

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re)	
)	
MARITIME COMMUNICATIONS/LAND	)	EB Docket No. 11-71
MOBILE, LLC	)	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	)	Application File Nos. 0004030479,
Authorizations in the Wireless Radio Services	)	0004144435, 0004193028, 0004193328,
	)	0004354053, 0004309872, 0004310060,
Applicant with ENCANA OIL AND GAS (USA),	)	0004314903, 0004315013, 0004430505,
INC.; DUQUESNE LIGHT COMPANY; DCP	)	0004417199, 0004419431, 0004422320,
MIDSTREAM, LP; JACKSON COUNTY	)	0004422329, 0004507921, 0004153701,
RURAL MEMBERSHIP ELECTRIC	)	0004526264, 0004636537,
COOPERATIVE; PUGET SOUND ENERGY,	)	and 0004604962
INC.; ENBRIDGE ENERGY COMPANY,)	
INC.; INTERSTATE POWER AND LIGHT)	
COMPANY; WISCONSIN POWER AND)	
LIGHT COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE – MID CONTINENT, LLC;)	
DENTON COUNTY ELECTRIC)	
COOPERATIVE, INC., DBA COSERV)	
ELECTRIC; AND SOUTHERN CALIFORNIA)	
REGIONAL RAIL AUTHORITY)	

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

**ENFORCEMENT BUREAU'S COMMENTS ON
THE JANUARY 17, 2014 PREHEARING CONFERENCE¹**

1. The Commission's policy on summary decision takes into consideration the

¹ At the prehearing conference held on January 17, 2014, the Presiding Judge afforded interested parties the opportunity to submit a filing to clarify the record related to Mr. Havens' legal representation. In light of the Presiding Judge's remarks, the Enforcement Bureau respectfully submits the enclosed to provide the Presiding Judge with additional guidance as he considers Mr. Havens' purported *pro se* status.

“possibility of unfairness in using summary decision against parties who appear without counsel”² and who thus may not have the capability, on their own, to “understand and respond to a motion for summary decision.”³

2. In *Order*, FCC 13M-16, the Presiding Judge raised a concern about rendering a summary decision against Mr. Havens, who had represented that he was appearing without counsel in this proceeding.⁴ Specifically, the Presiding Judge was concerned that Mr. Havens may not “understand[] the procedures and the issues”⁵ and may be “ill-equipped...to participate in complex motion practice.”⁶ Taking a cue from this *Order*, Mr. Havens argued that the motion for summary decision filed jointly by the Enforcement Bureau (Bureau) and Maritime Communications/Land Mobile, LLC (Maritime)⁷ should be denied simply because Mr. Havens

² See *In the Matter of Joseph Frank Ptak*, 13 FCC Rcd 22168, 22171, ¶ 8 (ALJ, rel. Jul. 6, 1998) (citing Summary Decision Procedures, 34 FCC 2d 485, 488 (1972)).

³ Summary Decision Procedures, 34 FCC 2d 485, 488, ¶ 6 (1972). The Commission’s discussion of its procedures, however, does not require that the Presiding Judge forego deciding summary decision in all cases involving *pro se* parties. Rather, the Commission’s summary decision standard recognizes that it is within the Presiding Judge’s discretion to decide whether a *pro se* party is capable of understanding the summary decision procedures and participating fully in the motions practice. *Id.* More generally, the Commission noted that the “standard for action on a motion for summary decision [under the Commission’s rules] is essentially the same as the standard” under Rule 56 of the Federal Rules of Civil Procedure. *Id.* at 487, ¶ 5. Under Rule 56, the courts have often distinguished leniency regarding technical or procedural requirements from leniency on the merits. See, e.g., *Spartalian v. Citibank, N.A.*, 2013 WL 5437347, at *2 (D. Nev. Sept. 27, 2013) (although “[p]ro se complaints are subject to ‘less stringent standards than formal pleadings drafted by lawyers’ and should be ‘liberally construed’...pro se litigants are not entitled to lenient evidentiary standards for the purposes of summary judgment motions”) (citation omitted); *Gittens v. Garlocks Sealing Technologies*, 19 F. Supp.2d 104, 110 (W.D.N.Y. 1998) (recognizing that “proceeding pro se does not otherwise relieve a litigant from the usual requirements of summary judgment”) (citation omitted); *Hass v. United States Air Force*, 848 F. Supp. 926, 929 (D. Kan. 1994) (“Even a pro se litigant, however, ‘does not escape the essential burden under summary judgment standards of establishing that there is a genuine issue as to a fact material to [the] case in order to avert summary judgment.’”) (citation omitted). See also *Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir. 1997) (recognizing that at the summary decision stage, a pro se party must still meet the burden of establishing that there is a genuine issue of material fact). Moreover, a party’s “pro se status, in and of itself, does not prevent [a] court from granting summary judgment.” *Hammad v. Bombardier Learjet, Inc.*, 192 F. Supp.2d 1222, 1229 (D. Kan. 2002) (citations omitted).

⁴ See *Order*, FCC 13M-16 (ALJ, rel. Aug. 14, 2013), at p. 8, ¶ 20.

⁵ *Id.*

⁶ *Id.*

⁷ See Joint Motion of Enforcement Bureau and Maritime For Summary Decision On Issue G, filed on Dec. 2, 2013 (Joint Motion).

was purportedly representing himself.⁸ At the same time, however, Mr. Havens admitted that his actions in this proceeding “have been informed by assisting counsel as to procedure and substance”⁹ and that in responding to the Bureau and Maritime’s Joint Motion, he “used assistance” of counsel.¹⁰ As a result, the Bureau argued that Mr. Havens would not be unfairly prejudiced by the Presiding Judge ruling on the Bureau and Maritime’s motion for summary decision.¹¹

3. In an effort to determine the scope of the legal assistance provided – and whether in fact Mr. Havens deserves any special consideration in the summary decision process – the Presiding Judge set a prehearing conference at which Mr. Havens’ counsel were to be prepared to identify, among other things, the nature of their representation of Mr. Havens, each pleading they prepared or assisted in preparing, and each paragraph of each such pleading they prepared or assisted in preparing.¹² During this prehearing conference, however, Mr. Havens repeatedly invoked the attorney-client privilege with respect to the Presiding Judge’s questions, precluding the Presiding Judge from establishing a complete record.

4. Nevertheless, the record as it exists plainly reflects that, for the purposes of the summary decision motion practice, Mr. Havens was not appearing “without counsel.” Rather, Mr. Havens was represented by Messrs. James Ming Chen, Danny E. Ruhl, and Timothy J.

⁸ See Havens Opposition to Joint Motion of Enforcement Bureau and Maritime For Summary Decision on Issue G, filed on December 16, 2014 (Havens’ Opposition) at 104-105.

⁹ See Havens-SkyTel First Motion Under Order 13M-19 to Reject Settlement, Proceed with the Hearing, and Provide Additional Relevant Discovery, filed on Dec. 2, 2013 (Havens’ First Motion), at n.1; Havens-SkyTel Additional Motions Under Order 13M-19, filed on Dec. 2, 2013 (Havens’ Additional Motions), at n.1.

