

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-IH-1751
) FRN: 0013587779

Participant in Auction No. 61 and Licensee of Various)
Authorizations in the Wireless Radio Services)
)

Applicant for Modification of Various Authorizations in the) Application File Nos.
Wireless Radio Services) 0004030479, 0004144435,
) 0004193028, 0004193328,
) 0004354053, 0004309872,
Applicant with ENCANA OIL AND GAS (USA), INC.;) 0004310060, 0004315903,
DUQUESNE LIGHT COMPANY; DCP MIDSTREAM, LP;) 0004315013, 0004430505,
JACKSON COUNTY RURAL MEMBERSHIP ELECTRIC) 0004417199, 0004419431,
COOPERATIVE; PUGET SOUND ENERGY, INC.;) 0004422320, 0004422329,
ENBRIDGE ENERGY COMPANY, INC.; INTERSTATE) 0004507921, 0004153701,
POWER AND LIGHT COMPANY; WISCONSIN POWER) 0004526264, 0004636537, and
AND LIGHT COMPANY; DIXIE ELECTRIC) 0004604962
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 OPPOSITION TO JOINT MOTION OF
ENFORCEMENT BUREAU & MARITIME FOR SUMMARY DECISION ON ISSUE G

Warren Havens hereby submits this response opposing the Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G, filed December 2, 2013¹ (the "EB-M Motion" and otherwise clearly described herein) (the "Response").

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¹ "Issue G" involves the question of whether Maritime Communications/Land Mobile, LLC, "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).

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Summary

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The Joint Motion must be denied because it rests unlawfully on the summary decision procedures of 47 C.F.R. § 1.251.² The Joint Motion, particularly as supplemented by the Enforcement Bureau and Maritime's Limited Joint Stipulation Concerning Issue G Licenses, represents in purpose and in effect a proposed consent order that must satisfy the substantive requirements of 47 C.F.R. § 1.93 and follow the procedural steps laid out in 47 C.F.R. § 1.94. "Consent 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). The Bureau and Maritime's reliance on the summary decision procedures of 47 C.F.R. § 1.251 represents an unlawful end run around sections 1.93 and 1.94 of the Commission's Rules, which provide the only channel by which issues designated for hearing may be resolved by consensual settlement rather than adjudication.

Nor does Maritime have the capacity as "a party" to negotiate and enter any consent order. *See* 47 C.F.R. § 1.93(b). As a debtor in possession subject to and required to act in accordance with the terms of a confirmed plan and related order entered by the United States Bankruptcy Court for the Northern District of Mississippi (the "Bankruptcy Court"), Maritime may act solely according to that plan and order and according to federal bankruptcy law. Compliance with the demands of bankruptcy law, however, would effect an unlawful *de facto* transfer of control of Maritime to Choctaw Telecommunications, Choctaw Holding, and/or

² Certain material in this motion was presented December 2, 2013, in the Havens-SkyTel First Motion Under Order 13M-19 to Reject Settlement, Proceed with the Hearing, and Provide Additional Relevant Discovery. Now that the Enforcement Bureau and Maritime Communications/Land Mobile, LLC, have filed their Joint Motion for Summary Decision on Issue G of December 2, 2013, Havens renews his objections on the reinvigorated basis that the Bureau and Maritime may not use the summary decision procedures of 47 C.F.R. § 1.251 to evade the strictures of 47 C.F.R. § 1.93. Rather than incorporating his earlier motion by reference, Havens has elected to integrate relevant arguments from his December 2 motion into this pleading for the convenience of the presiding officer.

