

applies the Protective Order, and is untimely. Choctaw and MCLM certainly should not be required to justify confidentiality designations based on blatantly false statements.¹

I. THE PETITION IS RIFE WITH FALSE AND MISLEADING STATEMENTS

A. Petitioners Falsely Assert That the Information Is in the Public Domain

Petitioners claim that the Commission has already denied confidential treatment to the business plans of Choctaw and MCLM because of public disclosures in a bankruptcy proceeding.² According to Petitioners:

The Commission denied the Maritime-Choctaw *Second Thursday* petition in a public order. After the denial, they petitioned for reconsideration and sought to designate their pleadings as confidential. On the contrary, however, in response to an FOIA request, the Commission determined to release those pleadings. Thus, the Commission has already determined that Maritime-Choctaw's alleged business activities and plans are not entitled to confidential treatment because of the public disclosures in the bankruptcy.³

These statements are false and misleading.

Petitioners are correct that Choctaw and MCLM filed pleadings in connection with their *Second Thursday* petition subject to a request for confidential treatment under the Commission's rules. Petitioners are also correct that Mr. Havens requested that the Wireless Telecommunications Bureau ("Wireless Bureau") release these confidential pleadings pursuant to the Freedom of Information Act ("FOIA"). From here, however, the Petitioners deviate from the truth. First, the Wireless Bureau did not release the confidential pleadings in their entirety under FOIA. To the contrary, the Wireless Bureau upheld the bulk of the redactions made by

¹ See 47 C.F.R. § 1.17 (requiring truthful and accurate statements to the Commission), § 1.52 (attorney signature on pleading indicates material is true and correct), § 1.24 (requiring attorneys to conform to the standards of ethical conduct).

² Petition of Environmental LLC and Verde Systems LLC to Deny, EB Docket No. 11-71, at 3 (dated Jan. 28, 2015) ("Petition").

³ *Id.* at 3-4.

Choctaw, thereby confirming the confidential nature of the redacted material.⁴ Second, the redacted material related to financial information provided by Mr. DePriest and did not involve any “business activities and plans” of Choctaw, as the Petitioners suggest.⁵ Finally, nothing in the FOIA decision indicated that the limited disclosure was due to public disclosures made in the bankruptcy proceeding.⁶ Quite the opposite – the Wireless Bureau expressly rejected Mr. Havens’s premise that the DePriest bankruptcy proceeding justified public disclosure of the materials Mr. Havens sought:

Though Mr. Havens asserts that this information may have to be disclosed in a bankruptcy proceeding and therefore should be disclosed pursuant to the FOIA Request, a bankruptcy court’s possible actions do not supersede Exemption 6. . . . We conclude that Exemption 6 is applicable.

The Petition should be dismissed on this basis alone.

B. Petitioners Falsely Assert that No Competitive Harm Exists

Petitioners assert that release of the transcript information would cause no competitive harm because there is no competition between MCLM-Choctaw and Skytel entities to sell spectrum to Amtrak for positive train control.⁷ This argument is likewise false and misleading.

There is substantial competition regarding the sale of spectrum to Amtrak for positive train control. Indeed, absent competition with MCLM to sell spectrum to Amtrak, Mr. Havens would have had no reason to try and secure access to MCLM’s confidential response to Amtrak’s Request for Proposal (“RFP”). In reality, however, Mr. Havens took extraordinary

⁴ See Email from Amanda Huetinck, Attorney, Mobility Division, Wireless Bureau, FCC, regarding FOIA 2015-058 (dated Jan. 9, 2015) (attached as Exhibit 1).

⁵ *Id.*; Letter from Roger Noel, Chief, Mobility Division, Wireless Bureau, FCC, to Warren Havens *et al.*, FCC FOIA Control No. 2015-058 and Related Requests for Confidential Treatment (Dec. 17, 2014) (attached as Exhibit 2) (confidential material omitted). The Wireless Bureau withheld disclosure of most of the redacted material regarding Mr. DePriest’s personal finances, agreeing with MCLM that it is within the scope of FOIA’s privacy exemption.

⁶ Exhibit 2.

⁷ Petition at 5.

steps to secure access to this confidential business document. Mr. Havens established a relationship with a disgruntled former MCLM employee – Steve Calabrese; compensated him; and secured through Mr. Calabrese access to MCLM’s confidential response to the RFP.⁸ Mr. Havens testified under oath that he had been monitoring MCLM’s website looking for information on the RFP response, but was unable to obtain such information until Mr. Calabrese provided a direct link to the plan.⁹

The fact that Mr. Havens took such unusual steps to secure access to MCLM’s response to the RFP clearly supports the notion that he had a competitive interest in that material.¹⁰ Furthermore, given the steps that Mr. Havens is clearly willing to take to obtain confidential information, it is entirely reasonable for MCLM and Choctaw to seek to protect information regarding their business plans to the maximum extent possible. The simple fact seems to be that Mr. Havens will use the public disclosure of even snippets of information regarding potential business plans and opportunities to try and obtain additional confidential information through any possible means.

II. PETITIONERS MISCONSTRUE SECTION 3 OF THE PROTECTIVE ORDER

The Petition is premised on the incorrect legal proposition that, under Section 3 of the Protective Order, MCLM and Choctaw bear the burden of justifying each and every individual confidentiality designation proposed in the transcript. To the contrary, Section 3 governs the admission of evidence in the proceeding and does not apply to designating transcript passages as confidential. Sections 9 and 10 of the Protective Order – not Section 3 – establish the applicable

⁸ See *Havens et al. v. Maritime Communications/Land Mobile, LLC*, Case 2:11-cv-00993-KSH-CLW, Redacted Transcript, at 27-35 (May 28, 2014) (“NJ Hearing Transcript”); *Havens et al. v. Maritime Communications/Land Mobile, LLC*, Case 2:11-cv-00993-KSH-CLW, Deposition of Warren Havens, Transcript, at 234, 239, 301-05 (Mar. 11, 2013) (“Havens NJ Deposition Testimony”).

⁹ Havens NJ Deposition Testimony at 301-05.

¹⁰ Mr. Havens also obtained from Mr. Calabrese a copy of a draft business plan prepared by Critical RF, a subsidiary of MCLM. NJ Hearing Transcript at 31.

legal standards for transcript confidentiality designations. Specifically, Section 9 governs Confidential and Highly Confidential Information during oral hearing testimony and Section 10 governs the designation of Confidential or Highly Confidential Information in transcripts. Nothing in Sections 9 or 10 places a burden on the designating party to justify each confidentiality designation in the transcript.

Under Section 10 of the Protective Order, the parties are expected to work cooperatively to make confidentiality designations. Moreover, nothing in Section 10 contemplates a Petition to Deny. If parties reach an impasse over transcript confidentiality designations in hearing proceedings, the issue is raised with the Presiding Judge and the parties ultimately act in accordance with the Judge's instructions. As Enforcement Bureau Counsel Michael Engle noted during the discussion of transcript redactions, "We'll follow your Honor's instruction. We'll do the best we can. . . . If we reach an impasse, we'll have to raise that with [the Judge]."¹¹ In response, the Presiding Judge stated: "Everybody go home and get this job done. And don't bother me with emails, please, motions only on – with respect to this. . . . Let me just tell you this as a little story, if you will. In the *Tennis Channel v. Comcast* case . . . they did find some stuff that was in the transcript that hadn't been specifically identified. And they ironed it out. They ironed it out among counsel."¹²

Petitioners, however, declined to work cooperatively on transcript designations. Nor did they informally express concerns to Choctaw and MCLM about the material designated as confidential or seek guidance from the Presiding Judge. Instead, Petitioners filed a Petition to Deny in an attempt to unilaterally force Choctaw and MCLM to expend resources in an exercise – line-by-line justifications for redactions – that is not contemplated by Section 10 of the

¹¹ FCC Hearing Transcript, at 1708 (Vol. 13 Dec. 11, 2014) ("Transcript").

¹² *Id.* at 1709.

Protective Order. This action by Petitioners is clearly a crude effort to gain some perceived tactical advantage over MCLM and Choctaw.

In fact, the Petition represents a complete reversal from the position taken by their counsel during the hearing. At the conclusion of the hearing, the parties sought guidance regarding the process for designating material as confidential. During that discussion, Petitioners' counsel stated:

Your Honor, may I interrupt because I think I can help here, okay? *The Bureau seems to be under the misimpression that they're going to have an opportunity to go through the transcript and pick and choose, line by line and page by page, what they want to attempt to exclude my client from reading, okay? That's not what happened.*

There's only two parts of the transcript that could possibly be designated as non-public: the second half of Mr. Reardon's testimony, where Mr. Havens was not in the room; and the second half of Mr. Trammell's testimony, where Mr. Havens was not in the room.

