

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Comment Sought On Application To Assign Licenses Under Second Thursday Doctrine, Request For Waiver And Extension Of Construction Deadlines, And Request To Terminate Hearing Application To Assign Licenses From Maritime Communications/ Land Mobile, LLC, Debtor-In-Possession (“MCLM”) To Choctaw Holdings, LLC (together, the “ <u>Application</u> ”)	DA 13-569 (the “ <u>PN</u> ”) WT Docket No. 13-85 File No. 0005552500 (the “ <u>Application</u> ”)

To the Secretary
Attention, Wireless Bureau Chief

Request to Extend Time and
Request to Compel MCLM to File a Required Section 1.65 Update
(or to Dismiss the Application)
and
Request to Provide a Supplemental Public Notice

The undersigned (“SkyTel”) individually and collectively request the following.

To the degree text below is argumentative as to the described MCLM Antitrust Case, the MCLM bankruptcy appeal action, and the SkyTel Application for Review and related Petitions for Reconsideration, and any other matters presented: these may be taken, secondarily, as part of a petition to deny the Application, but are primarily presented here for the purpose of the captioned requested relief, and at minimum establish, by a cursory reading of the legal pleadings and orders involved, that these present issues as to the Application’s request “Second Thursday” relief.

Certain terms used below have definitions shown in the caption above.

Request to Extend Time, and Request to Compel MCLM and File a Required
Section 1.65 Update (or to Dismiss the Application), and Related Matters

For reasons given below, SkyTel requests that the Wireless Bureau (the “Bureau”) extend the dates stated in the PN for filing petitions to deny and comments, and subsequent pleading cycle dates, by no less than the greater of (i) 45 days after current deadlines,¹ or (ii) 45 days after grant any Order to require MCLM to file any Section 1.65 report indicated herein below, whether or not that is accompanied by a Supplement Public Notice as requested below.

Alternatively, and as a proper sanction for failure to file the required Section 1.65 report, SkyTel requests that the Application be dismissed, and if it is resubmitted, then a Public Notice should provide for twice the amount of time for filing of Comments or Petitions to Deny as in the PN, for reasons given below based upon the Related Matters defined below.

The history of the licenses in the Application and course of events leading to the request for extraordinary relief in the Applications, including under the “Second Thursday” doctrine, is decades long and complex, and involves various legal proceedings, still pending, noted below. These proceedings, and filings, pleadings, orders, facts and law therein, bear upon whether such extraordinary relief may be granted under applicable FCC rules, the Communications Act, the Administrative Procedures Act and court case precedents.

Unless the relief sought herein is substantially granted, the proceedings on the Applications will be short changed and defective, and be good cause by itself for a appeal of any FCC grant of said special relief request. For an effective and proper public notice and participation, a foundation of the FCC making a sound decision on the Application, the following relief should be granted.

¹ The current dates in the PN are: Petitions to Deny and Comments Due: May 9, 2013, Oppositions to Petitions and Reply Comments Due: May 30, 2013, and Replies to Oppositions Due: June 20, 2013. The PN is dated March 28, 2013.

However, in addition to the just-stated reason as to public participation which cannot take place until the below noted “Related Matters” are noticed, SkyTel also asserts that the time period in Public Notice for filing Comments and Petitions to Deny is too short, given the need to address the complex factual and legal issues in the “Related Matters” numbered below. The PN did not consider or reflect the Related Matters in setting a time period. A time period that considers these Related Matters, even if not set forth in a new supplemental public notice as requested below, should be no less than two times the period given in the PN since the Related matters add more than two times the issues of fact and law to consider and address by parties submitting Comments or a Petition to Deny.

Thus, SkyTel submits the following. The numbered legal-action matters below compose the “Related Matters.”

1. MCLM had a duty to file a Section 1.65 report described below with regard to the appeal filed by SkyTel and related relief, currently pending, of the bankruptcy court approval of the MCLM Chapter 11 plan to assign its FCC licenses (the “Licenses”) to Choctaw via seeking so-called “Second Thursday” relief.^{2 3 4} Only after it files said report can the FCC properly understand the status of the Application and inform the public of it in a Supplemental PN as requested below. An Application, and a public proceeding based on the application, are

² This involves effective admissions of wrongdoing rather than defending against charges of wrongdoing at issue in the Hearing under the HDO FCC 11-64, docket 11-71 (the “MCLM Hearing”). Issue “(g)” in the Hearing regarding the site based Licenses involves wrongdoing, not only failures leading to termination.

