

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

In the Matter of)	
)	
SKYBRIDGE SPECTRUM FOUNDATION)	Petition for Expedited Declaratory Ruling
and WARREN C. HAVENS)	Regarding § 1.251(f)(3)
)	
MARITIME COMMUNICATIONS/LAND)	EB Docket No. 11-71
MOBILE, LLC)	FCC File Nos. 0004030479, et al.
)	
Participant in Auction No. 61 and Licensee)	
of Various Authorizations in the Wireless)	
Radio Services)	
)	
MARITIME COMMUNICATIONS/LAND)	WT Docket No. 13-85
MOBILE, LLC, DEBTOR-IN-POSSESSION)	FCC File No. 0005552500
)	
Application to Assign Licenses to Choctaw)	
Holdings, LLC)	

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

OPPOSITION TO PETITION FOR DECLARATORY RULING

Maritime Communications/Land Mobile, LLC – Debtor-in-Possession (“Maritime”), by its attorney, tenders the following opposition to the *Petition for Expedited Declaratory Ruling on § 1.251(f)(3)* (“*Petition*”) filed on April 5, 2016, by Skybridge Spectrum Foundation (“SFF”) and Warren C. Havens (“Havens”) (collectively, “Petitioners”).

A. THE PETITION SHOULD BE DISMISSED AS AN UNTIMELY AND IMPROPER CHALLENGE TO AN INTERLOCUTORY ORDER.

Although styled as a request for declaratory ruling, the *Petition* is actually a direct challenge to an interlocutory order issued a year ago by Richard L. Sippel, Chief Administration Law Judge, and presiding officer in Maritime hearing case.¹ Judge Sippel recounted numerous instances of abuse of process by the “Havens Entities”² in EB Docket No. 11-17. Judge Sippel

¹ *Memorandum Opinion and Order* (FCC 15M-14; rel. Apr. 22, 2015) (“*Referral Order*”).

² Environmental LLC, Verde Systems LLC (formerly Telesaurus-VPC LLC), Intelligent Transportation and Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, and V2G LLC are collectively referred to herein as the “Havens Entities”.

disqualified and excluded Havens and the Havens Entities from further participation in the proceeding,³ and “CERTIFIED to the Commission for determination as to whether the facts warrant the designation for hearing of issues as to [the] qualifications [of the Havens Entities] to hold Commission licenses.”⁴ Petitioners now assert that the *Referral Order* must be vacated.

Section 1.301(c)(2) of the Rules provides that appeals from interlocutory rulings in hearing proceedings must be submitted to the Commission within five days of release of the order.⁵ Insofar as the *Referral Order* was released on April 22, 2015, the *Petition* is a year late. This defect cannot be remedied by merely calling it a request for declaratory ruling.

Petitioners and the other Havens Entities have had more than ample opportunity to address the *Referral Order* and indeed have repeatedly done so. On April 29, 2015, Havens, Environmental LLC, and Verde Systems LLC (collectively referring to themselves as “EVH”) filed an interlocutory appeal from the *Referral Order*.⁶ On the same day, Havens also filed a *pro se* interlocutory appeal on behalf of himself and the other Havens Entities.⁷ Then, on August 12, 2015, the Commission granted Havens and the Havens Entities thirty days in which to file a joint supplement to the interlocutory appeals.⁸ The supplement was filed on September 11, 2015.⁹

Petitioners have been afforded extraordinary latitude in terms of both time and page limits in which to challenge the *Referral Order*. The *Petition* is nothing more than a thinly

³ *Referral Order* at ¶ 26

⁴ *Id.* ¶ 25.

⁵ 47 C.F.R. § 1.301(c)(2).

⁶ *ENL-VSL Interlocutory Appeal as of Right*, filed in EB Dkt 11-71 on April 29, 2015. EVH also submitted a request for reconsideration directly with the presiding judge. *Petition Seeking Reconsideration of April 22, 2015 Order on the Basis of Mistake*, filed May 22, 2015.

⁷ *Interlocutory Appeal*, filed on April 29, 2015; see also the “Errata Copy,” filed April 30, 2015.

⁸ Letter dated August 12, 2015, from Linda Oliver, Esq., Chief, Administrative Law Division, Office of General Counsel, FCC, to Jeffrey Blumenfeld, Esq.

⁹ *Supplement to Interlocutory Appeal*, filed September 11, 2015.

disguised attempt to take yet another bite from an apple already gnawed to its core. Such repetitive and duplicative submissions are typical of Havens's penchant for seeing the procedural rules as something to be honored in the breach and invoked and followed only when he perceives a self-serving strategic advantage. This is contrary to the public interest. It imposes undue burden on limited resources, both public and private, and greatly hampers the Commission's efforts to effectively adjudicate its duties. This is precisely the kind of abusive behavior described in the *Referral Order* and well known to the Commission in other proceedings as well.¹⁰ In addition to being an untimely interlocutory appeal, therefore, the *Petition* is improperly repetitive and duplicative of already-pending submissions by Havens and the Havens Entities.