This is not a complex process where they get to go through the transcript and re-decide what they want to say might be confidential. Everything in the transcript Mr. Havens has heard.

He was sitting here through the trial. So there's no opportunity for the Bureau to go back and claim that something is confidential in the transcript that Mr. Havens has sat here and heard.

So it's very simple. The part of the transcript – and you read the time when Mr. Reardon started testifying. From that point to the point where he got off the stand, that's the confidential portion of Mr. Reardon's testimony. From the time that Mr. Havens left the room during Mr. Trammell's testimony until the end, that's the confidential portion of that transcript.

So it's very simple. There isn't going to be any back and forth where people are going to be submitting to me a further redacted copy of the transcript claiming that things are confidential, that Mr. Havens has sat here and already heard.

So I don't know why the Bureau is trying to make this into a complicated process. It's not and I'm perfectly comfortable with the procedure that Your Honor outlined, which is very simple.¹³

Despite Mr. Stenger's strongly held conviction that line-by-line redactions are not justified, Choctaw and MCLM adhered to the letter and spirit of Section 10 of the Protective Order by identifying that subset of the closed hearing testimony that warranted confidential treatment. The Presiding Judge reviewed the designations and asked Choctaw and MCLM "to justify some, but not all, of their designations."¹⁴ After further review, Choctaw and MCLM withdrew some of the designations questioned by the Presiding Judge.¹⁵

In an about-face from his adamant stance during the post-hearing discussion on designating portions of the transcript as confidential, Petitioners' Counsel now claims that the Protective Order *mandates* a line-by-line review of the transcript and demands that the Presiding Judge deny confidential treatment to "every line and every page of the Maritime-Choctaw designations, including the ones not questioned by the Presiding Judge."¹⁶ The Presiding Judge should not condone Petitioners' tactical pivoting.

III. PETITIONERS' REQUEST IS UNTIMELY

The Petition also should be dismissed as untimely. By challenging the hearing transcript designations, Petitioners are making a collateral attack on the confidentiality of the underlying written direct testimony. As such, the Petition is grossly out of time.

Patrick Trammell and John Reardon provided written direct testimony in this case. Portions of their testimony were identified as confidential under the Protective Order. Their oral testimony during the hearing was a summary of their written testimony and Petitioners were

¹³ *Id.* at 1707-08 (emphasis added).

¹⁴ Petition at 2.

¹⁵ *Id.*

¹⁶ *Id.*

presented with an opportunity to cross examine them. If Petitioners had any concerns about the confidential nature of the testimony from Patrick Trammell and John Reardon, they should have objected to the confidentiality of the written testimony pursuant to Section 3 of the Protective Order at the time the testimony was proffered. Petitioners failed to do so. In fact, Petitioners' counsel failed even to sign the Protective Order until the hearing was well underway.

The time for challenging the confidential testimony has long passed. As the Presiding Judge noted during the hearing when Petitioners kept trying to reopen confidentiality designations:

You're not here to recreate what was done months ago. And so you're stuck with what you've got and I'd say you're a day late and a dollar short of all of this. There was no preliminary, no pre-hearing motions made that should have been made six months ago, at a minimum. Probably nine months ago or, or two years ago to get this straightened out on the, have these documents examined by myself that you're contending should be made public and we could have had a ruling on it, and maybe you would have won some of them, but you weren't here to do it.¹⁷

Further disruptions and delays on confidentiality issues should not be countenanced.¹⁸

¹⁷ Transcript, at 1446 (Vol. 12 Dec. 10, 2014).

¹⁸ This is yet the latest in a long history of Mr. Havens and his entities seeking to improperly disrupt and delay the progress of these proceedings. *E.g.*, Order, FCC 14M-44, at 2 (rel. Dec. 19, 2014) (“Mr. Havens’ brazen conduct is contemptuous of the Presiding Judge, prejudicial to all parties, and disruptive to the proceeding as it delays decision on the issues designated for hearing.”); Order, FCC 14M-40, at 2 (rel. Dec. 4, 2014) (“Mr. Havens, Environmental [sic], and Verde are engaged in a concerted pattern of wasting the time of the Presiding Judge, other counsel, and other parties . . .”); Order, FCC 12M-52, at 3 (rel. Nov. 15, 2012) (“Mr. Havens already has caused substantial delay and confusion on questions having nothing to do with the merits of this complex litigation.”). With regard to confidentiality issues, the Presiding Judge previously advised: “To the extent that Mr. Havens believes that specific information should not be treated as confidential, he may request that the Presiding Judge review that information and determine whether or not it should be released.” Memorandum Opinion and Order, FCC 14M-18, at 15 ¶ 41 (rel. June 17, 2014) (citation omitted).

CONCLUSION

For the aforementioned reasons, the Petition should be dismissed or denied.¹⁹

Respectfully submitted,

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LAND MOBILE, LLC

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February 4, 2015

¹⁹ If the Presiding Judge determines that additional justifications for the redactions proposed by Choctaw and MCLM are warranted, the Parties stand ready to provide such information.

EXHIBIT 1

Kirk, Robert

From: Amanda Huetinck <Amanda.Huetinck@fcc.gov>
Sent: Friday, January 9, 2015 6:07 PM
To: 'warren.havens@sbcglobal.net'
Cc: 'jstobaugh@telesaurus.com'; David Senzel; Richard Arsenault; rjk@telcomlaw.com; Kirk, Robert; O'Connor, Mary
Subject: RE: FOIA 2015-058
Attachments: FOIA 2015-058 Choctaw CT Full Filing - FCC Redactions.pdf; FOIA 2015-058 Maritime CT Full Filing - FCC Redactions.pdf

Mr. Havens-

We have not received appeals from MCLM or Choctaw. By this e-mail, we therefore are releasing to you the partially unredacted versions of their respective Petitions we included with the letters we sent each party December 17, 2014.

Best,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

**APPLICATION TO ASSIGN LICENSES FROM
MARITIME COMMUNICATIONS/LAND
MOBILE, LLC, DEBTOR-IN-POSSESSION, TO
CHOCTAW HOLDINGS, LLC**

For Commission Consent to the Assignment of Various
AMTS Authorizations

To: The Commission

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)
) WT Docket No. 13-85
) File No. 0005552500
)
)
)

Accepted/Files

OCT 14 2014

Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION

**CHOCTAW TELECOMMUNICATIONS, LLC
CHOCTAW HOLDINGS, LLC**

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TABLE OF CONTENTS

SUMMARY.....2

BACKGROUND2

DISCUSSION.....7

I. *SECOND THURSDAY* RELIEF IS APPROPRIATE BECAUSE IT WILL NOT
BENEFIT DONALD DEPRIEST7

 A. *SECOND THURSDAY* RELIEF IS APPROPRIATE BECAUSE DONALD
 DEPRIEST IS JUDGMENT-PROOF7

 B. *SECOND THURSDAY* RELIEF IS APPROPRIATE BECAUSE DONALD
 DEPRIEST’S GUARANTEES WILL BE EXTINGUISHED AS PART OF A
 CHAPTER 7 INVOLUNTARY BANKRUPTCY PROCEEDING9

II. *SECOND THURSDAY* RELIEF SHOULD BE GRANTED TO
ACCOMMODATE BANKRUPTCY LAW9

CONCLUSION14

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Federal Communications Commission
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PETITION FOR RECONSIDERATION

Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (hereinafter collectively “Choctaw”), pursuant to Section 1.106 of the Federal Communications Commission’s (“Commission”) Rules,¹ hereby request reconsideration of the *MO&O*² denying Choctaw’s request³ for *Second Thursday*⁴ relief. Reconsideration should be granted based on new

¹ 47 C.F.R. § 1.106. Alternatively, Choctaw urges the Commission to reconsider the decision on its own motion. Such reconsideration would be consistent with *LaRose v. FCC*, 494 F.2d 1145, 1149 (D.C. Cir. 1974), in which the court directed the Commission to address a *Second Thursday* petition for reconsideration despite a finality defense.

² *Maritime Communications/Land Mobile, LLC, Debtor-in-Possession*, Memorandum Opinion and Order, FCC 14-133 (rel. Sept. 11, 2014) (“*MO&O*”). Choctaw only seeks reconsideration of the *MO&O* to the extent it denies *Second Thursday* relief. In particular, it does not seek reconsideration of the *MO&O* to the extent it granted relief in support of positive train control. *See id.* at ¶¶ 26-33.

³ *See* Choctaw Holdings, LLC, Assignment Application, FCC File No. 0005552500 (filed Jan. 23, 2013, amended Jan. 25, 2013) (“Application”), Description of Transaction, Public Interest Statement and *Second Thursday* Showing (“PI Statement”), attached as an exhibit to the Application at 2-3.

