

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.; ENBRIDGE ) 0004417199, 0004419431,  
ENERGY COMPANY, INC.; INTERSTATE POWER AND ) 0004422320, 0004422329,  
LIGHT COMPANY; WISCONSIN POWER AND LIGHT ) 0004507921, 0004153701,  
COMPANY; DIXIE ELECTRIC MEMBERSHIP ) 0004526264, 0004636537,  
CORPORATION, INC.; ATLAS PIPELINE-MID CONTINENT, ) and 0004604962  
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 RESPONSE TO THE JOINT RESPONSE  
OF THE ENFORCEMENT BUREAU & MARITIME TO ORDER, FCC 14M-9

Warren Havens, the undersigned, (“Petitioner” or “Havens”) hereby submits this response (the “Response”) to the Maritime Communications/Land Mobile LLC (“Maritime” or “MCLM”) and FCC Enforcement Bureau (the “EB” or “FCC EB”) joint response filed March 26, 2014 (the “Joint Response”) to the Administrative Law Judge’s (the “ALJ”) Order, FCC 14M-9, released March 12, 2014 (the “Order” or “M9”) regarding the Maritime and EB Joint Motion for Summary Decision on Issue G, filed December 2, 2013<sup>1</sup> (the “EB-M Motion” or the

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<sup>1</sup> “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

“Joint Motion”) regarding its AMTS licenses (the “Licenses”) and 16 component stations (the “Stations”) that Maritime seeks to retain in its Joint Motion.

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Commission’s rules.” *Maritime Communications/Land Mobile, LLC*, 26 F.C.C.R. 6520, 6547 (2011) (FCC 11-64; EB Docket No. 11-71).

Authority: Discontinuance and Any Resumption of AMTS Public Coast *PMRS* Station Operations-Service Requires FCC Approval and Has No Grace Period: The Stations Auto Terminated for Failures Thereof.

12.	No Operations-Service without Construction Proof and Filings. There Can Be No Lawful Operations or Use Absent Proof of Lawful Construction. And Unlawful Spoilage of Evidence Thereof, Supported Maritime Counsel (and Subject to the Attorney-Client Privilege Crime Exception) Requires Investigation and Sanctions	27
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(i) Exhibits

[This list of exhibits may not reflect all exhibits that are referenced in the Response’s text and attached to it. This list is meant for the convenience of the parties.]

- Exhibit 1: Construction Authorities Memo by Attorney James Ming Chen, dated previously submitted in this proceeding.
- Exhibit 2: Document Reference List and Associated Chart of Facts and Information Relevant to the MCLM Alleged Leases for the Stations
- Exhibit 3: Havens v Mobex. Second Amended Complaint in New Jersey District Court NJ.
- Exhibit 4: Chart re Maritime-Pinnacle Alleged Uses, and Failures to Disclose
- Exhibit A.1. FCC responses to FOIA request re: engineering studies
- Exhibit C.1 Mobex Forms 499-A for 2003-2006
- Exhibit H.1 FCC 1<sup>st</sup> AMTS “audit” letter and responses
- Exhibit H.2 FCC 2<sup>nd</sup> AMTS “audit” letter and responses
- Exhibit G.1. MCLM Bankruptcy schedule listing creditors
- Exhibit I.1 An FCC Section 308 Letter to Paging Systems, Inc. asking for specific records to evidence construction of an AMTS station.
- Exhibit J.1 Mobex UCC filing listing stations with equipment “license holder”
- Exhibit K.1 Sample station “activation” notices submitted to the FCC by Maritime’s predecessors-in-interest, Mobex and Regionet, that contain no indication of anything constructed.
- Exhibit L.1. Predmore-produced chart of Maritime stations with construction and operational status information
- Exhibit M.1 A Letter from John Reardon to the USAC re: operational status of Maritime licenses
- Exhibit O.1 A November 2009 valuation report by Maritime’s broker, Spectrum Bridge, stating that AMTS site-based ceased operations and became dormant years ago (prior to the date of this report)

[1. Preliminary: No "Ghostwriting."  
And the ALJ Has Called on Havens for Facts and Relevant Law.](#)

There is no “ghostwriting” involved in any part of this filing. All text, including facts, legal citations, arguments, and other matters have been researched, reviewed, found to be

credible and reasonable, drafted, and finalized by the undersigned. Accordingly, this entire pleading is the sole work product of the undersigned.<sup>2</sup>

Many times in this proceeding, the ALJ, Judge Richard Sippel, has called on Havens to provide both relevant facts and law, and he does so herein. The ALJ asked and required Havens to explain he sought to participate herein as a pro se party, and one reason given was that he wanted to and could supply relevant facts and law, for the public interest and his private interests. The ALJ did not disagree with that explanation, and permitted (in accord with applicable law) his pro se participation to an extent.<sup>3 4</sup>

## 2. Introduction: Construction-Coverage-Operation-Service is Unified in Applicable FCC Law

Under applicable FCC rules and precedents, there is no separation between “construction,” “coverage,” “operation,” and “service.” Thus, the relevant facts and law

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<sup>2</sup> Notwithstanding the paragraph above, the undersigned maintains that there is no law or reasonable principle of law or equity that would bar or restrain a pro se party in a proceeding before the FCC, including before an administrative law judge to obtain advice of an assisting attorney in any pleading, without explanation of that fact, or the nature and extent of such assistance. The administrative law judge in this proceeding has acted in a way to threaten, increase the costs of, and effectively bar the undersigned’s use of assisting counsel that may have improved this pleadings, to provide a more full and complete record regarding the subject Motion and the component issues. The undersigned has pending before the Commission several interlocutory appeals regarding these matters, which if granted, may allow the undersigned to further address the matters in this pleading before the administrative law judge, or on appeal of a final decision by the administrative law judge in this case.

<sup>3</sup> In this regard, by the ALJ permitting Maritime and EB to supplement their Joint Motion, there is no good reason for the ALJ to not accept the Havens December 16 Opposition, including because the ALJ has effectively reopened the period for filing summary decision, has permitted Maritime and EB the right to fix their Joint Motion, thus it is equitable for the ALJ to accept and consider the Havens Dec. 16 Opposition, and because considering the Dec. 16 Opposition will not cause any undue delay or harm, since apparently the ALJ could not grant the Joint Motion as it stood, without a supplement with sufficient facts.

<sup>4</sup> This participation has been seriously frustrated, as described in Petitioner’s pending interlocutory appeals. However, as of this time, the ALJ as permitted the filing of this pleading. This pleading is filed without waiver of the position and assertions in those appeals, and others lodged with the ALJ in this hearing as to prejudicial actions regarding Petitioner and the SkyTel companies he manages.

presented herein must deal with these four elements that cannot be separated under applicable FCC law and in practice. I discuss this in the section below regarding Applicable Law.

### 3. Response Summary

The descriptive section titles in the Contents above, and other initial sections above, provide a full summary. In addition, Petitioner provides the following:

#### Summary

The Joint Motion (with its Joint Response) must be denied because it rests unlawfully on the summary decision procedures of 47 C.F.R. § 1.251.<sup>5</sup> The Joint Motion, particularly as supplemented by the Enforcement Bureau and Maritime’s Limited Joint Stipulation Concerning Issue G Licenses, represents in purpose and in effect a proposed consent order that must satisfy the substantive requirements of 47 C.F.R. § 1.93 and follow the procedural steps laid out in 47 C.F.R. § 1.94. “Consent orders may not be negotiated with respect to matters which involve a party’s basic statutory qualifications to hold a license.” Id. § 1.93(b). The Bureau and Maritime’s reliance on the summary decision procedures of 47 C.F.R. § 1.251 represents an unlawful end run around sections 1.93 and 1.94 of the Commission’s Rules, which provide the only channel by which issues designated for hearing may be resolved by consensual settlement rather than adjudication.

The facts in the records show that prior to any of the alleged Leases being entered into that the Licenses had already automatically terminated. Thus, the issue of whether the leases have somehow kept the licenses from being permanently discontinued is moot. If the Licenses

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<sup>5</sup> Certain material in this Response was presented December 2, 2013, in the Havens-SkyTel First Motion Under Order 13M-19 to Reject Settlement, Proceed with the Hearing, and Provide Additional Relevant Discovery, and in Havens’s December 16, 2013 Opposition to Joint Motion of Enforcement Bureau and Maritime For Summary Decision on Issue G. In the instant filing, Havens renews his objections on the reinvigorated basis that the Bureau and Maritime may not use the summary decision procedures of 47 C.F.R. § 1.251 to evade the strictures of 47 C.F.R. § 1.93.

are already automatically terminated for failure to be timely and/or properly constructed (e.g. meeting the construction-coverage requirements of AMTS under Section 80.475(a)), then it does not matter whether or not the Licenses were at a later date leased to a party. There are more than sufficient facts in the record in the instant proceeding in EB Docket No. 11-71, and in the pending challenges before the Wireless Telecommunications Bureau, the MCLM site-based stations subject of the instant filing, were not timely and properly constructed (with required construction-coverage under Section 80.475(a), required continuity of service along a waterway (with no breaks in coverage), with service contour over water. One cannot put the cart before the horse.

In addition, in this Response, Petitioners shows, contrary to the Joint Response's assertions, that there are no leases with Pinnacle or Duquesne; that Puget Sound Energy is not operating any stations under its lease agreement; that there is no period of time that the subject licenses could be discontinued and not considered permanently discontinued since they are operated as PMRS; that the lessees, if they are operating, are operating impermissibly as PMRS; that, as Maritime admits, the lessees are not operating at the authorized station locations; that the lessees are operating impermissible fill-in stations; and that the "lessees" are not seeking or using all of the spectrum in the subject licenses, and thus Maritime could have continued to operate its authorized, licensed stations, without, as MCLM and EB speciously assert, interfering with the operations of the lessees; and that Maritime ceased operations of the Stations well before any lease application with Pinnacle, Duquesne, Puge Sound Energy or Evergreen, was ever filed with the FCC.

For the facts and arguments given herein, the Joint Motion and the Joint Response must be denied.

