

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

In re	)	
	)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC	)	EB Docket No. 11-71
	)	File No. EB-09-01-1751
Participation in Auction No. 61 and Licensee	)	FRN: 001358779
Of Various Authorizations in the Wireless	)	
Radio Services	)	
	)	
Applicant for Modification of Various	)	App. FNs 0004030479,
Authorizations in the Wireless Radio Services	)	0004144435, 0004193028,
Applicant with ENCANA OIL AND GAS	)	0004193328, 0004354053,
(USA), INC.; DUQUESNE LIGHT	)	0004309872, 0004310060,
COPANY; DCP MIDSTREAM, LP;	)	0004314903, 0004315013,
JACKSON COUNTY RURAL,	)	0004430505, 0004417199,
MEMBERSHIP ELECTRIC	)	0004419431, 0004422320,
COOPERATIVE; PUGET SOUND	)	0004422329, 0004507921,
ENERGY, INC.; INTERSTATE	)	0004153701, 0004526264,
POWER AND LIGHT COMPANY;	)	0004636537, 0004604962.
WISCONSIN POWER AND LIGHT	)	
COMPANY; DIXIE ELECTRIC	)	
MEMBERSHIP CORPORATION, INC.;	)	
ATLAS PIPELINE – MID CONTINENT,	)	
LLC; DENTON COUNTRY ELECTRIC	)	
COOPERATIVE, INC., DBA COSERV	)	
ELECTRIC; AND SOUTHERN	)	
CALIFORNIA REGIONAL RAIL	)	
AUTHORITY	)	

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

Notice of Discharge of Previous Counsel  
And Related Matters

Initially, related to and drawing upon materials provided in this Notice to explain the context of this Notice, the undersigned for SkyTel entities will separately submit a Request for Subpoenas, with draft Subpoenas.<sup>1</sup>

- I -

The undersigned, Warren Havens, provides this Notice that I have discharged attorney

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<sup>1</sup> See Appendix 2 below.

Jim Chen and The Havener Law Firm from representing myself and the Skytel entities in this Maritime Hearing.

The reason for the discharge is noted in my recent two filings in this Hearing.<sup>2</sup> It is not regarding differences between the undersigned and Mr. Chen regarding matters of this Hearing (which did not arise),<sup>3</sup> but regarding the expert role of Mr. Chen in the US District Court case I described<sup>4 5</sup> and Maritime objections raised in that case as to his expert role therein in relation to his services in this Hearing.<sup>6</sup>

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<sup>2</sup> Motion to Dismiss and in the Alternative Opposition To Motion for Summary Decision, dated and filed February 7, 2013, and Motion to Dismiss and in the Alternative Opposition To Petition for Stay, dated and filed February 1, 2013.

<sup>3</sup> Mr. Chen's substantive participation in this Hearing was in the form of one memo on authorities showing the meaning, applied to AMTS site-based licenses, of "construction" and interdependent terms including "operation." This memo was requested by the Judge, addresses core "issue (g)" law, and should be compared with the Maritime position. Mr. Chen's memo participation in this Hearing is fully consistent with SkyTel's past filings in this Hearing, before the Commission, and before the Wireless Bureau for years, including their *pro se* petitions cited by the Commission in the HDO FCC 11-64 that lead to this Hearing.

<sup>4</sup> *Havens [and Skytel entities] v. Mobex, Maritime, et al.*, Civ. Action No. 11-993, US District Court, NJ ("Maritime Antitrust Case"). This court action preceded the instant FCC Hearing. SkyTel entities allege violations of US antitrust law by defendants Maritime et al. including by their concerted violations of FCC law, including those involving "issue (g)" in this Hearing. See Appendix 1 below citing *US v RCA*, 358 U.S. 334: violation of antitrust law is considered by the FCC in licensing decisions, and violation of FCC law may be, as in this court case, a component of violation of antitrust law, finding of which can allow the judge to directly revoke the FCC licenses involved under 47 USC §313.

<sup>5</sup> Mr. Chen also testified as an expert (which the court accepted) for SkyTel entities in the Maritime bankruptcy case Chapter 11 Plan confirmation hearing, including why the Plan lacks feasibility in that it relies on Maritime obtaining so-called "Second Thursday" relief from the FCC without being able to satisfy the FCC intent or criteria for said relief. The FCC, represented by US DOJ also submitted testimony on this issue at this hearing. Maritime presented as its expert on this issue, Robert Keller who represents Maritime in this FCC Hearing.