⁴ *See Second Thursday Corp.*, Memorandum Opinion and Order, 22 FCC 2d 515, 516 (“*Second Thursday MO&O*”), *recon. granted in part, Memorandum Opinion and Order*, 25 FCC 2d 112 (1970).

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facts not previously available to Choctaw and because the *MO&O* is based on a material error that deviates from long-standing Commission precedent.⁵

SUMMARY

Reconsideration is appropriate for three reasons. First, the *MO&O* denied *Second Thursday* relief based on the assumption that a grant would relieve Donald DePriest, an alleged wrongdoer, of his obligation to repay various guarantees amounting to approximately \$8 million.⁶ New facts demonstrate that Mr. DePriest is judgment-proof, however, and, as the *MO&O* recognizes, the elimination of personal guarantees from judgment-proof individuals is not considered a significant benefit that would bar *Second Thursday* relief.⁷ Second, newly available facts demonstrate that Mr. DePriest's guarantees will be unenforceable. Finally, reconsideration is appropriate because the Commission for the first time applied a new *Second Thursday* test that fails to accommodate bankruptcy law and the interests of innocent creditors consistent with *LaRose v. FCC* and long-standing Commission precedent.

BACKGROUND

Maritime Communications/Land Mobile, LLC, Debtor-in-Possession ("MCLM")⁸ holds a number of Automated Maritime Telecommunications Systems ("AMTS") site-based and geographic licenses ("Licenses").⁹ On April 19, 2011, the Commission designated for hearing issues relating to the relationship of Donald and Sandra DePriest to MCLM and whether, based

⁵ 47 C.F.R. § 1.106.

⁶ See *MO&O* at ¶ 23.

⁷ See *id.* at ¶ 22 n.60.

⁸ MCLM hereinafter refers to Maritime Communications/Land Mobile, LLC, Debtor-in-Possession, as well as the pre-bankruptcy Maritime Communications/Land Mobile, LLC.

⁹ *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designator Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520, 6547 (2011) ("*HDO*").

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on these relationships and MCLM's conduct with regard to its Auction No. 61 applications, "[MCLM] 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."¹⁰

On August 1, 2011, while the hearing was pending, MCLM filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Northern District of Mississippi (the "Bankruptcy Court"). Two parties – Choctaw and Council Tree Investors, Inc. – submitted plans to the Bankruptcy Court. The entire creditor group reviewed both plans and the Choctaw plan was selected based on positive votes from an overwhelming majority of the creditors *from each and every class*. As the Bankruptcy Court Judge noted in confirming the Choctaw plan: "I look at the votes – and that's another compelling thing – that have been presented by the tally of the ballots. *Every class voted to accept confirmation* by the respected requirements of the law."¹¹

After the creditors selected the Choctaw plan, the Bankruptcy Court conducted a hearing with MCLM, Choctaw, Warren Havens, and the Commission all participating. On November 15, 2012, after the hearing, the Bankruptcy Court confirmed the Chapter 11 reorganization plan submitted by Choctaw which called for the assignment of MCLM's licenses to Choctaw upon Commission approval.

Because MCLM's qualifications to hold the licenses subject to the bankruptcy proceeding were subject to a separate Commission hearing, the Commission's *Jefferson Radio*

¹⁰ *Id.* at 6521 (emphasis added) (citation omitted); *see also id.* at 6547. The specific MCLM authorizations and applications designated for hearing are appended to the *HDO*. *Id.* at 6553-55.

¹¹ Bankruptcy Hearing Transcript, *Maritime Communications/Land Mobile, LLC, Debtor*, U.S. Bankruptcy Court Northern District of Mississippi, Case No. 11-13463-dwh, at 187 (Nov. 15, 2012) (emphasis added).

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policy generally precluded the licenses from being transferred or assigned.¹² The *Second Thursday* doctrine, however, provides an exception that permits the transfer or assignment of licenses “if the licensee is in bankruptcy, the assignment will benefit innocent creditors of the licensee, and the individuals charged with misconduct ‘will have no part in the proposed operations and will either derive no benefit from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.’”¹³

On January 23, 2013, MCLM and Choctaw filed an Application seeking approval to assign MCLM’s licenses to Choctaw pursuant to the *Second Thursday* doctrine. The Application addressed each of the *Second Thursday* criteria and noted that neither of the DePriests would receive any significant benefit as a result of the transaction. In particular, the Application stated that “Mr. and Mrs. DePriest will not receive any portion of the purchase price associated with the operation or sale of the licenses.”¹⁴ The Application also noted that, to the extent *Second Thursday* relief would result in full recovery by innocent creditors and thus indirectly eliminate the release of any Donald DePriest guarantees, such action has been deemed “an incidental benefit that does not preclude *Second Thursday* relief.”¹⁵ It further cited the United States Court of Appeals for the District of Columbia Circuit *LaRose*¹⁶ decision which directed the Commission to “‘accommodate[]the policies of federal bankruptcy law with those of the Communications Act.’”¹⁷

¹² See *Jefferson Radio Corp. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

¹³ *MO&O* at ¶ 15 (citing *Second Thursday MO&O*, 22 F.C.C.2d at 516).

¹⁴ PI Statement at 8.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at n.23.

¹⁷ *LaRose*, 494 F.2d at 1146.

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Second Thursday relief is critical because, without such relief, the Bankruptcy Court order cannot be effectuated quickly and innocent creditors will be harmed. These creditors cannot be repaid until the licenses are transferred to Choctaw pursuant to the Bankruptcy Court order. Importantly, the innocent creditors are not Wall Street investment bankers, but rather they include a range of individuals from local businessmen to elderly citizens from the Southeastern United States. In many cases, the inability to get paid consistent with the Bankruptcy Court order jeopardizes their ability to make ends meet. These financial problems for the innocent creditors are further exacerbated by the fact that the process has taken far longer than anyone could have expected. Public interest considerations weigh heavily in favor of repaying innocent creditors versus denying *Second Thursday* relief based on a perceived indirect benefit that is worthless.

Nearly two years after the Application was filed, the Commission applied a new test for evaluating requests for *Second Thursday* relief. For the first time, and contrary to all prior precedent, the Commission held that relief from indirect, secondary liabilities (i.e., loan guarantees) *standing alone* could justify denying relief under *Second Thursday*.¹⁸ According to the Commission:

[T]here is a substantial possibility that granting the application would permit the DePriests to obtain a benefit that is neither minor nor incidental by releasing Mr. DePriest from his obligations under his personal guarantees of loans to MCLM. Mr. DePriest could escape a potential liability most conservatively estimated to be \$8 million because the creditors could be fully repaid from the proceeds from the assignment of the licenses, and would therefore

¹⁸ Given that this case represents the first time the Commission has treated the solvency of a guarantor as a dispositive factor under *Second Thursday*, Choctaw did not fully address this issue in its request. See *MO&O* at ¶ 20. As discussed in Section II, this represents the first case since *LaRose* where *Second Thursday* relief has been denied solely because of a perceived indirect, secondary liability benefit.

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have no basis to look to Mr. DePriest for recovery under his personal guarantees.¹⁹

This judgment was premised on the misperception that the release of Mr. DePriest's loan guarantees to MCLM, standing alone, is a sufficient legal basis to deny *Second Thursday* relief unless either the percentage of the liability when compared to the purchase price was extremely small²⁰ or "the wrongdoer's debts would still exceed his assets"²¹ such that the wrongdoer is "judgment-proof."²² The Commission apparently concluded that Mr. DePriest was not judgment-proof and MCLM creditors could collect up to \$8 million based on his personal guarantees.

On September 19, 2014, four creditors filed an Involuntary Petition with the United States Bankruptcy Court, Northern District of Mississippi to subject Donald DePriest to a Chapter 7 bankruptcy proceeding. Three of the four creditors are not involved in the MCLM bankruptcy proceeding and none of the creditors are affiliated with Choctaw. Once the Bankruptcy Court determines that Donald DePriest is a debtor in bankruptcy, the likely outcome of the bankruptcy case will be that Mr. DePriest will be discharged of all of his debts.²³ A discharge pursuant to Section 727(a) of the bankruptcy code "discharges the debtor from all debts that arose before the date of the order for relief."²⁴ Accordingly, the bankruptcy will discharge all of his personal liabilities, including the guarantees associated with the MCLM

¹⁹ *Id.*

²⁰ *MO&O* at ¶¶ 22-23 & n.62.

²¹ *Id.* at n.60.

²² *Id.* at n.63 (quoting *LaRose*, 494 F.2d at 1149).

²³ *See* 11 U.S.C. § 727(a).

²⁴ 11 U.S.C. § 727(b).

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bankruptcy. Thus, the only way for the innocent MCLM creditors to be made whole is for the Choctaw plan to proceed as confirmed by the Bankruptcy Court.

