

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
MARITIME COMMUNICATIONS/LAND) EB Docket No. 11-71
MOBILE, LLC) File No. EB-09-IH-1751
Participant in Auction No. 61 and Licensee of) FRN: 0013587779
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
Applicant with ENCANA OIL AND GAS (USA),) 0004354053, 0004309872,
INC.; DUQUESNE LIGHT COMPANY, DCP) 0004310060, 0004314903,
MIDSTREAM, LP; JACKSON COUNTY) 0004315013, 0004430505,
RURAL MEMBERSHIP ELECTRIC) 0004417199, 0004419431
COOPERATIVE; PUGET SOUND ENERGY,) 0004422320, 0004422329,
INC.; ENBRIDGE ENERGY COMPANY INC.;) 0004507921, 0004153701,
INTERSTATE POWER AND LIGHT) 0004526264, and 0004604962
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

Adopted: October 7, 2014

Released: October 14, 2014

By the Commission:

I. INTRODUCTION

1. By this memorandum opinion and order, we dismiss the "Appeal under Rule § 1.301(a)," filed January 28, 2014 (as corrected), by Warren Havens (Appeal). Havens seeks interlocutory review of a procedural ruling (14M-3) by Chief Administrative Law Judge Richard L. Sippel (ALJ) that rejected Havens' claim of attorney-client privilege at a prehearing conference.1 We find that a subsequent ruling

1 See Order, FCC 14M-3 (Jan. 17, 2014) (14M-3). Various parties filed oppositions or responses to Havens' Appeal. See Response of Technology Law Group to Interlocutory Appeal of Order FCC 14M-3, filed February 4, 2014 (TLG Response); Submission of Mr. James Ming Chen to Warren Havens' January 28, 2014 Interlocutory Appeal, filed February 4, 2014 (Chen Submission); Enforcement Bureau's Opposition to Mr. Havens' Interlocutory Appeal, filed February 4, 2014 (EB Opposition); Maritime's Opposition to Havens' January 28, 2014 Interlocutory Appeal, filed February 4, 2014 (Maritime Opposition).

by the ALJ has mooted appeal of the attorney-client privilege question.² We also dismiss six other interlocutory appeals that Havens has filed concerning the same proceeding.

II. BACKGROUND

2. Proceedings below. In this hearing proceeding, EB Docket No. 11-71 (Maritime Proceeding), the Commission designated issues against a company called Maritime Communications/Land Mobile, LLC (Maritime) to determine whether Maritime's wireless radio licenses should be revoked and its related wireless radio applications should be denied.³ The designated issues include whether Maritime failed to disclose its real-parties-in-interest, whether Maritime made misrepresentations or lacked candor, whether Maritime committed rules violations, and whether certain of Maritime's licenses automatically cancelled for failure to construct or operate.⁴ Havens is a party to the Maritime Proceeding.

3. The ALJ stayed the Maritime Proceeding, with the exception of one issue, to permit the Commission to consider whether Maritime should be allowed to transfer its authorizations pursuant to the Commission's *Second Thursday* doctrine.⁵ Litigation of the remaining issue, "Issue (g)," which concerns the question of whether some of Maritime's licenses have automatically cancelled, has proceeded through the discovery phase.

4. The matters before us arise from Maritime's attempts to obtain summary decision on Issue (g) and Havens' opposition to these attempts. On August 14, 2013, the ALJ granted in part and denied in part Maritime's May 8, 2013, Motion for Summary Decision on Issue (g).⁶ In partially denying the motion, the ALJ noted that Havens was appearing *pro se*, and that, generally, pursuant to Commission policy, summary decision should not in fairness be used against parties who appear *pro se*.⁷ In response to Maritime's continuing efforts to seek summary disposition, Havens subsequently, on December 2, 13, filed a motion asking the ALJ to reject further summary disposition of Issue (g). In that motion, Havens

