

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

FCC 14M-7
09915

In the Matter of	)	EB Docket No. 11-71
)	
MARITIME COMMUNICATIONS/LAND	)	File No. EB-09-IH-1751
MOBILE, LLC	)	FRN: 0013587779
)	
Participant in Auction No. 61 and Licensee of)	
Various Authorizations in the Wireless Radio)	
Services)	
	)	Application File Nos.
Applicant for Modification of Various	)	0004030479, 0004144435,
Authorizations in the Wireless Radio Services	)	0004193028, 0004193328,
	)	0004354053, 0004309872,
Applicant with ENCANA OIL AND GAS (USA),	)	0004310060, 0004314903,
INC.; DUQUESNE LIGHT COMPANY, DCP	)	0004315013, 0004430505,
MIDSTREAM, LP; JACKSON COUNTY	)	0004417199, 0004419431,
RURAL MEMBERSHIP ELECTRIC	)	0004422320, 0004422329,
COOPERATIVE; PUGET SOUND ENERGY,	)	0004507921, 0004153701,
INC.; ENBRIDGE ENERGY COMPANY,	)	0004526264, and 0004604962
INC.; INTERSTATE POWER AND LIGHT)	
COMPANY; WISCONSIN POWER AND)	
LIGHT COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE-MID CONTINENT, LLC;)	
AND SOUTHERN; CALIFORNIA REGIONAL)	
RAIL AUTHORITY)	
)	
For Commission Consent to the Assignment of)	
Various Authorizations in the Wireless Radio)	
Service)	

ORDER

Issued: February 26, 2014

Released: February 26, 2014

Preliminary Statement

On December 19, 2013, the Presiding Judge issued *Memorandum Opinion and Order*, FCC 13M-22 (“*MO&O*”), in response to several motions made by Warren Havens and out of concern about the nature of unspecified legal assistance provided to Mr. Havens by unidentified

counsel, a circumstance first disclosed in a footnote to those motions.¹ In rulings, the Presiding Judge struck Mr. Havens' December 2, 2013, pleadings due to untimely filing and denied his motions based on additional substantive grounds. The Presiding Judge also ordered Warren Havens' "assisting" counsel to file a Notice of Appearance on or before January 6, 2014.²

On December 27, 2013, Mr. Havens filed a "Request [to appeal] under Section 1.301(b)" ("Request"). Three days later, Mr. Havens filed an additional "Request [to appeal] under Section 1.301(b) of 12-30-13" ("Request of 12-30"). He filed a third pleading titled Request to Accept and Supplement to Request under Section 1.301(b) on January 7, 2014 ("Request of 1-7;" "Request," "Request of 12-30," and "Request of 1-7," together termed "Requests to Appeal"). For reasons set forth below, Mr. Havens' Requests to Appeal are denied.

A.

Timing of Requests to Appeal

Section 1.301(b) of the Commission's rules requires that parties request an appeal of an interlocutory order within five days of that order's release.³ The *MO&O* was issued and released on Thursday, December 19, 2013. So, allowing for the Christmas holiday, all requests to appeal were due on Friday, December 27, 2013.⁴ In a prior order, the Presiding Judge had directed that "[a]ll filings in this proceeding shall be due on their designated submission dates at close of business (5:30 pm EST) unless otherwise indicated."⁵ The Presiding Judge also ruled in a prior order that Mr. Havens would be strictly held to filing deadlines due to his exploitations of the Presiding Judge's prior discretionary disposition to consider his late submissions.⁶ In this instance, Mr. Havens filed his Request at 5:33 PM on December 27. He then filed his Request of 12-30 three calendar days after the December 27 deadline and filed an additional supplement eight calendar days after that.⁷ These untimely and unauthorized filings were made over twelve calendar days. Accordingly, Mr. Havens' Requests to Appeal must be denied.

Perhaps in anticipation of this ruling, Mr. Havens argues that the release date of the *MO&O* is actually December 20, rather than December 19, because the 20th is when the document was posted on the Commission's Electronic Comment Filing System ("ECFS").⁸ It is well established that in the case of non-rulemaking documents, the date on which public notice

¹ Havens-SkyTel First Motion Under Order 13M-19 To Reject Settlement, Proceed with the Hearing. [sic] and Provide Additional Relevant Discovery; Havens-SkyTel Additional Motions Under Order 13M-19.

² The *MO&O*, as issued, incorrectly states that the Notice of Appearance was due on or before January 6, 2013.

³ 47 C.F.R. § 1.301(b).

⁴ See 47 C.F.R. § 1.4(g) (computation of time from "release date").

⁵ *Order*, FCC 12M-55 at 2 n.2.

