

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

FCC 13M-16
09736

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)	

MEMORANDUM OPINION AND ORDER

Issued: August 14, 2013

Released: August 14, 2013

PRELIMINARY STATEMENT

1. On June 9, 2005, Maritime Communications/Land Mobile, LLC (“Maritime”) filed pre-auction FCC Form 175 (the short-form application) for Auction No. 61.¹ Maritime

¹ *Maritime Communications/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, 6523 ¶ 9 (2011) (“Hearing Designation Order”).

sought a 35 percent bidding credit and declared under penalty of perjury that it was eligible for the credit based on its status as a “very small business” with revenues less than or equal to \$3 million.² Based on its representations, Maritime received a bidding credit valued at \$2,737,000, effectively reducing the amount owed to the Commission for Maritime’s \$7,820,000 winning bid to \$5,083,000.³

2. On November 14, 2005, after the conclusion of Auction No. 61, Warren C. Havens (“Mr. Havens”) and certain affiliated entities (collectively “Petitioners”) filed a Petition to Deny Maritime’s long-form application.⁴ Petitioners alleged that:

Maritime submitted, in its short-form and the [long-form application] fraudulent and false certifications and these included fraudulent and false identity of the real party in control, . . . that Maritime deliberately and fraudulently failed to disclose many “affiliates” (as defined in FCC auction rules) which, if disclosed, would have resulted in a loss of the 35% bidding credits and resulted in a different auction outcome.⁵

3. On August 3, 2006, the Wireless Telecommunications Bureau (“WTB”) issued an order denying the Petition to Deny, but determined that Maritime’s failure to include certain interests and revenues violated the Commission’s Rules.⁶ As a result of subsequent disclosures from Maritime, WTB ruled that Maritime’s bidding credit should be reduced from 35 percent to 25 percent, and it ordered Maritime to pay the difference.⁷ Maritime complied, and WTB granted Maritime’s long-form application for Auction No. 61.⁸

4. Petitioners filed a Petition for Reconsideration of WTB’s Order that reduced Maritime’s bidding credit, alleging that Maritime was not entitled to any bidding credit due to its failure to disclose real parties in interest.⁹ WTB denied the Petition for Reconsideration in March 2007, in part based on lack of supporting evidence, but stated that Maritime’s representations were contradictory and its omissions violated the Commission’s Rules.¹⁰ Due to outstanding questions about Maritime’s entitlement to a bidding credit in Auction No. 61 and Maritime’s failure to initially disclose pertinent interests, WTB referred the matter to the Enforcement Bureau (“Bureau”) for investigation in late 2009.¹¹

5. On April 19, 2011, the Commission released a Hearing Designation Order directing the Presiding Judge “to determine ultimately whether [Maritime] is qualified to be and to remain a Commission licensee, and as a consequence thereof, whether any or all of its licenses should be revoked, and whether any or all of the applications to which Maritime is a party should

² *Id.*

³ *Id.* at 6524 ¶ 12.

⁴ *Id.* at 6525 ¶ 13.

⁵ *Id.*

⁶ *Id.* at 6525 ¶ 14.

⁷ *Id.* at 6526 ¶ 17.

⁸ *Id.*

⁹ *Id.* at 6526 ¶ 18.

¹⁰ *Id.*

¹¹ *Id.* at 6528 ¶ 23.

be denied.”¹² One of the issues designated for hearing in this proceeding, referred to as “Issue G,” is whether any of Maritime’s licenses for site-based Automated Maritime Telecommunications System (“AMTS”) stations have canceled automatically because they were constructed or operated at variance with sections 1.955(a) and 80.49(a) of the Commission’s Rules.¹³

MOTION FOR PARTIAL SUMMARY DECISION

6. On August 31, 2012, Maritime filed a Motion for Partial Summary Decision on Issue G. In this motion, Maritime sought partial summary decision on two categories of licenses: (i) Maritime authorizations that it voluntarily canceled or deleted (“Subsumed Incumbent Licenses”), as reflected in a joint stipulation filed by the Bureau and Maritime on May 31, 2012; and (ii) Maritime authorizations initially issued to Waterway Communications System, Inc. (“Watercom Licenses”).¹⁴ Questions regarding the construction and operation of Maritime’s remaining licenses were left for determination at hearing.