[4. Procedural Issues:  
Lack of Sworn Statement,](#)

and Reference to Other Defects Presented Below

Section 1.251 provides:

Summary decision. “(a)(1)... The party filing the motion ... must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing....  
(c) Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

M9 and the Joint Response pertained to alleged additional material facts not provided in the Joint Motion. However, the Joint Response does not contain a qualified affidavit or equivalent declaration under this rule, and some of the alleged factual “other materials” presented do not, apart from an affidavit, meet the standard of admissible evidence under the rule sufficient for disposing of the Issue (g) case in a summary decision.

It is obvious that had Maritime and Pinnacle actually engaged in use of the subject AMTS site-based station facilities and / or spectrum for State of New Jersey governmental agencies, as they indicate, they could have obtained sworn statements describing this form officers or other authorized employees of these agencies. But they did not. Neither Maritime nor EB has personal knowledge of these asserted facts, and they have never provided sufficient admissible evidence of these facts. At a hearing, they would be required to put on such evidence, and be cross examined. This asserted evidence fails and should be rejected, at least at the summary decision stage.

Likewise, the EB has powers and duties to do field investigations. It is a short trip to New Jersey, to the alleged operating AMTS stations for these alleged governmental agencies, and under their control or effective control. However, after years in this proceeding, the EB has not conducted any such simple field investigation, and delivered the results to the ALJ and parties, with an appropriate affidavit. Why not? This begs for an answer. In any case, EB is in no position to assert as facts what it does in the Joint Response and Joint Motion, when it failed

to perform these simple tasks that are among its main powers and duties. At least, this is a glaring failure at the summary decision stage.

Further, nothing in the rule calls for, or reasonably construed permits, use of information kept hidden from an opposing party, as Maritime-EB and Pinnacle have done. As elsewhere discussed herein, there is nothing about Issue (g) issues, or the relevant facts, that are confidential or highly confidential—this is about the most fundamental of FCC law: the minimum required construction- coverage- operation- service. None of the applicable rules, rulings, or required FCC notifications, calls for or requires any such secrets: and all such secrets are irrelevant. They are spurious and specious devices used in this proceeding and improperly tolerated and sheltered by the ALJ.

In addition, we refer to Section 19, near the end below, below regarding other Procedural Defects of the Joint Motion with Joint Response. This includes that summary decision is improper where, as here, the matter involves new and novel, or unsettled issues of law, and when an opposing party is acting on a pro se basis.

[5. Nature of the Joint Motion and Joint Response:  
Actually a Request for Settlement, or Effectively for Rule Waivers,  
with Unlawful Evidence Withholding, Destruction, and Avoidance.](#)

As elsewhere discussed herein, and at the end of the Exhibit Chart of Pinnacle- submitted and –related documents, the Joint Motion with the Joint Response are in content and posture actually an attempt at rule waivers. The Joint Motion initially attempted a stipulated settlement, but when Petitioner effectively opposed that, Maritime-EB shifted to an attempt to make the Joint Motion into more of a summary decision request, and for that purpose, they submitted the Joint Response. In these attempts, they unlawfully withhold information they assert is relevant to the decision they seek, but that is fails for reasons discussed elsewhere herein, and as follows:

Improperly Withheld Evidence Should Bar Grant of the Joint Motion. M9 and the Joint Response, and filings by Pinnacle Wireless, Inc. in this proceeding, that are a basis of the Joint

Motion and the Joint Motion, have certain text redacted and certain documents withheld from Petitioner, on the asserted basis that the subject information is highly confidential and should be available only to certain attorneys described in the Protective Order in this proceeding, but not to Petitioner, even though Petitioner is performing the same role as an outside attorney for a party in this proceeding. Even apart from Petitioner's role as a pro se participant that is equivalent to the role of a party's outside counsel, the withheld information and documents should have been provided, at least to the extent that the information and documents are relevant to the facts and law involved in Issue (g). The only information and documents that could be withheld from Petitioner, or any member of the public, related to Issue (g), would be ancillary to and not essential for determinations under Issue(g). For example, assertions of the amount of money paid to Maritime under any lease agreement, or paid by Maritime or a lessee to an antenna site facility owner, is possibly confidential and not subject to release to a party outside of those permitted to receive the information under the Protective Order; however, that type of information is not relevant to a determination of permanent discontinuance due to failure of construction or construction-operation. Petitioner has, along with Skybridge Spectrum Foundation (one of the "SkyTel" companies), submitted FOIA requests to obtain all of the redacted text and withheld documents noted above. Thus far, the FCC has not granted these FOIA requests. However, Petitioner has pending before the US District Court for the Northern District of California, a complaint against the FCC for unlawful denial of similar FOIA requests, which also pertain to redacted text and documents in this Issue (g) proceeding. As Petitioner informed the FCC, in the FOIA requests specific to the Joint Motion, M9 and the Joint Response, Petitioner will be amending the noted USDC complaint to add claims of unlawful and untimely processing and denial of these FOIA requests.

On this basis alone, Petitioner asserts it would be improper to grant the Joint Motion, and if it is granted, Petitioner intends to appeal the grant on this basis (among other bases).

6. No Leases:  
ULS and Documents Show No Leases for Any Station But One. Alleged Uses (if They Exist at ALL) Are Illegal, and Do Not Count Toward Operations-Service. Maritime, Pinnacle, and the Enforcement Bureau misled the ALJ on this threshold failure, And Violate Rule § 1.52 and 1.24; and Maritime Could Have Operated Authorized Stations.

Contrary to the Joint Response, the majority of the Stations have no leases filed with the FCC pursuant to the requirements of Section 1.9020 of the FCC's rules. See Exhibit 2 hereto that contains a chart, after the document reference list, listing the Maritime Call Signs and Stations' locations and whether or not they have any current, active lease with the FCC, or whether they previously submitted a lease application with the FCC, but it terminated, expired or was canceled long ago (Also, see the FCC's ULS records for the Licenses and the history of lease applications under each). See the column in the chart at Exhibit 2 that says "Status". This status information was taken from FCC ULS. It does not matter whether or not Maritime, on the one hand, and Pinnacle Wireless, Inc. ("Pinnacle"), Duquesne Light Company ("Duquesne"), and Puget Sound Energy ("PSE"), on the other, entered an agreement under which they may submit a lease application to the FCC for approval. Without an actual FCC-approved lease filed pursuant to the Commission's rules for leasing under Part 1, subpart X, including Sections 1.9020 and 1.9030,<sup>6</sup> any use of the spectrum under lease agreement would be unlawful, and cannot possibly count toward fulfilling requirements of construction and permanent operation. This, by itself, requires denial of the Joint Motion for those 14 stations.

It is false and lacks candor for MCLM and EB to inform the ALJ that the Stations are subject to leases, when it is clear in FCC ULS public records that there are no current, active leases for the majority of the Stations (except for with Evergreen School District and a pending one with Puget Sound Energy—under which Puget Sound says it is not operating), and when

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<sup>6</sup> Maritime has asserted it has long-term spectrum manager leases with the third parties. Spectrum Manager leases are governed by Section 1.9020.

there have never been any leases filed with the FCC for WRV374-14 (Selden, NY) and WRV374-18 (Valhalla, NY). As shown in the chart in Exhibit 2 hereto, by looking at the “Status” column (or at FCC ULS records), the leases filed for other Maritime stations subject of the Joint Motion have either expired, canceled, been dismissed or been withdrawn (never went into effect), or are in pending status, all for several years.

Regarding those of the Stations that Maritime alleges to lease to Pinnacle Wireless, Inc. under WRV374, and therefore to be in operation as it argues in the Joint Response and Joint Motion, Petitioner shows the following additional facts disputing Maritime’s and EB’s claims.

First, there is no record in FCC ULS of any lease between Maritime, or its predecessors Mobex, and Pinnacle Wireless, Inc. in year 2005, when Maritime alleges to have started leasing to Pinnacle. As the chart in Exhibit 2 shows, as well as FCC ULS records, Maritime filed the first lease application with Pinnacle in 2009. Thus, any claims by Maritime and EB that Pinnacle has been operating under a lease for WRV374 station Locations 3, 14, 15, 16, 18, 25, and 33, since some time in 2005, are incorrect. There is no valid lease if the required lease application is not filed with the FCC and the required advance notice of operations given per Section 1.9020.

Further in this regard, see Exhibit 4 hereto, which is a chart of documents and information relevant to the Maritime alleged lease with Pinnacle and Petitioner’s partial comments on those documents in a column to the right and at the end of the chart, some of which are restated here below. Petitioner fully references and incorporates herein his partial comments in the chart in Exhibit 4, as well as his notes at the end of the chart in Exhibit 4. The relevancy of those comments and notes are self-evidence upon review of Exhibit 4. Pinnacle and Maritime have filed information regarding their alleged lease and Pinnacle’s operation under said lease confidentially. However, none of the information and documents demanded in the document and interrogatory requests that is relevant to "issue (g)" is legitimately confidential or highly confidential. The relevant FCC rules, and FCC and Congressional spectrum policy involved, and

compliance therewith, or violations or failures thereunder, are all public. The irrelevant associated information that may be confidential or highly confidential, if any, could have been redacted. However, that class of information is already disclosed by Maritime in its bankruptcy case, and also cannot be kept confidential under New Jersey FOIA-equivalent law, with regard to Pinnacle Wireless, Inc.

Regardless of what information and documents Pinnacle Wireless, Inc. supplied in response to these document and interrogatory requests, it is irrelevant to the Joint Motion (and Joint Response), and the Joint Motion fails and should be denied in full, since:

(i) as stated above, Maritime had no lease to Pinnacle submitted to and approved by the FCC in the recent many years (*shown on ULS*), or between 2005 and 2009, and any operations of the spectrum without a lease is unlawful, and Maritime, Pinnacle, and the Enforcement Bureau misled the ALJ on this threshold failure;

(ii) Maritime admitted (*see Response text*) that none of the authorized, licensed Stations are in operation by it or anyone, for approximately 7 years at least, and fill-in stations are not valid but are unlawful where there is no licensed station in operation (to "fill in" poor-coverage gaps, in actual authorized service area);

(iii) The alleged Pinnacle uses of the spectrum (including as noted above) are PMRS, but without the required submitted and granted application therefore under rule §20.9(b), and any such use is thus unlawful;

(iv) There is no grace period for AMTS PMRS stations that are discontinued (before automatic termination due to discontinuance) and all Maritime reported operations were PMRS; and

(v) etc. For other reasons given in this Response text.

