

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: Marlene Dortch, Secretary. Attn: the Commission

Interlocutory Appeal Under Section 1.301(a)^[*]

The undersigned (“Havens”) submits this interlocutory appeal under and for purposes of rule section 1.301(a) with regard to the December 19, 2013 Order FCC 13M-22 (“the Order”) of the Administrative Law Judge Sippel (the “ALJ”) (the “Request”). Herein, “EB” means the FCC Enforcement Bureau. I attach as Appendix A my request filed today under §1.301(b) (the “301b Filing”). This filing draws from the 301(b) Filing. I argue below the Order effectively denies my party rights, and thus I submit this appeal. The Order includes (1) a requirement upon Havens that his assisting counsel, noted in his December 2, 2013 pleading (“To Reject Settlement, Proceed with the Hearing...”) which opposed the “EB-Maritime Motion filed earlier on the same day¹ (the “EB-M Motion,” for a settlement and summary decision) (the “Havens Initial Opposition”) take action to appear in this hearing (I had he same note in my Dec 16

^[*] The Order was released on ECFS (as shown on ECFS) on Dec. 20 (not on the 19th as the Order states). Thus, this filing is timely. Since this appeal is from an Order in docket 11-71, I am submitting this to the Secretary under this docket on ECFS.

¹ It also contained a motion seeking that certain further discovery be permitted, stated on one of the 61 pages. The remainder was an opposition to the EB-M Motion.

Further Opp), (2) a full rejection of the Havens Initial Opposition² deeming it untimely, and (3) a finding that the Havens Initial Opposition was subject to an alleged ALJ Order that all pleadings in this proceeding must be filed by 5:30 PM Eastern Time, and that it was a motion (only a motion) that was due on Dec. 2, 2013.³ In the 301(b) Filing, I assert that these present "new or novel question[s] of law or policy and that the Order is such that error would be likely to require remand should the appeal be deferred and raised as an exception"⁴ (the "1.301(b) Standard").

I submit that '(1)' has no basis in law or equity including since the reasons given in the Order--alleged past "confusion" created by Havens's and SkyTel entities' participation in cases on a pro se basis, and to some degree via representative legal counsel, were *resolved* in the past,⁵ and to use a settled matter as the basis to impose a current sanction (see below) is a new and novel expansion of authority, and otherwise meets the 1.301(b) Standard; that '(2)' is the exercise of new and novel, and impermissible, unbridled authority, and otherwise meets the 1.301(b) Standard, in that it mischaracterizes over 95% of a pleading to artificially create a defect (assuming in the first place that 5:30 pm was the deadline, and no extension of that after business hours was reasonable), then acts on the false characterization to entirely reject a major filing (the only one to pursue, in the circumstances, issue (g) prosecution as the Commission set out in the HDO, FCC 11-64), and that '(3)' is, likewise, an artificial imposition and with no public-interest benefit, *imposed only on Havens*, and thus is also part of the Order's new and novel expansion of authority and otherwise meets the 1.301(b) Standard. All three of these were imposed only on Havens, not on the other similarly situated parties, which in itself makes each of

² I filed a more complete Opposition on 12-16-2013 (herein, the "Dec 16 Further Opp").

³ It was in fact over 95% (all but for approximately one page that presented a motion) and opposition due two weeks after December 2. It was filed early, not late, and was the opposite of prejudicial to EB and Maritim.

⁴ If these, or any of these, were in error, the ALJ can correct them. However, these each appear to be taken after substantial consideration, and thus do not appear to be inadvertent error.

⁵ Havens complied with the Judge's orders as to his notice of appearance, and statement of why he chose to participate, and his ceasing (under protest) to represent any SkyTel entity pro se.

these, and the Order overall, subject the 1.301(b) Standard, as discussed below.⁶

(4) The Order effectively denies or terminates the right [of Havens] to participate as a party to a hearing proceeding, § 1.301(a)(1), by imposing "sanctions" not authorized by any source of law, including the Commission's rules and orders.⁷ The Order imposes conditions on no other party and has the effect, if not the form, of a directive excluding me alone from participating as a party in this proceeding. I believe that a conscious purpose to exclude me from this proceeding was "a 'substantial' or 'motivating' factor behind" the Order and that the burden should fall on ALJ Sippel to demonstrate that he would have imposed the Order's onerous conditions "without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (quoting *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). I submit '(4)' as a further matter under § 1.301(b) that is new or novel, and otherwise meets the 1.301(b) Standard (and as the basis of this appeal).