7. On September 17, 2012, the Bureau filed a response to Maritime’s Motion for Partial Summary Decision, requesting that the Presiding Judge issue an Order concluding that (i) all parts of Issue G are moot with respect to the Subsumed Incumbent Licenses and to Location 31 of call sign WRV374; and (ii) the Block B frequencies of the Watercom Licenses were constructed in accordance with Section 80.49(a) of the Commission’s Rules.¹⁵ The same day, several of Mr. Havens’ companies, collectively represented as “SkyTel-O,” filed an Opposition to Motion for Partial Summary Decision, disputing the force of Maritime’s evidence regarding the Watercom Licenses and arguing that summary decision was inappropriate as to the Subsumed Incumbent Licenses.¹⁶

8. On May 8, 2013, Maritime filed a second expanded Motion for Summary Decision (“Maritime’s Motion”) on Issue G to supplement its pending Motion for Partial Summary Decision.¹⁷ On May 21, 2013, the Bureau again agreed with Maritime that Summary Decision is appropriate in some respects, arguing that there is no substantial issue of material fact as to the canceled licenses and deleted facilities, the timely construction of the Watercom licenses, and the timely construction of all but three of the non-Watercom licenses.¹⁸ However, the Bureau opposes Summary Decision on the Issue G question of “permanent discontinuance.”¹⁹ On May 22, 2013, Mr. Havens submitted his own Opposition to Maritime’s

¹² *Id.* at 6520 ¶ 1.

¹³ *Id.* at 6547 ¶ 62(g).

¹⁴ Maritime’s Motion for Partial Summary Decision (August 31, 2012).

¹⁵ Enforcement Bureau’s Response to Maritime’s Motion for Partial Summary Decision at 5 ¶ 8 (September 17, 2012).

¹⁶ SkyTel-O’s Opposition to Motion for Partial Summary Decision at 9, 14-15 (September 17, 2012).

¹⁷ Maritime Communications/Land Mobile, LLC’s Motion for Summary Decision on “Issue G,” (May 8, 2013).

This Motion is read to subsume Maritime’s prior Motion for Partial Summary Judgment in its entirety. Accordingly, only Maritime’s Motion will be ruled upon.

¹⁸ Enforcement Bureau’s Response to Maritime’s Motion for Summary Decision on Issue G at 17 ¶ 27 (May 21, 2013) (“EB’s Response”).

¹⁹ *Id.*

Motion.²⁰

9. For the reasons described below, Maritime’s Motion for Summary Decision IS GRANTED as to the canceled licenses and the deleted facilities and IS DENIED as to the Block B frequencies of the Watercom Licenses as well as the non-Watercom licenses.

CONSTRUCTION ISSUE

10. The construction aspect of Issue G requires the Presiding Judge to determine whether any of “Maritime’s licenses for site-based AMTS stations have canceled automatically because [they] were never [timely] constructed” as required by Section 80.49(a).²¹ Section 80.49 of the Commission’s Rules, titled “Construction and regional service requirements,” provides:

(a) Public coast stations.

(3) 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. *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.*²²

Maritime and the Bureau agree that summary decision is appropriate for all but three of the licenses in question. Mr. Havens argues that summary decision is wholly unwarranted on this issue.

A. Arguments of Maritime and Enforcement Bureau

11. Maritime’s Motion requests that the Presiding Judge conclude that: (1) all parts of Issue G are moot with respect to licenses that Maritime has agreed to cancel and facilities it has agreed to delete;²³ (2) the Block B frequencies of the “Watercom Licenses”²⁴ were timely

²⁰ Havens’ Opposition to Motion for Summary Decision (May 22, 2013) (“Mr. Havens’ Opposition”). Mr. Havens also filed “conditionally, as a protective filing” on behalf of the SkyTel entities, as the SkyTel entities had recently submitted an interlocutory appeal to the Commission on the issue of whether the Presiding Judge may bar Mr. Havens from representing those entities. *See* Appeal under Rule § 1.301(a) And Request to Submit Supplemented Oversized Appeal Pleading (May 21, 2013). The Commission found that “the record amply supports the [Presiding Judge]’s Ruling that [Mr.] Havens should not be permitted to represent the SkyTel companies.” *Maritime Communications/Land Mobile, LLC*, Memorandum Opinion and Order, FCC 13-107 at 5 ¶ 11 (rel. August 5, 2013). Accordingly, Mr. Havens’ Opposition, insofar as it attempts to speak on behalf of the SkyTel entities, is stricken. *See Order*, FCC 13M-8 at 2 (May 1, 2013).

²¹ Hearing Designation Order at 6546 ¶ 61.

²² 47 C.F.R. § 80.49(a)(3) (emphasis added).

²³ Maritime’s Motion at 4-5.