The Joint Motion is in content a disguised rule waiver request, but station licenses that auto terminated cannot be revived even by an directly submitted waiver request, and a disguised

one is double defective: is ineffective and lacks candor. *This is apparently why Maritime and EB (backed by Pinnacle and others), presented the Joint Motion as a stipulated settlement, not a motion for summary decision, or a waiver request.*

Regarding the station WRV374-33 (World Trade Center), it is impossible for there to be any lease, since the World Trade Center was destroyed on 9/11/01, over 12 years ago. Thus, Maritime's WRV374-33 station could not have operated since at least that time and has long ago auto-terminated without specific Commission action under Section 1.955 and the Commission's "Chicago Order" precedent, FCC 10-39. Thus, the Joint Motion and Joint Response are clearly moot with respect to WRV374-33 (World Trade Center).

Regarding the alleged lease and operations under KAE889 with Puget Sound Energy, in the Joint Response (and Joint Motion) MCLM and EB misinform the ALJ and lack candor for suggesting that Puget Sound Energy is operating stations under a lease for KAE889 (Locations 4, 20, 30, 34 and 48), when they clearly know that Puget Sound Energy has admitted in the proceeding, as shown in DOCUMENT 3 listed in the document list and chart at Exhibit 2 hereto, that it is not operating any facilities yet under its lease with Maritime (also, see *Answers of Puget Sound Energy, Inc. to the Enforcement Bureau's First Set of Interrogatories*, filed by Puget Sound Energy, Inc. on 8/25/12, in EB Docket No. 11-71, at pages 5, 8, 12.). There are no PSE operations under the lease for the ALJ to consider, and it means at minimum, by Maritime's own admissions in the proceeding (notwithstanding other facts presented by Petitioners in the proceeding that show failure to timely or properly construct, and even earlier discontinuance, if there ever was any legitimate operation) that the KAE889 locations 4, 20, 30, 34 and 48 have not been operated since some time in 2007.

The remaining 2 stations involve Evergreen School District. However, the lease with Evergreen school district commenced on August 15, 2009, which is well after Maritime said it discontinued all operations, at minimum, in 2007. And again, as with Pinnacle, Duquense and

Puget Sound Energy, Evergreen is not operating the authorized, licensed stations, but allegedly impermissible fill-in stations, that are not permitted without the operation of the authorized station.

In a section below, Petitioner discusses other reasons why all 16 stations, including the ones under a lease with Evergreen School District, do not involve lawful construction and operation that prevent automatic termination.

In addition to the above, a review of the lease applications that were filed with the FCC, whether they are active or not currently, reveals that Maritime could have continued to operate its licensed, authorized Station locations without interfering with any actual or prospective lessees since either none or not all of the spectrum is or would be in use. The MCLM and EB assertions in the Joint Response that MCLM had to cease operations at the Stations' authorized locations in order to no interfere with the "lessees" are specious and lack candor, including that not all of the spectrum is sought or being used by the "lessees", that there are no actual leases for the majority of the Stations as shown above, and the fact that Maritime, itself, has admitted in the proceeding to ceasing many of its operations in early 2006 and all by some time in 2007 (there are facts indicating even earlier dates), well before Maritime entered most of the agreements to lease the Stations or before it filed any lease applications with the FCC, as shown in the chart in Exhibit 2 hereto. More importantly, the lease applications that Maritime has filed with the FCC, as shown in Exhibit 2 and FCC ULS records, do not involve all of the licensed spectrum in the subject Maritime licenses, but only parts of it (except the lease application filed for PSE, but PSE says it is not operating under the lease, so Maritime could have continued to operate those authorized stations).

In fact, many of the defunct lease applications filed with FCC (and that are either canceled, withdrawn, expired), as well as the only currently active lease application with Evergreen School District, contain attachments with statements by MCLM that it is only leasing

part of the total licensed spectrum. See e.g. the chart at Exhibit 2 under the column, “Amount of Spectrum Specified in Lease Application”, as well as the FCC’s ULS records. For example, Evergreen School District is only leasing a minority of the MCLM spectrum under Call Sign KAE889.

Thus, there is no good reason or explanation why Maritime could not have continued operating the licensed, authorized locations of the Stations, with the spectrum that it was not leasing.

For the reasons given above, Petitioners believes that Maritime and EB have violated Sections 1.24 and 1.52, including for not informing the ALJ of what active leases Maritime actually has filed with the FCC (only one for Evergreen), that PSE is not actually operating any stations under its lease application, and that Maritime was not leasing all of the spectrum to Duquesne, Pinnacle and Evergreen School District, so it clearly could have operated at the authorized, licensed locations without causing any interference, if it so chose.

[7. No Station Operations:  
All Stations’ Operations \(if Ever Operated\) Ceased Years Prior  
\(As Admitted, Approximately 7 or more years, Multiples of the Maximum Construction Period\)  
to Alleged but Nonexistent Leases and Usages to Pinnacle, Duquesne, and Others.](#)

See Sections 8 and 9 below. Also, Maritime has already admitted in the hearing in response to interrogatories and other pleadings that it, as the licensee, has not operated any of its stations since at least 2007,<sup>7/8</sup> and in the proceeding regarding Maritime’s refund request of USF

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<sup>7</sup> See e.g., Maritime Communications/Land Mobile LLC’s Reply to Enforcement Bureau’s Objection to Maritime’s First Draft Glossary, filed August 28, 2012 in Docket No. 11-71, at page 4, where it states, “Maritime has candidly stated that it has not provided AMTS service directly to end users from any of its incumbent stations since 2007....”

<sup>8</sup> Also, see e.g., Maritime’s *Report Per Order FCC 12M-36*, filed August 6, 2012 in Docket No. 11-71, at its pages 1-2, where it states, “As explained in the interrogatory responses, due to a combination of changes in the industry and severe financial hardship, Maritime has not provided AMTS services pursuant to any of its incumbent (site-based) licenses since December 2007....”

fees paid by Mobex,<sup>9</sup> John Reardon informed the FCC that during 2003-2005 period Watercom losts its customers to cellular and took their operations down.<sup>10</sup> Maritime's broker for sale of its licenses, Spectrum Bridge, Inc. also stated in a fair market valuation for SCRRA that most AMTS incumbent stations had become "dormant" (see Exhibit O.1 hereto).

8. Unauthorized Locations:  
Alleged Uses Are Not Even at and of Licensed Station Sites.

See Section 9 below. Maritime and EB admit that the "lessees" are not operating the licensed, authorized station locations under the subject Maritime licenses. Without operation of the authorized, licensed station location on the Maritime subject licenses, any operation of a fill-in station, as Maritime alleges that Pinnacle, Duquesne, and Evergreen (Puget Sound has said it is not operating anything) are doing is impermissible and does not prevent permanent discontinuance of the subject licenses. See e.g. the FCC's *Memorandum Opinion and Order*, FCC 10-39, 25 *FCC Rcd* 3390 that found a Mobex site-based AMTS station in Chicago had permanently discontinued for not being in operation for a long period of time, and that the Mobex-alleged fill-in station did not prevent said permanent discontinuance. If anything, Pinnacle, Duquesne, Evergreen, and Puget Sound should be ordered to cease operations at the unauthorized locations, including if they have no lease filed with the FCC, and also since without knowing their actual location and station technical operating parameters, along with the actual station technical parameters for the Maritime licenses, then there is no way to know if Pinnacle, Duquesne, Evergreen, and Puget Sound are operating within the Maritime licensed service area,

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<sup>9</sup> See *Petition for Reconsideration* by Maritime Communications/Land Mobile LLC filed September 25, 2008 in WC Docket No. 06-122 regarding Maritime's request for a refund of over \$1 million in fees paid by Mobex to Universal Service Administrative Company for Universal Service Fund fees. (the "Maritime Refund Proceeding" or "USF Refund Proceeding")

<sup>10</sup> See *Letter* from John Reardon, President of Maritime Communications/Land Mobile LLC to Jeffrey A. Mitchell, Associate General Counsel, Universal Service Administrative Company dated August 14, 2006, at its page 3, complete paragraphs 1, 3 and 4. Exhibit M.1. hereto.

or on the spectrum held by the co-channel geographic AMTS licensees, who are among the SkyTel companies managed by Havens.

In essence, any operations by Pinnacle, Duquesne, and Evergreen at fill-in station locations are “ghost” operations and are unauthorized and unlawful, and at minimum cannot count toward any construction and/or operational requirements of the subject licenses, for purposes of the licenses not being deemed permanently discontinued.

[9. Invalid Fill-in Stations:  
Invalid for Construction and Operation](#)

MCLM’s predecessors, Mobex and Regionet, had to construct and put into operation, with service to customers, all of the Stations several years before any agreements were signed to lease spectrum or any lease applications were filed with the FCC (e.g. Pinnacle says that it did not enter a lease agreement with Maritime until late 2005—see DOCUMENT 9 listed in Exhibit 2 hereto—and the other “lessees” did not enter agreements to lease or file lease applications until well after 2005). For example, the latest construction deadlines for stations of Call Sign WRV374 were in 2001, and the Call Sign KAE889 stations had even earlier construction and operation deadlines and Call Sign WHG750 even before that. Thus, any MCLM and EB assertions that “lessees” (Puget Sound, Pinnacle Wireless, Inc., Evergreen School District and Duquesne Light Company) are meeting the construction for the Stations is irrelevant, since the construction for the Stations had to have been met several years beforehand, and also since MCLM and EB admit that none of the alleged lessees is operating any of the authorized, licensed Stations on the Licenses.

The entities that are alleged to leasing Maritime’s site-based licensed spectrum (the “Lessees”) are not operating the authorized license station location, but instead are allegedly operating at other site locations as “fill-in” stations (as shown above, there are no actual leases filed with the FCC for many of the Stations)(As shown above, there are no leases for the

majority of the Stations). However, in a Commission Memorandum Opinion and Order,<sup>11</sup> FCC 10-39, released March 16, 2010, the Commission made clear that fill-in stations cannot substitute for the licensed, authorized station. Footnote 48 of the Chicago Order states [emphasis added]:

See, e.g., National Ready Mixed Concrete Co., Memorandum Opinion and Order, 23 FCC Rcd 5250, 5253-54 ¶ 11 (2008). That Mobex operated a fill-in site at another location in Chicago, see Modification Order, 20 FCC Rcd at 17961 ¶ 5, does not satisfy the requirement that the licensed site remain in operation. Whether a facility is in operation is determined with respect to the licensed site; operation of fill-in sites does not render operative an inactive licensed transmitter. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order, WT Docket No. 96-18, 14 FCC Rcd 10030, 10055 ¶ 35 (1999).