¹⁰ See Request to Accept and Opposition and Response to Enforcement Bureau’s Motion for Leave and Associated Reply, filed January 7, 2014 (Havens’ Response to The Bureau’s Reply), at n. 2.

¹¹ See, e.g., Enforcement Bureau’s Reply to Mr. Havens’ Opposition to Joint Motion for Summary Decision, filed on Dec. 23, 2013, at 9.

¹² See Order, FCC 14M-1 (ALJ, rel. Jan. 8, 2014) at 2-3.

Anzenberger when he filed the pleadings addressing the Bureau and Maritime's Joint Motion.¹³ Mr. Havens thus had "qualified licensed attorney[s]"¹⁴ at his disposal during the summary decision process who could – and did – assist him in understanding the procedures and the issues raised by the Bureau and Maritime's Joint Motion.¹⁵ Indeed, Mr. Havens has conceded as much on the face of the relevant pleadings.¹⁶

5. In addition, it is apparent that Mr. Havens copied, nearly verbatim, into his Opposition a prior filing in this proceeding that was prepared and signed by his current counsel, Mr. Chen. Specifically, Mr. Havens included nearly all of the pleading entitled "Authorities in Support of the Havens/SkyTel Definition of 'Constructed' and 'Construction'"¹⁷ at pages 41-53 of his Opposition.¹⁸ At a minimum, therefore, Mr. Havens received, and relied on, legal advice from Mr. Chen on a key issue raised in the Bureau and Maritime's Joint Motion – the timely construction of Maritime's site-based stations. Moreover, the fact that Mr. Havens so brazenly adopted Mr. Chen's work product as his own, without any indication that it reflected an attorney's contribution, calls into question whether Mr. Havens may have similarly incorporated (and relied on) other counsels' work product in his Opposition or any of the other pleadings

¹³ See Notice of Limited Special Appearance filed by Danny E. Ruhl and Timothy J. Anzenberger on January 6, 2014 at pp. 2-3 in which Messrs. Ruhl and Anzenberger admit to receiving requests for advice from Mr. Havens concerning bankruptcy related issues in connection with Havens' First Motion and Havens' Opposition; Notice of Limited Special Appearance filed by Mr. James Ming Chen on January 6, 2014 at pp. 2-3 in which he admits he has represented Mr. Havens during the summary decision time period.

¹⁴ See *Order*, FCC 13M-22 (ALJ, rel. Dec. 19, 2013) at 3, ¶ 6.

¹⁵ See *supra* note 13. During the prehearing conference, Mr. Havens admitted that when he needed the advice of counsel, he knew how to obtain it, even if it was just a meeting in a neighborhood coffee shop.

¹⁶ See *supra* notes 9 and 10.

¹⁷ See Authorities in Support of the Havens/SkyTel Definition of "Constructed" and "Construction" which was submitted by James Ming Chen on December 5, 2012 and filed in EB Docket No. 11-71 on that date under the title "Amended Authorities in Support" (Mr. Chen's Submission).

¹⁸ Attached hereto as Exhibit A is a highlighted copy of pages 41 through 53 of Havens' Opposition reflecting the text extracted from Mr. Chen's Submission. Attached hereto as Exhibit B is a highlighted copy of Mr. Chen's Submission with notations as to where in Havens' Opposition that text may be located.

concerning the Bureau and Maritime's Joint Motion.¹⁹

6. Commission precedent plainly leaves to the Presiding Judge the discretion to determine Mr. Haven's "capability...to understand and respond to a motion for summary decision...."²⁰ Here, there is sufficient evidence in the record to establish that Mr. Havens is not the typical *pro se* party who does not have access to counsel.²¹ Rather, throughout the summary decision process, Mr. Havens has not only had access to but relied on advice of counsel concerning the procedures and substantive issues raised by the Bureau and Maritime's Joint Motion. Mr. Havens wants to have it both ways: to seek advice of counsel when he believes he needs assistance, but to seek leniency as a *pro se* party when he believes that status will be to his advantage. Moreover, Mr. Havens' ability to recognize when he needs counsel belies any suggestion that he deserves leniency due to any purported lack of sophistication in the matters at issue here. Thus, despite the Presiding Judge's initial concerns, it would appear that Mr. Havens is, and has been, fully-equipped to participate in the summary decision motion practice. Accordingly, there is no need for the Presiding Judge to forego "summary decision to ensure the fairest proceeding possible" for Mr. Havens.²²

¹⁹ It would be in the public interest for the Presiding Judge to develop the record further by requiring Mr. Havens to identify any other portions of his summary decision filings that were prepared by or are based on his counsels' work product. If in fact Mr. Havens included attorney work product in these public filings, he has waived any privileges attached thereto and cannot now hide behind those privileges in refusing to identify those portions of his pleadings which he himself did not prepare. *See, e.g., Genentech Inc. v. ITC*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) (recognizing that disclosure of attorney work product to third parties constitutes a waiver of privilege as to those items).

²⁰ Summary Decision Procedures, 34 FCC 2d at 488, ¶ 6.

²¹ *See, e.g., McNeil v. United States*, 508 U.S. 106, 113 (1993) (recognizing that where pleadings are prepared by those "who do not have access to counsel" they should be liberally construed).

²² *See Order*, FCC 13M-16 (ALJ, rel. Aug 14, 2013) at 8, ¶ 20 (citations omitted).

Conclusion

7. For the foregoing reasons, the Bureau respectfully requests that the Presiding Judge issue an Order that because Mr. Havens has access to counsel, and has had access to and relied on counsel throughout the summary decision process, there is no basis to forego summary decision in order to ensure a fair proceeding.

Respectfully submitted,

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January 27, 2014

EXHIBIT A

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,

Applicant with **ENCANA OIL AND GAS (USA), INC.;**) 0004354053, 0004309872,
DUQUESNE LIGHT COMPANY; DCP MIDSTREAM, LP;) 0004310060, 0004315903,
JACKSON COUNTY RURAL MEMBERSHIP ELECTRIC) 0004315013, 0004430505,
COOPERATIVE; PUGET SOUND ENERGY, INC.;) 0004417199, 0004419431,
ENBRIDGE ENERGY COMPANY, INC.; INTERSTATE) 0004422320, 0004422329,
POWER AND LIGHT COMPANY; WISCONSIN POWER) 0004507921, 0004153701,
AND LIGHT COMPANY; DIXIE ELECTRIC) 0004526264, 0004636537, and
MEMBERSHIP CORPORATION, INC.; ATLAS PIPELINE-) 0004604962
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").