²⁴ WHG701 – WHG703 and WHG705 – WHG754.

constructed in accordance with Section 80.49(a)(3) of the Commission's Rules;²⁵ and (3) the "non-Watercom Licenses" were timely constructed in accordance with Section 80.49(a)(3) of the Commission's Rules.²⁶

1. Canceled Licenses and Deleted Facilities of Maritime

12. Maritime argues Issue G is moot with respect to several of its licenses that it has voluntarily canceled or modified. Specifically, Maritime argues that Issue G is moot as to stations KA98265, KCE278, KPB531, KUF732, WFN, WHW848, WHX877, and WRD580 because Maritime voluntarily submitted applications to cancel each of these licenses in their entirety.²⁷ Maritime refers the Presiding Judge to the Commission's Universal Licensing System (ULS), which indicates that these licenses have indeed been cancelled.²⁸ Further, Maritime and the Enforcement Bureau have jointly stipulated that these authorizations are canceled.²⁹ The Bureau agrees that there is no need to further litigate questions raised under Issue G with respect to these authorizations.³⁰

13. Maritime further argues that it has filed or agreed to file applications to delete from certain of its authorizations specified locations or frequency blocks.³¹ Maritime states that it is currently unable to file two of these applications³² due to the technical limitations of ULS.³³ However, Maritime argues that the pending nature of these applications "is not an impediment to summary decision" because "the Presiding Judge may, as part of the summary decision ruling, order that the specified portions be deleted from these authorizations."³⁴ Maritime and the Enforcement Bureau have jointly stipulated that these locations and/or frequency blocks are to be deemed and treated as deleted from these authorizations for purposes of Issue G.³⁵ The Bureau agrees with Maritime that Issue G should be deemed moot as it pertains to these locations/frequency blocks.³⁶ The Bureau also advises that call sign WRV374 (Location 31) "was inadvertently omitted" from the stipulated list of cancelled and deleted authorizations and should be treated identically to the other canceled and deleted authorizations for purposes of Maritime's Motion.³⁷

²⁵ Maritime's Motion at 6.

²⁶ *Id.* at 9. Additionally, Maritime argues that Issue G does not apply to its geographic licenses (WQGF315-318), but only to site-based licenses. *Maritime Motion* at 3-4. The Presiding Judge agrees. The Hearing Designation Order clearly provides that one of the petitioners "alleges that Maritime's licenses for *site-based* AMTS stations have canceled" and that "an appropriate issue will be designated to determine whether any of Maritime's *site-based* licenses were constructed." Hearing Designation Order, 26 FCC Rcd. at 6546 ¶ 61 (emphasis added).

²⁷ Maritime's Motion at 4.

²⁸ Maritime's Motion at Exh. B.1.

²⁹ *Limited Joint Stipulation Between Enforcement Bureau and Maritime and Proposed Schedule* at 2 ¶ 4 (May 31, 2012) ("Limited Joint Stipulation").

³⁰ EB's Response at 2-3 ¶ 2.

³¹ The implicated authorizations are KAE889 (Locations 8, 14, 26, 27, 28, 33, 37, 39, 40, and 44), WHG 693 (Block A), WHG 701-703 (Block A), WHG 705-754 (Block A), and WRV374 (Locations 2, 3, 17, 24, 27, 28, 29, and 36). *Maritime's Motion* at 4-5.

³² WRV374 and WHG726.

³³ Maritime's Motion at n.5.

³⁴ *Id.*

³⁵ *Limited Joint Stipulation* at 3-4 ¶¶ 6-7.

³⁶ EB's Response at 3 ¶ 2.

³⁷ EB's Response at 3-4 ¶ 3.

2. The Watercom Licenses

14. Maritime argues that summary decision is warranted on the construction aspect of Issue G for the Watercom Licenses. Maritime cites to a Commission Order from 1987 to support its assertion that the Watercom stations were timely constructed. In that Order, the Commission writes that the contemporary holder of the Watercom licenses “regularly kept us apprised of the status of construction and put the system into operation within the time we had allowed,” and that there was “no question of spectrum hoarding or other dereliction in its inauguration of service.”³⁸ The Bureau has agreed that this order “resolves the ‘construction’ question of Issue (g) with respect to the Watercom Licenses” and in that respect, that “there is no genuine issue of material fact for determination at the hearing.”³⁹

3. The Non-Watercom Licenses

15. Finally, Maritime argues that summary decision is warranted on the remaining licenses⁴⁰ because each of the facilities was timely constructed by prior licensees. Maritime presents copies of construction completion notification letters for these stations.⁴¹ Maritime also argues that at the time Maritime acquired these licenses, the Commission had already considered and rejected assertions that prior licensees had failed to timely construct these facilities.⁴² Maritime cites a decision in which the Wireless Telecommunications Bureau consented to a transfer of control from Mobex Network Services, LLC to Clarity GenPar, LLC.⁴³ In rejecting Mr. Havens’ argument that several authorizations involved in the transfer (including the non-Watercom licenses at issue here) should be canceled for failure to meet construction requirements, the Commission noted that an audit conducted “in anticipation of the AMTS auction confirmed that the vast majority of facilities at issue were timely constructed” and that any “unconstructed facilities have been deleted.”⁴⁴ Maritime further claims that this finding has been affirmed in subsequent proceedings.⁴⁵

16. The Bureau agrees that these construction completion notifications adequately demonstrate that the licenses in question were timely constructed and that summary decision is appropriate.⁴⁶ However, the Bureau argues that summary decision should be denied for KAE889

³⁸ *Waterway Communications System, Inc.*, Memorandum Opinion and Order, FCC 87-373, 2 FCC Rcd. 7317, 7319 ¶ 16 (1987).

