FILED/ACCEPTED

JUN 27 2012

Federal Communications Commission
Office of the Secretary

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: 0013587779
	)	
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, and 0004604962
	)	
For Commission Consent to the Assignment of Various Authorizations in the Wireless Radio Services	)	

To: The Commission

SECOND REQUEST FOR EXPEDITED ACTION

Atlas Pipeline Mid-Continent LLC
Denton County Electric Cooperative, Inc. d/b/a CoServ Electric
Dixie Electric Membership Corporation, Inc.
Enbridge Energy Company, Inc.
EnCana Oil & Gas (USA) Inc.
Jackson County Rural Electric Membership Corporation

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Introduction

Atlas Pipeline Mid-Continent LLC; Denton County Electric Cooperative, Inc. d/b/a CoServ Electric; Dixie Electric Membership Corporation, Inc.; Enbridge Energy Company, Inc.; EnCana Oil & Gas (USA) Inc.; and Jackson County Rural Electric Membership Corporation (collectively, the "*CII Petitioners*"), by their attorneys and pursuant to Section 1.41 of the Commission's rules,[1] hereby submit this *Second Request for Expedited Action.*

Background

The *CII Petitioners* consist of three oil and gas companies and three rural electric cooperatives, all defined as Critical Infrastructure Industry ("CII") companies under the Commission's rules.[2] In reliance on the Commission's "secondary markets" decisions, which authorized the partitioning and disaggregation of spectrum by existing licensees, the *CII Petitioners* independently negotiated in good faith and at arms' length their respective purchases of spectrum from Maritime Communications/Land Mobile LLC ("Maritime"), a then fully authorized Commission licensee marketing its licenses to the energy industry in certain geographic areas.[3] Contracts were finalized, and the above-captioned applications to assign small portions of Maritime's AMTS licenses to *CII Petitioners* were filed with the Commission from November 2009 to March 2011.[4]

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[1] 47 C.F.R. § 1.41 (2010).

[2] Under the definition in the Commission's rules, CII companies include electric utilities, oil and gas companies and railroads. 47 C.F.R. § 90.7 (2010).

[3] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 20604 (May 15, 2003).

[4] Encana Oil and Gas (USA) Inc. filed its assignment application in November 2009 (ADD FILE NO.). Jackson County REMC filed its application on July 6, 2010 (FCC File No. 0004310060). Enbridge filed its application on November 19, 2010 (FCC File No. 0004430505). DEMCO filed its application on December 8, 2010 (FCC File No. 0004507921). Atlas Pipeline filed its application on March 2, 2011 (FCC File No. 0004526264). CoServ filed its application on March 11, 2011 (FCC File No. 0004636537).

Hearing Designation Order

On April 19, 2011, the Commission released an *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing* ("*HDO*") designating for hearing Maritime's above-captioned licenses and assignment applications, including those of the *CII Petitioners*.[5] The *HDO* contained no allegations of wrongdoing – repeat, none – against any of the *CII Petitioners* or any other proposed assignee.

Among all of Maritime's proposed assignees (there were 12: 4 oil and gas companies, 7 electric utilities and 1 railroad), the *HDO* permitted only the Southern California Regional Rail Authority ("SCRRA") to show cause why its application should be "*removed from the ambit of the hearing proceeding and granted*" due to its pressing need to use this spectrum for Positive Train Control ("PTC").[6]

Petition for Reconsideration

On May 19, 2011, the *CII Petitioners* filed a *Petition for Reconsideration* of the HDO supporting the removal of SCRRA from the hearing but questioning why the *CII Petitioners*' applications were treated differently. The *CII Petitioners* pointed out that their requirements for this spectrum are as great as the railroad's requirements, and they, too, should be removed from the hearing.[7]

Like the railroad, the *CII Petitioners* are defined as "Critical Infrastructure" under the Commission's rules.[8] Like the railroad, the *CII Petitioners* require the use of this spectrum to

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[5] *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 (*rel.* Apr. 19, 2011) ("HDO").

[6] *Id* at *fn* 7.

[7] *See, CII Petitioners* Petition for Reconsideration, filed May 19, 2011 (EB Docket No. 11-71).

[8] 47 C.F.R. § 90.7 (2010).

comply with federal mandates. Like the railroad, the *CII Petitioners* need these frequencies to support critical and innovative new applications, such as smart grids, advanced pipeline automation and electric distribution control. Like the railroad, the Commission has made available no other suitable spectrum to satisfy the *CII Petitioners'* communications requirements. And, like the railroad, the *CII Petitioners* acted in good faith in their dealings with Maritime and are not alleged, in the *HDO*, to have done anything "wrong."

The *CII Petitioners* argued in their *Petition for Reconsideration* that nothing in the Commission's rules or prior decisions authorized the Commission to distinguish among critical infrastructure companies or to elevate a railroad above similarly-situated electric utilities and oil and gas companies in terms of the public interest, convenience and necessity. The *CII Petitioners* offered to pay into escrow any additional amounts due under their contracts with Maritime and to take any other appropriate steps to ensure that no benefits would accrue to the alleged wrongdoers pending the outcome of the administrative hearing process.

Request for Expedited Action

Since the Commission failed to timely rule on their *Petition for Reconsideration*, the *CII Petitioners* filed a *Request for Expedited Action* on July 15, 2011, reiterating their pressing need for this spectrum to support critical infrastructure applications in the energy industry and beseeching the Commission to act promptly and favorably on their request.[9] The *CII Petitioners* pointed out again that no other suitable spectrum was readily available to satisfy their communications requirements.

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[9] A copy attached of the *Petition for Reconsideration* is attached hereto.

