In the Matter of:

MARITIME COMMUNICATIONS/LAND MOBILE, LLC

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

Applicant with ENCANA OIL AND GAS (USA), INC.; DUQUESNE LIGHT COPANY; 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; DIXIE ELECTRIC MEMBERSHIP CORPORATION, INC.; ATLAS PIPELINE – MID CONTINENT, LLC; DENTON COUNTY ELECTRIC COOPERATIVE, INC., DBA COSERV ELECTRIC; AND SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY

To: Marlene H. Dortch, Secretary
Attention: The Commission

SUPPLEMENT TO INTERLOCUTORY APPEALS

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SUMMARY

This is a Supplement to the Interlocutory Appeals of Opinion and Order FCC 15M-14 (the “Order”), filed by Environmentel LLC, (“ENL”), Verde Systems LLC (“VSL”) and by Warren Havens pro se on April 29, 2015. It is filed on behalf of ENL, VSL, Intelligent Transportation and Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, and V2G LLC (“the Companies”), and Mr. Havens individually.

The Order refers to the Commission a question as to the character qualifications of Mr. Havens and the Companies, and bars Mr. Havens and the Companies from further participation in EB Docket 11-71 (the “Hearings” or the “proceeding”). Based on the record of the Hearings, the Order is arbitrary and capricious, and an abuse of discretion, and should be overturned.

The Order finds that ENL-VSL and Mr. Havens misled the Presiding Judge and delayed the proceeding. The record clearly demonstrates, to the contrary, that it was the Respondent, Maritime Communications/Land Mobile (“Maritime”), who misled the Presiding Judge throughout the proceeding by misrepresenting the history and status of its site-based licenses and component stations, and delayed the proceeding for years.

Mobex – a predecessor licensee of the Respondent Maritime – held pre-existing site-based licenses that would encumber AMTS licenses in the market/license areas on which Mr. Havens intended to bid. Mr. Havens found out that Mobex and its predecessors had failed to comply with the “construction” and “operation” requirements of their licenses, and also uncovered significant bidding misconduct by Maritime in Auction 61, all of which he reported to the Commission over the course of his decade-long investigations.

On April 18, 2011, the Commission adopted the Hearing Designation Order 11-64 (“HDO”), which recited in detail Maritime’s construction and bidding misconduct uncovered in the Bureaus’ own investigation, in large part tracking Mr. Havens’s reports.
Despite the “totality of the evidence” of Maritime’s misconduct, and after several years during which Maritime delayed the Hearings and refused to provide discovery responses, the Bureau changed sides, aggressively litigating on Maritime’s behalf, and leading the Presiding Judge to observe “[this is] the first case I ever had where the [Enforcement] Bureau comes around the other end and assists the Respondent and is against the attacks of the intervener.”

Having spent more than a decade pursuing Maritime’s wrongdoing and successfully encouraging the Commission to establish the Hearings, only to see the Bureau representing the Respondent rather than the whistleblower, Mr. Havens became increasingly but understandably frustrated, and therefore even more tenacious in working to demonstrate Maritime’s misconduct.

After Maritime and the Bureau between them had filed no less than three motions for summary decision, on October 27, 2014, ENL-VSL and Mr. Havens filed their only such motion (the “Motion”). Nearly six months later, the Presiding Judge issued the Order, which recites factual findings on which the Presiding Judge bases two grounds for the character qualifications referral: (1) the filing of the Motion was unauthorized, and therefore was frivolous and filed in bad faith, and (2) the conduct of Mr. Havens at the Hearings.

The Order is wrong on both the facts and the law on both grounds, is arbitrary and capricious and an abuse of discretion, and must be reversed. First, the record demonstrates that the Presiding Judge gave permission for the Motion to be filed; thus the Motion was not unauthorized, and therefore was not frivolous or filed in bad faith. Second, of the numerous criticisms of the conduct of Mr. Havens and ENL-VSL recited in the Order, some are incorrect on the facts, inconsistent with the record, and/or taken out of context; the remainder of the criticized actions are within the bounds of conduct by a pro se party in hard-fought litigation, particularly here, where Mr. Havens found himself as the sole party pursuing the facts set out in the HDO, litigating not only against the Respondent Maritime, but also against the Bureau, which should have been carrying that burden.
SUPPLEMENT TO INTERLOCUTORY APPEALS

Pursuant to 47 C.F.R. § 1.301(a)(1), and to the permission granted by the Office of General Counsel acting under delegated authority under 47 C.F.R. § 0.251(c), Environmentel LLC, (“ENL”), Verde Systems LLC (“VSL”), Intelligent Transportation and Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, and V2G LLC (the “Companies”), and Warren Havens individually (“Mr. Havens”) (collectively “Mr. Havens and the Companies”), hereby file this Supplement to the Interlocutory Appeals of the Opinion and Order FCC 15M-14 (the “Order”), filed on April 29, 2015, by ENL and VSL (together “ENL-VSL”) and by Warren Havens pro se.2

The Order refers a question to the Commission as to character qualifications of Mr. Havens and the Companies, and bars Mr. Havens and the Companies from further participation in EB Docket 11-71 (the “Hearings” or the “proceeding”).3 Based on the record of the Hearings, the Order is arbitrary and capricious, and an abuse of discretion, and should be overturned.4

I. The Order Under Appeal

The Order finds that ENL-VSL and Mr. Havens misled the Presiding Judge and delayed the proceeding. The record clearly demonstrates, to the contrary, that it was the Respondent, Maritime Communications/Land Mobile (“Maritime”), who misled the Presiding Judge

1 Letter from Linda Oliver, Associate General Counsel, FCC, to Dana Frix, Chadbourne & Parke LLP, EB Docket No. 11-71, DA 15-796 (rel. Jul. 9, 2015); Letter from Linda Oliver, Associate General Counsel, FCC, to Jeffrey Blumenfeld, Lowenstein Sandler LLP, EB Docket No. 11-71, DA 15-796 (rel. Aug. 12, 2015).
2 This supplements the interlocutory appeals filed April 29 and includes language from them both literally and by paraphrase without quotation marks.
3 While Mr. Havens and all six companies were designated in the HDO, only ENL and VSL participated in the Hearings; nevertheless, the Order sanctions all six companies.
4 See, e.g., Cablevision Sys. Corp. v. F.C.C., 597 F.3d 1306, 1307 (D.C. Cir. 2010) (“We will vacate an agency's decision as arbitrary and capricious ‘if [its] factual determinations lack substantial evidence,’ or if the agency … ‘entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency….’” (citations omitted)).
throughout the proceeding by misrepresenting the history and status of its site-based licenses and component stations, and delayed the proceeding for years, including by failing to provide meaningful responses to discovery requests thereby concealing the relevant facts. Maritime eventually admitted\(^5\) under Issue (g), that 73 of the stations (82\%) had been permanently abandoned and thus terminated by operation of law up to two-and-a-half years earlier, also implicitly admitting that its contrary statements to the Commission had been, simply, false.