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February 7, 2014; Choctaw's Opposition to Interlocutory Appeal of Warren Havens, filed February 5, 2014. *See also* Enforcement Bureau's Comments on the January 17, 2014 Prehearing Conference, filed January 27, 2014. Havens has moved to strike the opposition of Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (collectively, Choctaw). *See* Request to Strike and Comments on Choctaw's "Opposition to Interlocutory Appeal of Warren Havens," filed February 14, 2014. Choctaw was permitted to intervene in the Maritime Proceeding for the limited purpose of updating the status of its application for *Second Thursday* relief. *See infra* note 5; Order, FCC 13M-4 (Mar. 11, 2003) at 3. Consequently, Choctaw's pleading is beyond the scope of its authorized participation, and we grant Havens' motion to strike it. *See infra* para. 15.

² *See* Memorandum Opinion and Order, FCC 14M-18 (Jun. 17, 2014) (14M-18).

³ *See Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd 6520 (2011) (HDO).

⁴ *See HDO*, 26 FCC Rcd at 6547 ¶ 62.

⁵ *See* Order, FCC 13M-6 (Mar. 31, 2013). *See also Public Notice*, DA 13-569 (Mar. 28, 2013). Under the *Second Thursday* doctrine, a bankrupt licensee, the qualifications of which are subject to a hearing proceeding, may sell its stations where alleged wrongdoers would not benefit from the sale and the proceeds would be used to reimburse innocent creditors. *See Second Thursday Corp.*, 22 FCC 2d 515, *recon. granted on other grounds*, 25 FCC 2d 112 (1970). Choctaw is the transferee of Maritime's licenses specified in the proposed *Second Thursday* transaction. The Commission ultimately denied Maritime's request for *Second Thursday* relief, but removed some licenses from hearing to consider applications to transfer them to the Southern California Regional Rail Authority for positive train control. *See Maritime Communications/Land Mobile, LLC, Debtor-In-Possession*, FCC 14-133 (Sept. 11, 2014).

⁶ *See* Memorandum Opinion and Order, FCC 13M-16 (Aug. 14, 2013) (13M-16).

⁷ *See* 13M-16 at 7-9 ¶¶ 17-20. *See also Summary Decision Procedures*, 34 FCC 2d 485, 488 ¶ 6 (1972) ("[A] motion for summary decision should not in fairness be used against parties who appear without counsel [except where the issues are more simple than complex and the *pro se* party has personal knowledge of the facts].").

indicated that “Havens[’] actions in this hearing on a pro se basis have been informed by assisting counsel as to procedure and substance.”⁸ On that same date, Maritime filed a further motion for summary disposition, in which the FCC’s Enforcement Bureau joined.⁹ On December 16, 2013, responding to that joint motion, Havens (despite his earlier representations about “assisting counsel”) renewed his argument that summary decision should not be used against him because he is participating in the proceeding *pro se*.¹⁰

5. In response to Havens’ December 16 filing, the ALJ took several actions to inquire into whether and to what extent Havens’ pleadings reflected the assistance of counsel, ultimately scheduling a prehearing conference to examine Havens’ assisting counsel regarding the nature and scope of the services they have provided Havens.¹¹ In advance of the prehearing conference, Havens objected to any possible examination of assisting counsel, asserting that the ALJ’s proposal to question them as to their services was barred because that topic is privileged.¹² At Havens’ direction, assisting counsel declined at the hearing to answer any of the ALJ’s questions.¹³

6. In 14M-3, which memorializes and expands upon an oral ruling at the prehearing conference, the ALJ rejected Havens’ claims of privilege.¹⁴ In the Appeal, Havens asks the Commission to overturn 14M-3 because it requires legal counsel who assisted him to disclose information protected under the attorney-client privilege.¹⁵

7. During the pendency of Havens’ Appeal, in a decision released June 17, 2014, the ALJ granted in part and denied in part Maritime and the Enforcement Bureau’s joint motion for summary decision.¹⁶ In so doing, the ALJ rejected the argument of Havens’ December 16 opposition¹⁷ that Havens is entitled to lenient treatment as a *pro se* litigant.¹⁸ The ALJ reached that decision without the benefit of responses to the questions that Havens’ assisting counsel refused to answer at the prehearing conference concerning the nature of their assistance to Havens.¹⁹

⁸ Havens-SkyTel First Motion Under Order 13M-19 to Reject Settlement, Proceed With the Hearing and Provide Additional Relevant Discovery, filed December 2, 2013, at 1 n.1.