Choctaw Investors (collectively, “Choctaw”) in violation of section 310(d) of the Communications Act, 47 U.S.C. § 310(d). At a 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), would render the Enforcement Bureau and Maritime’s proposed settlement contrary to the public interest and therefore unlawful under 47 C.F.R. § 1.93(b).³

Even if section 1.251 of the Commission’s Rules were to be construed a proper vehicle for the resolution of Issue G, summary decision would not be appropriate. Most fundamentally, Rule 1.251 contemplates a single petition for summary decision. On August 31, 2012, Maritime filed a Motion for Partial Summary Decision on Issue G. On May 8, 2013, Maritime filed “a second expanded Motion for Summary Decision ... on Issue G to supplement its [then] pending Motion [of August 31, 2012] for Partial Summary Decision.” Order 13M-16, at 3 ¶ 8. In Order 13M-16, issued on August 14, 2013, the presiding officer denied Maritime’s motions for summary decision with respect to “the Block B frequencies of the Watercom Licenses as well as the non-Watercom Licenses,” *id.* at 4, ¶ 9, the very site-based licenses that the Joint Motion of December 2 seek to vest in Maritime. Inasmuch as the presiding officer has neither permitted nor invited Maritime to file a *third* motion for summary decision on Issue G, 47 C.F.R. § 1.251(a)(2), the Joint Motion should be denied as an improper successive petition for summary

³ As Havens understands the Joint Motion and the Joint Stipulation, the proposed settlement of Issue G, purportedly negotiated by Maritime, Choctaw, and the Bureau, would provide as follows: (a) Maritime would waive all rights to and would surrender for cancellation authority for more than 80% of the remaining incumbent locations, representing more than 90% of the site-based facilities designated for hearing; (b) Maritime would retain authority for less than 10% of the site-based facilities designated for hearing; (c) the 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; and (d) would agree that MCLM should retain these facilities as part of a settlement. *See Exhibit 1* (Correspondence with Robert J. Keller, counsel for Maritime).

decision. *Cf. id.* § 1.251(f) (“The presiding officer may take any action deemed necessary to assure that summary decision procedures are not abused.”).

The Enforcement Bureau and Maritime’s Joint Motion misstates the legal requirements of sections 1.955(a) and 80.49(a) of the Commission’s Rules, the very provisions at the heart of Issue G. This presents the appropriate interpretation of 47 C.F.R. §§ 1.955(a), 80.49(a), and additional provisions implicated by those Rules.⁴ The failure to “commence service or operations by the expiration of [the relevant] construction period or to meet ... coverage or substantial service obligations” serves to “terminate[d]” Maritime’s licenses “automatically, without specific Commission action, on the date the construction or coverage period expires.” 47 C.F.R. § 1.946(a).

In turn, automatic termination under section 1.946(a) of the Commission’s Rules affects the resolution of Issue G in two significant ways. First, automatic termination of Maritime’s licenses leaves the Enforcement Bureau no lawful room to negate by negotiation, let alone abdication, a legal consequence dictated by the Commission’s own rules. Second, to the extent that Maritime seeks to retain its licenses once the Commission has designated those licenses for hearing with respect to Maritime’s fulfillment of Rules 1.955(a) and 80.49(a), the ultimate burden of proof on Issue G rests squarely on Maritime as the “applicant” in this matter. 47 C.F.R. § 1.254.

Maritime has not discharged that burden of proof. The Enforcement Bureau and Maritime’s Joint Motion ultimately fails to satisfy the requirements of Rule 1.251. The Joint Motion attempts to support Maritime’s contention that sixteen of its Block B licenses were not

⁴ Havens’s views on these issues were presented in a December 5, 2012, memorandum on Authorities in Support of the Havens/SkyTel Definition of “Constructed” and “Construction.” For the convenience of the presiding officer, Havens has elected to integrate relevant arguments from that memorandum directly into this pleading, as opposed to incorporating that earlier memorandum by reference.

operated in variance with the construction and continuity of service requirements of 47 C.F.R. §§ 1.955(a), 80.49(a). Those efforts do not establish a basis for summary decision. Instead, fuller examination of the record as a whole reveals numerous “genuine issue[s] of material fact” left for full and proper “determination at the hearing.” 47 C.F.R. § 1.251(a)(1).