³ While MCLM has a duty to submit said §1.65 Report, the FCC and other parties can find this appeal and request for related relief on the US PACER online system (there is a modest charge to use the systems, upon a subscription) by searching under Bankruptcy cases under the name “Maritime Communications” and finding the case in the US bankruptcy court in Mississippi, case no. 11-13463.

⁴ The Notice of Appeal is attached as Exhibit 1 hereto. However, the related SkyTel motion for a limited stay, and motion for direct certification, have substance of the issues described in this paragraph 1 and footnotes thereto that bear upon the Application and its request for special relief.

defective if essential information as to whether or not the Application should be granted or denied is hidden.

2. SkyTel also believes that MCLM had a duty to file a Section 1.65 report with regard to the status and affect of the court action by SkyTel as plaintiffs against MCLM and its predecessor and affiliate Mobex⁵ after the court entered a default against Mobex.⁶ This is described in Exhibit 2 hereto, a submission to the Judge in the MCLM Hearing.⁷ Below and in Exhibit 2, SkyTel explain why this court order of Mobex default is relevant to the grant or denial of the Applications.

3. SkyTel further believes that MCLM in the Application, or at least the FCC in the PN, had a duty to describe SkyTel's pending Application for Review and related Petitions for Reconsideration on new facts, filed under MCLM long-form Application, File No. 0002303355⁸ that (i) challenge as void *ab initio*, among other defects, the MCLM geographic licenses, and (ii) assert that SkyTel (two of its component LLCs) was the lawful high bidder in Auction 61 of all said MCLM geographic licenses. This is relevant to the Application since any party submitting comments should be able to assess if the Application is possibly within the bounds of the FCC

⁵ By "Mobex" we mean Mobex Network Services LLC, and its parent, Mobex Communications Inc. Mobex continued in actions before the FCC and in a US bankruptcy court until at least year 2011. Mobex acted as a party in the MCLM Antitrust Action until the Mobex Default in this year 2013.

⁶ The court's Order regarding this default is in an attachment to Exhibit 1 hereto and was entered on February 14, 2013. This case and documents and decisions in the case, can be found on the PACER system described above, by a search in Civil cases, by entering as a party "Maritime Communications" and finding the case listed in the US District Court, New Jersey. The case is Skybridge et. al. (most SkyTel entities) v Mobex, MCLM et. al, in the just note Court, Case 2:11-cv-00993.

⁷ For alleged procedural defects in the subject formal hearing, the Judge did not decide on the issues presented yet (which will be subject to further action by SkyTel in that hearing, and in certain appeals from Hearing actions). In any case, the subject Application is not before this Judge.

⁸ These petitions, and MCLM oppositions, and SkyTel replies are all easily accessible in ULS under this File No. 0002303355.

past precedents under the so-called “Second Thursday” doctrine or balancing test. SkyTel believes the Application is outside of this doctrine and its tests, for this reason alone, and many other reasons (some partly indicated herein as to other matter not disclosed in the Application or the PN).

Persons that consider and prepare to submit comments and/or a petition to deny the Application based on the request for so-called “Second Thursday” relief, and other special relief, should have notice, with sufficient time thereafter, of the above listed pending legal actions and issues therein, since they relate to the licenses subject to the Applications, and the legal issues as to revocation and termination of those licenses in the FCC Hearing in docket 11-71 and in the other FCC legal proceedings identified above, all of which pose issues regarding the “Second Thursday” doctrine and tests, including the weight of enforcement of FCC law involved.

The appeal noted above sets forth reasons why the MCLM bankruptcy was for purposes outside those of legitimate bankruptcy relief, and other issues of fact and law⁹ that arose in the bankruptcy proceeding, that bear upon the “Second Thursday” relief tests as applied to the Application.

Likewise, the above noted Application for Review and related Petitions for Reconsideration have facts and law directly related to whether or not the Application’s requested “Second Thursday” relief should be granted in the relevant FCC “Second Thursday” precedents

⁹ Including, among others, (i) the personal guarantees of Donald Depriest and relief he will get from those, a financial benefit, if the subject “Second Thursday” relief request in the Application is granted, where Mr. and Mrs. Depriests are admitted or put forward as wrongdoers, (ii) the nature of the secured debt in MCLM and what they knew of the wrongdoing and their relations with the wrongdoers (the FCC has not accepted any MCLM assertion of who is and is not a wrongdoer, and an innocent creditor, to this point in time), (iii) the statements of the persons in control of MCLM as to filing of the bankruptcy for *purposes* of obtaining Second Thursday relief and absent demands by creditor and threats to litigate or force involuntary bankruptcy, (iv) the value of the MCLM licenses in the Application verses the alleged total innocent debt, and other facts and related legal arguments that directly or indirectly bear upon whether or not the “Second Thursday” relief sought in the Applications may satisfy or fail to satisfy the “Second Thursday” doctrine and tests.

and tests. This includes, among others, whether the FCC can defer to the alleged interests under bankruptcy law of alleged innocent creditors, at the expense of lawful high bidders in Auction 61 (two SkyTel entities) of the subject MCLM geographic licenses, and at the expense of the current holders of geographic licenses (many SkyTel entities) subject to MCLM site based licenses that are in FCC proceedings for termination (including in docket 11-71), which if terminated would free up the spectrum involved for said SkyTel geographic licensees under section 80.385(c).