⁶ *MO&O* at 3 ¶ 5.

⁷ Mr. Havens is to be lauded for seeking authorization to file his Request of 1-7. However, that filing cannot be accepted. The explanation Mr. Haven gives as to why the filing should be accepted is that it presents authority that supports his arguments. Request of 1-7 at 1. Mr. Havens provides no reason why this authority could not have been included in Mr. Havens' initial Request. To allow a supplemental filing solely because it bolsters a party's arguments, with no explanation as to why the substance of the filing could not be submitted earlier, would render the Presiding Judge's deadlines meaningless.

⁸ Request of 12-30 at n.*.

of the action is given is the release date.⁹ Therefore, Mr. Havens is incorrect because the date on which a document is available on ECFS, noted in ECFS as the posting date, does not control the release date. The Presiding Judge released the *MO&O* to the parties in this proceeding by e-mail on the stated “Released” date of December 19. Counting from the next day after release (i.e. Friday, the 20th), Mr. Havens had five days, excluding Christmas day, to file his request. He failed to do so and filed late on December 27, after the 5:30 pm deadline. Thus, Mr. Havens’ late submissions need not be considered.

However, in the interests of completeness of the record and fairness for Mr. Havens, the merits of Mr. Havens’ Requests to Appeal are considered and ruled upon below.

B.

Havens’ Requests to Appeal under Section 1.301(b)

Section 1.301(b) of the Commission’s Rules provides that:

*appeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer. Any party desiring to file an appeal shall first file a request for permission to file appeal. . . The request shall contain a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The presiding officer shall determine whether the showing is such as to justify an interlocutory appeal and . . . his ruling is final . . .*¹⁰

Mr. Havens seeks permission to appeal to the Commission three issues arising from the Presiding Judge’s *MO&O*, which is denied for each.

Havens’ Assisting Counsel

The first appeal request challenges the Presiding Judge’s order requiring that Mr. Havens’ unidentified “assisting counsel” file Notices of Appearance. Section 1.243(f) of the Commission’s rules grants the Presiding Judge the authority to manage its litigation, and to that end, take steps to regulate the course of the proceeding.¹¹ An essential aim of such regulation is to ensure that the Presiding Judge and the parties have knowledge as to the identities of the participants in a Commission proceeding, the capacities in which they participate, and the purposes and scope of their participation. If such information is not obtained through disclosure, a proceeding may face substantial delays. Parties may serve pleadings on the wrong individuals; critical participants may be inadvertently omitted from prehearing conferences; arguments may arise at any time as to the scope of parties’ representation that may later be disclosed or discovered; conflicts may be overlooked; and settlement opportunities may be missed.

⁹ 47 C.F.R. § 1.4(b)(2).

¹⁰ 47 C.F.R. § 1.301(b) (emphasis added).

¹¹ 47 C.F.R. § 1.243(f).

Here, on December 19, 2013, the date of the *MO&O*'s release, the Presiding Judge had just learned that Mr. Havens, a *pro se* litigant, was in some way being assisted by unidentified counsel, which is a highly unusual occurrence in Commission litigation. Obviously, the Presiding Judge had no idea as to the identity of such counsel, or the scope of counsel's participation. Also obviously, the scope and nature of representations are significant to evaluating the truth of Mr. Havens' *pro se* assertions. Earlier in this proceeding, the alternating representations of the SkyTel entities, sometimes *pro se* by Mr. Havens and other times by identified counsel, led to confusion and delay. So this time, the Presiding Judge deemed it necessary to immediately resolve questions in order to avoid additional confusion and delay.¹² The Presiding Judge justifiably exercised his authority under Section 1.243(f) in requiring Mr. Havens' counsel to self-identify so that the nature and scope of their roles in this proceeding could be understood.¹³ This uncontroversial exercise of judicial power falls clearly within the authority delegated to any presiding judge and fails to raise any new or novel question of law or policy. After twenty five plus years on the bench, the Presiding Judge is still unaware of any case in which a trial judge, by merely requiring counsel to self-identify, was questioned, reversed, or remanded.

