

Before the Federal Communications Commission
Washington, DC 20554

In the Matter of)
MARITIME COMMUNICATIONS/LAND) WT Dock. 13-85
MOBILE, LLC (i) Application to Assign Licenses) FCC FN. 0005552500
Application to Assign Licenses to Choctaw)
)
(ii) Applications to Modify and to Partially Assign) FCC FNs. 0004153701 0004144435
License for Station WQGF318 to Southern)
California Regional Rail Authority, and)
)
(iii) Application for New Automated Maritime) FCC FN. 0002303355
Telecommunications System Stations)
)
And OSC, HDO, and Notice of Opportunity) EB Dock 11-71, FN EB-09-IH-1751
) FCC FNs. 0004030479, etc.

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

Further Reply to Opposition to Petitions for Reconsideration¹

Skytel Entities (or herein “Entities”) hereby jointly file this further reply and supplement to their initial reply to the MCLM Opposition to the Skytel Recons (or herein “Recons”).² The Entities fully reference and incorporate herein their initial reply to the Opposition that was filed on October 31, 2014 (the “Initial Reply”).³

1. First, since MCLM argues that late-filed pleadings must be dismissed, then its own Opposition should be dismissed. The Initial Reply showed, among other things, that the Opposition was untimely and should be dismissed. MCLM and its counsel have to be assumed to know the rules that cause their Opposition to be late-filed, but they don’t request acceptance of late filing and give any reasons in support, and it is far too late to request that now. Clearly, in that case the Opposition is frivolous, due to being clearly late, and filed only for confusion and delay. It is thus a violation of Section 1.52, and MCLM and its counsel should be sanctioned. The sanction should be at minimum that MCLM and any of its agents are barred from any

¹ The defined terms herein have meaning given in the Entities’ Initial Reply filed on October 31, 2014.

² As shown by Exhibit 1 of their initial reply, Entities have until November 5, 2014 to file their reply and therefore this further reply and supplement is timely

³ Together, the instant filing and the Initial Reply constitute the entire reply of the Entities to the MCLM Opposition.

further filings in 13-85 or other proceeding or on ULS related to FCC 14-133, which is especially appropriate since they have no Article III interest and standing, or other procedural basis, to challenge FCC 14-133, as explained in the Recons, and also as explained the Recons because the Commission need not and should not allow MCLM to further engage in any actions to seek extraordinary Second Thursday relief, which is purely under Commission discretion.

2. The Recons were timely. The Initial Reply and Explanation unambiguously demonstrate that the Recons were timely filed, including, but not limited to that Skytel-2 Recon was timely filed via the FCC's ULS pleading system and thus was received by the FCC via an official pleading submission system. It is notable that Opposition fails to mention that the Skytel-2 Recon was timely filed on ULS, and thus it does not even challenge that fact.⁴ Clearly, MCLM avoids it because it undercuts its spurious arguments concerning late filing of Skytel-2 Recon.

The Wireless Bureau setup docket 13-85 for any member of the public to filing pleadings within a pleading cycle that was established, and at least permits subsequent filings, but filings outside the pleading cycle need not be considered by the FCC. On the other hand, Entities are parties to the subject license applications captioned in Recons, initially and most fundamentally, because they challenged those applications in a timely manner when they were placed on Public Notice, under 47 USC §309(d).⁵ In addition, the Opposition fails to explain why it would be in the public interest for the Commission to reject the Recons when, as shown in the Entities' Explanation, they did submit the Recons timely via the ECFS system well before the midnight deadline, but the ECFS system was not working and would not accept them, and therefore, the

⁴ MCLM and its counsel should be found to lack candor for avoiding the fact of the Skytel-2 Recon timely filing in its Opposition.

⁵ Entities do not simply submit comments in docket 13-85 as a non-party or what may be called a party in that docket. A party under 47 USC §309(d) is distinct from a party that timely files a pleading in a public docket such as 13-85, in which anyone, even without Article III interest and standing is permitted to file pleadings. Even if the FCC were to deem that the Recons were untimely filed in 13-85 on ECFS, the Skytel-2 Recon is nevertheless a timely pleading on ULS further challenging the subject applications, due to the new facts that arose by the Commission decision in FCC 14-133.

