

Before the
Federal Communications Commission
Washington, DC 20554

FCC 14M-23
10059

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

ORDER

Issued: July 15, 2014

Released: July 15, 2014

Preliminary Statement

On June 17, 2014, the Presiding Judge issued *Memorandum Opinion and Order*, FCC 14M-18 (“*MO&O*”). The *MO&O* granted summary decision on the timely construction aspect of Issue G, but denied summary decision on the permanent discontinuance aspect of Issue G, for

16 facilities licensed to Maritime. The *MO&O* also rejected a Limited Joint Stipulation Concerning Issue G Licenses, as well as a previous joint stipulation filed in May 2012 concerning the cancellation of numerous Maritime licenses.¹

On June 24, 2014, Warren Havens filed a Request Under § 1.301(b) Regarding and Comments on FCC 14M-18 [sic] (“Request”), seeking the Presiding Judge’s permission to file an interlocutory appeal of the *MO&O* with the Commission. The Bureau filed an opposition to Mr. Havens’ Request on July 1, 2014.² For reasons set forth below, the Presiding Judge concludes that Mr. Havens’ showing is insufficient to justify an interlocutory appeal.

Standard of Review

Section 1.301(b) of the Commission’s rules provides in pertinent provisions:

[A]ppeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer. Any party desiring to file an appeal shall first file a request for permission to file appeal. . . The request shall contain a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The presiding officer shall determine whether the showing is such as to justify an interlocutory appeal and, in accordance with his determination, will either allow or disallow the appeal or modify the ruling. If the presiding officer allows or disallows the appeal, his ruling is final.³

Discussion

Mr. Havens classifies several rulings of the Presiding Judge as exercises of new or novel questions of law or policy. Despite Mr. Havens’ insistence, the Presiding Judge finds that no new or novel issues are raised by the *MO&O*. Additionally, Mr. Havens fails to assert that the rulings in the *MO&O* are in such error that they would likely require remand if the appeal were deferred.

Evidence and Burden of Proof

In the Request, Mr. Havens asserts that there is no evidence in the record to support the Presiding Judge’s summary decision of the construction issue.⁴ Based on this belief, Mr. Havens assumes that the Presiding Judge placed the burden of proof on the Bureau, which Mr. Havens believes contradicts case law and the Administrative Procedure Act.⁵

¹ *Memorandum Opinion & Order*, FCC 14M-18 at 23-26 ¶¶ 67-71 (ALJ, rel. June 17, 2014) (“*MO&O*”).

² 47 C.F.R. § 1.301(b) states “[p]leadings responsive to the request [for interlocutory appeal] shall be filed only if they are requested by the presiding officer.” The Presiding Judge did not request or authorize any response to Mr. Havens’ Request. The Bureau’s opposition is unauthorized and is thus struck.

³ 47 C.F.R. § 1.301(b).

⁴ Request Under § 1.301(b) Regarding and Comments on FCC 14M-18 at 2 ¶ 1 (filed June 24, 2014) (“Request”).

⁵ *Id.* (citing *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994)).

Mr. Havens fails to argue that the supposed lack of evidence creates a new or novel issue. Additionally, his assertion that the record lacks any evidence in support of summary decision of the timely construction issue is clearly false. Maritime and the Bureau boldly cited, and the Presiding Judge unambiguously relied on, prior decisions by the Commission and the Wireless Telecommunications Bureau (“WTB”), which concluded that the licenses at issue were timely constructed.⁶ Further, Mr. Havens knows his argument to be erroneous, as he references the cited decisions in his Request.⁷

Mr. Havens’ view of assignment of the burden of proof is also flawed. The *Hearing Designation Order* explicitly states that “the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Enforcement Bureau” as to Issue G,⁸ pursuant to statute and the Commission’s rules.⁹ However, the burden assigned is different for a motion for summary decision. The Commission’s summary decision procedures provide that the “party moving for summary decision has the burden of establishing . . . that no triable issue exists.”¹⁰ Additionally, the Administrative Procedure Act states that “the proponent of a rule or order has the burden of proof.”¹¹ In accordance with these authorities, the Presiding Judge assigned the burden of demonstrating that summary decision was warranted jointly to the Bureau and Maritime.¹² The Presiding Judge found that the Bureau and Maritime met that burden on the timely construction issue. Contrary to Mr. Havens’ belief, the burden was not assigned solely to the Bureau, nor should it have been assigned solely to Maritime.

