

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
MARITIME COMMUNICATIONS/LAND) WT Docket No. 13-85
MOBILE, LLC, DEBTOR-IN-POSSESSION) FCC File No. 0005552500
Application to Assign Licenses to Choctaw)
Holdings, LLC)
)
MARITIME COMMUNICATIONS/LAND) FCC File Nos. 0004153701 and 0004144435
MOBILE, LLC)
Applications to Modify and to Partially Assign)
License for Station WQGF318 to Southern)
California Regional Rail Authority)
)
Application for New Automated Maritime) FCC File No. 0002303355
Telecommunications System Stations)
)
Order to Show Cause, Hearing Designation) EB Docket No. 11-71 File No. EB-09-IH-
)
) FCC File Nos. 0004030479, 0004144435,
) 0004193028, 0004193328, 0004354053,
) 0004309872, 0004310060, 0004314903,
) 0004315013, 0004430505, 0004417199,
) 0004419431, 0004422320, 0004422329,
) 0004507921, 0004153701, 0004526264,
) 0004636537, and 0004604962

To: The Secretary, Attn: The Commission (docket 13-85), and ALJ Sippel (docket 11-71)

PETITION FOR RECONSIDERATION
Of Skytel-2 Entities- Errata Copy^[*]

~~The~~ Skytel-2, defined below, pursuant to rule § 1.106, hereby petition for reconsideration of aspects of the *MO&O*, FCC 14-133, released on September 11, 2014 (“the Order”) (“Skytel-2 Recon”). Herein, “MCLM” and “Maritime” each mean Maritime Communications/Land Mobile LLC, “Skytel” or “SkyTel” (used in a few instances) means any or all of the entities defined below in the “Skytel-1” group and/or the “Skytel-2” group, “13-85” and “11-71” mean the dockets listed above, and the “HDO” means FCC 11-64.

[*] Deletions in strikethrough. Additions in blue.

Contents

Page	Section
2	I. Introduction and Summary
5	II. Donald DePriest Is A Real Party In Interest To The MCLM Applications
11	III. MCLM Failed To Comply With The Spousal Attribution Rule
13	IV. Changes In The Commission’s Rules And Policies Cannot Be Applied Retroactively To Excuse Maritime’s Deficient Application
16	V. Footnote 7 Relief Was Not Necessary Or Appropriate
18	VI. The Commission Failed To Comply With APA Notice And Comment Procedures.
19	VII. The HDO created footnote 7 without any prior notice and comment.
21	VIII. Conclusion

I. Introduction and Summary

“Skytel-2” consists of Environmental LLC (“[ENL](#)”), Verde Systems LLC (“[VSL](#)”), Telesaurus Holdings GB LLC, and V2G LLC in each of which Warren Havens (“Havens”) is the controlling interest holder and President as shown in FCC records. As also shown in FCC records, including auction application filings of auctions 87 and 95, Skytel-2 has a joint nationwide business plan with the entities in Skytel-1 in large part concerning wireless for Intelligent Transportation Systems.¹ SkyTel-1 entities consist of Warren Havens, as well as Intelligent Transportation and Monitoring Wireless LLC (“[ITL](#)”) and Skybridge Spectrum

¹ As the FCC has recognized, all entities in Skytel-1 and Skytel-2 are distinct entities with their respective assets, ownership, IRS and FNR numbers, and other [different](#) attributes. They sometimes submit joint pleadings before the FCC where they are able to do so. In this case, they have had access to different resources to prepare and complete their respective petitions for reconsideration, and each also have some additional material to present versus the other, but as indicated in each, they each join in the other’s final drafts that were filed.

Foundation (“SSF”), in each of which Havens is the controlling person.² Skytel-1 submits concurrently with the instant pleading, their own Petition for Reconsideration of the captioned matters (“Skytel-1 Recon”). All parties in Skytel-1 and Skytel-2 are listed as parties in FCC 11-64, the HDO-OSC that caused the proceedings in dockets 11-71 and also resulted in proceeding 13-85.

Skytel-2 agrees with and joins in the SkyTel-1 Recon, just noted, and in addition presents the following (the rest of this pleading).

To the degree any material presented herein is deemed to be (or inadvertently is) in conflict with any material in the Skytel-1 Recon, then the material in the Skytel-1 Recon (in which Skytel-2 has joined) shall prevail.

Skytel-2 is generally supportive of the Order, except to the extent set forth in this Petition.

Skytel-2 shows herein errors to be corrected, and respectfully seeks reconsideration and changes in several aspects of the Order. These prominently include:

First, Skytel-2 requests that the Commission issue a decision ~~on its~~ granting SkyTel’s pending Application for Review that was cited in para. 10 and note 25 of the Order, and that the Commission, on reconsideration modify the Order as necessary in view of the Commission’s decision on the Skytel application for review.

Second, Skytel-2 requests that the Commission reconsider its decision to permit Maritime Communications/Land Mobile, LLC (“MCLM”) to assign Auction 61 licensed spectrum to ~~the~~ Southern California Regional Rail Authority (“SCRRA”). Skytel-2 has (and it is apparent that

² ITL and ENL are the lawful ~~next~~ high bidders in FCC Auction 61 and claim the right to receive of the licenses awarded to MCLM. E.g., see the Skytel Application for Review cited in the Order. They also won and were awarded other AMTS licenses in Auction 61. After Auction 61, ITL, ~~and~~ ENL and VSL assigned by disaggregation some AMTS spectrum to SSF.

many other licensees also have) sufficient spectrum to satisfy the [asserted](#) needs of SCRRA and SCRRA should deal with Skytel-2 ([or such others](#)) with regard to the spectrum lawfully owned by Skytel-2, rather than allowing SCRRA to purchase from MCLM spectrum to which MCLM has no lawful rights.