Despite this, the Order does not sanction or even criticize Maritime. Instead, the Order seeks the addition of a character issue against Mr. Havens and the Companies, based not on any conduct relating to obtaining or exercising license rights,\(^6\) but based instead on two sets of grounds related to conduct\(^7\) at the Hearings to protect their licenses from encumbrances described in the HDO:

- First, filing a motion the Presiding Judge allegedly had instructed not be filed, on which point the record indicates the Presiding Judge is simply mistaken.
- Second, a collection of selective criticisms of allegedly-overly-zealous advocacy by Mr. Havens, acting *pro se*, despite the zeal being readily explained, and justified, by the fact that Mr. Havens found himself litigating not only against the Respondent but also against the Bureau.

This development was so remarkable that, at the time, the Presiding Judge observed:

> this is the first case I ever had where the Bureau comes around the other end and assists the Respondent and is against the attacks of the intervener in effect, or against the -- in other words, you got cases against each other, where normally, you’d expect them to be combined against the Respondent. It’s flipped around. Can you explain that to me? *Tr. 1260.*


\(^7\) *See* Section III.B below.
The Order also excludes Mr. Havens and the Companies from all further participation in the Hearings, despite the fact that at this point Mr. Havens and ENL-VSL have been Respondent Maritime’s primary opponents, and despite the fact that Mr. Haven’s efforts over the prior decade were significantly responsible for the HDO.

II. Background to the Hearings

For 15 years Mr. Havens has spent countless hours and dollars doing exactly what the Commission encouraged\(^8\) and expected him to do: discovering and shining light on the misconduct of Maritime and its predecessors in failing to construct and operate under their licenses and in consistently misrepresenting these facts to the Commission. Despite that misconduct, the subject of this Interlocutory Appeal is not an Order criticizing or sanctioning Maritime. Instead it is an Order criticizing the very relentlessness to which Mr. Havens was driven by the Enforcement Bureau’s remarkable about-face. That Order is arbitrary and capricious, and an abuse of discretion.

A. Preparations for Auctions 57 and 61

In 2004, after several years of public discussion on the topic, the FCC held Auction 57 for a new commercial radio service, the Automated Maritime Telecommunications System ("AMTS"). In 2005, the Commission held Auction 61 for additional AMTS licenses. Auctions 57 and 61 each offered 10 AMTS licenses in the 217-219 MHz band, for blocks of frequencies in defined geographic areas known as AMTS market areas.

Each AMTS market area included within its defined geography some number of pre-existing site-based licensees and stations, which were potential sources of interference to a geographic licensee, degrading the geographic licensee’s quality of service, thereby diminishing the value of the geographic license, and in turn limiting the amount a bidder would be willing to bid for a geographic license.

\(^8\) 47 U.S.C. § 309(d); 47 C.F.R. § 80.385(c); see infra note 9.
This potential interference from pre-existing site-based stations led to the adoption of AMTS service rules including Rule 80.385(c) which effectively provide that if the license of a site-based station located within an AMTS market area is proven to be invalid, the site-based license will be cancelled, and that spectrum given to the AMTS geographic licensee. With these rules, the Commission provided further incentive for AMTS licensees to uncover misconduct and failings by site-based licensees, “deputizing” AMTS licensees to assist the FCC in exposing misuse of spectrum rights granted by Commission license.

In late 1999 or early 2000, Mr. Havens had begun exploring AMTS business opportunities and possibly participating in the eventual auctions. He found that Mobex held pre-existing site-based licenses located within AMTS market/license areas on which he was interested in bidding, and discovered significant defects in these licenses, namely that Mobex and its predecessors had failed to comply with the “construction” and “operation” requirements of their licenses. Exercising his obligations and rights pursuant to the Commission’s rules, Mr. Havens began to bring these licensee failures to the attention of the appropriate Bureaus.

B. Auctions 57 and 61 and Aftermath

Mr. Havens and/or the Companies were the high bidders for the majority of the B-block licenses in Auction 57. They were the high bidders for a number of A-block licenses in Auction 61. They were the second-high bidders in every AMTS market area in which Maritime bid in Auction 61 and were the lawful high bidders for every license Maritime won.

9 “If an incumbent fails to construct, discontinues operations, or otherwise has its license terminated, the spectrum covered by the incumbent’s authorization will automatically revert to the geographic area licensee.” Factsheet for Auction 57, FED. COMM’N COMM’N., http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=57#key_dates. (last visited Sept. 11, 2015); Factsheet for Auction 61, FED. COMM’N COMM’N., http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=61#key_dates. (last visited Sept. 11, 2015); 47 C.F.R. § 80.385(c).
10 47 C.F.R. § 80.385(c) is thus closely-related conceptually to the Commission’s long-standing 47 U.S.C. §§ 309(d), 405.
11 These issues are discussed in more detail below.
On November 14, 2005, Mr. Havens and the Companies filed a Petition to Deny Maritime’s long-form application, setting forth in detail Maritime’s bidding misconduct. While the Petition was denied, the Wireless Bureau determined that Maritime had failed to reveal as a spousal affiliation that Donald DePriest was the husband of Sandra DePriest, the head of Maritime’s designated entity.\(^{12}\) Had Maritime not unlawfully hidden this information from the Commission, Maritime would not have been entitled to the bidding credits it received, could have been disqualified from bidding, and potentially was subject to having its licenses cancelled. Mr. Havens and the Companies then filed a Petition for Reconsideration which was also denied.

Despite the denial of the Motions, over the following five-plus years Mr. Havens continued to successfully press the Wireless and Enforcement Bureaus to act on evidence he had uncovered, and to further investigate on their own Maritime’s misconduct, on both its pre-existing site-based licenses purchased from Mobex and its participation in Auction 61.

C. FCC 11-64: the Establishment of EB Docket 11-71

On April 18, 2011, the Commission adopted FCC 11-64, Order to Show Cause and Hearing Designation Order (“HDO”), creating EB Docket 11-71. The HDO recited in detail the “totality of the evidence”\(^{13}\) of Maritime’s misconduct on both the construction and bidding issues uncovered in the Bureaus’ investigation, which it found required a hearing to determine

> 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 be denied. HDO ¶ 1.

The HDO was a clear vindication for Mr. Havens: its litany of Maritime’s misconduct echoed the issues Mr. Havens had been investigating and bringing to the Commission’s attention for the

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\(^{12}\) See Maritime Communication/Land Mobile, LLC, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 ¶¶ 11, 14, 37-39 (rel. Apr. 19, 2011) (HDO). Maritime also failed to include Donald DePriest’s own and affiliated interests and revenues in Maritime’s designated entity showing.

\(^{13}\) HDO ¶ 2.
previous decade.

