Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re	)	
	)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC	)	
	)	EB Docket No. 11-71
Participant in Auction No. 61 and Licensee of Various Authorizations in the Wireless Radio Services	)	File No. EB-09-IH-1751
	)	
Applicant for Modification of Various Authorizations in the Wireless Radio Services	)	FRN: 0013587779
	)	Application File Nos. 0004030479, 0004144435, 0004193028, 0004193328, 0004354053, 0004309872, 0004310060, 0004314903, 0004315013, 0004430505, 0004417199, 0004419431, 0004422320, 0004422329, 0004507921, 0004153701, 0004526264, 0004636537, and 0004604962
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	)	

To: Marlene H. Dortch, Secretary

Attention: Chief Administrative Law Judge Richard L. Sippel

Havens-SkyTel[1] First Motion Under Order 13M-19

To Reject Settlement, Proceed with the Hearing.
and Provide Additional Relevant Discovery

Warren Havens ("Havens") concurrently submits in this two pleadings several motions of the nature contemplated by Order 13M-19 that are due today, December 2, 2013. This Order

[1] This is submitted by Warren Havens, a previously defined "SkyTel" entity. Herein, "Havens" and "SkyTel" each mean Warren Havens, unless explained otherwise in any usage. As previously reported, Havens expects to secure representative counsel for or before the hearing. In addition, Havens actions in this hearing on a pro se basis have been informed by assisting counsel as to procedure and substance.

granted, with some changes, the Havens proposed schedules: the one before and the one after the government shutdown, the first of which summarized the nature of scope of motions Havens was considering. The motions submitted herewith are within that nature and scope.[2] This instant pleading submits the First Motion of the concurrent motions. Additional Motions are separately submitted in one other pleading.

Contents

3	I. Summary
3	II. Background, Nature and Scope
3	A. The Maritime-EB Motion of today
8	B. Additional background
10	C. Nature and Scope
11	III. First Motion
11	A. Request
11	B. Memo in Support
12	0. Introduction
	1. No authorization to enter a consent order on matters that "involve a party's basic statutory qualifications." 47 CFR § 1.93; Liberty Cable Co.
	2. De facto transfer of control
	a. Under its bankruptcy plan and order, Maritime lacks authority to pursue a settlement and a consent order, or otherwise proceed in this hearing
	b. Bankruptcy law requires the prior approval of the bankruptcy court, which neither Maritime nor any other party has sought, let alone secured
	c. Construing the bankruptcy plan and order to authorize a consent order would effect an unlawful de facto transfer of control from Maritime to John Reardon and Choctaw
34	IV. Conclusion

I. Summary

[2] Neither Judge Sippel, nor the Enforcement Bureau, Maritime or any other party issued any statement objecting to this nature and scope.

A summary is partially provided by the descriptions in the components of the Contents above, and further provided by the following. Herein, I request that the Judge issue certain subpoenas and allow for related further fact finding discovery actions due to the concealment and other wrongdoing of Maritime, the most compelling facts of which arose recently. I also request that the hearing not be terminated by any settlement proposed by Maritime, the Enforcement Bureau ("EB") or any other party, and that the hearing proceed to its completion, including on the issue of wrongdoing associated with issue (g) and that is the crux of this entire case as explained in the Hearing Designation Order, FCC 11-64 ("HDO") and the decades of wrongful actions involved indicated in the SkyTel petition proceedings named in the HDO. I provide a memo of law in support. I also initially respond to the motion filed today by Maritime and the EB (the "M-EB Motion") since it is mutually exclusive to the instant Havens First Motion, and the Havens Additional Motions separately filed today. I suggest that the Judge consider summary dismissal of the M-EB Motion due to what I believe and explain are procedural defects. I note that while this Havens First Motion and Additional Motions are presented pro se, I used diligence in their preparation, including advice of counsel as reflected in the memo.

II. Background, Nature and Scope

A. The Martime-EB Motion of today.

Initially, the Havens First and Additional Motions were composed, but for final edits and exhibits, prior to my receipt today by email of the Motion today by Maritime and the Enforcement Bureau ("EB") for a second-bit summary decision and proposed settlement (the "M-EB Motion"). I thus do not comment herein on this EB-M Motion but will oppose by the due date, or any extension thereof granted by the Judge.[3] However, I initially state that this

[3] I may submit a motion to summarily dismiss the M-EB Motion for good cause, some indicated herein. If the M-EB Motion is not summarily dismissed soon, then there appears to be

appears, among other defects (including bars under relevant FCC rules and case precedent, set out in the memo below),

(i) To be an impermissible second-bite motion for summary decision (and impermissible late request for reconsideration), improperly multiplies and delays the ligation, and is an abuse of process. [4] *Due to this and other apparent defects, some initially noted herein, I believe there is good cause for the Judge to, on his own motion, summarily and promptly dismiss the M-EB Motion, and with prejudice to resubmission of any like motion.*

(ii) To falsely asserts as its foundation that "[t]he undisputed facts demonstrate that these 16 site-based facilities were timely constructed in accordance with Section 80.49(a) of the Commission's rules and that the operations of these stations have not been permanently discontinued." That is false since, among other reasons, the EB and Maritime know that I dispute all of those "undisputed facts," with facts and law given in my opposition to the "first-bite" motion for summary decision (by Maritime) and otherwise in this hearing, and also do so in parallel proceedings before the Wireless Bureau ("WB") (the "Parallel WB Proceedings")[5] some of which cited in the M-EB Motion;

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a need to extend the date by which I (and other parties with interest) can submit an opposition to the M-EB Motion. It is not a simple settlement proposal as Maritime and the EB several times suggested to the Judge in their proposed schedules (and to me in direct communications), but as noted below, it is a second-bite motion for summary decision, or a late petition for reconsideration of the Judge's denial of the first motion for summary decision, and in either case, this warrants allowing additional time for an opposition or oppositions, if the M-EB Motion is not summarily and promptly dismissed.

[4] Parties in this hearing standing to benefit from this M-EB Motion appear to be involved in this motion, and for this and other reasons, should be subject to the fact finding I propose hererin, including Pinnacle, Duquesne, and Puget Sound Energy, along with other parties that this M-EB Motion identify as part of the asserted Maritime efforts that should count as operations (and stand against permanent discontinuance) such as the railroads with asserted interest in obtaining some of the Maritime licenses (which SkyTel disputes).

[5] These include, *among various others*, challenges by SkyTel to these site based licenses involving the following (some of which are indicated in the HDO, FCC 11-64—see Exhibit 2 hereto): (1) a petition to deny (now in reconsideration stage) of the assignment of all of these site-based licenses from Mobex to Maritime, including on the basis that the licenses are subject

(iii) To raise questions as to said Parallel WB Proceedings verses the instant proceeding under 11-71 before Judge Sippel, including the authority of the WB to decide on matters also in this hearing, including as to termination (by non-renewal or other means) and associated wrongdoing regarding the site-based licenses in the name of Maritime.[6] Even voluntary cancellation is at issue, shown by the fact the Wireless Bureau ("WB") has not granted the license (and license block) cancellation applications of well over a years ago submitted by Maritime on behalf of Maritime and the EB, based on their stipulation that they represented Judge Sippel would be effective.[7] Apparently, the WB does not, or not yet, agree to this stipulation. Nor is there any showing by Maritime or the EB to attempt to get the WB to grant these cancellations—after passing of more than a year. This calls into question both the intent as to the cancellation filings, and moreover the effectiveness of what EB and Maritime now propose in their M-EB Motion: they cannot even get the first set of licenses cancelled, and now propose

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to termination for failure to meet construction and permanent operation requirements, wrongdoing and lack of licensee qualification, and other reasons, (2) petitions to deny renewal applications of all of these licenses, several in the reconsideration stage, and the most recent regarding WRV374 has not yet been ruled on by the Wireless Bureau, (3) a petition to deny the long form of Maritime in Auction 61 (captioned in the HDO) that includes facts and argument challenging all of these site-based licenses which were the means by which Maritime commenced, and fraudulently asserted with Mobex that all of the site-based licenses were validly constructed and in operation, to artificially depress competition in the both AMTS auctions and in the relevant market (this is pending before the full Commission in an Application for Review), and (4) other requests and petitions challenging these licenses and Maritime licensee qualification, and unfair and unequal application of the law as to allowing Mobex and Maritime to assert and keep the licenses without complying with the *sine qua non* continuity of service rule (coverage and actual service) while applying the rule in all cases to Havens's AMTS applications, among other cases.