³⁹ EB’s Response at 4-5 ¶ 6.

⁴⁰ KAE889 (Locations 3, 4, 6, 12, 13, 20, 22, 30, 34, 46, and 48), WHG693 (Block B), WHV733 (Locations 1,2, and 3), WHV 740 (Location 2), WHV843 (Locations 1, 5, and 6), WRV374 (Locations 8, 12, 14, 15, 16, 18, 19, 20, 22, 23, 25, 26, 33, 34, 35, 39, and 40).

⁴¹ See Maritime’s Motion at Exhs. F-H.

⁴² *Id.* at 7.

⁴³ Maritime’s Motion at 7-8.

⁴⁴ *Mobex Network Services, LLC*, 19 FCC Rcd. 24939, 24943-24944 ¶ 6 (WTB 2004).

⁴⁵ Maritime’s Motion at 8 (citing *Mobex Network Services, LLC*, 20 FCC Rcd. 14813 (2005); *Mobex Network Services, LLC*, 20 FCC Rcd. 17957 (WTB 2007); *Mobex Network Services, LLC*, 22 FCC Rcd. 665 (WTB 2007); *Mobex Network Services, LLC*, 22 FCC Rcd. 1311 (WTB 2007); *Mobex Network Services, LLC*, 25 FCC Rcd. 3390 (2010)).

⁴⁶ EB’s Response at 5-6 ¶ 8.

(location 12), WRV374 (location 23), and WHG693 (Block B) for lack of evidence.⁴⁷ The Bureau also argues that the decisions cited by Maritime are insufficient to support a finding that these three licenses were timely constructed.⁴⁸ Rather, the Bureau asserts that in *Mobex Network Services, LLC*, the Wireless Bureau concluded only that Mr. Havens' petitions to deny did not "demonstrate that the licenses for the stations at issue should be deemed to have canceled automatically for failure to meet construction/coverage requirements."⁴⁹ The Bureau further contends that the Commission "did not identify the Mobex licenses subject to its ruling or affirmatively rule that all of Mobex's licenses had been constructed on time."⁵⁰ The Bureau argues that Maritime's reliance on subsequent Commission decisions related to the Mobex licenses is similarly misplaced because these decisions fail to identify the licenses subject to their rulings and do not address the question of whether the licenses at issue were timely constructed in accordance with Section 80.49 of the Commission's Rules.⁵¹

B. Third Party Opposition of Warren Havens

17. Mr. Havens, participating *pro se*, asserts that summary decision is inappropriate on the construction aspect of Issue G. He argues that "evidentiary issues, and the lack of agreement on how 'construction' is to be defined, require a finding by the ALJ that a material issue of fact exists for all licenses, including the non-Watercom licenses and all Watercom licenses."⁵² Havens further argues that "[t]he activation notices are admissions of non construction by a facial reading, and there were not subsequent filings by [Maritime] predecessors as to actual timely 'construction.'"⁵³

18. The Commission has noted that summary decision should not in fairness be used against parties who appear *pro se*.⁵⁴ The Commission adopted this view with the caveat that "parties normally appear without counsel in only the simplest of cases, in which they have personal knowledge of all matters of fact, and that in such cases, the capability of a party to understand and respond to a motion for summary decision may, in fairness, be left to the discretion of the presiding officer."⁵⁵ The Commission has followed this policy, noting that "where . . . the issues are more simple than complex and the respondent has personal knowledge of the facts, the Presiding judge has discretion to apply summary decision."⁵⁶

⁴⁷ *Id.* at 6-7 ¶ 9. EB notes that Maritime has conceded that it has not located any documentation for KAE889 (location 12) or WRV 374 (location 23), and Maritime has not submitted any documentation for WHG693. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at ¶ 10; *see also Mobex*, 19 FCC Rcd. at 24944 ¶ 10 (WTB 2004).

⁵⁰ EB's Response at 7 ¶ 10.

⁵¹ *Id.* at 7-8 ¶¶ 11-12.

⁵² Mr. Havens' Opposition at 7.