For the reasons discussed herein, the Joint Motion should be denied, and the Joint Stipulation stricken from the record of this proceeding. At their core, the Joint Motion and the Joint Stipulation are nothing more than a poorly disguised attempt at an unlawful end run around the Commission’s restrictions on the availability of a consent order. Even if the Joint Motion could properly be considered and treated as a motion for summary decision, the Joint Motion should nevertheless be denied, because the movants have not satisfied and cannot satisfy the summary decision standard. Havens therefore asks that the presiding officer deny the Enforcement Bureau and Maritime’s joint motion for summary decision on the following seven grounds:

1. Summary decision is an improper vehicle for settling Issue G because granting relief under 47 C.F.R. § 1.251 would circumvent 47 C.F.R. § 1.93(b)’s provision that “[c]onsent orders may not be negotiated with respect to matters which involve a party’s basic statutory qualifications to hold a license.”
2. Maritime lacks the capacity as “a party” to negotiate and enter any consent order. *See* 47 C.F.R. § 1.93(b). As a debtor or debtor in possession, Maritime is governed by a bankruptcy court’s plan and order and by federal bankruptcy law. Compliance with bankruptcy law would effect an unlawful *de facto* transfer of control of Maritime. *Contra* 47 U.S.C. § 310(d); *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983; *Ellis Thompson*, 7 F.C.C.R. 3932.
3. Because Maritime has already filed two motions for summary decision, which the presiding officer has already granted in part and denied in part, a third motion under 47 C.F.R. § 1.251 represents improper use of the summary decision process, arguably arising to abuse.
4. The Joint Motion misinterprets sections 1.955(a) and 80.49(a) of the Commission’s Rules, the very provisions animating Issue G. Because Maritime failed to “commence service or operations by the expiration of [the relevant] construction period or to meet ... coverage or substantial service obligations,” its

licenses have “terminate[d] automatically, without specific Commission action.”
47 C.F.R. § 1.946(a).

5. Automatic termination of Maritime’s licenses leaves the Enforcement Bureau no room to negotiate away this legal consequence through any purported settlement.
6. The burden of proof to establish compliance with 47 C.F.R. §§ 1.955(a), 80.49(a) falls squarely upon Maritime, which has not discharged that burden. Proper review of the record demonstrates, consistent with the presiding officer’s recognition in Order 13M-17, that “significant issues of substantial fact [remain] to be resolved at a formal hearing.” Summary decision is therefore inappropriate.
7. The Joint Motion should also be denied because of the third-party Opposition of Havens, a pro se party herein.

ARGUMENT

A. The Joint Motion represents an unlawful circumvention of 47 C.F.R. § 193’s limitations on the availability of consent orders to resolve Maritime’s basic statutory qualifications.

In principle, the rules of the Federal Communications Commission contemplate and, under defined circumstances, permit the resolution of disputes by mutual consent of the Commission and the party under investigation. The Commission’s rules define a “consent order” as “a formal decree accepting an agreement 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). Consent orders are subject to conditions limiting the Commission’s authority to negotiate with parties under its jurisdiction: “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). Above all, however, the Commission’s

rules forbid the use of consent orders in circumstances implicating the qualifications of a licensee, including the inextricably intertwined questions of candor, character, and basic fitness that Maritime must undergo in this hearing. Section 1.93 of the Commission's Rules plainly provides: "Consent 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). The original order adopting the Commission's consent order provisions confirm these rules' purpose: to "afford the opportunity for avoiding protected adjudication where compliance with Commission rules and policies can be secured through agreement," but (critically) only where "the party's qualifications to remain a licensee are not in question." *Amendment of Parts 0 and 1 of the Commission's Rules with Respect to Adjudicatory Re-Regulation Proposals*, 58 F.C.C.2d 865, 866 (1976) [hereinafter *Adjudicatory Re-Regulation Proposals*].

