

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

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,
) 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 CORPORATION, INC.;)
ATLAS PIPELINE – MID CONTINENT, LLC;)
DENTON COUNTY ELECTRIC)
COOPERATIVE, INC. , DBA COSERV)
ELECTRIC; AND SOUTHERN CALIFORNIA)
REGIONAL RAIL AUTHORITY)

To: The Commission

ENFORCEMENT BUREAU'S CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

1. On May 19, 2011, several electric and gas utilities and oil and gas companies filed two petitions for reconsideration¹ of the Commission's Order to Show Cause and Hearing

¹ One petition was filed by 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"). The other was filed by Duquesne Light Company ("Duquesne").

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Designation Order (HDO) in this proceeding,² which designated for hearing issues concerning Maritime's qualifications to remain a Commission licensee. The petitions seek reconsideration of footnote 7 of the HDO, which states that the Commission will, on an appropriate showing, consider whether to approve a proposed assignment of certain spectrum from Maritime to the Southern California Regional Rail Authority (SCRRA) to enable SCRRA to implement a congressionally-mandated positive train control (PTC) system to prevent train accidents. The Petitioners and Duquesne argue that they should be authorized to make a similar showing, and generally argue for a broad public safety exception to the Commission's longstanding *Jefferson Radio* policy, which prohibits the grant of an assignment or transfer application when the seller's qualifications to continue holding the licenses are in issue.³ Pursuant to section 1.106(g) of the Commission's rules, 47 C.F.R. § 1.106(g), the Chief, Enforcement Bureau, by her attorneys, hereby opposes the broad relief sought in the petitions as inconsistent with the Commission's clear intent in the HDO, and as plainly detrimental to the Commission's longstanding character and *Jefferson Radio* policies.

BACKGROUND

2. The Commission commenced the above-captioned hearing proceeding with its release of the HDO, in which the Commission found that Maritime's actions had called into question whether Maritime has the basic qualifications to be a Commission licensee. The Commission found that there are substantial and material questions of fact as to whether Maritime, among other things, violated the designated entity rules and received a bidding credit to which it was not entitled, and repeatedly made misrepresentations to and lacked candor with

² *Maritime Communications/Land Mobile, LLC*, FCC 11-64, EB Docket No. 11-71, 2011 WL 1495195 (April 19, 2011).

³ See *Jefferson Radio v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

the Commission.⁴ Petitioners were made parties to the hearing proceeding because of their status as proposed assignees in some of the applications that were designated for hearing.⁵

3. The Commission's *Jefferson Radio* policy generally prohibits a licensee whose qualifications to remain a licensee have been set for hearing from assigning or transferring control of the licenses.⁶ The premise of the policy is that "a licensee ... has nothing to assign or transfer unless and until he has established his own qualifications."⁷ This policy serves as a strong deterrent to licensees from engaging in misconduct before the Commission because a licensee would likely suffer an "awesome loss" financially if its licenses were revoked and/or not renewed.⁸ As the Commission has observed: "where an evidentiary hearing has been designated on a ... show cause order to determine disqualification questions, permitting the suspected wrongdoer to evade sanction by transferring his interest or assigning the license without hearing will diminish the deterrent effect which revocation or renewal proceedings should have on broadcast licensees."⁹ In rare circumstances, the Commission has adopted narrow exceptions to the *Jefferson Radio* policy based on compelling public interest considerations.¹⁰

4. In footnote 7 of the HDO, the Commission raised the possibility of carving out such a narrow exception in this case. The Commission stated that it would, upon an appropriate

⁴ See HDO at para. 2.

⁵ 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). The statute requires that the Commission designate these applications for hearing and that the assignees thereto be provided with the opportunity to appear and participate in the hearing.

⁶ See *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C. Cir. 1981).

⁷ *Northland Television, Inc.*, 42 Rad.Reg.2d (P & F) 1107, 1110 (1978).

⁸ See *Stereo Broadcasters*, 652 F.2d at 1030.

⁹ *Northland Television, Inc.*, 42 Rad.Reg.2d at 1110. The *Jefferson Radio* policy applies to wireless as well as broadcast licenses. See, e.g., *Worldcom, Inc, Transferor, and MCI, Inc., Transferee.*, 18 FCC Rcd 26484, 26493-94 (2003).