Entities were required to file them via other electronic means.⁶

Furthermore, contrary to the Opposition's assertions, when the Commission instituted electronic filing of pleadings, it means that the public has until up to the deadline to file via the Commission's electronic systems, not that the public is required to file by a certain time well in advance of said deadline, or that electronic filers should somehow predict or divine that an FCC system (ECFS in this case) will have issues at a given time and therefore file in a way to avoid those.^{7/8} Further, when the ECFS system does not allow submissions before a deadline due to excessive incoming pleadings being filed, or for any other reason, then that is good cause for the FCC to accept late filing, especially where the filer can show that it would have timely filed via ECFS (or other FCC e-filing system) if not for ECFS system problems (that is the case here).^{9 /10}

In sum, nothing the Opposition argues warrants dismissal of the Recons as untimely, and

⁶ Entities completed the filing cover form, uploaded their respective pleading and hit the button to proceed to submit (numerous times before the deadline), but ECFS would not function.

⁷ Since the Commission allows electronic filing of pleadings as an official filing method, then it must also understand that its electronic filing systems may encounter problems at times that warrant granting exceptions to filing deadlines.

⁸ In any case, the Entities have demonstrated clearly that they did not wait until the last minute and that they were not experiencing any technical issues on their side, and that they were able to submit the Recons to the Commission by other electronic means, including via FCC ULS pleading system well in advance of the deadline.

⁹ The Commission allows submission of pleadings via paper and electronic means. The public has the right to rely upon the Commission's electronic filing systems that allow submission of pleadings and other filings right up to the last second of a filing deadline. In the case of electronic filing that is up until just before midnight on the filing deadline. The FCC accepts paper filings until 7:00pm ET. The FCC does not reject paper filings that are submitted at 6:59pm ET or even right at 7:00pm ET, and if something occurred on the FCC's side to prevent a party from filing in paper by 7:00pm ET (e.g. a million people show up that day to file via paper and not everyone can get into the building by 7pm, or the FCC office closes for some reason prior to 7pm), then that would be good cause for grant of an exception to permit late-filing. There is no reason electronic filings should be treated differently.

¹⁰ ECFS did not provide a notice to parties filing on that date, including the hour before midnight, that parties should expect significant delays, or even inability to file, due to the extremely high incoming pleadings that were being received in another docket, or in all dockets combined. It would have been easy for ECFS staff to give such a notice itself, as well as in the daily digest. The FCC gave no such notice. Along with such a notice, the FCC should provide an alternative means to efficiently and promptly file pleadings during such periods of ECFS malfunction or jamming, otherwise, a party's submissions on ECFS are not accepted due to not fault of the filer, and situations like this one arise whereby an adverse party makes frivolous arguments to attempt to have dismissed a filing properly submitted with ample proof of such proper submission.

doing so would not be in the public interest. However, if for any reason the Commission determines either of the Recons to be untimely, and does not fully consider them and find them procedurally sound, the Commission should nevertheless fully review and decide upon the substance for reasons given in §1.106(c)(2). For example, the Commission has properly found:

...[A] petition for reconsideration which relies on facts not previously presented to the Commission may be granted only if these facts relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or if these facts were unknown to petitioner until after its last opportunity to present such matters. Should these circumstances not be present, the rules nevertheless allow grant of the petition for reconsideration should the Commission determine that consideration of the facts relied on by petitioner is in the public interest. *Id.* at § 1.106(c)(2).

In re Applications of Stockholders of CBS Inc., FCC 96-478, 11 FCC Rcd 19746; 1996 FCC LEXIS 6981, Rel. December 17, 1996.

