

**Before the
Federal Communications Commission
Washington, D.C. 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 PETITION TO STAY

1. On January 23, 2013, Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (Choctaw) requested that the Presiding Judge stay all of the issues designated in the above-captioned hearing, including Issue (g), “pending Commission resolution of the pending applications pursuant to the *Second Thursday* doctrine.”¹ The Presiding Judge has

¹ See Petition to Stay, filed January 23, 2013 (Petition), at 10.

already considered and resolved this exact question.

2. Nearly 18 months ago, on August 1, 2011, Maritime Communications/Land Mobile, LLC (Maritime) filed a motion to delay the hearing pending “submission to the Commission of appropriate applications pursuant to the Second Thursday policy.”² The Enforcement Bureau (Bureau) opposed Maritime’s motion.³ After considering the parties’ respective pleadings on this subject, and arguments proffered during the October 25, 2011 prehearing conference – including Maritime’s concession that Issue (g) should be resolved in the hearing and not by application of the *Second Thursday* doctrine⁴ – the Presiding Judge effectively stayed the above-captioned hearing on all designated issues other than Issue (g).⁵ The Presiding Judge ruled from the bench that Issue (g) “has to be litigated, and there’s no reason to hold it up.”⁶ As a result, the Presiding Judge allowed discovery on Issue (g) to move forward, and since October 2011, the parties have devoted extensive time and resources to developing the record related to Issue (g). The close of discovery on this Issue is set for March 1, 2013. Choctaw’s Petition offers no basis for revisiting the Presiding Judge’s decision on Issue (g).

3. In support of its Petition, Choctaw relies upon the four-factor test applied by the Commission and the courts which considers (1) the petitioner’s likelihood of success on the merits, (2) irreparable injury to the petitioner, (3) harm to other parties, and (4) the public interest.⁷ As detailed below, Choctaw has not met this four-part test.

² See Maritime’s Motion to Defer All Procedural Dates, filed on August 1, 2011 (Motion). See also Reply to Oppositions to Motion to Defer Procedural Dates, filed August 16, 2011.

³ See Enforcement Bureau’s Opposition to Motion to Defer All Procedural Dates, filed on August 10, 2011 and Enforcement Bureau’s Supplement to Its Opposition to Motion to Defer All Procedural Dates, filed on September 16, 2011.

⁴ See Maritime’s Motion at fn. 6 and see, e.g., October 25, 2011 Prehearing Conference Transcript (10/25/11 Transcript) at pp. 250-51, 253-254.

⁵ See, e.g., 10/25/11 Transcript at pp. 249-257.

⁶ Id. at p. 257.

⁷ See Petition at 3.

Choctaw Is Not Likely To Succeed On The Merits Of Its Claims

4. In support of factor (1), Choctaw argues first that there is a “strong likelihood that Choctaw will succeed on the merits of [its] claim under *Second Thursday*.”⁸ Although the Bureau believes there are serious questions as to the likelihood of Choctaw’s success on its request for *Second Thursday* relief given the circumstances of this case,⁹ the purported strength of Choctaw’s *Second Thursday* showing is immaterial to whether Issue (g) should now be stayed.

5. In deciding to move forward with discovery on Issue (g), the Presiding Judge already acknowledged that the question of whether Maritime constructed or operated its site-based stations at variance with Sections 1.955(a) and 80.49(a) of the Commission’s rules does not call into question Maritime’s basic qualifications and therefore falls outside the types of hearing issues that should be stayed pending resolution of a *Second Thursday* petition.¹⁰ Moreover, Maritime conceded that, regardless of its intent to pursue *Second Thursday* relief, “Issue (g) in the designation order ... will still need to be resolved” and that it would “work with Enforcement Bureau counsel to work out a process for addressing and resolving the issue as to the incumbent stations” outside of the *Second Thursday* process.¹¹ Choctaw provides no reason for the Presiding Judge to reverse his earlier ruling to resolve Issue (g) in hearing.

6. Choctaw alternatively argues that, even if Issue (g) is not subsumed within its request for *Second Thursday* relief, the hearing on Issue (g) should be stayed because it has

⁸ Id.

⁹ For example, Choctaw’s request for *Second Thursday* relief raises novel questions concerning whether the application of the *Second Thursday* exception is appropriate when the value of the licenses at issue likely exceeds the amount owed to innocent creditors. Because this is an issue of first impression before the Commission, there is no way to predict how the Commission will rule on this issue. Thus, Choctaw cannot establish for the purposes of its stay request that the Commission is likely to grant it *Second Thursday* relief.

¹⁰ See, e.g., 10/25/11 Transcript at pp. 249-257.