Thus, any operation by the Lessees of any stations other than the authorized, licensed site does not render the license operative.

Also, Maritime has already admitted in the hearing in response to interrogatories and other pleadings that it, as the licensee, has not operated any of its stations since at least 2007,<sup>12/13</sup> and in the proceeding regarding Maritime's refund request of USF fees paid by Mobex,<sup>14</sup> John Reardon informed the FCC that during 2003-2005 period Watercom lost its customers to

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<sup>11</sup> *Memorandum Opinion and Order*, FCC 10-39, released March 16, 2010, 25 *FCC Rcd* 3390 (the "Chicago Order").

<sup>12</sup> See e.g., Maritime Communications/Land Mobile LLC's Reply to Enforcement Bureau's Objection to Maritime's First Draft Glossary, filed August 28, 2012 in Docket No. 11-71, at page 4, where it states, "Maritime has candidly stated that it has not provided AMTS service directly to end users from any of its incumbent stations since 2007...."

<sup>13</sup> Also, see e.g., Maritime's *Report Per Order FCC 12M-36*, filed August 6, 2012 in Docket No. 11-71, at its pages 1-2, where it states, "As explained in the interrogatory responses, due to a combination of changes in the industry and severe financial hardship, Maritime has not provided AMTS services pursuant to any of its incumbent (site-based) licenses since December 2007...."

<sup>14</sup> See *Petition for Reconsideration* by Maritime Communications/Land Mobile LLC filed September 25, 2008 in WC Docket No. 06-122 regarding Maritime's request for a refund of over \$1 million in fees paid by Mobex to Universal Service Administrative Company for Universal Service Fund fees. (the "Maritime Refund Proceeding" or "USF Refund Proceeding")

cellular and took their operations down.<sup>15</sup> Maritime's broker for sale of its licenses, Spectrum Bridge, Inc. also stated in a fair market valuation for SCRRA that most AMTS incumbent stations had become "dormant" (see Exhibit O.1 hereto). Thus, there is evidence in dispute as to when the Maritime AMTS site-based licenses (assuming they were timely and properly constructed) actually ceased operations. The facts presented herein and previously in this proceeding by Petitioner and the Skytel companies show that the Maritime site-based AMTS licenses have not been in operation for a period of between 6-10 years, and possibly longer (and that is assuming the licenses were even constructed timely and properly in the first place, and there are facts in the proceeding showing otherwise).

In addition, the licenses are CMRS regulatory status, while the lessees are operating as PMRS: the spectrum is used solely for their own internal purposes and does not meet the requirements of CMRS under §20.3 or §20.9(a), including provided for a profit, interconnected service, and available to the public (in order not to operate as CMRS, an AMTS licensee must file an application under §20.9(b) and have it approved by the FCC. Maritime has not filed and gotten approved any §20.9(b) application for its site-based AMTS licenses). Thus, any use by the lessees cannot count toward the licenses' construction and operation since they are not providing the only service authorized by the licenses, CMRS service.

Moreover, as explained above, since Maritime has not provided its site-based AMTS stations' actual operating parameters (see e.g. Exhibit 3 and FCC ULS records—no reports of construction with showings ever filed), it means that Maritime has no way to tell a lessee of exactly where the lessee can legally operate, since without knowing what it actually constructed and is operating since the construction deadline, the lessee cannot determine the licensed station's actual service area or ERP, and therefore, where or at what actual ERP the

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<sup>15</sup> See *Letter* from John Reardon, President of Maritime Communications/Land Mobile LLC to Jeffrey A. Mitchell, Associate General Counsel, Universal Service Administrative Company dated August 14, 2006, at its page 3, complete paragraphs 1, 3 and 4. Exhibit M.1. hereto.

lessee can operate its own station(s), and still be within the site-based license's actual service area. For example, given the number of stations being operated by Pinnacle Wireless in New Jersey and Duquesne Light Company in Pennsylvania, it is very unlikely that their operations at “fill-in” sites are fully encompassed within the actual service areas of the license’s authorized station location(s) (Of course, the actual service area of the authorized station locations cannot be determined since Maritime has never provided to the FCC its actual station technical parameters—i.e. what it built at the construction deadline, or at most, what it had constructed, if anything, by the time of the FCC’s freeze of incumbent licensing in November 2000).

Regarding lessee Duquesne, in Duquesne Light Company’s Answers to Enforcement Bureau’s First Set of Interrogatories, filed August 27, 2012, in Docket No. 11-71, Duquesne Light Company admits that it did not construct or operate the Maritime authorized station site at Hookstown, PA, but constructed its own sites (see Duquesne’s Answer to interrogatory 1. at page 2 of its Answers, and its answers to interrogatories 7. and 8. at page 5 of its Answers). The Hookstown, PA station had to be constructed over a decade ago. Duquesne admitted that the sites it is operating were not built and operated until middle of 2010 (see Duquesne’s answer to interrogatory 5. and 6. at pages 4 and 5 of its Answers). Per the facts and admissions by Maritime in Maritime Refund Proceeding, Maritime (and John Reardon) have admitted that Watercom took down its operations at least 5 years before Duquesne constructed its stations and started operating them.

Further, as argued above, without Maritime providing its actual station technical parameters for WHG750, there is no way to know its authorized service area, and thus, no way for Duquesne to know in what area it can operate its stations. In fact, given the number of stations that Duquesne is operating, it is very unlikely that it is operating entirely within Maritime’s authorized, license service territory, even assuming that WHG750 was properly constructed and kept in permanent operation (which it was not). Thus, it is very likely that

Duquesne is currently operating on geographic license spectrum that belongs to Verde Systems LLC and Skybridge Spectrum Foundation.

Regarding Pinnacle Wireless, see the above Maritime admissions in Docket No. 11-71 that Maritime is not operating the authorized station license sites, at least since 2007 (Exhibit G.1 hereto also shows that Maritime has not paid site rents for years, and Maritime has been sued by tower companies, including American Tower Corporation for nonpayment of site rents since 2005-2006 time period). Thus, Pinnacle Wireless is operating stations on a “fill-in” station basis. For the reasons already given above, these Pinnacle fill-in stations do not meet the requirements for the licensed site to be in operation, and Pinnacle cannot even know where and what it can operate since MCLM has never provided its actual station technical parameters to the FCC (Maritime cannot on the one hand provide those details to Pinnacle, yet on the other hand withhold them from the FCC and from geographic licensees requesting them under Section 80.385(b) and the FCC’s Two Orders, DA 10-664 and DA 09-793, as explained in this Response.). ULS records also show that Maritime did not file a lease notification application with Pinnacle until 2009, many years after the subject stations had already been discontinued by Mobex and then Maritime, even assuming they were timely and properly constructed by the construction deadline (see the chart at Exhibit 2 hereto that shows the first lease application with Pinnacle was filed with the FCC in 2009 ) (leases must be notified to the FCC by filing the appropriate application via ULS).

Furthermore, in order to operate so many stations, Pinnacle is probably relying on an asserted service contour from the WRV374, Station 33, World Trade Center, which was destroyed on 9/11/01, over 12 years ago. Maritime never sought permission from the FCC to discontinue this station or to get another replacement station authorized to maintain any “footprint” created by this World Trade Center station. Also, any fill-in station constructed at another location did not meet the requirements for the World Trade Center licensed station

location, as explained above, and in order to do so would have required submission of a modification application, or a new site application, and approval by the FCC, since per public coast AMTS rules, any change in station location was a major modification, see §1.929 and §1.947. Maritime, nor its predecessors, ever submitted such an application.

Pinnacle filed certain facts with the FCC regarding its lease of the spectrum under site-based stations of WRV374 and its operation of its own station locations, on a “fill-in” basis, however, it filed all of those facts confidentially with the FCC, which as explained in this Response, cannot all be confidential or highly confidential (the construction and operation status of AMTS site-based stations is not confidential—see e.g. the Exhibit I.1 hereto that shows the Wireless Bureau does not consider construction and operation information confidential), and thus was impermissibly withheld from Havens and the SkyTel entities. Thus, the FCC Enforcement Bureau and Maritime cannot rely on any facts from Pinnacle to support their Joint Motion (and Joint Response).

Regarding the stations leased to Puget Sound Energy in Washington and Oregon, the same facts discussed above regarding failure to meet the construction-coverage and operational requirements for AMTS site-based stations apply. In addition, see the facts below, including from the David Predmore-produced documents and Predmore deposition transcript,<sup>16</sup> that indicate that the Washington and Oregon stations being leased were not in service (no customers and not generating revenues since possibly as far back as 2002, if not before). Also, Puget Sound Energy, Inc. stated in its answers to Enforcement Bureau interrogatories<sup>17</sup> that it was operating as PMRS (see page 1 of the PSE Answers and its response to interrogatory 1.), thus, any PMRS

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<sup>16</sup> See Exhibit L.1 hereto that was provided by Predmore in his deposition, and David Predmore’s deposition testimony contained at Exhibit 1 to Havens’s first Opposition to Motion for Summary Decision filed on 5/22/13 in Docket No. 11-71 ”) (the “Predmore Transcript” or “Predmore Depo”)(the “Havens First Opp to MSD).

<sup>17</sup> See Puget Sound Energy, Inc.’s Answers of Puget Sound Energy, Inc. to the Enforcement Bureau’s First Set of Interrogatories, filed August 29, 2012 in Docket No. 11-71. (the “PSE Answers”)

operations it may conduct under the station licenses do not fulfill the CMRS requirements of the KAE889 license with a regulatory status of CMRS (in order not to operate as CMRS, an AMTS licensee must file an application under §20.9(b) and have it approved by the FCC. Maritime has not filed and gotten approved any §20.9(b) application for its site-based AMTS licenses).

