

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re	)	
	)	
<b>MARITIME COMMUNICATIONS/LAND</b>	)	EB Docket No. 11-71
<b>MOBILE, LLC</b>	)	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 <b>ENCANA OIL AND GAS (USA),</b>	)	0004314903, 0004315013, 0004430505,
<b>INC.; DUQUESNE LIGHT COMPANY; DCP</b>	)	0004417199, 0004419431, 0004422320,
<b>MIDSTREAM, LP; JACKSON COUNTY</b>	)	0004422329, 0004507921, 0004153701,
<b>RURAL MEMBERSHIP ELECTRIC</b>	)	0004526264, 0004636537,
<b>COOPERATIVE; PUGET SOUND ENERGY,</b>	)	and 0004604962
<b>INC.; ENBRIDGE ENERGY COMPANY,</b>	)	
<b>INC.; INTERSTATE POWER AND LIGHT</b>	)	
<b>COMPANY; WISCONSIN POWER AND</b>	)	
<b>LIGHT COMPANY; DIXIE ELECTRIC</b>	)	
<b>MEMBERSHIP CORPORATION, INC.;</b>	)	
<b>ATLAS PIPELINE – MID CONTINENT, LLC;</b>	)	
<b>DENTON COUNTY ELECTRIC</b>	)	
<b>COOPERATIVE, INC., DBA COSERV</b>	)	
<b>ELECTRIC; AND SOUTHERN CALIFORNIA</b>	)	
<b>REGIONAL RAIL AUTHORITY</b>	)	

To: Marlene H. Dortch, Secretary  
Attention: Chief Administrative Law Judge Richard L. Sippel

**ENFORCEMENT BUREAU'S OPPOSITION TO  
CHOCTAW'S MOTION FOR SUMMARY DECISION**

1. On January 24, 2013, Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (Choctaw), filed a motion for summary decision (Motion) on Issue (g) of the

HDO.<sup>1</sup> In this Motion, Choctaw seeks summary decision concerning the two questions raised by Issue (g): (1) whether Maritime's site-based facilities were constructed (*i.e.*, placed in operation) within two years of their grant, as required by Section 80.49(a)(3) of the Commission's rules; and (2) whether operations of any of Maritime's site-based facilities were permanently discontinued pursuant to Section 1.955(a) of the Commission's rules.<sup>2</sup> For the reasons set forth below, the Bureau opposes Choctaw's Motion.

### **Choctaw Is Not Properly A Party to this Proceeding**

2. For the reasons the Bureau articulated in its recent Request for a Prehearing Conference on Choctaw's Party Status,<sup>3</sup> Choctaw has not met – and cannot meet – the requirements of Section 1.223(c) of the Commission's rules governing intervention.<sup>4</sup> Accordingly, Choctaw is not properly a party to this hearing and its Motion was not properly filed. Therefore, Choctaw's Motion should not be considered by the Presiding Judge.

### **Summary Decision on Construction of the Watercom Licenses Is Already Pending**

3. Choctaw argues that there is no genuine issue of material fact regarding the timely construction of a subset of the site-based authorizations at issue in the hearing: WHG701 – WHG703 and WHG705-WHG754.<sup>5</sup> In its Motion, Choctaw refers to these authorizations as the Watercom Licenses.<sup>6</sup> Choctaw argues that, more than 25 years ago, the Commission concluded that the Watercom Licenses had been constructed within the time prescribed by the

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<sup>1</sup> See Choctaw's Motion for Summary Decision of Issue G, filed January 24, 2013.

<sup>2</sup> See *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, 26 FCC Rcd 6520 (2011) (HDO) at ¶ 62(g).

<sup>3</sup> See Enforcement Bureau's Request for A Prehearing Conference on Choctaw's Party Status, filed on January 31, 2013.

<sup>4</sup> See 47 C.F.R. § 1.223(c).

<sup>5</sup> See Motion at 6-8.

<sup>6</sup> See *id.* at 6.