¹⁰ See *Mountain View Communications, Inc., Assignor and Patrick County Communications, L.L.C. Assignee*, 24 FCC Rcd 13516, 13520 & n.28 (Media Bureau 2009).

showing, consider allowing the proposed assignment of spectrum from Maritime to SCRRRA – the only pending application contemplating assignment of spectrum for a PTC system – to be removed from the ambit of the hearing.¹¹ Footnote 7 does not offer any other party to the hearing the opportunity to show whether the public interest would be served by removing its application.¹² In support of its decision, the Commission specifically identified safety of life considerations involved in using the spectrum in question to prevent train collisions.¹³ The *Rail Safety Improvement Act of 2008*¹⁴ (RSIA) mandates the development and implementation of PTC systems by December 31, 2015.¹⁵ PTC is designed to prevent accidents, like the September 2008 train collision in Chatsworth, California that killed 25 people and injured more than 100,¹⁶ by automatically assuming some control of a train if a train crew does not or cannot comply with signal indications.¹⁷ PTC accomplishes this by establishing a communications-based network linking trains to equipment along the track and centralized office locations to provide information to a locomotive about its authority to proceed along the track at a particular speed.¹⁸ These networks include the use of data radios to enable wireless communication between

¹¹ Footnote 7 of the HDO refers to SCRRRA as “Metrolink.” The two are synonymous.

¹² In its Petition, Duquesne incorrectly contends that the Commission, at footnote 7, proposed that SCRRRA’s applications should be removed from the HDO. *See* Duquesne Petition at 6. This is inaccurate. Footnote 7 merely offers SCRRRA the opportunity to make a showing as to why its applications should be removed. It does not reflect the Commission’s position on whether such applications actually should be removed.

¹³ *See* HDO at para. 7, n.7.

¹⁴ Pub. L. No. 110-432, filed Oct. 16, 2008, 122 Stat. 4848, 4856-57 § 104(a) (2008).

¹⁵ We note that SCRRRA has committed to implement PTC by 2012’s end, well ahead of the federal deadline.

¹⁶ *See* National Transportation Safety Board. 2010. *Collision of Metrolink Train 111 With Union Pacific Train LOF65–12, Chatsworth, California, September 12, 2008*. Railroad Accident Report NTSB/RAR-10/01 (located at <http://www.nts.gov/publicctn/2010/RAR1001.htm>).

¹⁷ *See* H.R. Rep. No. 110-336 at 31 (2007).

¹⁸ *See Wireless Telecommunications Bureau Seeks Comment on Spectrum Needs for the Implementation of the Positive Train Control Provisions of the Rail Safety Improvement Act of 2008*, Public Notice, DA No. 11-838, released May 5, 2011 (citing United States Government Accountability Office, Report to Congressional Committees, Rail Safety: Federal Railroad Administration Should Report on Risks to the Successful Implementation of Mandated Safety Technology, at 2 (Dec. 2010) (GAO Report)).

locomotives and wayside units along the track.¹⁹ Because of its reliance on wireless communication between locomotives and wayside units along the track to assume control of the trains, PTC necessarily requires the use of wireless spectrum. PTC has been on the National Transportation Safety Board's "Most Wanted List" since its creation in 1990.²⁰

5. In their Petitions, Petitioners and Duquesne request that the Commission reconsider the limited exception it contemplated in footnote 7 so as to afford them the opportunity to show that their applications should be removed from the ambit of the hearing. Petitioners and Duquesne also request that, upon consideration of the showings they have made in their Petitions, the Commission remove their applications from the hearing and promptly grant their applications.²¹ In support of their request to expand the scope of footnote 7, both Petitioners and Duquesne suggest that they are in parity with SCRRA as applicants, and should therefore be treated by the Commission in the same manner as SCRRA. Petitioners, for example, contend they are "similarly situated" to SCRRA because, like SCRRA, they are identified as critical infrastructure industries under the Commission's rules,²² and intend to use the spectrum at issue to promote public safety initiatives in compliance with federal law. Duquesne likewise argues it is in "fundamentally the same position" as SCRRA because it offers

¹⁹ See GAO Report at 12. Wayside units are devices installed at signals, switches, and other locations along the track that monitor the status to signals and switches and communicate that information to locomotives directly or through railroads' centralized office systems. GAO Report at 17-18.

²⁰ See National Transportation Safety Board, *Most Wanted List, Transportation Safety Improvements, Federal Issues* (2007) (available at http://www.ntsb.gov/recs/mostwanted/positive_train.htm).

²¹ Duquesne also appears to be challenging its original inclusion as a party in the HDO. See Duquesne Petition at 4. However, as discussed above, the Commission was required by statute to designate Duquesne's application for hearing and to give Duquesne the opportunity to file a notice of appearance and participate in the hearing proceedings. 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). Duquesne offers no argument to the contrary. Indeed, it provides no basis for why its application should not have been originally included in the ambit of the HDO.