See also the Skytel-1 Recon in which it proposes a full and lawful solution to the SCRRA asserted need for only AMTS spectrum for its PTC system. However, there is *nothing* that stands up to even threshold objective scrutiny shown by SCRRA or MCLM, or the letters and filings from others including members of Congress in or related to 13-85, to support a finding that only AMTS spectrum (and of that, only AMTS spectrum unlawfully obtained by MCLM) is available and suitable for PTC. It is purely an economic matter as anyone with the slightest knowledge of radio technology, systems, and spectrum markets can immediately understand. Also, in docket 10-83 (created especially for the MCLM assignment to SCRRA) Skytel demonstrated from SCRRA's own records that it admitted that it did not need but a small minority of the amount of spectrum in the assignment (1,000 kHz was assigned), and the rest it planned to use for profit [or speculation](#). It bought the spectrum due to the fire-sale caused by the MCLM cheating and impending disqualification, and that is not good cause for an exception to [the](#) Jefferson Radio policy, but radically offends and undercuts the policy. As with waiver standards, a FCC policy cannot be excepted or waived unless that better serves the purpose or broader enveloping FCC and Congressionals purposes than its strict application. In the Order, the Commission errs in creating just the opposite.

As shown below, there was and remains no need nor justification at all, for the HDO, or the proceedings in 11-71 and 13-85, or the Order (FCC 14-133), given the below-shown disqualification of MCLM as to the auction licenses, ~~and~~ [or](#) to continue proceedings as to the site-based licenses, due to the below-discussed disqualification now shown in the below-noted

admissions in the September 2014 Joint Stipulation in 11-71. See the Skytel-1 Recon for further discussion of these matters. In this regard, and apart from the solution for SCRRA presented in the Skytel-1 Recon, the government can use eminent domain power where there is a legitimate need, as to taking licensed spectrum from its rightful owner or claimant: that is the real nature of the decision under Footnote 7, but there is no need demonstrated or that can be demonstrated. Yet SkyTel-1 offers a full solution without any such demonstration.

II. Donald DePriest Is A Real Party In Interest To The MCLM Application

The Skytel-2 application for review should be granted and the MCLM licenses should be cancelled, as void *ab initio*, as having been erroneously issued by the Wireless Telecommunications Bureau (WTB). In year 2005, Skytel-2 petitioned to deny the MCLM auction applications. The WTB dismissed the petitions to deny and granted the licenses to MCLM over the valid, clear and well supported objections of Skytel-2. This was error by the WTB and the error should be corrected by the Commission by acting on the Skytel-2 Application for Review pending since year 2007.

The WTB erred *first* because the facts clearly show that Donald DePriest is not simply the spouse of Sandra DePriest,³ rather, he is unquestionably the real party in interest to the MCLM application. The amendment filed by MCLM that added some of Donald DePriest's revenue (but continued to conceal other revenue) was wholly insufficient, even if it were deemed to comply with the spousal attribution rule. The amendment only addressed MCLM's reading of the spousal attribution, but failed to address the real party in interest rules.

Donald DePriest is not simply the spouse of Sandra DePriest. He is a real party in interest to the MCLM application. Ironically, the Order expressly references the correspondence

³ But even that alone, under the spousal affiliate rule at issue, is deemed to constitute co-control, and the DePriests never showed otherwise.

of Fred C. Goad which, among many other sources in proper FCC filings, details many facts that show that Donald DePriest treated MCLM as his company. More than sufficient information along these same lines was provided by Skytel-2 in its petitions to deny, for reconsideration and its application for review (initial and errata, amended copies) and should have been considered by the WTB.

Donald DePriest is, at a minimum, a 50% owner of MCLM based on the real party in interest standard, regardless of how the WTB read the spousal attribution rule. The MCLM amendment was insufficient and untruthful because it failed to show Donald DePriest as a real party in interest with at least a 50% stake. The reason why MCLM failed to file an accurate and complete amendment is obvious.

It would be a major amendment to change the MCLM application to show Donald DePriest as at least a 50% owner. Sandra DePriest would go from 100% control to 50% control. Parties who each have 50% control are deemed to have negative control. A change in status from positive 100% control to 50% negative control is a transfer of control.⁴ A transfer of control is a major amendment. It could not be filed by MCLM after the auction ([or short form deadline](#)) and therefore its application had to be dismissed.

In addition, whether this amendment was made or not, the short and long forms of MCLM misrepresented ownership and control, provide false certifications of this essential threshold requirement of these (and any other) applications for radio spectrum, and fully rendered the applications fatally defective, and the auction participation and high bids of

⁴ This is basic Commission law. For example, the Instructions to FCC Form 323 state the Commission's longstanding position on this point: "A transfer of control takes place when: (a) An individual stockholder gains or loses affirmative or negative (50% control. (Affirmative control consists of control of more than 50% of voting stock; negative control consists of control of exactly 50% of voting stock." FCC 323 Instructions, 15 FCC Rcd 19065 (Sept. 2000).