Commission's rules.<sup>7</sup> Specifically, the Commission found that "Watercom was required to meet a schedule of construction ... and put the system into operation within the time we had allowed."<sup>8</sup> The Commission further noted that "there can be no question of spectrum hoarding or other dereliction in [Watercom's] inauguration of service."<sup>9</sup>

4. A motion for summary decision on this issue is already pending before the Presiding Judge. On August 31, 2012, Maritime Communications/Land Mobile, LLC (Maritime) filed a Motion for Partial Summary Decision in which it made the same argument as Choctaw now makes.<sup>10</sup> The Bureau did not oppose Maritime's Motion, acknowledging that the Watercom Order resolves the "construction" question of Issue (g) with respect to the Watercom Licenses.<sup>11</sup>

**Choctaw Has Not Met Its Summary Decision Burden on the Issue of Construction of the Non-Watercom Licenses**

5. Pursuant to Section 1.251 of the Commission's rules,<sup>12</sup> summary decision is appropriate only when "[t]he party filing the motion ... show[s], by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing."<sup>13</sup> In support of its claim that there is no genuine issue of material fact concerning whether the non-Watercom site-based licenses were timely

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<sup>7</sup> See *id.* at 6-7 (citing Waterway Communications System, Inc., Memorandum Opinion and Order (FCC 87-373), 2 FCC Rcd 7317 (1987)) (Watercom Order).

<sup>8</sup> Watercom Order ¶ 16.

<sup>9</sup> *Id.*

<sup>10</sup> See Maritime's Motion for Partial Summary Decision, filed August 31, 2012, at 4-8.

<sup>11</sup> See Enforcement Bureau's Response To Maritime's Motion For Partial Summary Decision, filed September 17, 2012, at 4-5.

<sup>12</sup> See 47 C.F.R. § 1.251(a).

<sup>13</sup> *Id.*

constructed,<sup>14</sup> Choctaw relies on two decisions by the Wireless Telecommunications Bureau (Wireless Bureau) and the Commission that rejected Warren Havens' allegations that certain unidentified licenses previously licensed to Mobex Network Services (Mobex) were not timely constructed.<sup>15</sup> Neither of these decisions concludes that the 36 non-Watercom licenses at issue in this proceeding were constructed on time.

6. In *Mobex Network Services, Inc.*, 19 FCC Rcd 24939 (WTB 2004), the Wireless Bureau concluded only that Mr. Havens' petitions to deny did not "demonstrate that the licenses for the stations at issue should be deemed to have canceled automatically for failure to meet construction/coverage requirements."<sup>16</sup> The Wireless Bureau did not identify the Mobex licenses subject to its ruling or affirmatively rule that all of Mobex's licenses had been constructed on time.<sup>17</sup>

7. In *Mobex Network Services, Inc.*, 25 FCC Rcd 3390 (2010), the Commission did not even address the question of whether the licenses at issue were timely constructed. It simply acknowledged that the Public Safety and Critical Infrastructure Division of the Wireless Bureau had acted properly in denying Mr. Havens' petition to deny.<sup>18</sup> As with the Wireless Bureau's earlier ruling, the Commission did not identify the Mobex licenses subject to its ruling.

8. The burden is on Choctaw, as the movant, to establish that there is no genuine issue of material fact that the specific non-Watercom licenses at issue in this proceeding were

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<sup>14</sup> There are 36 non-Watercom licenses: KAE889, locations 3, 4, 6, 12, 13, 20, 22, 30, 34, 46, and 48; WHG693, WHV733, locations 1-3; WHV740, location 2; WHV843, locations 1, 5, and 6; and WRV374, locations 8, 12, 14-16, 18-20, 22, 23, 25, 26, 33-35, 39 and 40.

<sup>15</sup> See Motion at 7-8.

<sup>16</sup> See *Mobex Network Services, Inc.*, 19 FCC Rcd at 24944.

<sup>17</sup> *Id.* at 24941-24942.

<sup>18</sup> See *Mobex Network Services, Inc.*, 25 FCC Rcd at 3394.

constructed in accordance with Section 80.49(a) of the Commission's rules.<sup>19</sup> To meet this burden, Choctaw must do more than cite decisions holding that Mr. Havens failed to meet his burden of proving that an undefined subset of Mobex licenses were not timely constructed. Choctaw must demonstrate for each of the 36 non-Watercom licenses at issue that there is no genuine issue of material fact that it was constructed on time. Choctaw has not met this burden. Accordingly, its motion for summary decision on this issue should be denied.<sup>20</sup>

