

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

In the Matter of )

**MARITIME COMMUNICATIONS/LAND )  
MOBILE, LLC )**

EB Docket No. 11-71  
File No. EB-09-IH-1751  
FRN: 001358779

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 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 )**

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

For Commission Consent to the Assignment of Various )  
Authorizations in the Wireless Radio Services )

**FILED/ACCEPTED**

**JUN 13 2011**

**Federal Communications Commission  
Office of the Secretary**

To: THE COMMISSION (via Marlene H. Dortch, Secretary)  
Attn.: Chief Administrative Law Judge Richard L. Sippel

**CONSOLIDATED REPLY TO OPPOSITIONS TO  
PETITION FOR RECONSIDERATION**

*Duquesne Light Company*

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To: THE COMMISSION (via Marlene H. Dortch, Secretary)  
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**CONSOLIDATED REPLY TO OPPOSITIONS TO  
PETITION FOR RECONSIDERATION**

Duquesne Light Company (“Duquesne”), by its undersigned counsel, hereby submits this Reply to the Oppositions to its Petition for Reconsideration filed by the Commission’s Enforcement Bureau and by SkyTel.

## **BACKGROUND**

Duquesne filed a Petition for Reconsideration, Request for Removal from Hearing Designation Order, and Request for Grant of Application<sup>1</sup> on May 19, 2011 (“Petition”). The Petition seeks, essentially, the very same treatment already offered to the Southern California Regional Rail Authority (SCRRA) in this proceeding.

The Commission’s Enforcement Bureau (“EB”) filed on June 2, 2011 a Consolidated Opposition to the Petition and to a similar request filed by other entities (“EB Opposition”). Also on June 2, 2011, several companies, which go by the name “SkyTel,” filed a Consolidated Opposition to these same petitions for reconsideration (“SkyTel Opposition”).

This Consolidated Reply responds to the arguments raised in the EB Opposition and the SkyTel Opposition, and renews Duquesne’s request that the Commission promptly grant the relief sought in the Petition.

## **INTRODUCTION**

The EB Opposition and the SkyTel Opposition do nothing to counter critical positions established by the Petition:

- Duquesne needs the spectrum at issue to implement critical infrastructure improvements designed to improve the safety and reliability of, and minimize the economic and bodily harm caused by, the operation and restoration of the electric grid as mandated by the Commonwealth of Pennsylvania.
- Both Oppositions, in fact, concede this point without argument. They simply claim that other considerations are more important.

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<sup>1</sup> FCC File No. 0004193328, filed April 21, 2010.

- The *Jefferson Radio* policy, however, while important, does not control here as to the transfer of a non-broadcast wireless license destined for public safety use by an innocent purchaser. Instead, *Second Thursday* is more instructive, and a similar balancing test to the one in that case should be applied, such as:

Where there is a clear, tangible and logical nexus between needed spectrum and the safety, security and reliability of critical infrastructure subject to a governmental mandate, the FCC cannot be the arbiter of degrees of public endangerment. The FCC's interest in deterring licensee abuse in such situations must be served by remedies other than preventing the critical use of the spectrum.

- The EB's focus on body count must therefore be disregarded and the Commission should grant the petition, finding that it has the authority to do so under 47 C.F.R. section 1.106 and/or section 1.41.

## ARGUMENT

### **I. *Jefferson Radio* Does Not Control The Grant of Duquesne's Application**

The Enforcement Bureau argues in its Opposition that the *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." EB Opposition at 3. The bureau cites *Worldcom Inc., Transferor, and MCI, Inc., Transferee*, 18 FCC Rcd 26484, 26493-94 (2003), claiming that case holds that "[t]he *Jefferson Radio* policy applies to wireless." This is an overstatement of that case.

At issue in *Worldcom* was the transfer of various non-broadcast licenses from WorldCom to MCI. The Commission noted that, in determining whether to grant a transfer of a non-broadcast license, it will consider the character of the applicant in a similar fashion as it does in a broadcast context, but noted a variety of differences between the two very different services. *Id.* at 26493 ("many of the underlying public interest concerns in the broadcast arena...do not apply

with equal force to common carrier facilities, where content is divorced from conduit.”).

