

ACCEPTED/FILED

DEC 31 2013

Federal Communications Commission
Office of the Secretary

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
Errata Copy *
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.

* This 12-31-13 Copy will be filed in hard copy with the Secretary's office. Additions in boxes; deletions in strikeout.

No. of Copies rec'd 0+6
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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").

Summary:

/ 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 Maritime.

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 ^{below} footnote, (2) had its filings on E-FCS examined to see if they were filed after 5:30 PM-^{CF} and there is no way to determine that anyway, but, apparently, by special access to E-FCS 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 ^{Appendix A} 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 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/Further 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/Appendix 1 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~~ the effective denial of my party rights to the Commission.

Respectfully submitted,

/s/


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

December 30, 2013

or said Exhibit 1 comments

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.

Since there are 4 issues in this Request, I believe that I should be permitted more than 5 pages, but I believe I do *not* have more than five pages of *countable* text: see § 1.48, §1.49 Note (and §1.49(e) is not yet specified.) If I am incorrect, then I request acceptance of this a *nominally* oversized pleading, for the clear public interest shown herein.

Appendix A

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

In re)	
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MARITIME COMMUNICATIONS/LAND MOBILE, LLC)	EB Docket No. 11-71
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Participation in Auction No. 61 and Licensee)	FRN: 001358779
Of Various Authorizations in the Wireless)	
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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,
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ENERGY, INC.; INTERSTATE)	0004153701, 0004526264,
POWER AND LIGHT COMPANY; ET AL.)	0004636537, 0004604962.

To: Marlene Dortch, Secretary. Attn: Chief Administrative Law Judge Richard Sippel

Request under Section 1.301(b) of 12-30-13^[*]

The undersigned (“Havens”) submits this request under and for purposes of rule section 1.301(b) with regard to the December 19, 2013 Order FCC 13M-22 (“the Order”) of the Administrative Law Judge Sippel (the “ALJ”) (the “Request”).¹ Herein, “Maritime” means Maritime Communications/ Land Mobile LLC, and “EB” means the FCC Enforcement Bureau.

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

^[*] Since the Order was released on ECFS (as shown on ECFS) on Dec. 20 (not on the 19th as the Order states), I believe this filing is timely. If timely, then it replaces my filing on 12-27-13 on the topic of this filing. It is prejudicial to a Party to have to argue based on an error that was fully in the control of the authority. The Order *alleged* tardiness by Havens and applied the most harsh result, in new and novel means and results. The ALJ should comply with his own concerns, and not put on his Orders premature release dates which shorten my and other Parties’ time to respond to his Orders: the Order is tardy and defective, on that basis.

¹ Initially, Havens’ assisting counsel intend to take action to satisfy their respective obligations, if any, in connection with ¶ 6 of the Order no later than Jan. 6, 2014. This filing does not purport to comment on what action assisting counsel will take in that regard.

opposed the “EB-Maritime Motion filed earlier on the same day² (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 Further Opp), (2) a full rejection of the Havens Initial Opposition³ 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, 2013.⁴ I seek to appeal these to the Commission as presenting "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"⁵ (the “1.301(b) Standard”).

I respectfully 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,⁶ 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

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³ I filed a more complete Opposition on 12-16-2013 (herein, the “Dec 16 Further Opp”).

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⁵ 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.

⁶ 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.

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 these, and the Order overall, subject the 1.301(b) Standard, as discussed below.⁷

In addition, (4) the Order *effectively*⁸ "denies or terminates the right ...[of Havens] ... to participate as a party to a hearing proceeding," as described in §1.301(a)(1), for reasons given above, and since these impose "sanctions" and sanctions cannot be applied but when authorized by agency law, and no FCC law authorizes the above.⁹ I submit this issue '(4)' as a further matter under §1.301(b) that is new or novel, and otherwise meets the 1.301(b) Standard.

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.¹⁰ Re issue

⁷ 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.

⁸ E.g., in *Plessy v. Ferguson* (1896) the Supreme Court held that "separate but equal" facilities, was constitutional. The rights were not denied outright, but were effectively denied.

⁹ 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.)

¹⁰ 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

'(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).

Further re issue (2): My motion of Dec. 2, even if deemed untimely, 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 and ultimately do so participate. *Id.*

"These facts might lead a reviewing court to consider harmful" errors "that it might consider

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.

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, 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).

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.