In Order 13M-16, issued on August 14, 2013, the presiding officer granted in part and denied in part the motion of Maritime Communications/Land Mobile, LLC, for partial summary judgment. Rejecting Maritime's argument that its operations could not be deemed to "ha[ve] been permanently discontinued" because the Commission's AMTS rules were unconstitutionally vague, the presiding officer recognized that "[t]here remains a genuine issue of material fact as to whether Maritime attempted to comply with any reasonable interpretation of [47 C.F.R.] Section 1.955(a)(3)." *Id.* at 13 ¶ 30. That same day, the presiding officer issued Order 13M-17, which again recognized that the resolution "by summary decision" of "[m]ultiple Issue G questions" nevertheless left "significant issues of substantial fact to be resolved at a formal hearing." In the immediate wake of those orders, the Enforcement Bureau and Maritime announced through the submission of a Joint Proposed Schedule (August 27, 2013) that those "parties [were] engaged in discussions to *resolve* the remaining substantive questions pertaining to Issue G" (emphasis added). The Bureau and Maritime "therefore propose[d] a schedule that affords sufficient time

to *reach resolution* on Issue G” (emphasis added). The reputed use of various forms of the verb *resolve* left no doubt that Bureau and Maritime intended to settle Issue G by mutual consent.

The Bureau and Maritime confirmed this intention in their Joint Motion of December 2. In so doing, however, they invoked the language not of consent orders and 47 C.F.R. § 1.93, but of summary decisions and 47 C.F.R. § 1.251:

The Bureau and Maritime have reached agreement on the material facts related to the construction and operational status of ... 16 site-based AMTS facilities The Bureau and Maritime thus seek summary decision with regard to these 16 facilities. In the interest of expediting resolution of this matter so that creditors can be paid and resources conserved, Maritime has agreed to cancel the remaining 73 site-based licenses. This action, together with the instant Joint Motion, will resolve any any outstanding substantive issues concerning Issue (g).... Pursuant to Section 1.251(a)(1) of the Commission’s rules, therefore, summary decision is appropriate and should be granted.

Joint Motion, at 4-5, ¶¶ 6-7 (footnote omitted). The Bureau’s acquiescence in Maritime’s characterization of the 16 site-based licenses, which presumably will save those licenses from automatic termination for failure to comply with 47 C.F.R. §§ 1.955(a), 80.49(a), was Maritime’s *quid pro quo* for canceling the 73 site-based licenses.

For its part, the Bureau and Maritime’s Limited Joint Stipulation Concerning Issue G Licenses (incorporated by reference through p. 4, ¶ 7, n.15 of the Joint Motion) took pains to emphasize that “[t]he cancellation of authority pursuant to this stipulation does not constitute an admission on the part of either Maritime or the Bureau on the merits of Issue (g) as to the foregoing site-based licenses, but is being done solely to expedite resolution of Issue (g) and eliminate or minimize the need for further litigation.” *Id.* at 4 ¶ 4.

These are the hallmarks of a consent order. The Joint Motion and Joint Stipulation bristle with the language of negotiated resolution. Variants of the verbs *agree*, *resolve*, and *stipulate*

appear throughout both documents.⁵ The Bureau's acquiescence in Maritime's retention of 16 valuable site-based AMTS licenses is the obvious consideration for Maritime's cancellation of 73 other licenses.⁶ Why else would Maritime offer to cancel 73 AMTS licenses, but in exchange for a meaningful *quid pro quo* from the Enforcement Bureau? After all, as the presiding officer recognized in partially denying Maritime's August 31, 2012, motion for summary decision, Maritime is fully capable of unilaterally and "voluntarily submitt[ing] applications to cancel ... licenses in their entirety." Order 13M-16, at 5 ¶ 12.