Maritime, and licenses issued, void *ab initio*.

The WTB relied on *Biltmore Forest* for the proposition that an amendment to the application that ~~changes~~ lowers the attributable revenue and the “bidder size” is not a major amendment. Skytel-2 disagrees with that reading of *Biltmore*, but the Commission need not reach that issue. This case goes far beyond that lowering and the mere attribution of spousal revenues under the spousal attribution rule. ~~The spousal attribution rule applies where one spouse is accurately identified as the equity interest holder in the application and the other spouse is accurately identified as not having an equity interest in the application (or stated otherwise, not identified as having said interest).~~ The spousal attribution rule is necessary ~~in such a situation~~ because in the absence of the rule, the alleged or indicated non-involved spouse would otherwise be ignored as to the attributable revenue showing of said spouse’s affiliates.

Application of the spousal attribution rule was not even necessary here. Donald DePriest is not an uninvolved spouse. He is a real party in interest. He must be listed in the MCLM application as at least a 50% equity interest holder and controller for the application to be accurate. The spousal attribution rule is not even necessary in this circumstance because Donald DePriest’s revenues are all directly attributable to MCLM because Donald DePreist is a real party in interest to the application, at least a co-controller if not the sole controller as it appears from the evidence (including in the HDO FCC 11-64 and the investigation it described and the SkyTel petitions it cites to, in 11-71, in 13-85 and in the Maritime bankruptcy case in which the FCC is a party).

Section 1.2110, Designated Entities, Subsection (c), Definitions, defines “controlling interests” to include “entities with either *de jure* or *de facto* control of the applicant.” 47 C.F.R. §1.2110(c)(2). It is beyond denial that Donald DePriest had at least 50% negative *de facto* control of MCLM. As such, the application was defective and needed to be amended to disclose

Donald DePriest as the holder of at least 50%, negative control. Not only was that never done, but the DePriests never even tried to cure in any way the serial violations of **required** corrective filings under rule §1.65 cited in the HDO FCC 11-64 by amending the subject Auction 61 long form to list their post-long-form- begrudgingly partly admitted list of affiliates and attributable gross revenues, what to speak of amendments to their application for extraordinary relief in 13-85 regarding illegally warehoused AMTS site-based licenses nationwide for up to about 2.5 years after the dates of auto termination they recently admitted to in 11-71.⁵

This is further underscored in the Designated Entity rule in Section 1.2110 where the rule requires application of designated entities to contain the “Applicant ownership and other information, as set forth in §1.2112.” *See* 47 C.F.R. §1.2110 (a)(2)(ii)(B). The Ownership Disclosure Requirements set forth in Section 1.2112 require disclosure of all agreements, “including the establishment of a *de facto* or *de jure* control or the presence or absence of attributable material relationships.” *See* 47 C.F.R. §1.2112(b)(1)(iii). The MCLM application failed to accurately disclose its ownership as required under the Ownership Disclosure Requirements for Applications rule, Section 12112.

To correct its deficient application, MCLM would have had to amend the application to disclose that Donald DePriest is at least a 50% owner. That amendment would have involved a

⁵ *Joint Stipulation Between the Enforcement Bureau and Maritime on Discontinuance of Operations of Previously Stipulated Site-based Facilities*, by Maritime Communications/Land Mobile LLC, Debtor-in-Possession and FCC Enforcement Bureau, filed September 11, 2014, in Docket No. 11-71. ALJ Sippel accepted the conclusions (auto termination) of the Stipulation in his Order, FCC 14M-31 for purposes of issue (g) in 14M-31 released October 9, 2014, in Docket No. 11-71. MCLM flaunts in the Commission’s face its violations of threshold rules and the warnings in the HDO by these continued withholdings of required disclosures as to both the geographic AMTS and the site-based AMTS spectrum it obtained and maintained by cheating. It expects a pay off for that, but it has now admitted in the Stipulation to such violations as are fully disqualifying in themselves (not considering admissions in the proceedings on the auction and geographic spectrum that are also fully disqualifying).

transfer of negative control and that would be a major amendment under Section 1.2105(b), Modification and Dismissal of Short Form Applications.

In sum, WTB read and acted on the Skytel-2 petitions to deny and reconsideration petitions too narrowly. The WTB found that the spousal attribution rule simply required Maritime to amend its application to include the revenues of Donald DePriest as the spouse of Sandra DePriest. That required a waiver, and even MCLM believed that *and requested* a waiver, but there was no waiver grant justified or issued. The WTB further found that an amendment of an auction application to change the reported revenues and “bidder size” (the bidding discount level size) is only a minor amendment. That is clearly wrong and for the WTB or any other level of the FCC to serially assert this is malfeasance.⁶ However, the Commission need not decide on

⁶ That was directly contrary to the full Commission’s explanation of the purposes and meaning of the subject rule, §1.2105 in the rule making order adopting this rule in which the Commission rejected just this interpretation and found that any change, up or down, in bidder size is not permitted, after a bidder has certified a bidder size and the short-form filing window has closed: *In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures...* FCC 97-413. 13 FCC Rcd 374. Rel. December 31, 1997 (emphasis and text in brackets added):