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

Respectfully submitted, December 30, 2013¹¹

/s/Warren Havens
2509 Stuart Street, Berkeley CA 94705 | 510 841 2220, 848 7797

¹¹ Under protest, I submit this by 5:30 PM on EFCS. I am amend and submit this again later today prior to Midnight, but understand that the Judge may reject that – but my position herein is that filings are due on EFCS before Midnight. Since there are 4 issues in this Request, I believe that under §1.301(b) that I should be permitted more than 5 pages, but I do not have more than five pages of countable text, as far as I understand. If I am incorrect, then I request that the Judge accept this as an oversized pleading.

Exhibit

From the Manual for Administrative Law Judges at link below -

http://www.archive.org/stream/gov.acus.1993.manual/manualforadmin1193unse_djvu.txt

Emphasis added to the below pages from this Manual.

This exhibit provides reasons, clear in established law (deviations of which are “new and novel, and may be good cause for remand if not corrected- the 1.301(b) Standard) that

(i) The ALJ should not act harshly against a pro se party, but provide reasonable accommodation of mistakes the pro se party may make, as to procedure, form, and the like, especially in complex cases as this case. (ii) The ALJ should err on the side of developing a sound and full record, even if a party asserts that relevant materials should be restricted under an protected order based on asserted confidentiality and need to keep it from another party as a competitor. This ALJ in this case, has done the opposite. For example: First by taking part in¹² denial of Havens-Skytel FOIA actions to seek records labeled but not proven up as highly confidential, which was a proper means in a formal hearing to seek relevant Commission records. While this FOIA matter is not an issue under the subject Order, discussed in the Request above, it is relevant background: Under this Order, the *Judge ramped up his actions* to effectively keep Havens from getting essential facts into this proceeding,¹³ and to be heard as to why the evidentiary hearing should take place, and to require Maritime to disgorge hidden withheld evidence that the EB refused to obtain, even after it demanded that Havens get it, as did the Judge. This sort of action by an administrative law judge is contrary to established law, reflected below, and is thus under the 1.301(b) Standard.

¹² The ALJ spent considerable effort, with the EB and Maritime attorney, to discuss how the records sought by the SkyTel entity (via Havens) could be handled under the Protective order and the control of the EB and authority of the Judge, rather than allow the FCC FOIA officers to make their decisions, unaffected by the non-FOIA parties, the EB and Maritime, and to keep the ALJ office out of this. Getting into this reflects prejudice, and I believe was prejudicial.

¹³ The ALJ and the EB have repeatedly rejected Havens written submissions that they act to obtain approximately 100 boxes of relevant evidence spoiled and hidden by Maritime, and its counsel, and more recently, another several hundred according the testimony of Mr. Predmore that I describe in my Dec 2 and Dec 16 oppositions to the EB-M settlement motion.

MANUAL FOR ADMINISTRATIVE LAW JUDGES

frivolous objections are counter-productive, or to defer a recess or to refuse to go off the record. If witnesses are sequestered, it may be necessary to prevent witnesses who have not testified from talking to witnesses who have. This can frequently be accomplished by extending the length of the session to avoid overnight or other lengthy recesses. Also, it goes without saying that the ALJ should be alert to protect a witness, and the record, if the witness is unsophisticated, unfamiliar with courtroom procedure, timid, or suffering from any other personal trait or handicap that would make for vulnerability to the questioning of a clever or forceful lawyer. The ALJ should assure, as much as humanly possible, that the record reflects the witness' actual observations and viewpoints.

When cross-examination by all adverse parties is concluded, the ALJ should permit redirect examination on matters brought out on cross-examination.

If there is more than one party in an otherwise simple case, each party in turn should try its case in the manner outlined above except that each party should, during or at the conclusion of its direct presentation, rebut the case of any party that has previously presented its direct case. Each party should be permitted to rebut the cases of those parties that followed it in making their direct presentations.