²² See 47 C.F.R. § 90.7 (2010).

a necessary service to the public with inherent dangers and because it seeks the spectrum at issue to implement initiatives “that have been deemed to be in the interests of the public.”²³

DISCUSSION

6. The Commission did not – and we believe should not – create a general “public safety” or “public interest” exception to the *Jefferson Radio* policy when it recognized the unique circumstance of PTC systems. Petitioners propose a sweeping expansion of footnote 7 that would essentially gut the Commission’s longstanding character qualifications and *Jefferson Radio* policies, and would have broad application far beyond the wireless radio service. In crafting footnote 7, the Commission was obviously aware of the various pending applications involving Maritime and the requirements and benefits of its *Jefferson Radio* policy. Therefore, footnote 7’s focus on the only PTC-related matter pending before the Commission was deliberate. It reflected the Commission's willingness to consider a carefully and narrowly drawn exception to *Jefferson Radio* – one that involved a federal safety of life mandate of the highest priority and immediacy.

7. In arguing for an expansion of footnote 7 to allow their applications to be granted notwithstanding the fundamental questions that have been raised about Maritime’s character, Petitioners suggest that general public interest benefits (*i.e.*, to energy efficiency, worker safety, and automated technologies) should be sufficient to defeat *Jefferson Radio*. This is incorrect and reflects a fundamental misunderstanding of the Commission’s intent in footnote 7 and of the *Jefferson Radio* policy itself. If general public interest benefits could defeat *Jefferson Radio*, presumably the Commission would have granted all of the pending applications outright or directed the Wireless Telecommunications Bureau to do so. Instead, the Commission properly declined that sweeping approach in the HDO and should affirm that course. To do otherwise

²³ Duquesne Petition at 10.

would create the very perverse incentives that *Jefferson Radio* was designed to prevent. It would enable a party whose qualifications to hold a license have been called into question to determine where the spectrum should go, and would run counter to decades of Commission precedent.

8. The proposed spectrum transfer to SCRRRA for PTC purposes raises unique and compelling public interest considerations. PTC is a congressionally-mandated safety system that relies on spectrum to work. It has been on the NTSB's Most Wanted List since 1990.²⁴ Between 1997 and 2007 the NTSB investigated more than 50 rail accidents that PTC likely would have prevented.²⁵ These accidents can result in catastrophic loss of life and injuries, like the Chatsworth, California collision that killed 25 people and injured more than 100. In passing the RSIA, Congress repeatedly underscored the direct and imminent threat posed to life and limb in the absence of automatic train braking systems:

In recent years, the total number of train accidents has increased significantly [and] serious accidents continue to occur. . . .The NTSB also stated that it “remains concerned about the safety of railroad operations where backup systems are not available to intervene when . . . a train crew operates a train improperly or fails to comply with wayside signals. NTSB accident investigations over the past three decades have shown that the most effective way to prevent train-to-train collisions is through the use of a positive train control (“PTC”) system that will automatically assume some control of a train when the train crew does not comply with signal indications.” Over the years, the NTSB has issued a series of recommendations on PTC. In fact, PTC has remained on the Board’s Most Wanted Transportation Safety Improvements list since 1990. The NTSB concluded that the Macdona, Texas, accident is “another in a long series of railroad accidents that could have been prevented had there been a PTC system in place at the accident location.” . . .

. . . .

In August 1999, the Railroad Safety Advisory Committee published a report entitled *Implementation of Positive Train Control Systems*. The report states that out of a select group of 6,400 accidents that occurred from 1998 through 1997, 2,659 of those accidents could have been prevented had some form of positive train control been implemented.²⁶

²⁴ See *supra* para. 4.

²⁵ See H.R. Rep. No. 110-336 at 44 (2007); see also S. Rep. No. 110-270 at 5 (2008).

²⁶ H.R. Rep. No. 110-336, at 29-30, 44 (2007) (describing train accidents).

9. In addition, the Bureau understands that because RSIA also requires that a PTC system implemented by one railroad carrier be interoperable to accommodate the movement of trains over track owned by other railroad carriers,²⁷ and carriers such as Union Pacific and BNSF have already joined a freight rail consortium to use spectrum in the 220 MHz frequency range for their PTC systems,²⁸ it will be incumbent upon other carriers, such as SCRRRA, who operate in overlapping geographical areas to implement PTC using the same spectrum range. Notably, as part of its inquiry into the railroads' progress in developing and implementing PTC, in December 2010, the Government Accountability Office (GAO) released a report indicating that the acquisition of adequate spectrum in the 220 MHz frequency range, specifically in dense, metropolitan areas, could present a challenge.²⁹ In carving out an exception to the *Jefferson Radio* policy in footnote 7 of the HDO for SCRRRA, therefore, the Commission likely appreciated that use of the wireless spectrum at issue in the Maritime hearing (within the requisite 220 MHz frequency range) would be critical for SCRRRA to implement PTC and to immediately increase the safety of riding on the nation's railroads.