66. After careful consideration of the comments addressing the issue, we believe that a definition of major and minor amendments similar to that provided in our PCS rules, n174 is appropriate. After the short-form filing deadline, applicants will be permitted to make minor amendments to their short-form applications both prior to and during the auction. However, applicants will not be permitted to make major amendments or modifications to their applications after the short-form filing deadline. Major amendments will include, but will not be limited to, changes in license areas designated on the short-form application, changes in ownership of the applicant which would constitute a change in control, and the addition of other applicants to any bidding consortia. Consistent with the weight of the comments addressing the issue, n175 major amendments will also include any change in an applicant's size which would affect an applicant's eligibility for designated entity provisions. For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company would not qualify as a small business [would go down in “bidder size”], the amendment reflecting the change in ownership of Company A would be considered a major amendment. Otherwise, the new entity could receive small business bidding credits and installment payments when it does not qualify for them. As is the case in our PCS rules,

and remedy that wrong action to find MCLM's licenses void. Donald DePriest has been shown to be a controlling interest holder and the MCLM application required a major amendment to correct its inaccuracy, an amendment that it could not file after it had participated in the auction based on an inaccurate application. Therefore, the WTB should have dismissed the MCLM application, not the SkyTel petitions to deny and reconsideration petitions, and in any case the Commission must now find the issuance of the Auction 61 licenses to MCLM as void *ab initio*. SkyTel has demonstrated in its petitions challenging the MCLM long form and the WTB issuance of Auction 61 licenses to MCLM that the licenses awarded to MCLM are void *ab initio* and two of the SkyTel entities are the lawful high bidders.

As noted in the Summary and shown above, there was and remains no need nor justification at all, for the HDO, or the proceedings in 11-71 and 13-85, or the Order (FCC 14-133), given the above-shown disqualification of MCLM as to the auction licenses, ~~and~~ or to continue proceedings as to the site-based licenses, due to the above-discussed disqualification now shown in the above-noted admissions in the September 2014 Joint Stipulation in 11-71. See the Skytel-1 Recon for further discussion of these matters. In this regard, and apart from the solution for SCRRA presented in the Skytel-1 Recon, the government can use eminent domain power where there is a legitimate need, as to taking licensed spectrum from its rightful owner or claimant: that is the real nature of the decision under Footnote 7, but there is no need demonstrated or that can be demonstrated. Yet [the SkyTel-1 Recon](#) offers a full solution without any such demonstration.

however, applicants will be permitted to amend their short-form applications to reflect the formation of bidding consortia or changes in ownership that do not result in a change in control of the applicant, provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. n176 In contrast, minor amendments will include, but will not be limited to, the correction of typographical errors and other minor defects, and any amendment not identified as major.

III. MCLM Failed To Comply With The Spousal Attribution Rule

Even under the WTB aberrant reading of the spousal attribution rule and *Biltmore* (see discussion above), the MCLM long-form application should have been denied. The WTB gave MCLM multiple bites at the apple to try to file an accurate application with regard to MCLM's attributable revenues. MCLM repeatedly failed to do so. This is not a situation where an applicant files an attributable revenue amendment after the auction and the WTB deems it to be a minor amendment and allows it.

MCLM never filed an accurate application, despite being given multiple chances to do so. The MCLM application that the Bureau granted was not accurate and complete, and to this day it has not been corrected and completed. The WTB should have found that MCLM's purported amendment was inaccurate and incomplete, that MCLM misrepresented the facts and lacked candor. The grant of the MCLM application, even as amended, violated the letter and the spirit of the Commission's rules. Moreover, FCC acceptance of that and issuance of the licenses violated the integrity of auctions and small-company preferences mandated by Congress, and the rights of the lawful high bidders. It made a mockery of these mandates and fundamental rights. The grant should be rescinded and the licenses held to be void, to uphold the rules, remedy the loss of integrity and respect these rights.⁷

The HDO contains a recitation of the repeated dissembling by MCLM even after being admonished by both the WTB and the Enforcement Bureau to provide accurate and complete

⁷ See: "Passive Takings: The State's Affirmative Duty to Protect Property." Vanderbilt Public Law Research Paper No. 14-19: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419482 "[T]he Takings Clause imposes an affirmative obligation on the government to protect property." etc. Also See: http://www.law.cornell.edu/wex/due_process "The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be 'deprived of life, liberty or property without due process of law.' The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states."

information. As a matter of sound auction administration, the WTB set a regrettable and unlawful precedent in granting the MCLM application and then being forced to use an HDO to correct the situation.⁸ The Commission simply cannot allow this precedent to stand. This precedent means that auction applicants can file post-auction “minor” amendments that are inaccurate and incomplete, obtain the auction license, and then force the Commission [and lawful high bidders](#) to spend years in hearing trying to get the licenses back.

This is simply bad law and bad administrative procedure. The Commission must rescind the grant to MCLM and set a strong precedent that dissembling in auction applications will not be tolerated. The WTB must stop dissemblers in their tracks *before* they receive an auction license.