<sup>6</sup> Maritime has a history of both attempts to block SkyTel entities from participating in this Hearing, with counsel and *pro se*, largely to suppress evidence. SkyTel commenced on a *pro se* basis, just as it left off in the underlying licensing proceedings cited in the HDO FCC 11-64. Upon obtaining counsel, Maritime (and most all of the Applications, captioned above) requested the Judge to deny or limit SkyTel party rights, which was denied. Maritime and some Applicants later sought to limit *pro se* rights of the undersigned. (Continued)

I am seeking new counsel for advice and representation, as appropriate. Until I obtain new representation, I will continue *pro se* as I commenced in my recent two filings.<sup>7</sup>

I may also submit, in this public Hearing and docket, factual information for the Judge's consideration as I have in the past.

- II -

By the other text herein including in footnotes and the Appendixes, I provide important further information relevant to this Notice and critical to issue (g) in this Hearing.

I attempt to place the Maritime objection as to Mr. Chen noted above in context of Maritime's history of suppressing evidence needed by the FCC including evidence essential for a sound record to decide upon issue (g).

I also attempt to show why the evidence at issue, being suppressed, should be brought into this Hearing and that there is no legal or equitable bar, and to not do so will lead to judicial inefficiencies. This evidence is directly essential to issue (g).<sup>8</sup> This evidence is also important

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(Continued) *As to relevant facts*, Maritime has acted in the Maritime Antitrust Case to keep evidence of decisional importance to issue (g) away from the Judge and Enforcement Bureau in this Hearing as partly indicated in the last of my two filings described in footnote 2: said evidence in this court case include, in addition to the "NCASS" 101 boxes of documents, scores of document subpoena responses from the owners and controllers of Maritime issue-(g) "stations" (Maritime does not use the definition in Part 80 and Part 1 rules for this term, which means actual stations) across the nation, as to their construction and operation, and lack thereof: *materials Maritime did not provide to the Enforcement Bureau in this Hearing under its document-production requirements*. While suppressing this critical evidence, Maritime acts with and by Choctaw to seek a summary decision on their restricted set of facts.

Again, see the Appendix 1 below, citing the US Supreme Court as to consideration of the same facts of FCC licensee violations of FCC law *in both* (i) a FCC licensing hearing before the FCC and under its jurisdiction, and (ii) an antitrust law action before a US court, under its jurisdiction including under the Antitrust Savings Clause in the 1996 Telecom Reform Act.

<sup>7</sup> In these two filings (see footnote 2 above), I also explained the distinctions between my personal interests and those of the Skytel entities which I may further supplement, in accord with the Judge's past instructions.

<sup>8</sup> While issue (g) deals facially only with license terminations for what may be deemed to be only failures to construct and/ or keep in permanent operation, if the evidence shows false

and I believe essential regarding any FCC consideration of the Maritime-Choctaw “Second Thursday” relief initiatives in that it goes to the weight of FCC regulatory interests, including willful and repeated violations of FCC law, withholding evidence, lack of candor, and licensee character and fitness.

As indicated initially above and discussed in Appendix 2 below, I will separately file, as soon as I can (within a business day or two, as planned) a certain Request for Subpoenas aimed at getting this evidence before the Judge and the Enforcement Bureau.

Respectfully submitted,

/s/  
Warren Havens  
Individually and for SkyTel legal entities  
(previously defined in this case)

2509 Stuart Street  
Berkeley CA 94705  
510 841 2220, 848 7797

Dated: February 14, 2013

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licensing applications and filings to obtain and maintain licenses, that is not failure to act, but unlawful action contrary to the threshold FCC requirement for licensing, which can lead to sanctions including license revocation, fines, and referral to the Department of Justice. See also Appendix 2 above regarding licensing statements and 18 USC §1001.

## Appendix 1

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The following three court decisions are related, and the findings in this are relevant to SkyTel attempts to get critical evidence on issue (g) into this FCC Hearing, and Maritime attempts to block that.