More importantly, Puget Sound stated in its PSE Answers that as of the filing of the PSE Answers it had not yet activated its “own radio facilities under the Spectrum Manager Lease Agreement.” (Answer to interrogatory 1, page 5 of PSE). Thus, as recently as August 2012, Puget Sound Energy was not operating Maritime’s Washington and Oregon stations that Maritime seeks to keep by its motion. In its response to interrogatory 3., Puget Sound Energy stated that it had no direct knowledge of whether “there is currently a facility constructed at each of the five (5) locations on Call Sign KAE889 for which PSEI has a Spectrum Manager Lease from Maritime”, and that it had only observed “Maritime facilities operating at each of these locations” in late August 2011, (PSE Answers at page 7); however, in its answer to interrogatory 6., Puget Sound Energy stated that it had no direct knowledge of when the 5 station locations were placed into operation (e.g., whether they were in operation prior to late August 2010 or for what period of time), or whether the stations were in operation at the time it entered its lease or constructed at the time of the lease (see PSE Answers at page 8 and page 9, respectively). Puget Sound Energy also admitted that it did not verify whether the 5 stations were constructed in accordance with FCC rules for the station licenses, including regarding coordinate location, antenna height, and other technical requirements (see PSE Answers at page 10, answers to interrogatory 10. and 11.).

Thus, there is nothing to support that the Maritime lease with Puget Sound is evidence of construction and operation of the subject station licenses. In fact, by Maritime’s and Puget Sound Energy’s own admissions neither of them is operating the subject site-based station

licenses (Maritime since at least 2007, but evidence indicates well before then, and Puget Sound never).

10. Unlawful PMRS:  
The Alleged Lease (or Other) Usage is Solely PMRS, but Without the  
Required Submitted and Granted Application Therefore Under Rule §20.9(b):  
Any Use is Thus Unlawful.

This rule requires that any AMTS spectrum used for PMRS must apply for it and get FCC approval. There is no exception for an application to lease spectrum as opposed to an application for new or assigned spectrum. For this reason alone, the Maritime-EB asserted spectrum uses by alleged lessees of Maritime (that have no FCC approved Leases, but for Evergreen) are unlawful, and do not count toward permanent operation.

11. Auto Termination for Failure to Get Discontinuance-Resumption Authority:  
Discontinuance and Any Resumption of AMTS Public Coast PMRS Station  
Operations-Service Requires FCC Approval and Has No Grace Period:  
The Stations Auto Terminated for Failures Thereof.

Contrary to the MCLM and FCC EB assertions in the Joint Response (and Joint Motion), that there is no rule on permanent discontinuance for AMTS, there is no grace period for AMTS stations operated as PMRS to be off the air. See Section 80.471:

§ 80.471 Discontinuance or impairment of service.

Except as specified in § 20.15(b)(3) of this chapter with respect to commercial mobile radio service providers, a public coast station must not discontinue or impair service unless authorized to do so by the Commission.

The exception applies only to CMRS operations. Maritime and its predecessors never constructed the Stations as CMRS. There is no construction report at all for the subject stations on FCC ULS records, and the FCC's "audit" in year 2004 also revealed that the FCC has no such notifications (and the required construction-coverage showings that go with such notifications). Rule Section 80.49 requires a report of construction. This failure alone should be deemed an admission of lack of timely and proper construction, and of lack of CMRS operation. If there was any operation, it can only be deemed to be a type of token transmission of signals, or some

PMRS use. Also, see the Maritime USF Refund Request proceeding, in which MCLM argued that its AMTS licenses are operated as PMRS and, therefore, that it was entitled to a refund.<sup>18</sup> MCLM also admitted in that proceeding that it, and its predecessors, took down all interconnection lines (interconnect is required for CMRS), and argued that the service they were providing was PMRS, not CMRS. In this proceeding, Maritime has asserted that the Stations were in operation up to some point after they were purchased, ceasing no later than a time in year 2007.<sup>19</sup> However, any discontinuance of AMTS Public Coast, PMRS station operation was subject to Rule Section 80.471, for which forbearance under the CMRS-Forbearance ruling does not apply. Thus, Maritime was required to submit to the FCC an application for authority to discontinue, and to be permitted to resume operations and retain the licenses, under a proposal in the application. There is no grace period for discontinuance under this rule, rather, the licensee must obtain grant of such an application to be off the air and to resume, absent which the license authority terminates.

The Joint Response's statement that "the length of the discontinuance is essentially defined by the period of the lease agreements" is entirely false and misleading, as shown by the facts in FCC ULS records and MCLM's own admissions in the hearing in Docket No. 11-71, and in facts presented by Petitioner and the SkyTel companies in this proceeding, including in the section below, and in challenges before the FCC Wireless Telecommunication Bureau and the Commission. The Stations, even assuming they were timely and properly constructed and put into service, were discontinued before any leases were filed with FCC. MCLM, itself, has stated

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<sup>18</sup> See *Petition for Reconsideration* by Maritime Communications/Land Mobile LLC filed September 25, 2008 in WC Docket No. 06-122 regarding Maritime's request for a refund of over \$1 million in fees paid by Mobex to Universal Service Administrative Company for Universal Service Fund fees. (the "Maritime Refund Proceeding" or "USF Refund Proceeding")

<sup>19</sup> See e.g., Maritime Communications/Land Mobile LLC's Reply to Enforcement Bureau's Objection to Maritime's First Draft Glossary, filed August 28, 2012 in Docket No. 11-71, at page 4, where it states, "Maritime has candidly stated that it has not provided AMTS service directly to end users from any of its incumbent stations since 2007...."

in the proceeding that, at minimum, it has ceased all operations as of a time in 2007. Exhibit 2 hereto shows that all of the lease applications that were submitted by MCLM were submitted well after 2007. In addition, MCLM stated in the USF Refund Proceeding that it stopped operations (service to customers) at most of its stations in the 2002-2003 time period. Further, David Predmore's testimony and documents in the New Jersey antitrust case, Havens v. Mobex (copies of which were produced and filed in this proceeding, including with Petitioner's December 16, 2013 opposition to the Joint Motion), show that many of the Stations never had any customers at all (not revenue generating) and were constructed with only token license holder equipment, that could provide no real service (see e.g. Exhibit L.1 hereto that was provided by Predmore in his deposition, and David Predmore's deposition testimony (contained at Exhibit 1 to Havens's first Opposition to Motion for Summary Decision filed on 5/22/13 in Docket No. 11-71 (the "Havens First Opp to MSD"))(the "Predmore Depo").

[12. No Operations-Service without Construction Proof and Filings.  
There Can Be No Lawful Operations or Use Absent Proof of Lawful Construction.  
And Unlawful Spoilage of Evidence Thereof, Supported Maritime Counsel \(and Subject  
to the Attorney-Client Privilege Crime Exception\) Requires Investigation and Sanctions](#)

As indicated above, there is no required construction-coverage reports for the subject Maritime Stations and licenses. Instead, Maritime in this proceeding and before the Wireless Bureau has take the position that it placed or left the records of the Stations, allegedly constructed by its predecessors, into storage and they were destroyed. Later, Petitioner and his SkyTel companies found these and made them available to the ALJ and EB, repeatedly, to no avail. In any case, Maritime has access to these, via the Bankruptcy proceeding. Even with these records, Maritime has failed to demonstrate any actual required construction and/ or construction-coverage.

Without that, no operation is lawful, since without that, the licenses and Station automatically terminated, or should be deemed automatically terminated. AMTS licensees must keep station logs. See rule §80.409.

See Sections 7, 8 and 9 above. As stated above, there are no reports of construction under the subject Maritime licenses on FCC ULS. Maritime, nor its predecessors, have not provided to the FCC their actual, constructed station technical parameters at the time of each license's or station's construction deadline and have not filed any showings of coverage based on those actual station technical parameters. And, as shown at Section 14 below, Maritime refuses to provide its actual station technical parameters.

Regarding the Joint Response's reference to *In the Matter of Applications of Northeast Utilities Service Co.*, 24 FCC Red 3310 (WTB 2009), Exhibit I.1. hereto contains a copy of the FCC Wireless Telecommunications Bureau's letter under Section 308 to Paging Systems, Inc. (the "NY 308 Letter"). The NY 308 Letter seeks from Paging Systems, Inc. records showing construction and operation of its AMTS station license, Call Sign WQA216. This letter was issued by the Wireless Bureau after the FCC Order, *In the Matter of Applications of Northeast Utilities Service Co.*, 24 FCC Red 3310 (WTB 2009) was issued, and while Havens's and the SkyTel entities' appeal of said Order was still pending. Havens and Skytel had presented in their challenge and appeals evidence from site authorities and other sources that Paging Systems, Inc. had not constructed or operated on the World Trade Center. Regardless of *In the Matter of Applications of Northeast Utilities Service Co.*, once the Wireless Telecommunications Bureau was shown evidence of actual non-construction and operation, then the Wireless Telecommunications Bureau issued a letter under Section 308. In the instant case the Enforcement Bureau did not go get evidence on construction and operation. It did not subpoena site owners. It did not require equipment purchase or installation records. Havens and the Skytel entities challenged for years the Maritime site-based AMTS licenses as not being constructed.

Any prior Wireless Bureau decisions on the Maritime site-based AMTS licenses did not involve fact finding, but now in the hearing construction and operation of those licenses are issues, and there are facts indicating no construction and operation. In any case, the Wireless Bureau never did fact finding or got third party documents, and nor has the FCC Enforcement Bureau. Thus, the facts and circumstances test cannot be applied in this case, because the facts are still missing.

The NY 308 Letter shows that the Wireless Bureau effectively backtracked on its position in In the Matter of Applications of Northeast Utilities Service Co., that Paging Systems, Inc. had not permanently discontinued, and found sufficient basis to further investigate and request various records regarding the construction and operational status of WQA216, including information regarding discontinuance of the license's operations and the period of time of any such discontinuance. As in that case, there are sufficient facts in the instant case to call into question the construction and operational status of Maritime's site-based AMTS licenses, including the 16 Stations that it seeks to keep. There is also sufficient evidence to seriously call into question Maritime's representations and candor regarding the construction and operation of its site-based AMTS licenses given its past history and the findings already in the FCC's HDO, FCC 11-64. Clearly, at minimum, additional fact finding is merited, including, but not limited to, issuing subpoenas to site owners and other third parties with relevant information regarding the construction and operational status of the 16 stations, and conducting station site visits.