The Order underscores the extreme dangers to sound policy, administration and the public interest that the WTB decisions created. The Order denies the *Second Thursday* application of MCLM, but in doing so the Order underscores what happened as a result of the

⁸ But as SkyTel showed in 13-85 and other proceedings including the MCLM bankruptcy (in which the FCC is a party), MCLM thwarted even that by a sham bankruptcy the FCC went along with to date, in which the financial supporters of MCLM, now called Choctaw, that funded the wrongdoing with security in the proceeds of the wrongly obtained licenses, pose first as the innocent creditors and then, in the Second Thursday request, as saviors of the public interest, if they can now only obtain a huge windfall profit by getting the licenses they wrongfully funded in the first place. That, and more to it, is a sham bankruptcy created to foil the FCC enforcement of fundamental rules and the Jefferson Radio policy, and misuse bankruptcy law and procedure. Judge Sippel rightfully found *still further* abuses in the bankruptcy, not corrected to this day: see his Order FCC 14M-18 in the section on the “Troubling Stipulation” ¶¶ 67-72, agreeing with an argument of Havens as to how the Stipulation was in violation of the Maritime bankruptcy including the MCLM-Choctaw Chapter 11 Plan and Plan Order. This was the attempt of Maritime and the Enforcement Bureau to allow Maritime to keep a substantial number of site-based licenses stations in major markets with no proof of permanent operations (and not proof of evidence of construction in this fact finding hearing). Havens made this argument to compel MCLM and the Enforcement Bureau to do what they eventually did: the admissions as to permanent abandonment, discontinuance and automatic termination in the September 2014 Joint Stipulation described above (and not to benefit this specious bankruptcy and specious Chapter 11 Plan).

WTB decision. The WTB gave MCLM licenses it should never have been awarded, and when the Commission recognized this mistake, MCLM filed bankruptcy and *misused* the *Second Thursday* doctrine to tie up the spectrum for years and bargain for concessions.⁹ Surely the Commission recognizes the danger of allowing a WTB precedent to stand that could result in a repeat of this situation.

MCLM did not file an accurate, minor amendment of reported revenues. It failed to file an accurate amendment, it misrepresented the facts and lacked candor. Under any interpretation of the spousal attribution rule and *Biltmore*, the MCLM application was defective and an abuse of the auction process. It should have been denied, not granted, the Skytel application for review should be granted and the MCLM license grant should be rescinded.

IV. Changes In The Commission's Rules And Policies Cannot Be Applied Retroactively To Excuse Maritime's Deficient Application

Subsequent to Auction 61, the Commission amended its short-form application process to allow applicants who misstated their eligibility for bidding credits to amend their applications and pay the difference.¹⁰ The Skytel-2 Companies have protested¹¹ and continue herein to protest this *ultra vires* change in the auction process, noting that it is unfair to competing bidders and to genuine small businesses, and contrary to the Commission policy of promoting diversity

⁹ In addition, in the first phase of 11-71, issue (g) regarding determination of automatic termination of the MCLM site-based licenses: MCLM somehow got the Enforcement Bureau to cave in on a lot as to issue (g) and even end up presenting only the Maritime case as its direct case in this issue (g) hearing. Why that happened and continues is a major question, but it is impermissible for the Bureau and in violation of its duties under the HDO FCC 11-64 and its delegated duties in Part 0 of the FCC rules. It is not for lack of time and effort since the Bureau has put extensive time and effort at not only supporting MCLM rather than prosecuting the case against MCLM but in repeatedly acting to frustrate and block the SkyTel entities in their attempt to defend their rights and the public interest in this 11-71 proceeding, taking up the job the Bureau should be doing.

¹⁰ See the "Auction Procedures" Public Notices of all auctions since auction 61.

¹¹ Among others, in filings in the captioned matters, and challenges to Auction 87 still pending.

of ownership by small businesses who ~~do not~~ rely upon bidding credits. It allows bidders to bid using bidding credits to which they are not entitled, [cheat competitors](#), and only after they learn of the result of the auction do they need to reveal their actual financial status to the Commission.

Regardless of the propriety or wisdom of the Commission's action, one thing is clear. *The Commission cannot engage in retroactive rulemaking.* The Supreme Court held in *Bowen* that under the Administrative Procedures Act agencies may adopt rules only "of future effect."¹² The Commission has taken pains to ensure that its actions comply with the *Bowen* standard. The Commission has held that, "[b]y definition, a rule has legal consequences only for the future."¹³ The Commission also has recognized that, "[i]mpermissible retroactivity involves, by definition, the application of a new rule to past occurrences."¹⁴

The Supreme Court also held that administrative agencies should be more circumspect than courts in making new law through adjudications because administrative agencies, unlike

¹² *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216, 109 S.Ct. 468 (1988). While *Bowen* stands as an absolute bar to retroactive rulemaking, the Court distinguished adjudication, noting that administrative agencies, like courts, have the right to adjudicate disputes arising from past conduct. *Bowen*, 488 U.S. at 216. (The distinction between rulemaking and adjudication is "the entire dichotomy upon which the most significant portions of the APA are based.") However, *Bowen* further stands for the proposition that adjudication involves the application of rules to past conduct *where those rules were in effect at the time the conduct occurred*. In *Bowen* the Supreme Court rejected the position of the Secretary of Health and Human Services that, after promulgating a new rule, the Secretary could apply the rule retroactively under his authority to adjudicate adjustments to medicare reimbursements. *Bowen*, 488 U.S. at 220.

¹³ *E.g.*, *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 23 CR 410, 15 FCC Rcd 25020 (Dec. 13, 2000), para. 37; *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1998* (Apr. 1, 2003), paras. 10-11.