B. THE PETITION IS AN UNTIMELY AND IMPROPER REQUEST FOR RECONSIDERATION OF A FINAL RULEMAKING ORDER.

Section 1.251 of the Rules, governing summary decision procedures in FCC hearing proceedings,¹¹ was proposed in Docket No. 19141 in 1971.¹² The final rule was adopted in April of 1972.¹³ Petitioner's contend that subsection (f)(3), a provision providing for certification by the presiding judge of certain questions to the Commission, is invalid because it was not explicitly included in the proposed regulatory language published in the *Notice of Proposed Rule Making*. According to Petitioners, this renders the provision null and void for failure to meet the prior notice and public comment requirements of the Administrative Procedure Act.¹⁴ Their challenge is delinquent by more than four decades.¹⁵

¹⁰ For a more detailed discussion, see *Maritimes Comments on the Receiver's Petition to Stay or Hold in Abeyance*, filed in EB Dkt 11-17 & WT Dkt 13-85 on March 31, 2016.

¹¹ 47 C.F.R. § 1.251(f)(3).

¹² *Notice of Proposed Rule Making* (FCC 71-105), 36 Fed. Reg. 279 (Feb. 10, 1971).

¹³ *Report and Order* (FCC 72-310), 34 FCC 2d 485 (1972), 37 Fed. Reg. 7507 (Apr. 15, 1972).

¹⁴ 5 U.S.C. §§ 551-558.

¹⁵ The merits (or lack thereof) of Petitioners' argument will be addressed in Section C, below.

Section 1.429(d) of the Rules provides that a petition for reconsideration of a final rulemaking order “shall be filed within 30 days from the date of public notice of such action.”¹⁶ The regulations define the “date of public notice” for rulemaking actions as the date of publication in the Federal Register.¹⁷ The *Report and Order* in Docket No. 19141, was published in the April 15, 1972, issue of the Federal Register,¹⁸ making reconsideration petitions due on or before Monday, May 15, 1972. The *Petition* is therefore nearly forty four (44) years late.

The thirty day period for filing reconsideration petitions is based on Section 405(a) of the Communications Act.¹⁹ It is well established that this statutory deadline may not be waived except in the most extraordinary circumstances.²⁰ “The deadline may not be extended, not even for reasons of equity.”²¹ While an exception might be warranted if the petitioner lacked adequate notice due Commission procedural failure, even this requires that the petitioner act with due diligence to file as expeditiously as possible upon becoming aware of the challenged action.²²

A petitioner [filing after the statutory deadline] has a burden to show (a) when and how he received notice in fact, (b) that the time remaining was inadequate to allow him reasonably to meet the 30-day requirement (from date of issuance) of § 405, and (c) that he moved for reconsideration promptly on receiving actual notice. Because persons directly affected typically become aware of rulings and decisions, through items in the general or trade press, before the official letter arrives from the agency's secretary, it will be an extraordinary case ... where a petitioner can meet that burden.²³

¹⁶ 47 C.F.R. § 1.429(d).

¹⁷ 47 C.F.R. § 1.4(b)(1).

¹⁸ See footnote 16, above.

¹⁹ 47 U.S.C. § 405(a).

²⁰ *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976), citing *Radio Station KFH v. FCC*, 247 F.2d 570, 573 n.2 (D.C. Cir. 1957); *Albertson v. FCC*, 182 F.2d 397, 401 (D.C. Cir. 1950); *Reuters Limited v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986).

²¹ *Adelphia Communications Corp.*, 12 FCC Rcd 10759, 10761 n.12 (1997), citing *Gardner v. FCC*, 530 F.2d at 952.

²² *Gardner v. FCC*, 530 F.2d 1086 at 1092.

²³ *Gardner v. FCC*, 530 F.2d 1086 at 1091 n.24.

It cannot be seriously contended that a reconsideration request filed more than forty years after the rule's adoption meets this standard. Petitioners have long been on constructive if not actual notice of the rule in question. Moreover, Petitioners waited a full year after the regulation was invoked in the *Referral Order* to advance their latest theory. The *Petition* must be rejected as having been tendered far beyond the statutory deadline.²⁴

C. EVEN IF NOT DISMISSED FOR THE REASONS DISCUSSED ABOVE, THE PETITION FAILS ON ITS MERITS.

Petitioners contend that, because subsection (f)(3) of Section 1.251 was not explicitly contained in the draft rule proposed in Notice of Proposed Rule Making, it violates the public notice requirement of Section 4(a) of the Administrative Procedure Act.²⁵ But it has been long and well established that neither the exact text of the regulation nor every precise provision that may be adopted need be contained in the notice.²⁶ A final rule is not invalid simply because it may differ in some respects that the initially proposed rule, provided interested parties have a fair opportunity to participate in the rulemaking process.²⁷ Indeed, the express statutory language requires only that the notice contains “either the terms or substance of the proposed rule *or a description of the subjects and issues involved.*”²⁸ The *Notice of Proposed Rule Making* in Docket No. 19141 certainly met this standard.