See Exhibit K.1. hereto that contains copies of Maritime's station activation notices for its WRV374 stations. Most of the activation notices for call signs KAE889 and WRV374 did not report any actual construction, but stated only that they will activate the station to begin tests to commence service, on or about a certain date. There is no language in the "activation" notices that clearly stated the station had been constructed, was providing the required coverage and continuity of service along the waterway, and was providing service to customers (which is required of CMRS licenses). Thus, the activation notices are not evidence of construction of

Maritime's site-based AMTS licenses, including the 16 Stations it seeks to keep, but, at most, a notice of intent to commence testing.

Further, the activation notices did not list the station's actual constructed technical parameters, such as power output, antenna directionality and gain, final mounted antenna height, system losses, actual ERP, etc., all of which are needed to determine the station's actual service contour and thus the area being covered. As explained above, the FCC has stated that AMTS site-based license's coverage is based on actual station parameters and actual effective radiated power, not theoretical parameters and theoretical effective radiated power.

Exhibits 1 and 2 of Havens First Opp to MSD (the Predmore Transcript and the Predmore-produced documents, respectively) show that many of the 16 Stations that Maritime seeks to keep have had no customers (not in service), are not generating revenues, and had only "license holder" equipment, which indicates token construction that did not meet the coverage-construction requirements for AMTS site-based licenses (if the purpose of the equipment was to solely "hold the license", then it was not providing service to customers, and thus not properly constructed (capable of providing service) or in operation providing service—which are required of CMRS licenses).

See Exhibit 2 of Havens First Opp to MSD at the pages labeled Predmore316-Predmore332 and Exhibit L.1. hereto that contains the just noted pages, that contain the chart of Maritime's site-based AMTS stations, including the 16 stations, on which most of Maritime's site-based stations are listed as not revenue generating and with an equipment purpose of "license holder". Predmore testified to this chart in Predmore Transcript which is contained at Exhibit 1 of Havens First Opp to MSD, see in particular pages 171, lines 19-25, and page 172, lines 1-7. In particular, the following stations of the 16 Stations are listed on this chart as not revenue generating (i.e. no customers and not service) (per the Predmore deposition testimony

non-revenue generating meant the station did not have any customers—thus not in service)

and/or listed with “license holder” equipment:

WRV374: Station 14, Selden, NY (not revenue generating & license holder)  
WRV374: Station 16, Allentown, PA (not revenue generating & license holder)  
WRV374: Station 33, One World Trade Center, NY (not even on chart)  
WRV374: Station 35, Rehoboth, MA (not revenue generating & license holder)  
KAE889: Station 3, Camas, WA (Livingston Peak) (not revenue generating)  
KAE889, Station 4: Rainier, WA (not revenue generating)  
KAE889, Station 13: Portland, OR (not revenue generating)  
KAE889: Station 20, Orcas Island, WA (Mt. Constitution) (not revenue generating)  
KAE889: Station 30, Bremerton, WA (Gold Mountain) (not revenue generating)  
KAE889: Station 34, Olympia, WA (Capital Peak) (not revenue generating)  
KAE889, Station 48: Seattle, WA (Tiger Mountain) (not revenue generating)

And, see Exhibit 1 of Havens First Opp to MSD, the Predmore Transcript, at page 186, lines 2-25, and page 187, lines 1-8 regarding non-revenue generating meaning a station had no customers; and at page 184, lines 20-25, page 185, lines 1-25, page 186, line 1, regarding license holders. Also, see the just noted Predmore Transcript at page 187, lines 9-15, regarding the chart of stations covering a time period no earlier than 2002, which shows that most of the Maritime AMTS site-based stations did not generate revenues and did not have customers, and had at best “license holder” equipment (i.e. token construction), since 2002! Thus, the stations have not been operated and in service since well before 2007, when Maritime claims it stopped operating the stations, and well before it entered into any leases for the 16 Stations. Mr. Predmore was an officer of Mobex and its last executive officer.

Also, see Exhibit J.1. hereto that is a Mobex UCC filing that contains a similar list of Maritime’s site-based AMTS license stations, including the 16 stations, in which most of the stations are listed as not generating revenues and with “license holder” as equipment.

The above is clear evidence of token construction at best, non-operation (no service to customers), and warehousing by Maritime (and its predecessors) of the site-based AMTS station licenses, including the majority of the 16 stations that Maritime seeks to keep.

See Exhibits H.1. and H.2. that contain copies of the FCC's Public Safety and Critical Infrastructure Division 2004 AMTS "audit" letters. By these letters, the Division did not conduct any fact finding regarding the construction and operational status of the site-based AMTS licenses (e.g., require evidence of construction such as site leases, equipment purchase records, equipment installation records, site lease payments, customer records, etc.). These letters only asked for the licensees to enter in a date for when construction was completed or a "yes" or "no" answer. It was not a construction audit in the real sense of the word "audit". Thus, these 2004 AMTS "audit" letters are not evidence or confirmation of construction of the stations and cannot be relied upon. Exhibit I.1. hereto contains a copy of the FCC Wireless Telecommunications Bureau's letter under Section 308 to Paging Systems, Inc. (the "NY 308 Letter") that shows the type of records and fact finding the Wireless Bureau conducts when doing a true audit of the construction and operational status of a license: see in particular the record requests to Paging Systems under the sections "Construction" and "Operation".

In addition, Maritime's predecessor, Mobex, filed Form 499-A reports, under penalty of perjury, with the FCC show lack of operation of Maritime's New York and New Jersey stations, as well as others, and further support permanent discontinuance as to WRV374, stations 14, 15, 18, 25, 33, 35, and 40. At minimum, the Forms 499-A at Exhibit C.1. hereto call into question the operational status of the New York and New Jersey stations of the Stations going back over 10 years, and whether or not they were constructed (CMRS construction required service to customers and the Forms 499-A show that there was no service to customers). In specific, Mobex stated in the Forms 499-A contained at Exhibit C.1. hereto that it was not providing any telecommunications service in several of the states where Maritime holds site-based AMTS licenses, including for some of the subject Stations, as shown below.<sup>20</sup> These forms were filed at a time when all of Maritime's site-based AMTS licenses had to have been constructed and in

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<sup>20</sup> See Mobex's 2003 Form 499-A, Exhibit C.1 at p. 3.

operation. The following states were not listed as jurisdictions in which Mobex had been or *would be* providing telecommunications service for the “past 15 months” or next 12 months”:

<b>State</b>	<b>Call Sign and Station</b>
Connecticut	WRV374-40
Massachusetts	WRV374-35
New Jersey	WRV374-15, -25
New York	WRV374-14, -18, -33

Thus, the 2003 Mobex Form 499-A is evidence of non-construction and non-operation of the above noted WRV374 stations.

For just the above reasons, the Joint Motion (and the Joint Response) cannot be granted, because the issue of license construction and coverage must be resolved, before proceeding to consider any issue of permanent discontinuance.

[13. No Coverage:  
Auto Termination for Failure of System Coverage-Operation-Service](#)

See Exhibit 1 that contains a memo of authorities regarding construction and operation for AMTS. This Exhibit 1 is fully referenced and incorporated herein. It was also previously filed in this proceeding.

Also, see Sections 2, 7, 8, 9, 10, 11 and 12 above that contain facts and arguments relevant to coverage and auto-termination. Also, see Section 14 below also, regarding Section 80.475(a), no FCC engineering, and Maritime not providing its actual station technical parameters to ever determine if it met the requirements of Section 80.475(a)(1999) to keep the subject licenses in the first place.

As stated above, to determine if the coverage and construction requirements were met requires looking at all of Maritime’s site-based AMTS stations along the applicant-defined

waterway (coastline or inland waterway), since AMTS was for a system of stations along a waterway (covering 60% of waterway, or 100% if an inland waterway less than 150 miles long), and not isolated groups of stations (along less than the 100% or 60%, just noted) or a single-site station. Thus, the FCC EB-MCLM cannot assert that the 16 Stations were timely constructed and in operation without considering the construction status and coverage provided by the other stations that were part of the entire licensed system of stations in which any of the 16 Stations existed. Thus, since the FCC Enforcement Bureau and Maritime are not providing evidence regarding the construction and coverage of the other component, Maritime site-based AMTS stations that were part of the AMTS license systems that included the 16 Stations subject of the Joint Motion, then it is not possible to determine that the 16 Stations met the AMTS construction-coverage and continuity of service requirements, including former §80.475(a) (1999).<sup>21</sup>

Furthermore, the Enforcement Bureau and Maritime have not shown that Maritime's site-based, AMTS licensed stations ever provided the required construction-coverage and continuity of service by their construction deadlines, using their actual station technical parameters. In fact, Maritime has repeatedly refused to provided its actual station technical parameters to Havens and the SkyTel entities on numerous occasions by refusing to respond to requests under §80.385(b) and the FCC's two Orders (see Exhibit 3 hereto).

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<sup>21</sup> The FCC has decided that even a small gap in contiguous coverage is failure under §80.475(a), even if harsh. For example, from *DA 01-2359*, 16 FCC Rcd 18046 (2001):

Havens's applications for AMTS ... to serve 236 miles, or 55.5 percent, of the 425-mile Trinity River....The Division rejected this... because ... did not propose 60 percent coverage.... consistent with the purpose of Section 80.475(a). That the rule may in some cases have what might be considered harsh results does not render it invalid, or the Division's interpretation of it incorrect.

Also, see the Havens December 16, 2013 opposition to the Joint Motion at its Section 7 “Additional material facts in dispute” (pages 76-87) that goes through each of the construction-coverage defects that the Stations suffer, including under former Section 80.475(a) (1999).

14. Violation of Fundamental AMTS Operating Requirements  
Under §§80.385(b) and 80.70, and Associated Orders Imposed on Maritime:  
Further Demonstrate Lack of Actual Construction-Coverage-Operation-Service, and Unlawful  
Alleged Spectrum Uses. Unclean Hands.

Rule Section 80.385(b) and two Wireless Bureau decisions<sup>22</sup> make clear that Maritime must provide to the co-channel geographic licensee, which are among “SkyTel” companies managed by Petitioner, the station technical parameters by which both Maritime and the co-channel licensee can calculate the lawful service-coverage area of the Maritime Stations, including the 16 Stations. However, after repeated written requests, in compliance with these Two Orders, Maritime has failed to provide this information based upon which the Stations’ service contours, and factual existence, are asserted and defined. See e.g. Exhibit 4(a) to the Second Amended Complaint of Petitioner and SkyTel companies in the case of Havens v. Mobex, in the US District Court, for the District of New Jersey, Case No. 2:11-cv-00993-KSH-CLW, a copy of which is attached hereto as Exhibit 3.