The very nature of a consent order involves exchange. Rule 1.93(b) authorizes "the Commission, by its operating Bureaus, [to] 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." The Joint Motion and the Joint Stipulation both adopt the language of Rule 1.93(b)'s references to "the interests of timely enforcement or compliance" and to "prompt disposition." Maritime seeks to "expedit[e] resolution of this matter so that creditors can be paid and resources conserved" (Joint Motion); the Joint Stipulation binds Maritime and the Bureau jointly "to expedite resolution of Issue (g) and to eliminate or minimize the need for further litigation." Consistent with Rule 1.93(a)'s emphasis on "future compliance with ... statutes, rules or policies" and with the requirement of 47 C.F.R. § 1.94(c)(6) that agreement through consent order "is for purposes of settlement only and that its signing does not

⁵ Dictionary definitions and etymological analysis establish that even the least obvious of these verbs, *stipulate*, plainly connotes agreement. Anderson Publishing's *Law Dictionary* (2002) defines *stipulation* as "an agreement; a bargain, proviso, or condition, e.g., an agreement between opposing litigants that certain facts are true." The *Online Etymology Dictionary* traces *stipulate* to the Latin word *stipulatus*, "past participle of *stipulari* 'exact (a promise), bargain for.'" <http://www.etymonline.com/index.php?search=stipulate>

⁶ And even that concession is not entirely clear. The Joint Motion says that "Maritime has agreed to file applications to delete from its licenses authority for ... [those] 73 site-based facilities" (p. 4, ¶ 6, n.15). Evidently Maritime has not yet actually filed any such applications.

constitute an admission by any party of any violation of law, rules or policy,” both sides have declined to make any “admission ... on the merits of Issue (g).”

A glaring and ultimately fatal defect dooms the Joint Motion. The Enforcement Bureau has a single tool for resolving disputed issues in a case designated for hearing: the consent order process laid out in 47 C.F.R. §§ 1.93-.94. The Joint Motion of December 2 omits any mention of consent orders or the Commission’s Rules governing consent orders. Instead, the Joint Motion is styled as a motion for summary decision under 47 C.F.R. § 1.251. Quite strikingly, the Joint Motion repeatedly speaks according to the substantive standards of Rule 1.93, even as the Motion assiduously avoids any citation to that provision. The Joint Motion offers no basis upon which the presiding officer can find that a consent order would serve the public interest. *See* 47 C.F.R. § 1.93(b) (authorizing negotiation of a consent order only to the extent that “the interests of timely enforcement or compliance, the nature of the proceeding, and the public interest permit” it). Such a finding is a prerequisite to acceptance and issuance of the consent order by the presiding officer. *See id.* § 1.93(a).

The Enforcement Bureau and Maritime’s reliance on Rule 1.251 rather than Rules 1.93 and 1.94 deprive their would-be agreement of the necessary elements of a consent order. Under 47 C.F.R. § 1.94(c), “[e]very agreement” leading to a consent order “shall contain the following:”

- (1) An admission of all jurisdictional facts;
- (2) A waiver of the usual procedures for preparation and review of an initial decision;
- (3) A waiver of the right of judicial review or otherwise to challenge or contest the validity of the consent order;
- (4) A statement that the designation order may be used in construing the consent order;
- (5) A statement that the agreement shall become a part of the record of the proceeding only if the consent order is signed by the presiding officer and the time for review has passed without rejection of the order by the Commission;

- (6) A statement that the agreement is for purposes of settlement only and that its signing does not constitute an admission by any party of any violation of law, rules or policy (*see* 18 U.S.C. § 6002); and
- (7) a draft order for signature of the presiding officer resolving by consent, and for the future, all issues specified in the designation order.

With a single exception, the Joint Motion and Joint Stipulation flunked every element of Rule 1.94(c). The lone element favoring Maritime, a statement disclaiming any admission of wrongdoing, appears prominently in the Joint Stipulation (p. 4, ¶ 4). In every other respect, Maritime concedes nothing — no admission of jurisdictional facts; no waiver of its right to review, challenge, or contest its settlement; no concession of the interpretive relevance and validity of the designation order.