¹⁴ *E.g.*, *In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures*, 19 FCC Rcd 2551 (Feb. 4, 2004), para. 22; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 72 RR 2d 649, 8 FCC Rcd 3359 (April 30, 1993), paras. 118-121.

courts, have the option of using rulemaking to make new law.¹⁵ Nevertheless, the Commission retains discretion as to whether to address an issue by rulemaking or by adjudication.¹⁶ Where the Commission chooses to proceed by rulemaking, the rules adopted may only be applied prospectively.¹⁷

Even where the Commission decides to proceed by adjudication, the decision may not be applied retroactively where the decision changes rather than applies the law or where retroactive application of the decision would be unjust because a party reasonably has relied upon contrary Commission pronouncements.¹⁸

The auction forms and procedures under said *ultra vires* rule change that was effected by placement in all Auction Procedures Public Notices after auction 61 were not in use when this auction 61 was conducted. Therefore, the Commission cannot rely upon its subsequent actions

¹⁵ *SEC v. Chenery*, 332 U.S. 194, 202, 67 S. Ct. 1575 (1947). (“Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct....”)

¹⁶ *Qwest v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).

¹⁷ *Qwest v. FCC*, 509 F.3d at 539 (“[I]n a rulemaking context...the retroactivity issue is now moot because of *Bowen v. Georgetown University Hospital*.”)

¹⁸ The Commission declined to apply retroactively its decisions in *InterCall, Inc.*, 23 FCC Rcd 10731 (June 30, 2008) and *AT&T's Phone-to-Phone IP Telephony*, noting in the latter, “The D.C. Circuit has explained that whether to permit retroactive application of an agency decision ‘boil[s] down to . . . a question grounded in notions of equity and fairness.’ One relevant factor is whether there has been ‘detrimental reliance’ on prior pronouncements by the Commission.” *Id.* at para. 22; see also, *Communications Vending v. Citizens Communications*, 17 FCC Rcd 24201 (Nov. 19, 2002), para. 33; *In re Gaco Communications*, 94 FCC2d 761 (June 21, 1983), para. 24. In *Vonage* the D.C Circuit recently held that the Commission could not suspend the carrier’s carrier rule, even temporarily, as doing so would result in duplicative USF contributions. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007). By contrast, the D.C. Circuit’s decision to uphold retroactive application of charges in *AT&T Calling Card Services* was based upon a finding that, “AT&T had no reasonable basis to expect to avoid these obligations merely by adding an unsolicited advertising message to its prepaid calling card service. *AT&T Calling Card Services* at para. 32, affirmed, *AT&T v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

retroactively to excuse Maritime's misrepresentations under and other violations of rule §1.20105 as to bidder size. In addition, the WTB has no authority to act contrary to Commission rule making determinations as to the purpose and meaning of this rule, cited above. To the extent that the Order may be read to suggest otherwise, Skytel-2 requests reconsideration on the grounds that retroactive application of new to excuse Maritime' conducted is unwarranted and inconsistent with controlling precedent.¹⁹

V. Footnote 7 Relief Was Not Necessary Or Appropriate

The Commission's decision to create a new exception to the general denial of *Jefferson Radio* to allow Maritime to sell auction spectrum to SCRRA should be reconsidered. Footnote 7 of the HDO created the possibility of relief, but did not mandate it. The Commission should have decided not to proceed under Footnote 7.²⁰

First, the new exception to *Jefferson Radio* was unnecessary to enable SCRRA to meet its statutory obligation to implement positive train control. SCRRA never demonstrated that it needed to obtain the spectrum for positive train control from Maritime, as opposed to another source. For example, SCRRA could have obtained spectrum from Skytel. (See the Skytel-1 Recon as to its offer to provide at below market price, sufficient AMTS spectrum to SCRRA, or if it chooses, 900 MHz ITS-class spectrum, M-LMS Spectrum.) The decision directly damaged

¹⁹ The Order continues the apparent assumption in the HDO FCC 11-64 that the MCLM auction 61 licenses were validly issued, but subject to revocation for post-auction misdeeds. That is not correct as SkyTel entities have demonstrated from the commencement of their challenge to the MCLM long form and grant of the licenses, to this day.

²⁰ As discussed above, the Jefferson Radio policy and any exceptions thereto are interpretive law, and can be challenged anytime if in violation on its face or as applied to a challenger's (and others') protected rights under the Constitution including the Amendments. Footnote 7 is challenged as defective facially and as applied, on the basis presented herein, from its inclusion in the HDO FCC 11-64 and its later partial implementation in the Order. In the HDO, it was not clear what this exception even was, or if it would be pursued. It is ripe to be challenged at this time, but in addition it may be challenged at this time for reasons just stated.

Skytel because it allowed SCRRA to avoid paying a fair market price for lawfully acquired Skytel-2 spectrum. In fact, Skytel entities offered and offers to sell, lease and otherwise provide use of spectrum to [public](#) railroads and others similarly situated at less than fair market value in order to serve the public interest, as shown in many FCC public proceedings including those discussed herein.

Second, the new exception to *Jefferson Radio* is wholly inappropriate. The Commission recognized that the SCRRA exception benefits the DePriests ([and MCLM and affiliates](#)) to the tune of many millions of dollars. Since the Commission denied *Second Thursday* relief because of the unjustified benefit to the DePriests, it is clear that the SCRRA exception is not and cannot be [justified under](#) *Second Thursday* relief.