///

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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23	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. 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 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 3. Construing the bankruptcy plan and order to authorize a consent order would effect an unlawful de facto transfer of control from Maritime to John Reardon and Choctaw
38	C. Because Maritime has already filed two motions for summary decision, a third motion represents improper use — arguably even abuse — of the summary decision procedures of under 47 C.F.R. § 1.251
40	D. Because Maritime has 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).
53	E. Automatic termination of Maritime's licenses leaves the Enforcement Bureau no room to negotiate away this legal consequence through any purported settlement
55	F. Summary decision under 47 C.F.R. § 1.251 is inappropriate 1. Having failed to discharge its burden of proof to establish compliance with 47 C.F.R. §§ 1.955(a), 80.49(a), and to prove the absence of a "genuine issue of material fact" on Issue G, id. § 1.251(a)(1), Maritime does not merit summary decision in its favor 2. Numerous Assertions in the Joint Motion have nothing to do with whether

summary decision is appropriate

3. Even if the Joint Motion were a proper motion for summary decision, which it is not, Maritime and the EB have failed to meet their burden under 47 C.F.R. § 1.251

a. The summary decision standard

b. As a general matter, Maritime and the EB are not entitled to summary decision as to the licenses Maritime purposes to turn back to the Commission for cancellation/deletion

c. As a general matter, Maritime and the EB are not entitled to summary decision because of Maritime's discovery violations related to the Mobex Documents

4. Whether the Block B Watercom Licenses automatically canceled due to Maritime's failure to timely construct the licenses pursuant to 47 C.F.R. § 80.49(a)(3).

a. WHG750 Block B frequency

b. The remaining Block B Watercom Stations

5. Whether the Mobex Licenses automatically canceled due to Maritime's failure to timely construct the licenses pursuant to 47 C.F.R. § 80.49(a)(3)

a. Call Signs KAE889 (locations 3, 4, 13, 20, 30, 24, and 48) and WRV374 (locations 14, 15, 16, 18, 25, 33, 35, and 40).

b. The remaining Mobex Licenses

6. Genuine issues of material fact exist as to whether the operations of Maritime's site-based facilities have been permanently discontinued pursuant to Section 1.955(a) of the Commission's rules

a. Operations of facilities at WHG750 and KAE889 (Locations 3, 4, 13, 20, 30, 34, 48).

b. Operations of facilities at call sign KAE889 (locations 4, 20, 30, 34, 48)

c. Operation of facilities at call sign WRV374 (locations 35 and 40).

d. Operations of facilities at call sign KAE889 (locations 3 and 13)

e. Operations of facilities at call sign WHG750

f. Operations of facilities at call sign WRV374 (locations 14, 15, 16, 18, 25, and 33).

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 - a. Other disputed facts regarding WRV374 (Locations 14, 15, 18, 25, 33, 35, and 40).
 - b. Other disputed facts as to WRV374 (location 14).
 - c. Addition disputed facts as to WRV374 (location 15)
 - d. Additional disputed facts as to WRV374 (location 16).
 - e. Additional disputed facts as to WRV374 (location 18).
 - f. Additional disputed facts as to WRV374 (location 25).
 - g. Additional disputed facts as to WRV37 (location 33).
 - h. Additional disputed facts as to WRV374 (location 35).
 - i. Additional disputed facts as to WRV374 (location 40)
 - j. Facts applicable to all MCLM stations, including the “16” stations (unless otherwise indicated by textz): [Categories [1] to [9] presented]

103 G. The Joint Motion should also be denied because of the third-party Opposition of Havens, a pro se party herein

105 H. Additional Reasons for Denying the EB-M Motion (Ex 10)

106 Conclusion

107 Declaration of Warren Havens

Appended Materials (most separately filed)

Maritime operated the site-based licenses at issue in variance with 47 C.F.R. §§ 1.955(a) and 80.49(a). See Joint Motion, at 5 ¶ 8, 7 ¶ 11. The lone legal authority marshaled by the Joint Motion in support of this assertion, *Paging Systems, Inc., and Maritime Communications/Land Mobile LLC*, 27 F.C.C.R. 8028 (2012) [hereinafter *PSI*], specifically noted that the precise “question of whether [Maritime’s] site-based AMTS stations were properly constructed is pending” in the hearing designation order FCC 11-64 and that any decision by the Wireless Bureau in that case would be “without prejudice to any determinations” in this proceeding. *Id.* at 8029 n.6. Nor did the Wireless Bureau in *PSI* undertake to reconcile its reasoning with its own contrary position in *Dennis C. Brown: Request by Maritime Communications/Land Mobile, LLC for Clarification of Sections 80.385 and 80.215 of the Commission’s Rules*, 24 F.C.C.R. 4135 (2009) [hereinafter *Dennis Brown*]. Inasmuch as Issue G hinges upon proper definition of “construction” and other terms central to the meaning of 47 C.F.R. §§ 1.955(a) and 80.49(a), this opposition will now offer guidance on those questions of law (including, in due course, proper reconciliation of the Wireless Bureau’s contradictory positions).

An incumbent Automated Maritime Telecommunications System should be deemed “constructed” if all the necessary equipment¹³ and each station in the system and system authorization are in place, and the system has been built in compliance with the terms of the then-current authorization.

After issuance, all authorizations issued by the Commission may remain valid, provided that licensees comply with the applicable rules in effect at the time that the licenses are issued.

¹³ AMTS is a species of commercial mobile radio service (CMRS), See 47 U.S.C. § 20.9(a)(3) (describing AMTS as a form of “public coast” service). Because CMRS is subject to the rules governing common carriers, CMRS requires interconnection. See *id.* § 20.5 (defining CMRS). Since a base station cannot support subscribers solely by one-way signals from the station to subscribers, CMRS service requires station equipment that allows subscribers (who are a *sine qua non* of “construction”) to communicate back to equipment at the base station. An AMTS station cannot support subscribers solely by one-way, base station-to-subscriber signals.

Failure to comply with those rules is cause for revocation, *see* 47 U.S.C. § 312(a)(4), and, under some circumstances, “automatic termination.”

Section 1.946 of the Commission’s Rules, 47 C.F.R. § 1.946, sets forth the Commission’s “[c]onstruction and coverage requirements”: “For each of the Wireless Radio Services, requirements for construction and commencement of service or commencement of operations are set forth in the rule part governing the specific service.” *Id.* § 1.946(a). The term “construction period” refers to “the period between the date of grant of an authorization and the date of required commencement of service or operations.” *Id.*

Licensees in certain wireless radio services must also satisfy “geographic coverage” or “substantial service” requirements: “In certain Wireless Radio Services, licensees must comply with geographic coverage requirements or substantial service requirements within a specified time period. These requirements are set forth in the rule part governing each specific service.” *Id.* § 1.946(b). “Geographic” coverage requirements refer to a wider area, with multiple sites. Section 1.946(b) of the Commission’s Rules defines the term “coverage period” as “the period between the date of grant of an authorization and the date that a particular degree of coverage or substantial service is required.” *Id.*

The failure to meet either the obligation to construct (to “commence[.]” required “service or operations”) or to cover (to satisfy a requirement of “a particular degree of coverage or substantial service”) leads to the automatic termination of a licensee’s authorization: “If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires.” *Id.* § 1.946(a).