It is quite evident that the Enforcement Bureau and Maritime, by filing their Joint Motion and Joint Stipulation, wish to achieve some sort of negotiated resolution of Issue G. Superficially, they rely upon the summary decision procedure of 47 C.F.R. § 1.251. But it is amply evident that the Bureau and Maritime invoke Rule 1.251 to evade an absolute bar to the application of the consent order procedures of 47 C.F.R. §§ 1.93-94 — namely, Rule 1.93’s provision 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).

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 6547,⁷ the presiding judge must not approve any motion — let alone approve a consent order — that contradicts or undermines the central purpose of this proceeding.

Section 1.93(b) of the Commission's Rules generally authorizes the appropriate "operating Bureau[]" (in this instance, the Wireless Telecommunications 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

⁷ 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....

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.

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;

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 and other grounds for revocation under 47 U.S.C. § 312.

The record in this proceeding demonstrates that counsel for the Enforcement Bureau and for Maritime knew of this limitation on 47 C.F.R. § 1.93 more than two years ago, and the presiding officer took notice of counsel's awareness. Counsel for Maritime went so far as to presage his intention to rely on the summary decision procedures of 47 C.F.R. § 1.251 as a substitute for the consent order procedures outlined in Rules 1.93 and 1.94. In a conference before Judge Sippel on October 25, 2011, counsel for Havens and SkyTel raised “another issue designated for hearing that is not affected by” *Second Thursday Corp.*, 22 F.C.C.2d 515 (1970), *reconsideration granted in part*, 25 F.C.C.2d 112 (1970) — namely, “the question of whether certain of Maritime's site-based licenses terminated automatically for failure to construct.” Transcript at 249. Robert Keller, counsel to Maritime, expressed his client's “hope and desire to resolve that issue outside the context of hearing,” specifically because “we don't anticipate coming back for a hearing ... at all” on the issue now known as Issue G. *Id.* at 250. When questioned by the presiding officer, Mr. Keller responded, “We're going to find some way to resolve it through a combination of a summary decision or some sort of ... litigati[on].” *Id.* at 251. This entire colloquy took place in the presence of Pamela Kane of the Enforcement Bureau,

who acknowledged that she “[a]bsolutely” understood the issue of automatic termination of site-based licenses, as raised by counsel to Havens and SkyTel. *See id.* at 250.

Counsel for Havens and SkyTel asserted again that “application of the *Second Thursday* doctrine” had “nothing to do with the issue of the site-based licenses” and urged the presiding officer to schedule that issue for hearing. *Id.* at 253. The presiding officer then pressed counsel for Maritime further: “you’re thinking of a summary decision.” *Id.* The following colloquy ensued:

MR. KELLER: Well, [summary decision is] *one* possible resolution. See, the *other* —

JUDGE SIPPEL: Well, it’s got to be resolved some way.

MR. KELLER: It’s got to be resolved.

JUDGE SIPPEL: It’s got to be resolved in this forum.

MR. KELLER: It’s got to be resolved some way in this forum, but also what will happen under *Second Thursday* is, if the other licenses are resolved under *Second Thursday*, these particular licenses — ... there is, then, the possibility of resolving this during negotiating settlement, *as well*. *It wouldn’t exist for a basic qualifying issue.*

JUDGE SIPPEL: *It wouldn’t exist for a basic qualifying issue.*

MR. KELLER: What I’m saying is, we’re working hard to come up with a way of resolving these in either some sort of an expedited hearing or a non-hearing process, which, obviously, will have to be agreed to or cooperated with by the other parties

Id. at 253-54 (emphases added).

The colloquy between Robert Keller and the presiding officer demonstrates three crucial points. First, Mr. Keller, counsel to Maritime, acknowledged the distinction between summary decision and “other” methods of dispute resolution, such as “the possibility of resolving this during negotiating settlement.” Second, counsel to Maritime acknowledged that consensual resolution — which could only mean the consent order process of 47 C.F.R. §§ 1.93-94 —

“wouldn’t exist for a basic qualifying issue.” Third, the presiding officer confirmed the nonavailability of the consent order process where a licensee’s basic qualifications have come into question.