The Commission must admit that the SCRRA exception to *Jefferson Radio* is a new and novel exception to *Jefferson Radio* that is separate and apart from *Second Thursday*. Indeed, there is no discussion whatsoever in the SCRRA portion of the Order that the relief is necessary to benefit [still-undetermined](#) “innocent creditors” of Maritime, the bedrock standard of *Second Thursday* relief. The SCRRA discussion focuses squarely on excusing the multi-million dollar benefit to the DePriests, something that is anathema to *Second Thursday*. So the SCRRA relief is an entirely new and novel creation of the Order.

This new creation is a Frankenstein that should never have been animated. The Commission tied itself in knots attempting to explain why the DePriests should [be](#) allowed to benefit from the sale of unlawfully obtained spectrum to SCRRA. Hornbook law tells us that sale of stolen property is wrong and the buyer cannot acquire good title. The Order contradicts centuries of basic jurisprudence.

Moreover, the Commission attempts to thread a needle that it cannot thread. The utilities who were denied Footnote 7 (Footnote 7-like) relief undoubtedly will ask why SCRRA is

different. The alleged rationale is that SCRRRA has to meet a statutory mandate, and railroads have decided to only use 220-MHz-range spectrum for PTC, whereas utilities just think it might be nice to have some of that spectrum especially if its cheap by the MCLM fire sale due to its being caught cheating and unloading it before it looses it, and to allege that the buyers then cure its cheating. (The utilities are not innocent in this.)²¹ This rationale shows a complete lack of understanding of the federal and state laws that govern utilities. It also ignores entirely the President’s Cybersecurity Order and the mandates imposed on utilities.

Skytel-2 is not here to represent the interests of the utilities. And Skytel-2 is certainly not suggesting an enlargement of the SCRRRA exception. This brief discussion is interposed solely to underscore that the Commission has not, and cannot, create rational boundaries for its new SCRRRA exception to *Jefferson Radio*. The new SCRRRA exception should, on reconsideration, be relegated to the scrap heap and the Commission should deny all of the requested relief in accordance with its decision on *Second Thursday*.

VI. The Commission Failed To Comply With APA Notice And Comment Procedures.

The Commission failed to comply with APA notice and comment procedures with a regard to at least two important aspects of this case. First, the Commission created an entirely new exception to *Jefferson Radio* by footnote 7 of the HDO without notice and comment. Second, the Commission failed to provide notice and comment before amending its auction rules in a manner that purports to allow participants to use a bidding credit to [win licenses](#) in the auction and then decide after the fact to give up the credit by virtue of a minor amendment of their auction application.

²¹ Skytel does not, at this time, comment on Puget Sound Energy in this regard for reasons indicated in Skytel filings in 11-71 including its recently filed (last week) lists of evidence documents and witnesses with explanations for the issue (g) hearing. References herein to “utilities” or a similar term do not include Puget Sound Energy.

The Commission must comply with the APA by following notice and comment procedures before it amends its rules. For example, in *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3rd Cir. 2011), the Third Circuit noted:

Among the purposes of the APA's notice and comment requirements are “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”²²

VII. The HDO created footnote 7 without any prior notice and comment.

The SkyTel-1 Recon also discusses this subject.

The Commission lacks legal authority for this Footnote 7 exception to the law of the Jefferson Radio policy. There was no required public notice and comment, and not even a coherent and clear description of this new exception. And the exception was not even articulated until that was attempted in the Order that put this new law into effect. A policy, here the Jefferson Radio policy, that governs or implements Communication Act § statutes and related FCC regulations as to impermissible license assignments when the licensee qualifications to hold the licenses is at issue—which is interpretive law, cannot be changed without required clear definition²³ and public notice and comment, any more than a subsumed regulation can be change

²² 652 F.3d at 449 (citations omitted).

²³ It is axiomatic that law that is not clear is not permissible or in legal effect under the “void for vagueness doctrine.” See, e.g., *FCC & USA v. Fox Tele. Stations, Inc. et al.*, No. 10-1293 (Sup. Ct.). Copy at: <http://www.fcc.gov/document/fcc-usa-v-fox-tele-stations-inc-et-al-no-10-1293-sup-ct>

Held: Because the Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission’s standards as applied to these broadcasts were vague. * * * * (a) The fundamental principle that laws regulating persons or entities must

without such requirement.

Although the Commission may argue it created its new footnote 7 policy in an adjudicatory context, the policy obviously has broad implications that go beyond the case at hand. In other cases where a decision in effect creates a new rule, the Commission has put the matter out for notice and comment. *E.g. InterCall, supra*. After Maritime reacted to the HDO by filing a *Second Thursday* application, the Commission accepted comment on the *Second Thursday* application, but all of that post-dated the creation of Footnote 7 in the HDO. The Commission created a new exception to *Jefferson Radio* for the benefit of the SCRRA without giving the public an opportunity for meaningful comment as required under the APA.

Also, the Commission amended its auction rules and procedures without adequate notice and comment. The Commission changed the auction notice instructions to state that a bidder can claim a bidding credit, use it in the auction and then amend its application later to abandon the credit. It is obvious that bidders who do not claim [any](#) credits and then abandon them would have concerns about change in the auction rules, or at least an interest in thoroughly reviewing the matter and commenting on it. Yet the Commission simply adopted this change in the auction rules without notice or comment.