The ALJ should usually excuse a witness when his testimony is concluded, subject to recall pending later developments at the hearing.

d. Miscellaneous. Administrative proceedings conducted under particular statutes, types of regulations, or agency customs may present special problems that call for alertness and ingenuity on the part of the ALJ. For example, in Social Security claims cases the agency is not represented and the claimant may appear without counsel²⁰⁵. Although these Social

²⁰⁵ It should be noted that the Social Security ALJs operate under a special statutory regimen in disability cases, where they are not presiding over purely adversarial proceedings. In a sense, the Social Security ALJs are under a duty to independently consider the positions of all parties. See *Richardson v. Perales*, 402 U.S. 389 (1971); see also *Rausch v. Gardner* 267 F. Supp. 4, 6 (E.D. Wis. 1967) (ALJ wears "three hats.") Incidentally, the number of cases where a claimant is represented seems to have increased substantially. As of 1992, the rate of claimants represented by an attorney apparently was over 80%. Letter from Acting Chief Administrative Law Judge, dated May 20,

Security cases are not normally considered adversary proceedings, they do require a delicate sense of fairness and an extra effort by the ALJ to insure that the record is fully developed and that the claimant is fully aware that the ALJ is treating both the agency and the claimant fairly and impartially. Indeed, courts have remanded cases for further hearing when Administrative Law Judges have not met their special obligations in cases involving unrepresented claimants.²⁰⁶

The unrepresented party is more likely to be encountered in the "simple" cases. The ALJ often needs a high order of skill to deal with the inexperienced pro se party, especially in proceedings which structurally are more adversarial than Social Security disability cases. The pro se party may never have been in a hearing room or courtroom before. The ALJ sometimes is whipsawed between complying with the mandate of reviewing courts -- take the unrepresented party's circumstances into consideration -- and the simple fact that the unrepresented party may be difficult to control. This party may present the volatile combination of a weak case and strong feelings about the righteousness of his or her cause. Furthermore, pro se cases occasionally involve conflicting claims and personal animosity. A relatively small amount of benefits or penalty sometimes generates more ill-will and hard feelings than larger sums. Also, the ALJ sometimes must make special efforts to calm witnesses who are frightened, confused, or angry and must be

1992, to Morell E. Mullins, principal revisor of the 1993 edition of this Manual. Moreover, it is not beyond the realm of possibility that the agency may seek, directly by legislation or indirectly by other means, to have legal representation at some hearings. Cf., *Salling v. Bowen*, 641 F. Supp. 1046 (W.D. W. Va. 1986).

²⁰⁶ The Ninth Circuit has stated that: "When a claimant is not represented by counsel, the administrative law judge has an important duty to scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts and he must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." *Cruz v. Schweiker*, 645 F.2d 812 (9th Cir. 1981). See also, *Sims v. Harris*, 631 F.2d 26 (4th Cir. 1980). Another typical case follows a similar philosophy, referring to the ALJ's duty to probe and explore relevant facts if a claimant is unrepresented by counsel and disabled, *Poulin v. Bowen*, 817 F.2d 865 (D.C. Cir., 1987).

[Below page does not follow from above pages.]

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the agency, the demand is not too indefinite and the information sought is reasonably relevant."¹²¹

B. Discovery and Confidential Material

When it is desirable to have an advance written exchange of confidential material, the ALJ should develop appropriate safeguards to assure confidentiality. The ALJ may, for example: (1) obtain the commitment of the parties receiving the material to limit its distribution to specific persons; or (2) ask unaffected parties to waive the receipt of certain material; or (3) issue appropriate orders. As an additional safeguard, ALL copies of such material should bear a prominent legend stating the limitations upon its distribution pursuant to the order of the ALJ.

In some agencies, such as the FCC or FTC, confidential information, particularly material claimed to be proprietary information or trade secrets, may be handled by procedures contained in a protective order issued by the ALJ¹²². The need for such an order often arises during prehearing discovery when a party refuses to release material to an adversary party, an intervenor, or the agency staff without provision for confidential treatment. The request for the order is usually grounded on the claim that unrestricted release of the material may result in its misuse, such as unfairly benefitting competitors. To guard against misuse of the information the order should provide the terms and conditions for the release of the material. It should also contain an agreement to be signed by users of the material, and may include procedures for handling the material if offered in evidence, including, for example, prior notification to the party submitting the material of the intention to offer it as evidence, and provisions for sealing the

¹²¹ United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

¹²² See Exxon Corp.; v. Federal Trade Commission, 665 F.2d 1274 (D.C. Cir. 1981). For examples of agency regulations related to various protective orders, see 10 CFR § 2.734 (2000) (Nuclear Regulatory Commission; confidential informant); 10 CFR § 501.34(d) (2000) (Department of Energy); 14 CFR § 13.220 (h) (2000) (FAA civil penalty actions); 15 CFR § 25.24 (2000) (Department of Commerce, Program Fraud Civil Remedies); 16 CFR § 3.31(d) (2000) (FTC).

pertinent portions of the record, briefs, and decisions¹²³. In some situations the ALJ may find it easier to allow the parties to draft a proposed order for his signature.