10. As explained above, the Bureau urges that the Commission deviate from its long-established *Jefferson Radio* policy in only the very narrowest of circumstances. Neither Petitioners nor Duquesne can present a sufficiently compelling case to justify allowing Maritime to transfer its licenses to them before the presiding Administrative Law Judge has determined whether Maritime is even qualified to hold those licenses in the first place. For instance, in contrast to SCRRRA, neither Petitioners nor Duquesne are subject to a congressional directive to deploy a spectrum-based safety system that directly and immediately achieves protection of life

²⁷ 49 U.S.C. § 20157(a)(2), (i)(1).

²⁸ SCRRRA Petition at 6.

²⁹ See GAO Report at 76 (Appendix III: Detailed Results of Experts' Assessment of Rail Safety Technologies).

and limb in the same way as does the use of spectrum for PTC. The electric utility Petitioners³⁰ and Duquesne suggest that their intended use of the spectrum – to upgrade their existing communications or monitoring systems – would facilitate reliable communications in emergency situations.³¹ The fact that there may be some public benefit falls far short, however, of PTC’s congressionally-mandated purpose of preventing horrific, deadly train crashes. The same is true as to the oil and gas Petitioners,³² who intend to use the spectrum at issue to operate or update systems that provide real-time monitoring of pipeline operations.³³ The Petitioners and Duquesne did not – and cannot – articulate how their intended use of the spectrum will directly and immediately save lives in the same way as PTC, and we urge the Commission not to depart from its longstanding and important *Jefferson Radio* policy.

CONCLUSION

11. For the foregoing reasons, the petitions for reconsideration should be denied. To the extent the Commission carves out any exception to the *Jefferson Radio* policy in this proceeding, it should be limited to the unique and compelling circumstances presented by the proposed spectrum assignment for positive train control.³⁴

³⁰ These petitioners are Denton County Electric Cooperative, Inc. d/b/a CoServ Electric (“CoServ”), Dixie Electric Membership Corporation, Inc. (“DEMCO”), Interstate Power and Light Company (“IPL”), Wisconsin Power and Light Company (“WPL”), and Jackson County Rural Membership Electric Cooperative (“Jackson County REMC”).

³¹ See Petition filed by CoServ, DEMCO, IPL, WPL, and Jackson County REMC (“CII Petition”) on at 9-12.

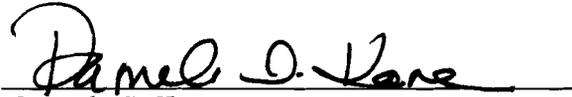
³² These petitioners are Enbridge Energy Company, Inc., (“Enbridge”), Atlas Pipeline Mid-Continent, LLC (“Atlas”), DCP Midstream (“DCP”), and EnCana Oil & Gas (USA) Inc. (“EnCana”).

³³ See CII Petition at 6-8.

³⁴ In a recent pleading in this proceeding, the Bureau argued that even in the PTC context, any licenses that might be removed from the hearing should be subject to certain conditions to ensure that Maritime is not allowed to profit from any transfer of licenses until its qualifications to hold them have been established. The Bureau urged in that context that the Commission expressly condition grant of any license transfer applications on the following: (1) the proceeds from the transaction should be deposited into an escrow account; (2) the Commission should review and approve of the terms of the escrow agreement in advance; (3) the Commission should be a party to the escrow agreement; and (4) the deposited funds should be held in escrow until such time as the hearing proceeding in EB Docket 11-71 is resolved through all administrative and judicial appeals with finality. See Enforcement Bureau’s Consolidated Comments on Showings Filed Pursuant to Footnote 7, at para. 9 (filed May 18, 2011). Should the Commission decide to grant the Petitioners or Duquesne the relief they seek, we strongly recommend that the same conditions be imposed.

Respectfully submitted,

P. Michele Ellison
Chief, Enforcement Bureau

A handwritten signature in black ink, reading "Pamela S. Kane", written over a horizontal line.

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June 2, 2011

CERTIFICATE OF SERVICE

Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 2nd day of June, 2011, sent by first class United States mail of the foregoing "ENFORCEMENT BUREAU'S CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION" to:

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