Despite the “totality of the evidence” detailed in the HDO, the Hearings took an unusual turn. After several years during which Maritime delayed the Hearings by successfully refusing to provide meaningful responses to discovery requests, the Bureau changed sides, and began aggressively litigating on Maritime’s behalf. The Presiding Judge himself observed that this hearing was “the first case [he] ever had where the [Enforcement] Bureau comes around the other end and assists the Respondent and is against the attacks of the intervener.”

Having spent more than a decade pursuing Maritime’s wrongdoing, working to convince the Commission to take action, finally seeing the Commission establish hearings on that misconduct – only to find that the Bureau was representing the Respondent rather than the whistleblower – it is understandable and reasonable that Mr. Havens became increasingly frustrated and that his frustration took the form of becoming even more tenacious in working to demonstrate Maritime’s misconduct.

D. The Hearings

The HDO designated Mr. Havens and the Companies as Parties, over Maritime’s objections. As the Presiding Judge later noted, Mr. Havens was “invited into this case . . . [and] should be in the case because [of] the information he brought to the attention of the Commission. . . . And the idea would be that he would be in here to assist the Bureau in prosecuting its case against the Respondent . . . .”

The first pre-hearing conference was held on June 15, 2011, but the Hearings got off to a slow start. Despite the HDO’s clear instructions and the Bureau’s early efforts to obtain

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14 Tr.1260.
15 HDO ¶ 72.
16 During the early stages of the Hearings, the Bureau defended Mr. Havens’s participation, asserting that “[i]t is our understanding … that by virtue of the fact that [Warren Havens] has filed a petition to deny against the very applications that are designated, he is entitled to full party status in this hearing.” Tr. 1-33.
17 Tr. 1260.
necessary information, Maritime repeatedly failed to properly respond to discovery.\(^\text{18}\) By the
summer of 2011, Maritime already had sought and received two extensions of time to respond to
the Bureau’s Requests for Admission,\(^\text{19}\) and, on August 1, 2011, Maritime moved to defer all
procedural dates in the Hearings, noting that it intended to seek Second Thursday relief in
connection with its bankruptcy proceeding.\(^\text{20}\) Despite the Presiding Judge’s repeated criticisms of
Maritime for its failure to provide any meaningful information or significant documents in
response to discovery served by the Bureau,\(^\text{21}\) just nine days after the most recent such criticism
Maritime again requested a delay, which the Presiding Judge denied.\(^\text{22}\)

On February 6, 2012, Maritime sought yet another extension of time to produce
documents.\(^\text{23}\) The following month the Presiding Judge again lamented the lack of progress:

> Unfortunately, there has been little more than slow motion discovery since the
> last Prehearing Conference that was held on January 25, 2012. Therefore, it
> now appears timely and appropriate to once again visit the status of readiness
> of the parties with respect to … unreasonable delays in discovery. Order, FCC

Remarkably, even though it had continued to defy both the HDO and the Presiding Judge’s
orders for at least eight months, Maritime suffered no sanctions or other consequences.

Meanwhile, despite the fact that full Second Thursday relief was improbable,\(^\text{24}\) the
Presiding Judge determined to bifurcate the proceeding, opting to move forward only with
Issue (g): whether Maritime had timely constructed its licensed stations, and if so, whether it had

\(^{18}\) See Memorandum Opinion and Order, FCC 11M-23 (rel. Aug. 10, 2011); Memorandum
Opinion and Order, FCC 11M-29 (rel. Oct. 21, 2011); Memorandum Opinion and Order, FCC


\(^{20}\) See Maritime’s Motion to Defer All Procedural Dates (filed Aug. 1, 2011).

\(^{21}\) See Memorandum Opinion and Order, FCC 11M-23 (rel. Aug. 10, 2011).

\(^{22}\) Memorandum Opinion and Order, FCC 11M-33 at 2 (rel. Nov. 8, 2011).

\(^{23}\) Status Report on Discovery and Request for Partial Extension of Time (filed Feb. 6, 2012).

\(^{24}\) As expected, Second Thursday relief was largely denied by the Commission on September 11,
2014, having found that Applicants failed to demonstrate that individuals suspected of
misconduct will either derive no benefit from favorable actions on the application or only a
minor benefit which is outweighed by equitable considerations in favor of innocent creditors.
permanently discontinued operations at those locations,\textsuperscript{25} and directed the parties to proceed with
discovery on that issue alone. But even after the Presiding Judge narrowly tailored the initial
phase of the proceeding and limited discovery to that single issue, Maritime continued resisting
discovery, providing little or no useful information, while suffering no consequences.\textsuperscript{26} And on
July 2, 2012 – more than a year after the first pre-hearing conference – the Presiding Judge
rebuked the Bureau’s discovery efforts to that date, noting that “[t]here has been little movement
by the Enforcement Bureau to discover basic information on structure and directional
management of Maritime.”\textsuperscript{27}

Earlier in 2012, Mr. Havens had informed the Presiding Judge and the Parties that he had
located a large collection of Mobex documents at a storage facility in Virginia, and further
informed the Presiding Judge and the Parties that he had obtained a bankruptcy court order to
preserve the boxes of records in full, and further offered to pay for retrieving and producing
these documents.\textsuperscript{28} Maritime’s counsel responded that all of Mobex’s documents related to
construction had been destroyed.\textsuperscript{29} After six more months of fruitless discussion of these boxes
of documents, the Presiding Judge finally ordered the parties to file Status Reports to “state
whether, based on first-hand knowledge, some of the box documents probably raise material

\textsuperscript{25} See, e.g., Order, FCC 11M-31 (rel. Oct. 26, 2011); Order, FCC 12M-22 at 2 (rel. Apr. 6,
2012); Order, FCC 13M-6 (rel. Mar. 21, 2013); Tr. 257, 478.
\textsuperscript{26} See e.g., Order, FCC 12M-7 (rel. Jan. 27, 2012); Tr. 478-481, 631; Maritime’s Status Report
on Discovery and Request for Partial Extension of Time (filed Feb. 6, 2012); Enforcement
Bureau’s Comments on Maritime’s Status Report on Discovery and Request for Partial
Extension of Time (filed Feb. 8, 2012); Enforcement Bureau’s Motion to Compel Maritime to
Respond to Joint Interrogatories (filed Feb. 16, 2012) (noting that Maritime's answers to nearly
half of the Interrogatories were neither full nor complete, and that many responses were cursory
and evasive); Order, FCC 12M-22 (rel. Apr. 6, 2012); Order, FCC 12M-26 (rel. May 23, 2012).
\textsuperscript{27} Order, FCC 12M-32 (rel. July 2, 2012).
\textsuperscript{28} See, e.g., Tr. 403-405; e-mail from Warren Havens to Chief Administrative Law Judge Sippel
(copying all parties to EB Docket No. 11-71) (dated and filed June 1, 2012).
\textsuperscript{29} Tr. 405-407. This statement is quite different from prior Maritime statements, including in its
2011 renewal application for WRV 374 (its blanket call sign for many of its stations) in which it
described these very documents as evidence related to construction and operation of the Mobex
site-based licenses prior to their sale to Maritime.
issues of fact.”