The ALJ must realize that protective order procedures could be inimical to the concept of a proceeding which is a matter of public record. Consequently, extreme care must be exercised in the issuance and application of the order to insure that the integrity of the record is preserved and the rights of the parties and the public are duly considered.

Moreover, the order should make clear that it does not constitute a ruling that any material claimed by a party to be covered is in fact confidential and entitled to be sealed and withheld from examination by the general public.¹²⁴

C. Testimony of Agency Personnel and Production of Agency Documents

Testimony of agency personnel and the production of documents in agency custody must sometimes be restricted to protect the agency's investigative or decisional processes¹²⁵. Consequently some agencies provide special procedures applicable to discovery requests for materials in the agency's custody, such as requiring that they be referred to the agency either initially

¹²³Forms 19-a-d in Appendix I are sample protective orders.

¹²⁴ For further discussion of confidential material and administrative proceedings, see text *infra* accompanying notes 242-48.

¹²⁵ See, 5 U.S.C. § 552(b) (1994 & Supp. V 1998). The cited statutory provision is part of the Freedom of Information Act (FOIA), which deals with public access to federal government records, rather than discovery by private litigants. FOIA and discovery pertaining to government records sought by private litigants obviously are related. At least some cases indicate that precedents construing one of the FOIA exemptions are not always irrelevant to issues involving discovery. See, *McClelland v. Andrus*, 606 F.2d 1278, 1285, n. 48 (D.C. Cir. 1979), *Washington Post Co. v. U.S. Dept. of Health & Human Services*, 690 F.2d 252, 258 (1982).

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or upon interlocutory appeal by the agency staff¹²⁶. The ALJ should assure that these procedures are not used frivolously or for clearly improper purposes.¹²⁷

In *Jencks v. United States*¹²⁸ it was held that the defendant in a criminal prosecution has the right to examine all reports in the possession of the prosecution that bear upon the events and activities to which a prosecution witness testifies at trial. This principle has been extended to administrative proceedings in which the agency is an adversary¹²⁹. Some agencies have adopted procedural rules specifically directed to the "Jencks" problem.¹³⁰

In ruling upon such requests, the ALJ does not occupy precisely the same position as did the court in *Jencks*. The Administrative Law Judge is not a court, or the representative of a separate branch of government who is being asked to compel unwilling disclosure by the agency. The Administrative Law Judge is an employee of the agency, who is making the initial decision for the agency itself as to what it shall voluntarily disclose. Accordingly, in the absence of agency policy to the contrary, and within the scope of sound discretion, the ALJ should be guided by agency policies and a sense of fair play rather than by a narrow

¹²⁶ For an example, see FTC regulations, 16 CFR §§ 3.23(a), 3.36 (2000).

¹²⁷ See *Domestic Cargo-Mail Service Case*, 30 CAB 560, 651 (1960).

¹²⁸ 353 U.S. 657, 672 (1957). The principle of this case, with some modifications, was later codified, 18 U.S.C. § 3500 (1994). This provision is applicable only to criminal cases.

¹²⁹ *Great Lakes Airlines v. CAB*, 291 F.2d 354, 363-365 (9th Cir. 1961), cert. denied, 368 U.S. 890 (1961); *NLRB v. Adhesive Product Corp.*, 258 F.2d 403, 408 (2d Cir. 1958); *Communist Party of the United States v. SACB*, 254 F.2d 314, 327-328 (D.C. Cir. 1958).

¹³⁰ See for example, 7 CFR § 1.141 (2000) (Department of Agriculture, providing that production of such documents "shall be made according to the procedures and subject to the definitions and limitations prescribed in the *Jencks Act*"); 17 CFR § 201.231(a) (2000) (SEC).

legal analysis of whether, under *Jencks*, the Constitution would force the agency grudgingly to provide the information requested.

In the absence of good reasons to the contrary, the ALJ should seriously consider requiring production of all relevant and material factual statements, whether or not covered in the witness' testimony. (If nothing else, disclosure could prevent a court from later reversing and remanding the case, with an attendant waste of time for everyone concerned.) In deciding this question the ALJ, to the extent permitted by agency rules, may examine the statements *in camera*. To avoid delay at the hearing the ALJ may require the parties to submit such statements before the hearing.