⁹ See Joint Motion of Enforcement Bureau and Maritime [Communications/Land Mobile, LLC] for Summary Decision on Issue G, filed December 2, 2013.

¹⁰ See Havens Opposition to Joint Motion for Enforcement Bureau & [Maritime] for Summary Decision on Issue G, filed December 16, 2013, at 104-05, *quoting* 13M-16 at 7 ¶ 18.

¹¹ See Order, 14M-1 (Jan. 8, 2014) (14M-1), at 2-3 ¶¶ 3-7. Havens’ interlocutory appeal of 14M-1 is discussed *infra* at paragraphs 9 through 11.

¹² See Motion for Relief regarding Order FCC 14M-1 (the “Order”), filed January 15, 2014, at 2 ¶ 2.

¹³ See *generally* tr., Volume 8.

¹⁴ See 14M-3 at 1-2. See also *id.* at 3 n.3; tr. at 8-1063-64 (bench ruling).

¹⁵ See Appeal at 2. In the Appeal, Havens invokes “[p]rivileges,” *id.*, that he describes as “attorney-client privilege, work product, and confidentiality,” *id.* at 4. In 14M-3, however, the ALJ restricted his analysis to the attorney-client privilege, finding that Havens did not raise any other privilege “with respect to particular questions asked in the January 17, 2014, prehearing conference.” 14M-3 at 1 n.2. Because we dismiss Havens’ appeal as moot, see *infra* para. 8, we need not consider or decide whether the ALJ correctly limited the scope of his analysis.

¹⁶ See 14M-18; *supra* note 9.

¹⁷ See *supra* para. 4 and note 8.

¹⁸ See 14M-18 at 12-14 ¶¶ 33-37.

¹⁹ See *id.* at 14 ¶ 37. Havens has not sought interlocutory review of this aspect of the ALJ’s June 17, 2014, order.

III. DISCUSSION

8. Appeal of 14M-3. As reflected in the transcript of the prehearing conference²⁰—as well as in several of the oppositions to Havens’ Appeal²¹—the ALJ’s purpose in seeking to question Havens’ assisting counsel at the prehearing conference was to obtain information that would inform the ALJ’s analysis of whether Havens should receive lenient treatment as a *pro se* litigant when opposing Maritime and the Enforcement Bureau’s joint motion for summary decision on Issue (g).²² In the June 17, 2014, order, however, the ALJ was able to resolve that question without recourse to further information from Havens’ assisting counsel.²³ Accordingly, we find that whether the ALJ erred in overruling Havens’ privilege claims at the prehearing conference—which is the sole question presented in Havens’ Appeal that is suitable for interlocutory appeal as a matter of right under the Commission’s rules²⁴—is moot. We therefore dismiss Havens’ Appeal.

9. Other Appeals. In addition to challenging 14M-3, Havens has filed interlocutory appeals concerning other procedural rulings in the Maritime Proceeding. Two of these, 13M-22²⁵ and 14M-1,²⁶ relate to aspects of the ALJ’s attempts to inquire into Havens’ legal assistance preliminary to 14M-3. Two other orders, 14M-22 and 14M-25, concern actions regarding Havens’ legal representation following 14M-3. We will not discuss these matters at great length, because none of the orders involved falls within the scope of rulings that qualify for interlocutory appeal as of right.