Similarly, the Court Order as to the default of Mobex, read with the pleadings and court orders in the subject MCLM antitrust case, described above, also directly bears upon the subject requested “Second Thursday” relief, including since Mobex was the predecessor of MCLM and sold to MCLM of its site-based licenses, and was an affiliate of MCLM for purposes of Auction 61, and in actions thereafter. These Mobex licenses were the basis of the founding of MCLM and gave it the incumbent position in Auction 61 with that bidding advantage: a finding of default of Mobex as to violation of US antitrust law, is also a violation of the Communications Act 47 USC 314, and under 313 may lead to revocation of the licenses: in this case the site-based licenses of MCLM in the Application and under the subject “Second Thursday” relief request.

Request to Provide a Supplemental Public Notice

For reasons given above—in sum, so that persons considering and preparing Comments of a Petition to Deny the Applications can have notice of the matters described above (that are not described in the Application, and not indicated in the PN: the “Related Matters”) that pertain to a full and proper review of whether or not the Applications should be granted based on the extraordinary relief sought (under the “Second Thursday” doctrine, and on other special basis plead)—SkyTel requests that the FCC put out a Supplemental Public Notice that identifies and briefly explains the Related Matters, with references to how to access the dockets involved to

obtain the relevant pleadings, filings, and orders (as this filing does above), and that includes a pleading cycle SkyTel requests above.

Conclusion

For reasons given above, the relief requested should be granted fully or to the extend the Bureaus finds in appropriate under relevant law and the extraordinary nature of the Applications.

Note on Filing

This pleading is submitted on ECFS in the above captioned docket in accord with the following instruction in the PN:

Notwithstanding the restricted nature of this proceeding, however, pleadings and comments filed via the Commission's Electronic Comment Filing System (ECFS), as discussed below, will not have to be served on the parties.

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Respectfully,

/s/ Electronically submitted. Signature on file.

Warren Havens
Individually and as President of each of:

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Intelligent Transportation & Monitoring Wireless LLC

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Dated: May 3, 2013

¹⁰ For purpose of this submission, for convenience, Skybridge, which maintains its own office, uses the listed address of the LLCs.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

<i>In re:</i>	:	
	:	CHAPTER 11
MARITIME COMMUNICATIONS/,	:	
LAND MOBILE LLC	:	CASE NO. 11-13463-NPO
Debtor.	:	
_____	:	

NOTICE OF APPEAL
(Dkt. #s 973, 980)

Warren Havens, Skybridge Spectrum Foundation, Verde Systems LLC (formerly called Telesaurus, VPC LLC), Environmental LLC (formerly called AMTS Consortium LLC), Intelligent Transportation & Monitoring LLC, and Telesaurus Holdings GB LLC (collectively, “SkyTel”), creditors, objectors, and parties-in-interest in the above-captioned bankruptcy case (the “Bankruptcy Case”), appeal under 28 U.S.C. § 158(a) and any other applicable law from the *Order Confirming Plan of Reorganization [Dkt. #s 973, 980]* of Judge David W. Houston entered in the Bankruptcy Case on or about January 11, 2013.¹ This Notice of Appeal is being filed expressly subject to, and without waiver of, any and all rights, remedies, motions, and requests, including, but not limited to, requests for stay and direct appeal relief.

The names of all parties to the Order appealed from and, where applicable, the names, addresses, and telephone numbers of their respective counsel are as follows:

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¹ The Confirmation Order was initially entered on January 11, 2013 as Dkt. #973, but was missing the last two pages. The completed Confirmation Order was thereafter re-entered on January 15, 2013 as Dkt. #980 (though the date of re-entry is shown as January 11, 2013 on the face of the Pacer docket). Out of an abundance of caution, both docket numbers are referred to in this Notice of Appeal.

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THIS the 25th day of January, 2013.