⁵³ *Id.*

⁵⁴ *In the Matter of Summary Decision Procedures*, 34 F.C.C.2d 485, 488 ¶ 6 (1972).

⁵⁵ *Id.*

⁵⁶ *In the Matter of Joseph Frank Ptak San Marcos, Texas*, 13 FCC Rcd. 22168, 22171 ¶ 8 (1998) (noting that case had been under investigation for over a year and Mr. Ptak had ample opportunity to obtain legal representation by the time the Bureau filed its Motion for Summary Decision).

19. Mr. Havens has repeatedly been warned about (and discouraged from) appearing *pro se*⁵⁷ due to his propensity to cause “substantial delay and confusion on questions having nothing to do with the merits of this complex litigation”⁵⁸ and due to concerns that he was not adequately qualified to represent the SkyTel corporate entities in this litigation. Mr. Havens’ Opposition demonstrates that these concerns are warranted. Mr. Havens’ arguments are confusing, sometimes indecipherable, and at other times wholly absent. For example, he includes hundreds of pages of exhibits without a single pincite,⁵⁹ which he somehow believes to show that Maritime has hid evidence and “committed fraud” in the course of this proceeding.⁶⁰ It is unclear to what evidence Mr. Havens is referring and how he believes they relate to Maritime’s Motion. As an additional example, Havens at one point argues that the activation notices that Maritime has presented “are admissions of non construction by a facial reading, and [that] there were not subsequent filings by MCLM predecessors as to actual timely ‘construction’ (as that term means, or any timely construction).”⁶¹ The Presiding Judge is at a complete loss as to what Mr. Havens’ could reasonably mean. Some of Mr. Havens’ other “arguments” are simply sections headings, leaving the Presiding Judge to speculate as to Mr. Havens’ meaning and how those “arguments” might apply to this case.

20. While the Commission has determined that summary decision against parties appearing *pro se* may be appropriate in situations where litigation is simple, the litigation in this proceeding is complex. Mr. Havens has not adequately “shown through his pleadings that he understands the procedures and the issues and that he has first-hand knowledge of the facts.”⁶² If anything, Mr. Havens’ Opposition suggests that he does not have a firm grasp of the scope and impact of Maritime’s Motion and struggles to communicate his understanding of the facts to the Presiding Judge and to the Commission. That said, Mr. Havens has demonstrated through his participation in this proceeding that he has a good grasp of the business aspects of the AMTS market and has knowledge of the history of Maritime and its predecessor-in-interest, Mobex. The Presiding Judge suspects that Havens may have information in his grasp that relates to Issue G. Therefore, he should not be foreclosed at this stage of the proceeding simply because he is ill-equipped as a *pro se* litigant to participate in complex motion practice. The only way to properly determine the worth and substance of the evidence that Mr. Havens brings to this case would be to examine it at and after hearing. Granting Maritime’s Motion in total in this case would be in direct contravention of the Commission’s well-reasoned policy of foregoing summary decision to ensure the fairest proceeding possible for *pro se* litigants.⁶³ This finding is

⁵⁷ See, e.g., *Order*, FCC 13M-11 at 3 (“[T]he Presiding Judge has spent a great deal in time and resources advising Mr. Havens to stop pretending that he was a licensed attorney.”).

⁵⁸ *Order*, FCC 12M-52 at 3.

⁵⁹ Mr. Havens also includes some exhibits with his pleading that he fails to cite at all. It is unclear in what manner Mr. Havens intends the Presiding Judge to consider these fragments.

⁶⁰ Mr. Haven’s Opposition at 5.

⁶¹ *Id.* at 7.

⁶² Cf. *Joseph Frank Ptak San Marcos, Texas*, 13 FCC Rcd. at 22171 ¶ 8.

⁶³ Maritime may believe that, despite Mr. Havens’ current status as a *pro se* litigant, summary judgment is appropriate on the Watercom Licenses because Mr. Havens was represented via counsel for SkyTel-O at the time of the filing of Maritime’s Motion for Partial Summary Decision. However, the Presiding Judge agrees with SkyTel-O that summary decision was inappropriate at the time that motion was filed as discovery had not yet closed and SkyTel-O continued to seek information that it believed to be essential to its opposition. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (“[S]ummary judgment [is to] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.”). Although discovery is now

further supported by the Commission’s emphasis “that the presiding officer has broad authority to go forward with a hearing, regardless of the showing made, if the nature of the proceeding and of circumstances surrounding the request [for summary decision] persuade him that a hearing is desirable.”⁶⁴