Section 1.955 of the Commission's Rules confirms that authorizations held by licensees who fail to meet applicable construction or coverage requirements will be automatically terminated: "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. See § 1.946(c)." 47 C.F.R. § 1.955(a)(2).

Strict enforcement of the Commission's construction and coverage deadlines prevents licensees "who fail promptly to construct facilities" from "preclud[ing] other applicants who are willing, ready, and able to construct from access to limited and valuable spectrum." *Miami MDS Company and Boston MDS Company*, 7 F.C.C.R. 4347, 4348-49 (1992), *review denied sub nom. Miami MDS Co. v. FCC*, 14 F.3d 658 (D.C. Cir. 1994). Strict enforcement prevents licensees from "delaying, or even denying, service to the public." *Id.*

AMTS is a species of CMRS. See 47 C.F.R. § 20.9(b). For commercial mobile radio services, the "construction period" is defined as "[t]he period between the date of grant of an authorization and the date of required commencement of service." 47 C.F.R. § 22.99. This definition, which applies to AMTS as a species of CMRS, reinforces the interdependence between "construction" and the "commencement of service." Construction is what must take place between the "grant of an authorization" and the "commencement of service" required of the holder of that authorization. Practically and axiomatically, "commencement of service" requires physical "construction." In turn, "construction" serves strictly to provide "service" to customers.

In addition, section 1.955(c)(3) of the Commission's Rules appears to treat the words "service" and "operations" as interchangeable. That provision states: "Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued." Section (c)(3) proceeds to direct "[a] licensee who discontinues *operations* [to]

notify the Commission of the discontinuance of operations by submitting FCC Form 601 or 605 requesting license cancellation.” 47 C.F.R. § 1.955(c)(3) (emphases added).

The relevance of these legal interpretations becomes evident upon closer examination of the claims advanced by the Enforcement Bureau and Maritime. Much of the Joint Motion is devoted to a recitation of spectrum lease arrangements involving Maritime’s site-based licenses. *See* Joint Motion, at 12-19 ¶¶ 21-33. The mere leasing of spectrum, however, does not suffice to constitute continuance of service or of operations. AMTS, it must be remembered, is a species of commercial mobile radio service. *See* 47 C.F.R. § 20.9(b). The Commission defines CMRS as “[a] mobile service that is,” among other things, “[a]vailable to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public.” *Id.* § 20.3(a)(3). By contrast, private mobile radio service (PMRS) is a “mobile service that is neither a commercial mobile radio service nor [its] functional equivalent.” *Id.* § 20.3; *see also id.* § 20.15 (detailing regulatory obligations that bind CMRS operators, but not their PMRS counterparts).

Leasing to a single lessee, regardless of its size, does not constitute making AMTS service “[a]vailable to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public.” 47 C.F.R. § 20.3(a)(2). Although AMTS licensees may “offer service on a private mobile radio service basis,” *id.* § 20.9(b), they must first “file an application to modify its authorization[] seeking authority to dedicate a portion of the spectrum for private mobile radio service,” *id.* § 20.9(b)(1). That application “must include a certification that” the AMTS licensee “will offer ... AMTS service on a private mobile radio service basis.” *Id.* “The certification,” in turn “must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in § 20.3.” *Id.*

§ 20.9(b)(1). Throughout this process, the AMTS licensee “must overcome the presumption that ... AMTS Stations are commercial mobile radio services.” *Id.* § 20.9(b).

There is no evidence in the record of this proceeding that either Maritime or any of its spectrum lessees secured authorization under section 20.9(b) to conduct AMTS operations on a PMRS basis. Any application, much less its approval, should be known to the public, since “[a]ny application requesting to use any ... AMTS spectrum to offer service on a private mobile radio service basis will be placed on public notice by the Commission.” 47 C.F.R. § 20.9(b)(1). Absent fulfillment of the PRMS authorization process laid out in Rule 20.9(b), Maritime must be understood to have operated its licenses in opposition to the public interest and in violation of not only that section of the Commission’s Rules, but also of the Communications Act itself. Since violations of the Commission’s Rules are also violations of the statute that those rules “lawfully implement,” *Global Crossing*, 550 U.S. at 54, the Joint Motion’s basis for demonstrating Maritime’s compliance with 47 C.F.R. § 1.955(c)(3)’s “service” requirement is tantamount to a confession of Maritime’s double-barreled violation of 47 U.S.C. § 332(d)’s application of common carrier obligations to commercial mobile service providers and 47 U.S.C. § 301’s prohibition on unauthorized transmissions of radio energy. Assertions that Maritime has satisfied the “service” requirement of 47 C.F.R. § 1.955(c)(3) through leasing spectrum to individual lessees must therefore fail.

Construction and coverage requirements “are set forth in the rule part governing each specific service.” 47 C.F.R. § 1.955(b); *cf.* § 1.955(a) (providing that “[f]or each of the Wireless Radio Services,” construction requirements “are set forth in the rule part governing the specific service”). Part 80 of the Commission’s rules sets forth the construction and coverage requirements governing AMTS. Section 80.49 prescribes the rules governing AMTS licenses.

The relevant subsection begins by reciting the requirements expected of AMTS geographic licensees:

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.

47 C.F.R. § 80.49(a)(3). The rule then prescribes the rules governing site-based AMTS licenses:

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.

Id. § 80.49(a)(3). In sum, an AMTS geographic licensee “must make a showing of substantial service within its service area within ten years of the initial license grant.” A site-based AMTS licensee must place a new station or new frequencies “in operation within two years from the date of the grant.”¹⁴

The regulatory definition of AMTS as a system requires that *system coverage* be treated as part of the construction requirement. The acronym AMTS, as used in 47 C.F.R. § 80.49(a)(3) and in other sections of the Commission’s Rules, stands for a “system.” The provision of AMTS service under site-based system licenses requires not merely a single station, but rather a series of stations comprising an entire system. *See, e.g.*, 47 C.F.R. § 80.475(a) (2001) (referring to “each ... station in a system”); *In re Fred Daniel d/b/a Orion Telecom*, 11 F.C.C.R. 5764, 5764 n.1 (1996) (“The AMTS provides automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system ... for vessels to use along a waterway. AMTS offers improved services over those available from individual public coast stations.”)

¹⁴ The foregoing analysis belies and rebuts the Joint Motion’s disparagement of Havens’s interpretation of 47 C.F.R. § 80.49(a)(3) as a “misread[ing]” of the law (p. 6 ¶ 7).

(emphasis added)). Maritime's site-based licenses derive their authorization from the pre-2002 version of the Commission's rules, which demand continuity of service of all providers of AMTS service:

AMTS applicants proposing to serve inland waterways *must* show how the proposed system will provide *continuity of service* along more than 60% of each of one or more navigable inland waterways.... AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline *must* define a substantial navigational area and show how the proposed system will provide *continuity of service* for it.

47 C.F.R. § 80.475(a) (2001) (emphases added); *see also In re Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS)*, 6 F.C.C.R. 437, 440 (1991) (acknowledging that "continuity of service has always been a goal" of AMTS regulation and describing steps that the Commission would take to "ensure continuity of service" along the Atlantic, Pacific, and Gulf of Mexico coasts).