For the reasons set forth below, Choctaw hereby seeks reconsideration of the *MO&O* to the extent it denies relief pursuant to *Second Thursday*.

DISCUSSION

I. SECOND THURSDAY RELIEF IS APPROPRIATE BECAUSE IT WILL NOT BENEFIT DONALD DEPRIEST

New facts demonstrate that Mr. DePriest is judgment-proof and creditors cannot collect on his guarantees to MCLM.²⁵ The Commission decision denying *Second Thursday* is therefore flawed and should be reconsidered.

A. SECOND THURSDAY RELIEF IS APPROPRIATE BECAUSE DONALD DEPRIEST IS JUDGMENT-PROOF

Choctaw recently learned of new facts demonstrating that Mr. Donald DePriest is judgment-proof. First, Choctaw has obtained a document – **[[an Estimated Statement of Financial Condition]]** – demonstrating that, as of August 31, 2014, Donald DePriest had less than **(b) (6)(b) (6)(b) (6)(b) (6)** ²⁶ The document further demonstrates that Mr. DePriest's liabilities exceed his total assets **[[by more than (b) (6) (b) .]]** Choctaw also has learned that **[[various banks already have (b) (6)(b) (6)(b) (6)(b) (6)(b) (6)(b) (6)(b) (6)(b) (6)(b) (6)(b) (6)** **(b) (6)(b) (6)(b) (6)** ²⁷

²⁵ See 47 C.F.R. § 1.106.

²⁶ See Exhibit A.

²⁷ See Letter from **[[Richard H. Maynard, Senior Vice President, Renasant Bank, to E.S. Thomas, Jr., Certified Public Accountant, Mitchener, Stacy, Thomas & Associates, PLLC (Sept. 24, 2014)]]** (Attached as Exhibit B); Letter from **[[A. Johnson, Executive Vice President and Chief Financial Officer, Bank of Vernon, to E.S. Thomas, Jr., Certified Public Accountant, Mitchener, Stacy, Thomas & Associates, PLLC]]** (Attached as Exhibit C).

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Second, consistent with the financial information set forth above, Choctaw has learned that various creditors filed an involuntary Chapter 7 bankruptcy petition against Mr. DePriest on September 19, 2014.²⁸ The bankruptcy petition identifies more than \$13 million in claims against Mr. DePriest. **[[Consistent with the attached Estimated Statement of Financial Condition, the amount of the claims involved in the bankruptcy proceeding is (b) (6) (b) (6),]]** This involuntary bankruptcy case further demonstrates that (i) Mr. DePriest's liabilities grossly exceed his assets and (ii) he is now judgment-proof.

It is well settled that the release of a personal guarantee does not preclude *Second Thursday* relief where the guarantor is judgment-proof.²⁹ For example, the Commission granted *Second Thursday* relief in *Pyle Communications of Beaumont*³⁰ even though the wrongdoer would be relieved of secondary liability because "the wrongdoer's debts would still exceed his assets."³¹ Similarly, in *LaRose*, the elimination of secondary liability "was not of a magnitude warranting defeat of a *Second Thursday* proposal" because the wrongdoers were judgment-proof.³² The same conclusion is warranted here – the existence of Donald DePriest's guarantees should not defeat a request for *Second Thursday* relief because he is now judgment-proof – the wrongdoer's debts will exceed his assets.

²⁸ See Exhibit D, *Donald R. DePriest*, Involuntary Petition, U.S. Bankruptcy Court, Northern District of Mississippi, Case No. 14-13522-JDW (Sept. 19, 2014); see also Summons to Debtor in Involuntary Case, U.S. Bankruptcy Court, Northern District of Mississippi, Case No. 14-13522-JDW (Sept. 23, 2014) (attached as Exhibit E).

²⁹ See *MO&O* at nn.60 & 63 (quoting *LaRose*, 494 F.2d at 1149).

³⁰ *Pyle Communications of Beaumont, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 8625, 8626 (1989) ("*Pyle MO&O*").

³¹ *Id.*; see *MO&O* at n.60.

³² *LaRose*, 494 F.2d at 1149; *MO&O* at n.63.

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B. SECOND THURSDAY RELIEF IS APPROPRIATE BECAUSE DONALD DEPRIEST'S GUARANTEES WILL BE EXTINGUISHED AS PART OF A CHAPTER 7 INVOLUNTARY BANKRUPTCY PROCEEDING

As a result of the recently filed involuntary bankruptcy petition, the personal guarantees of Mr. DePriest will be extinguished. The innocent MCLM creditors that hold guarantees from Mr. DePriest have claims against him in his bankruptcy case.³³ These guarantees, however, will be discharged as part of the Chapter 7 involuntary bankruptcy proceeding in accordance with Section 727 of the bankruptcy code.³⁴ Thus, separate and apart from the fact that Mr. DePriest is judgment-proof, any perceived benefits associated with the guarantees will be extinguished by virtue of this bankruptcy proceeding, not by a grant of *Second Thursday* relief. In short, Mr. DePriest will receive neither a direct nor an indirect benefit should the Commission reverse itself and grant *Second Thursday* relief, permitting the licenses to be assigned to Choctaw.

Based on the foregoing, Choctaw respectfully requests reconsideration of the denial of *Second Thursday* relief based on new facts demonstrating that creditors would not be able to collect on personal guarantees made by the alleged wrongdoer in this hearing, Mr. DePriest.

II. SECOND THURSDAY RELIEF SHOULD BE GRANTED TO ACCOMMODATE BANKRUPTCY LAW

The Commission decision denying *Second Thursday* is also flawed as a matter of law, separate and apart from the new facts discussed above. Indeed, the denial of *Second Thursday* relief here is inconsistent with court and Commission precedent and should be reversed.

³³ See 11 U.S.C. § 101(5) (defining a claim as “a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”).

³⁴ See 11 U.S.C. § 727(a).

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In *LaRose*, the United States Court of Appeals for the D.C. Circuit stated that the Commission must “accommodate[] the policies of federal bankruptcy law with those of the Communications Act.”³⁵ The court warned:

Administrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest. . . . [A]gencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized.³⁶

The Commission itself has long recognized that it “is obliged to reconcile its policies under the Communications Act with the policies of other federal laws and statutes, including the federal bankruptcy laws in particular.”³⁷ Thus, when evaluating whether *Second Thursday* relief is appropriate, the Commission conducts “an *ad hoc* balancing of the possible injury to regulatory authority that might flow from wrongdoers’ realizing benefits against the public

³⁵ *LaRose*, 494 F.2d at 1146-47 n.2.

³⁶ *Id.*

³⁷ *Dale J. Parsons*, Memorandum Opinion and Order, 10 FCC Rcd 2718, 2720 (1995); see *Urban Radio I, L.L.C., Debtor-in-Possession and YMF Media, New York Licensee LLC for Consent to Assign Licenses*, Memorandum Opinion and Order, 29 FCC Rcd 6389, 6391 (2014) (noting that under *LaRose*, the “Commission is obligated to protect innocent creditors so long as the transaction in question does not unduly interfere with objectives of the Act”). See *Family Broadcasting, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7591 (2010) (“*Family MO&O*”); *WorldCom, Inc. and its Subsidiaries (debtors-in-possession)*, Memorandum Opinion and Order, 18 FCC Rcd 26484 (2003) (“*WorldCom MO&O*”); *Hertz Broadcasting of Birmingham, Inc.*, Memorandum Opinion and Order, 57 F.C.C.2d 183, 184 (1976) (“*Hertz MO&O*”); *KOZN FM Stereo LTD., Debtor-in-Possession*, Memorandum Opinion and Order, 6 FCC Rcd 257, 257 (1991) (“*KOZN FM 1991 MO&O*”); *KOZN FM Stereo 99 LTD.*, Memorandum Opinion and Order, 5 FCC Rcd 2849, 2850 (1990) (“*KOZN FM 1990 MO&O*”); *MobileMedia Corporation, et al.*, Memorandum Opinion and Order, 14 FCC Rcd 8017, 8023 (1999) (“*MobileMedia MO&O*”); *NewSouth Broadcasting, Inc.*, Order, 8 FCC Rcd 1272, 1273 (1993) (“*NewSouth Order*”); *Seraphim Corp.*, Memorandum Opinion and Order, 4 FCC Rcd 8819, 8821 (1989) (“*Seraphim MO&O*”); *Pyle MO&O*, 4 FCC Rcd at 8626; *Davis Broadcasting Company, Inc.*, Memorandum Opinion and Order, 67 F.C.C.2d 872, 875 (1977) (“*Davis MO&O*”).

