

FILED/ACCEPTED

MAY 31 2011

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re)	
)	
MARITIME COMMUNICATIONS/LAND	)	EB Docket No. 11-71
MOBILE, LLC	)	File No. EB-09-IH-1751
	)	FRN: 0013587779
Participant in Auction No. 61 and Licensee of)	
Various Authorizations in the Wireless Radio)	
Services)	
)	
Applicant for Modification of Various	)	Application File Nos. 0004030479,
Authorizations in the Wireless Radio Services	)	0004144435, 0004193028, 0004193328,
	)	0004354053, 0004309872, 0004310060,
Applicant with ENCANA OIL AND GAS (USA),	)	0004314903, 0004315013, 0004430505,
INC.; DUQUESNE LIGHT COMPANY; DCP	)	0004417199, 0004419431, 0004422320,
MIDSTREAM, LP; JACKSON COUNTY	)	0004422329, 0004507921, 0004153701,
RURAL MEMBERSHIP ELECTRIC	)	0004526264, 0004636537,
COOPERATIVE; PUGET SOUND ENERGY,	)	and 0004604962
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: Chief Administrative Law Judge Richard L. Sippel

ENFORCEMENT BUREAU'S
OPPOSITION TO MOTION TO HOLD HEARING IN ABEYANCE

1. On May 19, 2011, Atlas Pipeline Mid-Continent, LLC, DCP Midstream, LP, Denton County Electric Cooperative, Inc. d/b/a CoServ Electric, Dixie Electric Membership Corporation, Inc., Enbridge Energy Company, Inc., EnCana Oil & Gas (USA) Inc., Interstate Power & Light Company, Jackson County Rural Electric Membership Cooperative, and Wisconsin Power and Light Company (collectively, "Petitioners") filed with the presiding

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Administrative Law Judge (“presiding Judge”) a pleading entitled Motion To Hold Hearing In Abeyance As To CII Petitioners (“Motion”). Pursuant to section 1.294 of the Commission’s rules, 47 C.F.R. § 1.294, the Chief, Enforcement Bureau (“Bureau”), by her attorneys, hereby opposes the Motion.

2. By way of background, the Commission commenced the above-captioned hearing proceeding with its release of *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, FCC-11-64, rel. April 19, 2011 (“HDO”). The HDO requires the presiding Judge to determine ultimately whether Maritime is qualified to be and remain a Commission licensee and consequently whether its pending applications should be denied and its licenses should be revoked. Petitioners were made parties in the instant hearing proceeding because of their status as proposed assignees in some of the applications that were designated for hearing.¹ On May 19, 2011, the same day the Petitioners filed their Motion, they also filed with the Commission a Petition for Reconsideration (“Petition”) of the HDO in which they urge the Commission to afford them the opportunity under footnote 7 of the HDO to show that their applications should be removed from the ambit of the hearing.²

3. In their Motion, Petitioners request that the presiding Judge stay the hearing proceeding in EB Docket No. 11-71 insofar as their applications are concerned until the Commission has ruled on their concurrently-filed Petition. In support, they state that, since the

¹ See sections 309(e), 312(a)(1), 312(a)(2), 312(a)(4), and 312(c) of the Act, 47 U.S.C. §§ 309(e), 312(a)(1), 312(a)(2), 312(a)(4), and 312(c).

² In footnote 7, the Commission specifically noted that it would, upon an appropriate showing, consider whether, and if so, under what terms and conditions, the public interest would be served by allowing the application of Southern California Regional Rail Authority (“Metrolink”) – designated pursuant to the HDO – to be removed from the ambit of the hearing. The Commission noted the potential safety of life considerations involved in using the spectrum in question to implement the federally mandated positive train control (“PTC”) systems and other safety controls to enable automatic braking and to help prevent train collisions by the 2015 deadline set forth in the *Rail Safety Improvement Act of 2008*, Pub. L. No. 110-432, filed Oct. 16, 2008, 122 Stat. 4848, 4856-57 § 104(a) (2008). Footnote 7 does not offer any other party the opportunity to show whether the public interest would be served by removing its application from the hearing.

relief they seek in their Petition is intended to remove all of their applications from the ambit of the Maritime hearing, no purpose would be served by requiring them to appear and participate in the hearing.

4. There is no merit to Petitioners' request for a stay. A request for stay requires that the moving party demonstrate: (a) that it is likely to prevail on the merits; (b) that it will suffer irreparable harm absent a stay; (c) that grant of a stay will not substantially harm other interested parties; and (d) the public interest favors grant of a stay.³ However, Petitioners offer no basis for satisfying any of these factors. Instead, they offer only conclusory statements that they "are likely to prevail on the merits" of their Petition and that they will "suffer irreparable and unnecessary harm in participating in the hearing" without offering any explanation.

5. Petitioners' unsupported assertions do not satisfy their burden of showing they are likely to prevail in obtaining the relief they seek in their Petition. The Commission, at footnote 7 of the HDO, plainly invited only Metrolink – and not just any entity who could articulate public safety considerations – to show why its applications should be removed from the ambit of the hearing. In adopting the specific language of footnote 7, the Commission apparently concluded that Metrolink's applications are unique among those designated for hearing in the HDO in that they alone contemplate the use of spectrum for the purpose of implementing the federally-mandated positive train control ("PTC") system, designed to protect the public from catastrophic train-to-train collisions.⁴ Because footnote 7 applies only to applicants in the hearing intending to use spectrum for PTC purposes, and Petitioners do not intend – and cannot argue that they intend – to use the spectrum at issue for implementing PTC, the Bureau submits that Petitioners are *not* likely to prevail on the merits of their Petition.

³ See, e.g., *In the Matter of WTVG, Inc. and WUPW Broadcasting, LLC*, 25 FCC Rcd 12263 (2010) (denying request for a stay when the moving party failed to satisfy its burden of proof in support of a stay)(citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

6. In addition, the Commission has repeatedly recognized that for a movant to demonstrate that an injury qualifies as “irreparable harm” when seeking a motion to stay, it must identify a harm that is more than simply “theoretical” and it must provide “proof indicating [that] such harm is certain to occur in the near future.”⁵ In their Motion, Petitioners fail to meet either of these obligations. Moreover, if the presiding Judge were to grant Petitioners’ request for a stay, it would delay the hearing and unjustifiably harm the public’s interest in ensuring that the proceeding is promptly resolved. Consequently, unless and until the Commission rules favorably and with finality on their Petition, Petitioners should remain parties in this proceeding. As such, they should be bound by any rulings handed down by the presiding Judge, including those at the prehearing conference.

7. Based on the foregoing, the Bureau opposes a stay of the Maritime hearing insofar as Petitioners’ applications are concerned.

Respectfully submitted,

P. Michele Ellison
Chief, Enforcement Bureau



Pamela S. Kane
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau

⁴ See S. Rep. No. 110-270 at 5 (2008); see also H.R. Rep. No. 110-336 at 31, 43 (2007).

⁵ See *In the Matter of Petition for Reconsideration and Motion for Stay of Paging Systems, Inc.*, 20 FCC Rcd 8087, 8094 (2005) (citation omitted).

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May 31, 2011

CERTIFICATE OF SERVICE

Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 31st day of May, 2011, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S OPPOSITION TO MOTION TO HOLD HEARING IN ABEYANCE" to:

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