Although the Commission in 2002 removed the "continuity of service" requirement from section 80.475(a), *see Amendment of the Commission's Rules Concerning Maritime Communications*, 17 F.C.C.R. 6685, 6737 (2002) (amending 47 C.F.R. § 80.475(a)), the previous rule's "continuity of coverage" requirement had already served its purpose. By 2002, construction deadlines for all site-based licenses subject to this coverage requirement had passed.¹⁵ Inasmuch as the pre-2002 version of § 80.475(a) (which has been unquestionably applied to all licenses granted under its authority — namely, all site-based AMTS licenses) and ongoing Commission practice have continued to uphold the public interest in uninterrupted service along the waterway for which the multi-site system license was issued, continuity of

¹⁵ With respect to operations following construction and commencement of service, the Commission has consistently reasoned "that allowing incumbent licenses to continue operating under the terms of their current station licenses will further the public interest by avoiding interruption of the services they provide," *id.* at 6699; *accord In re Maritime Communications*, 18 F.C.C.R. 24,391, 24,400 & n.84 (2003).

service constitutes a required element of an incumbent AMTS licensee's obligation to "construct" its system according to the terms of its authorization.

The order of the full Commission in *RegioNet Wireless License, LLC*, 15 F.C.C.R. 16,119 (2000), validates the foregoing understanding of the obligation of site-based AMTS licensees to supply continuity of service. The *RegioNet* order recognized AMTS as "a specialized system of public coast stations providing integrated, interconnected marine voice and data communications," in contrast with "services ... available from individual VHF public coast stations," whose customers must "change frequencies and contact new coast stations" while in transit. *Id.* at 16,119-20 (emphasis added). This distinction proved crucial to the Commission's decision to forbear from applying 47 C.F.R. § 80.102's requirement that stations in maritime services to identify themselves by giving their call sign at the beginning and end of each communication and at 15-minute intervals when transmission exceeds 15 minutes. *RegioNet* acknowledged that "[s]tation identification serves the public interest by assisting enforcement agencies in the rapid identification of signal sources" for quick sorting of lawful from unlicensed or otherwise unlawfully operated stations. 15 F.C.C.R. at 16,121. The Commission nevertheless granted forbearance:

[T]he current frequency allocation and assignment already allows for the rapid identification of any unlicensed transmitters or AMTS operators that might violate Commission rules. The Commission has generally exempted CMRS licensees operating on an exclusive basis in Commission-defined service areas from station identification requirements. The Commission concluded that the requirement is unnecessary because such licensees can readily be identified by information in our licensing records and other publicly available sources. The Commission declined to exempt services licensed on a station-by-station basis, because such licensees cannot readily be identified by reference to known geographic boundaries. While AMTS licenses are not based on Commission-defined service areas, they also are not licensed on a traditional site-by-site basis. *Rather, each system must provide continuity of service to a specific navigable inland waterway or a substantial navigational area of coastline.*

Id. at 16,122 (footnotes omitted and emphasis added). In the footnote to the final sentence in this passage, *RegioNet* cited “47 C.F.R. § 475(a),” clearly intending to cite 47 C.F.R. § 80.475(a). The *RegioNet* order confirms that former section 80.475(a) of the Commission’s Rules imposed a *system-wide* continuity-of-service obligation on AMTS licensees. *RegioNet* also verified the ongoing, binding nature of that obligation, one that would follow licenses throughout their existence, and not one that would cease upon issuance of the license. Because Maritime acquired the site-based licenses at dispute in Issue G subject to section 80.475(a) as that rule stood before 2002, those licenses continue to be subject to the continuity-of-service obligations that Maritime undertook upon licensure.

Subsequent adjudication within this agency confirms *RegioNet*’s interpretation of site-based AMTS licenses’ continuity-of-service obligations. In a 2009 declaratory ruling issued under 47 C.F.R. § 1.2 to Maritime, the Wireless Bureau expressly recognized the applicability of the “continuity of service” requirement imposed by the pre-2002 version of § 80.475(a):

It is our understanding that MC/LM is concerned that, unless Section 80.385(b) is interpreted as requested, there exists the potential for a geographic AMTS licensee to interpose a station between two of the incumbent’s stations. The Commission has concluded, however, that such a scenario will not occur if the incumbent licensee *constructed its system* in compliance with the *then-existing requirement to maintain continuity of service*, see 47 C.F.R. § 80.475(a) (1999). See Amendment of the Commission’s Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391, 22401 ¶¶ 23-24 (2003).

Dennis C. Brown, Esq.: Request by Maritime Communications/Land Mobile, LLC for Clarification of Sections 80.385 and 80.215 of the Commission’s Rules, 24 F.C.C.R. 4135, 4136 n.7 (2009) (emphases added). In *Paging Systems, Inc.*, 27 F.C.C.R. 8028 (2012), a decision cited by the Joint Motion at 6-7 ¶ 10, the Wireless Bureau contradicted *Dennis Brown* without citing, let alone analyzing, its previous declaratory ruling. *PSI* brushed aside the continuity of service requirement imposed by the pre-2002 version of section 80.475(a) of the Commission’s Rules,

see 27 F.C.C.R. at 8030, despite the Wireless Bureau's valid recognition that the full Commission had intended no substantive change in "the basic construction and coverage requirements set forth in the Commission's rules" when it adopted 47 C.F.R. 1.946(c) through its 1998 Universal Licensing System proceeding. *Amendment of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 13 F.C.C.R. 21,027, 21,075 (1998); accord *PSI*, 27 F.C.C.R. at 8029-30.

Contrary to the Joint Motion's suggestion that no further definition of construction is necessary and that *PSI*, in any event, represents an authoritative reading of law that binds the presiding officer and the full Commission in this proceeding, see Joint Motion, at 5-7 ¶¶ 8-11, the definition of terms such as "construction," "coverage," and "continuity of service" is pivotal to the resolution of Issue G. At best, the Wireless Bureau adopted conflicting interpretations of former 47 C.F.R. § 80.475 in *Dennis Brown* and *PSI*. Havens feels that greater wisdom counsels the presiding officer to engage in *de novo* interpretation of sections 1.946, 1.955, and 80.49 of the Commission's Rules and of the legally significant words in those provisions, on which this entire proceeding hinges.