But Mr. Havens believes that there is "no basis in law or equity" for the order because occasions of "alleged past 'confusion' created by Havens's [sic] and SkyTel entities' participation in cases on a *pro se* basis" was resolved.¹⁴ To "use a settled matter as the basis to impose a sanction," he argues, "is a new and novel expansion of authority" that warrants immediate appeal.¹⁵ Not so. Mr. Havens is incorrect in arguing that the basis for the order was confusion that was already resolved. Rather, the basis for the order was the recent revelation that unknown counsel were assisting Mr. Havens while he was simultaneously representing in Commission pleadings that he was participating *pro se*. Those representations of *pro se* participation were not wholly accurate. The record of a proceeding requires the names of counsel and clarification of counsel's role so as to inform the Presiding Judge and the parties and to avoid any confusion or delay. Section 1.243(f) of the Commission's rules empowers the Presiding Judge to mitigate confusion in representation.¹⁶ Mr. Havens laments that the other parties to this proceeding were not also required to file Notices of Appearance.¹⁷ But that is because their identity was disclosed from the start by their earlier Notices of Appearance and by signing their names to pleadings. The roles of counsel for the other parties were made clear. To require "ghost" attorneys to come out from hiding and file appearances at a minimum corrects confusion and serves the Commission's goal of transparency.

¹² *MO&O* at 3 ¶ 6. Unfortunately, the role that Mr. Havens' now known counsel play in his participation appears significant but remains clouded, in light of Mr. Havens baselessly asserting attorney-client privilege and directing counsel to refuse to answer even bland foundational questions that do not ask for any disclosures of confidences. See *Order*, FCC 13M-3; cf. also Prehearing Conference of January 17, 2014 at Tr. 993-94 and *passim*.

¹³ *MO&O* at 3 ¶ 6.

¹⁴ Request at 2 (*italics added*).

¹⁵ *Id.*

¹⁶ In addition, in his Opposition to Joint Motion of Enforcement Bureau & Maritime for Summary Decision of Issue G (Opposition), Mr. Havens' seeks benefits normally afforded to "true blue" *pro se* litigants. Opposition at 104-05. Mr. Havens' disclosures raise a factual issue regarding the appropriateness of granting him those benefits, as had been done in the past. Requiring counsel to identify so that significant fact issue can be examined falls squarely within the Presiding Judge's authority to rule upon questions of evidence. See 47 C.F.R. § 1.243(d).

¹⁷ Request at 3 n.6.

Further, Mr. Havens' characterization of the Presiding Judge's order as a "sanction" is uninformed, implausible, and wrong. The order merely required his counsel to provide non-privileged, factual information that would inform the Presiding Judge of the identities and scope of all participants in this case. This is hardly a sanction. Mr. Havens even asserts that the requirement that counsel identify themselves "imposes time and cost on the *pro se* party."¹⁸ These questioned rulings place absolutely no burden on Mr. Havens. He only needed to take time to inform his unidentified counsel, who could not be notified through the proceeding's service list, about the rulings. It is very likely that Mr. Havens as a matter of course provides counsel with all rulings as they are made so that counsel may provide him with competent legal services and advice he requires. Same day notification of counsel by Mr. Havens can be readily accomplished in seconds with the click of his computer's mouse at little or no cost.

Mr. Havens also makes the dramatic argument that the *MO&O* "places a chill and cloud on the party's participation and attempt to use assisting counsel to improve his participation."¹⁹ He fails to explain how the *MO&O* "chills" participation. It seems to be a baseless charge. It would be irrational for Mr. Havens to become discouraged from participating here simply because the Presiding Judge has asked unidentified "assisting" counsel to step out of the shadows and clarify the nature and scope of their legal "assistance." This is especially so since it was Mr. Havens himself who raised his *pro se* status as an issue, knowing that it needs examination by the Presiding Judge.²⁰

The order directing Mr. Havens' unidentified counsel to identify themselves does not prevent Mr. Havens from still participating as a *pro se* party. Nor does it prevent counsel from assisting Mr. Havens, nor from vigorously participating. Counsel complied with the order to file Notices of Appearance more than a month ago. Mr. Havens and his counsel continue to participate in this proceeding without evidencing any chilling effect that can be related to the *MO&O*.²¹ Thus, Mr. Havens' request to appeal the issue of identification of his counsel is denied.

Striking Havens' Untimely Filing

Mr. Havens now seeks permission from the Presiding Judge to appeal an order striking Havens' December 2, 2013, pleadings as untimely. Mr. Havens appears to argue that the Presiding Judge erred in striking his pleadings in their entirety because the majority of his arguments were unrelated to substantive motions that were due on December 2, but were related to *responses* to substantive motions that were due later on December 16.²² Mr. Havens argues that by striking his pleadings the Presiding Judge exercised a "new and novel, and impermissible, unbridled authority."²³ To grant his request for appeal on a ruling that is hardly "new," let alone "novel," would only add to the already wasted time and expense of this overly litigated case.

¹⁸ *Id.* at 3 (italics added).

¹⁹ *Id.*

²⁰ See Opposition at 104-05.

²¹ The only observable "chill" on counsel's participation was caused by Mr. Havens, who instructed counsel that they must refuse to answer normal *voir dire* questions posed by the Presiding Judge.