**Genuine Issues of Material Fact Preclude Summary Decision  
on the Issue of Permanent Discontinuance**

9. Choctaw also seeks summary decision concerning the second part of Issue (g): whether operations of Maritime's site-based facilities were permanently discontinued pursuant to Section 1.955(a) of the Commission's rules.<sup>21</sup> Summary disposition of this issue is inappropriate. As Choctaw concedes, there are outstanding questions of fact regarding whether, when, and for how long operations at the majority of Maritime's site based stations were suspended.<sup>22</sup> Choctaw claims, however, that these unresolved questions of fact – the same questions on which the Bureau and other parties have expended considerable resources for the last 18 months – are not material to the resolution of Issue (g).<sup>23</sup> We disagree with Choctaw's claim that these questions of fact are immaterial. The Commission has evaluated AMTS permanent discontinuance issues on a case-by-case basis, and resolution of the outstanding factual questions is indispensable to the question of whether the licenses were permanently

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<sup>19</sup> See 47 C.F.R. § 80.49(a).

<sup>20</sup> The parties have spent considerable resources over the last 18 months developing the record on whether the site-based authorizations at issue were constructed within the two-year time period imposed by Section 80.49(a). After discovery on this question is completed, it is possible there will be sufficient evidence to demonstrate that the construction requirement was met as to the non-Watercom licenses. If that is the case, the parties can negotiate a stipulation or seek summary decision on that part of Issue (g) at a later date.

<sup>21</sup> See Motion at 8-13.

<sup>22</sup> See Motion at 8.

<sup>23</sup> See *id.* at 9.

discontinued under applicable precedent.

10. Choctaw argues that summary decision is proper here because the Commission's rules and precedent failed to provide Maritime with fair notice of what was "'expected of it.'"<sup>24</sup> It is clear that the Commission expected Maritime to construct and operate its site-based stations.<sup>25</sup> The Commission has a compelling interest in ensuring that scarce, valuable spectrum does not lie fallow when it could be used to provide service to the public.<sup>26</sup> The Commission's rules plainly indicate that the consequence of permanently discontinuing operations is automatic termination of the license.<sup>27</sup>

11. While discovery is ongoing concerning Maritime's discontinuance of operations, the record to date indicates that Maritime has failed to operate the majority of its site-based stations for many years. Specifically, Maritime chose to discontinue operations at seventy (70) of its eighty-nine (89) site-based stations as of December 31, 2007, more than five years ago.<sup>28</sup>

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<sup>24</sup> See *id.* at 9-10 (quoting *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (citations omitted)).

<sup>25</sup> See, e.g., 47 C.F.R. § 80.49(a) and 47 C.F.R. § 80.1 *et al.*; 47 C.F.R. § 1.955(a). See also *Mobex Network Services, LLC*, 25 FCC Rcd 3390 (2010); *Northeast Utilities Service Co.*, 24 FCC Rcd 3310 (WTB 2009); *Mobex Network Services, LLC*, 22 FCC Rcd 665 (WTB Jan. 23, 2007); *Mobex Network Services, LLC*, 22 FCC Rcd 1311 (WTB Jan. 29, 2007); *Paging Systems, Inc.*, 21 FCC Rcd 7225 (WTB July 7, 2006); *Mobex Network Services, Inc.*, 19 FCC Rcd 24939 (WTB 2004).

<sup>26</sup> See, e.g., *Pacific Gas & Electric Co.*, 26 FCC Rcd 3465, 3467 (WTB 2011) ("The purpose of the construction and permanent discontinuance rules is [to] ensure use of licensed spectrum, and prevent licensees from warehousing spectrum . . ."); *Northstar Technology, LLC*, 24 FCC Rcd 13476, 13479 (WTB 2009) ("We agree with the Applicants that a purpose of section 1.955(a)(3) is to ensure use of licensed spectrum and to prevent its warehousing by a licensee."); *Northstar Technology, LLC*, 19 FCC Rcd 3015, 3022 (WTB 2004) (recognizing that the Commission's performance requirements are intended "to ensure speedy delivery of service to the public, and to prevent stockpiling or warehousing of spectrum by licensees").

<sup>27</sup> See 47 C.F.R. § 1.955(a)(3) ("Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued."); see also 47 C.F.R. § 80.49(a)(3) ("[I]f the station or frequencies authorized have not been placed in operation within two years from the date of the grant, the authorization becomes invalid and must be returned to the Commission for cancellation.").