Although the Commission references *Jefferson Radio* in the footnotes of *Worldcom* where it is citing its general broadcast review standards, it declines ever to state that *Jefferson Radio* applies directly in a non-broadcast, wireless context.<sup>2</sup> Indeed, the interest of free transferability of licenses is greater in the context of non-broadcast licenses<sup>3</sup> where “deferral of all actions on all of the licenses held by a multiple licensee pending a final resolution of character issues raised by alleged misconduct may operate to the detriment of the public interest.”<sup>4</sup>

The *Worldcom* case is, however, useful for its articulation of the “*Second Thursday*” exemption to the *Jefferson Radio* policy. See *id.* at 26495, citing *Application of Second Thursday Corp. (WWGM), Nashville, Tenn. For Renewal of License*, 22 FCC 2d 515 (1970). *Second Thursday* holds that an application, which is tied up in a bankruptcy, may be granted if the transferor will have no part in the proposed operations of the transferee and “will either derive no benefit from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.” *Worldcom* at 26495.

Although MCLM is not in bankruptcy, the *Second Thursday* balancing approach is useful here. Grant of Duquesne’s Application would provide only a minor benefit to MCLM

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<sup>2</sup> See also *In the Matter of XM Radio*, 15 FCC Rcd 24484 (2000), where the Commission declined to apply *Jefferson Radio* in the context of an already granted DARS license.

<sup>3</sup> *Applications of Cablecom-General, Inc.*, 87 FCC2d 784, 790-791 (1981). (Allowing a transfer of control involving applications in several non-broadcast services including the Cable Television Relay Service (CARS); point-to-point common carrier microwave radio service; and the satellite communications service.)

<sup>4</sup> *Cellular System One of Tulsa*, Memorandum Opinion and Order, 102 FCC 2d 86, at ¶8 (1985). “An agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Otis L. Hale d/b/a Mobilfone Communications, Order to Show Cause and Memorandum Opinion and Order Designating Applications for Hearing*, 1985 FCC LEXIS 2389, at ¶13 (“Mobilfone”) citing *Haney v. Chaney*, 470 US 821, 831 (1985). In *Mobilfone*, applying Supreme Court precedent, the Commission upheld the Common Carrier Bureau’s initial decision not to initiate enforcement action against certain licenses of Mobilfone, even as other licenses were being designated for hearing.

(the price of the assignment)—or no benefit at all if the FCC creates an escrow of such monies as has been proposed, EB Opposition at 9, n. 34, or imposes forfeitures on MCLM. Meanwhile, grant of the Application would allow Duquesne to move forward with its governmentally-mandated smart grid operations and also strengthen its distribution safety and control systems.<sup>5</sup> Even if the EB seeks to wholly ignore state mandates and policies, it cannot ignore that the improvement of the nation's electric grid is also central to key national policies regarding safety, reliability and homeland security.<sup>6</sup>

These are the very kinds of equitable considerations contemplated by *Second Thursday*. Moreover, Duquesne sits in an identical position to an innocent creditor; indeed, in this proceeding it is an innocent purchaser of the spectrum at issue in its Application.

The Commission's *Jefferson Radio* policy does not control the relief sought in Duquesne's Petition. Instead, the Commission should weigh the relative benefits to MCLM, if any, against the considerable equitable considerations that grant of the Application would provide Duquesne and the public. On balance, grant of Duquesne's Application is merited.

## **II. The Enforcement Bureau Provides No Reasoned and Rational Basis for the Disparate Treatment of SCRRA and Duquesne**

Duquesne seeks in its Petition the same treatment offered to SCRRA; namely, the opportunity to be excluded from the HDO and to have its Application granted.

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<sup>5</sup> As noted in the Petition, and explained more below, Duquesne intends to use the requested frequencies to replace outdated data communications facilities in its rural territories and for smart metering.

<sup>6</sup> See also *Comment Sought on the Implementation of Smart Grid Technology*, Public Notice, DA 09-2017 (rel. Sept. 4, 2009) (discussing implementation of smart grid and other communications systems pursuant to federal government directive); *Critical Infrastructures Protection Act of 2001*, PL 107-56, October 26, 2001, 115 Stat 272 (discussing the national security concerns of utilities, oil and gas companies and other critical infrastructure which may be affected by terrorist attacks and concerns that communications systems remain reliable and secure during emergency situations).

**A. The Enforcement Bureau Overstates SCRRA's Case and Ignores the Merits of Duquesne's Petition**

Duquesne supports the Commission's determination that SCRRA should be allowed to seek exemption from the HDO.<sup>7</sup> The Enforcement Bureau also supports the Commission's offer to SCRRA, but has objected to Duquesne's request for a similar opportunity. As set forth herein, the bureau has offered no logical rationale for this disparate treatment.