As shown below in the cited case text below:

*There is not only no jurisdiction bar, but there is good cause for the “Commission [to have] all the information available to the Court before it,”*

*That may be the only judicially efficient course where—as here—both the Court and the FCC must ultimately deal with the same facts as to violation of FCC law by a licensee, and where, based upon these facts, the Court considers violation of FCC law in its determination of violation of antitrust law, and the FCC considers violation of antitrust law in determining licensing actions.*

An arrangement where the “Commission [has] all the information available to the Court before it,” is efficient, and other arrangements are not, including since “[e]ven though F.C.C. approval has been granted, transactions are not immunized from challenge under the antitrust laws.”

From *US v RCA*, 358 U.S. 334 (emphasis added):

18. This conclusion is re-enforced by the Commission's disavowal of either the power or the desire to foreclose ... antitrust actions aimed at transactions which the Commission has licensed. This position was taken both before the district judge below, and in a Supplemental Memorandum filed in this Court, page 8:

"Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall...an antitrust suit challenging those transactions."

.....  
This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served ..., for this Court has held the contrary.

From *McKeon Construction v. McClatchy Newspapers*. 1969 U.S. Dist. LEXIS 10593; 1969 Trade Cas. (CCH) P73, 212, citing *US v RCA* (above) (emphasis added; asterisks in original):

The question of whether F.C.C. approval bars action under the antitrust laws was considered in a different factual situation in *United States v. Radio Corporation of America, et al.*, 1959, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354. .... The F.C.C. approved the exchange. The United States brought a civil suit, grounded on a Section 1, Sherman Act violation.

The defendant advanced the argument that the F.C.C. approval foreclosed subsequent Government action. It was stipulated that the Commission had all the information available to the Court before it and "that the F.C.C. decided all issues relative to the antitrust laws that were before it". For R.C.A. to prevail, the Court held, it would be necessary to demonstrate the extent to which Congress authorized the Commission to pass on antitrust questions.

The Court, after examining the history of the Radio Act of 1927 held that "[while] this history compels the conclusion that the F.C.C. was not intended to have any authority to pass on antitrust violations as such, it is equally clear that courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." (358 U.S. at 343, 344.) Subsequent amendments, retracting language in the Radio Act concerning antitrust violations did not dispose of the overriding policy, as it "apparently [was] considered that inherent in the scheme of the Act was the right to challenge under the antitrust laws even transactions approved by the Commission \* \* \*". (358 U.S. at 345).

Finally the Court held, "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." (358 U.S. at 346). 27

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27 In holding that the Commission did not have primary jurisdiction over the antitrust laws, the Court stated:

"This is not to imply that federal antitrust policy may not be considered in determining whether the 'public interest, convenience, and necessity' will be served by proposed action of a broadcaster, for this Court has held the contrary. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met.... (358 U.S. at 351, 352).

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Defendant would restrict *United States v. Radio Corporation of America*, to its facts, and have the court hold that F.C.C. approval can only be overturned by the antitrust laws when the antitrust violations occurred prior to the Commission's license grant. While factually distinguishable, I see no reason to so restrict *United States v. R.C.A.* Even though F.C.C. approval has been granted, transactions are not immunized from challenge under the antitrust laws. It would be inconsistent to grant immunity to those who gain Commission approval and receive licenses before engaging in actions in restraint of trade ... and subject those who act before F.C.C. approval to the full force of the antitrust laws. This conclusion

receives support from 47 U.S.C. § 313 [in the Communications Act], which states in pertinent part:

"(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to \* \* \* interstate or foreign radio communications. \* \* \*"

From the Opinion, 2011 U.S. Dist. LEXIS 148654, on the Maritime motion to dismiss in Havens [and Skytel entities] v. Mobex, Maritime, et al., Civ. Action No. 11-993, US District Court, NJ ("MCLM Antitrust Case") (emphasis added):

Defendants argue that the FCA established an elaborate framework under which the FCC regulates radio frequency allocation, and that the FCA therefore preempts Sherman Act claims because those claims may interfere with FCC radio frequency determinations. Absent from defendants' argument, however, is any authority to suggest that a court should abstain from hearing a case within its jurisdiction merely because it touches on an area subject to sophisticated agency regulation. Cf. *Raritan Baykeeper v. Edison Wetlands Ass'n, Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (in context of primary jurisdiction doctrine, noting that "[w]hen 'the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility'" (quoting *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1094 (3d Cir. 1995) (further citations omitted))).