[6] As noted above, there is no FCC final action yet as to the assignment of these site-based licenses to Maritime. That is solely an issue before the Wireless Bureau and Commission, and arose before the HDO, FCC 11-64.

[7] For example, see: (1) File No. 0005224246, still pending application to modify license to delete A-block frequencies of call sign WHG702, and (2) File No. 0005223613, still pending application to modify license, KAE889, to delete certain station locations. This information, with relevant supplementary information as *to the adverse affects on SkyTel entities* that this ineffective purported attempts to cancel licenses and license blocks cases, is set out in Exhibit 3 hereto.

that more will be cancelled, if Maritime can keep some—and get out of the major issue that is wrongdoing.

(iv) In relation to '(iii)' above, to flagrantly violate 47 USC §309(a) and (d) since the Skytel entities' petitions to deny in the Parallel WB Proceedings are under this statute, and the private party rights of SkyTel in these §309 proceedings cannot be "resolved" by Maritime as it chooses, even with another party on its side (in this case, the EB)[8] including by the M-EB Motion—especially where they purport to do that with information concealed from SkyTel and the public (see '(v); below) under these Section 309 proceedings which are public; and

(v) To improperly rely on secret, non-public data that is redacted in the M-EB Motion (reflecting underlying documents that were also kept secret) to "resolve" issues that are solely based on failure to comply with FCC rules for public CMRS operations and other public actions, and in the face of evidence of concealment of massive amounts of evidence by Maritime (and its inside and outside attorneys, and its officers and agents, John Reardon and Sandra and Donald Depriest) which the Judge ordered to be made part of this hearing, and the EB repeatedly declined to lift a finger to obtain (refusing repeated arrangements offered by Havens, Skytel, and our attorney at the time), after Havens-Skytel, at high cost (in the range of $100,000) complied with the Judge's instruction to find and produce that information (approximately 100 boxes initially). And to misrepresent facts as to my participation in this Hearing and as to the purported "negotiations" (see below) by the EB and Maritime with me on this suggested settlement, that is now revealed as a second attempt at summary decision.

(vi) To assert as settled law the very issue raised as unsettled by Judge Sippel in calling for Maritime, EB and SkyTel to submit glossaries and then for SkyTel's counsel at the

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[8] See authority cited in my First Motion as to the EB not representing the Commission, in a role as party prosecuting a case that the Commission designated for a hearing.

time, Mr. Chen, to submit a further memo on FCC-law authorities as to the meaning of "constructed" and related terms. The Judge has not ruled on these, and thus the M-EB Motion lacks foundation for this reason alone. The Judge clearly did not resign himself to what any party argued is the law as to the key terms involved in issue (g) including what the Wireless Bureau has decided (whether those decisions are pending on appeal or not). Where a matter of law is in dispute in a proposed summary decision, even if the facts are not in dispute (which there are in this case), summary decision cannot be granted. (Even more fundamental reasons under FCC rules and case precedent as to why, in this case, any such settlement and summary decision cannot be granted, is given below in this Havens First Motion.)

(v) To assert facts without support (including competent sworn statements) and that to suggest that the issue of who has the burden of proof has been settled, where the Judge properly raised that issue in this hearing, as did Havens-Skytel. Indeed, in the current situation show by the M-EB Motion, the EB which is supposed to be prosecuting the case for the Commission has improperly, I believe, effectively conceded that Maritime does not have the burden of proof as to issue (g). In any case, for reasons the Judge and Havens-Skytel indicated previously,[9] this is not settled, and thus issues of fact and law that the M-EB Motion purposed to be not in dispute or disputable, are in disputable and in dispute for this reason alone.

Again, the preceding does not constitute my formal response and opposition to the M-EB Motion, which will be later filed, but is relevant to my First Motion and Additional Motions. While I expected a M-EB motion seeking that Maritime keep some of the stations, since M-EB informed me of that in general terms (without identifying the stations, or any justification), I did

[9] This included the obvious issue: that it is the licensee alone that has the knowledge of what was constructed and kept in operation. The licensee must keep the records of its licenses and alleged actual stations under the licenses, and not concealing and using fraud as to that essential information. This is in fact required in FCC law, including §80.

not expect to see what, on an initial look, appears to be highly improper means and assertions indicated in part above: *this further justifies* my First Motion and related Additional Motions.

B. Additional background.

The following background (prepared prior to an initial review of the M-EB Motion summarily discussed above) is important to understand the nature and scope of the Havens First Motion and Additional Motions submitted today, on December 2, 2013 under the current scheduling order, as opposed to other motions that may be submitted in a formal hearing, including this hearing, without a date therefor being established ahead of submission in a scheduling order. I reserve the right to submit, for good cause, such other motions.

The background involves, in sum: settlement vs. continuation of the issue(g) hearing. In this regard, the Enforcement Bureau and Maritime ("EB-M") jointly proposed a schedule prior to the government shutdown. Thereafter, on the same day, I responded by proposing a schedule with some changes to what EB –M had proposed, which EB-M then agreed to, and the Judge accepted with modifications. After the shutdown, I proposed an amended schedule, which EB-M agreed to and the Judge accepted, with modifications.

In the first set of proposed schedules just noted: EB-M proposed as the first scheduled item their intended motion for a resolution of issue (g) by a settlement among parties. My response to that, in my responsive proposed schedule, was that I intended to submit other motions, as the first scheduled item, that related to resolution to some degree, but I did not know what settlement EB-M had in mind (but for some general concepts and quantification disclosed to me by EB-M).

In the second set of proposed schedules (leading the current scheduling Order), EB-M indicated the same thing: that they intended a motion regarding a proposed settlement, and they stated that they were in "negotiations" with me (Havens) for that purpose. They later responded to me (this time also including Choctaw as well, "EB-M-C') that what they meant to represent to

the Judge by saying they were in "negotiation" with me, was that Maritime purported to invite me into their negotiations, if I complied with conditions. See Exhibit 1 hereto. That is not "negotiation" by any stretch of any denotation or connotation of the word. *I thus correct here their misstatement to the Judge, and strongly object to the misrepresentation.*[10] In addition, I believe that Maritime and the EB mislead me and the Judge as to their contemplated settlement since it was actually, as now revealed, a second motion for summary decision, or late petition for reconsideration of the Judge's denial of the first one. Any "negotiations" (even under the Maritime and EB misuse of that term) are not in good faith there the fundamental purpose and nature are speciously presented, as in this case.