Instead, and perhaps sensing the overwhelming similarities between the applications of SCRRA and Duquesne, the Enforcement Bureau focuses on—and exaggerates—the media headline differences between the two requests. First, the bureau focuses on the 25 fatalities that occurred in southern California, and the relation of that tragedy to SCRRA's application, which seeks spectrum for use in furtherance of train separation and control. *See* EB Opposition at 7, 9 (referencing “imminent threat posed to life and limb” and use of spectrum to “immediately save lives”). By contrast, the bureau says Duquesne's spectrum needs will have no direct or immediate effect on “sav[ing] lives.” EB Opposition at 9.

Next, the Enforcement Bureau claims the SCRRA frequencies will be used for “preventing horrific, deadly train crashes,” while Duquesne's spectrum would be used merely to “facilitate reliable communications in emergency situations.” *Id.* (emphasis added).

This is preposterous. The dangers posed by highly charged power lines to utility workers and the public are no less than those faced by riders of public transportation.<sup>8</sup> and Duquesne's

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<sup>7</sup> Interestingly, neither the Enforcement Bureau nor the Commission ever provides the impetus for this protection. While the HDO provides such treatment in footnote 7, it never claims SCRRA ever requested this treatment. Indeed, the docket of this proceeding is bereft of any filing, *ex parte*, or other communication supporting such a determination by SCRRA or any other entity.

<sup>8</sup> *See, for example*, “Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, Occupational Safety and Health Administration,” *Proposed Rule*, 70 Fed.Reg. 34821, 34825 (June 15, 2005) (noting that “[e]lectricity has long been recognized as a serious workplace hazard exposing employees to dangers such as

use of its spectrum is as important to safety as the use made of that spectrum by SCRRA.<sup>9</sup> Indeed, in one of the very worst disasters ever experienced in the United States, Hurricane Katrina and its aftermath, the United States Senate recognized the critical importance of the electric infrastructure to the public welfare, the inextricable link between power restoration and vital communications and the laudable role played by Mississippi Power in restoring communications and protecting human life.<sup>10</sup>

The EB's focus on media headlines and body count is no way to weigh the relative importance of these licenses nor is it an appropriate method by which to craft Commission policy.

**B. The Enforcement Bureau's Position Provides No Standard**

The Commission needs a reasonable, bright-line standard to determine whether to grant Duquesne (or SCRRA) the right to be exempted from the HDO. The Enforcement Bureau's rubric, which focuses on tragic headlines and body counts as opposed to creating an overarching reliable communications system, and reveres federal government mandates while ignoring state mandates, cannot be the test.

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electric shock, electrocution, electric arcs, fires, and explosions. [ ]. The 227,683 employees performing work covered by the proposed standards experience an average of 444 injuries and 74 fatalities each year.").

<sup>9</sup> Duquesne provided sworn testimony in its Petition describing how the requested spectrum will be used to cut power and sectionalize outages during storm restoration. In other words, Duquesne uses the very spectrum sought here to eliminate the inadvertent contact between the public, or utility workers, and fallen "live" power lines. Although Duquesne cannot point to a number of deaths or injuries that this technology prevents, the public safety benefit is obvious. Further, Duquesne explained in its Petition that it requires grant of its Application to support smart grid initiatives that are mandated by the Commonwealth of Pennsylvania and supported by the Commission. The Enforcement Bureau makes no mention of this government mandate in its Opposition.

<sup>10</sup> *S. Rpt. 109-322 – Hurricane Katrina: A Nation Still Unprepared*, 287-91, 321-23 (2006).

Duquesne does not agree with the Enforcement Bureau that what the Commission is required to do here is “carve out an[] exception to the *Jefferson Radio* policy.” EB Opposition at 9. As noted above, that policy applies to broadcast licenses.

Rather, the Commission must balance granting an application where the transferring party is under investigation but the innocent assignee will use the spectrum for the benefit of worker and public safety, and other public interest considerations, such as fostering federal energy policy or the environment.

Duquesne therefore suggests the following, which is a distillation of the Commission’s holdings in *Jefferson Radio*, *Second Thursday*, and *XM Radio*, *supra*:

Where there is a clear, tangible and logical nexus between needed spectrum and the safety, security and reliability of critical infrastructure, the FCC cannot be the arbiter of degrees of public endangerment. The FCC’s interest in deterring licensee abuse in such situations must be served by remedies other than preventing the critical use of the spectrum.

This policy provides a sensible framework for determining when an application should be granted as compared to when it should be delayed, pending the outcome of a show cause proceeding. It is especially useful where, as here, the use of an escrow account or forfeitures can remove any potential financial benefit to the licensee subject to a show cause hearing.