<sup>28</sup> Maritime stipulated that, as of December 31, 2007, it has not provided AMTS service to end user subscribers via the following site-based stations: KAE889, locations 6, 12 and 22; WHG693; WHG701-WHG703; WHG705-WHG754; WHV733, locations 1-3; WHV740, location 2; WHV843, locations 1, 5 and 6; and WRV374, locations 8, 14, 19, 20, 22, 23, 26, 34, 35, and 40. See *Limited Stipulations Between the Enforcement Bureau and Maritime and Proposed Discovery Schedule*, filed on November 28, 2012, at ¶ 5. See also October 11, 2012 Deposition Transcript of Robert T. Smith at pp. 267:9-268:1.

Thirty-four (34) of these discontinued stations are no longer even capable of providing service because Maritime lost access to the towers or sites for failure to maintain lease payments<sup>29</sup> or because the utilities were disconnected.<sup>30</sup>

12. Nevertheless, Choctaw argues that the facts regarding when operations were suspended are “immaterial” because there are no circumstances under which the Presiding Judge could, consistent with due process requirements, find that any of Maritime’s stations permanently discontinued operations.<sup>31</sup> That is not the law. To prevail on its due process argument, Choctaw must show that Maritime reasonably could have interpreted the permanent discontinuance rule to mean that failure to operate a station for years on end without any excuse would not result in termination of the underlying license by operation of law.<sup>32</sup> The permanent discontinuance rule is not, as Choctaw suggests, *per se* unlawful because it is vague; the issue is whether it is unlawful as applied in this case. Consequently, it is premature for Choctaw to challenge the permanent discontinuance rule as applied to Maritime before the Commission has taken a position on which stations permanently discontinued operations. As Choctaw admits, there are unresolved questions of fact. Because discovery directed to these outstanding questions is on-going, the Bureau has not finalized its position concerning which of Maritime’s site-based licenses terminated by operation of law due to permanent discontinuance of operations.

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<sup>29</sup> See Maritime’s Report Per Order FCC 12M-36, filed on August 1, 2012 (Report Per Order FCC 12M-36), ¶ 2; Maritime’s Errata and Additional Information Regarding Amended and Further Supplemental Response to Interrogatories, filed on March 19, 2012 (Errata), at Table 3.

<sup>30</sup> See Errata at Table 3.

<sup>31</sup> See Motion at 8-9.

<sup>32</sup> See *Trinity Broadcasting of Florida, Inc.*, 211 F.3d at 632 (upholding due process challenge “[w]here ... the regulations and other policy statements are unclear, where the petitioner’s interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements”); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995) (upholding due process challenge when the agency’s interpretation was “so far from a reasonable person’s understanding of the regulations that [the regulations] could not have fairly informed GE of the agency’s perspective”); *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (holding that agency failed to give fair notice that regulation required use of breathing equipment when the regulation “would reasonably be read” not to require that equipment).

13. In any event, Maritime had fair notice that its failure to operate its site-based stations for several years constitutes permanent discontinuance. The law is clear that Maritime was provided with fair notice if, by reviewing the Commission’s regulations and other public statements, Maritime would be able to identify, with ascertainable certainty, the standards with which it was expected to conform in operating its AMTS site-based stations.<sup>33</sup> As detailed below, a review of the relevant regulations and public statements by the Commission demonstrates that Maritime had fair notice that by not operating its AMTS site-based stations for multiple years it risked automatic termination of these licenses.

14. As early as December 2004 – a year before Maritime acquired the site-based licenses in question – the Wireless Bureau made clear that “AMTS facilities must be constructed within a specified time and must remain operational in order for the license to remain valid.”<sup>34</sup> The Wireless Bureau reiterated this same warning in July 2006 and January 2007,<sup>35</sup> well before Maritime made the decision to discontinue service on many of its site-based stations in December 2007.<sup>36</sup> In articulating the standards that it expected AMTS licensees to meet, the Wireless Bureau cited to Sections 1.955(a) and 80.49(a) of the Commission’s rules. Section 1.955(a)(3) confirms that, in the absence of specific Commission action, authorizations automatically terminate if service is permanently discontinued.<sup>37</sup> Section 80.49(a)(3) requires that an AMTS facility be “placed in operation” within two years from the grant: “[I]f the station or frequencies authorized have not been placed in operation within two years from the date of the

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<sup>33</sup> See, e.g., *Trinity Broadcasting*, 211 F.3d at 628 (citations omitted).

