

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

In the Matter of:

MARITIME COMMUNICATIONS/LAND MOBILE, LLC

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

Applicant with ENCANA OIL AND GAS (USA), INC.;  
DUQUESNE LIGHT COPANY; 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

To: Marlene H. Dortch, Secretary  
Attention: The Commission

EB Docket No. 11-71

File No. EB-09-IH-1751  
FRN: 0013587779

Application File Nos.  
0004030479,  
0004144435, 0004193028,  
0004193328, 0004354053,  
0004309872, 0004310060,  
0004314903, 0004315013,  
0004430505, 0004417199,  
0004419431, 0004422320,  
0004422329, 0004507921,  
0004153701, 0004526264,  
0004636537, 0004604962.

**REPLY TO OPPOSITIONS TO SUPPLEMENT TO INTERLOCUTORY APPEALS**

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Date: October 8, 2015

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V2G LLC, and  
Warren Havens individually

**REPLY TO OPPOSITIONS TO SUPPLEMENT TO INTERLOCUTORY APPEALS  
ON BEHALF OF WARREN HAVENS AND THE COMPANIES**

Environmental LLC, (“ENL”), Verde Systems LLC, (“VSL”), Intelligent Transportation and Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, and V2G LLC (the “Companies”), and Mr. Havens individually, hereby reply to the Oppositions to their Supplement to Interlocutory Appeals filed by the Enforcement Bureau (the “Bureau”) and Maritime Communications/Land Mobile, LLC (“Maritime”) on September 25 and 30, 2015.

The Supplement to Interlocutory Appeals (the “Supplement”) shows that Memorandum Opinion and Order, FCC 15M-14 (the “Order”) should be overturned as arbitrary and capricious, and an abuse of discretion. The Oppositions fail to undermine that conclusion. This Reply principally addresses three points:<sup>1</sup> (1) the Motion for Summary Decision filed by Mr. Havens and ENL-VSL was authorized and filed in good faith, (2) the conduct complained of in the Order cannot be evaluated apart from the conduct of the Bureau and Maritime, particularly the about-face of the Bureau on Issue (g), and (3) ENL-VSL’s and Mr. Havens’s tenacious efforts at factual inquiry on Issue (g) are outside the reach of Rule 1.251, and in light of the Bureau’s about-face do not merit the draconian responses of barring Mr. Havens and the Companies from further hearings, or a referral to the Commission for an inquiry on character.<sup>2</sup>

**I. The Motion for Summary Decision was Authorized and Filed in Good Faith**

Contrary to the Oppositions of the Bureau and Maritime, the Supplement and the record show that the October 27, 2014 ENL-VSL/Havens Motion for Summary Decision (the “Motion”) was authorized and submitted in good faith; the transcript excerpt cited<sup>3</sup> in the

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<sup>1</sup> Although many of the points made by Maritime and the Bureau in their 27 pages of Oppositions are incorrect and/or fail to squarely address the issues raised in the Supplement, because of the prescribed page limit this Reply addresses only three of the most important issues.

<sup>2</sup> As noted in the Supplement, sanctioning all six companies designated in the HDO is clearly arbitrary and capricious given that only ENL and VSL participated in the hearings.

<sup>3</sup> Maritime’s argument that counsel’s interpretation of the excerpted transcript is a “post-hoc rationalization dreamed up” by Mr. Havens and the Companies (Maritime Opposition at 5) is not

Oppositions does not contravene that showing. Moreover, the Bureau and Maritime ignore two crucial facts: the Presiding Judge admitted that any prohibition against filing such a motion was only dictum, and his caution against additional summary decision motions was necessarily directed only at the Bureau and Maritime as the only parties that had filed such motions.<sup>4</sup>

## **II. The Bureau's Conduct on Issue (g) is Highly Relevant to These Appeals**

For at least the first fifteen months and six pre-hearing conferences, large portions of the discussions were focused on Maritime's failure to provide even the most basic facts on construction and operation, the heart of Issue (g),<sup>5</sup> with repeated statements by Maritime's counsel that it had little if any information on either construction or operation for the vast majority of its stations.<sup>6</sup> Nevertheless, in December 2013 the Bureau and Maritime came to an

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correct, and contrary to the record. As ENL-VSL counsel noted at a pre-hearing conference ("PHC") shortly after the Motion was filed: "[a]t the status conference that we had a month or so ago, I said that I was going to file a motion for summary decision, and no one objected to that point." Tr. vol. 10, 1170.