To be sure, prior legal pronouncements by the Wireless Bureau, "while not controlling upon the [presiding officer] by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). "The weight" of the Wireless Bureau's "judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control." *Id.* (emphasis added). Where, as in *PSI*, the Bureau's legal interpretation was "apparently restricted by [a mistaken] notion," neither the

presiding officer nor the full Commission should hesitate to declare the Bureau's "understanding of the law ... to be erroneous." *Id.*

It therefore behooves the presiding officer, and ultimately the full Commission, to eschew the Joint Motion's blind deference to a single erroneous and internally contradicted decision of the Wireless Bureau and instead to adopt a more comprehensive view of the law. The broader context of others rules and orders issued by the Commission, especially as buttressed by a deeper understanding of the regulatory purposes underlying those rules and orders, confirms Havens's view that the Wireless Bureau in *Dennis Brown* correctly read former 47 C.F.R. § 80.475(a) as imposing an ongoing continuity of service obligation on site-based AMTS licenses originally issued under the authority of that Rule. Consider, for instance, section 80.60 of the Commission's Rules. That provision sheds further light on the meaning of "construct," "construction," and other derivatives of those words. Under section 80.60(d)(3), the "original construction deadline[s] ... as set forth in § 80.49" apply to "[p]arties seeking to acquire a partitioned license or disaggregated spectrum from a site-based AMTS ... licensee." 47 C.F.R. § 80.60(d)(3). Such parties "will be required to construct *and commence 'service to subscribers'* in all facilities acquired through such transactions within the original construction deadline for each facility as set forth in § 80.49." *Id.* § 80.60(d)(3). Again, licensees who fail to meet this deadline face the automatic termination of their authorizations: "Failure to meet the individual construction deadline will result in the automatic termination of the facility's authorization." *Id.*

Section 80.60's specific requirement of "service to subscribers" indicates why and how construction and coverage requirements ensure the actual provision of service to the public and prevent the hoarding of FCC-licensed spectrum. "Service to subscribers" is defined under the Commission's CMRS rules as "[s]ervice to at least one subscriber that is not affiliated with, controlled by or related to the providing carrier." 47 C.F.R. § 22.99. In adopting rules designed

to harmonize its treatment of commercial and private mobile radio services, the Commission reasoned that the requirement of provision of service to at least one subscriber — a requirement that the Commission characterized as “hardly burdensome” — would provide “an added safeguard against” evasive behavior by a licensee who “could chose to construct minimal facilities in order to warehouse spectrum rather than provide actual service.” *In re Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 7988, 8075 (1994). Critically, the Commission observed:

“[S]ervice to subscribers” is defined to mean provision of service to at least one party unaffiliated with, controlled by, or related to the providing carrier. This requirement serves the interests of regulatory symmetry by imposing a uniform definition of service commencement on all CMRS services.... The requirement of securing one customer is hardly burdensome.... [I]t remains possible that a licensee could choose to construct minimal facilities in order to warehouse spectrum rather than provide actual service. Thus, the service commencement requirement serves as an added safeguard against such behavior.

Id. at 8075 (emphases added).

The foregoing interpretation of AMTS site-based licenses’ construction requirements and their regulatory purposes is reflected in various FCC decisions. The decision by the Chief of the Wireless Bureau in 2002 in *In re Paging Systems, Inc.*, 15 F.C.C.R. 23,983 (2000), is particularly instructive:

AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels. Pursuant to Section 80.49(a)(2) of the Commission's Rules AMTS stations must be [constructed and] placed in operation within eight months of the license grant.... We note that under Section 1.955(a)(2) of the Commission’s Rules, authorizations automatically terminate, without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements.... We may waive Section 1.955(a)(2) of the Commission’s Rules in order to consider PSI's request for an extension of the construction deadline if a) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and grant of a waiver would be in the public interest; or b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. We conclude that PSI has not demonstrated that a waiver is warranted under

either standard. First, we believe that the *underlying purpose of the rule, i.e., to ensure that service is provided to the public within a reasonable time following grant of the license*, is furthered by applying the rule to this case.

Id. at 23,983-84 (emphases added; footnotes retained).

Additional support for the foregoing interpretation of “constructed” and “construction” can be found in the online glossary for the FCC’s Universal Licensing System (ULS). The Universal Licensing System’s online glossary defines “Construction Requirements” as “[r]ules requiring wireless licensees to construct facilities and commence service within a specified time after the license grant date (the construction period).” <http://wireless.fcc.gov/uls/index.htm?job=glossary>. The ULS glossary further explains: “If the licensee fails to construct and commence service within the construction period, and does not receive an extension of time, the license automatically terminates. ‘Commencement of service’ refers to commencing actual operation of the facility.” *Id.*

E. Automatic termination of Maritime’s licenses leaves the Enforcement Bureau no room to negotiate away this legal consequence through any purported settlement

The Enforcement Bureau’s effort to settle Issue G, whether by the theoretically available but legally barred channel of 47 C.F.R. §§ 1.93-.94’s consent order procedures or by the wholly improper channel of a motion for summary decision under 47 C.F.R. § 1.251, fails to clear a legal hurdle specific to the Bureau as an arm of a federal administrative agency. Section 1.946(c) of the Commission’s Rules, styled “Termination of authorizations,” provides:

If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically (in whole or in part as set forth in the service rules), *without specific Commission action*, on the date the construction or coverage period expires.

47 C.F.R. § 1.946(c) (emphasis added). Similarly, all three subparagraphs of 47 C.F.R. § 1.955(a) provide that “[a]uthorizations automatically terminate, without specific Commission

Declaration of Warren Havens

in Support of

Havens Opposition to the Joint Motion of
Enforcement Bureau and Maritime for Summary Decision on Issue G (the "Joint Motion")

(said Opposition, the "Response")

I, Warren C. Havens, declare and certify under penalty of perjury that the facts within this Response are true and correct, including within the section of the Response text called "F. Summary decision under 47 C.R.R §1.251 is inappropriate," and also that the facts I assert within the other parts of this Response are true and correct (together, the "Facts"). *See* 28 U.S.C. § 1746. Pursuant to 47 C.F.R. §§ 1.251(c) and 1.351 and other applicable law, said declaration and certification of the Facts is made on personal knowledge and sets forth such facts as would be admissible in evidence, and that I am competent to testify to said Facts and matters of said Facts. In this Declaration, "Facts" further means both factual assertions and denials. This Declaration is for the purpose of my Response (defined above) in opposition to both the Joint Motion (defined above) as a settlement proposal (its "joint stipulation" and related language) and as a motion seeking summary decision under §1.251.

Executed at Berkeley, California, on December 16, 2013.

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

Warren Havens

CERTIFICATE OF SERVICE

The undersigned certifies that he has on this 16th day of December, 2013 caused to be served by first class United States mail copies of the foregoing Opposition (“Response”) to:

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

Warren Havens

EXHIBIT B

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

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

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

**AUTHORITIES IN SUPPORT OF THE HAVENS/SKYTEL DEFINITION OF
“CONSTRUCTED” AND “CONSTRUCTION”**

In Order No. 12M-53, the Honorable Richard L. Sippel, Chief Administrative Law Judge, directed me as “new counsel for Mr. [Warren] Havens and SkyTel companies ... to submit authorities relied on by Mr. Havens for his proposed definition of [the] term ‘constructed.’” I respectfully offer the following recitation and analysis of legal authorities in support of Mr. Havens's and SkyTel companies' definition of the term “constructed” and its variants, especially “construction.”