In spite of that knowledge, and in spite of the presiding officer’s recognition that consent orders are not authorized to resolve issues implicating a licensee’s basic qualifications, the Enforcement Bureau and Maritime now propose to dispense with Issue G in its entirety through the summary decision procedures of 47 C.F.R. § 1.251, as if that provision could deflect inquiry into Maritime’s “basic statutory qualifications to hold a license.” 47 C.F.R. § 1.93(b). That question remains controlling despite Maritime’s misguided attempt to mischaracterize its efforts to obtain a consent order as a motion for summary decision.

The presiding judge’s memorandum opinion and order in FCC 13M-16 (Aug. 14, 2013), has confirmed that Issue G implicates questions of Maritime’s qualifications. The presiding judge has recognized the validity of SkyTel’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 officer in this proceeding very clearly and persuasively articulated the limits imposed by 47 C.F.R. § 1.93 on consent orders. As in 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 insulating 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. Maritime and its principals and predecessors have similarly engaged in extensive wrongdoing. *See* **Appendix A** and the HDO.

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 in 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 may be 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

at 868 (“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 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 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. *Cf. Northwest Indiana Broadcasting Corp.*, 60 F.C.C.2d 205, 210 (1976) (observing that the Commission, after the disqualification of a licensee or the cancellation of its licenses, “will have nothing [left] to assign”).

B. Federal bankruptcy law deprives Maritime of capacity as “a party” to negotiate and enter any consent order. To rule otherwise would effect an unlawful *de facto* transfer of control of Maritime.

Havens’s second basis for challenging the Joint Motion also rests on the premise that any voluntary resolution of Issue G (or any other issue designated for hearing) must be based on the Commission’s procedures for a consent order, 47 C.F.R. §§ 1.93-.94, rather than its summary decision procedures, *id.* § 1.251. 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), Maritime’s efforts to negotiate a consensual resolution of Issue G of the hearing designation order effectively violate at least two further requirements imposed by section 1.93(b) of the Commission’s rules. Rule 1.93(b) 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 collectively or any individual Choctaw entity — is the

licensee subject to the hearing designation order, Maritime and Maritime alone must qualify as the party that negotiates a consent order. The requirement that the Commission negotiate with “a party” squarely puts into dispute the capacity of Maritime to negotiate, let alone to enter, any consent order. As a debtor or debtor in possession subject to the Bankruptcy Court’s confirmed plan and related confirmation order, Maritime may act only in accordance with that plan and that order. Governing bankruptcy law does not permit Maritime to negotiate the contemplated settlement.

Construing the bankruptcy plan and order to authorize such a course of action by Maritime would violate 47 C.F.R. § 1.93(b). To repeat: Maritime may negotiate a voluntary resolution of Issue G or other matters designated for hearing solely through the Commission’s consent order procedures, and not through its process for summary decision. To treat the Joint Motion as a proposed consent order rather than a motion for summary decision, as the presiding officer must do in order to grant the relief requested, would effect a *de facto* transfer of control over Maritime to Choctaw, in violation of 47 U.S.C. § 310(d). This violation would render any resulting 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 or 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) (hereinafter referred collectively as the “plan and order,” and individually as the “Disclosure Statement,”

“Plan,” and “Confirmation Order”).⁸ Under the plan and order, and under other general requirements of bankruptcy law, Maritime lacks the capacity to negotiate the settlement proposed in the Joint Motion and is therefore not qualified to be a “party” negotiating a consent order under 47 C.F.R. § 1.93(b).

To the extent that Maritime is permitted under the plan and order, and other sources of bankruptcy law, to negotiate the proposed settlement of Issue G, that course of action would constitute an independent violation of 47 C.F.R. § 1.93(b). Maritime is proposing 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).