D. Reports, Estimates, Forecasts, and Other Studies

Although most discovery questions which an Administrative Law Judge may encounter will be fairly analogous to discovery issues confronting courts, there are some situations which have few or no counterparts outside of administrative agency proceedings. For instance, historical data, statistical or technical reports, forecasts, or estimates may have to be prepared, sometimes by more than one party. If so, it is frequently necessary for the ALJ to establish standard bases and time periods. In addition, it is sometimes necessary to specify in some detail the manner of preparation -- by requiring, for example, that the parties use certain specified methods in preparing cost estimates. Use of such procedures should not prevent a party from supplementing its data with similar material in other forms, subject to the ALJ's discretion.

E. Polls, Surveys, Samples, and Tests

As with reports, estimates and forecasts, information may be needed about habits, customs, or practices for which little reliable information is available -- for example, the method of loading trucks, the volume of traffic along a particular route, or the percentage of travelers who prefer non-smoking areas. Polls, surveys, samples, or tests may be the most feasible methods of obtaining the needed data. These may have been previously prepared by a party or an independent source for other purposes or they may be prepared specifically for the pending proceeding -- either by one or more of the parties independently or with the consent and knowledge of the ALJ and the other parties as a part of the prehearing procedure.¹³¹

¹³¹ Cf., 18 CFR § 156.5 (2000) (FERC, Application for Orders under Section 7(a) of the Natural Gas Act).

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 "Request" to:

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Chief Administrative Law Judge
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Warren Havens

Appendix B

The Order deals with (i) an alleged amendment requiring 5:30 PM filing deadlines by a footnote (later contradicted by another footnote only recommending COB filing) of an Order requiring filing on ECFS (that has no intra-day deadline, and not clock- it does not intra-day stamp or even day stamp filings and confirmations) (“we do not know [this] data... purged [not kept]” by ECFS – see below) (and, “Time...if you only kept on good terms..., he’d do [as] you like” – id.), and (ii) and using that, conscrews my Dec. 2 opposition filed 13 days early into a thing it was not (“that it language does not admit” – id.), then rejecting it as untimely due to what it was not (“...[]like the Mad Hatter’s unsolvable riddle” – id.) which “contorted arguments... [to] refus[e] [the party participation rights are] arbitrary, capricious, and contrary to law.” From Lab. Corp. of Am. v. United States, 108 Fed. Cl. 549; 2012:

- "If you knew Time as well as I do,' said the **Hatter**, 'you wouldn't talk about wasting IT. It's HIM."

- "I don't know what you mean,' said **Alice**."

- "Of course, you don't,' the **Hatter** said, tossing his head contemptuously. 'I dare say you never even spoke to Time!'"

- "Perhaps not,' **Alice** cautiously replied: 'but I know I have to beat time when I learn music."

- "Ah! that accounts for it,' said the **Hatter**. 'He won't stand beating. Now, if you only kept on good terms with him, he'd do almost anything you liked with the clock....2/

2/ Lewis Carroll, Alice's Adventures in Wonderland 101-02....

Defendant [the United States], regrettably, has injected an Alice-in-Wonderland ... into this preaward bid protest case.¹ In arguments worthy of the Mad Hatter, according to defendant, the quotation was late. Now, in fact, we do not know what LabCorp actually saw because the data corresponding to that webpage was automatically purged by the e-Buy website immediately after the closing of the procurement.... it contacted the contracting officer to point out the problem with the time listed on the website, and was told that the proposals were due at the time listed in the solicitation, i.e., 2:00 p.m. CDT. Despite this communication, defendant argues that LabCorp waived its objections regarding the timeliness of its quotation Fortunately, unlike the Mad Hatter's unsolvable riddle for Alice ("Why is a raven like a writing desk?"), 4 the solution to defendant's contorted arguments is readily found in ... binding precedent...[that] establish that the VA's refusal to

¹ Likewise, I am in docket 11-71, protesting award of licenses to Maritime, and my companies are the competitors, shown in the HDO, including for the site-based licenses under issue (g) base on rule § 80.385(c) “automatic reversion.”

accept [denial of] plaintiff's quotation here was arbitrary, capricious, and contrary to law.

* * * *

The court cannot conceive why it ought to construe the amendment 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).

Errata Copy: Served 12-31-13, but otherwise as stated below.

/s/ W. Havens

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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