21. Nonetheless, summary decision on Issue G is granted for those licenses Maritime has canceled and those facilities Maritime has deleted or agreed to delete.⁶⁵ Maritime is correct in concluding that where the ultimate question is whether licenses have automatically canceled, that issue is rendered moot by voluntary cancellation of the licenses at issue or the voluntary deletion of locations/frequency blocks from the authorizations at issue. *See* Maritime’s Exhibits B.1 and C.1. This evidence, in conjunction with the Limited Joint Stipulation, leaves no genuine issue of material fact for consideration with respect to Issue G, *i.e.*, the authorizations in question have been voluntarily canceled and that the locations/frequency blocks in question have been deleted or are agreed to be treated as deleted. Summary decision is therefore granted on Issue G with respect to these authorizations.⁶⁶ WRV374 (Locations 2, 3, 17, 24, 27, 28, 29, 31, and 36) and WHG726 (Block A) are ordered deleted so that ULS may accurately reflect Maritime’s stipulation, per its request.⁶⁷

PERMANENT DISCONTINUANCE ISSUE

22. The discontinuance aspect of Issue G requires the Presiding Judge to determine whether any of Maritime’s site-based licenses are to be automatically canceled “because operation of the stations has been permanently discontinued.”⁶⁸

23. Section 1.955(a)(3) of the Commission’s Rules provides that:

“Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued. The Commission authorization or the individual service rules govern the definition of permanent discontinuance for purposes of this section.”⁶⁹

closed, Mr. Havens is now without counsel, rendering summary judgment not inappropriate in most respects for the reasons stated above.

⁶⁴ *Summary Decision Procedures*, 34 F.C.C.2d at 487.

⁶⁵ KA98265, KCE278, KPB531, KUF732, WFN, WHW848, WHX877, WRD580, KAE889 (locations 8, 14, 26, 27, 28, 33, 37, 39, 40, and 44), WHG693 (Block A), WHG701-703 (Block A), WHG705-754 (Block A), and WRV374 (locations 2, 3, 17, 24, 27, 28, 29, 31, and 36)

⁶⁶ SkyTel-O correctly asserts that “the character and fitness of Maritime to hold any license is at issue,” in this proceeding and that a review of the “Subsumed Licenses” might reveal conduct that relates to that issue. *See* Hearing Designation Order, 26 FCC Rcd. at 6530 ¶ 27. However, determinations as to whether Maritime is qualified to hold Commission licenses have no bearing on the resolution of Issue G, which requires only a determination of “whether the licenses for any of Maritime’s site-based AMTS stations have canceled automatically for lack of construction or permanent discontinuance of operation.” *Id.* at 6546 ¶ 61. Summarily deciding Issue G with respect to these authorizations does not bar any party from presenting evidence at hearing related to those authorizations that also is relevant to the remaining issues to be heard in this proceeding.

⁶⁷ Maritime’s Motion at n.5.

⁶⁸ *Id.*

⁶⁹ 47 C.F.R. § 1.955(a)(3).

Where neither the authorizations at issue nor the individual rules for AMTS licenses provide further guidance as to the meaning of “permanent discontinuance,” determinations as to whether operation has been permanently discontinued are made on a case-by-case basis.⁷⁰

A. Arguments of Maritime

24. Maritime’s Motion seeks summary decision on the issue of whether any of Maritime’s licenses for site-based AMTS stations have canceled automatically due to permanent discontinuance of operation. Maritime argues that the Commission’s Rules governing permanent discontinuance of AMTS stations do not provide fair notice as to what will trigger the automatic termination of a license.⁷¹ Thus, Maritime alleges, any determination that its AMTS licenses have automatically terminated in accordance with Section 1.955 of the Commission’s Rules would be an unconstitutional violation of its right to due process under the Fifth Amendment. In other words, Maritime believes that, as a matter of law, none of its licenses can be found to have automatically terminated.

25. Citing precedent in *Trinity Broadcasting*, Maritime argues that the Commission may deprive a regulated entity of a license only if “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.”⁷² Maritime argues that unlike the rules for other radio services,⁷³ the Commission’s AMTS rules do not explicitly define “permanent discontinuance.” Therefore, no “objective standard for determining when discontinuance of service [is] deemed or presumed permanent” exists with which Maritime could comply.⁷⁴ It argues that only an “objective standard” could provide Maritime with sufficient “ascertainable certainty” so as to avoid violating the Due Process Clause of the Fifth Amendment.⁷⁵ Maritime further argues that the Commission may not now “change the rules of the game” by revising its rules through a pending rulemaking and retroactively applying those new rules to Maritime’s prior conduct.⁷⁶ In turn, the Enforcement Bureau replies that Commission precedent has provided sufficiently fair notice,⁷⁷ and that there are still outstanding questions of material fact as to Maritime’s efforts at maintaining operations at its stations.⁷⁸

B. Analysis

26. “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . A conviction or punishment fails to comply with due process if the statute or regulation under which it is

⁷⁰ *Northeast Utilities Service Co.*, 24 FCC Rcd. 3310, 3314 ¶ 10 (WTB MD 2009).