<sup>34</sup> *Mobex Network Services, LLC*, 19 FCC Rcd at 24940.

<sup>35</sup> See *Paging Systems, Inc.*, 21 FCC Rcd 7225 (WTB July 7, 2006); *Mobex Network Services, LLC*, 22 FCC Rcd 665, 666 (WTB Jan. 23, 2007) and *Mobex Network Services, LLC*, 22 FCC Rcd 1311 (WTB Jan. 29, 2007).

<sup>36</sup> See *supra* note 28.

<sup>37</sup> See 47 C.F.R. § 1.955(a)(3).

grant, the authorization becomes invalid and must be returned to the Commission for cancellation.”<sup>38</sup> These rules and the Wireless Bureau’s 2004, 2006 and 2007 AMTS-related decisions put Maritime on notice that for its site-based licenses to remain valid, its stations must be placed in operation within a specified time and must remain in operation.

15. There is also Commission precedent directed to the question of permanent discontinuance of an AMTS license raised by Issue (g). In *Northeast Utilities Service Co.*, 24 FCC Rcd 3310 (WTB 2009), the Wireless Bureau placed Maritime on notice that “Part 80 licensees may not cease operations indefinitely without the license terminating for permanent discontinuance,”<sup>39</sup> and that the Wireless Bureau would “evaluate claims of permanent discontinuance on a case-by-case basis.”<sup>40</sup> In *Northeast Utilities*, the licensee suspended operations at the licensed location – the World Trade Center in New York City – when it was destroyed by the September 11, 2001 terrorist attack. The Wireless Bureau concluded that the licensee’s due diligence to secure a new space to operate demonstrated that the discontinuance was not yet permanent.<sup>41</sup> In reaching that conclusion, the Wireless Bureau considered evidence of communications, beginning in 2005, between the licensee and the entity administering the Freedom Tower antenna concerning the licensee’s request to operate on the new tower.<sup>42</sup> Thus, as of the date of this decision (March 2009), Maritime had fair notice that it could cease operations at a site without the license terminating for permanent discontinuance if (1) operations were discontinued due to events beyond its control, like a terrorist attack; and (2) objective evidence showed that it was making reasonable efforts to resume operations at the site.

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<sup>38</sup> See 47 C.F.R. § 80.49(a)(3).

<sup>39</sup> *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 3316 n. 19 and n. 40.

16. A year later, in *Mobex Network Services, LLC*, 25 FCC Rcd 3390 (2010), the Commission provided Maritime with additional guidance concerning the circumstances pursuant to which it would deem AMTS operations permanently discontinued. Therein, the Commission concluded that evidence that a licensee had failed to maintain or operate equipment at a licensed location for multiple years “is sufficient to demonstrate permanent discontinuance of operation.”<sup>43</sup> The evidence in question was an affidavit from the property manager of the building on which the licensee was to be operating, which stated that the licensee had removed equipment from the licensed location nearly three years earlier and had not received electric power supply to its equipment after that date. This decision was released on March 16, 2010. At the very least, it provided Maritime with fair notice as of 2010 that if it did not have equipment at any of its licensed locations for multiple years or if any of its equipment did not receive electric power supply for multiple years, the Commission would consider those stations permanently discontinued.

17. Choctaw argues that the Presiding Judge should ignore the *Northeast Utilities* and *Mobex Network Services* precedent because a “case-by-case” analysis of permanent discontinuance could not have put Maritime on notice of its operational obligations. Choctaw offers no legal support for this position. Choctaw does not cite to any cases concluding that a “case-by-case” or a “totality-of-the-circumstances” analysis fails to provide fair notice of a party’s obligations. Instead, Choctaw cites only to *Trinity Broadcasting*, which says nothing of the kind.<sup>44</sup> *Trinity Broadcasting* simply precludes an agency from enforcing an interpretation of

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<sup>43</sup> *Mobex Network Services, LLC*, 25 FCC Rcd at 3395.