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interest in innocent creditors' recovery from the sale and assignment of the license to a qualified party."³⁸

Where there is only a "potential indirect benefit" related to guarantor liability, the Commission's *ad hoc* balancing traditionally favors grant of *Second Thursday* relief.³⁹ In the forty years between *LaRose* and this *MO&O*, there has never been a Commission-level decision where this balancing resulted in a denial of *Second Thursday* relief based *solely* on the potential elimination of indirect, secondary liability.

In denying Choctaw's request for *Second Thursday* relief, the Commission concluded for the first time that the potential release of secondary liability – in the form of guarantees held by Donald DePriest – is a significant benefit that standing alone precludes *Second Thursday* relief.⁴⁰ The Commission implies that, where guarantees are held by an alleged wrongdoer subject to a character hearing, *Second Thursday* relief is appropriate only if the guarantees fall below an undefined percentage of the purchase price or if the guarantee holder is "judgment-proof."⁴¹ This approach is inconsistent with long-standing Commission precedent.

In *Hertz Broadcasting*, the Commission determined that the alleged wrongdoer would receive no direct benefit, but would receive an indirect benefit because he would be relieved from secondary liability associated with large guarantees.⁴² The alleged wrongdoer held guarantees that exceeded the anticipated sale proceeds and amounted to nearly 90 percent of the

³⁸ See *Family MO&O*, 25 FCC Rcd at 7596; *WorldCom MO&O*, 18 FCC Rcd at 26459.

³⁹ See *Family MO&O*, 25 FCC at 7599; *WorldCom MO&O*, 18 FCC Rcd at 26500.

⁴⁰ *MO&O* at ¶ 20.

⁴¹ *Id.* at ¶¶ 20-24.

⁴² *Hertz MO&O*, 57 FCC 2d at 184. The Commission recognized that a direct benefit was possible, but unlikely. *Id.* at 184 n.3.

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total liabilities. *Second Thursday* relief nevertheless was granted.⁴³ There was no allegation or finding that the guarantor in *Hertz* was judgment-proof.

Similarly, in *Family Broadcasting*, there were no allegations that the wrongdoer was judgment-proof or that the alleged wrongdoer would receive a direct benefit. Various parties claimed that *Second Thursday* relief was inappropriate, however, because the wrongdoer would be relieved of potential secondary liability for taxes associated with the station. The Commission rejected this argument:

[E]ven if the [alleged wrongdoers] would receive indirect tax benefits from grant of the Application, we would find that those benefits are “outweighed by equitable considerations in favor of innocent creditors.” Equitable considerations strongly favor granting this Application. First, granting the Application will protect [the bankrupt licensee’s] innocent creditors (most notably, the Internal Revenue Service and the Virgin Islands Bureau of Internal Revenue), whose debts will be fully satisfied if the assignment is approved but who will receive virtually no recovery if it is denied. The licenses are “by far the most valuable asset of” [the licensee], and denying the Application would “effectively deprive [] creditors of any significant recovery of the moneys they have advanced.”⁴⁴

This same analysis applies to the *Second Thursday* request filed by Choctaw.

In every other post-*LaRose* *Second Thursday* case where the only potential benefit from a grant of relief was secondary liability, the Commission has granted relief. In *KOZN*, the Commission found that the “incidental benefit” associated with the elimination of “potential secondary liability” was not sufficient to warrant denial of *Second Thursday* because grant of

⁴³ *Id.* at 184. Mr. DePriest’s guarantees, even if enforceable, do not approach the 90 percent ratio that was acceptable in the *Hertz MO&O*.

⁴⁴ *Family MO&O*, 25 FCC Rcd at 7599 (citations omitted).

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relief may result in creditors being paid in full.⁴⁵ The same result was reached in *MobileMedia*,⁴⁶ *NewSouth Broadcasting*,⁴⁷ *Seraphim*,⁴⁸ *Pyle Communications of Beaumont*,⁴⁹ and *Davis Broadcasting*.⁵⁰

In contrast to this long-standing precedent, the Commission cites to a single post-*LaRose* case where *Second Thursday* relief was denied. In that case, however, the alleged wrongdoer would have received *both* direct *and* indirect benefits if relief had been granted.⁵¹ That is not the case here. To the contrary, as demonstrated above and in the Application, Donald DePriest will receive *no direct benefit* if *Second Thursday* relief is granted.⁵²

Given the absence of any post-*LaRose* precedent denying *Second Thursday* relief based solely on the potential elimination of secondary liability and the long line of precedent where such relief is granted where only indirect benefits (such as relief from secondary liability) would result, Choctaw urges the Commission to reconsider the *MO&O*, grant *Second Thursday* relief, and authorize MCLM to assign the licenses to Choctaw as requested in the assignment

⁴⁵ *KOZN FM 1991 MO&O*, 6 FCC Rcd at 257; *see also KOZN FM 1990 MO&O*, 5 FCC Rcd at 2850 (“Green will receive no more than an incidental benefit from the sale in the elimination of his potential secondary liability.”).

⁴⁶ *MobileMedia MO&O*, 14 FCC Rcd at 8023 (citing *Shell Broadcasting, Inc.*, 38 F.C.C.2d 929, 933 (1973) (approval of *Second Thursday* relief despite direct and indirect benefits to the suspected wrongdoer)).

⁴⁷ *NewSouth Order*, 8 FCC Rcd at 1273.

⁴⁸ *Seraphim MO&O*, 4 FCC Rcd at 8821.

⁴⁹ *Pyle MO&O*, 4 FCC Rcd at 8626.

⁵⁰ *Davis MO&O*, 67 F.C.C.2d at 875.

⁵¹ *Mid-State Broadcasting*, 61 F.C.C.2d 196, 198 (1976).

⁵² Even if Mr. DePriest were solvent, the only potential benefit would have been an indirect, secondary liability benefit and, as discussed above, the Commission has never found that an indirect benefit, standing alone, warrants denying *Second Thursday* relief.

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Application. This course of action would be consistent with Commission precedent and its obligation to accommodate bankruptcy law so as to ensure the protection of innocent creditors.

CONCLUSION

For the foregoing reasons, the Commission should reconsider the portion of its *MO&O* denying *Second Thursday* relief to Choctaw. Given the new facts and the long-recognized importance of accommodating bankruptcy law and protecting innocent creditors, Choctaw urges a prompt grant of *Second Thursday* relief on reconsideration.

Respectfully submitted,

CHOCTAW TELECOMMUNICATIONS, LLC
CHOCTAW HOLDINGS, LLC

By:



David H. Solomon
Robert G. Kirk
Mary N. O'Connor

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2300 N Street, NW Suite 700
Washington, DC 20037
202.783.4141
Their Attorneys

October 14, 2014

EXHIBIT A – CONFIDENTIAL

EXHIBIT B – CONFIDENTIAL

EXHIBIT C - CONFIDENTIAL

EXHIBIT D

B 5 (Official Form 5) (12/07)

UNITED STATES BANKRUPTCY COURT		INVOLUNTARY PETITION
Northern District of Mississippi		
DEBTOR (Name of Debtor - If Individual: Last, First, Middle) Donald R. DePriest		ALL OTHER NAMES used by debtor in the last 8 years (Include married, maiden, and trade names.)
Last four digits of Social-Security or other Individual's Tax-I.D. No./Complete EIN (If more than one, state all.):		
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) 510 7th Street North Columbus, MS 39701		MAILING ADDRESS OF DEBTOR (If different from street address)
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS Lowndes County, MS		
ZIP CODE 39701		ZIP CODE
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)		
CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED <input checked="" type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 11		
INFORMATION REGARDING DEBTOR (Check applicable boxes)		
Nature of Debts (Check one box.) Petitioners believe: <input type="checkbox"/> Debts are primarily consumer debts <input checked="" type="checkbox"/> Debts are primarily business debts	Type of Debtor (Form of Organization) <input checked="" type="checkbox"/> Individual (Includes Joint Debtor) <input type="checkbox"/> Corporation (Includes LLC and LLP) <input type="checkbox"/> Partnership <input type="checkbox"/> Other (If debtor is not one of the above entities, check this box and state type of entity below.)	Nature of Business (Check one box.) <input type="checkbox"/> Health Care Business <input type="checkbox"/> Single Asset Real Estate as defined in 11 U.S.C. § 101(51)(B) <input type="checkbox"/> Railroad <input type="checkbox"/> Stockbroker <input type="checkbox"/> Commodity Broker <input type="checkbox"/> Clearing Bank <input checked="" type="checkbox"/> Other Capital Investment
VENUE	FILING FEE (Check one box)	
<input checked="" type="checkbox"/> Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. <input type="checkbox"/> A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.	<input checked="" type="checkbox"/> Full Filing Fee attached <input type="checkbox"/> Petitioner is a child support creditor or its representative, and the form specified in § 304(g) of the Bankruptcy Reform Act of 1994 is attached. [If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.]	
PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)		
Name of Debtor	Case Number	Date
Relationship	District	Judge
ALLEGATIONS (Check applicable boxes)		COURT USE ONLY
1. <input checked="" type="checkbox"/> Petitioner (s) are eligible to file this petition pursuant to 11 U.S.C. § 303 (b). 2. <input checked="" type="checkbox"/> The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code. 3.a. <input checked="" type="checkbox"/> The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount; or b. <input type="checkbox"/> Within 120 days preceding the filing of this petition, a custodian, other than a trustee receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.		