<sup>4</sup> Tr. vol. 10,1180. *See also Order*, FCC 14M-22 at 3 (filed July 15, 2014). Maritime's Opposition essentially argues that the result of *Maritime and the Bureau* having filed *too many* motions for summary decision is that it is an abuse of process for Mr. Havens and the Companies to file *a single one*. In fact, summary decision motions were liberally permitted. Maritime and the Bureau between them filed three. And at an earlier PHC, Maritime's counsel opined that "as I also understood . . . [a discovery extension] . . . wouldn't preclude either party from filing a summary decision," to which the Presiding Judge responded, "Of course not" and the Bureau added, "That's all we were asking." Tr. vol. 7, 904-6.

<sup>5</sup> *See, e.g.*, Tr. vol. 1, 46-7 (Bureau noting that "history has shown as it has been put forth in the HDO that Maritime has been very difficult in providing complete discovery or complete information and we're fearful that we're going to have to go to them repeatedly and . . . appear before [the Presiding Judge] for some sort of relief. . ."); Tr. vol. 2, 128-35, 195-256, 286-91; Tr. vol. 3, 302-4, 324-5, 380-435, Tr. vol. 4, 442-95, 513-6, 453-4 (Bureau asking "whether [Maritime has] this information or not"); Tr. vol. 5, 537, 541-2, 555, 585,602-13, 615-62, 666-75, 621 (Bureau: "We have asked for all evidence in support of construction. And, instead . . . all they provided was a chart. And . . . said that the rest of their information is based on information and belief. We are well past the information and belief in this proceeding . . . we are a year into discovery now."); Tr. vol. 6, 685-92. 694-708, 710-25, 736-42,747-56, 788-91, 815-9, 691 (Bureau: "we're taking two steps forward and one step back because the information, at least as to operation, is constantly changing for Maritime"), 719-20 (Bureau "need[s] an actual answer . . . about whether or not the station is operating. Not if it's capable of operating, but if it's operating. And all we've yet to get is the same verbiage over and over").

<sup>6</sup> *See supra* note 5. No doubt frustrated, the Presiding Judge quipped that Maritime's position on this matter "reminds me of a historical figure who identified combat conditions as the known, the

agreement on Issue (g): the Bureau was willing to agree with Maritime on timely construction, and that 16 Maritime stations had not been permanently discontinued.<sup>7</sup> Thereafter, the Bureau abandoned its effort to develop a factual record on Issue (g), took up Maritime's defense of its construction and operation, presented Maritime's case at hearings, sponsored its witnesses, and protected them from efforts by Mr. Havens and ENL-VSL counsel to cross-examine.<sup>8</sup>

Maritime and the Bureau insist that this course of events is not relevant.<sup>9</sup> That is simply not correct. Understanding this context is both relevant and crucial. First, *virtually all* of the conduct that is the subject of the Order took place *after* the Bureau changed sides, from trying to discover the true facts of the case to defending Maritime's lack of facts.<sup>10</sup> Second, the tenacity of Mr. Havens and ENL-VSL counsel were *driven by* the Bureau's about-face, leaving Mr. Havens and ENL-VSL counsel as the only participants interested in knowing and documenting the facts.

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unknown and the unknowns that you don't know are the unknowns. And it sounds like [Maritime's] got the same situation here." Tr. vol. 6, 699.

<sup>7</sup> Maritime, in turn, agreed to cancel all but 16 of its facilities. See Limited Joint Stipulation Concerning Issue G Licenses (filed Dec. 2, 2013); Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G (filed Dec. 2, 2013).

<sup>8</sup> *Id.* See also Enforcement Bureau's Trial Brief (filed Nov. 25, 2014); Enforcement Bureau's Witness Notification for Cross-Examination (filed Sept. 30, 2014); Tr. vol. 11, 1258 ("The Bureau intends to demonstrate by a preponderance of the evidence that when these factors are taken into consideration, Maritime took concrete steps to ensure that the discontinuance of operations at [the locations at issue] . . . was not permanent"); Enforcement Bureau Written Objections to EVH Written Direct Testimony, EVH Additional Witnesses, and EVH Witnesses for Cross-Examination (filed Oct. 29, 2014). See also Tr. vol. 9, 1119-23; Tr. vol. 11, 1260, 1268-9, 1275-6, 1283-5, 1289-90, 1292, 1295, 1299, 1329, 1337, 1357-60, 1364, 1378, 1382-3, 1389, 1404, 1407-8, 1475, 1480-2, 1492-3, 1504-5, 1520-4, 1544-5, 1549-50, 1555-7.

<sup>9</sup> The Bureau asserts incorrectly that Mr. Havens and the Companies claim that the Bureau's position concerning Issue (g) "somehow justified [their] decision to file unauthorized pleadings [or] to include misleading statements in its pleadings." In fact, to the contrary, Mr. Havens and the Companies have repeatedly stated that their pleading was authorized and that the statement at issue was not misleading.