- I -

With respect to the core definition of “constructed” and related basic law, Mr. Havens and SkyTel companies propose to define the term “constructed” according to the following core description:

An incumbent Automated Maritime Telecommunications System is deemed to be “constructed” if all the necessary equipment¹ and each station in the system and system authorization are in place, and the system has been built in compliance with the terms of the then-current authorization.

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The following authorities and analysis support and explain this core definition.

Initially, all FCC authorizations (licenses) are issued and may remain valid based upon the applicable rules in effect at the time of their issuance. Failure to comply with those rules and with terms based on those rules is cause for revocation, *see* 47 U.S.C. § 312(a)(4), and, under some circumstances, “automatic termination.” As I shall clarify

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¹ Although it is beyond the scope of this summary memorandum to provide details of required station equipment, I note that AMTS is common carrier CMRS. *See* 47 U.S.C. §20.9(a)(3) (describing AMTS as a form of “public coast” service). CMRS requires Interconnection. *See* § 20.5 (defining CMRS). Moreover, since a base station cannot support subscribers solely by one-way signals from the station to subscribers, CMRS service requires station equipment that allows subscribers (who, as I argue below, are a *sine qua non* of “construction”) to communicate back to the base station.

Footnote 13

further, this core definition incorporates the relevant rules, including those defining “constructed” and “construction.”

Section 1.946 of the FCC’s rules, 47 C.F.R. § 1.946, sets forth the Commission’s “[c]onstruction and coverage requirements”: “For each of the Wireless Radio Services, requirements for construction and commencement of service or commencement of operations are set forth in the rule part governing the specific service.” § 1.946(a). The term “construction period” refers to “the period between the date of grant of an authorization and the date of required commencement of service or operations.” *Id.*

Licenses in certain wireless radio services must also satisfy “geographic coverage” or “substantial service” requirements: “In certain Wireless Radio Services, licensees must comply with geographic coverage requirements or substantial service requirements within a specified time period. These requirements are set forth in the rule part governing each specific service.” § 1.946(b).³ The term “coverage period” refers to “the period between the date of grant of an authorization and the date that a particular degree of coverage or substantial service is required.” *Id.*

The failure to meet either the obligation to construct (to “commence[]” required “service or operations”) or to cover (to satisfy a requirement of “a particular degree of coverage or substantial service”) leads to the automatic termination of a licensee’s authorization: “If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires.” §

³ “Geographic” coverage requirements refer to a wider area, with multiple sites.

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1.946(a). Section 1.955 of the Commission's rules confirm that authorizations held by licensees who fail to meet applicable construction or coverage requirements will be automatically terminated: "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. See § 1.946(c)." 47 C.F.R. § 1.955(a)(2).

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Strict enforcement of the Commission's construction and coverage deadlines prevents licensees "who fail promptly to construct facilities" from "preclud[ing] other applicants who are willing, ready, and able to construct from access to limited and valuable spectrum." *Miami MDS Company and Boston MDS Company*, 7 F.C.C.R. 4347, 4348-49 (1992), *review denied sub nom. Miami MDS Co. v. FCC*, 14 F.3d 658 (D.C. Cir. 1994). Strict enforcement prevents licensees from "delaying, or even denying, service to the public." *Id.*

AMTS is a species of CMRS. For commercial mobile radio services, the "construction period" is defined as "[t]he period between the date of grant of an authorization and the date of required commencement of service." 47 C.F.R. § 22.99. This definition, which applies to AMTS as a species of CMRS, reinforces the interdependence between "construction" and the "commencement of service." Construction is what must take place between the "grant of an authorization" and the "commencement of service" required of the holder of that authorization.

Practically and axiomatically, "commencement of service" requires physical "construction." In turn, "construction" serves strictly to provide "service" to customers.

Construction and coverage requirements “are set forth in the rule part governing each specific service.” 47 C.F.R. § 1.955(b); cf. § 1.955(a) (providing that “[f]or each of the Wireless Radio Services,” construction requirements “are set forth in the rule part governing the specific service”). Part 80 of the Commission's rules sets forth the construction and coverage requirements governing AMTS. Section 80.49 prescribes the rules governing AMTS licenses. The relevant subsection begins by reciting the requirements expected of AMTS geographic licensees:

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.

§ 80.49(a)(3). The rule then prescribes the rules governing site-based AMTS licenses:

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.

§ 80.49(a)(3). In sum, an AMTS geographic licensee “must make a showing of substantial service within its service area within ten years of the initial license grant.” A site-based AMTS licensee must place a new station or new frequencies “in operation within two years from the date of the grant.”

- II -

I turn now to the regulatory treatment of AMTS as a system, and *system coverage* as part of the required construction:

The acronym AMTS (including as used in §80.49(a)(3)) stands for a “system.” The provision of AMTS service under site-based system licenses requires not merely a

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46-47

single station, but rather a series of stations comprising an entire system. *See, e.g.*, 47 C.F.R. § 80.475(a) (2001) (referring to “each ... station in a system”); *In re Fred Daniel d/b/a Orion Telecom*, 11 F.C.C.R. 5764, 5764 n.1 (1996) (“The AMTS provides automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system ... for vessels to use along a waterway. *AMTS offers improved services over those available from individual public coast stations.*” (emphasis added)). The site-based licenses at issue in this proceeding derive their authorization from the pre-2002 version of the FCC’s rules, which demand continuity of service of all providers of AMTS service:

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AMTS applicants proposing to serve inland waterways *must* show how the proposed system will provide *continuity of service* along more than 60% of each of one or more navigable inland waterways. ... AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline *must* define a substantial navigational area and show how the proposed system will provide *continuity of service* for it.

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47 C.F.R. § 80.475(a) (2001) (emphases added); *see also In re Amendment of Parts 2 and 80 of the Commission’s Rules Applicable to Automated Maritime Telecommunications Systems (AMTS)*, 6 F.C.C.R. 437, 440 (1991) (acknowledging that “continuity of service has always been a goal” of AMTS regulation and describing steps that the Commission would take to “ensure continuity of service” along the Atlantic, Pacific, and Gulf of Mexico coasts). Although the Commission in 2002 removed the “continuity of service” requirement from § 80.475(a), *see Amendment of the Commission’s Rules Concerning Maritime Communications*, 17 F.C.C.R. 6685, 6737 (2002) (amending 47 C.F.R. § 80.475(a)), the previous rule’s “continuity of coverage” requirement had already served its purpose. By 2002, construction deadlines for all site-based licenses subject to this

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coverage requirement had passed.⁴ Inasmuch as the pre-2002 version of § 80.475(a) (whose applicability to licenses granted under its authority — namely, all site-based AMTS licenses — has never been questioned) and ongoing Commission practice has continued to uphold the public interest in uninterrupted service along the waterway for which the multi-site system license was issued, continuity of service constitutes a required element of an incumbent AMTS licensee’s obligation to “construct” its system according to the terms of its authorization.