Respectfully submitted,

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By: /s/ William H. Leech

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing Notice of Appeal to be filed via the Court's Electronic Case Filing System, which caused a copy to be served on all counsel and parties of record who have consented to receive ECF notification, including the following:

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I further certify that I have caused the foregoing Notice of Appeal to be served on the following via first class U.S. Mail, postage prepaid:

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THIS the 25th day of January, 2013.

/s/ William H. Leech
Of Counsel

EXHIBIT 2

(The court order as to Mobex default is an attachment in this Exhibit 2, below.)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)	
)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC	)	EB Docket No. 11-71
	)	File No. EB-09-01-1751
Participation in Auction No. 61 and Licensee	)	FRN: 001358779
Of Various Authorizations in the Wireless)	
Radio Services)	
)	
Applicant for Modification of Various	)	App. FNs 0004030479,
Authorizations in the Wireless Radio Services	)	0004144435, 0004193028,
Applicant with ENCANA OIL AND GAS	)	0004193328, 0004354053,
(USA), INC.; DUQUESNE LIGHT	)	0004309872, 0004310060,
COPANY; DCP MIDSTREAM, LP;	)	0004314903, 0004315013,
JACKSON COUNTY RURAL,	)	0004430505, 0004417199,
MEMBERSHIP ELECTRIC	)	0004419431, 0004422320,
COOPERATIVE; PUGET SOUND	)	0004422329, 0004507921,
ENERGY, INC.; INTERSTATE	)	0004153701, 0004526264,
POWER AND LIGHT COMPANY;	)	0004636537, 0004604962.
WISCONSIN POWER AND LIGHT)	
COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE – MID CONTINENT,)	
LLC; DENTON COUNTRY ELECTRIC)	
COOPERATIVE, INC., DBA COSERV)	
ELECTRIC; AND SOUTHERN)	
CALIFORNIA REGIONAL RAIL)	
AUTHORITY)	

To: Marlene H. Dorch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

Errata copy: re ECFS file-size error re Exhibit 2, etc.*

Request to Extend Discovery Period and for Other Relief

Warren Havens, the undersigned (“Havens”), for SkyTel entities (previously defined in this Hearing)¹ request that the Judge extend the current discovery cut off deadline in this Hearing as to issue (g) (and as to other issues) for reasons given below, and related to those reasons, also asks the Judge to take other actions required under the Commissions HDO, FCC 11-64, given the history, facts in, and current situation of the Hearing as established by the HDO (the “Request”).

Initially, we point out that no party has obtained from the Commission any modification

¹ In preceding filings, I have described the basis of my acting pro se at the current time. That applies to this filing.

* NOTE. Exhibit 2 was rejected when uploaded with the Request due to exceeding the ECFS file size limitation, according the error message. Thus, we correct here that this filing has no Exhibit 2 directly provided. However, it is in public FCC files, and on the public PACER system, as explained in footnote 4 below. Page 4 has one correction also.

of the HDO.

Skytel requests that the Judge set aside the current discovery deadlines and set a new deadline or deadlines consistent with the matters presented herein. Alternatively, we request that the Judge impose sanctions upon Maritime by drawing negative inferences regarding issue (g) that Maritime has failed to meet the burden of proof that only the licensee can meet (to keep records and prove stations were lawfully and timely constructed and kept in permanent operation), and thus, the stations have “automatically terminated without specific Commission action” as the relevant Part 1 and Part 80 rules provide.

In support of this Request, SkyTel submits the following:

Default in the Maritime Antitrust case,
directly related to issue (g), as well as to the other issues.

In sum: because Mobex has been found by the US court in the Maritime Antitrust Case as in default, regarding charges of violation of US antitrust law (Exhibit 1 hereto), under applicable FCC law the Judge should, and we believe must, consider these violations with regard to issue (g) and all of the other issues in this Hearing. The evidence of these charges is specified in the Complaint and resides in extensive discovery evidence in this case, and involves, among other things relevant to the issues in this Hearing, most or all of the Maritime site-based licenses—issue (g). Discovery should be extended in this Hearing, as requested by this Request, so that this evidence can be brought into this Hearing for the purposes just stated. We explain and discuss this further below.

See Exhibit 1 below, a copy of the recent court *Order* filed February 19, 2013 in the Maritime Antitrust Case, *Havens et al. v Mobex and Maritime*² (the “*Default Order*”). This

² *Havens et al. v Mobex, Maritime, et al.*, case No. 11-993 in the US District Court District of New Jersey (the “Maritime Antitrust Case”). SkyTel has described this case a number of times in its pleadings in this Hearing, including its recent pro se filings by Havens.