B 5 (Official Form 5) (12/07) - Page 2

Name of Debtor Donald R. DePriest

Case No. _____

TRANSFER OF CLAIM		
<input type="checkbox"/> Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).		
REQUEST FOR RELIEF		
Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.		
Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.		
x  Signature of Petitioner or Representative (State title) <u>Oliver L. Phillips</u> Name of Petitioner _____ Date Signed <u>09/19/2014</u>	x  Signature of Attorney _____ <u>John W. Crowell, Crowell Gillis & Cooper, PLLC</u> Name of Attorney Firm (If any) <u>Post Office Box 1827, Columbus, MS 39703-1827</u> Address <u>(662) 243-7308</u> Telephone No. _____	
Name & Mailing Address of Individual Signing in Representative Capacity <u>81 Windsor Blvd. Columbus, MS 39702</u>		
x <u>/s/ Charles N. Parnell, III, Attorney</u> Signature of Petitioner or Representative (State title) <u>ADECA</u> Name of Petitioner _____ Date Signed <u>09/19/2014</u>	x <u>/s/ Charles N. Parnell, III</u> Signature of Attorney _____ <u>Parnell & Crum, PA</u> Name of Attorney Firm (If any) <u>Box 2189, Montgomery, AL 36102-2189</u> Address <u>(334) 269-8460</u> Telephone No. _____	
Name & Mailing Address of Individual Signing in Representative Capacity <u>c/o Parnell & Crum, PA Box 2189 Montgomery, AL 36102</u>		
x <u>/s/ William Rutledge, III, Attorney</u> Signature of Petitioner or Representative (State title) <u>Bank of New Albany</u> Name of Petitioner _____ Date Signed <u>09/19/2014</u>	x <u>/s/ William Rutledge, III</u> Signature of Attorney _____ <u>William Rutledge, III, Rutledge Davis and Harris, PLLC</u> Name of Attorney Firm (If any) <u>Box 29, New Albany, MS 38652-0029</u> Address <u>(662) 534-6421</u> Telephone No. _____	
Name & Mailing Address of Individual Signing in Representative Capacity <u>c/o William Rutledge, III PO Box 29 New Albany, MS 38652</u>		
PETITIONING CREDITORS		
Name and Address of Petitioner	Nature of Claim	Amount of Claim
<u>Oliver Phillips, 81 Windsor Blvd., Columbus, MS 39702</u>	<u>Judgment</u>	<u>9,133,230.00</u>
Name and Address of Petitioner	Nature of Claim	Amount of Claim
<u>ADECA, c/o Parnell, Box 2189, Montgomery, AL 36102</u>	<u>Judgment</u>	<u>2,947,899.74</u>
Name and Address of Petitioner	Nature of Claim	Amount of Claim
<u>Bank of New Albany, Box 29, New Albany, MS 38652-0029</u>	<u>Judgment</u>	<u>797,405.95</u>
Note:	Total Amount of Petitioners' Claims	
If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.	<u>13,260,803.69</u>	

1 continuation sheets attached

B 5 (Official Form 5) (12/07) -- Page 2

Name of Debtor Donald R. DePriest

Case No. _____

TRANSFER OF CLAIM		
<input type="checkbox"/> Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).		
REQUEST FOR RELIEF		
Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.		
Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.		
<input checked="" type="checkbox"/> <u>/s/ Chad J. Hammons, Attorney</u> Signature of Petitioner or Representative (State title) <u>Republic Bank & Trust</u> <u>09/18/2014</u> Name of Petitioner Date Signed Name & Mailing Address of Individual <u>601 S. Hurstbourne Ln</u> Signing in Representative <u>Louisville, KY 40222</u> Capacity _____	<input checked="" type="checkbox"/> <u>/s/ Chad J. Hammons</u> <u>09/19/2014</u> Signature of Attorney Date <u>Chad J. Hammons, Jones Walker, LLP</u> Name of Attorney Firm (If any) <u>Jones Walker, LLP, PO Box 427, Jackson, MS 39205</u> Address <u>(601) 949-4900</u> Telephone No.	
<input type="checkbox"/> _____ Signature of Petitioner or Representative (State title) Name of Petitioner _____ Date Signed _____ Name & Mailing Address of Individual _____ Signing in Representative _____ Capacity _____	<input type="checkbox"/> _____ Signature of Attorney _____ Date _____ Name of Attorney Firm (If any) _____ Address _____ Telephone No. _____	
<input type="checkbox"/> _____ Signature of Petitioner or Representative (State title) Name of Petitioner _____ Date Signed _____ Name & Mailing Address of Individual _____ Signing in Representative _____ Capacity _____	<input type="checkbox"/> _____ Signature of Attorney _____ Date _____ Name of Attorney Firm (If any) _____ Address _____ Telephone No. _____	
PETITIONING CREDITORS		
Name and Address of Petitioner	Nature of Claim	Amount of Claim
<u>Republic Bank & Trust, 601 S Hurstbourne Ln, Louisville, K</u>	<u>Judgment</u>	<u>382,268.00</u>
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims <u>13,260,803.69</u>

0 continuation sheets attached

EXHIBIT E

United States Bankruptcy Court

NORTHERN District Of MISSISSIPPI

In re Donald R. DePriest, Debtor* Case No. 14-13522-JDW Chapter 7

SUMMONS TO DEBTOR IN INVOLUNTARY CASE

To the above named debtor:

A petition under title 11, United States Code was filed against you in this bankruptcy court on 9/19/14 (date), requesting an order for relief under chapter 7 of the Bankruptcy Code (title 11 of the United States Code).

YOU ARE SUMMONED and required to file with the clerk of the bankruptcy court a motion or answer to the petition within 21 days after the service of this summons. A copy of the petition is attached.

Address of the clerk: U. S. Bankruptcy Court Thad Cochran U. S. Bankruptcy Courthouse 703 Hwy 145 North Aberdeen, MS 39730

At the same time, you must also serve a copy of your motion or answer on petitioner's attorney.

Name and Address of Petitioner's Attorney: John W. Crowell P.O. Box 1827 Columbus, MS 39703

If you make a motion, your time to answer is governed by Fed. R. Bankr. P. 1011(c).

If you fail to respond to this summons, the order for relief will be entered.

s/ David J. Puddister (Clerk of the Bankruptcy Court)

Date: 9/23/14

By: AOH (Deputy Clerk)



* Set forth all names, including trade names, used by the debtor within the last 8 years. (Fed. R. Bankr. P. 1005).

EXHIBIT 2



Federal Communications Commission
Washington, D.C. 20554

December 17, 2014

By U.S. Mail and E-Mail

Warren Havens
2509 Stuart Street
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Re: FCC FOIA Control No. 2015-058; and Related Requests for Confidential Treatment

Dear Mr. Havens, Mr. Keller, Mr. Kirk, and Ms. O'Connor:

This letter responds to:

(1) Mr. Havens's Freedom of Information Act (FOIA) request dated October 25, 2014, received by the Federal Communications Commission (Commission) FOIA Control Staff on October 27, 2014, and assigned FOIA Control Number 2015-058 (FOIA Request), in which Mr. Havens seeks unredacted copies of the Choctaw and MCLM petitions for reconsideration, as described below, each of which contains redacted personal financial information of Donald DePriest;¹

(2) a request for confidential treatment (Choctaw Confidentiality Request) of an unredacted petition for reconsideration filed in Docket 13-85 by Choctaw Telecommunications, LLC (Choctaw) on October 14, 2014, and referenced as confidential on the Commission's Electronic Comment Filing System (ECFS) website on October 21, 2014 (Choctaw Petition); and

(3) a request for confidential treatment (MCLM Confidentiality Request, and with the Choctaw Confidentiality Request, the Confidentiality Requests) of an unredacted petition for

¹ On November 24, 2014, Amanda Huetinck, an attorney with the Mobility Division (Division) of the Wireless Telecommunications Bureau, notified Mr. Havens that, the Commission was extending the time period to process the FOIA Request by ten business days to December 10, 2014. On December 9, 2014, Mr. Havens consented to an extension of time, until December 17, 2014, to process the FOIA Request.

reconsideration filed in Dockets 11-71 and 13-85 by Maritime Communications/Land Mobile, LLC (MCLM) on October 14, 2014, and referenced as confidential on the ECFS website on October 21, 2014 (MCLM Petition, and with the Choctaw Petition, Petitions).