<sup>10</sup> For example, the Bureau made no effort to obtain the so-called 93 boxes despite the fact that the boxes likely contained documents relevant to the issue of construction. Tr. vol. 3, 403-405; e-mail from Warren Havens to Chief Administrative Law Judge Sippel (copying all parties to EB Docket No. 11-71) (dated and filed June 1, 2012); e-mails between Warren Havens and Pamela Kane, Enforcement Bureau, FCC (copying Maritime counsel) (dated and filed Nov. 7, 2012); Opposition to Motion for Partial Summary Decision (filed Sept. 17, 2012).

And third, the attitude of both the Bureau and the Presiding Judge towards Mr. Havens and ENL-VSL counsel from that point forward *resulted from and was in reaction to* their refusal to go along with the deal struck by Maritime and the Bureau.

Contrary to the HDO's requirement, the December 2013 Stipulation and Joint Motion For Summary Decision filed by the Bureau and Maritime were not based on factual evidence, but instead on two prior Commission rulings which, in turn, were based on statements by the prior holder(s) of the Maritime licenses; with no facts on hand, the Bureau substituted a "legal determination."<sup>11</sup> Even more troubling was the Bureau's and Maritime's insistence that Maritime's 16 remaining site-based stations had not been permanently discontinued, which also was not supported by the facts. Indeed, on that basis the Presiding Judge insisted on a hearing.<sup>12</sup>

By this time, the Bureau clearly was no longer a "neutral" party, as it insists in its Opposition.<sup>13</sup> Instead, it had become Maritime's advocate, essentially acting as Maritime's counsel. Maritime offered no witnesses of its own, deferring to the Bureau, which aggressively fought all efforts by Mr. Havens and ENL-VSL counsel to present evidence showing that Maritime had failed to timely construct its facilities and/or had permanently discontinued them.<sup>14</sup>

Maritime's criticism that the witness list submitted by Mr. Havens and ENL-VSL counsel was 'late' is misplaced, verging on the ironic.<sup>15</sup> As ENL-VSL counsel explained at a pre-hearing conference, the criticized witnesses on that list were people who had been identified *by Maritime* in its interrogatory responses as having information relevant to the construction and operation issues; they were listed 'late' for the simple reason that Mr. Havens and counsel only found out

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<sup>11</sup> Limited Joint Stipulation Concerning Issue G Licenses (filed Dec. 2, 2013); Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G (filed Dec. 2, 2013). The Bureau admitted relying on the *Watercom* Decision was "based on really more of a legal determination rather than what factually constituted construction. Tr. vol. 7, 947.

<sup>12</sup> *Memorandum Opinion and Order*, FCC 14M-18 (rel. June 17, 2014).

<sup>13</sup> See Enforcement Bureau's Opposition at 4.

<sup>14</sup> See *supra* note 8.

<sup>15</sup> See Maritime's Opposition at 13.

when they saw the Bureau's witness list that neither Maritime nor the Bureau intended to call them. Mr. Havens is being condemned for trying to introduce relevant evidence that the Bureau no longer wanted to hear.<sup>16</sup>

### **III. Mr. Havens's Conduct Is Not Grounds for Exclusion or Character Referral**

Many of the accusations in the Order are, in essence, complaints that Mr. Havens's *pro se* conduct was unacceptable, inappropriate or just plain annoying. Mr. Havens's conduct was reasonable and within the bounds of *pro se* in high-stakes litigation where Mr. Havens found himself litigating against both Maritime *and* the Bureau to build a factual record.

The Bureau and Maritime argue that Mr. Havens flaunted the Presiding Judge's orders to obtain counsel, but as they both know, the Companies did obtain counsel, and the Presiding Judge repeatedly permitted Mr. Havens to continue to act *pro se*, including at the hearing.

### **IV. Conclusion**

As demonstrated here and in the Supplement, the Order's referral of a character issue as to Mr. Havens and the Companies is contrary to the full record and context of this matter. And excluding the Companies and Mr. Havens from further participation in the Hearing would remove Maritime's only opponent, rewarding it for its discovery abuses and years of misrepresentations on construction and operation, as well as on qualifications for bidding credits, while unfairly punishing the whistleblower.

Such a result is arbitrary, capricious, unwarranted and unjust.

Respectfully submitted,

*/s/ Jeffrey Blumenfeld* \_\_\_\_\_

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Dated: October 8, 2015

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<sup>16</sup> Tr. vol. 9, 1132-36, 1140-43.

## **CERTIFICATE OF SERVICE**

The undersigned, an attorney at Lowenstein Sandler LLP, hereby certifies that on this day, October 8, 2015, a copy of the foregoing Reply to Oppositions to Supplement to Interlocutory Appeals was filed with the Commission, served on the parties listed below via First Class United States Mail, and a courtesy copy was provided via electronic email.

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