Because Maritime failed to comply with this essential rule, it is not possible to grant its and the EB Joint Motion, including since a decision cannot be made on the construction and operational status of the Stations without MCLM ever providing its actual, constructed station technical parameters. Those fundamental station technical parameters are the foundation for determining whether a station met the construction-coverage requirements of AMTS and for determining the area in which the licensee, or a lessee, can operate with a station. Any decision

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<sup>22</sup> *Letter Order, re Request by Maritime Communications/Land Mobile, LLC for clarification of Sections 80.385 and 80.215 of the Commission’s Rules, DA 09-793, Dated April 8, 2009, 24 FCC Rcd 4135, and (2) Order on Reconsideration (of DA 09-793), DA 10-664, Rel. April 19, 2010, 25 FCC Rcd 3805 (together, the “Two Orders”).*

made on the Stations, without knowing their actual, constructed technical parameters (at the time of their construction deadline and thereafter, is clearly defective.

Further, the FCC has never conducted any engineering studies to determine what coverage the Maritime site-based licenses ever provided, and Maritime has never provided its actual station technical parameters (what it may have actually constructed) for the FCC to have conducted such engineering studies to determine the site-based stations' actual coverage of the waterway (and overlapping coverage over the waterway with other stations in the AMTS system of stations) and continuity of service along it, as required by AMTS rules, including former §80.475(a) (1999).<sup>23/24</sup> See e.g., the FCC's response to FCC FOIA Control No. 2007-177, dated April 3, 2007, (Exhibit A.1 hereto) where in response to a FOIA Request by Intelligent Transportation & Monitoring Wireless LLC asking for all records of engineering employed by the FCC to "consider or determine coverage and other technical requirements" of site-based AMTS licenses, the FCC did not locate any records of any studies performed, but only found a report regarding potential AMTS interference to TV reception, and could not find any records identifying any FCC staff who performed engineering in connection with AMTS licensing.

In this case, the Enforcement Bureau and Maritime have not produced any engineering showings using the actual station technical parameters (which have also not been produced or

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<sup>23</sup> See Letter (Declaratory Ruling and Order), DA 09-793, Rel. April 8, 2009 that stated (emphasis added):

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).

<sup>24</sup> Havens and the SkyTel companies are appealing *In the Matter Paging Systems, Inc. and Maritime Communications/Land Mobile LLC*, 27 FCC Rcd 8028 (WTB 2012). Thus, the matters in that Order are not final, but subject to the pending appeal.

proven up) at the time of the relevant construction deadlines for each station, or at the time of the Commission's freeze on further site-based AMTS licensing in November 2000,<sup>25</sup> to show that the Maritime site-based AMTS licenses, including the Stations subject of Joint Motion, ever provided the required overlapping coverage over the applicant-defined waterway (coastline or inland waterway) and continuity of service under the former §80.475(a) (1999), the sine qua non AMTS rule, that was in effect at the time of the construction deadline for Maritime's site-based AMTS stations.

In addition, to determine if the coverage and construction requirements were met requires looking at all of Maritime's site-based AMTS stations along the applicant-defined waterway (coastline or inland waterway), since AMTS was for a system of stations along a waterway (covering 60% of waterway, or 100% if an inland waterway less than 150 miles long), and not isolated groups of stations (along less than the 100% or 60%, just noted) or a single-site station. Thus, the FCC EB-MCLM cannot assert that the 16 Stations were timely constructed and in operation without considering the construction status and coverage provided by the other stations that were part of the entire licensed system of stations in which any of the 16 Stations existed. Thus, since the FCC Enforcement Bureau and Maritime are not providing evidence regarding the construction and coverage of the other component, Maritime site-based AMTS stations that were part of the AMTS license systems that included the 16 Stations subject of the Joint Motion, then it is not possible to determine that the 16 Stations met the AMTS construction-coverage and continuity of service requirements, including former §80.475(a) (1999), and if they were providing the required AMTS service to customers.

Furthermore, the Enforcement Bureau and Maritime have not shown that Maritime's site-based, AMTS licensed stations ever provided the required construction-coverage and continuity

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<sup>25</sup> *In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, 4th R&O and 3rd FNPRM, FCC 00-370, ¶¶ 76, 77

of service by their construction deadlines, using their actual station technical parameters. In fact, Maritime has repeatedly refused to provide its actual station technical parameters to Havens and the SkyTel entities on numerous occasions by refusing to respond to requests under §80.385(b) and the FCC's two Orders (see Exhibit 3 hereto): the FCC has clearly stated that an AMTS station's service contours are not based on the maximum theoretical ERP, but on the station's actual technical operating parameters that the licensee actually constructed. See e.g., the FCC's two Orders, DA 09-793 and DA 10-664, that made this abundantly clear. Letter Order, DA 09-793 stated this at its ¶3:

Instead, we conclude that the Commission intended for an AMTS geographic licensee's obligation to provide co-channel interference protection to an incumbent site-based station to be based on the site-based station's actual operating parameters.

And that was upheld by Order on Reconsideration, DA 10-664, see e.g., its ¶6:

Maritime's observation regarding the absence of authorized ERP from AMTS licenses is correct, but does not require that we abandon the use of actual ERP for determining co-channel interference protection. Indeed, the Division directly addressed this issue, pointing out that AMTS site-based licensees are expected to cooperate with geographic licensees in avoiding and resolving interference issues, and that this obligation requires, at minimum, that the site-based licensee "provid[e] upon request sufficient information to enable geographic licensees to calculate the site-based station's protected contour.

And its ¶9:

We conclude that the Division properly interpreted Section 80.385(b)(1) as specifying that a geographic AMTS licensee locating a station within 120 kilometers of a co-channel site-based AMTS station must make a showing that at least 18 dB protection will be provided to the site-based station's predicted 38 dBu signal level contour, as determined by reference to the site-based station's actual operating ERP, rather than an assumed ERP of one thousand watts.

Without knowing Maritime's site-based AMTS stations' actual technical parameters (even assuming something was timely constructed) and conducting an engineering study to determine the stations' rule-based service contours, the Enforcement Bureau and Maritime

cannot show that the requirements of the former §80.475(a) (1999) were ever met and that all of the stations within the licensed system of stations met the AMTS construction and coverage requirements, and therefore, that any stations did not automatically terminate without specific action under §1.946(c) and §1.955(a)(2) for failure to meet said construction and service requirements under §80.49 and former §80.475(a) (1999). The same and similar facts and issues are pending in numerous proceedings still before the Wireless Telecommunications Bureau and FCC Commission, including in pending challenges regarding the renewal applications of Call Sign WRV374 (Atlantic Coast)(File No. 0004738157), the “Watercom” licenses, including WHG750 (File No. 0005531407), and Call sign KAE889 (File No. 0001768691).

[15. The Jefferson Radio Doctrine Bar Should Apply to Lawful Leases, And Must Apply to the Subject Unlawful Assignments of Spectrum Uses](#)

This doctrine reasonably construed cannot apply only to license assignments, to allow gain to the license assignee, but not to apply to provision of the license’s spectrum by unlawful means, and by that to achieve the same gain but by unlawful means. Herein, we show that Maritime has no FCC approved Leases (but for Evergreen) and otherwise is providing use of spectrum unlawfully: and that should be found to violate this doctrine, since Maritime is subject to the HDO, FCC 11-64 and the proceedings thereunder.

[16. Alleged Users Character and Fitness. Maritime’s Alleged Spectrum Users Including Pinnacle are Subject to Character and Fitness Qualifications. Pending Challenges. New Evidence of Fraud Pinnacle Admits in SEC Filings and Other Releases.](#)

See the Exhibit hereto with the chart: the item on Pinnacle’s SEC and other statements that admit to fraud (and that have resulted in various pending lawsuits).

[17. Additional Facts Regarding the Subject Stations: Maritime Alleged Facts, and Contrary Evidence \(in Addition to Preceding, with Some Reiteration\)](#)

As argued above, a motion for summary judgment of decision must be supported by a declaration or affidavit under penalty of perjury as to fact alleged and evidence presented. Maritime –EB failed to do so and thus their alleged facts and evidence lack foundation and must be rejected.

### 18. Additional Applicable Law and Argument

The following presents additional relevant law and arguments to what is presented in other sections herein, and also more fully presents some law and arguments indicated elsewhere herein.

*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), and any alleged operations (to assert lack of permanent discontinuance) are unlawful, including due to lack of licensed authority.*

Although the Enforcement Bureau and Maritime concede that the presiding officer “has not determined how to define the term ‘construction’” as it is used in 47 C.F.R. §§ 1.946, 1.955, 80.49, “neither the Bureau nor Maritime believes that the term ‘construction’ must be further defined to resolve” Issue G. Joint Motion, at 5 ¶ 8. Despite offering no guidance of its own regarding the definition of pivotal legal terms (aside from belittling and mischaracterizing previous legal positions adopted by Havens), see *id.* at 6-7 ¶¶ 9-10, the Joint Motion asserts that summary decision is an appropriate vehicle for resolving the purely legal question of whether 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 equipment 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. 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.*

Licenseses 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.”

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.” (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. 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 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.

Automatic termination of Maritime's licenses leaves the Enforcement Bureau no room to negotiate away this legal consequence through any purported settlement: the Joint Motion, which the Joint Response seeks to salvage, is by content a request to approve a stipulated 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 action,” upon expiration absent “timely application for renewal,” for “[f]ailure to meet construction or coverage requirements,” or “if service is permanently discontinued.”