¹¹ Maritime Motion at fn. 6. See also 10/25/11 Transcript at pp. 250-51, 253-254.

asked the Wireless Telecommunications Bureau (Wireless Bureau) to waive Maritime's construction and operational requirements under Sections 1.955(a) and 80.49(a) of the Commission's rules as they apply to the Issue (g) licenses.¹² In doing so, Choctaw has asked the Wireless Bureau to act on licenses that are currently in hearing and over which the Wireless Bureau presently has no jurisdiction. Because the Issue (g) licenses were designated for hearing, only the Presiding Judge has jurisdiction to resolve questions pertaining to them. Choctaw cites to no precedent – because there is none – that would strip the Presiding Judge of jurisdiction over the Issue (g) licenses and return such jurisdiction to the Wireless Bureau.

7. Ignoring this fact, Choctaw suggests that its waiver request is likely to be granted by the Wireless Bureau because construction deadlines have been waived in other cases involving bankruptcy or the *Second Thursday* doctrine.¹³ Choctaw refers the Presiding Judge to the argument it made in its Public Interest Statement filed with the Wireless Bureau on January 23, 2013.¹⁴ The cases Choctaw cites within its Public Interest Statement, however, are distinguishable from the circumstances here because they do not address licenses that have been designated for hearing or that were subject to a request for relief under *Second Thursday*.

8. Thus, Choctaw's waiver request before the Wireless Bureau cannot provide any basis for staying the hearing on Issue (g). Accordingly, Choctaw cannot meet factor (1) of the four-part test for staying Issue (g). Its Petition should be denied on this basis alone.

Choctaw Will Not Suffer Irreparable Harm

9. Choctaw argues on factor (2) that it and other innocent creditors will suffer irreparable harm absent a stay, in part because a hearing will delay a number of pending

¹² See Petition at 6.

¹³ See *id.* at 6-7.

¹⁴ See *id.* at fn. 18.

transactions that could provide substantial funds to repay creditors.¹⁵ However, the Bureau is aware of only one pending transaction which implicates one of the many licenses affected by Issue (g) – the transaction with Duquesne Light Company which implicates call sign WHG750.¹⁶ The remaining pending transactions relate only to the geographic licenses which are not part of Issue (g). Continuing the hearing on Issue (g), therefore, will not delay these transactions or repayment to innocent creditors. Choctaw also argues that continuing with a hearing would prevent it from negotiating transactions that may be necessary to generate funds for creditor payment.¹⁷ Here again, allowing Issue (g) to proceed would not impact Choctaw’s ability to negotiate transactions related to the geographic licenses to secure additional funding to repay innocent creditors.

10. In any event, Choctaw has failed to show that anyone will suffer irreparable harm unless a stay is granted. All of the alleged harms identified by Choctaw are financial, and the Commission has consistently held that monetary losses do not constitute irreparable harm.¹⁸ First, Choctaw claims that a stay is needed to ensure that creditors are repaid as quickly as possible. Mere delay in repayment does not constitute irreparable harm. Second, Choctaw argues that a hearing on Issue (g) will require Choctaw to expend additional funds.¹⁹ Choctaw was on notice of the pending hearing and the possible costs associated therewith when it chose to

¹⁵ See *id.* at 9. Notably, Choctaw was formed by several of the secured creditors, all of whom loaned money to Maritime more than seven years ago. The Choctaw creditors took no formal steps to secure repayment prior to Maritime filing for bankruptcy in August 2011.

¹⁶ Duquesne has been using this license since February 2010. Maritime and/or Duquesne may argue that Duquesne’s operation of this license warrants its exclusion from Issue (g).

¹⁷ See Petition at 9.

¹⁸ See, e.g., *In re Gavin*, 23 FCC Rcd 12060, 12065 (Aug. 12, 2008); *In re KSWB, Inc.*, 13 FCC Rcd 21867, 21868 (CSB Oct. 30, 1998); *In re Tele-Visual Corp.*, 34 FCC 2d 292 (Mar. 29, 1972).

¹⁹ See Petition at 9. Choctaw also argues that if the hearing is not stayed it will be a “significant distraction from the reorganization of the former MCLM.” *Id.* Yet, Choctaw has not offered any explanation of how proceeding with the hearing on Issue (g) will disrupt any reorganization of Maritime. The Bankruptcy Court has already issued its Order confirming the Plan of Reorganization, and presumably the steps required therein are already underway.

step forward in the bankruptcy case to acquire the licenses currently subject to the hearing. Choctaw then chose to intervene in this hearing. After purposefully, and knowingly, assuming the costs of proceeding with this hearing, Choctaw cannot now use these costs as a basis to stay the hearing on Issue (g). Indeed, the Presiding Judge has already acknowledged that the possible strain of litigation costs is not a basis for staying Issue (g).²⁰

Other Parties Will Be Harmed By A Stay

11. In support of factor (3), Choctaw asserts that other parties to the hearing will not be significantly harmed by a stay of the hearing, but its sole rationale for this position appears to be that a stay will preserve resources on matters that could be mooted by the Commission's action on its *Second Thursday* request or Choctaw's waiver request before the Wireless Bureau.²¹ However, as the Bureau noted above, Issue (g) is not something that is subsumed in the Commission's consideration of Choctaw's *Second Thursday* request and the Wireless Bureau has no jurisdiction to act on Choctaw's waiver request. Thus, there is no Commission action that would moot the matters raised by Issue (g) and no reason to further delay resolution of Issue (g).