10. Appeals of 13M-22 and 14M-1. Havens asserts that he may appeal both 13M-22 and 14M-1 as a matter of right under § 1.301(a).²⁷ Contrary to his assertions, however, neither 13M-22 nor 14M-1 falls within the categories of rulings that may be appealed as of right on an interlocutory basis.²⁸

²⁰ See, e.g., tr. at 8-1040, lines 10-12 (explaining, in response to inquiries from Havens concerning the purpose of the ALJ’s questions: “Why should I give you any leniency for being *pro se* if you have got ghost writer lawyers behind you cranking this stuff out?”); *id.* at 8-1051, lines 20-25 (“Because again, I have got this problem measuring the substantial participation, whether Mr. Havens is substantially participating in these pleadings as to whether he is entitled to [my] looking at him in a lenient fashion as opposed to an attorney. In other words, [whether] he kind of gets [an] advantage.”).

²¹ See, e.g., TLG Response at 4 (characterizing “the issue that gives rise to this appeal” as “the propriety of deference to Mr. Havens as a *pro se* party”); Chen Submission at 4 (calling “[t]he issue of Mr. Havens’ *pro se* status . . . the only issue in question here”); EB Opposition (“The privilege issue arose because the Presiding Judge had sought information about whether Mr. Havens—who had asserted that he was appearing *pro se* and had sought special consideration on that basis—had in fact received the advice of counsel on issues pertinent to a pending motion for summary decision.” (footnote omitted)).

²² See *supra* note 9.

²³ See 14M-18 at 14 ¶ 37.

²⁴ See 47 C.F.R. § 1.301(a)(2). A ruling that requires testimony or the production of documents over a claim of privilege is one of five classes of rulings that qualify for interlocutory appeal as a matter of right. See *infra* note 28. Other matters raised in Havens’ appeal are outside the scope of § 1.301(a).

²⁵ Order, FCC 13M-22 (Dec. 19, 2013) (13M-22).

²⁶ See *supra* note 11.

²⁷ See Interlocutory Appeal Under Section 1.301(a), filed January 15, 2014 (appealing 14M-1); Interlocutory Appeal Under Section 1.301(a), filed December 31, 2013 (as corrected) (appealing 13M-22); see also Request to Accept and Supplement to Interlocutory Appeal Under Section 1.301(a), filed January 7, 2014 (concerning 13M-22).

²⁸ The five types of rulings appealable as a matter of right are: (1) a ruling that denies or terminates a person’s right to participate as a party, (2) a ruling that requires testimony or the production of documents over a claim of privilege, (3) a ruling that denies a motion to disqualify the presiding judge, (4) a ruling that grants a settlement without terminating the proceeding, and (5) a ruling that removes a counsel from the hearing. See 47 C.F.R. § 1.301(a). With respect to other rulings, a party may ask the ALJ for leave to file an interlocutory appeal upon a

(continued. . .)

More specifically, 13M-22 addresses several procedural issues: (1) suspension of the pre-hearing calendar, (2) the timeliness of Havens' filings, (3) a requirement that Havens' assisting counsel file notices of appearance, (3) a request for an extension of time, (4) a motion for further discovery, (5) the status of allegedly undisclosed evidence, (6) a motion for declaratory ruling, and (7) a glossary submissions by the parties.²⁹ None of these issues falls within the scope of § 1.301(a), inasmuch as none of the ALJ's corresponding rulings terminates the right of a party to participate in the proceeding, removes counsel from the hearing, or fits within any of the other specified categories of rulings that qualify for interlocutory review as of right. Similarly, we do not construe 14M-1 as a ruling within the scope of § 1.301(a). 14M-1 is the order in which the ALJ scheduled the prehearing conference dealing with Havens' assisting counsel.³⁰ We do not construe an order scheduling a prehearing conference as falling within the scope of § 1.301(a). Because neither 13M-22 nor 14M-1 is appealable to the Commission as a matter of right, we dismiss Havens' appeals of those rulings pursuant to § 1.301(a).