²² Request at 2 n.3.

²³ *Id.* at 2.

Parties Warned to File Timely

By *Order*, FCC 12M-55, released over one year ago on December 5, 2012, the Presiding Judge instructed all parties that “[a]ll filings in this proceeding shall be due on their designated submission dates *at close of business (5:30pm EST)* . . .”²⁴ In a later *Order*, FCC 13M-19, the Presiding Judge set a deadline of December 2, 2013 for filing all substantive motions regarding matters related to Issue G.²⁵ Mr. Havens filed his pleadings between 11:51 pm and 11:59 pm on that date, nearly six and one half hours beyond the prescribed time, thus making them untimely.²⁶ In considering whether to accept those pleadings notwithstanding their untimeliness, the Presiding Judge concluded that strong remedial action was appropriate because “Mr. Havens exploited the Presiding Judge’s generous flexibility on filing deadlines when he used additional time not available to the other parties to significantly respond to pleadings to which he should not yet have had access.”²⁷ Thus, the Presiding Judge found it appropriate to strictly enforce the deadline as to Mr. Havens’ untimely December 2 pleadings and filings thereafter.

Unfair Advantage to File Late

Striking these pleadings was necessary to ensure that Mr. Havens did not gain an advantage by using unauthorized extra time to improve his pleading with information made available only to him “after hours” and thereby gain an unfair advantage. Far from being “impermissible [and] unbridled,” such remedial action to strike tardy filings is appropriate and falls squarely within the Presiding Judge’s authority to regulate the proceeding.²⁸ Far from such action being new or novel, the Presiding Judge merely followed Commission precedents repeatedly striking or dismissing Mr. Havens’ pleadings due to his failure to comply with pleading requirements.²⁹ Further, the issue that Mr. Havens seeks to appeal is now moot because the Presiding Judge did not bar Mr. Havens from resubmitting his arguments at the appropriate time, a remedy that Mr. Havens has exercised profusely.³⁰ Thus, Mr. Havens’ request to appeal the striking of his December 2 pleadings is denied.

Equally Applied Deadlines

Mr. Havens seeks appeal of the Presiding Judge’s determination that he “was subject to an alleged ALJ Order that *all pleadings* in this proceeding must be filed by 5:30 PM Eastern Time.”³¹ He argues that the setting of an equal time requirement is “an artificial imposition and with no benefit, imposed only on Havens, and thus is also part of the Order’s new and novel

²⁴ *Order*, FCC 12M-55 at 2 n.2 (emphasis added).

²⁵ *Order*, FCC 13M-19 at 2.

²⁶ *MO&O* at 3 ¶ 5.

²⁷ *Id.*

²⁸ 47 C.F.R. § 1.243(f).

²⁹ *Cf. Warren C. Havens*, Order on Reconsideration, DA 14-121 at 6 ¶ 19 (WTB Mobility 2014); *Skybridge Spectrum Foundation Warren Havens on Request for Inspection of Records*, Memorandum Opinion and Order, FCC 13-120, 28 FCC Rcd 13539, 13543 ¶ 10 (2013); *Warren C. Havens*, Order on Further Reconsideration, 21 FCC Rcd 3553, 3555 ¶ 5 (WTB 2006).

³⁰ See Opposition.

³¹ Request at 2 (emphasis added).

expansion of authority.”³² Mr. Havens also tactfully asserts a fall-back argument that since ECFS mechanically allows filing until midnight, he should be permitted to file at any time of day.³³ He also asserts that the Presiding Judge’s staff gave him permission to file his pleading of December 16 after 5:30 pm.³⁴

Authority to set deadlines is an essential tool for a Presiding Judge to regulate proceedings. There is nothing unusual about any judicial officer setting a deadline. The Presiding Judge set the 5:30 pm EST deadline in order to provide certainty to the parties of filing deadlines and thereby avoid any confusion that could arise due to time differences or uncertainties.³⁵ The same deadline applies to all parties.³⁶ No “new” or “novel” issue arises when a presiding judge exercises authority to set filing deadlines.³⁷ Mr. Havens has cited no authority for his position that ECFS’s acceptance of filings after the close of business trumps an earlier time certain deadline set by the Presiding Judge.

Havens’ Sanctions Argument

Mr. Havens asserts that the Presiding Judge’s *MO&O* raises new and novel issues of law in that it “effectively ‘denies or terminates the right ...[of Havens] ... to participate as a party to a hearing proceeding,’” and imposes sanctions though “sanctions cannot be applied but when authorized by agency law, and no FCC law authorizes the above.”³⁸ In support of this position, Mr. Havens relies on the Administrative Procedure Act at 5 U.S.C. § 558(b), which states that “[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.”