In a 2009 declaratory ruling issued under 47 C.F.R. § 1.2 to Maritime, the Wireless Bureau has expressly recognized the applicability of the “continuity of service” requirement imposed by the pre-2002 version of § 80.475(a):

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It is our understanding that MC/LM is concerned that, unless Section 80.385(b) is interpreted as requested, there exists the potential for a geographic AMTS licensee to interpose a station between two of the incumbent’s stations. The Commission has concluded, however, that such a scenario will not occur if the incumbent licensee *constructed its system* in compliance with the *then-existing requirement to maintain continuity of service*, see 47 C.F.R. § 80.475(a) (1999). See Amendment of the Commission’s Rules Concerning Maritime Communications, Third Memorandum Opinion and Order, PR Docket No. 92-257, 18 FCC Rcd 24391, 22401 ¶¶ 23-24 (2003).

Request by Maritime Communications/Land Mobile, LLC for Clarification of Sections 80.385 and 80.215 of the Commission’s Rules, DA 09-793 (April 8, 2009) (emphases added).

- III -

⁴ As to operations following construction and commencement of service, the FCC has consistently reasoned “that allowing incumbent licenses to continue operating under the terms of their current station licenses will further the public interest by avoiding interruption of the services they provide,” *id.* at 6699; *accord In re Maritime Communications*, 18 F.C.C.R. 24,391, 24,400 & n.84 (2003).

I shall now discuss *service to customers* as part of the construction requirement:

Section 80.60 of the Commission's rules shed further light on the meaning of "construct," "construction," and other derivatives of those words. Under § 80.60(d)(3), the "original construction deadline[s] ... as set forth in § 80.49" apply to "[p]arties seeking to acquire a partitioned license or disaggregated spectrum from a site-based AMTS ... licensee." 47 C.F.R. § 80.60(d)(3). Such parties "will be required to construct and commence 'service to subscribers' in all facilities acquired through such transactions within the original construction deadline for each facility as set forth in § 80.49." § 80.60(d)(3). Again, licensees who fail to meet this deadline face the automatic termination of their authorizations: "Failure to meet the individual construction deadline will result in the automatic termination of the facility's authorization." *Id.*⁵

Section 80.60's specific requirement of "service to subscribers" indicates why and how construction and coverage requirements ensure the actual provision of service to the public and prevent the hoarding of FCC-licensed spectrum. "Service to subscribers" is defined under the Commission's CMRS rules as "[s]ervice to at least one subscriber that is not affiliated with, controlled by or related to the providing carrier." 47 C.F.R. § 22.99. In adopting rules designed to harmonize its treatment of commercial and private mobile radio services, the FCC reasoned that the requirement of provision of service to at least one subscriber — a requirement that the Commission characterized as "hardly burdensome" — would provide "an added safeguard against" evasive behavior by a licensee who "could chose to construct minimal facilities in order to warehouse spectrum

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rather than provide actual service.” *In re Regulatory Treatment of Mobile Services*, 9
Page 52 F.C.C.R. 7988, 8075 (1994).⁶

- IV -

This memorandum’s summary of AMTS site-based licenses’ construction requirements and their regulatory purposes is reflected in various FCC decisions. The
Page 52 decision by the Chief of the Wireless Bureau in 2002 in *In re Paging Systems, Inc.*, 15 F.C.C.R. 23,983 (2000), is particularly instructive:

AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels. [note 2] Pursuant to Section 80.49(a)(2) of the Commission’s Rules AMTS stations must be [constructed and] placed in operation within eight months of the license grant. [note 3] ... We note that under Section 1.955(a)(2) of the Commission’s Rules, authorizations automatically terminate, without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements. [note 9] ... We may waive Section 1.955(a)(2) of the Commission’s Rules in order to consider PSI’s request for an extension of the construction deadline if a) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and grant of a waiver would be in the public interest; or b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. [note 10] We conclude that PSI has not demonstrated that a waiver is warranted under either standard. First, we

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⁶ The relevant passage from this decision is illuminating and worth quoting at greater length:

“[S]ervice to subscribers” is defined to mean provision of service to at least one party unaffiliated with, controlled by, or related to the providing carrier. This requirement serves the interests of regulatory symmetry by imposing a uniform definition of service commencement on all CMRS services.... The requirement of securing one customer is hardly burdensome.... [I]t remains possible that a licensee could choose to construct minimal facilities in order to warehouse spectrum rather than provide actual service. Thus, the service commencement requirement serves as an added safeguard against such behavior.

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Id. at 8075 (emphases added).

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believe that the *underlying purpose of the rule, i.e., to ensure that service is provided to the public within a reasonable time following grant of the license*, [note 11] is furthered by applying the rule to this case.

[note 2] See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), First Report and Order, GEN Docket No. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991).

[note 3] 47 C.F.R. § 80.49(a)(2). In Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, FCC 00-370, ¶17 (rel. Nov. 16, 2000), the Commission extended the *construction requirement* for new [site-based] AMTS stations from eight months to two years. The new rule will not become effective until 30 days after publication in the Federal Register. *Id.* at ¶ 87.

[note 9] 47 C.F.R. § 1.955(a)(2).

[note 10] 47 C.F.R. § 1.925(b)(3).

[note 11] See Miami MDS Company and Boston MDS Company for Extension of Time to Construct a Channel 2 Multipoint Distribution Service Station (WLK 230) at Miami, Florida, and Station (WGW339) at Boston, Massachusetts, Memorandum Opinion and Order, 7 FCC Rcd 4347, 4348-49 ¶ 12 (1992) (*strict enforcement of construction deadline to ensure that service is not delayed or denied to the public*).

Id. at 23,983-84 (emphases added; footnotes retained).

Further support for Mr. Havens's and SkyTel's proposed definition of "constructed" and "construction" can be found in the online glossary for the FCC's Universal Licensing System (ULS). The Universal Licensing System's online glossary defines "Construction Requirements" as "[r]ules requiring wireless licensees to construct facilities and commence service within a specified time after the license grant date (the construction period)." <http://wireless.fcc.gov/uls/index.htm?job=glossary>. The ULS glossary further explains: "If the licensee fails to construct and commence service within the construction period, and does not receive an extension of time, the license

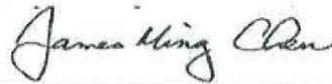
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automatically terminates. 'Commencement of service' refers to commencing actual operation of the facility." *Id.*

For further expressions of the views of Mr. Havens and SkyTel companies on "constructed," "construction," and other related terms at issue in this proceeding, see *Objections to Maritime's First Draft Glossary* (filed by Robert H. Jackson, Esq., Oct. 2, 2012), *Substantive Objections to Maritime's First Draft Glossary* (filed by Robert H. Jackson, Esq., on Oct. 2, 2012), and the exhibits attached to those memoranda.

Respectfully submitted,



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Dated: December 5, 2012

CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 5, 2012, I caused a true copy of the foregoing filing in FCC docket 11-71 to be served by USPS first class mail (with complimentary email copies, using emails of record) to:

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Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 27th day of January, 2014, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S COMMENTS ON THE JANUARY 17, 2014 PREHEARING CONFERENCE " to:

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