11. In addition to appealing 13M-22 and 14M-1 as a matter of right under § 1.301(a), Havens alternatively sought permission from the ALJ to file interlocutory appeals of those same orders pursuant to 47 C.F.R. § 1.301(b), the provision of the Commission's rules that governs discretionary review of interlocutory rulings.³¹ The ALJ denied Havens' requests.³² On February 4, 2014, Havens filed an appeal of the ALJ's ruling denying Havens' request for discretionary leave to file an interlocutory appeal of 14M-1.³³ Similarly, on March 6, 2014, Havens filed an appeal of the ALJ's ruling denying Havens' request, under 47 C.F.R. § 1.301(b), for leave to file an interlocutory appeal of 13M-22.³⁴ Under § 1.301(b), ALJ rulings that deny permission to file "discretionary" interlocutory appeals are final, *i.e.*, nonappealable. We therefore dismiss Havens' February 4 and March 6 appeals.³⁵

12. Appeal of 14M-22. On July 22, 2014, Havens filed an appeal under § 1.301(a) of an order addressing procedural dates for the completion of discovery and the commencement of the hearing for Issue (g).³⁶ The order states: "[C]ounsel representing Mr. Havens at trial SHALL FILE AND SERVE a Notice of Appearance on or before July 30, 2014."³⁷

13. 14M-22 does not fall within the categories of rulings that would be appealable as a matter of right, which categories include rulings that "den[y] or terminate[] the right of any person to

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showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would likely require remand should the appeal be deferred and raised as an exception. *See id.* § 1.301(b).

²⁹ *See* 13M-22 at 2-8 ¶¶ 2-17.

³⁰ *See* 14M-1 at 1-2 ¶ 1; *see also supra* paragraph 5.

³¹ *See* Request Under Section 1.301(b), filed January 16, 2014 (errata copy) (requesting permission to appeal 14M-1); Request [to appeal] under Section 1.301(b), filed December 27, 2013, and similar pleadings filed December 30, 2013, and January 7, 2014 (requesting permission to appeal 13M-22).

³² *See* Order, FCC 14M-6 (Jan. 30, 2014); Order, 14M-7 (Feb. 26, 2014).

³³ *See* Order, 14M-6 (Jan. 30, 2014); Interlocutory Appeal Under § 1.301(a), filed February 4, 2014 (February 4 Appeal); Enforcement Bureau's Opposition to Mr. Havens' Interlocutory Appeal, filed February 11, 2014.

³⁴ Order, FCC 14M-7 (Feb. 26, 2014); Interlocutory Appeal Under § 1.301(a), filed March 7, 2014 (as corrected).

³⁵ Havens states that, in addition the ALJ's rulings denying leave to file interlocutory appeals of 13M-22 and 14M-1, the February 4 and March 6 appeals cover two other orders by the ALJ: Order, FCC 14M-4 (Jan. 27, 2014), and Order, FCC 14M-5 (Jan. 28, 2014). *See* February 4 Appeal at 1. Those orders involve the time for filing an appeal of 14M-3 and other miscellaneous matters. They do not qualify for interlocutory review as of right.

³⁶ *See* Order, FCC 14M-22 (Jul. 15, 2014) (14M-22), at 3; Appeal Under § 1.301(a) Regarding and Comments on FCC 14M-22, filed July 22, 2014 (Havens 14M-22 Appeal).

³⁷ 14M-22 at 3 (emphasis omitted).

participate as a party to a hearing proceeding,³⁸ or that “remove counsel from [a] hearing.”³⁹ Contrary to Havens’ assertion, we do not read 14M-22 as prohibiting Havens from representing himself, or as prospectively terminating his participation in the Maritime Proceeding if he attempts to represent himself.⁴⁰ During the course of the Maritime Proceeding, Havens has indicated on at least one occasion that he “intend[s] to have, but [has] not yet fully secured, legal counsel for the hearing.”⁴¹ We understand 14M-22 to require any counsel whom Havens may wish to represent him at the hearing to file a notice of appearance on or before July 30, 2014. We do not construe the imposition of that deadline as a “preemptive ‘ruling removing counsel,’” as Havens has characterized it,⁴² nor as a ruling preventing Havens from participating as a party in the Maritime Proceeding. Because 14M-22 thus does not implicate § 1.301(a), it is not appealable as a matter of right, and we dismiss Havens’ interlocutory appeal.