### **III. Commission Rules Provide Authority for the Relief Sought**

#### **A. 47 C.F.R. § 1.106**

SkyTel argues in its Opposition that Commission rule 1.106 does not provide a grounds for reconsideration as set forth in the Petition.<sup>11</sup> SkyTel cites to the text of Commission rule 1.106 and to a case in which it was involved 37 years ago where the *target* of the hearing

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<sup>11</sup> SkyTel’s objection is ponderous, if not ironic, given its own claim that “the Hearing is improper.” SkyTel Opposition at 5.

designation order sought reconsideration of the Commission's determination to order a hearing. See SkyTel Opposition at 2-3. The argument SkyTel posits, that a party who is subject to a hearing cannot stop the hearing before it occurs merely by seeking reconsideration, may apply to Maritime Communications / Land Mobile, LLC ("MCLM"), which is the target of the Hearing Designation Order ("HDO"), and notably did not seek reconsideration.

SkyTel's argument is not at all applicable to Duquesne. Duquesne—unlike MCLM—has no active case pending before the Commission. Duquesne—unlike MCLM—has not been ordered to defend itself against any allegations whatsoever. Duquesne has been brought into this action only because of its pending Application regards MCLM. As set forth in a contemporaneous Duquesne filing, Duquesne's only interest in this proceeding will arise in a penalty phase, if any, where the presiding officer determines if MCLM should be subject to revocation of its licenses and denial of any applications related to those licenses.<sup>12</sup>

Further, as Duquesne made clear in its Petition, the decision to include Duquesne in this proceeding was a final Commission action (appealable under the general petition standard of rule 1.106), which was adverse to Duquesne (making it appealable under the standard for hearing designations, if applicable). The Commission has previously held that it will consider a petition for reconsideration filed by a party challenging its inclusion in a hearing.<sup>13</sup> Moreover, if Duquesne had not appeared, it would have had its pending Application dismissed, *with prejudice*. See HDO ¶ 68. Indeed, Duquesne's mere inclusion in this proceeding will

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<sup>12</sup> Duquesne is filing a contemporaneous Motion for Protective Order and Request for Bifurcation, which seeks to divide this proceeding into a liability and penalty phase and to limit the participation of Duquesne to the penalty phase.

<sup>13</sup> See, e.g. *Western States Telephone Company v. AT&T*, FCC 77-656 (rel. Sept. 27, 1977).

indefinitely stall the grant of its Application, which given its state-mandated need for grant of the Application to further its smart grid initiatives, is adverse and detrimental to Duquesne.

Notably, the Enforcement Bureau has made no claim that Duquesne's Petition is without authority in the Commission's rules. Accordingly, the Commission should grant the Petition.

**B. 47 C.F.R. § 1.41**

Rule 1.41 allows the Commission to grant requested relief where no formal procedure otherwise exists. In its Petition, Duquesne sought pursuant to rule 1.41 not only reconsideration of inclusion of its Application in the HDO (in the alternative to rule 1.106), but also removal of its Application from the HDO and immediate grant of the Application. Neither SkyTel nor the Enforcement Bureau challenges Duquesne's Petition as it pertains to section 1.41 of the Commission's rules. Thus, the Commission should grant the requested relief.

**CONCLUSION**

No dispute exists that Duquesne has important concerns of public safety and welfare, as well as national and state energy and environmental policy, bound up with the grant of its Application. The Enforcement Bureau simply believes that Duquesne's interests are not as important as those of SCRRA.

But neither the Enforcement Bureau, nor the Commission, should be the arbiter of just how deadly a situation has to be before it will forego one of its methods of punishing a licensee. Certainly, the Commission has an interest in deterring licensee misbehavior, but that interest cannot place it in the position of deciding which threats to critical infrastructure and public safety are more imminent in charging which enforcement mechanisms take precedence over demonstrable harm to the public welfare.

The Commission should grant Duquesne's Petition and its underlying Application.

Respectfully submitted.

A large, stylized handwritten signature in black ink, appearing to read 'Charles A. Zdebski', is written over a horizontal line.

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Dated: June 13, 2011

**CERTIFICATE OF SERVICE**

I, Charles A. Zdebski, certify that on this 13<sup>th</sup> day of June, 2011, I caused a true and correct copy of the foregoing Duquesne Light Company Consolidated Reply to Oppositions to Petition for Reconsideration to be served via first-class mail, postage prepaid, upon:

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