<sup>44</sup> See Motion at 12 referring the Presiding Judge to *Trinity Broadcasting*, 211 F.3d at 628. Moreover, Choctaw ignores the well-settled principle that agencies may proceed by either rulemaking or adjudication. See *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947) (choice of proceeding by rule or adjudication is committed to agency discretion; grant of a requested authorization that was contrary to standards developed in adjudication would have

regulations or precedent that is so far from a reasonable person's understanding of those regulations and precedent that it could not have fairly informed a regulated entity of the agency's perspective.<sup>45</sup> Choctaw has offered no evidence that in this case, the Commission is seeking to enforce against Maritime an interpretation of the Commission's rules and precedent that is so far from a "reasonable person's understanding" that it could not have informed Maritime of the Commission's perspective on permanent discontinuance of AMTS operations.

18. From the AMTS precedent alone, a reasonable person would have understood the Commission's rules and precedent as requiring an AMTS licenses to maintain operations at its stations for the licenses to remain valid.<sup>46</sup> A reasonable person would also have understood that an AMTS licensee could not cease operations of its stations indefinitely without that license terminating for permanent discontinuance.<sup>47</sup> In addition, a reasonable person would have understood that, in considering the particular circumstances of a discontinuance of AMTS operations, the Commission would look to such factors as whether the licensee maintained equipment at the licensed location, whether electric power was being supplied to equipment at the licensed location, and the licensee's due diligence in re-commencing operations at the licensed location or an alternative location.<sup>48</sup> A reasonable person would have also understood that the Commission would consider how many years the stations had not been operating and why operations had been discontinued.<sup>49</sup>

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been arbitrary and capricious where agency's rationale was simply that it had not codified the standards in a rule); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) (same).

<sup>45</sup> See *Trinity Broadcasting*, 211 F.3d at 628.

<sup>46</sup> See *Mobex Network Services, LLC*, 19 FCC Rcd. at 24940; *Paging Systems, Inc.*, 21 FCC Rcd at 7225; *Mobex Network Services, LLC*, 22 FCC Rcd at 666 and *Mobex Network Services, LLC*, 22 FCC Rcd at 1311.

<sup>47</sup> See *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314.

<sup>48</sup> See *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314; *Mobex Network Services, LLC*, 25 FCC Rcd at 3395.

<sup>49</sup> See *supra* note 48.

19. The Commission’s definitions of “permanent discontinuance” in rules governing other wireless services further enabled Maritime to identify, with ascertainable certainty, that it could not discontinue operations of its site-based licenses for multiple years without risking termination of its authorizations. Section 22.317 of the Commission’s rules, for example, states that “any station that has not provided service to subscribers for 90 continuous days is considered to have been permanently discontinued, unless the applicant notified the FCC otherwise prior to the end of the 90 day period and provided a date on which operation will resume, which date must not be in excess of 30 additional days.”<sup>50</sup> Section 90.157(a) of the Commission’s rules defines permanent discontinuance as suspension of operations for one year or more.<sup>51</sup>

20. In light of this precedent, a reasonable person also would have been able to identify, with ascertainable certainty, that it could not meet its operating requirements by simply having equipment at the licensed locations that was capable of providing service but was not doing so. Merely building a facility that was capable of utilizing the licensed spectrum but then allowing it to sit dormant for years without using the spectrum would be at odds with the Commission’s licensing structure as a whole and would make a mockery of the Commission’s long-standing policy against warehousing spectrum.<sup>52</sup>

21. Notably, Choctaw has not attached any affidavits to its Motion or cited to statements in the record from anyone at Maritime that it did not have fair notice as to how the Commission would interpret its rules and precedent with regard to permanent discontinuance.<sup>53</sup>

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<sup>50</sup> See 47 C.F.R. § 22.317.

<sup>51</sup> See 47 C.F.R. § 90.157(a).

<sup>52</sup> See *supra* note 26.

<sup>53</sup> Any such affidavits surely would have created questions of fact as to Maritime’s understanding of the Commission’s rules and precedent that would have defeated Choctaw’s attempt to seek summary decision on this issue.