On November 8, 2012, despite having not seen or made efforts to obtain these documents, the Bureau stated in a joint Status Report with Maritime that it “does not believe that any documents in the 93 boxes that relate to the Watercom Licenses are likely to raise material issues of relevant fact concerning the construction of the Watercom Licenses.” This was not the “first-hand knowledge” required by the Presiding Judge and was even more troubling in light of the admission in the Joint Status Report that “without access to the actual documents, it is not possible to know to what extent, if any, they relate to construction of the Watercom facilities, as opposed to financial and other matters.” The next day, the Presiding Judge ruled:

[t]he discovery fiasco surrounding the ‘93 boxes’ as told in the parties’ recent Status Reports is troublesome . . . [but t]he state of discovery of the ‘93 boxes’ must not further delay this proceeding. Therefore, complete disclosure of the status of those documents is needed by the Presiding Judge prior to resolving Maritime’s Motion seeking Partial Summary Decision. Order, FCC 12M-50.

On August 31, 2012, Maritime had filed a Motion Seeking Partial Summary Decision. Mr. Havens had opposed Maritime’s motion, but the Bureau had not, further indicating a potential and significant positional change on the Bureau’s part. That indication became crystal clear a few months later, on December 2, 2013 – two and a half years after the first pre-hearing

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30 Order, FCC 12M-49 (emphasis supplied).
31 Enforcement Bureau’s and Maritime’s Joint Status Report in Response to Orders FCC 12M-48 and 12M-49 at 6-7 (filed Nov. 8, 2012). Watercom was a predecessor licensee.
32 Id. at 5 (emphasis added). One might reasonably – but incorrectly – have expected the Bureau to conclude from that statement that it would be important, therefore, to examine the documents. Mr. Havens continued to request that the Bureau take action to obtain the documents, but the Bureau declined to take any such action. See, e.g., e-mails between Warren Havens and Pamela Kane, Enforcement Bureau, FCC (copying Maritime counsel) (dated and filed Nov. 7, 2012).
33 Opposition to Motion for Partial Summary Decision (filed Sept. 17, 2012).
34 Enforcement Bureau’s Response to Maritime’s Motion for Partial Summary Decision at 2 (filed Sept. 17, 2012).
conference – when the Bureau and Maritime filed a Joint Motion of Enforcement Bureau and Maritime For Summary Decision on, and a Limited Joint Stipulation Concerning, Issue (g) (“Joint Motion” and “Joint Stipulation” respectively, “Joint Filings” collectively). The Joint Stipulation revealed that Maritime was in the process of filing to delete 73 (or 82%) of its 89 site-based licenses.36

The Joint Filings evidenced a compromise “settlement” between the Bureau and Maritime which must have resulted from lengthy discussions and negotiations between them. But it was a settlement reached without Mr. Havens. The Joint Filings thus confirmed that the Bureau had switched sides, moving from enforcing against Maritime to defending it.

Even more troubling was the content of the Joint Motion, claiming that the remaining 16 licensed stations had in fact been constructed within the required time period and that Maritime could keep them. The Bureau and Maritime also claimed that “the undisputed facts demonstrate” that those facilities had not been permanently discontinued, requesting that the Presiding Judge grant summary decision in favor of the 16 site-based licenses on both the construction and the operation issues.37

Had the Joint Motion been fully successful, it would have short-circuited the Phase I hearings by effectively imposing a settlement agreed to only by the Bureau and Maritime. And it clearly expressed the Bureau’s view that the continued misrepresentations of Maritime and its predecessors did not amount to a character issue disqualifying Maritime from holding FCC licenses, the character issue designated for hearing in paragraph 62(h) of the HDO.

36 Limited Joint Stipulation Concerning Issue G Licenses at 2 (filed Dec. 2, 2013). The Bureau and Maritime agreed that deleting the licenses “did not constitute an admission on the part of either Maritime or the Bureau on the merits of Issue (g) . . . but is being done solely to expedite resolution of Issue (g) and to eliminate or minimize the need for further litigation.”

The Presiding Judge granted in part and denied in part the Bureau’s and Maritime’s Joint Motion, agreeing on the construction issue but refusing to accept the Bureau and Maritime’s contention that the stations had not been permanently discontinued, finding that genuine issues of material fact remained as to the operational status of those 16 stations, and noting among other things that the Bureau and Maritime had not provided any evidence regarding efforts to resume operations at 14 of the 16 facilities.

In late 2014, the parties were finally within sight of actual hearings on Issue (g) in connection with the remaining 16 stations, and exchanged their direct cases and witness lists. Maritime offered only a single exhibit: a September 11, 2014 Joint Stipulation Between the Enforcement Bureau and Maritime on Discontinuance of Operations of Previously Stipulated Site-Based Facilities. Maritime offered no witnesses of its own, providing only what it termed a “Brief Summary of Testimony Supporting Maritime’s Position” which it said “demonstrated by the witness testimony and documentary evidence tendered by the Enforcement Bureau and admitted into evidence by the Presiding Judge at the November 4, 2014 admissions session.”

On November 25, 2014, the Bureau submitted its trial brief, claiming that 14 of the 16 stations in question had not been permanently discontinued, based on what it said were

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38 Memorandum Opinion and Order, FCC 14M-18 at 16-18 (rel. June 17, 2014). Despite the fact that the HDO instructs that hearings be held to determine the facts regarding construction of Maritime’s stations, the Presiding Judge accepted the Bureau’s and Maritime’s contentions (as advanced in their Joint Stipulation) which were not based on factual determinations but rather on a 1987 Memorandum Opinion and Order on construction which was itself based, in large part, on a prior statement by the Commission that the initial licensee had “regularly kept [the Commission] apprised of the status of construction and put the system into operation within the time we had allowed.” Waterway Communications System, Inc., Memorandum Opinion and Order (FCC 87-373), 2 FCC Rcd 7317 (1987).


40 Memorandum Opinion and Order, FCC 14M-18 at 20, 22 (rel. June 17, 2014) (“Summary decision cannot be granted without reliable evidence that Maritime or its lessees are taking concrete steps that are calculated to result in operations resuming at the licensed facilities.”)

41 Maritime’s Supplemental Description of Documentary Evidence and List of Witnesses (filed Oct. 10, 2014)

42 Maritime’s Trial Brief on Remaining Issue G Matters at 2 (filed Nov. 25, 2014).
Maritime’s ongoing efforts to operate its AMTS spectrum. The Bureau’s evidence, according to its brief, relied heavily on the written direct testimony of Ms. DePriest and other Maritime personnel. As if any more clarity were needed on its role as Maritime’s chief “counsel,” the Bureau also stated that it intended to cross examine Mr. Havens’s witnesses. The Bureau was presenting Maritime’s case on Maritime’s behalf.