Prior Commission Findings

Mr. Havens argues that the *MO&O* “appears to stand for a new and novel assumption of authority and role by the [administrative law judge]” because its ruling on the timely construction issue relies on prior decisions by the Commission and WTB.¹³ He believes that

⁶ *MO&O*, at 16-17 ¶¶ 44-46 (citing *Mobex Network Services, LLC*, Order, 19 FCC Rcd 24939 (WTB 2004) (“*Mobex*”); *Waterway Communications System, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 7317 (1987) (“*Watercom*”)).

⁷ See Request at 2 ¶ 1 (“It must be assumed that the Commission . . . understood its past decisions that the ALJ now uses to grant summary decision on the construction issue . . .”).

⁸ See *Maritime Communication/Land Mobile, LLC*, Order to Show Cause, *Hearing Designation Order*, and *Notice of Opportunity for Hearing*, EB Docket No. 11-71, 26 FCC Rcd 6520, 6549 ¶ 70 (2011) (“HDO”).

⁹ 47 C.F.R. § 1.91(d)(1) states: “In all such revocation and/or cease and desist hearings, the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.” Additionally, 47 U.S.C. § 312(d) states: “In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.” Section 312 applies to revocation of station license or construction permit proceedings, including the instant proceeding.

¹⁰ *In the Matter of Summary Decision Procedures*, 34 F.C.C.2d 485, 488 (1972); 47 C.F.R. § 1.251(a)(1).

¹¹ 5 U.S.C. § 556(d). Mr. Havens cites *Greenwich Collieries* to support his view that the burden of proof should rest solely on Maritime. Request at 2 ¶ 1. In that case, the Supreme Court struck down a Department of Labor rule that shifted the burden of persuasion to the party opposing a benefits claim as conflicting with Section 7(c) of the Administrative Procedure Act, which is codified at 5 U.S.C. § 556(d). *Greenwich Collieries*, 512 U.S. at 269. However, the Court contradicts Mr. Havens’ view, as its ruling makes clear that the burden of proof must be carried by the proponent of a rule or order. As they were the movants for summary decision, the burden of proof must be carried jointly by Maritime and the Bureau, not Maritime alone.

¹² *MO&O* at 7-8 ¶ 19; see also *MO&O* at 9 ¶ 24 (“No sleight of hand could bypass the difficult factual burden that [Maritime and the Bureau] must satisfy.”).

¹³ Request at 2 ¶ 1.

reliance on such decisions usurps the Commission's designation of Issue G for "formal evidentiary hearing."¹⁴

In *People's Broadcasting Corporation*,¹⁵ the Commission Review Board examined how administrative law judges related previous Commission findings of fact and conclusions of law to an issue designated for hearing on a related matter.¹⁶ "In an effort to balance the administrative economy presented by relying on a closed adjudication with [the applicant's] individual rights," the administrative law judges in that case held that prior findings of fact and conclusions of law would constitute rebuttable presumptions with respect to the issue in question.¹⁷ The Review Board found "no fault" with that approach.¹⁸ The Board found that the affected applicant in that case was "keenly aware that some previous testimony and evidence might be pertinent" to the designated issue, and thus "had every opportunity to meet its burdens by adducing any testimony or other evidence it deemed relevant to the . . . issue, the same as any other party."¹⁹ The Review Board deemed the "rebuttable presumption" mechanism to mean simply that prior Commission findings and conclusions "were to be likened to admissible evidence."²⁰ The affected applicant "had the option to 'deny, explain or clarify' such evidence or face the risk that such evidence could be held against it."²¹

The *MO&O* here in *Maritime* reflected this approach. The Presiding Judge treated the Commission's prior orders in *Watercom* and *Mobex* as admissible evidence. Mr. Havens was certainly aware that the findings and conclusions of these decisions were pertinent, particularly as he was directly involved in the *Mobex* proceeding. He even represents that he has pending challenges to the Commission's affirmation of that decision.²² And both the *Watercom* and *Mobex* orders were cited by the Bureau and *Maritime* in their joint motion, involved the same licenses that were the subject of the joint motion, and addressed the same issue of timely construction that was designated for hearing. Mr. Havens had full opportunity to present new evidence to rebut the findings and conclusions of those orders but failed to do so. All challenges that Mr. Havens raised to the reliance on the orders were addressed in the *MO&O*.²³

Mr. Havens tries another tack in arguing that the designation of Issue G must indicate that the Commission reconsidered its prior conclusions on the timely construction issue and found those conclusions to be "lacking or defective."²⁴ Therefore, Mr. Havens argues that the Presiding Judge cannot rely on those decisions in granting summary decision. Preferring a more rational approach, the Presiding Judge will not assume that the Commission has invalidated its previous decisions in *Watercom* or *Mobex* by silent implication or inference. Had the

¹⁴ *Id.*

¹⁵ *Peoples Broad. Corp.*, 92 F.C.C.2d 1303 (Rev.Bd. 1983).