Prehearing Conferences

During prehearing conferences in the hearing proceeding, the *CII Petitioners* repeatedly complained to the Presiding Administrative Law Judge ("ALJ") of the Commission's delay in processing their applications and requested that the ALJ remove the applications from the scope of hearing and grant them. The ALJ acknowledged the applicants' frustration but determined that "his hands are tied," stating that he lacks the authority necessary to approve the applications:[10]

> I'm trying to think if there is anything it's possible that I can do, and I'm, honestly, my hands are tied. And I know the frustration. I mean, I can't believe that what I'm hearing here is that you've got such public interests hanging around... I'm frustrated. I don't know what I would do if I were in your situation. I don't know what you should do.[11]

Continued Delay and Uncertainty

Fifteen months after the Commission's *HDO*, fourteen months after the *Petition for Reconsideration*, and eleven months after the *Request for Expedited Action*, the Commission still has not acted despite the *CII Petitioners*' demonstrated need for this spectrum to support critical infrastructure applications and the absence of any other readily available frequency alternatives.

Meanwhile, the FCC hearing proceeding has become inextricably intertwined with Maritime's subsequent filing for bankruptcy protection in a federal court in Mississippi and does not appear remotely close to resolution.[12] Following Maritime's filing for bankruptcy, the parties in the hearing proceeding have engaged in extensive but still only preliminary debate

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[10] *See*, Transcript of October 25, 2011, Hearing at p. 266 available at http://apps.fcc.gov/ecfs/document/view?id=7021747027 (last visited June 19, 2012).

[11] *Id.*

[12] See, August 1, 2011, bankruptcy filing *In Re Maritime Communications/Land Mobile, LLC*, Voluntary Petition for Chapter 11 Bankruptcy, No. 11-13463 (N.D. Miss. filed Aug. 1, 2011).

regarding the application of the Commission's *Second Thursday* precedent to the pending applications.[13] Although the bankruptcy court has approved the assumption of most of the underlying agreements supporting the applications, the Reorganization Plan has not yet been approved by the court or presented to the Commission. At this point, nothing has been resolved and there is no way of predicting whether *Second Thursday* filings ever will be submitted to the Commission for consideration let alone approved for grant.

The hearing also is marred by unending, acrimonious and time-consuming disputes among Maritime, the Enforcement Bureau and other parties regarding discovery.[14] Despite the ALJ's best efforts, Maritime and the Enforcement Bureau apparently have been unwilling or unable to agree on stipulations to expedite the discovery process, and recriminations have been flying back-and-forth as up to 100 boxes of potentially relevant documents that had been thought lost were recently discovered.[15] None of this bodes well for a timely resolution of the hearing.

No end is in sight. Rather than a reasoned decision by the Commission, the pending assignment applications are slowly being resolved by attrition as the proposed assignees reluctantly throw in the towel due to the delay, uncertainty and expense of the Commission's

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[13] In general, under *Second Thursday*, assignment applications subject to pending FCC enforcement actions and also included in a bankruptcy proceeding may be granted if the alleged wrongdoers 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. Second Thursday Corp., *Memorandum Opinion and Order*, 22 FCC 2d 515 (1970), recon. granted, Memorandum Opinion and Order, 25 FCC 2d 112 (1970) ("*Second Thursday*"). Maritime has indicated it will file its *Second Thursday* showing after the Bankruptcy Court approves its Plan of Reorganization, but it is still unclear if let alone when the Court might approve the Plan. *See,* Transcript of May 22, 2012, Hearing at p. 569, available at http://apps.fcc.gov/ecfs/document/view?id=7021921947 (last visited June 15, 2012). The Plan was filed with the Bankruptcy Court on April 30, 2012, and is being contested. If a Plan eventually is approved, Maritime will then draft and file its *Second Thursday* showing, interested parties may file pleadings in support or opposition and the Commission will review the showing and issue a ruling, which is subject to yet further appeal.

[14] Earlier this year, the Chief Administrative Law Judge issued an Order extending discovery "to an appropriate date in November." Order, EB Docket No. 11-71, FCC 12M-26, *fn 1*, May 23, 2012. It is unlikely the hearing will start in 2012 or be resolved in the next 12 months.

[15] *See*, Transcript of May 22, 2012, Hearing at pp. 661-62 available at http://apps.fcc.gov/ecfs/document/view?id=7021921950 (last visited June 19, 2012).

processes. To date, three critical infrastructure companies -- an oil and gas company and two electric utilities -- have actually withdrawn from the hearing in frustration.[16]

Through no fault of their own, the *CII Petitioners* – all Critical Infrastructure Companies representing different aspects of the energy industry – are being denied access to much needed spectrum to satisfy their communications requirements. Even though none of the proposed assignees is alleged to have done anything wrong, they are being "punished" by the Commission for their reliance on the Commission's well publicized secondary markets decisions.

Conclusion

CII Petitioners respectfully renew their longstanding request for favorable Commission action on their *Petition for Reconsideration.* In many cases, the ongoing uncertainty surrounding the hearing process and the inactivity regarding their applications impairs the *CII Petitioners*' ability to operate and maintain critical infrastructure systems safely and efficiently in the public interest and in compliance with federal requirements. It should be unacceptable to the Commission as a matter of public policy.

It is long past time for the Commission to act. These applications should be removed from the hearing process and granted *post haste.*

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[16] On August 16, 2011, DCP Midstream LP filed a Motion to Withdraw its Notice of Appearance and indicated that it determined "not to prosecute further the captioned application." On October 26, 2011, Interstate Power and Light and Wisconsin Power and Light filed similar motions to withdraw from the hearing. These motions were granted on November 1, 2011 (*See,* Memorandum Opinion and Order, FCC 11M-32).

Respectfully submitted,

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Attachment: Certificate of Service