Indeed, Maritime has never made any such argument in the course of this hearing.<sup>54</sup> Instead, Choctaw simply quotes from the Commission’s Notice of Proposed Rule Making<sup>55</sup> to suggest that Part 80 AMTS licensees, such as Maritime, might reasonably conclude that they “could discontinue service for a long period without fear of automatic license termination.”<sup>56</sup>

Choctaw’s reliance on this statement in the Commission’s NPRM is misplaced. This statement was limited to Part 24 and Part 27 licensees – and did not even mention Part 80. In fact, Part 80 AMTS licensees appear to be distinguishable from both Part 24 and Part 27 licensees because there is precedent that places Part 80 AMTS licensees on notice that the Commission expects its licenses to remain in operation to be valid,<sup>57</sup> and that a licensee cannot cease operations indefinitely without risking that license terminating for permanent discontinuance.<sup>58</sup> There does not appear to be similar precedent in the context of Part 24 or Part 27 licenses. Thus, unlike a Part 24 or Part 27 licensee, a Part 80 licensee, such as Maritime, could *not* reasonably conclude that it “could discontinue service for a long period without fear of automatic license termination.”<sup>59</sup> Moreover, the NPRM pointed out that the time periods used to define permanent discontinuance in other Commission rules range from 90 days to one year or more.<sup>60</sup> It also put Maritime on notice that the Commission’s proposed permanent discontinuance period

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<sup>54</sup> Instead, Maritime has argued that it “never intended to permanently discontinue operations.” Motion at 8. As the Commission’s rules, decisions, and other public statements discussed above demonstrate, the Commission has always focused on objective evidence in determining whether a licensee permanently discontinued operations.

<sup>55</sup> See Amendment of Parts 1, 22, 24, 27, 74, 80, 95 and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services, 25 FCC Rcd 6966 (2010) (NPRM).

<sup>56</sup> See Motion at 11-12 (quoting NPRM, 7017-18 ¶ 52).

<sup>57</sup> See *supra* note 46.

<sup>58</sup> See *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314.

<sup>59</sup> See *supra* note 56.

<sup>60</sup> See NPRM, 7017-18 ¶¶ 51, 54-56 and 7023 ¶ 71.

for AMTS licensees did not exceed 180 days.<sup>61</sup>

22. Choctaw's Motion is wrong, therefore, when it asserts that the Commission's rules and precedent "are totally devoid of any standards by which the Presiding Judge may render a judgment that operation of an AMTS station has been permanently discontinued."<sup>62</sup> As the Bureau has demonstrated above, there is clearly AMTS-specific precedent from which the Presiding Judge may render such a judgment. This precedent, together with other Commission rules and policies, provided Maritime with fair notice of what would constitute permanent discontinuance of an AMTS station. Maritime was given fair notice that, in considering whether Maritime's authorizations should be terminated for permanent discontinuance of operations, the Presiding Judge – and the Commission – would consider the specific facts of this case, including that Maritime has not operated equipment at certain licensed locations since it acquired the licenses in late 2005;<sup>63</sup> that it removed equipment or dismantled towers at certain of its locations as early as 2009;<sup>64</sup> that utilities were discontinued at other locations as early as 2009;<sup>65</sup> and that it chose to discontinue operations at a majority of its site-based stations as of December 31, 2007, more than five years ago.<sup>66</sup>

23. Accordingly, the outstanding questions of fact concerning whether, when, and for how long operations at the majority of Maritime's site based stations were suspended, and the efforts, if any, Maritime undertook to re-commence operations at these locations – questions which Choctaw concedes are presently unresolved – remain highly material to resolution of Issue

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<sup>61</sup> See NPRM, 7012 ¶ 67.

<sup>62</sup> Motion at 9.

<sup>63</sup> See Report Per Order FCC 12M-36 ¶ 2; Errata at Table 3.

<sup>64</sup> See *supra* note 63.

<sup>65</sup> See, e.g., Errata at Table 3.

<sup>66</sup> See *supra* note 28.

(g). As a result, Choctaw has failed to meet a basic prerequisite of summary decision on the issue of permanent discontinuance. Its Motion on this issue should therefore be denied.

### Conclusion

24. For the foregoing reasons, the Bureau respectfully requests that the Presiding Judge issue an Order denying Choctaw's Motion.

Respectfully submitted,

P. Michele Ellison  
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February 7, 2013

**CERTIFICATE OF SERVICE**

Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 7th day of February, 2013, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S OPPOSITION TO CHOCTAW'S MOTION FOR SUMMARY DECISION" to:

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