¹⁶ *Id.* at 1305 ¶ 4.

¹⁷ *Id.*

¹⁸ *Id.* at 1306 ¶ 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See *Mobex Network Services, LLC*, 25 FCC Rcd. 3390, 3390 ¶ 1 (2010) (affirming WTB's findings that the stations at issue here were timely constructed); Request at 2-3 ¶¶ 1-2.

²³ *MO&O* at 16-17 ¶¶ 44-46.

²⁴ *Id.*

Commission intended the Presiding Judge to disregard its prior findings of fact and legal conclusions, it would have explicitly instructed the Presiding Judge to do so. Mr. Havens' reasoning thus misses the mark and is deeply flawed.

Per the Commission's rules, the Presiding Judge is authorized to rule on "all motions, petitions and other pleadings" in designated cases,²⁵ as well as "[r]ule upon questions of evidence."²⁶ The Presiding Judge, therefore, relied upon well-established authority to rule on the joint motion for summary decision, including ruling on the evidentiary weight of *Watercom* and *Mobex* Orders. He did so in accordance with precedent. Accordingly, the Presiding Judge's reliance on those previous orders is not an exercise of any new authority that presents a new and novel question of law or policy that warrants interlocutory appeal.

Finality of Decisions

Mr. Havens also argues that the Presiding Judge has created a new or novel issue by relying on the *Watercom* and *Mobex* orders because those orders are "still on appeal" and relying on non-final Commission rulings "encroaches" on the jurisdiction of WTB and the Commission.²⁷ But Mr. Havens' argument is again flawed. Section 1.103(b) of the Commission rules states that a "Commission action shall be deemed final, for purposes of seeking reconsideration at the Commission or judicial review, on the date of public notice" of the action.²⁸ Even where a petition for reconsideration is sought, "[n]o such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission."²⁹ Therefore, the *Watercom* and *Mobex* decisions are final, enforceable, and may be relied on in subsequent proceedings for any purpose. There is nothing new or novel about reliance on a Commission order's "finality" for purposes of Section 1.103(b).

As to the orders themselves, *Watercom* was decided in 1987 and, to the Presiding Judge's knowledge, there are no outstanding appeals or opportunities for appeal. *Mobex* was decided in 2004, with WTB finding that the vast majority of *Mobex*'s facilities at issue in that matter were timely constructed.³⁰ Mr. Havens' argument that *Mobex* failed to meet construction requirements was again rejected in two orders the following year.³¹ Mr. Havens sought reconsideration of *Mobex* and one of those subsequent orders, but WTB again denied his non-construction arguments in 2007.³² In 2010, the Commission affirmed WTB's determination that these stations were timely constructed, with the exception of one station that is not at issue in this

²⁵ 47 C.F.R. § 0.341(a).

²⁶ 47 C.F.R. § 1.243(d).

²⁷ Request at 2-3 ¶ 2.

²⁸ 47 C.F.R. § 1.103(b).

²⁹ 47 U.S.C. § 405(a).

³⁰ *Mobex Network Services, LLC*, 19 FCC Rcd 24939 (WTB 2004).

³¹ *Mobex Network Service, LLC*, 20 FCC Rcd 17957 (WTB 2005); *Mobex Network Service, LLC*, 20 FCC Rcd 17959 (WTB 2005).

³² *Mobex Network Services, LLC*, 22 FCC Rcd 665, 669-70 ¶¶ 9-10 (WTB 2007) (finding that Havens' petition was "merely a rehash of arguments which Havens had raised and which had been fully considered").

proceeding.³³ Mr. Havens maintains in his Request here that he still has an appeal pending.³⁴ For ten years, Mr. Havens has repeatedly attempted to revive this issue and his argument has repeatedly been rejected. Under the circumstances, the Presiding Judge cannot wait to rule on interlocutory issues in this proceeding.

Further, Mr. Havens' argument against relying on the *Watercom* and *Mobex* decisions makes no logical sense. The reliance by the Presiding Judge on an order released by the Commission, or by Bureau or Office under delegated authority, in no way "encroaches" upon their "jurisdiction." Relying on the findings and conclusions of an existing decision recognizes both the deciding entity's authority and the merits of its analysis. This reliance is an essential element of *stare decisis*. Mr. Havens does not even attempt to explain how the citation of a Commission, Bureau, or Office order on an issue that has been tasked to the Presiding Judge to decide can possibly usurp the cited entity's "jurisdiction." That argument is accordingly rejected.