As explained below, we grant in part and deny in part the FOIA Request, and we grant in part and deny in part the Confidentiality Requests.

Because the redacted portions of the Petitions are subject to requests for confidential treatment, the Division notified each party of the FOIA Request pursuant to section 0.461(d)(3) of the Commission's rules.² Choctaw and MCLM each had to respond by November 18, 2014, or else that party would be considered to have no objection to disclosure and we would furnish the relevant Petition in its unredacted form to Mr. Havens; we directed the parties to serve any replies upon the Commission and Mr. Havens via e-mail.³ On November 18, 2014, Choctaw and MCLM timely submitted responses objecting to the disclosure of the redacted portions of their respective Petitions.⁴ Pursuant to section 0.461(d)(3), Mr. Havens then had until November 28, 2014, to respond, which he did on November 28, 2014 (Havens Response).⁵

In the Choctaw Confidentiality Request, Choctaw argues that the redacted financial information should be withheld to protect personal privacy under FOIA Exemption 6,⁶ as well as commercially sensitive information under FOIA Exemption 4.⁷ Choctaw contends that the information is protected by Exemption 6 because it is the "personal financial information of an individual [Donald DePriest] involved in a hearing proceeding before the Commission's Chief Administrative Law Judge," and that the release of this information would expose Mr. DePriest to an unwarranted invasion of his personal privacy.⁸ In addition, Choctaw argues that "[t]he information also constitutes commercial information protected by FOIA Exemption 4 because [MCLM], and, by extension, Choctaw, have a commercial interest in this information."⁹ Choctaw contends that release of the information would cause competitive harm to

² 47 C.F.R. § 0.461(d)(3).

³ Letter from Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, to Robert G. Kirk and Mary N. O'Connor, Wilkinson Barker Knauer, LLP, dated November 7, 2014; Letter from Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, to Robert J. Keller, Law Offices of Robert J. Keller, P.C., dated November 7, 2014.

⁴ Letter from Robert G. Kirk and Mary N. O'Connor, Wilkinson Barker Knauer, LLP, to Amanda Huetinck, Attorney Advisor, Mobility Division, Wireless Telecommunications Bureau, dated November 18, 2014; Letter from Robert J. Keller, Law Offices of Robert J. Keller, P.C., to Amanda Huetinck, Attorney Advisor, Mobility Division, Wireless Telecommunications Bureau, dated November 18, 2014.

⁵ We note that Mr. Havens simultaneously e-mailed Division attorney Amanda Huetinck two responses on November 28, 2014: a document titled In re: "FOIA Control No. 2015-058," and a document titled "Errt and Supp. Reply FOIA 2015-058." Errt and Supp. Reply FOIA 2015-058 appears to supersede the document captioned FOIA Control No. 2015-058 and is the document to which we cite herein as the Havens Response.

⁶ 5 U.S.C. § 552(b)(6).

⁷ 5 U.S.C. § 552(b)(4). See Choctaw Petition at 2. Specifically, Choctaw requests confidential treatment for the portions of the responses "denoted with the symbols [[]] and contained in Exhibits A-C." *Id* at 1. The symbols [[]] are found on pages 7 and 8 of the Choctaw Petition.

⁸ *Id* at 2.

⁹ *Id* at 2 (citing Robert J. Butler, 6 FCC Red 5414, 5415 (1991); American Airlines v. National Mediation Board, 588 F.2d 863, 868 (2d Cir. 1978)).

Choctaw because other companies may not be willing to work with Choctaw if they believe it cannot protect those companies' information.¹⁰

In the MCLM Confidentiality Request, MCLM argues that the redacted financial information should be withheld under FOIA Exemptions 4, 6, and 7(C),¹¹ which protects private information compiled for law enforcement purposes.¹² MCLM contends that "the information is competitively sensitive. Disclosure would potentially harm [MCLM; Sandra M. DePriest, MCLM's principal; and Donald DePriest, Sandra DePriest's spouse], not only in connection with [Automated Maritime Telecommunications Systems] and the pending transaction, but also in other future business dealings as well. Disclosure of Mr. DePriest's personal financial information would also be a harmful invasion of privacy."¹³

As an initial procedural matter, in his Response, Mr. Havens argues that "[t]he responses of MCLM and Choctaw were not timely served ... and are thus late and should be disregarded and thus the requested records... should be immediately released. Alternatively and in addition, the [r]eponses are irrelevant, unsupported, and frivolous and in no way provide good cause under any FCC FOIA withholding exemption."¹⁴ Mr. Havens argues that Choctaw and MCLM's service of their responses was not consistent with section 1.47 of our rules¹⁵ because it was done via e-mail, and that such service was prejudicial to Mr. Havens. By directing Choctaw and MCLM to provide service by e-mail, the Division effectively waived the provisions of section 1.47(d) regarding mail service of documents in paper form.¹⁶ We did so for good cause, so that Mr. Havens would receive the responses more quickly than by mail, given the temporal urgency noted in the FOIA Request.¹⁷ As such, we find that Choctaw and MCLM's e-mail service of their responses was proper.

¹⁰ *Id* at 2. Choctaw states that "[t]he D.C. Circuit has found parties do not have to 'show actual competitive harm' to justify confidential treatment. Rather, '[a]ctual competition and the likelihood of substantial competitive injury is sufficient to bring commercial information within the realm of confidentiality.'" *Id* at 2 (citing Public Citizen Health Research Group, 704 F.2d at 1291).

¹¹ 5 U.S.C. § 552(b)(7)(C).

¹² *See* MCLM Petition at 2. Specifically, MCLM seeks confidential treatment of "Paragraphs 14 and 15 of the Petition for Reconsideration and supporting Exhibits 4, 5.1, 5.2, 5.3 & 6." *Id.* at 1. We note that MCLM requests confidential treatment for Exhibits "5.1, 5.2, 5.3;" the MCLM Petition, however, does not contain Exhibits 5.1, 5.2, or 5.3. Rather, it contains Exhibits 4.1, 4.2, and 4.3. In addition, MCLM's November 18, 2014, response to the FOIA Request states that it redacted "Exhibits 4 through 6" from the publically filed version of the MCLM Petition. Based on these facts, we find that MCLM intended to seek confidential treatment for Exhibits 4 through 6 (Exhibits 4.1, 4.2, 4.3, 5, and 6).

¹³ *Id* at 2.

¹⁴ Havens Response at 1. We address here only the arguments that are pertinent to the FOIA Request and the Confidentiality Requests. Mr. Havens's other arguments, which include the properness of Choctaw and MCLM's actions in Docket No. 11-74 and Docket No. 13-85, as well as in related bankruptcy and other court proceedings; previous FOIA requests filed by Mr. Havens; and the operation of bankruptcy law, are outside the scope of this letter and therefore are not addressed herein.

¹⁵ 47 C.F.R. § 1.47. Section 1.47(d) states that "[d]ocuments that are required to be served must be served in paper form, even if documents are filed in electronic form with the Commission, unless the party to be served agrees to accept service in some other form." 47 C.F.R. § 1.47(d).

¹⁶ 47 C.F.R. § 1.3 permits us, on our own motion, to waive our rules at any time for good cause.

¹⁷ *See* FOIA Request (stating that "[t]ime is of the essence").

Turning to the merits, Mr. Havens argues that neither Choctaw nor MCLM has sufficiently demonstrated that FOIA Exemptions 4, 6, or 7(C) apply to the Petitions. Regarding Exemptions 4 and 6, Mr. Havens states that “[a]ssertions of ‘intent’ to be private and the like, and that Mr. Depriest provided [r]edaction information with ‘understanding’ that it be kept secret by MCLM . . . is woefully insufficient where no document was provided demonstrating said ‘intent,’ ‘understanding,’ etc.”¹⁸ He further argues that “[a]ny loans from Depriest to MCLM need to be publicly disclosed in the MCLM bankruptcy and Mr. Depriest’s individual bankruptcy and thus cannot be confidential.”¹⁹ Finally, Mr. Havens states that “[t]o the degree Mr. Depriest or anyone else has elected to provide to MCLM or Choctaw any information to use in said petition for reconsiderations . . . , it has become property of MCLM and cannot then be alleged to be that provider’s individual property.”²⁰

Regarding Exemption 7(C), Mr. Havens states that “it applies to protect law enforcement proceedings information from public release such that it does not get to the target of the investigation, which is MCLM and affiliates. But here, it is MCLM and affiliate Choctaw that is seeking to keep secret information it already has.”²¹ As such, Mr. Havens contends, Exemption 7(C) is inapplicable.