²⁴ Petitioners are well aware of the statutory deadline for reconsideration petitions, having run afoul of it before. As instructed by the Commission: “Havens ... filed ... beyond the statutory 30-day filing window for seeking reconsideration. ... In three separate orders, ... first the staff and then the Commission concluded that Havens had failed to demonstrate why he should be excused from the consequences of his failure to file a timely petition for reconsideration” *Warren C. Havens*, 27 FCC Rcd 2756, 2757 (2012) (citations and footnotes omitted).

²⁵ 5 U.S.C. § 553(b).

²⁶ E.g., *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980); *Mount Mansfield Television v. FCC*, 422 F.2d 470 (2nd Cir. 1971).

²⁷ E.g., *Chocolate Manufacturers v. Block*, 775 F.2d 1098, 1104 (4th Cir. 1985).

²⁸ 5 U.S.C. § 553(b)(3) (emphasis added).

Furthermore, Section 1.251 generally and subsection (b)(3) thereof specifically are procedural, not substantive, regulations and are therefore exempt from the Administrative Procedure Act public notice requirements. The statute expressly exempts from the notice requirement ‘rules of agency procedure, or practice.’²⁹ It is difficult to imagine a rule that is more procedural in nature than Section 1.251. Petitioners will no doubt contend that the impact of designation of a character qualifications hearing looking toward the possible revocation of their licenses is substantive, not procedural. But neither the challenged rule nor the *Referral Order* constitutes a hearing designation order. The *Referral Order* simply refers the matter for evaluation and determination by the Commission. That is not only procedural in nature, it is the very nascent stage of a proceeding that may or may not go any further.

Assuming without conceding that the actual adoption of a hearing designation order might be substantive, the mere investigation and consideration of the possibility is something well within the scope of the procedural rule exception. For example, the Court in *U.S. Dept. of Labor v. Kast Metals Corp.*,³⁰ held that an OSHA regulation establishing methodology for selecting employer sites for inspection was procedural, and thus exempt, over objections that “the rule substantial impact on those regulated.”³¹ By analogy, even though a hearing designation order may have substantial impact on the subject licensee, that does not render the mere consideration of the possibility a substantive rather than procedural matter for purposes of the Administrative Procedure Act.

Finally, it is worth noting that Petitioners’ myopic focus on Section 1.251(f)(3) is misplaced. The specific charge of bad faith exploitation of the summary decision process, and hence the invocation of Section 1.251(f)(3), was merely one aspect in a long litany of abuse of

²⁹ 5 U.S.C. § 553(b)(3)(A).

³⁰ 744 F.2d 1145, 1551-1556 (5th Cir. 1984).

³¹ 744 F.2d at 1154.

process and other misconduct cited in the *Referral Order*. Separate and apart from Section 1.251(f)(3), indeed even if the rule did not exist, it is certainly within the prerogative of the presiding judge to refer such matters to the Commission for evaluation and appropriate action. As discussed in the *Referral Order*, the presiding judge tried repeatedly to reign in the disruptive and abusive conduct by Havens and the Havens Entities. It was neither ultra vires nor an abuse of discretion, therefore, for Judge Sippel to have finally decided to send this matter to the Commission rather than continuing to endure the endless delays and disruption in the hearing.³²

WHEREFORE, the foregoing premises considered, it is requested that the *Petition* be dismissed or in the alternative denied on its merits.

Respectfully submitted,



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³² Petitioners advance what can only charitably be characterized as “silly” arguments that the *Referral Order* is suspect because Judge Sippel did not act as a mindless automaton, slavishly parroting the exact language of the rule. Petitioners are disturbed that the judge suggested a possible “designation for hearing” rather than the “addition of an issue.” *Petition* at p. 5 n.9. Petitioners feign dismay that the judge referenced “qualifications to hold Commission licenses” rather than “character qualifications.” *Id.* at n.10. It suffices to say that the judge neither exceeded his authority nor abused his discretion by using equivalent language. But the fact that the *Referral Order* does not regurgitate the precise wording of the rule supports the very point discussed above, namely, the matters referred to the Commission are not limited solely to the improper submission of a summary decision motion petition, but go in addition to the consistent pattern of Havens misconduct throughout the course of the entire proceeding.

CERTIFICATE OF SERVICE

I certify that on this 20th day of April, 2016, I caused copies of this document to be served, by U.S.P.S., First Class postage prepaid, on the following parties of record in EB Docket No. 11-71.*

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* Insofar as this pleading relates to WT Docket No. 13-85, it is being electronically filed in that docket ECFS. In accordance with the Commission’s March 28, 2013, Public Notice (DA 13-569) at p. 3: “Notwithstanding the restricted nature of this proceeding, ... pleadings ... filed via the Commission’s Electronic Comment Filing System (ECFS) ... will not have to be served on the parties.”