Reinstatement of Licenses

Finally, Mr. Havens argues that it is new and novel for the Presiding Judge to "reinstate licenses that the [WTB] has cancelled."³⁵

First, it is noted that this argument is a departure from those made in his Opposition to the Motion for Summary Decision.³⁶ There, Mr. Havens essentially argued that Maritime could not cancel its licenses without prior approval from the Bankruptcy Court. Mr. Havens also argued that such cancellation was a material departure from Maritime's bankruptcy reconstruction plan and was therefore invalid.³⁷ Now, in his current Request, Mr. Havens argues to the contrary that the Presiding Judge must recognize or otherwise approve pending and completed cancellations.

Second, it must be noted with emphasis that no such action has been taken. The *MO&O* provided that particular licenses were no longer deemed canceled for purposes of Issue G *to the extent that they were canceled by ruling of the Presiding Judge*.³⁸ While it is recognized that paragraph 71 of the *MO&O* may have been ambiguous, it was not the intention of the Presiding

³³ *Mobex Network Services, LLC*, 25 FCC Rcd 3390 (2010) (affirming WTB's findings on the timely construction of all stations except one, KPB531 location 6, which was terminated due to permanent discontinuance).

³⁴ Request at 2-3 ¶¶ 1-2.

³⁵ *Id.* at 3 ¶ 3.

³⁶ *Havens Opposition to Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G* at 23-28 (filed Dec. 16, 2013).

³⁷ *Id.*

³⁸ *MO&O* at 26 ¶ 77 (emphasis added). The Bureau and Maritime have submitted two stipulations regarding the cancellation of some of Maritime's licenses. The first Limited Joint Stipulation was filed on May 31, 2012 and outlined a series of site-based licenses the Bureau and Maritime agreed to cancel and indicated several site-based facilities that were no longer providing service. *See* Limited Joint Stipulation Between Enforcement Bureau and Maritime and Proposed Schedule (filed May 31, 2012). On December 2, 2013, the Bureau and Maritime filed another Limited Joint Stipulation Concerning Issue G Licenses, which provided a list of licenses stipulated to be canceled for purposes of minimizing the need for further litigation. *See* Limited Joint Stipulation Concerning Issue G Licenses, ¶ 4 (filed Dec. 2, 2013).

Judge to reinstate any license that was canceled by WTB prior to his ruling in *Memorandum Opinion and Order*, FCC 13M-16.³⁹

The Presiding Judge's ruling in the *Memorandum Opinion and Order*, FCC 13M-16, was based on the premise that there were no substantive obstacles to the pending deletion of licenses described in the May 2012 stipulation, so those licenses for which deletion was pending should be considered moot for purposes of this proceeding. However, in the view of the Presiding Judge, the concerns for the creditors raised by Mr. Havens required prompt revisiting, reconsideration and rejection of that premise. For clarification, it is affirmed that the *MO&O* rejects the May 2012 stipulation that the Presiding Judge previously accepted, and rejects any conclusion that Issue G is moot as to the licenses that were the subject of that stipulation. To the extent that this would mean that licenses canceled by WTB prior to the ruling in *Memorandum Opinion and Order*, FCC13M-16,⁴⁰ would be on course for examination at hearing, the Presiding Judge is willing to deem Issue G moot as to those licenses upon the submission of a stipulation accompanied by the WTB ruling that effects cancelation. For reasons stated in the *MO&O*, the Presiding Judge will not reconsider the mootness of Issue G as to licenses for which deletion is still pending.⁴¹

Conclusion

No new or novel questions of law or policy have been presented. Nor has there been any argument articulated that the ruling is such error that would likely require remand should the appeal be deferred and raised as an exception pursuant to Commission rules.⁴² Accordingly, the request of Warren Havens for permission to appeal the *MO&O* is denied.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION⁴³



Richard L. Sippel
Chief Administrative Law Judge

³⁹ *MO&O* at 25 ¶ 71 (citing *Memorandum Opinion and Order*, FCC 13M-16 at 9 ¶ 21, 13 ¶¶ 31-33).

⁴⁰ *Id.* (citing *Memorandum Opinion and Order*, FCC 13M-16 at 13 ¶ 32).

⁴¹ *See MO&O* at 23-26 ¶¶ 67-72.

⁴² 47 C.F.R. § 1.301(b).

⁴³ Courtesy copies of this *Order* sent by e-mail on issuance to each counsel and to Mr. Havens.