bureau should have put in if they were going to act as staff counsel for the Commission in a show cause revocation hearing.</p> <p>But, we were surprised at the last minute to find when we received the Government's</p>

direct case that they don' have any of these witnesses in their direct case. They're not challenging what Maritime is saying at all.

Now, Your Honor, that stands in direct violation of your June 17th order. The Government and Maritime made motion for summary decision last year and they said it's our position that these stations were constructed and that the operations were never discontinued. They made that summary motion jointly last year.

And Your Honor granted that motion in part. You said that the construction issue was off the table, but You Honor denied that motion as far as the operation of the stations were concerned and Your Honor said that you expected that there would be a hearing on that issue of continuing operations.

You said in paragraph 62 of your June 17th order that clearly significant factual questions remain that require proof by one or more of the following: documentation testimony, cross examination or expert opinion if available.

Now, I'm sure that when Your Honor wrote that You Honor expected that we were going to have a vigorous hearing where Maritime was going to put on witnesses, alleging that they were continuing operations and that the Bureau was going to cross examine those witnesses and put on some kind of case on behalf of the Government.

But, the Bureau is not doing that. They've abandoned their case entirely.

What they're basically saying to Your Honor is we don't care about your June 17th order. We're going to continue right down the road with our motion for summary decision that you denied.

We made a motion saying that in our opinion there' no factual dispute. These stations are all continuously operating.

You denied our motion and you said you wanted to have a hearing, but you know what? We're not going to give you a hearing. We're just going to come in here with Maritime s witnesses, put them on the stand and we won't cross-examine them because we're not going to cross-examine our own witnesses. It's up to Mr. Stenger now to make the case.

And that's -- this isn't a game of musical chairs -where the Government gets up out of their seat and abandon- their statutory role. In Section 1 of the rules, which sets forth the duties of the Bureau, they're supposed to act as staff counsel for the Commission, not staff counsel for the defendant.”

**Exhibit 2**  
**“Rulings” from July 15, 2014 Order FCC 14M-22**

**RULINGS**

For the foregoing reasons, **IT IS ORDERED** that the Bureau's Motion to Re-open the Discovery Period **IS GRANTED** solely with respect to the 80 licensed facilities that were subject of the May 31, 2012, Limited Joint Stipulation of Maritime and the Bureau.

**IT IS FURTHER ORDERED** that the parties **SHALL PROPOSE** a calendar of prehearing procedural deadlines and **ESTIMATE** the length of the hearing on or before **July 30, 2014**.

**IT IS FURTHER ORDERED** that counsel representing Mr. Havens at trial **SHALL FILE AND SERVE** a Notice of Appearance on or before **July 30, 2014**.

**IT IS FURTHER ORDERED** that all discovery on the limited issues described above **SHALL BE COMPLETED** on or before **August 15, 2014**.

**IT IS FURTHER ORDERED** that the deadline for good cause requests for extending discovery extensions **IS SET** for **August 15, 2014**.

**IT IS FURTHER ORDERED** that the hearing **IS SET** to commence on **September 30, 2014 at 10:00 am**.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has on this 8<sup>th</sup> day of June, 2015, arranged to be mailed by first class United States mail copies of the foregoing Reply to:

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