Again, any default by Maritime under 47 C.F.R. §§ 1.946(c), 1.955(a), or 80.49(a) for failure to construct or to meet coverage or substantial service obligations automatically terminates Maritime’s licenses, without specific Commission action. These self-executing legal standards, codified by the Commission’s Rules, preclude any attempt by the Enforcement Bureau to exercise discretion it does not have, to revive by putative settlement licenses that have “automatically terminate[d], without specific Commission action,” if Maritime has operated its licenses in variance with those sections of the Commission’s Rules. In other words, if the facts demonstrate failure to construct or cover on a timely basis (including failure to satisfy continuity-of-service obligations attaching to site-based AMTS licenses issued under the authority of the pre-2002 version of 47 C.F.R. § 80.475(a)), or permanent discontinuance of service, then no act by any party, including the Bureau, whether couched as a proposed consent order or as a motion for summary decision, can revive those automatically terminated licenses. This limit on the Commission’s authority likewise precludes the grant of Second Thursday relief and the ensuing transfer of licenses for the benefit of innocent creditors. Automatically terminated licenses are just that, terminated.

The hearing designation order in FCC 11-64, having triggered inquiries into Maritime’s truthfulness, candor, and fitness to be a licensee and into Maritime’s compliance with the construction, coverage, and service requirements of 47 C.F.R. §§ 1.955(a), 80.49(a), cannot now

be halted by the Bureau's abdication of its responsibilities. A line of federal court cases illustrates how the "automatic termination" provisions impose a hard limit on the Commission's "exercise of enforcement power," in the form of firm constraints on this "agency's power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985); see also *id.* 833 n.4 (condemning agency action "that is so extreme as to amount to an abdication of ... statutory responsibilities").

Once the Commission designated Maritime's licenses for hearing and included Issue G within the scope of the HDO, this decision triggered a corresponding responsibility to answer hard questions — leading, if the facts so inexorably dictated, to automatic termination of Maritime's licenses — and above all not to retreat by attempting a settlement like that proposed in the Joint Motion. Although an agency "does not automatically have to reach every issue whose importance it ha[s] noted," it "must provide an acceptable explanation for [a] decision" to decline resolution of that issue through adjudication. *MCI Telephone Corp. v. FCC*, 917 F.2d 30, 41 (D.C. Cir. 1990). The inquiry into Issue G has generated a material issue of fact that, once established, would dictate the automatic termination of Maritime's licenses for failure to comply with sections 1.955(a) and/or 80.49(a) of the Commission's Rules. Having reviewed this evidence, and "having before it" the presiding officer's partial denial of Maritime's first and second motions for summary decision, the Enforcement Bureau cannot "at [this] point change its mind, wiping out the hearing" into Issue G "as though it had never [begun], and in effect decide that it will not enter upon a hearing." *Minneapolis Gas Co. v. Federal Power Comm'n*, 294 F.2d 212, 215 (D.C. Cir. 1961); accord *MCI*, 917 F.2d at 42. The Bureau's bid to settle Issue G by filing a Joint Motion with Maritime remains subject to the "automatic termination" standard set by those sections of the Commission's Rules cited in Issue G and by the designation of this matter for hearing. See *Port of Seattle v. FERC*, 499 F.3d 1016, 1026-27 (9th Cir. 2007).

#### [19. Additional Procedural Issues](#)

#### A. Petitioner's Pro Se Status Should Bar, or Weigh Against Grant of the Joint Motion

Grant of the Joint Motion would be counter to the Judge's prior rulings and the Commission's policy to forego summary decision in cases of pro se litigants.<sup>26</sup>

#### B. Summary Decision is Improper When the Matter Involves New and Novel, or Unsettled Issues of Law<sup>27</sup>

In M9 the judge permitted Maritime and EB to submit certain legal arguments. The Joint Response asserted that there is no standard in AMTS rules and orders regarding what constitutes permanent discontinuance, but it is solely on a vague, not-defined, unsettled, case-by-case basis, which is tantamount to saying there is no standard at all, and it up to the ALJ to engage in rule making or the like. Beyond even that unsettlement law, the Joint Response further presents new and novel situations, when the actual factual assertions of Maritime-EB as presented herein are considered. These include assertions of non permanent discontinuance, employing said unsettled, undefined case-by-case analysis, in this case of (i) alleged leases and use of spectrum thereunder, but with no FCC approved Leases on ULS; (ii) use of AMTS solely for PMRS purposes, but with no authority to do so under rule §20.9(b), (iii) assertions of compliance with the most fundamental of FCC spectrum rules (minimum construction-coverage-operation-service) but by use of alleged secret information withheld from the only challenging party, Petitioner; (iv) complete lack of the required wide-area system continuous coverage (required under §80.474(a) (1999) for all site-based AMTS licenses systems, where only systems were licensed, and could be constructed and operated); (v) and other such situations at odds with rules that are clear and were not waived. Said effective assertion of law is clearly new and novel, and

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<sup>26</sup> FCC 13M-16, p. 8

<sup>27</sup> Petitioner believes the relevant law is more than sufficiently clear to find summary decision against Maritime on Issue (g) as to all licensed stations. However, since Maritime-EB assert the law is not settled, it cannot seek summary decision, since even relevant facts, if they existed in Maritime-EB favor (and they do not) cannot properly be allied in a summary decision to unsettled law.

as unsettled as one can imagine. As note above, it is in effect an attempt as numerous rule waivers.<sup>28</sup>

In this regard, Judges grant motions for summary judgment in cases that they see as being clear and straight forward. *See, e.g.,* First United Mortg. Co., Inc. v. Chaucer Holdings PLC, Civil No. 2:08-2754, 2010 WL 3283525, (D.N.J. Aug. 17, 2010) (“This matter is a straight forward coverage dispute rooted in the language of the policy agreement, and for the reasons which will be elaborated below, the Court will GRANT Defendant’s Motion for Summary Judgment . . . .”) A judge should not “go out on a ledge” to grant such a motion.

From *Neustom v Union Pacific*, 156 F.3d 1057 (Tenth Circuit) (emphasis added):

In this contractual indemnification case, appellant Asplundh Tree Expert Company ("Asplundh") appeals the district court's grant of summary judgment to Union Pacific Railroad Company ("Union Pacific") on Union Pacific's claim that it was indemnified by Asplundh for injuries sustained by Union Pacific employee Terry Neustrom ("Neustrom") and the district court's order for Asplundh to reimburse Union Pacific for its settlement with Neustrom....

It is well-established law in this circuit that "certification is particularly appropriate where the legal question at issue is novel and the applicable state law is unsettled." *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 667 (10th Cir. 1990). Asplundh does not point to any case law that would indicate that the legal concept of clear and unequivocal expression of an intent to indemnify a party for its own negligence is unsettled in Kansas. Moreover, as discussed above, it is clear that under Kansas law railroads may contract for third-party indemnification from liability for their own negligence. Therefore, we need not certify these questions to the Supreme Court of Kansas in order to correctly apply the law of that state.

From *Buthe v Britt*, 749 F.2d 1235 (Seventh Circuit) (emphasis added):

The district court on remand should first determine whether there is federal diversity jurisdiction in this case. If not, the court should decide whether the Indiana state courts would be the more appropriate forum for the resolution of Buethe's state law claim in light of the fact that the federal claim was dismissed on a motion for summary judgment and that the claim of unlawful discharge raises novel and unsettled questions of Indiana law. Accordingly, we reverse the

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<sup>28</sup> More plainly, the Joint Motion was a settlement proposal, not a request for summary decision on the facts. But when Petition demonstrated that such a settlement cannot be granted at this stage of this formal proceeding, including in his December 16, 2014 opposition, then the ALJ and Maritime-EB shifted to an attempt to morph the Joint Motion into a motion for summary decision, and M9 and the Joint Response resulted.

district court's grant of summary judgment on Buethe's state law claim and remand to the district court for consideration of the jurisdictional issues as directed in this opinion.

### C. Improperly Withheld Evidence Should Bar Grant of the Joint Motion

M9 and the Joint Response, and filings by Pinnacle Wireless, Inc. in this proceeding, that are a basis of the Joint Motion and the Joint Motion, have certain text redacted and certain documents withheld from Petitioner, on the asserted basis that the subject information is highly confidential and should be available only to certain attorneys described in the Protective Order in this proceeding, but not to Petitioner, even though Petitioner is performing the same role as an outside attorney for a party in this proceeding. Even apart from Petitioner's role as a pro se participant that is equivalent to the role of a party's outside counsel, the withheld information and documents should have been provided, at least to the extent that the information and documents are relevant to the facts and law involved in Issue (g). The only information and documents that could be withheld from Petitioner, or any member of the public, related to Issue (g), would be ancillary to and not essential for determinations under Issue(g).

For example, assertions of the amount of money paid to Maritime under any lease agreement, or paid by Maritime or a lessee to an antenna site facility owner, is possibly confidential and not subject to release to a party outside of those permitted to receive the information under the Protective Order; however, that type of information is not relevant to a determination of permanent discontinuance due to failure of construction or construction-operation. Petitioner has, along with Skybridge Spectrum Foundation (one of the "SkyTel" companies), submitted FOIA requests to obtain all of the redacted text and withheld documents noted above. Thus far, the FCC has not granted these FOIA requests. However, Petitioner has pending before the US District Court for the Northern District of California, a complaint against the FCC for unlawful denial of similar FOIA requests, which also pertain to redacted text and documents in this Issue (g) proceeding. As Petitioner informed the FCC, in the FOIA requests

specific to the Joint Motion, M9 and the Joint Response, Petitioner will be amending the noted USDC complaint to add claims of unlawful and untimely processing and denial of these FOIA requests.

We discuss this topic in other sections of this pleading, in addition.

On this basis alone, Petitioner asserts it would be improper to grant the Joint Motion, and if it is granted, Petitioner intends to appeal the grant on this basis (among other bases).

#### 20. Conclusion

For the foregoing reasons, and those given in his December 2<sup>nd</sup> initial opposition and December 16, 2013 opposition to the Joint Motion, the Joint Response and Joint Motion should be denied in full.

Respectfully submitted,

**WARREN C. HAVENS**

/s/ Warren C. Havens  
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April 9, 2014

### Declaration

I, Warren C. Havens, declare and certify under penalty of perjury that the facts within this Response are true and correct. 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 response to the Joint Response (defined above) as a supplement to the Joint Motion, a settlement proposal (its “joint stipulation” and related language) and as a motion seeking summary decision under §1.251.

Executed at Berkeley, California, on April 9, 2014.

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

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Warren Havens

## CERTIFICATE OF SERVICE

The undersigned certifies that he has on this 9<sup>th</sup> day of April 2014, caused to be served by first class United States mail copies of the foregoing Response to:

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

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Warren Havens