Recognizing the Bureau’s role reversal, on December 9, 2014, the Presiding Judge observed that

this is the first case I ever had where the Bureau comes around the other end and assists the Respondent and is against the attacks of the intervener, in effect . . . where normally, you’d expect them to be combined against the Respondent. [I]t’s flipped around. Tr. 1260.

That left Mr. Havens and ENL-VSL as the only Parties working to expose Maritime’s misconduct, and made it clear that they would be litigating against both Maritime and the Bureau.

Mr. Havens and ENL-VSL filed their first – and only – Motion for Summary Decision (the “Motion”) on October 27, 2014, arguing the evidence showed that the 16 stations still at issue had been permanently discontinued. On April 22, 2015, nearly six months later, the Presiding Judge issued the Order that is the subject of this Interlocutory Appeal. The Order’s finding that the Motion was unauthorized and was filed in bad faith is simply incorrect, as discussed below.

The remainder of the Order consists of numerous criticisms of the conduct of Mr. Havens and ENL-VSL. Some of those criticisms are incorrect, inconsistent with the record, and/or taken

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43 Enforcement Bureau’s Trial Brief at 5 (filed Nov. 25, 2014). See also Tr. 1258 (“The Bureau intends to demonstrate by a preponderance of the evidence that when these factors are taken into consideration, Maritime took concrete steps to ensure that the discontinuance of operations at [the locations at issue] . . . was not permanent.”).
46 See, Sections III.A and III.B.
out of context. The rest are criticisms of actions that are within the bounds of conduct by a pro se party in hard-fought litigation, particularly in this case, where Mr. Havens found himself as the sole party pursuing the facts set out in the HDO, litigating not only against Maritime, but also against the Bureau, which should have been carrying that burden.

III. The Order Is Arbitrary and Capricious, and an Abuse of Discretion, and Must be Overturned

The Order recites factual findings by the Presiding Judge “that he believes warrant a separate proceeding in which several issues as to the character qualifications of Mr. Havens and the Havens companies to hold Commission licenses are examined.” The corresponding Ordering paragraph reads:

25. IT IS ORDERED that conduct described above of Warren Havens; Environmental LLC; Intelligent Transportation and Monitoring Wireless LLC; Skybridge Spectrum Foundation; Telesaurus Holdings GB LLC; Verde Systems LLC; and V2G LLC IS CERTIFIED to the Commission for determination as to whether the facts warrant the designation for hearing of issues as to their qualifications to hold Commission licenses.

The Order is wrong on both the facts and the law.

A. The Order Certifying a Character Issue is Directly Contrary to the Record, is Arbitrary and Capricious, and an Abuse of Discretion, and Must be Reversed

The Order finds that (i) on October 27, 2014, ENL-VSL (joined by Mr. Havens) filed an unauthorized motion for summary decision, (ii) the Motion was improper and filed in bad faith because it was unauthorized, and (iii) the finding of bad faith on the part of ENL-VSL and Mr. Havens should be referred to the Commission.

Specifically, the Order concludes that ENL-VSL and Mr. Havens “defiantly filed” the Motion, “blatantly ignor[ing] the Presiding Judge by failing to even acknowledge” a July 15,

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47 Order ¶ 23.
48 The claim that the Motion was filed improperly and in bad faith is repeated several times in the Order in support of the Order’s conclusions. See, e.g., Order ¶¶ 2, 4, 7, 13, 18(b).
49 Id. ¶¶ 4, 12-13, 23.
2014 Order in which, the Order claimed, the Presiding Judge stated he had “held that he would not consider further motions for summary decision.”50 That conclusion is simply not correct.

On July 15, 2014, in response to the Bureau’s motion to re-open discovery, the Presiding Judge stated in the body of Order FCC 14M-22 – but not in the Ordering paragraphs – that he “is concerned that the Bureau’s motion may suggest that the additional discovery may be used to support yet another summary decision motion, [and thus] cautioned that [he] will not entertain a further motion for summary decision.”51

But FCC 14M-22 does not directly hold that filing a motion for summary decision is prohibited, as the Presiding Judge acknowledged during a hearing on November 4, 2014.52 And at an earlier prehearing conference on October 1, 2014, just weeks before filing the Motion at issue, counsel for ENL-VSL stated, “I really think on October 28, I may have to file a motion to strike the Government’s entire case.”53 The Presiding Judge responded, “Well, you’re free to file any motion you care to, as long as you do it in a professional manner,”54 thus explicitly authorizing counsel for ENL-VSL to file any motion counsel chose to file, including a motion for summary decision under Rule 1.251.55

The Order also finds that the Motion was “submitted in bad faith and is patently frivolous” and that “there is no credible ground to support a filing that was prohibited by an earlier Order.”56 This finding is also clearly erroneous. The colloquy quoted in the prior paragraph demonstrates that the filing was not “prohibited by an earlier Order” and therefore there is no factual basis for the Order’s ruling that, on the basis of such prohibition, the Motion

50 Id. ¶ 4.
51 Order, FCC 14M-22 at 3 (rel. July 15, 2014). By this point, the Bureau and Maritime, between them, had filed three motions for summary judgment.
52 Tr. 1180.
53 Tr. 1127.
54 Id.
55 See also Petition Seeking Reconsideration of April 22, 2015 Order on the Basis of Mistake, filed by ENL-VSL on May 22, 2015. This Petition remains pending before the Presiding Judge.
56 Order ¶ 13.
was “submitted in bad faith” and/or was “patently frivolous.”

Because it was clearly contrary to the record, the Order’s findings are arbitrary and capricious, and must be reversed.

B. The Order Certifying a Character Issue Based on Conduct at the Hearing Has No Legal Basis, is Arbitrary and Capricious, and an Abuse of Discretion, and Must be Reversed

The authority for a Presiding Judge to certify an issue of character to the Commission is the FCC’s Summary Decision rule, 47 C.F.R. § 1.251(f), which provides in relevant parts that where a presiding judge concludes that facts exist that warrant a finding of bad faith with regard to a filing for summary decision, 47 C.F.R. § 1.251(f)(1), the judge pursuant to 47 C.F.R. § 1.251(f)(3) “will certify the matter to the Commission, with his findings and recommendations, for a determination as to whether the facts warrant addition of an issue as to the character qualifications of that party.”

As demonstrated above, the facts in the record not only do not support, but explicitly contradict, the Order’s finding of bad faith in filing the Motion. Because there was no lawful finding of bad faith, there could be no basis for certification under 47 C.F.R. § 1.251(f)(3). Therefore the Order certifying a character issue to the Commission is arbitrary and capricious, an abuse of discretion, and must be reversed.