In both of these cases, the Commission failed to comply with the standard set forth in *Prometheus*. Neither footnote 7 nor the auction rule change was “tested by exposure to diverse public comment.” The footnote 7 exception was buried (literally as a footnote) in an HDO that would not have come to the attention of the diverse group of interest holders who might have a stake in *Jefferson Radio* and exceptions to it such as *Second Thursday* and now footnote 7.

give fair notice of what conduct is required or proscribed, see, e.g., *Connally v. General Constr. Co.*, 269 U. S. 385, 391, is essential to the protections provided by the Fifth Amendment’s Due Process Clause, see *United States v. Williams*, 553 U. S. 285, 304, which requires the invalidation of impermissibly vague laws.

Although the change in the auction rule was fully exposed in the Commission auction notices, interested auction participants were simply confronted with it, without any prior opportunity for comment.

All of this was manifestly unfair to the affected parties, contrary to the second prong of the test articulated in *Prometheus*. Those opposed to footnote 7 relief and those who seek a broader application of it, have both come away believing that the Commission treated them unfairly. Likewise, auction participants who do not use bidding credits, or use them lawfully, may understandably feel that gaming the use of the credits is unfair to and cheats them.

And the third prong of the test articulates the purpose of notice and comment being the opportunity for interested parties “to develop evidence in the record.” The evidence in the record was inadequate as to whether the railroad really needed footnote 7, or other options existed. And the record was inadequate as to whether the auction credit system was being gamed and abused by others besides Maritime. Proper notice and comment would have helped the Commission make informed decisions based on an evidentiary record.

VIII. Conclusion

Wherefore, for the foregoing reasons, Skytel-2 respectfully requests reconsideration of the Order to the extent and on the grounds set forth herein, and grant of all of the relief requested herein.

Respectfully submitted, Tuesday October 14, 2014

 /s/
Warren Havens
For defined Skytel-2 Petitioners named above
2509 Stuart Street, Berkeley CA 94705
Phone (510) 841 2220

Declaration

I declare under penalty of perjury that the facts in the foregoing filing are true and correct to the best of my knowledge.

/s/ Electronically submitted. Signature on file.

Warren Havens
President of the Skytel-2 Petitioners named above

October 14, 2014

Certificate of Service^[*]

The undersigned certifies that he has on this 14th day of October 2014, caused to be served, by first-class United States mail, a copy of the foregoing filing to:²⁴

Parties in Docket No. 11-71:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Richard Sippel Richard.Sippel@fcc.gov
Patricia Ducksworth Patricia.Ducksworth@fcc.gov
Austin Randazzo Austin.Randazzo@fcc.gov
Mary Gosse Mary.Gosse@fcc.gov

Pamela A. Kane
Michael Engel
Enforcement Bureau, FCC,
445 12th Street, S.W., Room 4-C330
Washington, DC 20554
Pamela Kane Pamela.Kane@fcc.gov

Jeffrey L. Sheldon
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
Counsel for Puget Sound Energy, Inc
Jeff Sheldon jsheldon@lb3law.com

Jack Richards
Wesley Wright
Albert Catalano
Keller & Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Counsel for Atlas Pipeline – Mid Continent LLC; DCP Midstream, LP; Enbridge Energy Co., Inc.; EnCana Oil and Gas (USA), Inc.; and Jackson County Rural Membership Electric Cooperative, Dixie Electric Membership Corporation, Inc.

^[*] Only this Errata Copy, which fully contains the initially filed copy, will be served.

²⁴ The mailed copy being placed into a USPS drop-box today may be after business hours and thus may not be processed and postmarked by the USPS until the next business day.

Jack Richards Richards@khlaw.com, Wesley Wright wright@khlaw.com, Albert Catalano catalano@khlaw.com

Charles A. Zdebski
Gerit F. Hull
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for Duquesne Light Co.
Charles Zdebski czdebski@eckertseamans.com

Matthew J. Plache
Law Office of Matthew J. Plache
5425 Wisconsin Avenue
Suite 600, PMB 643
Chevy Chase, MD 20815
Counsel for Pinnacle Wireless, Inc.
Matthew J. Plache Matthew.Plache@PlacheLaw.com

Robert J. Keller
Law Offices of Robert J. Keller, P.C.
P.O. Box 33428
Washington, D.C. 20033
Counsel for Maritime Communications/Land Mobile LLC
Robert Keller rjk@telcomlaw.com

Robert G. Kirk
Wilkinson Barker Knauer, LLP
2300 N Street, NW Suite 700
Washington, DC 20037
Counsel for Choctaw Telecommunications, LLC and Choctaw Holdings, LLC
Robert G. Kirk RKirk@wbklaw.com

James A. Stenger
Chadbourne & Parke, LLP
1200 New Hampshire Ave., NW
Washington, DC 20036
Counsel to Environmental LLC and Verde Systems LLC
James Stenger jstenger@chadbourne.com

Jimmy Stobaugh, GM
Skytel entities
2509 Stuart Street
Berkeley, CA 94705
Jimmy Stobaugh jstobaugh@telesaurus.com

Parties re: Footnote 7 decision, not listed above:

Dennis C Brown

8124 Cooke Court, Suite 201

Manassas, VA 20109-7406

Counsel for Maritime Communications/Land Mobile LLC (MCLM Debtor-in-Possession)

Paul J. Feldman

Harry F. Cole

Fletcher, Heald & Hildreth, P.L.C.

1300 N. 17th Street – 11th Floor

Arlington, VA 22209

Counsel for Southern California Regional Rail Authority

Paul Feldman feldman@fhhlaw.com, Harry Cole cole@fhhlaw.com

/s/ [Filed Electronically. Signature on File]

Warren Havens