Apart from the objection I raise above, the relevance of this background is that the motions due today were first proposed by EB-M to be with regard to a full settlement they were negotiating. Since they noted that twice to the Judge (in their first and second proposed schedules, note above) and communicated that to me a number of times directly (partly shown in Exhibit 1 hereto), my First Motion submitted to day closely relates to their announced motion, and my Additional Motions follow the conclusions of my First Motion. In short, I submit motions that are important to continue this hearing with proper and full evidence as to both the technical aspects of issue (g) (failures leading to automatic termination) and the associated wrongdoing including what I present as concealment of evidence and fraud to date, and I oppose any settlement (as EB-M have suggested to the Judge, and EB-M-C directly indicated to me)

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[10] In addition, I was clear to EB-M, and EB-M-C, that I saw no reason to enter any confidentiality agreement on settling this public proceeding, and they gave none to me. In addition, the EB informed me that that the EB looked to the Protective Order in this case to provide confidentiality of the settlement negotiations, and that I was not entitled to receive any information designated by Maritime (or other party) as confidential under the Protective Order. In sum, there was no such "negotiation" with me, nor did EB-M-C provide to me any reason for confidentiality, or any details of the settlement they were negotiating.

whereby Maritime keeps any of the FCC licenses involves and /or evades a hearing on the wrongdoing and ramifications thereof. [11]

I further explain that as follows:

C. Nature and Scope.

These Motions involve the following nature and scope:

(i) I oppose any attempt by Maritime (alone or with Chocktaw) and/or the Enforcement Bureau to terminate this hearing under docket 11-71 and the Hearing Designation Order 11-64 ("HDO"), based on a proposed settlement or otherwise, on procedural and substantive grounds;

(ii) I request that the issue of wrongdoing that accompanies issue (g) (as indicated by the Judge in FCC 13M-16, Aug. 14, 2013 [decision on motion for summary decision], n66) and all other issues under the HDO be fully heard;

(iii) since Maritime and others employed concealment and fraud as to central evidence in this case, and the best evidence of this concealment and fraud was recently discovered (which I describe in the First Motion), I submit the First Motion requesting that that certain additional discovery be permitted and that the Judge issue certain subpoenas; and

(iv) I submit the Additional Motions to seek additional clarity and efficiency in the hearing to its conclusion.

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[11] As I noted to Judge Sippel and parties in this hearing previously, I presented to Maritime in its bankruptcy proceeding and concurrently to the EB a full settlement proposal where the FCC would ultimately determine all public-interests aspects, and that would extend to all Havens-SkyTel claims before the FCC, the USDC in NJ, and the bankruptcy proceeding. Maritime and Choctaw clearly and summarily rejected this, shown in the records of the bankruptcy proceeding. They engaged in no discussion, counter offer, etc. In recent months, Maritime confirmed that it has no interest in any settlement except with regard to the site-based licenses, and except where the details are confidential and not part of this public proceeding.

III. First Motion

A. Request

That Judge Sippel issue subpoenas and allow related discovery to be conducted by Havens (and any Skytel legal entity, upon meeting requirements of the Judge for resuming participation in this hearing) for the purpose of the "wrongdoing" issue found in the presiding judge's memorandum opinion and order in *Maritime Communications/Land Mobile, LLC*, FCC 13M-16 (Aug. 14, 2013) n66.

If this motion is granted, then within 3 business days (by close of the day, by filing on EFCS), I will submit specific requests, identifying the parties involved, the addresses and other contact information (for subpoenas to non-parties) and the documents and information of relevance for the Judges consideration.

Use of subpoenas is appropriate in this case including to obtain documents and testimony form persons and parties that own and control the Maritime-alleged station facilities, and that hold the Maritime-concealed boxes of records: in the range of 300 boxes, according the testimony of Mr. Predmore indicated herein, and in Appendix A hereto, and submitted in my Opposition to the Maritime motion for summary decision that was denied.

Allowing me and other parties with interest, to undertake additional discovery (document demands, interrogatories, and depositions, and physical station site inspections) is also appropriate for these reasons, further discussed below.

The following memo supports the above requests in this First Motion, and its further explains the nature and scope explained above.

Appendix A hereto provides a summary of wrongdoing by Maritime and related parties that is a basis of this First Motion and is references in various places below.

B. Memo in Support of First Motion

0. Introduction

Maritime Communications/Land Mobile, LLC, and the Enforcement Bureau have evidently begun negotiating the terms of a possible consent order to resolve "whether Maritime constructed or operated any of its stations at variance with sections 1.955(a) and 80.49(a) of the Commission's rules," *Maritime Communications/Land Mobile, LLC*, 26 F.C.C.R. 6520, 6547 (2011) (FCC 11-64; EB Docket No. 11-71), known as "Issue (g)." The Commission's rules define a "consent order" as "a formal decree accepting an agrement between a party to an adjudicatory hearing proceeding held to determine whether that party has violated statutes or Commission rules or policies and the appropriate operating Bureau, with regard to such party's future compliance with such statutes, rules or policies, and disposing of all issues on which the proceeding was designated for hearing." 47 C.F.R. § 1.93(a). The Commission's rules further provide: "Where the interests of timely enforcement or compliance, the nature of the proceeding, and the public interest permit, the Commission, by its operating Bureaus, may negotiate a consent order with a party to secure future compliance with the law in exchange for prompt disposition of a matter subject to administrative adjudicative proceedings." *Id.* § 1.93(b).

SkyTel objects to any proposed consent order that purports to resolve Issue (g) and, with it, inextricably intertwined questions of candor, character, and the basic fitness of Maritime to hold licenses issued by the Commission. First and most fundamentally, SkyTel believes that such a consent order would violate the Commission's rule that "[c]onsent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license." *Id.* § 1.93(b). Moreover, inasmuch as the Commission's rules require that "the Commission, by its operating Bureaus, … negotiate a consent order *with a party*," *id.* (emphasis added), the capacity of Maritime to negotiate and enter such a consent order is squarely at issue. Maritime is a debtor in possession subject to a plan and order entered by the United States

Bankruptcy Court for the Northern District of Mississippi. Accordingly, it may act solely according to the terms of that plan and order. Maritime must also satisfy other demands imposed by federal bankruptcy law. Any course of action by Maritime under its governing bankruptcy plan and order, however, would effect an unlawful *de facto* transfer of control of Maritime to Choctaw Telecommunications or some other entity named in that plan and order, in violation of section 310(d) of the Communications Act, 47 U.S.C. § 310(d). At an absolute minimum, violations of Commission policies regarding *de facto* transfers of control, *see Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984 (1964); *Ellis Thompson Corp.*, 7 F.C.C.R. 3932, 3935 (1992), render this purported consent order contrary to the public interest and therefore unlawful under 47 C.F.R. § 1.93(b) (authorizing consent orders only "[w]here the interests of timely enforcement or compliance, the nature of the proceeding, and *the public interest* [so] permit" (emphasis added)).

1. No authorization to enter a consent order on matters that "involve a party's basic statutory qualifications." 47 C.F.R. § 1.93; *Liberty Cable Co.*

The central issue in this Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, *Maritime Communications/Land Mobile, LLC*, 26 F.C.C.R. 6520 (2011) (FCC 11-64; EB Docket No. 11-71), is "ultimately whether Maritime Communications/Land Mobile, LLC ('Maritime') is qualified to be and to remain a Commission licensee, and as a consequence thereof, whether any or all of its licenses should be revoked, and whether any or all of the applications to which Maritime is a party should be denied." *Id.* at 6521. In entertaining motions that pertain, directly or indirectly, to Issue (g) in FCC 11-64, "whether Maritime constructed or operated any of its stations at variance with sections 1.955(a)

and 80.49(a) of the Commission's rules," *id.* at 6547,[12] the presiding judge must not approve any motion — let alone approve a consent order — that contradicts or undermines the central purpose of this proceeding.

Through its attorney, Robert J. Keller, Maritime "alleges to be in confidential negotiations" under which Maritime proposes to "surrender to the FCC for cancellation the majority of [its] remaining, still held Site-Based AMTS licenses, if the FCC will stop the hearing on 'Issue (g).'" The Commission's rules do not permit Maritime to secure a consent order of this

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[12] 47 C.F.R. § 1.955(a) provides in relevant part:

> (a) Authorizations in general remain valid until terminated in accordance with this section, except that the Commission may revoke an authorization pursuant to section 312 of the Communications Act ….
>
> > (1) *Expiration.* Authorizations automatically terminate, without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed.…
> >
> > (2) *Failure to meet construction or coverage requirements.* Authorizations automatically terminate (in whole or in part as set forth in the service rules), without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements.…
> >
> > (3) *Service discontinued.* Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued.…

[12]47 C.F.R. § 80.49(a) provides in relevant part:

> (a) *Public coast stations*. (1) Each VHF public coast station geographic area licensee must notify the Commission of substantial service within its region or service area (subpart P) within five years of the initial license grant, and again within ten years of the initial license grant in accordance with §1.946 of this chapter. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.…
>
> (3) Each AMTS coast station geographic area licensee must make a showing of substantial service within its service area within ten years of the initial license grant, or the authorization becomes invalid and must be returned to the Commission for cancellation. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. For site-based AMTS coast station licensees, when a new license has been issued or additional operating frequencies have been authorized, if 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.

sort. To the extent that any consent order is permissible in this proceeding, that consent order may not dispose of the central question of Maritime's basic qualifications to be and to remain a licensee of this Commission.

Although neither the Wireless Telecommunications Bureau nor the Enforcement Bureau has offered SkyTel an opportunity "to participate in the negotiations" that might lead to a consent order, 47 C.F.R. § 1.94(b),[13] the most basic, and ultimately fatal, failure of any proposed consent order in this proceeding lies in the would-be order's departure from the substantive requirements imposed by 47 C.F.R. § 1.93. Section 1.93(b) of the Commission's Rules authorizes the appropriate "operating Bureau[]" (in this instance, the Enforcement Bureau) to "negotiate a consent order … in exchange for prompt disposition of a matter subject to administrative proceedings." 47 C.F.R. § 1.93(b). But the same section of the Commission's rules imposes a critical limitation on the scope of consent orders negotiated under this authorization: "Consent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license." *Id.* (citing 47 U.S.C. §§ 308, 309).

The basic statutory qualifications of any party to hold an FCC license include the character of that party. Under section 312(a) of the Communications Act, "[t]he Commission may revoke any station license or construction permit," *inter alia*,

> (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;
> (2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
> (3) for willful or repeated failure to operate substantially as set forth in the license; [or]
> (4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

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47 U.S.C. § 312(a). Among the litany of possible violations of this provision by Maritime that were outlined in FCC 11-64, various principals and agents of Maritime are alleged to have violated sections 1.17 and 1.65 of the Commission's rules. Section 1.17 provides in relevant part:

> In any investigatory or adjudicatory matter within the Commission's jurisdiction … or any tariff proceeding, no person subject to this rule shall
>
> > (1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and
> >
> > (2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

47 C.F.R. § 1.17(a). For its part, section 1.65 of the Commission's rules requires applicants to report substantial and significant changes in information furnished to the Commission, including "any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications." *Id.* § 1.65. Any violation of 47 C.F.R. §§ 1.17, 1.65, or of any other Commission rule that lawfully implements the Communications Act, is a violation of the statute itself. *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.* 550 U.S. 45, 54 (2007); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995). The hearing designation order in FCC 11-64 alleges violations of 47 C.F.R. §§ 1.17 and 1.65, among other rules.

By purporting to negotiate a consent order over Issue (g), or any other issue within the scope of this hearing designation order, Maritime cannot purport to deflect inquiry into its "basic

statutory qualifications to hold a license." 47 C.F.R. § 1.93(b). The presiding judge's memorandum opinion and order in *Maritime Communications/Land Mobile, LLC*, FCC 13M-16 (Aug. 14, 2013), acknowledges as much. The presiding judge has recognized the validity of Havens's argument "that 'the character and fitness of Maritime to hold *any* license is at issue' … and that a review of" all licenses, including those covered by Issue (g), "might reveal conduct that relates to that issue." *Id.* at 9 ¶ 21, n.66. No resolution of Issue (g) can "bar any party from presenting evidence at hearing related to … authorizations" disposed by summary decision or consent order "that is also relevant to the remaining issues to be heard in this proceeding," including issues of character, fitness, and basic statutory qualification to be a licensee. *Id.* A consent decree that "purports to resolve … potential character qualification questions" arising from "[m]isrepresentation and lack of candor," as forms of "serious misconduct that may implicate a party's basic qualifications," simply cannot be approved in accord with 47 C.F.R. § 1.93. *La Star Cellular Tel. Co.*, 11 F.C.C.R. 1059, 1060-61 (1996).

In an initial decision involving multichannel video programming applications by Liberty Cable, the presiding judge in this proceeding very clearly and persuasively articulated the limits imposed by 47 C.F.R. § 1.93 on consent orders. Very similarly to this proceeding, *Liberty Cable Co.*, 13 F.C.C.R. 10,716 (1998), *aff'd in relevant part*, 15 F.C.C.R. 25,050 (2000), *recon. denied*, 16 F.C.C.R. 16,105 (2001), involved alleged violations of 47 C.F.R. §§ 1.17 and 1.65. *See* 13 F.C.C.R. at 10,722. In his initial decision, the presiding judge in *Liberty Cable* denied summary decision on premature activations of microwave transmissions in violation of 47 U.S.C. § 301 and on "related misrepresentations" because those issues "depend[ed] on credibility and candor issues that permeate[d] Liberty's non-disclosures, inadequate disclosures and the explanations made in related testimony." 13 F.C.C.R. at 10,726.

Among numerous other failures in candor, character, and fitness, the Liberty Cable Company engaged in "reckless or intentional withholding of highly relevant evidence," *id.* at

10,736, and acquired probable knowledge (or at least reasonable suspicion) of unlawful activities by its employees, *see id.* at 10,746. Liberty Cable attempted to "insulate itself from consequences of noncompliance by delegating all of the authority and responsibility to an employee and then insulate management from knowledge of the unlawful activities." *Id.* at 10,781. It even tried "to insulate itself by placing all responsibility on its legal counsel." *Id.* at 10,785. Likewise, Maritime [**FILL IN NARRATIVE RECOUNTING JOHN REARDON'S MANY MISDEEDS, ETC.**].

Lack of candor before the Commission is grounds for legal disqualification from eligibility to be a licensee. *See, e.g., FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946); *Garden State Broadcasting, Ltd. Partnership v. FCC*, 996 F.2d 383, 393 (D.C. Cir. 1993); *RKO General, Inc. v. FCC*, 670 F.2d 215, 234 (D.C. Cir. 1981); *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 130 (1983). The absence of candor is especially egregious where an applicant or licensee engages in a pattern of willful failure to disclose significant information that it has a duty to fully disclose. *See Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994). Violations of the Communications Act or of the Commission's rules or policies bear directly on licensee behavior and the Commission's regulatory responsibilities. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1209 (1986). Because the Commission depends heavily on the accuracy and completeness of statements by applicants and licensees, it is of "utmost importance" to the Commission that parties seeking to acquire or renew licenses properly discharge their "affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *Fox Television Stations, Inc.*, 10 F.C.C.R. 8452, 8478 (1995).

Cognizant of the centrality of candor to the Commission's mandate, *Liberty Cable* denied approval to a consent order that purported, in direct violation of 47 C.F.R. § 1.93(b), to resolve "matters which involve[d] a party's basic statutory qualifications to hold a license." 13 F.C.C.R.

at 10.797. Here, as in *Liberty Cable*, Maritime has demonstrated "reckless disregard of its licensing obligation[s] and deliberately withheld true, complete and accurate disclosure tin order to suit its own purposes." *Id.* Maritime has "attempted to deceive the Commission by stating blatant mistruths in filings that it was in 'technical compliance'" with the Commission's rules and policies. In *Liberty Cable*, the presiding judge refused to accept "Liberty's offer of forfeiture … in exchange for Commission licenses which Liberty is fundamentally not qualified to receive." *Id.* Any purported settlement of Issue (g) involving anything less than the complete surrender of *all* of Maritime's licenses would likewise constitute a partial submission of less valuable licenses in exchange for unearned and undeserved absolution from the unethical, disqualifying conduct that FCC 11-64 has designated for hearing. Section 1.93 of the Commission's rules explicitly forbids a consent order under these circumstances. In accord with those rules, the presiding judge should reject any purported consent order that would relieve Maritime of responsibility for lack of candor or any other breaches that would strip it of legal eligibility to be a licensee.

Indeed, the full Commission's decision in *Talton Broadcasting Co.*, 67 F.C.C.2d 1594 (1978), can and should be read as holding that consent orders negotiated under 47 C.F.R. § 1.93 are entirely inappropriate for a case such as this one, where comparative licensing is not at issue and where automatic cancellation of licenses is the remedy prescribed for any violations of 47 C.F.R. § 1.955(a). *Talton* recognized that the Communications Act demands an answer to any "question as to the public interest in renewing [a] license" that has been "designated for hearing." 67 F.C.C.2d at 1597. "Plainly, in a non-comparative case" such as the one designated for hearing in FCC 11-64, "the only reason for designating a renewal application for hearing is because the Commission is unable to make the necessary public interest finding." *Id.* at 1597 n.9 (citing 47 U.S.C. § 309(a), (e); *Office of Communication of the United Church of Christ v. FCC*, 259 F.2d 994 (D.C. Cir. 1966)). The Commission in *Talton* reasoned that "only the Commission

[itself], or an entity empowered to act for the Commission," may make the pivotal, indispensable determination that "grant of a license would serve the public interest." *Id.* at 1598. Although section 1.93 of the Commission's rules contemplate that the appropriate operating Bureau may exercise such delegated authority, *Talton* recognized that the designation of a matter for hearing changes the legal landscape: "After designation, … the Bureau's function is that of an adversary party. Thus, at that stage of the proceeding, the Bureau has no authority, implicitly or otherwise, to determine for the Commission whether the public interest would be served by grant of the license." *Id.*; *see also Adjudicatory Re-Regulation Proposals*, 58 F.C.C.2d 865, 868 (1976) ("Bureau staff's role after designation is that of an adversary party in cases of adjudication, and the Bureau has no part in ruling on the consent order at any level."). In this case, where (along with the issue of wrongdoing and associated disqualification), automatic termination is the appropriate, lawful remedy for any breaches of 47 C.F.R. §§ 1.955(a), 80.49(a), *Talton*'s observations about the complete removal of the Commission's operating Bureaus from negotiation, proffer, and approval of a consent order under 47 C.F.R. § 1.93 regarding license renewals apply with even greater force. If Maritime's licenses are automatically terminated because of operation at variance with 47 C.F.R. §§ 1.955(a) and 80.49(a), as contemplated in Issue (g) of the Hearing Designation Order, then there is nothing to renew and, by extension, no public interest that can be served by renewal. The issue of wrongdoing and disqualification remains, even if all of the licenses were terminated or voluntarily cancelled.

2. *De facto* transfer of control

In addition to violating the prohibition against consent orders addressing "matters which involve a party's basic statutory qualifications to hold a license," 47 C.F.R. § 1.93(b), any negotiation by Maritime to resolve Issue (g) of the hearing designation order violates two further requirements imposed by section 1.93(b) of the Commission's rules. First, that provision

requires that "the Commission, by its operating Bureaus, … negotiate a consent order *with a party*." *Id.* (emphasis added). Since Maritime and Maritime alone — and not Choctaw Telecommunications or any other entity — is the licensee subject to the hearing designation order, Maritime and Maritime alone must qualify as the party that negotiates a consent order. Section 1.93(b)'s requirement that there be "a party" squarely puts into dispute the capacity of Maritime to negotiate and enter any consent order. As a debtor in possession subject to a bankruptcy court plan and order, Maritime may act only in accordance with that plan and order. Governing bankruptcy law does not permit Maritime to negotiate the contemplated consent order. Reading the bankruptcy plan and order to authorize such a course of action by Maritime would create a second violation of 47 C.F.R. § 1.93(b). The proposed consent order would effect a *de facto* transfer of control over Maritime to Choctaw Telecommunications, in violation of 47 U.S.C. § 310(d). This violation would render the proposed consent order contrary to the public interest and therefore unlawful under 47 C.F.R. § 1.93(b), which authorizes consent orders only "[w]here the interests of timely enforcement or compliance, the nature of the proceeding, and *the public interest* [so] permit" (emphasis added).

Maritime is a debtor in possession subject to the jurisdiction of the United States Bankruptcy Court for the Northern District of Mississippi. As a result, Maritime must conform its conduct to the Third Amended Disclosure Statement (Bankr. N.D. Miss. Docket No. 668), the First Amended Plan of Reorganization (Bankr. N.D. Miss. Docket No. 669), and the Order Confirming Plan of Reorganization (Bankr. N.D. Miss. Docket No. 980) in that court. (In the interest of economical expression, SkyTel will refer to these documents collectively as the "plan and order" of the bankruptcy court, specifically citing each individual document — Disclosure Statement, Reorganization Plan, Confirmation Order — as the context may require.) Any actions undertaken by Maritime, in addition to conforming with the bankruptcy court's plan and order, must also satisfy further demands made by federal bankruptcy law. All sources of

bankruptcy law, from the plan and order to more general requirements of federal bankruptcy law, negate Maritime's to make any claim of capacity to negotiate a consent order. It is therefore not qualified to be the "party" negotiating a consent order under 47 C.F.R. § 1.93(b).

To the extent that Maritime is permitted under its governing bankruptcy plan and order to negotiate a consent order, that course of action would constitute an independent violation of 47 C.F.R. § 1.93(b). If it has not done so already, Maritime proposes to effect an unlawful *de facto* transfer of control to Choctaw Telecommunications or some other entity named in the bankruptcy court's plan and order, in violation of section 310(d) of the Communications Act, 47 U.S.C. § 310(d). At an absolute minimum, Commission policies regarding *de facto* transfers of control, *see Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984 (1964); *Ellis Thompson Corp.*, 7 F.C.C.R. 3932, 3935 (1992), bar the acceptance of any purported consent order that violates these policies regarding *de facto* transfers of control. It bears repeating that 47 C.F.R. § 1.93(b) authorizes consent orders only "[w]here the interests of timely enforcement or compliance, the nature of the proceeding, and *the public interest* [so] permit" (emphasis added).

a. Under its bankruptcy plan and order, Maritime lacks authority to pursue a settlement and consent order, or otherwise proceed in this hearing

In the first instance, Maritime must have legal authority to negotiate, much less enter, a consent order with the Commission through its "appropriate operating Bureau." The bankruptcy court documents that constrain Maritime's conduct do not grant Maritime that authority. Maritime's Reorganization Plan grants the following *exclusive* rights, powers, and duties to the Liquidating Agent named in the Plan:

- "to use, acquire *and dispose of property* free of any restrictions imposed under the Bankruptcy Code"
- "to sell, devise or otherwise *dispose of any assets* without further notice or order of the Bankruptcy Court, except as otherwise provided" in the Plan

- "to … *prosecute, litigate* … and otherwise *administer* any Cause of Action in the Bankruptcy Court *or other court of competent jurisdiction* and *settle* same without further order of Court or notice to creditor[s]"
- "to represent the Estate before the Bankruptcy Court *and other courts of competent jurisdiction with respect to all matters*."

Reorganization Plan, Bankr. N.D. Miss. Docket No. 669, at 20 (emphases added). These provisions indicate that the Liquidating Agent, *and not Maritime*, is the party that the Reorganization Plan authorizes to negotiate any consent order with the appropriate operating Bureau of the Federal Communications Commission. At most, the Confirmation Plan contemplates that Maritime as "Debtor[,] will … be required … to *monitor* the ongoing FCC application process and, to the extent necessary, participate therein." *Id.* at 29 (emphasis added). As "[t]he Debtor," Maritime "will likely remain obligated to *participate in* the FCC Enforcement Bureau litigation as well, post-confirmation." *Id.* (emphasis added). To "monitor" or even to "participate in" proceedings within the FCC falls far short of the rights, duties, and powers that the Confirmation Plan assigns exclusively to the Liquidating Agent: "to … *prosecute, litigate* … and otherwise *administer* any Cause of Action in [any] *court of competent jurisdiction* and *settle* same." *Id.* at 20 (emphasis added).

b. Bankruptcy law requires the prior approval of the bankruptcy court, which neither Maritime nor any other party has sought, let alone secured

Whether it is Maritime, the Liquidating Agent, Choctaw, or any other entity that negotiates and carries out a consent order that purports to surrender a considerable portion of Maritime's FCC licenses in exchange for a termination of Issue (g) proceedings investigating Maritime's compliance with the construction and continuance of service requirements of 47 C.F.R. §§ 1.955(a) and 80.49(a), no entity may enter a settlement of that magnitude without the prior approval of the bankruptcy court. To SkyTel's knowledge, such approval has not been

sought, much less secured. There are two independent reasons requiring bankruptcy court approval. SkyTel will outline each of those reasons in turn.

First, section 1127(b) of the Bankruptcy Code requires prior bankruptcy court approval of any material, post-confirmation modification of a plan:

> The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. § 1127(b). Section 1127(c) further provides that "[t]he proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified." *Id.* § 1127(c). Any proposal to surrender a majority of Maritime's site-based licenses, the crown jewels of Maritime's holdings in AMTS spectrum, for automatic cancellation by the FCC would effect a material modification of the Plan. For Maritime to surrender those licenses, Maritime (or at least some other entity so authorized by the Plan, such as the Liquidating Agent), must first file a motion to modify the Plan prior to substantial consummation of the plan.[14] That plan, as modified, must further satisfy the requirements of 11 U.S.C. § 1122 (relating to the classification of claims) and 11 U.S.C. § 1123 (relating to the mandatory and permissive contents of a reorganization plan). Moreover, and only if the modification is not "sufficiently minor," the requirements of 11 U.S.C. § 1125 must also be met. *See* 11 U.S.C. § 1127(d); *In re Boylan Int'l,*

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[14] Under 11 U.S.C. § 1127, a debtor may not modify a plan after "substantial consummation" of the plan. At present, Maritime's Reorganization Plan has *not* been substantially consummated. Maritime remains subject to the Hearing Designation Order in FCC 11-64; pending the resolution of that hearing, Maritime remains the licensee with respect to all licenses issued to it by the Commission. Because the Hearing Designation Order has called into question Maritime's basic qualifications to remain a licensee, *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964), presumptively bars the transfer of those licenses. The continuing application of *Jefferson Radio* and the pendency of the hearing designated in FCC 11-64 collectively pose an insuperable bar to substantial consummation of Maritime's Reorganization Plan.

Ltd., 452 B.R. 43, 47 (Bankr. S.D.N.Y. 2011) ("The filing of additional disclosure and re-solicitation is necessary if the plan is materially modified."); *In re Young Broadcasting, Inc.*, 430 B.R. 99, 120 (Bankr. S.D.N.Y. 2010). Section 1125 would require disclosure of adequate information concerning the modification to Maritime's creditors — for instance, through the filing of a new disclosure statement. After notice, adequate disclosure, and a hearing, creditors whose interests are adversely affected by the modification may withdraw their acceptance of the Plan. Collier on Bankruptcy ¶ 1127.03[5] (Alan N. Resnick & Henry J. Somme reds., 16th ed.).

There is every reason to believe that a putative consent order of the sort evidently contemplated by Maritime would constitute a material, post-confirmation modification subject to 11 U.S.C. § 1127.[15] As in *United States Brass Corp. v. Travelers Ins. Group, Inc.* (*In re United States Brass Corp.*), 301 F.3d 296 (5th Cir. 2002), a Fifth Circuit case that the bankruptcy court in the Northern District of Mississippi must heed, the circumstances of this case are likely to trigger section 1127's requirement of bankruptcy court approval of a material, post-confirmation modification. In *United States Brass Corp.*, the Fifth Circuit reasoned that a plan of reorganization "functions as a contract in its own right [that] constrain[ed] the [debtor's] ability" to compromise creditor's claims, whether (as there) by arbitration or (as here) through a consent order. 301 F.3d at 307. Full litigation of Issue (g), to say nothing of the balance of the issues covered by the Hearing Designation Order in FCC 11-64, would provide all safeguards of the adversarial process, including the ability of interested and potentially adversely affected parties

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[15] Bankruptcy courts have found material modification to have occurred where "changes to a plan [would] alter 'the legal relationships among the debtors and its creditors,'" *In re Sea Island Co., McCrary v. Barnett (In re Sea Island Co.)*, 486 B.R. 559, 563 (S.D. Ga. 2013) (citing *In re Ionosphere Clubs, Inc.*, 208 B.R. 812, 816 (Bankr. S.D.N.Y. 1997), where "provisions of a plan are violated or removed," *In re Sea Island Co.*, 486 B.R. at 563 (citing *Hawkins v. Chapter 11 Trustee*, 2009 U.S. Dist. LEXIS 23710, at *3 (N.D.N.Y. Mar. 13, 2009)), or where the proposed change alters the creditors' payment rights, *In re Boylan Int'l, Ltd.*, 452 B.R. 43, 47 (Bankr. S.D.N.Y. 2011) (citing *In re Joint Eastern & Southern District Asbestos Litig.*, 982 F.2d 721, 747-48 (2d Cir. 1992)). All three of these conditions are arguably present in this situation.

such as SkyTel to assert their own claims and defenses. By contrast, a consent order could give cover to collusion with Maritime and/or Choctaw and impose "binding" legal consequences that are ultimately "inconsistent with the facts and applicable law." *United States Brass Corp.*, 301 F.3d at 307. Recognizing that a proposed "settlement" was in fact a post-confirmation modification of a reorganization plan, the Fifth Circuit required the debtor in *United States Brass Corp.* to comply with the requirements of 11 U.S.C. § 1127(b). *See* 301 F.3d at 308.

Having chosen to submit itself to the jurisdiction of the bankruptcy court for the Northern District of Mississippi, Maritime must now honor the terms of the bargain that it struck with its creditors and with the court that confirmed its plan of reorganization. That bargain requires some entity — Maritime, the Liquidating Agent, and/or Choctaw — to seek FCC approval of the eventual transfer of *all* of Maritime's Licenses to Choctaw, for the ultimate purpose of obtaining enough proceeds to satisfy the claims of all of Maritime's creditors. Now, however, Maritime would materially modify this bargain by proposing to surrender to the FCC for cancellation the majority of its remaining site-based AMTS licenses, which in turn constitute a significant portion of overall radio spectrum licensed by the FCC to Maritime. Such radical modification of the plan, at a minimum, would alter the contemplated payments to Maritime's creditors. Indeed, at the Confirmation Hearing, John Reardon testified that the value of Maritime's spectrum was approximately $40 million and that Maritime had at that time approximately $40 million in claims against it. Confirmation Hearing Transcript, vol. I, at 101, 107. Reardon further testified that "the plan purports to try to pay everybody out, all the secured creditors, all the administrative claims, all the unsecured claims." *Id.* at 90. Robert Keller, expert and attorney to Maritime, likewise testified that "there's a good likelihood of 100 percent recovery or close to it for all creditors." *Id.* at 173. In its response to a competing proposal to reorganize Maritime, Choctaw represented that it "has worked extensively to develop a comprehensive plan for marketing the FCC Licenses in an efficient manner *which will repay all creditors* in the most

expeditious manner possible." Choctaw Response to CTI Plan, Exhibit "C-2" to Disclosure Statement, Dkt. No. 668-6 at p. 3 (emphasis added). Therefore, by surrendering roughly half of its spectrum and the attendant value of those licenses spectrum, Maritime would materially modify the "bargain" it proposed to its creditors by drastically reducing those creditors' expected payout under the bankruptcy court's plan and order. Therefore, absent notice, hearing, and bankruptcy court approval, 11 U.S.C. § 1127 is likely to strip Maritime of any authority that Maritime might have under the bankruptcy court's original plan and order to negotiate a consent order in this proceeding.

The Federal Rules of Bankruptcy Court Procedure impose a second, independent bar to any consent order that Maritime might negotiate to exchange site-based AMTS licenses for full dismissal of Issue (g) from the scope of the Hearing Designation Order in 11-64. "Once a settlement is reached between the parties [to a bankruptcy case], the parties *must seek approval of the settlement by the bankruptcy court*." *In re Myers*, 425 B.R. 296 (S.D. Miss. 2010) (emphasis added).[16] Rule 9019 of the Federal Rules of Bankruptcy Court Procedure provides that "[o]n motion by the trustee [or debtor-in-possession] and after notice and a hearing, the court may approve a compromise or settlement." A bankruptcy "court should only approve [a]

[16] Although the proposed consent order would run between parties to an FCC proceeding, as opposed to parties to a bankruptcy case, it nevertheless appears more likely than not that the bankruptcy court must independently approve the consent order. The interests of the estate in Maritime's FCC licenses hang in the balance of the hearing designation order and any consent order that would resolve that proceeding or any portion thereof. *See In re U.S. Brass Corp.*, 255 B.R. 189 (Bankr. E.D. Tex. 2000) (addressing settlement approval under Rule 9019 where debtor sought approval of settlement of tort proceedings in another jurisdiction); *In re Papinsick*, 2007 Bankr. LEXIS 3917 (Bankr. N.D. Okla. Nov. 16, 2007) (bankruptcy court approved settlement under Rule 9019 as to state court breach of contract action); *Engram v. Manera (In re Engram)*, 2008 Bankr. LEXIS 4392 (9th Cir. B.A.P. Feb. 21, 2008) (affirming a bankruptcy court's approval, under Rule 9019, of a settlement reached between parties to state-court litigation involving a bankruptcy estate's interest in real property); *Management Action Programs, Inc. v. Global Leadership & Mgmt. Res., Inc.*, 2005 U.S. Dist. LEXIS 45627 (C.D. Cal. May 18, 2005) (noting that the bankruptcy court approved a settlement reached in state court); *In re Nicole Energy Servs.*, 385 B.R. 201 (Bankr. S.D. Ohio 2008) (affirming a bankruptcy court's approval under Rule 9019 of a settlement of state court litigation).

settlement when the settlement is 'fair and equitable and in the best interest of the estate." *In re Myers*, 425 B.R. 296, 303 (S.D. Miss. 2010). In making that determination, the Fifth Circuit has set forth the following factors for bankruptcy courts to consider: (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay; (3) all other factors bearing on the wisdom of the compromise, including the best interests of the creditors with proper deference to their reasonable views and the extent to which the settlement is truly the product of arm's-length bargaining and not of fraud or collusion. *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980); *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917-18 (5th Cir. 1995); *Official Committee of Unsecured Creditors v. Cajun Electric Power Cooperative, Inc. (In re Cajun Electric Power Cooperative, Inc.)*, 119 F.3d 349, 356 (5th Cir. 1997); *accord Myers*, 425 B.R. at 303.

This case presents a very palpable concern over the extent to which Maritime's offer to settle Issue (g) by consent order is truly the product of arm's-length bargaining, rather than the consequence of fraud or collusion. Sandra DePriest and/or John Reardon may face personal liability for alleged wrongdoing in connection with Issue (g). [**DETAILS.**] For purposes of this discussion, SkyTel presumes (without conceding the ultimate legal question) that the consent order would negate such personally liability. The elimination of this personal liability could give rise to conflicts of interest that the Bankruptcy Court should consider in its Rule 9019 determination. In *Morgan v. Goldman (In re Morgan)*, 375 B.R. 838 (9th Cir. B.A.P. 2007), the trustee proposed a settlement of an adversary proceeding that would relieve her of personal liability at the expense of unsecured creditors. The court recognized a disqualifying conflict of interest between the trustee and the estate, such that cause exists for removal of the trustee. Likewise, under the proposed consent order as articulated in Robert J. Keller's email of

September 12, 2013, "[t]he parties to the settlement would agree not to dispute that the retained facilities were timely constructed or that operation of the retained facilities were never permanently discontinued," which may arguably negate any personal liability to DePriest and/or Reardon as to these failures and/or as to false and/or misleading communications regarding the construction, operation, or discontinuance of Maritime facilities subject to Issue (g).

The very "nature of a bankruptcy case imparts upon the bankruptcy court a duty to scrutinize settlements in a more exacting manner than would be warranted in a two party context." *Gordon Props., LLC v. First Owner's Ass'n of Forty Six Hundred Condo., Inc. (In re Gordon Props., LLC)*, 2013 Bankr. LEXIS 3426 (E.D. Va. Aug. 22, 2013) (citing *In re Merry-Go-Round Enterprises, Inc.*, 229 B.R. 337, 347 (Bankr. D. Md. 1999)). Outside of bankruptcy, "litigants are the only ones involved in the settlement and the only ones affected by it." *Gordon Props.*, 2013 Bankr. LEXIS 3426 at *2. Thus, "they act in their own best interests as they see them and have had the opportunity to obtain representation and advice." *Id.* "Bankruptcy cases," on the other hand, "are different. They are community affairs with different constituencies having different interests in the reorganization of the debtor. Many creditor claims are too small and the likelihood of recovery too problematic to make representation economically feasible. A compromise between a chapter 11 debtor in possession and a creditor affects all other creditors in the case and the debtor's reorganization efforts." *Id.*

By this reasoning, Sandra DePriest's and John Reardon's potential conflicts of interest, at an absolute minimum, would inform the bankruptcy court's Rule 9019 determination of whether the proposed consent order is fair and equitable and in the best interest of Maritime's creditors. That inquiry, which has yet to take place, stands in the way of any purported consent order that Maritime could negotiate, even if the bankruptcy court's plan and order could be construed to give Maritime such authority. Again, this question arises solely because Maritime, having thrown itself upon the jurisdiction of the bankruptcy court, may not disclaim the strictures of

federal bankruptcy law — whether they arise from the plan and order or from generally applicable bankruptcy statutes and statutes such as 11 U.S.C. § 1127 and Rule 9019 — upon discovering that applicable principles of bankruptcy law

c. Construing the bankruptcy plan and order to authorize a consent order would effect an unlawful de facto transfer of control from Maritime to John Reardon and Choctaw

SkyTel anticipates that Maritime will offer an alternative reading of the bankruptcy court plan and order that would confer upon Maritime the authority it needs to negotiate a consent order. The bankruptcy court's Confirmation Order states that "no provision of the Plan relieves [Maritime as] Debtor, the Choctaw entities … or the Liquidating Agent from their obligations to comply with the Communications Act … and the rules, regulations, and orders promulgated thereunder by the FCC." Bankr. N.D. Miss. Docket No. 980, at 7. The Reorganization Plan similarly conditions the transfer of Maritime's property, "except the Debtor's equity interest in Critical RF and all assets owned by Critical RF," to Choctaw upon "FCC approval of the transfer of the FCC Spectrum Licenses." Bankr. N.D. Miss. Docket No. 669, at 28, 32.

These general savings clauses, especially as construed in light of the interpretive canon, *generalia specialibus non derogant*,[17] do little to offset the Reorganization Plan's very specific

[17] Literally: "the general does not detract from the specific." As rendered in the British case of *The Vera Cruz*, 10 App. Cas. 59 (House of Lords 1884), *generalia specialibus non derogant* prevents the implied repeal of a specific statutory provision by a general one: "where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any evidence of a particular intention to do so." A contemporaneous Supreme Court decision likewise observed "that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." *Ex parte Crow Dog*, 109 U.S. 556, 570 (1883); *accord Rodgers v. United States*, 185 U.S. 83, 88 (1902); *Williams v. United States*, 327 U.S. 711, 719 n.17 (1946). Nevertheless, "[c]anons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different

reservations of exclusive rights, duties, and powers over disposition of property and settlement of claims to the Liquidating Agent, at the expense of Maritime Communications/Land Mobile, LLC. But Maritime is more than merely the debtor in possession; it is and remains the Commission's licensee. The Communications Act plainly reserves to the Commission all legal authority over transfers of control of licenses and permits issued by the Commission:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission ….

47 U.S.C. § 310(d).

Section 310(d) prohibits both *de jure* and *de facto* transfers of control. *See Lorain Journal Co. v. FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). SkyTel believes that the plain terms of the bankruptcy court's plan and order, especially the Reorganization Plan's specific assignment of rights, duties, and powers over disposition of property and settlement of claims, on an exclusive basis, to the Liquidating Agent rather than Maritime, effects an unlawful *de jure* transfer of control. Even if the plan and order are not so construed, especially in light of those documents' savings clauses purporting to preserve the primacy of the Communications Act and the Commission's rules, orders, and policies, Maritime in practice has ceded *de facto* control of its licenses and the disposition of those licenses to Choctaw and to John Reardon. That unlawful *de facto* transfer is readily seen once the motivation for Maritime's conduct is understood: Maritime, far from operating as a legitimate licensee of the FCC, is a sham entity that has manipulated its business behavior and its posture before the Commission to shield John Reardon, Sandra DePriest, and Donald DePriest from

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direction. " *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Interpretive canons should not override common sense and legal logic. "[T]he ancient interpretive principle that the specific governs the general (*generalia specialibus non derogant*) applies" strictly as a tiebreaker in cases of conflict, and even then, "only to conflict between laws of equivalent dignity." *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 504 (2012).

personal liability and ultimately to enrich the closely associated individuals who have invested in a license-laundering scheme under the current guise of Choctaw who, from Maritime's commencement to this day, provided the majority of funds to Maritime with direct liens on its licenses, as well as proceeds therefrom.

The Commission has laid out six indicia of *de facto* control in *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984 (1964), and *Ellis Thompson Corp.*, 7 F.C.C.R. 3932, 3935 (1992), and has affirmed this six-factor test in a 1986 policy statement, *see Cellular Control Notice*, 1 F.C.C.R. 3 (1986). The six indicia of *de facto* control are:

1. Does the licensee have unfettered use of all facilities and equipment?
2. Who controls daily operations?
3. Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
4. Who is in charge of employment, supervision, and dismissal of personnel?
5. Who is in charge of the payment of financing obligations, including expenses arising out of operating?
6. Who receives monies and profits from the operation of the facilities?

Ellis Thompson, 7 F.C.C.R. at 3935; *accord Telephone & Data Sys., Inc. v. FCC*, 19 F.3d 42, ___ (D.C. Cir. 1994); *see also Telephone & Data Sys., Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994) (*per curiam*). Actual control is the touchstone of the *Intermountain*/*Ellis Thompson* test of *de facto* transfers of control. *See, e.g.*, *News Int'l, PLC*, 97 F.C.C.2d 349, 355-56 (1984); *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819 (1975).

The bankruptcy court's plan and order have reduced Maritime to little more than a holding vessel for its FCC licenses pending the ultimate disposition of those licenses (including, potentially, through a conclusive ruling in this hearing that Maritime is legally disqualified to serve as a Commission licensee). Maritime's own actions have amply confirmed, as a factual

matter in addition to the formalities addressed by the plan and order, that Choctaw and John Reardon, the chief executive officer that Choctaw inherited from Maritime, exercise "unfettered use" and effective "control[]" over Maritime's facilities, daily operations, and "policy decisions, including [the] prepar[ation] and filing [of] applications with the Commission" (*Intermountain/Ellis Thompson* factors 1, 2, and 3). Choctaw, on its own and with the apparent approval (or at least acquiescence) of Maritime, has entered an appearance in this proceeding and has applied to the presiding judge for summary decision (and perhaps other relief) with respect to Issue (g). Maritime's own motion for summary decision postdated and was wholly derivative of Choctaw's motion. Choctaw, and not Maritime, appears to be the prime mover behind the negotiations over a consent order that would purport to resolve Issue (g). The retention of Reardon as CEO is at once *prima facie* and conclusive evidence that Choctaw enjoys control over "employment, supervision, and dismissal of personnel" (*Intermountain/Ellis Thompson* factor 4).

Factors 5 and 6 of the *Intermountain/Ellis Thompson* test of *de facto* control focus, respectively, on "the payment of financing obligations, including expenses arising out of operating," and on the receipt of "monies and profits from the operation of the facilities." Choctaw's investors have financed Maritime throughout the pendency of this Hearing Designation Order. Even the lender financing Maritime's operations as debtor in possession is owned by investors in Choctaw. [**CHECK THIS**.] In light of the undisputed fact that nearly all of Maritime's value (except the nominal, trivial value of its Critical RF subsidiary) rests in FCC-licensed spectrum, the entire scheme — including but not limited to this effort to resolve Issue (g) — is an effort to launder federal communications licenses for two purposes, both unlawful: enriching Choctaw's investors and extinguishing the personal liability of Maritime insiders such as John Reardon and Sandra and Donald DePriest. Bankruptcy court testimony by two of Maritime's officers, Sandra DePriest and John Reardon, makes it amply clear that Maritime

declared bankruptcy for the express purpose of circumventing the Commission's hearing designation order and the *Jefferson Radio* doctrine. For its part, Choctaw is comprised entirely of Maritime's creditors. These creditors — who are more accurately described as investors — are not innocent. They became entangled with Maritime with full knowledge of the conduct that prompted the Commission to designate this matter for hearing. Choctaw intends to extract full value from every move putatively made in Maritime's name, including this purported consent order resolving Issue (g). This is apparent from the fact that Choctaw has always expected to realize proceeds far in excess of creditors' claims against Maritime and thereby to reap a huge windfall through the eventual transfer of licenses from Maritime.

The *de jure* or *de facto* transfer of control of Maritime to Choctaw, without the express approval of the Commission, constitutes a blatant violation of section 310(d) of the Communications Act. By definition, such unlawful action is against the public interest. *See In re Airadigm Communications, Inc.*, 519 F.3d 640, 652 (7th Cir. 2008) (recognizing that "a judicially enforced sale [of licenses] would mean that a 'transfer of the licenses occurred without an 'application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby'" (quoting 47 U.S.C. § 310(d)). Inasmuch as a consent order may be negotiated and accepted only to the extent that such an order advances the public interest, the proposed consent order exceeds the scope of 47 C.F.R. § 1.93.

IV. Conclusion

For good cause shown, I request grant of this First Motion, and in addition, ask the Judge consider summary dismissal on his own motion of the M-EB Motion (without waiver of right to file a timely motion for that purpose).

Respectfully submitted,

/s/

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December 2, 2013

Declaration

I declare under penalty of perjury that the facts in the pleading above, and its appended materials, that are attributed or attributable to my actions or knowledge are true and correct.

Submitted December 2, 2013

/s/

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CERTIFICATE OF SERVICE

The undersigned certifies that he has on this 2nd day of December, 2013 caused to be served by first class United States mail copies of the foregoing "Motion to Amend Schedule" to:

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