Moreover, the Ordering paragraph certifying a character issue does not confine its claimed legal authority to the narrow ground of 47 C.F.R. § 1.251(f)(3), but rather claims as an additional basis the “conduct described above of Warren Havens,” which in turn refers to the conduct described throughout the Order, and summarized in paragraph 23. In that paragraph, after paraphrasing 47 C.F.R. § 1.251(f)(3), the Order goes on to say:

57 Moreover, the Motion was based in large part on the Bureau/Maritime direct case and Maritime Responses to Interrogatories, both of which had been submitted some weeks before the Motion was filed.
58 Order ¶ 25. The Order does not invoke 47 C.F.R. § 1.251(f)(2) against the attorneys who filed the Motion on behalf of ENL-VSL.
23. ... The Presiding Judge finds that Mr. Havens and the Havens companies not only filed their Motion for Summary Decision in bad faith, but also engaged in patterns of egregious behavior that he believes warrant a separate proceeding in which several issues as to the character qualifications of Mr. Havens and the Havens companies to hold Commission licenses are examined. Accordingly, the Presiding Judge certifies this matter to the Commission. (emphasis supplied)

The legal basis for a Presiding Judge to certify a character issue to the Commission is 47 C.F.R. § 1.251(f)(3), which does not include “patterns of egregious behavior” at hearings, which is what the Presiding Judge was describing. Thus, insofar as the Order purports to base certification of a character issue on such conduct, the Order is arbitrary and capricious, and an abuse of discretion, and must be reversed.

C. The Order is Arbitrary and Capricious, and an Abuse of Discretion, Because the Order’s Findings of Misconduct by Mr. Havens and the Companies are Simply Not Correct in Some Cases and in Other Cases are Based on a Selective Reading of the Record Which Omits Necessary Context

1. Alleged Intentional Misrepresentation of “Identical” Motions

The Order notes that the Presiding Judge “is most concerned with” an alleged intentional misrepresentation by ENL-VSL of the Bureau’s position regarding its response to the Motion.60 This is a reference to a statement made in the ENL-VSL Response Regarding Suspension of the Hearing Schedule, filed November 7, 2014, in which counsel for ENL-VSL stated that the Bureau informed him that it would submit a motion for summary decision “identical” to the motion the Bureau had filed jointly with Maritime on December 2, 2013.61 According to the

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59 The page limit does not permit a full response to each and every one of the Order’s accusations. This is essentially self-evident: The Order is 14 single-spaced pages, the equivalent of approximately 22 double-spaced pages. Responding to each accusation requires more room than does reciting the accusation, because, as we have noted, each response requires quotations from and citations to a broader record than stated in the accusation itself, either to correct errors or to provide broader context than provided in the accusation.

60 Order ¶ 9.

61 ENL-VSL Response Regarding Suspension of the Hearing Schedule at 2-3 (filed Nov. 7, 2014); ENL-VSL Opposition to Motion to Strike Status Reports (filed Nov. 17, 2014).
Order, “the offending statement [about identical pleadings] . . . was not made to characterize a pleading, but . . . to misinform the [Presiding Judge]”. 62

In its Motion to Strike, the Bureau said that it had informed counsel for ENL-VSL not that its countermotion would be “identical” but rather that its countermotion would argue for the same legal conclusions for which it had argued in its December 2, 2013 motion, i.e., that it would argue, once again, that Maritime’s 16 stations still pending in Issue (g) were not abandoned. In any common sense understanding, that would make the upcoming filing identical; the fact that the Bureau might use different words to argue the same point is the essence of a distinction without a difference.

Moreover, even if “identical” were to be taken as an inaccurate characterization of the Bureau’s message, the statement at issue by counsel for ENL-VSL was predictive, characterizing the Bureau’s description of a filing not yet made. Further, the fact that intervening discovery may have yielded additional facts the Bureau could cite in support of the same legal conclusion, as noted in the Order, paragraph 10, does not undermine the characterization. The Bureau presumably would add those additional facts into its argument for the identical legal conclusion, not substitute the additional facts for the pre-existing facts that had been argued in the prior filing in support of that identical legal conclusion. 63

2. Alleged Pattern of Harassment

The Order also accuses Mr. Havens of carrying out a pattern of harassment through email, 64 citing to and excerpting from a handful of emails, including an email to the Bureau that is not part of the record. This accusation mischaracterizes the record and Mr. Havens’s actions, which were within the bounds of pro se conduct in hard-fought litigation, and which are entirely

62 Order ¶ 10.
63 The Appeal as of Right correctly characterized this accusation as “a tempest in a teacup.” Appeal as of Right at 2.
64 Order ¶ 14-17.
reasonable in the context of the Hearings, even when expressing or evidencing frustration, especially given that Mr. Havens was left to prosecute on his own against Maritime and the Bureau. To illustrate, the Order claims that Mr. Havens

in a manufactured *cause celebre* … e-mailed Bureau counsel regarding the announcement by counsel for Environmentel and Verde at hearing that he had learned that there was a bench warrant issued for Steve Calabrese, a witness who was to appear and testify for Environmentel and Verde.

The Order further notes that Mr. Havens,

[in] a barely intelligible screed … accused Bureau counsel of ‘spending large amounts of taxpayer funds to defend violation of FCC law (*sic*), and depriving [Mr. Havens and his] companies’ rights under the Constitution and subsidiary law to defend the law, and our lawful FCC licenses and business . . . [and] . . . that Mr. Havens threatened to ‘pursue economic and other remedies,’ demanded documents from the Bureau in bold red letters, and implied that counsel for the Bureau had filed with criminal intent a false police report. Mr. Havens added his unsupported conclusion that the Bureau was conspiring to obstruct justice. *Order ¶ 16.*

This colorful description of the record and of Mr. Havens’s actions is incomplete in several important particulars.

Mr. Calabrese was the only remaining witness for ENL-VSL on Issue (g). 65 Because the Bureau intended to present the case on this issue on behalf of Maritime, Mr. Calabrese was also the primary witness against Maritime and, therefore, a key witness supporting the HDO. Mr. Calabrese had been told that the Bureau’s witness had filed a police report against him and so was understandably concerned that he might be arrested if he testified in person, and therefore reluctant to appear, as he reported to Mr. Havens.

Alarmed at the prospect of losing his only remaining witness on this point, Mr. Havens sent an email to the Bureau informing them of the situation and asking them to take appropriate action. 66 Mr. Havens also asserted in his email that the Bureau had failed in its prosecutorial role, expressing his frustration with the Bureau’s having switched sides. But

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65 The Presiding Judge had already stricken Mr. Havens’s two other witnesses. Tr. 1186.
66 E-mail from Warren Havens to Michael Engel and Pamela Kane (dated Dec. 11, 2014).
he certainly did not imply that the Bureau had filed, or accuse the Bureau of filing a false police report with criminal intent. Significantly, in a section of his email not quoted in the Order, Mr. Havens beseeched the Bureau to “take proper enforcement action . . . and to stop obstructing enforcement of FCC law [that] I [Mr. Havens] have taken up for the Commission and the United States.” Under these circumstances, and considering the entirety of the text, it is true that Mr. Havens’s email included criticism – even harsh criticism – of the Bureau, and indicated that he might pursue other legal avenues. But neither of those points, alone or together, constitutes accusations, threats or harassment.