1. Under the Bankruptcy Court’s plan and order, Maritime lacks authority to negotiate the proposed settlement, or otherwise proceed in this hearing as it has proposed

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

⁸ *See* Order Confirming Plan of Reorganization (Bankr. N.D. Miss. Docket No. 980), at p. 9 (ordering that the provisions of the plan and confirmation order shall bind the debtor and creditors), p. 10 (ordering that, subsequent to the entry of the confirmation order, the Bankruptcy Court shall retain jurisdiction as contemplated in the plan), and p. 22 (property of the estate remains vested in the estate and subject to the jurisdiction of the Bankruptcy Court following confirmation of the plan). To the extent any of those terms are inconsistent, the Confirmation Order controls. *See* Confirmation Order, at p. 5.

court documents that govern Maritime’s conduct with respect to the controversy at hand do not grant Maritime that authority. For example, Maritime’s Reorganization Plan grants the following *exclusive* rights, powers, and duties *to the Liquidating Agent* named in the plan, and *not* to Maritime:

- “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 dictate 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,” “to ... dispose of property,” and “to ... dispose of ... assets.” *Id.* at 20 (emphasis added).

2. *Bankruptcy law requires that the Bankruptcy Court approve the proposed settlement after notice and a hearing, and neither Maritime nor any other party has sought, let alone secured, such approval*

Whether it is Maritime, the Liquidating Agent, Choctaw, or any other entity that attempts to negotiate and execute an agreement purporting to surrender a considerable portion of Maritime's FCC licenses in exchange for, among other things, a termination of 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 after notice and a hearing. To Havens's knowledge, such approval has not been sought, much less secured. There are two independent reasons why bankruptcy court approval would be required under these circumstances. This opposition 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 significant portion of Maritime's site-based licenses for cancellation would effect a material modification of the plan. Among other reasons, the crux of the plan, as presented by Maritime and Choctaw to the creditors who voted on it, was for *all* the licenses ultimately to be transferred, either in connection with pending asset purchase agreements, or to

Choctaw so that Choctaw could market and sell those licenses, in an effort to repay Maritime's creditors and to retain any remainder for itself.

For Maritime to attempt to surrender those licenses according to proposal embodied in the Joint Motion, Maritime (or at least some other entity so authorized by the Plan, such as the Liquidating Agent), would first need to file a motion to modify the Plan prior to substantial consummation of the plan.⁹ 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, 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.).

⁹ 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.

The transaction proposed by the Joint Motion constitutes a material, post-confirmation modification subject to 11 U.S.C. § 1127.¹⁰ 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 binding the Bankruptcy Court, the circumstances of this case 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 HDO, would provide all safeguards of the adversarial process, including the ability of interested and potentially adversely affected parties such as Havens 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, Maritime must now honor the terms of the bargain that it struck with its creditors and with the court that

¹⁰ 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 appear to be present here.

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 trying to obtain enough proceeds to satisfy the claims of all of Maritime’s creditors. Now, however, Maritime would propose to materially modify this bargain by offering 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 prior notice, a hearing, and the approval of the Bankruptcy Court, 11 U.S.C. § 1127 is likely to strip Maritime, the Liquidating Agent, or any other actor of any authority that any of these actors might otherwise

have had under the Bankruptcy Court’s original plan and order to negotiate a settlement in this proceeding.

The Federal Rules of Bankruptcy Court Procedure impose a second, independent bar to any settlement under which Maritime would 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).¹¹ 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] 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

¹¹ Although the proposed consent order would run between parties to an FCC proceeding, as opposed to parties to a bankruptcy case, it nevertheless appears that the Bankruptcy Court must independently approve any such consent order. The interests of the estate in Maritime’s FCC licenses hang in the balance of the HDO 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).

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. See, e.g., **Appendix A** and the HDO. For purposes of this discussion, Havens 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 invoked the jurisdiction of the Bankruptcy Court, may not now 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