As previously held, ordering counsel to self-identify is not a sanction. This meritless argument is thus rejected. Even if viewed as a sanction, Mr. Havens’ argument fails. Mr. Havens asserts his erroneous position with assumedly first-hand knowledge of precedent that it is frivolous. Mr. Havens raised a strikingly similar argument before the Commission in a situation involving a sanction.³⁹ The Commission squarely rejected this argument, holding that:

³² *Id.* at 3.

³³ *Id.* at 4.

³⁴ *Id.* The Presiding Judge has not yet ruled on any aspect of Mr. Havens’ December 16, 2013, filing and will not do so here.

³⁵ In his January 7, 2014, Supplement to Response, Mr. Havens argues that the Presiding Judge “breach[es] a Commission determination” that permits the electronic filing of comments until midnight of the date due. Mr. Havens’ Request to Accept and Supplement to Request under Section 1.301(b) at 1-2 (citing *Electronic Filing of Documents in Rulemaking Proceedings*, Report and Order, 13 FCC Rcd 11322, 11331 ¶ 19 (1998)). Mr. Havens is reminded that this is not a notice and comment rulemaking proceeding, and thus the Report and Order he cites is not applicable.

³⁶ “All filings in this proceeding shall be due on their designated submission dates at close of business (5:30pm EST) unless otherwise indicated . . .” *Order*, FCC 12M-55 at 2 n.2 (emphasis added).

³⁷ See 47 C.F.R. § 1.243(f).

³⁸ Request at 3.

³⁹ *Warren C. Havens*, 27 FCC Rcd. 2756, 2758 ¶ 8 (2012) (“Havens [erroneously] contends that imposition of the proposed sanction [for making frivolous or repetitive filings in Commission proceedings] violates 5 U.S.C. § 558(b), which states that 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.’”).

As the Commission has long recognized, '[a]n agency is not powerless to prevent an abuse of its processes,' and it 'need [not] allow the administrative process to be obstructed or overwhelmed by captious or purely obstructive protests.' In the Communications Act, this principle is reflected in the broad provisions of sections 4(i) and 4(j). Section 4(i) states that the Commission 'may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.' Section 4(j) provides that the Commission 'may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.' In similar fashion, section 303(r) provides that the Commission may '[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.' *The courts have recognized that an inherent part of an agency's ability to manage its proceedings and execute its functions is the ability to impose sanctions to 'protect the integrity of its own processes.'*⁴⁰

Yet, Mr. Havens now argues that this issue is new and novel. Mr. Havens does not at all discuss the Commission precedent concerning himself and his related entities and the similar fact pattern under consideration in this proceeding. He does not even disclose the existence of adverse authority with his name in the case captions. Mr. Havens should not be permitted to waste the time of the Commission with arguments that it has already visited and rejected.

Conclusion

Mr. Havens' Requests to Appeal are frivolous on the merits, and transparent as an effort to delay this proceeding by miring it in meretricious, meritless appeals and requests to appeal. Remember that we are all aware that the Joint Motion for Summary Decision on Issue G ("Joint Motion") was filed more than two months ago on December 2, 2013, and is ripe for decision. Thereafter, possibly in an effort to delay a judgment day, Mr. Havens systematically challenges routine exercises of the Presiding Judge's authority in making rudimentary interlocutory rulings, no matter how axiomatic or generic the supporting authority relied upon in the rulings.

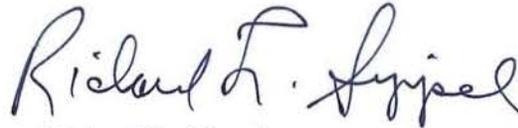
Rulings

Accordingly, based on the foregoing and in the discretion of the undersigned Presiding Judge, **IT IS ORDERED** that Mr. Havens' Requests to Appeal *Memorandum Opinion and Order*, FCC 13M-22, released December 19, 2013, **ARE DENIED**.

⁴⁰ *Id.* at 2758-59 ¶ 9 (footnotes and internal quotation marks omitted) (emphasis added).

IT IS FURTHER ORDERED that Warren Havens' pleadings filed on December 2, 2013, **REMAIN STRUCK**.

FEDERAL COMMUNICATIONS COMMISSION⁴¹

A handwritten signature in black ink that reads "Richard L. Sippel". The signature is written in a cursive style with a large, prominent initial "R".

Richard L. Sippel
Chief Administrative Law Judge

⁴¹ Courtesy copies of this *Order* are e-mailed on issuance to each counsel and Mr. Havens.