The Public Interest Would Not Be Served By A Stay

12. In support of factor (4), Choctaw again argues only that a stay would conserve resources on a hearing that could be rendered moot by the Commission's action on its request for *Second Thursday* relief.²² For the reasons already articulated above, the Commission's action on Choctaw's *Second Thursday* petition would not render Issue (g) moot. Accordingly, the public interest would be best served by continuing to develop the record on Issue (g) and by finally resolving the question of whether Maritime's Issue (g) licenses automatically terminated for failure to comply with the Commission's construction and operational requirements either

²⁰ See 10/25/11 Transcript at pp. 254-55.

²¹ See Petition at 9.

²² See *id.* at 10.

through motions practice or a trial. In this regard, the Bureau would expect Choctaw to provide timely and complete responses to the discovery requests the Bureau recently served on Choctaw, particularly since it was a prerequisite to intervention, pursuant to the Commission's rules, that Choctaw be able to show that its participation will assist the Presiding Judge and the Commission in considering the issues designated in the HDO and other matters the Presiding Judge has deemed relevant to this hearing.²³ If Choctaw has information responsive to the Bureau's discovery requests, it could only benefit the public interest to develop the record accordingly.

13. For the foregoing reasons, the Bureau respectfully asks the Presiding Judge to deny Choctaw's request to stay the hearing on Issue (g). This proceeding should move forward unfettered on Issue (g), with Choctaw serving on the Bureau its answers to the Bureau's outstanding interrogatories and document requests, and with all parties continuing with the hearing process in accordance with the schedule to be set by the Presiding Judge.

²³ See Section 1.223(c) of the Commission's rules, 47 C.F.R. §1.223(c). The Bureau notes that Choctaw's Petition to Intervene argued that the Presiding Judge should grant its petition because it has a direct and substantial interest in this proceeding that is not represented by any other party. It did not appear to fully identify how its participation will assist the Presiding Judge and the Commission in the hearing as required by Section 1.223(c). Because of a delay in service, the Bureau did not receive a copy of Choctaw's Petition before the Presiding Judge issued Order, FCC 12M-60 (ALJ, rel. Dec. 14, 2012). Rather than moving to vacate the Presiding Judge's Order, the Bureau served discovery on Choctaw directed to, among other things, developing the record of how Choctaw's intervention will assist the Presiding Judge and the Commission on the matters designated for hearing.

Respectfully submitted,

P. Michele Ellison
Chief, Enforcement Bureau



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

Brian J. Carter
Attorney
Investigations and Hearings Division
Enforcement Bureau

Federal Communications Commission
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

January 29, 2013

CERTIFICATE OF SERVICE

Alicia McCannon, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 29th day of January, 2013, sent by first class United States mail, copies of the foregoing "Enforcement Bureau's Opposition to Petition to Stay" to:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554 (by hand, courtesy copy)

Sandra DePriest
Maritime Communications/Land Mobile LLC
218 North Lee Street
Suite 318
Alexandria, Virginia 22314

Dennis C. Brown
8124 Cooke Court
Suite 201
Manassas, VA 20109
Counsel for Maritime Communications/Land Mobile LLC

Jeffrey L. Sheldon
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
Counsel for Puget Sound Energy, Inc

Jack Richards
Wesley Wright
Keller & Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Counsel for Atlas Pipeline – Mid Continent LLC; DCP Midstream, LP; Enbridge Energy Co., Inc.; EnCana Oil and Gas (USA), Inc.; and Jackson County Rural Membership Electric Cooperative

Charles A. Zdebski
Gerit F. Hull
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Duquesne Light Co.

Paul J. Feldman
Harry F. Cole
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, VA 22209

Counsel for Southern California Regional Rail Authority

Matthew J. Plache
Albert J. Catalano
Catalano & Plache, PLLC
3221 M Street, N.W.
Washington, D.C. 20007

**Counsel for Dixie Electric Membership Corp.
Counsel for Pinnacle Wireless Corp.**

Robert J. Keller
Law Offices of Robert J. Keller, P.C.
P.O. Box 33428
Washington, D.C. 20033

Counsel for Maritime Communications/Land Mobile LLC

James Ming Chen
2904 Beaumont Road
Louisville, KY 40205

Counsel for Warren Havens and SkyTel

Robert G. Kirk
Wilkinson Barker Knauer, LLP
2300 N Street, NW Suite 700
Washington, DC 20037

Counsel for Choctaw Telecommunications, LLC and Choctaw Holdings, LLC



Alicia McCannon