Re issue '(1)': there is no FCC rule, and no case precedent I can find, that prohibits a pro se party acting before the FCC to use assisting counsel, or that provide authority to any FCC employee, Office or Bureau, or the Commission, to require an appearance of said assisting counsel. Doing so imposes time and cost on the pro se party, and places a chill and cloud on the party's participation and attempt to use assisting counsel to improve his participation.⁸

⁶ No other party was (1) subject to an Order that its assisting, non-representative counsel appear. See above footnote, (2) had its filings on EFCS examined to see if they were filed after 5:30 PM- and there is no way to determine that anyway, but, apparently, by special access to EFCS staff that the ALJ and EB have, but not Havens or other parties, who should not have to accept agency self-alleged, hidden proof, and (3) had its critical pleadings entirely rejected, for an alleged procedural violation with no practical effect, and a pro se party must be given some slack by law, e.g., see the Exhibit here, citing court precedent, in advice to administrative law judges.

⁷ Under the Administrative Procedures Act ("APA"): a "sanction" includes a "requirement, limitation, or other condition affecting the freedom of a person," "withholding relief," and "taking... restrictive action," and where "relief" means "recognition of a ...right". 5 USC §551. The APA, in 5 USC § 558, "Imposition of sanctions; determination of applications for licenses..." provides "(a) This section applies according to the provisions thereof, to the exercise of a power or authority, (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." (Emphasis added.)

⁸ In addition, the Judge did not impose the same requirement on Maritime or the other parties: it is apparent that they have counsel other than representative counsel that are involved in their

Re issue '(2)': My motion of Dec. 2, even if deemed untimely,⁹ should be considered on its merits because it presents significant grounds for objecting to EB and Maritime's proposed settlement and for affording additional discovery. The "overly restrictive" application of timing rules, *Starks v. Perloff Bros., Inc.*, 760 F.2d 52, 55 (3d Cir. 1985), especially when those rules are not being applied as they were in earlier stages of this proceeding and are being applied in a way that uniquely handicaps me, alone among parties to this proceeding, does more than violate the mandate that pleadings be construed so as to do substantial justice. *Cf.* Fed. R. Civ. Proc. 8(e). Such application of the timing rules is arbitrary, capricious, an abuse of discretion, and violative of the rule of prejudicial error. 5 U.S.C. § 706. This proceeding is "not truly adversarial" (notwithstanding my objections to the proposed EB-Maritime settlement). *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). Despite my reliance on assisting counsel, I do assert my right to participate in this proceeding on a *pro se* basis. *Id.* "These facts might lead a reviewing court to consider harmful" errors "that it might consider harmless in other circumstances." *Id.*; *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). Order 13M-22 applies new and prejudicial requirements in variance with the presiding officer's previous decisions. In rescinding or contradicting his previous rulings, the presiding officer "is obligated to supply a reasoned analysis for the change beyond that which may be required" if he had imposed these conditions "in the first instance" upon my participation in this proceeding. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413,

pleadings, for example, Maritime uses bankruptcy and licensing counsel, which are not Mr. Keller, and the same applies for the other or most of the other parties.

⁹ *First* it simply mischaracterizes the Dec. 2 opposition that was *13 days early*, then denies it as untimely *for what is is not*. "The court cannot conceive why it ought to construe the [document] in a way that its language does not admit in order to give effect to an intent that ...[was] never had. Compare *United States v. Winstar Corp.*, 518 U.S. 839, 911, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996)." *Lab. Corp. v. United States*, 108 Fed. Cl. 549; 2012.

1425 (D.C. Cir. 1983); *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982). The application of the new, onerous requirements of Order 13M-22 to me and me alone, excepting other parties in EB Docket No. 11-71, might rise to such a level as to constitute intentional, discriminatory treatment of me from other similarly situated parties, without a rational basis for the difference in treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Re issue ‘(3)’: The Judge established that pleadings in this proceeding be filed on EFCS filings which allows them up to midnight, and his later Orders’ footnotes read together only say that he "recommends" filing by close of business, and his Orders only requests that courtesy copies be sent by email. Filing by 5:30 pm or by midnight makes no practical difference and EFCS does not provide any filing confirmation receipt that has the time of filing (it does not even have the day of filing) and ECFS has no means to later ascertain the time of filing. In addition, as to Havens December 16 Opposition, I got permission to file from the Judge’s staff as I proposed (before midnight, and in multiple parts, etc.), citing the Judge’s last Order on this topic that had such a footnote that allowed ECFS filing by midnight, and only recommended (not required) filing by close of business (this is shown in an attachment to this December 16 filing).

I reference and incorporate herein my comments on the Exhibit below. The pages that I then attach in the Exhibit, from the *Manual for Administrative Law Judges*, provide authority for those comments, and for some of the comments above. I include Appendix B for a like case.¹⁰

For the above reasons, I request permission to appeal these four issues to the Commission.

Respectfully submitted,

/s/
Warren Havens
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December 30, 2013

¹⁰ I cite this case above, and provide it and a summary since it has parallels to the instant case. But if the Commission does not allow the summary as beyond five pages, then I withdraw it.

CERTIFICATE OF SERVICE

The undersigned certifies that he has on this 30th day of December, 2013 caused to be served by first class United States mail copies of the foregoing Appeal to:

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/ s / [Electronically signed. Signature on file.]

Warren Havens