More to the point, defendants' argument ignores 47 U.S.C. § 152, in which an uncodified amendment states that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, § 601(b)(1) (1996). The amendment further clarifies that the term "antitrust laws" includes the Sherman Act. Pub. L. No. 104-104, § 601(e)(4). The legislative history of this amendment clarifies that when Congress enacted the Telecommunications Act of 1996, it sought to ensure that the FCC could not "confer antitrust immunity" through the course of its decision making. See S. Rep. No. 104-230, at 178-79 (1996) (Conf. Rep.). Thus, Congress envisioned a system in which the FCC could consider antitrust matters when reaching decisions, but that the FCC's decisions would not preclude the operation of independent antitrust statutes. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (holding that notwithstanding arguments for implied immunity, "the savings clause preserves those claims that satisfy established antitrust standards" (citation and quotation marks omitted)). Accordingly, the FCA does not preempt plaintiffs' Sherman Act claim.

\* \* \* \*

### 3. Sherman Act Section 1 Claim

A claim under section one of the Sherman Act, 15 U.S.C. § 1, consists of four elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action[ was] illegal; and (4) . . . [plaintiff] was injured as a proximate result of the concerted action." *Howard Hess Dental Labs., Inc.*, 602 F.3d at 253 (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005)). Defendant alleges that the complaint fails to satisfy the first element because it does not allege that defendants

"conspired or agreed to act in concert with any other party, let alone the other defendants." (Defs.' Br. Supp. Mot. Dismiss 39.) See also *Twombly*, 127 S. Ct. at 1961 (in antitrust case, insufficient to allege "parallel conduct unfavorable to competition" without "some factual context suggesting agreement, as distinct from identical, independent action").

The facts here, however, are distinguishable from the facts in *Twombly*. Here, plaintiff has stated sufficient facts to "allow[] the court to draw the reasonable inference that" defendants had the requisite intent to act in concert. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 127 S. Ct. at 1965). First, plaintiff alleges specific reasons for the defendants' decisions to act in concert, such as that the defendants made a spectrum-splitting arrangement to allow each to share in the benefits of the AMTS licenses. (See Second Am. Compl. ¶ 36.) Moreover, Havens learned through communications with PSI that PSI and Mobex were cooperating and had an intertwined financial stake in the AMTS spectrums at issue. (*Id.* ¶ 38.) Cooperation could also be seen in other areas, such as Mobex and PSI locating stations at the same sites in order to reduce costs. (*Id.* ¶ 39.) This cooperation extended beyond physical interactions, as Mobex and PSI jointly petitioned the FCC on certain matters regarding the licenses. (*Id.* ¶ 41.)

The complaint alleges a history of cooperation and interactions between the companies on the very licenses at issue in this case. This makes plausible plaintiffs' allegation of concerted action, and plaintiffs have therefore stated a claim on which relief can be granted.

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The Subpoena Requests will be presented soon after this Notice is submitted (the planned date is Friday February 15, 2013, tomorrow, or the next business day).

The Requests will ask the Judge to issue a subpoena, under authority to do so that will be cited, to require from Maritime and SkyTel documents in their possession (large quantities recently obtained, and additional ones being regularly obtained) in the Maritime Antitrust Case discussed below are essential to “issue (g)” in this FCC Hearing, as well as to the other issues including license revocation and fines, and the required “weighing” under any “Second Thursday” consideration.

Some of the documents are indicated herein above.

The Judge has stated his interest in these documents in past prehearings and resultant Orders, and the Enforcement Bureau document requests in this Hearing to Maritime, SkyTel and others also cover the scope of these documents.

The Request for Subpoenas will cite these statements and requests, present why the Subpoenas are required, and why the subject documents (but for possibly small portions that may be redacted that are not relevant to Maritime violation of FCC and antitrust law) cannot be, as Maritime asserts, suppressed from use in this FCC Hearing or any other lawful purpose, including referral to the Department of Justice if violations of the threshold FCC licensing requirement is found Form 601 (and other licensing forms) summarize this threshold requirement:

WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, §1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, §312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, §503).

The evidence in demonstrates repeated willful false statements over decades on FCC licensing forms and other filings.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 14, 2013, I caused a true copy of the foregoing filing in FCC docket 11-71 to be served by USPS first class mail (with courtesy email copies, using emails of record) to:

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/s/

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