14. Appeal of 14M-25. Finally, Havens appeals an order in which the ALJ directed Havens and an attorney, James A. Stenger (Stenger) of the firm of Chadbourne & Parke, LLP, to file prehearing submissions jointly and required them to coordinate questioning witnesses and objections at the hearing.⁴³ Although no attorney has filed a notice of appearance on behalf of Havens, on July 29, 2014, Stenger filed a notice of appearance on behalf of two of Havens’ companies, Environmental LLC and Verde Systems LLC.⁴⁴ We find that the order in question, 14M-25, which merely imposes conditions on how Havens, as a party, must conduct himself, does not terminate his party status. It therefore does not “effectively” deny Havens’ right to participate as a party.⁴⁵ We dismiss his interlocutory appeal.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the Appeal under Rule § 1.301(a), filed January 28, 2014, by Warren Havens IS DISMISSED; the Interlocutory Appeal under Rule § 1.301(a), filed March 6, 2014, by Warren Havens IS DISMISSED; the Interlocutory Appeal under Rule § 1.301(a), filed February 4, 2014, by Warren Havens IS DISMISSED; the Appeal under Rule § 1.301(a), filed January 15, 2014, by Warren Havens IS DISMISSED; the Interlocutory Appeal Under Section 1.301(a), filed December 30, 2013, by Warren Havens, and the Request to Accept and Supplement to Interlocutory Appeal Under Section 1.301(a), filed January 7, 2014, by Warren Havens ARE DISMISSED; the Appeal Under § 1.301(a) Regarding and Comments on FCC 14M-22, filed July 22, 2014, by Warren Havens IS DISMISSED; and the Request Under § 1.301(a), filed August 18, 2014, by Warren Havens IS DISMISSED.

³⁸ 47 C.F.R. § 1.301(a)(1).

³⁹ *Id.* § 1.301(a)(5).

⁴⁰ The Commission has recognized an individual’s right to appear *pro se*. See *Black Television Workshop of Los Angeles, Inc.*, 7 FCC Rcd 6868, 6870 ¶ 7 (1992) (characterizing “the right to self-representation [as] a right of high-standing”). In the Maritime Proceeding, although the ALJ has (legitimately) determined that Havens may not represent corporate parties with which Havens is affiliated, the ALJ has permitted Havens to represent himself. See *Maritime Communications/Land Mobile, LLC*, 28 FCC Rcd 11596, 11599 ¶¶ 9-11 (2013).

⁴¹ 14M-18 at 12 ¶ 31 n.101, *quoting* Proposed Schedule from Warren Havens, filed August 27, 2013, at 3 ¶ 4.

⁴² Havens 14M-22 Appeal at 2.

⁴³ See Order, FCC 14M-25 (Aug. 11, 29014) (14M-25) at 3.

⁴⁴ See Notice of Appearance, filed July 29, 2014, by James A. Stenger, Chadbourne & Parke, LLP. In a pleading filed the same day (and in some subsequent pleadings), Stenger stated that Havens (acting *pro se*) agreed with the content of the pleading and set forth Havens’ position on the merits. See, e.g., Response to Joint Request for Prehearing Conference, filed July 29, 2014, at 2, n.1.

⁴⁵ See Request Under § 1.301(a), filed August 18, 2014, by Warren Havens. See also Enforcement Bureau’s Opposition to Mr. Havens’ Interlocutory Appeal, filed August 21, 2014; E-mail from Warren Havens to Pamela Kane *et al.* (Aug. 21, 2014).

16. IT IS FURTHER ORDERED that the Request to Strike and Comments on Choctaw's "Opposition to Interlocutory Appeal of Warren Havens," filed February 12, 2014, by Warren Havens IS GRANTED AND Choctaw's Opposition to Interlocutory Appeal of Warren Havens, filed February 5, 2014, IS STRICKEN.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary