

**Before the  
Federal Communications Commission  
Washington, DC 20554**

**FCC 15M-7**  
10266

In the Matter of	)	EB Docket No. 11-71
	)	
<b>MARITIME COMMUNICATIONS/LAND MOBILE, LLC</b>	)	File No. EB-09-1H-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 Wireless Radio Services	)	Application File Nos. 0004030479, 0004193028, 0004193328, 0004354053, 0004309872, 0004310060, 0004314903, 0004315013, 0004430505, 0004417199, 0004419431, 0004422320, 0004422329, 0004507921, and 0004604962
	)	
Applicant with <b>ENCANA OIL AND GAS (USA), INC.; DUQUESNE LIGHT COMPANY, DCP MIDSTREAM, LP; JACKSON COUNTY RURAL MEMBERSHIP ELECTRIC COOPERATIVE; PUGET SOUND ENERGY, INC.; ENBRIDGE ENERGY COMPANY, INC.; INTERSTATE POWER AND LIGHT COMPANY; WISCONSIN POWER AND LIGHT COMPANY; AND DIXIE ELECTRIC MEMBERSHIP CORPORATION, INC.</b>	)	
	)	
For Commission Consent to the Assignment of Various Authorizations in the Wireless Radio Service	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Issued: February 25, 2015**

**Released: February 25, 2015**

1. This *Memorandum Opinion and Order* rules on several pending motions regarding confidentiality designations made by the parties as to the hearing transcript and the exhibits.

*Scope of the Protective Order*

2. The *Protective Order* provides that a party may designate information as Confidential Information “upon a good faith determination that such information constitutes trade secrets or commercial or financial information privileged or confidential within the

meaning of Exemption 4 of the Freedom of Information Act or . . . any other bona fide claim of right or privilege.”<sup>1</sup> A party may also designate information as Highly Confidential Information “upon a determination in good faith that the disclosure of such information, if disclosed to a counterparty or competitor of the [d]esignating [p]arty, would significantly disadvantage [its] current or future negotiating or competitive position.”<sup>2</sup> Either *sua sponte* or upon petition, the Presiding Judge may require the designating party to demonstrate that the designated material is entitled to confidential treatment.<sup>3</sup> If that burden is not met, the information is publically disclosed.<sup>4</sup>

### *Confidentiality Designations of Maritime and Choctaw*

3. In *Order*, FCC 15M-2, the Presiding Judge set the deadline for the filing of transcript confidentiality designations for noon on January 15, 2015. On January 15, Maritime Communications/Land Mobile, LLC (“Maritime”) Choctaw Telecommunications, LLC, and Choctaw Holdings, LLC (“Choctaw”) submitted their Joint Confidentiality Designations. The Presiding Judge reviewed these designations and found several redactions to be unjustified. In *Order*, FCC 15M-3, the Presiding Judge ordered Maritime to demonstrate clearly and persuasively that those redactions were warranted.<sup>5</sup> Revised Joint Confidentiality Designations of Maritime and Choctaw in Response to the Presiding Judge’s Order, FCC 15M-3 (“Revised Designations”) were filed on January 26, 2015.

4. In the Revised Designations, Maritime and Choctaw defended only five of the confidentiality designations specified by the Presiding Judge.<sup>6</sup> They argue that these five portions of the transcript include discussion and testimony regarding the details of confidential lease contracts with Pinnacle Wireless (“Pinnacle”).<sup>7</sup> Those contracts are said to include express confidentiality provisions that preclude the disclosure of any information not required to be disclosed to the Commission.<sup>8</sup> Maritime and Choctaw also state that the designated testimony includes discussions of future business plans, particularly with regard to Amtrak.<sup>9</sup> Maritime and Choctaw are concerned that Warren Havens, through one or more of his companies, is in fact a potential competitor,<sup>10</sup> and therefore the release of those portions of the transcript would disadvantage the competitive positions of Maritime and Choctaw.

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<sup>1</sup> Protective Order, FCC 11M-21 at 2(d) (rel. July 20, 2011).

<sup>2</sup> *Id.* at 3 ¶ 2(f).

<sup>3</sup> *Id.* at 4 ¶ 3.

<sup>4</sup> The Protective Order provides that the designating party will have three business days to withdraw that information from the record following notice of a finding that information will not be afforded confidential treatment. *Id.* at 4 ¶ 3(c). However, the Presiding Judge will not allow this provision to apply to testimony at hearing. To do so would provide the perverse incentive for a party to designate as confidential the unfavorable cross-examination testimony of its witnesses so the testimony may later be withdrawn. To allow such a practice would create large gaps in the record and threaten the integrity of this proceeding.

<sup>5</sup> *Order*, FCC 15M-3 at 2 (rel. January 16, 2015).

<sup>6</sup> They argue that the following portions of the transcript should be designated Confidential: page 1493, lines 1-4; page 1496, lines 4-25; page 1497, lines 1-3; page 1502, lines 6-7; and page 1503, lines 6-19.

<sup>7</sup> Revised Joint Confidentiality Designations of Maritime and Choctaw in Response to the Presiding Judge’s Order, FCC 15M-3 at 2 (filed Jan. 26, 2015).

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 2-3.

5. Having reviewed the five confidentiality designations, the Presiding Judge finds that **lines 6-7 of page 1502** and **lines 6-19 of page 1503** are entitled to confidential treatment. **Page 1502, lines 6-7** discloses the amounts of payments by Pinnacle to Maritime pursuant to the lease between them, which is deemed to be confidential information.<sup>11</sup> **Page 1503, lines 6-19** describes specific substantive business proposals that the Presiding Judge finds would significantly disadvantage the competitive positions of Maritime and Choctaw if released.

6. However, the generalized arguments of Maritime and Choctaw do not adequately demonstrate that the remaining three confidentiality designations are warranted. The underlying transcript portions are not found to involve trade secrets, confidential commercial or financial information, or information that would significantly disadvantage the competitive positions of Maritime or Choctaw if disclosed. *Page 1493, lines 1-4* describe how information was presented in a response to an Amtrak proposal, but does not reveal any underlying information that appears commercially or financially sensitive. *Page 1496, line 4-25* and *page 1497, lines 1-3* describe how information was presented in Bureau Exhibit 53, but again does not present any underlying information that would significantly disadvantage Maritime or Choctaw if disclosed. These confidentiality designations, as well as the designations specified by *Order*, FCC15M-3, that Maritime and Choctaw chose not to defend, are rejected and thus those portions of the transcript shall be publically released.

*Petition to Deny of Environmental and Verde*

7. On January 28, 2015, Environmental LLC (“Environmental”) and Verde Systems LLC (“Verde”) filed a Petition to Deny Maritime-Choctaw Transcript Confidentiality Designations. Seeking the rejection of all of the confidentiality designations of Maritime and Choctaw,<sup>12</sup> Environmental and Verde interpret the *Protective Order* to require the designating parties to (1) “establish that the information is confidential, and therefore not in the public domain, under Section 3(a)” and (2) “where the information is confidential . . . demonstrate that the harm of disclosure would outweigh the public interest in disclosure” under Section 3(b).<sup>13</sup> They argue that the Revised Designations fail to claim that the information is confidential and not in the public domain.<sup>14</sup> They also argue that Maritime has not demonstrated that competitive harm exists. They assert that Maritime and Choctaw face no competition from Mr. Havens’ companies with regard to Amtrak,<sup>15</sup> and are required to publically disclose to the Commission “[a]ll of the information that is relevant to competition and negotiations.”<sup>16</sup> Further, Environmental and Verde clarify that Maritime’s fear of litigation by Pinnacle for violating the confidentiality provisions of lease contracts is not a valid reason for withholding information

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<sup>11</sup> See *id.* (“There shall be a rebuttable presumption that the following information is entitled to protection as Highly Confidential Information: . . . documents reflecting any commercially sensitive term of agreement described in subparagraph f(i), including, without limitation, documents reflecting the amount of any payments made or promised pursuant to such an agreement.”)

<sup>12</sup> ENL-VSL Petition to Deny Maritime-Choctaw Transcript Confidentiality Designations at 2 (filed Jan. 28, 2015).

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 2-4.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.*

under the *Protective Order*.<sup>17</sup>

8. Maritime and Choctaw filed a Joint Opposition to Petition to Deny Confidentiality Designations of Maritime and Choctaw (“Opposition”) on February 4, 2015. They assert that the petition is “rife with false and misleading statements.”<sup>18</sup> In particular, Maritime and Choctaw detail that Mr. Havens’ competitive interest in selling spectrum to Amtrak for positive train control is clear, as he has taken several steps to secure access to Maritime’s confidential response to Amtrak’s Request for Proposal.<sup>19</sup> They also argue that Section 3 of the *Protective Order* only governs the admission of evidence, while Sections 9 and 10 govern oral hearing testimony and transcript designations.<sup>20</sup> They do not believe that Sections 9 and 10 place a burden on the designating party to justify each confidentiality designation in the transcript.<sup>21</sup>

9. Environmental, Verde, Maritime, and Choctaw all misread the *Protective Order*. While Maritime and Choctaw are correct that Sections 9 and 10 respectively govern oral hearing testimony and the designation of confidential material in the transcripts, it is indeed Section 3, in conjunction with the definitions of Confidential and Highly Confidential Information in Section 2, that determines whether information is entitled to confidential treatment. However, there is no requirement that the designating party “establish the information is confidential, and therefore not in the public domain” in Section 3(a). Nor does Section 3(b) suggest that any kind of balancing test be made between the harms of disclosure and the public interest in disclosure. The “two prong” test that Environmental and Verde put forward is thus a complete fabrication with no conceivable basis in the text of Section 3.

10. As stated above, the *Protective Order* provides that a party may designate information as Confidential Information if it constitutes trade secrets or commercial or financial information privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, or any other bona fide claim of right or privilege, or as Highly Confidential Information if disclosure of such information would significantly disadvantage their current or future negotiating or competitive position.<sup>22</sup> After reviewing the confidentiality designations of Maritime and Choctaw, the Presiding Judge finds that the information underlying the two designations approved above, as well as the information underlying those original Joint Confidentiality Designations that were not called into question in *Order*, FCC 15M-3, warrant confidential treatment under the *Protective Order*.

11. The majority of this information would significantly disadvantage the competitive positions of Maritime or Choctaw if disclosed, with the remainder constituting privileged financial information. The record in this proceeding has made abundantly clear that Mr. Havens and his companies, including Environmental and Verde, are fierce competitors of Maritime in the market for spectrum related to automated maritime telecommunications systems. Even assuming Mr. Havens

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<sup>17</sup> *Id.*

<sup>18</sup> Joint Opposition to Petition to Deny Confidentiality Designations of Maritime and Choctaw at 2 (filed Feb. 4, 2015).

<sup>19</sup> *Id.* at 3-4.

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> See *Protective Order* at 4 ¶ 3.

and his companies were not competitors for a particular contract, namely one with Amtrak for positive train control, the public release of the designated information would still put Maritime or Choctaw at a competitive disadvantage against other competing companies. Further, the Presiding Judge is not aware of any Commission rule that requires the release of “[a]ll of the information that is relevant to competition and negotiations,” nor does Environmental or Verde cite any such rule.

12. In accordance with these findings, Maritime and Choctaw shall submit on or before **March 6, 2015**, a redacted version of the transcript that includes the redactions approved by the Presiding Judge in this *Order*, and excludes the redactions rejected by the Presiding Judge both in this *Order* and in *Order*, FCC 15M-3. Before submission, Maritime and Choctaw shall afford the other parties the opportunity, limited to three business days, to review the redactions to ensure that they accurately reflect the Presiding Judge’s rulings. Once the redacted transcript is submitted and made accessible to the public, the Presiding Judge will issue an *Order* setting a due date for the parties’ Proposed Findings of Fact.

#### *Confidentiality Designations of Duquesne*

13. On January 15, 2015, the Office of Administrative Law Judges received a single physical copy of the Confidentiality Designations of Duquesne Light Company (“Duquesne”). Duquesne re-filed its Confidentiality Designations on January 23, 2015. Environmental and Verde submitted a Petition to Deny Duquesne Transcript Confidentiality Designations on January 28, 2015. Upon review, the Presiding Judge found no basis for those designated portions of the transcript to receive confidential treatment. Despite concerns as to whether the pleading was properly and timely filed, the Presiding Judge released *Order*, FCC 15M-5, on January 28, 2015, requiring Duquesne to demonstrate clearly and persuasively that the designated portions of the transcript warranted confidential treatment or else those portions would be publically released. Duquesne has not responded. Accordingly, the Confidentiality Designations of Duquesne Light Company are rejected, and those portions of the transcript will be made publically available.

#### *Status Conference Request of Environmental and Verde*

14. On January 14, 2015, Environmental and Verde filed a Request for a Status Conference to Make Records Public. They move for the Presiding Judge to “set a status conference to consider arguments from the parties as to whether to make public the records of this proceeding that have been withheld from the public.”<sup>23</sup> Environmental and Verde primarily seek the release of what it describes as “alleged contracts between Maritime and purchasers/lessees of spectrum, Pinnacle Wireless, Duquesne Light, Puget Sound Energy and Evergreen School District,” which are designated as Bureau Exhibits 38, 45, 46, 51-53, 55, and 60.<sup>24</sup> Environmental and Verde argue that the “alleged contracts” are central to Maritime’s arguments, yet Environmental and Verde “do not effectively have access to the documents since their President, [Warren] Havens is barred from discussing it with ENL-VSL counsel, and ENL-VSL cannot make public arguments based on the evidence.”<sup>25</sup> Environmental and Verde insist

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<sup>23</sup> ENL-VSL Request for a Status Conference to Make Records Public at 1 (filed Jan. 14, 2015).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 4.

that the documents should be released because the public is entitled to see evidence of rule violations and the parties are entitled to make public arguments.<sup>26</sup> Further, Environmental and Verde argue that Maritime and Choctaw have “no valid countervailing interest in keeping the documents confidential” as they have not alleged that the contracts contain trade secrets or privileged information, they have not demonstrated competitive harm would result if the contracts were released publically,<sup>27</sup> and they have released the contracts in other venues.<sup>28</sup>

15. Environmental and Verde also seek the release of Bureau Exhibits 58, 59, 70, 71, and 91, which are answers to interrogatories by various parties in this proceeding that have been designated confidential. Environmental and Verde argue that the public is entitled to know the facts obtained by the Bureau that pertain to the allegations in this proceeding.<sup>29</sup>

16. On January 20, 2015, the Enforcement Bureau filed a Response to ENVL-VSL Request for Status Conference. The Bureau does not oppose holding a conference where Environmental and Verde would identify with specificity the confidentiality designations it is challenging. However, the Bureau argues that any attempt of Environmental or Verde to challenge the inclusion of hearing testimony in the record should be denied.

17. The Presiding Judge rejected a similar motion by Mr. Havens in *Order*, FCC 14M-44. In his Memo on Documents Alleged Confidential Under the Protective Order But Lawfully in the Public Domain, Mr. Havens sought access to three confidential exhibits on grounds that the documents were already publically released;<sup>30</sup> that Maritime made no attempt to meet its burdens under the Protective Order;<sup>31</sup> and that he was entitled to confidential information as a *pro se* party.<sup>32</sup> The Presiding Judge noted that had the motion not been mooted, he would have rejected it as untimely, to wit:

As the Presiding Judge articulated at hearing, Mr. Havens and his companies have missed several opportunities to challenge confidentiality designations. Those designations could have been challenged when the designated documents were first produced, when many of those documents were used in support of summary decision motions, and when the Enforcement Bureau sought to have those documents admitted as exhibits. Throughout these prehearing activities, the Presiding Judge expected that Mr. Havens would move for review of the confidentiality designations, but that motion never arrived. Instead, Mr. Havens opted to search for a solution outside of this proceeding by serially filing requests under the Freedom of Information Act and searching filings made in other legal proceedings. He then failed to offer the public versions of confidential documents that he claims to possess as direct exhibits. . .

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 5-6.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> Memo on Documents Alleged Confidential Under the Protective Order But Lawfully in the Public Domain at 2-3 (filed Dec. 10, 2014).

<sup>31</sup> *Id.* at 3-4.

<sup>32</sup> *Id.* at 4-5.

The Presiding Judge emphasized:

Mr. Havens cannot sit on his hands for more than a year and then waste time by belatedly seeking relief at hearing, with direct exhibits already admitted and witnesses in court and ready to testify. To do so disrupts the hearing, unfairly burdens opposing counsel, and needlessly distracts the Presiding Judge from the business at hand. Accordingly, for all the above reasons, his request is denied.<sup>33</sup>

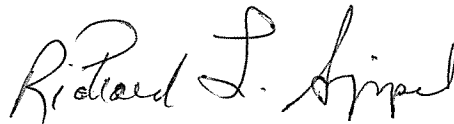
For these same reasons, the Request of Environmental and Verde is denied.

18. Finally, the Presiding Judge finds the Environmental-Verde Request to be frivolous and in violation of Section 1.52 of the Commission's rules. Under Section 1.52, the signature of an attorney "constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."<sup>34</sup> There is no good ground to support this motion. As the Presiding Judge has already made clear in *Order*, FCC 14M-44, challenges to the confidentiality designations of the parties' exhibits are now untimely and will not be considered. Environmental and Verde disregard that ruling. They not only cite Mr. Havens' previously rejected motion at length in support of their Request; they also explicitly incorporate that same rejected motion by reference.<sup>35</sup> They make no attempt to distinguish their Request from the rejected Havens motion and fail even to acknowledge the existence of *Order*, FCC 14M-44.

19. Environmental and Verde have repeatedly filed frivolous motions that ignore or defy the Presiding Judge's prior orders. Like Mr. Havens, they have demonstrated contempt for the Presiding Judge, the Commission, the Commission's rules, and this proceeding. Accordingly, the Presiding Judge must consider whether Environmental and Verde should be allowed to continue their contemptuous participation. Also under consideration is a referral of the conduct of counsel to the Office of General Counsel for appropriate action.

**SO ORDERED.**

FEDERAL COMMUNICATIONS COMMISSION<sup>36</sup>



Richard L. Sippel  
Chief Administrative Law Judge

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<sup>33</sup> *Order*, FCC 14M-44 at 4 (rel. Dec. 19, 2014).

<sup>34</sup> 47 C.F.R. § 1.52.

<sup>35</sup> Request at 8 n.8.

<sup>36</sup> Courtesy copies sent to all counsel and to Mr. Warren Havens by e-mail upon issuance of this *Order*.