3. Entities have standing. The Opposition makes a weak and contrary argument on lack of standing. First, it talks about standing of “Havens,” but “Havens” is only one of the many listed Entities in one of the two Recons. Second, the Opposition does not even attempt to describe what it believes are the criteria for legal standing. Next, the Opposition says that “Havens arguably has standing...insofar as...‘Footnote 7’ relief,” but that assertion is not proper in an Opposition. An Opposition cannot “arguably” argue about anything. An argument must be clear one way or the other. Then, with no explanation, the Opposition asserts that everything else in the Recons “is not proper matter for reconsideration.” However, the Opposition gives no explanation of what it means by “not proper matter.” “Proper matter” is not a defined term in FCC law, or other law. It appears to mean nothing more than MCLM does not like it. This entire section in the Opposition labeled “Havens Lacks Standing...” is improper pleading under §1.52 because it makes no sense, and is not supported by any reference to relevant rules and case law, and uses undefined, irrelevant terms. The Commission designated all of the Entities as parties in FCC 11-64, which unquestionably makes all of these Entities parties to any licensing application listed in the HDO or that came after the HDO resulting from MCLM’s attempt at

special relief from the HDO, including by its assignment to Choctaw and the associated request for special relief that resulted in docket 13-85. The reasons the Commission made the Entities parties in the HDO is entirely clear in the various petitions of these Entities cited in the HDO as a seminal cause of the HDO itself. That includes that the Entities are the lawful high bidders for all of the MCLM geographic AMTS licenses. For the above reasons, the Opposition's section "B." is frivolous and sanctionable and MCLM's attorney and MCLM should be sanctioned.¹¹

4. The Recons are all proper petitions regarding the Order, FCC 14-133. This responds to Opposition's section "C." Opposition distorts the Skytel Recon's presentations. The Recons properly brought up new facts including MCLM admissions that the Commission should consider in maintaining any relief to MCLM. The Opposition avoids any specifics of the Recons in its section "C." It misrepresents the Recons in stating that they assert that the *Jefferson Radio* policy cannot be waived. The Recons' asserted that the *Second Thursday* policy or doctrine is bad law, given a Supreme Court decision that was cited, at least as applied to this extreme case of MCLM-Choctaw. The Opposition avoided that, as one more example of improper pleading. It is improper to misrepresent or distort an opponent's pleading and to then attack that, or to setup a straw man to attack. MCLM has a history of this from its beginning to present.

5. Recons' challenge to footnote 7 relief is entirely sound. This responds to Opposition's section "D." Opposition asserts, with no explanation, that footnote 7 relief is not a new exception to the *Jefferson Radio* policy. However, the Commission itself described it as a unique, new relief to *Jefferson Radio* solely for this one railroad and in the context of an alleged Congressional mandate. It is indeed a new exception, and it is not in any way justified under the principles of *Jefferson Radio* or *Second Thursday*, or any other policy or doctrine that the

¹¹ MCLM itself is purportedly owned and operated by an attorney, Sandra DePriest, and its current existence and operations are solely under the bankruptcy court Chapter 11 order involving Choctaw, which in itself is managed by John Reardon, an attorney. All MCLM filings must be deemed to be approved by these inside attorneys for MCLM and Choctaw, and they should be sanctioned as well as Mr. Keller for frivolous pleadings. The entity MCLM should also be sanctioned.

Commission has ever implemented in its decisions or that any court has upheld. In addition, as the Recons explained, the factual premises of the Commission in granting footnote 7 relief are incorrect, and once the actual facts are reconsidered, then the Commission by its own logic has to deny that relief. This includes, that Congress did not require railroads to obtain 220 MHz range spectrum, or 1 MHz of spectrum, and SCRRRA's internal documents that Entities timely presented in their challenges of MCLM's assignment to SCRRRA demonstrate that SCRRRA did not need even half of 1 MHz in any of its geographic area, nor was MCLM the only source of 220 MHz range spectrum. MCLM and SCRRRA misrepresented to the Commission the facts that were the basis of footnote 7 relief. For that, they should be sanctioned.

The Opposition section "D" cites the *LaRose v. FCC* case, also cited in the Recons. However, the Recons showed that under *LaRose* the licensee that obtained a type of *Second Thursday* relief had the bad actor removed and was being operated by a new court-appointed controller. That is entirely different from the MCLM request for special relief under footnote 7 and *Second Thursday*. MCLM keeps its own tentatively admitted wrongdoers, the DePriests, as the persons in charge of MCLM and its representations to the Commission for said relief, as if the discredited wrongdoers should now be believed as to facts asserted to get the relief, and trusted with the proceeds of the sale to SCRRRA. None of that makes sense under any FCC decision granting any type of *Second Thursday* relief.