⁷¹ Maritime’s Motion at 12.

⁷² *Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)).

⁷³ See Maritime’s Motion at n.10.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* at 10, 12.

⁷⁷ EB’s Response at 11.

⁷⁸ *Id.* at 17.

obtained ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.’”⁷⁹ These principles apply in hearings before an Administrative Law Judge. Here, the Commission’s Rules regarding permanent discontinuance of AMTS services provide clear notice of what conduct is prohibited and provide ascertainable certainty as to the standard to which Maritime must conform.⁸⁰ Maritime’s Motion insofar as it argued that there existed inadequacy of notice as to the permanent discontinuance aspect of Issue G is denied.

27. Granted, there is no explicit definition of the phrase “permanent discontinuance” under the Commission’s Rules. However, the meaning of the phrase as used in Section 1.955(a)(3) is plain: operation of a service may not indefinitely lapse or else its authorizations will automatically terminate.⁸¹ Through case-by-case determination, the Commission allows licensees the opportunity to present a range of evidence that may demonstrate whether operation of an assigned frequency has or has not indefinitely lapsed. For example, in *Mobex Network Services*,⁸² the Commission examined whether an AMTS license for a Chicago station that Mobex sought to transfer to Maritime had automatically terminated due to permanent discontinuance of operation. The Commission determined that the station had permanently discontinued its operations, citing an affidavit from the manager of the licensed site stating that equipment that was necessary for operation had not been present at the site for years.⁸³ In *Northeast Utilities Service Company*, the Wireless Telecommunication Bureau’s Mobility Division (“Division”) examined whether an AMTS license had terminated for permanent discontinuance where a station had not operated for several years due to its tower’s destruction in the terrorist attacks of September 11, 2001.⁸⁴ The Division found that the license had not terminated because the “discontinuance of operation [was] not yet permanent,” as the licensee had demonstrated that it “exercised due diligence in its efforts to secure space on the Freedom Tower” so that it could continue operating.⁸⁵ The guidance provided to holders of AMTS licenses through these decisions is reasonable and plain: licensees must keep their stations operating, or else be able to demonstrate that they have exercised due diligence in resuming operations, or the authorizations in question will be determined to have automatically terminated.

⁷⁹ *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012) (internal citations omitted).

⁸⁰ Maritime argues that the Commission’s Part 80 rules provide insufficient notice because it lacks an “objective standard for determining when discontinuance of service [is] deemed or presumed permanent.” Maritime Motion at 9. In doing so, Maritime appears to take the position that the onset of “permanent discontinuance” must be defined by the passage of a set number of days from the initial lapse of operation, as it is in other Parts of the Commission’s Rules. However, there exists no support for Maritime’s view that an “objective standard” is a prerequisite for providing adequate notice. The phrase “objective standard” simply does not appear in the precedent that Maritime cites. Rather, the Presiding Judge relies on the formulation that *does* appear in the precedent that Maritime cites: a regulation provides sufficient notice if a regulated party is “able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.” *Trinity Broad.*, 211 F.3d at 628.

⁸¹ See *Northeast Utilities Service Co.*, 24 FCC Rcd. at 3314 ¶ 10 (agreeing that Part 80 licensees may not cease operations indefinitely without the license terminating for permanent discontinuance) (*recon. pending*).

⁸² *In the Matter of Mobex Network Services, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 3390, 3391-92 ¶¶ 2-5 (2010) (*recon. pending*).

⁸³ *Id.* at 3395 ¶ 10.

⁸⁴ *Northeast Utilities Service Co.*, 24 FCC Rcd. at 3310, 3314 ¶ 10.

⁸⁵ *Id.* (citing documentary evidence demonstrating ongoing negotiations with the Freedom Tower property management company regarding the site availability).

28. Maritime correctly notes that there is an ongoing Commission rulemaking that seeks in part to clarify the Commission's Rules regarding permanent discontinuance of operations.⁸⁶ In particular, Maritime emphasizes the Commission's view that "it is imperative that [the Commission's] rules provide a clear and consistent definition of permanent discontinuance of operations; they do not."⁸⁷ However, this statement should not be read improperly to be an acknowledgment that the meaning of permanent discontinuance is not ascertainably certain. The statement must be read in its proper context as part of the Commission's efforts to standardize its rules across services so as to provide for easier to understand, comparable treatment.⁸⁸ Although the rules regarding permanent discontinuance of AMTS stations differ from those of other services, as the Commission notes,⁸⁹ the Commission's view should not be misinterpreted to suggest that the rules and the Commission's decisions are in any way insufficient in informing Maritime of its responsibilities as a licensee.