We agree with Mr. Havens that the information Choctaw and MCLM seek to keep confidential is not entitled to protection under FOIA Exemptions 4 or 7(C). We do, however, find that certain redacted financial information in the Petitions is subject to confidential treatment under Exemption 6.

Exemption 4 of the FOIA protects “commercial or financial information obtained from a person [that is] privileged or confidential.”²² The very existence of Exemption 4 encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable.²³ Commercial or financial matter is “confidential” for purposes of Exemption 4 “if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”²⁴ As the redacted information concerns Mr. DePriest’s personal finances and would not disclose the finances or business operations of Choctaw or MCLM, we find no basis for finding that disclosure would result in competitive harm to Choctaw or MCLM. Exemption 4 is thus inapposite.

Exemption 6 protects information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”²⁵ The Supreme Court has held that Congress intended the term “similar files” to be

¹⁸ Havens Response at 4.

¹⁹ *Id.*

²⁰ *Id.* at 2.

²¹ *Id.* at 4.

²² 5 U.S.C. § 552(b)(4).

²³ *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc).

²⁴ Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also* Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

²⁵ 5 U.S.C. § 552(b)(6).

interpreted broadly, rather than narrowly²⁶ and has made clear that all information that “applies to a particular individual” meets the threshold requirement for Exemption 6 protection.²⁷ Furthermore, courts have consistently upheld protection for financial information.²⁸ The redacted information includes Mr. DePriest’s bank account information, as well as detailed information regarding his financial affairs. We find that this type of sensitive financial information is subject to Exemption 6’s protections, and we withhold it accordingly. Though Mr. Havens asserts that this information may have to be disclosed in a bankruptcy proceeding²⁹ and therefore should be disclosed pursuant to the FOIA Request, a bankruptcy court’s possible actions do not supersede Exemption 6. Nor does the fact that this financial information was disclosed to Choctaw and MCLM alter its sensitive, personal nature.³⁰ We conclude that Exemption 6 is applicable.

Mr. Havens also argues that “[t]he MCLM-Choctaw position, if sustained, will mean that no party can challenge any relief granted under these petitions for reconsideration, and that would violate the purposes and meaning of 47 USC § 405.”³¹ It is well-established, however, that a FOIA requester’s basic access rights are neither increased nor decreased because the requester claims to have a particular interest in the records sought.³² As such, it is irrelevant to our decision here that Mr. Havens claims he (or others) needs the information to respond to the Petitions.

Protective Order. We note that MCLM also filed the MCLM Petition in Docket 11-71. To the extent that Mr. Havens seeks material from the MCLM Petition that will not be released pursuant to the FOIA Request, he may seek it under the terms of the protective order issued in Docket 11-71.³³

²⁶ *United States Department of State v. Washington Post Co*, 456 U.S. 595, 599-603 (1982) (citing H.R. Rep. No. 89-1497, at 11 (1966); S. Rep. No. 89-813, at 9 (1965); S. Rep. No. 88-1219, at 14 (1964)).

²⁷ *Id.* at 602.

²⁸ *See, e.g.*, *Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1056 (D.C. Cir. 2009) (concluding that HHS properly withheld information that could reveal total payments received by physicians from Medicare for covered services); *Green v. United States*, 8 F. Supp. 2d 983, 998 (W.D. Mich. 1998), appeal dismissed, No. 98-1568 (6th Cir. Aug. 11, 1998). *But see Reno Newspapers, Inc. v. U.S. Parole Comm’n*, No. 09-683, 2011 U.S. Dist. LEXIS 33957, at *16 (D. Nev. Mar. 29, 2011) (holding that agency must release “all segregable” information from a parole applicant’s bank statements and other documents submitted to parole officer).

²⁹ On December 16, 2014, Choctaw and MCLM confirmed via e-mail to Amanda Huetinck that none of the information for which they seek confidential treatment has been disclosed in any public proceeding.

³⁰ Like Exemption 6, Exemption 7(C) protects personal privacy interests, except it is limited to information compiled for law enforcement purposes. *See* 5 U.S.C. § 552(b)(7)(C). As the redacted information was not submitted for law enforcement purposes within the meaning of Exemption 7(C), Exemption 7(C) does not apply here.

³¹ Havens Response at 6.

³² *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (recognizing that a requester’s “rights under the Act are neither increased nor decreased by reason of the fact that [he or she] claims an interest in the [requested records] greater than that shared by the average member of the public”); *see also United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (“As we have repeatedly stated, Congress ‘clearly intended’ the FOIA ‘to give any member of the public as much right to disclosure as one with a special interest [in a particular document]’” (quoting *Sears*, 421 U.S. at 149)).

³³ *See Protective Order*, EB Docket No. 11-71, FCC 11M-21 (Jul. 22, 2011).

We also note that pursuant to section 0.459(d)(3) of the Commission's rules,³⁴ information for which confidential treatment properly has been sought will be accorded confidential treatment, as provided for in sections 0.459(g) and 0.461 of the Commission's rules,³⁵ until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.³⁶ We therefore must continue to afford the Petitions the confidential treatment requested by Choctaw and MCLM.³⁷ As such, we direct Mr. Havens to the publically available versions of the documents available in ECFS at this time.

Pursuant to Section 552(b) of the FOIA,³⁸ however, we do find that certain redactions of the Petitions include information that is not covered by Exemption 6, and we will withhold only the specific, sensitive personal financial information that is reasonably segregable. We therefore will disclose certain information (such as addresses, and non-sensitive statements) tangentially related to Mr. DePreist's personal finances. **With the copy of this letter to Choctaw and MCLM, we include a version of their respective Petitions specifying the information we intend to release to Mr. Havens consistent with this letter.**³⁹ Accordingly, we grant the FOIA Request to the degree that we are not withholding all of the redacted information for which the parties requested confidential treatment, but, under FOIA Exemption 6, we are withholding all personal financial information that is reasonably segregable.

Fees. As a "commercial requestor" pursuant to section 0.470(a)(1) of the Commission's rules,⁴⁰ Mr. Havens is responsible for fees that cover the full, reasonable direct cost of searching for and reviewing responsive records as well as the cost of reproducing any records released in response to your request. In the FOIA Request, Mr. Havens committed to pay up to \$300 to process the FOIA Request; we are assessing a total fee of \$289.18.⁴¹ This amount will be invoiced under separate cover by the Commission's Office of Managing Director, Financial Operations Center.

Appeal Rights. Pursuant to section 0.461(i) of the Commission's rules,⁴² Choctaw and MCLM have ten (10) business days to appeal the proposed disclosures, or the material will be disclosed. Pursuant to section 0.461(j) of the Commission's rules,⁴³ Mr. Havens has thirty (30) calendar days to appeal the rulings in this letter. The parties should submit any such application for review with the Commission's Office of General Counsel. The caption and transmitting envelope of any such application must contain "Review of Freedom of Information Act Action" and should reference FOIA Control Number 2015-058.

³⁴ 47 C.F.R. § 0.459(d)(3).

³⁵ 47 C.F.R. §§ 0.459(g), 0.461.

³⁶ 47 C.F.R. § 0.461(d)(3).

³⁷ See 47 C.F.R. §§ 0.459(g), (h) for a description of the process now that we have ruled on the Parties' requests for confidential treatment.

³⁸ 5 U.S.C. § 552(b). Section 552(b) states that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

³⁹ The information we intend to redact is boxed, while anything not contained within a box will be released.

⁴⁰ 47 C.F.R. § 0.470(a)(1).

⁴¹ The search and review fee reflects: one GS-15 level hour, at \$81.46 per hour; and three GS-14 level hours, at \$69.24 per hour. See <http://transition.fcc.gov/foia/#feeschedule>. We are not providing any documents and therefore assess no fee for duplication of documents. 47 C.F.R. § 0.465(c)(2).

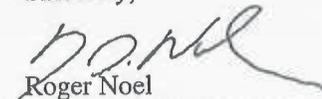
⁴² 47 C.F.R. § 0.461(i).

⁴³ 47 C.F.R. § 0.461(j).

In addition, as stated above, pursuant to section 0.459(g), the redacted portions of the Petitions will be accorded confidential treatment until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

Questions regarding the foregoing may be referred to Amanda Huetinck of the Mobility Division at 202-418-7090 or Amanda.Huetinck@fcc.gov.

Sincerely,



Roger Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

Enclosure to Choctaw Counsel (copy of Choctaw Petition showing which redacted information will not be afforded confidential treatment)

Enclosure to MCLM Counsel (copy of MCLM Petition showing which redacted information will not be afforded confidential treatment)

CERTIFICATE OF SERVICE

I, Paula M. Lewis, hereby certify that on this 4th day of February, I caused copies of the foregoing report to be served, by U.S. Postal Service, First Class postage prepaid, on the following:

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