The Opposition also, under section "D", falsely asserts that Entities "asserts...allegations against Maritime as if they were proven..." That is not correct. The Recons assert that MCLM tentatively pled that the DePriests were wrongdoers for the purpose of attempting extraordinary relief from the *Jefferson Radio* doctrine. That is a fact. The Recons further noted, also accurately, that MCLM has not admitted to any wrongdoing, if they do not obtain that relief, otherwise, the Commission would not have in the Order lifted the stay in docket 11-71 so that MCLM could proceed to hearing on the issues of its wrongdoing, licensee disqualification,

license revocation, and various financial sanctions. Again, MCLM and its counsel distort the actual opponent's pleading for improper purposes.

Next, the Opposition at section "D" asserts that "it is...virtually impossible, that the DePriests would receive any of the proceeds...paid by SCRRA." These assertions are simply an attorney's bald assertion, not supported by any sworn statement, and without citing any bankruptcy court order or law, or anything else in particular to support those strident assertions.

Next, the Opposition asserts that "The Commission has not adopted a rule of general applicability to all licensees." That is another frivolous assertion. The FCC has a set of rules by which licensees apply for, and can maintain, and assign licenses. Any exceptions to those rules has to be either by a proper rule change, in notice-and-comment rulemaking, or by creation of a doctrine or policy that is also subject to proper notice and comment, because parties affected by it have to have the opportunity to challenge the proposed new law. That is required under APA, and case precedent, as discussed in the Recons. The Opposition does not show otherwise.

The Opposition further suggests that "There was ample opportunity to comment on the proposal," by which MCLM suggests footnote 7 was simply a proposal. Footnote 7 was not in any way a proposal. It was part of an order that was entirely new and never previously proposed to anyone. It simply invited MCLM and SCRRA to apply for an exception under the *Jefferson Radio* doctrine, for vaguely suggested reasons, and assumed facts that were incorrect, as shown by the Entities' challenge to the MCLM assignment to SCRRA, and further shown thereafter.

The Opposition further mischaracterizes by stating that the Recons assert "the *Jefferson Radio* policy...is also invalid." However, the Recons said nothing of the sort, instead they supported the *Jefferson Radio* policy by arguing that it should not be broken by an improper, new footnote 7 exception. Further, contrary to the Opposition, the *Jefferson Radio* policy arose in a decision by the DC Circuit Court, which the Commission was obligated to follow. Footnote 7 is nothing of the kind. When a policy or doctrine arises by action of a Federal agency, it has to

follow proper public notice and allow comments, before subjecting licensees and applicants to the policy or doctrine. A court precedent is a different matter and applies not only to the particular case, but also sets a precedent for similar cases, at least in decisions such as the DC Circuit Court's *Jefferson Radio* decision.

6. MCLM does not effectively refute the new facts of disqualifying wrongdoing. As partly discussed above, the Opposition lightly deals with, without any specifics, the very serious new facts clearly presented in the Recons regarding MCLM's unlawful warehousing of AMTS site-based licensed stations nationwide for up to 2.5 years, that also involves extensive lying to the FCC in violation of 18 USC §1001. Because MCLM did not refute that weighty, specific showing of what should be found in itself to be fully disqualifying, and a bar to any relief from the Jefferson Radio policy. It should be deemed that MCLM admits to those facts and conclusions, or at minimum that it had no effective counter facts and arguments.

/ s / Warren Havens

Warren Havens

Individually and as President of the companies in the defined Entities: **Skytel -1:** Intelligent Transportation & Monitoring Wireless LLC and Skybridge Spectrum Foundation, and **Skytel-2:** Environmental LLC, Verde Systems LLC, Telesaurus Holdings GB LLC and V2G LLC
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November 5, 2014

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 Entities named above

November 5, 2014

Certificate of Service

The undersigned certifies that he has on this 5th day of November 2014, caused to be served, by first-class United States mail, a copy of the foregoing filing to:¹²

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¹² 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.

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