29. Even if one were to conclude that the plain meaning of "permanent discontinuance" in conjunction with the Commission's decisions did not present an ascertainably certain standard of conduct to which Maritime must conform, Maritime must demonstrate that it attempted to follow the regulation in spite of any perceived ambiguity. A lack of sufficient notice creates a violation of due process when an ambiguous regulation gives rise to reasonable interpretations by both the agency and the regulated party.⁹⁰ If an agency penalizes a regulated party because of the party's own reasonable interpretation of an ambiguous regulation, the regulated party can claim to lack notice.⁹¹ However, even if a regulation is ambiguous, the regulated party must not only interpret the regulation reasonably, it must also attempt to act in accordance with its interpretation.⁹² A regulated party cannot simply use an ambiguity in a regulation to "excuse its failure to comply with uncertain rules."⁹³

⁸⁶ See Maritime's Motion at 9-10, 12.

⁸⁷ *In the Matter of Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, 25 FCC Rcd. 6996, 7017 ¶ 50 (2010).

⁸⁸ "In this proceeding, we propose to create consistent requirements for renewal of licenses and consistent consequences for discontinuance of service, and to clarify construction obligations for spectrum licenses that have been divided, by geographic partitioning or disaggregation of the spectrum. In making these rules clearer and consistent across services, we seek to apply the rules that have worked the best to a larger group of services, and to simplify the regulatory process for licensees." *Id.* at 6997 ¶ 1.

⁸⁹ *Id.* at 7017 ¶ 50 ("The definition varies by service, and some service rules contain no clear definition. We believe that standardizing the definition of permanent discontinuance of operations will serve the public interest by providing licensees and other interested parties much needed certainty and by affording similarly-situated licensees and like services comparable regulatory treatment.").

⁹⁰ *Trinity Broad.*, 211 F.3d at 632.

⁹¹ See *Trinity Broad.*, 211 F.3d at 632 (denial of a license violated due process because the plaintiff had reasonably interpreted a requirement as *de jure* when the agency interpreted it as *de facto*); *Satellite Broad. Co., Inc. v. F.C.C.*, 824 F.2d 1, 2 (D.C. Cir. 1987) (due process violated when found when the FCC penalized a license application because it was filed in the wrong place when regulation provided no guidance as to where to file).

⁹² "We therefore have held that the FCC was arbitrary and capricious when it rejected an application as untimely based on an ambiguous cut-off provision, not clarified by FCC interpretations, *if the applicant made a reasonable effort to comply.*" *Florida Inst. of Tech. v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992) (emphasis added). See *Satellite Broad. Co., Inc.*, 824 F.2d at 4-5 (finding that the Commission cannot punish a member of the regulated class for *reasonably interpreting* the Commission's Rules).

⁹³ *21st Century Telesis Joint Venture v. F.C.C.*, 318 F.3d 192, 202 (D.C. Cir. 2003) (licensee could not claim a due process violation because it had not attempted to comply with notices it asserted to be confusing and ambiguous).

30. Maritime cannot succeed solely on the legal argument that the Commission's AMTS license rules are ambiguous. It must present a reasonable interpretation of the rules in question and demonstrate that it attempted to adhere to that interpretation. Maritime has not provided the Presiding Judge with any interpretation of Section 1955(a)(3). There remains a genuine issue of material fact as to whether Maritime attempted to comply with any reasonable interpretation of Section 1.955(a)(3). Accordingly Maritime's Motion for Summary Decision will be denied on the permanent discontinuance aspect of Issue G.

ORDERS

31. For the foregoing reasons IT IS ORDERED that Issue G IS DEEMED MOOT with respect to stations KA98265, KCE278, KPB531, KUF732, WFN, WHW848, WHX877, and WRD580.

32. IT IS FURTHER ORDERED that sites WRV374 (Locations 2, 3, 17, 24, 27, 28, 29, 31, and 36) and WHG726 (Block A) ARE DELETED.

33. IT IS FURTHER ORDERED that Issue G IS DEEMED MOOT with regard to sites KAE889 (Locations 8, 14, 26, 27, 28, 33, 37, 39, 40, and 44), WHG 693 (Block A), WHG 701-703 (Block A), WHG 705-754 (Block A), and WRV374 (Locations 2, 3, 17, 24, 27, 28, 29, 31, and 36).

34. IT IS FURTHER ORDERED that the Motion for Summary Decision on "Issue G" of Maritime Communications/Land Mobile, LLC IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION⁹⁴



Richard L. Sippel
Chief Administrative Law Judge

⁹⁴ Courtesy copies of this *Order* sent by e-mail on issuance to each counsel and to Mr. Havens.