The Order provides another example of what it characterizes as a harassing email, this one relating to an effort by Mr. Havens to clarify his obligations in an upcoming session of the Hearings. The Order states that on the day after a hearing session discussing the requests for admission,

Mr. Havens, *ex parte*, sent an e-mail to the Office of Administrative Law Judges’ (“OALJ’s”) . . . advisory attorney . . . [and] requested that the Presiding Judge issue instructions as to what filings were due from the parties that attended the admission session the prior day. At the Presiding Judge’s direct, staff sent an e-mail to the case distribution list urging Mr. Havens to seek the information from counsel for Environmentel and Verde[.] Mr. Havens responded . . . disregarding the Presiding Judge’s directives. Mr. Havens ‘shouted’ in bold, italicized letters that he ‘asked again’ for his requests to be fulfilled. [The] OALJ replied . . . [and] again advised [Mr. Havens] that a written summary of the admission session was not needed because counsel for Havens’ companies had been present could report what had transpired to Mr. Havens. . . . Mr. Havens also was barred from communicating with OALJ on this matter . . . Mr. Havens persisted in ignoring the Presiding Judge’s e-mail embargo e-mailing further demands for written explanations of rulings . . . [Mr. Havens] redundantly argued against the prior ruling, using vituperative rhetoric to diminish the Presiding Judge’s authority. . . . boldly threatened OALJ with a lawsuit under the Federal Tort Claims Act ... [and] vented on the record, personally making a barely veiled threat to lodge a *Bivens* action against the Presiding Judge and his staff. After exhausting such ineffective, theatrical intimidations, Mr. Havens used an interlocutory appeal under Section 1.301(a) to redirect his callous conduct up the ‘chain of command.’ *Order* ¶ 15.

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67 Contacting a judge’s chambers on a purely procedural or administrative matter is not an *ex parte* communication unless the judge has specifically ordered to the contrary.
The Order relies on selective omission of key facts to paint Mr. Havens in a bad light.

Unable to attend yet another pre-hearing conference on the other side of the country from his home in California, Mr. Havens made a simple request of the OALJ: he wanted to know what he was required to do by the end of the week.68 Mr. Havens had requested to attend by phone as he had in prior sessions, but the Presiding Judge had denied the request, with the result that Mr. Havens had no first-hand knowledge of what the Presiding Judge had ordered to be done. So he sent an email to the OALJ requesting that the Presiding Judge put in writing, in an Order or an email, the instructions that he had given orally the previous day at the pre-hearing conference.

In response to Mr. Havens’s request, the OALJ suggested that Mr. Havens instead find out that information from Mr. Stenger, the attorney for ENL and VSL.69 That afternoon, in his second of three emails on this subject, Mr. Havens informed the OALJ, copying all parties, that pursuant to the OALJ’s directives he had contacted Mr. Stenger (who was not his attorney) as well as the Bureau, but that neither could provide him with sufficient detail, and therefore again asked for clarification of his obligations.70 The OALJ again refused Mr. Havens’s request, stating that such a request would not be entertained when that “party’s retained lawyer was present” at the conference, again ignoring the facts that Mr. Havens was pro se, that Mr. Stenger was not Mr. Havens’s attorney, and that Mr. Havens had contacted Mr. Stenger, but had not been able to get

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68 E-mail from Warren Havens to Austin Randazzo, Attorney Advisor, Office of Administrative Law Judges, FCC (dated Nov. 5, 2014).
69 E-mail from Austin Randazzo, Attorney Advisor, Office of Administrative Law Judges, FCC, to Warren Havens (copying all parties to EB Docket No. 11-71) (dated Nov. 5, 2012).
70 In this second email Mr. Havens used bold italics to emphasize two particular sentences. Those were not “shouts” but rather a common method used to underscore more significant points. In this case, Mr. Havens used these methods to indicate that it was necessary for him to know what obligations or requirements were expected of him as a party. E-mail from Warren Havens to Austin Randazzo, Attorney Advisor, Office of Administrative Law Judges, FCC (copying all parties to EB Docket No. 11-71) (dated Nov. 5, 2014).
sufficient clarity. The OALJ went on to state that Mr. Stenger had a duty to inform “his client” or his “co-counsel” – an apparently-ironic reference to Mr. Havens’s pro se participation – of what had transpired. The OALJ also informed Mr. Havens that the Presiding Judge asked that he cease and desist from further communications on the matter.  

Still having received no clarification of his obligations for the next day, Mr. Havens sent his third and final email. He asked if the “cease and desist” imposed in the OALJ’s previous email was now in effect, and asked further, if it was not, to be permitted to submit the remainder of his email in which he explained that he was only requesting to know the orders and requirements or rights to which he was subject. Mr. Havens further explained that, contrary to the OALJ’s suggestion that he ought to rely on Mr. Stenger for this information, he and Mr. Stenger did not have an attorney-client or co-counsel relationship, and that Mr. Havens was an independent pro se party in the proceeding. Mr. Havens also indicated that he might pursue other legal avenues available to him, including an interlocutory appeal, and he ultimately did file such an appeal.

Moreover, had Mr. Havens relied on Mr. Stenger, he would have been at risk: if Mr. Stenger had been incorrect in providing the clarification Mr. Havens sought, or if Mr. Havens had misunderstood Mr. Stenger, it would have been Mr. Havens, not Mr. Stenger, whom the Presiding Judge would have held responsible for failing in the relevant obligations.

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71 E-mail from Austin Randazzo, Attorney Advisor, Office of Administrative Law Judges, FCC, to Warren Havens (copying all parties to EB Docket No. 11-71) (dated Nov. 6, 2012).
72 E-mail from Warren Havens to Austin Randazzo, Attorney Advisor, Office of Administrative Law Judges, FCC (copying all parties to EB Docket No. 11-71) (dated Nov. 6, 2014).
73 See Response to Oral Orders (filed Nov. 7, 2014).
In light of the full context of this email exchange, Mr. Havens’s statements fall far short of “vituperative rhetoric to diminish the Presiding Judge’s authority.”\textsuperscript{74} The Order also labels Mr. Havens’s appeal as a means for Mr. Havens “to redirect his callous conduct up the ‘chain of command.’” That is both unfair and uncharitable. Rather, both Mr. Havens’s email statements and his subsequent filing were nothing more than the perhaps-inartful efforts of a \textit{pro se} litigant trying without success to clarify his legal obligations imposed at a hearing he could not attend in person and was not permitted to attend by telephone.

3. \textbf{Alleged Disruptive and Prejudicial Conduct}

The Order also labels Mr. Havens’s conduct as disruptive and prejudicial, omitting important context and mischaracterizing Mr. Havens’s role in the proceeding. For example, the Order accuses Mr. Havens of having

\begin{quote}
 dumped . . . more than 444 unscreened exhibits constituting over 17,000 pages as their direct case. Review of these pages revealed that the direct case could not have been prepared in good faith. . . . [and claims that m]ost exhibits lacked relevance, were repetitive, or were otherwise useless . . . [and that ENL-VSL] casually conceded that many of their exhibits were not relevant, but made no effort to weed out inapplicable or duplicative exhibits. Nor was there any effort made to show the relevance of each document after being ordered to do so. \textit{Order} ¶¶ 8-9.\textsuperscript{75}
\end{quote}

These accusations again present an incomplete and therefore incorrect set of facts. The full facts demonstrate that the submission was entirely professional and reasonable. ENL-VSL did in fact offer more than 400 exhibits on Issue (g). But the exhibits were carefully selected and assembled and were prepared in good faith in furtherance of the case against Maritime set out in the HDO which the Bureau chose not to present. The Presiding Judge ultimately found that only 6 of the 444 exhibits were duplicative and admitted at least 50

\footnotesize
\textsuperscript{74} Order ¶ 15. \\
\textsuperscript{75} The Order also states that as “Maritime and the Bureau objected to irrelevant exhibits, ENL-VSL stupefied the proceeding by making no effort to respond to specific objections or confess any error.” The record clearly indicates that counsel responded appropriately. \textit{See} Tr. at 1182-83.
of the exhibits.\textsuperscript{76} And many of the exhibits that were not admitted did in fact pertain to Issue (g) generally, and therefore were not irrelevant.

Moreover, as ENL-VSL had previously explained to the Presiding Judge, they had submitted these exhibits as part of their direct case \textit{before} the September 2014 joint Bureau/Maritime stipulation, and therefore the exhibits covered all 89 of Maritime’s site-based licenses at issue in the Hearings, not just the licenses that the Bureau planned to defend in its direct case.\textsuperscript{77} In fact, ENL-VSL’s counsel noted in the October 1, 2014 session that

\begin{quote}
[ENL-VSL had submitted its] exhibits without having yet seen [at the time] the Government’s direct case and that once we saw their direct case, we would make an effort to narrow down the exhibits . . . . \textit{Tr. 1125-26}.
\end{quote}

further explaining that although they were submitting

\begin{quote}
400 and some documents . . . we’re talking about a license revocation hearing that involves a company that’s been in business for a number of years. They [Maritime] admitted that they discontinued operating some of these stations in 2007-2009, so this is a span of time that’s extensive . . . . [A]t the time that we put those documents together, there were many other stations involved, and there was a stipulation that the Bureau and Mr. Keller filed which was to dispose of many of the other stations and narrow it down to 16. \textit{Tr. 1156-57}.
\end{quote}

4. \textbf{Alleged Inappropriate Conduct}

Many of the accusations in the Order are, in essence, complaints that Mr. Havens’s \textit{pro se} conduct was unacceptable, inappropriate or just plain annoying. The Commission’s rules clearly contemplate and permit an individual to represent him- or herself as a \textit{pro se} litigant.\textsuperscript{78} An experienced judge such as the Presiding Judge knows that it is almost universally true, and therefore to be expected, that the conduct of a \textit{pro so} litigant will depart, perhaps dramatically, from the conduct expected of an experienced attorney. And it is equally universally

\textsuperscript{76} FCC 14M-34.
\textsuperscript{77} ENL-VSL and Havens Direct Case Exchange at 2-3 (filed Sept. 16, 2014); \textit{Tr. 1125-31, 1156-59, 1181-83}.
\textsuperscript{78} 47 C.F.R. § 1.21(a) provides: “Any party may appear before the Commission and be heard in person or by attorney.”
acknowledged that a judge presiding over a proceeding involving a *pro se* litigant should be indulgent of such differences, making every effort to ensure that the *pro se* litigant is not disadvantaged, either explicitly or implicitly, for such departures. As the most recent edition of the Manual for Administrative Law Judges advises,\(^7^9\) such proceedings do require a delicate sense of fairness and an extra effort by the ALJ to ensure that the record is fully developed and that the claimant is fully aware that the ALJ is treating both the agency and the claimant fairly and impartially. Indeed, courts have remanded cases for further hearing when Administrative Law Judges have not met their special obligations in cases involving unrepresented claimants.

As demonstrated above in Sections III.A and III.B, the complained-of conduct does not support the Order’s certification of a character issue, the only legal basis for which is 47 C.F.R. § 1.251(f). Nor does that conduct justify the extreme sanction of excluding Mr. Havens and the Companies from the Hearings. If the Presiding Judge had concluded that Mr. Havens’s *pro se* participation was the source of the conduct he found objectionable, he had available the significantly-less-extreme remedy of insisting that Mr. Havens hire, and participate only through, counsel, thereby ensuring that at least one party was acting to enforce against Maritime for the misconduct documented in the HDO.

In any event, Mr. Havens’s conduct was within the bounds of conduct of *pro se* litigants in high-stakes litigation who are not themselves attorneys, and was reasonable in these Hearings, as Mr. Havens found himself in the remarkable situation “where the [Enforcement] Bureau comes around the other end and assists the Respondent and is against the attacks of the intervener . . . . It’s flipped around.”\(^8^0\)

**IV. Conclusion**

Indeed it is “flipped around,” with the Enforcement Bureau adverse to Mr. Havens and the Companies, putting on the case for the Respondent, and with Mr. Havens putting on the case

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\(^{8^0}\) Tr. 1260.
for the Enforcement Bureau, shouldering the burden of enforcing against Maritime for its wrongdoing. As demonstrated above, there is no factual or legal basis for the Order’s referral of a character issue as to Mr. Havens and the Companies. And excluding the Companies and Mr. Havens himself from further participation in the Hearing would unfairly punish the whistleblower Mr. Havens – “who should be in the case because [of] the information he has brought to the attention of the Commission” \(^{81}\) in the words of the Presiding Judge – while rewarding Maritime by removing its most aggressive opponent. As the Presiding Judge further observed, “if Mr. Havens hadn’t intervened in this case [and] hadn’t been permitted to intervene in this case, we wouldn’t even have an issue today.”\(^{82}\)

Respectfully submitted,

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Dated: September 11, 2015

\(^{81}\) Id.
\(^{82}\) Tr. 1262.
CERTIFICATE OF SERVICE

The undersigned, an attorney at Lowenstein Sandler LLP, hereby certifies that on this day, September 11, 2015, a copy of the foregoing Supplement to Interlocutory Appeals was filed with the Commission, served on the parties listed below via First Class United States Mail, and a courtesy copy was provided via electronic email.

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