Default Order is against Mobex,³ Maritime's predecessor, entering a default and striking the Mobex Answer with prejudice as to SkyTel's complaint in this case of violation of US antitrust law. As further background, see the Complaint in this case, a copy of which is online.⁴ Most but not all of the SkyTel entities are the plaintiffs.⁵

FCC licensing involves whether or not a party to a license transaction violated US antitrust law. For example, Form 603 includes:

102) Has any court finally adjudged the Assignee/Transferee, or any party directly or indirectly controlling the Assignee/Transferee guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition? / If 'Y', attach an exhibit explaining the circumstances.

See also *US v RCA*, 358 U.S. 334, and *McKeon v. McClatchy*, 1969 U.S. Dist. LEXIS 10593, citing *US v RCA*, each cited in relevant parts in Appendix 1 below: these show that the FCC must consider violation of antitrust law, even independent a determination of violation by a court (or FTC or DOJ), but certainly where the violation is under 47 USC §313.

In this case, Mobex has been found by a US court Order, the *Default Order*, in default as to the SkyTel plaintiffs' detailed charges of violation of the antitrust law that is summarily indicated in the Form 603 qualification question above, and that is more fully stated in 47 USC §313 (emphasis added):

47 USC § 313 - Application of antitrust laws to manufacture, sale, and trade in radio apparatus
(a) Revocation of licenses

³ The two Mobex defendants shown in the Complaint, herein called "Mobex."

⁴ A copy is on the federal courts' PACER systems, and a copy may also be found in FCC files, as the attachment to the Section 1.65 report found at the following link:
<https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp?applType=search&fileKey=1464088908&attachmentKey=18687836&attachmentInd=applAttach>

⁵ While only most of the SkyTel entities are involved, for convenience, we call these plaintiffs herein "SkyTel."

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: Provided, however, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

(b) Refusal of licenses and permits

The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

The Complaint (see above) in the Maritime Antitrust Case involves violation of “law of the United States relating to unlawful restraints and monopolies....,” which include the Sherman Act § 1.

Under 47 USC §313(b), as shown above, Congress has provided that “The Commission is ... directed to refuse a station license ... to any person (or to any person directly or indirectly controlled by such person) whose license have been revoked by a court under this section.”

Under antitrust law, the defendants are jointly as well as severally liable of violations of the law, if found. Mobex has by default ^a Order judgment been found in violation, which applies to Maritime due to said joint liability: Maritime is the defendant directly related to Mobex in this antitrust case as co-conspirator defendant as charged, and the successor of all of the Mobex site-based AMTS licenses and alleged operating, valid stations nationwide, and related business.

The Default Order will result in a judgment of default in the Maritime Antitrust Case for reasons shown in the plaintiff’s motion that was granted in full by the Default Order, including

the long history of Mobex participation in the case with counsel, and in explicit coordination with Maritime and its counsel (the court designated these defendants as one common group of defendants for purposes of discovery and limiting plaintiffs' discovery rights, etc.): the Default Order was specifically an issue in this case before the order was entered, or even sought, based upon actions by Mobex and its counsel, and with no opposition by Maritime (or any other defendant: several parties affiliated with Mobex and Maritime, as charged in the Complaint). However, even prior to said default judgment being entered based upon the Default Order, the FCC should and must consider clear evidence of violation of US antitrust law, as indicated in the cases cited above and further presented in the Appendix hereto.

Under FCC law, as shown by the above-cited qualifying question on Form 603, a prospective licensee must qualify (and a licensee must remain qualified) as to not having violated and not violating US antitrust law. In this regard, Maritime obtained all of the site based AMTS licenses involved in this Hearing from Mobex who obtained all of them (but for a small percentage of stations) as the assignee of Watercom and Regionet, as FCC records show. Maritime, as the ultimate successors of these Watercom and Regionet AMTS licenses (including subsidiary station authorities), cannot protect these licenses by assignment laundering or otherwise, if they are defective due to Mobex's violation of US antitrust law, as is now found in the Default Order. If they are defective, they are void at the time of the violations took place. Under 47 USC §308, Congress has instructed:

47 USC 308

(b) Conditions

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

The FCC used the above process to investigate Maritime which lead to the HDO and this Hearing: that was based on the SkyTel petitions as the “petitioners” discussed in the HDO, including with regard to the Regionet and Watercom AMTS site based licenses and stations obtained by Mobex, and fairly quickly assigned over to Maritime. Under this Section 308 authority, the FCC, including the Judge in this Hearing, may “determine whether such original application should be ... denied or such license revoked.” For reasons given above, the Judge should consider the Default Order and the analysis and finding we summarize above, and grant this extension request to allow the evidence noted above to be brought into this case, not only for issue (g) but for the other issues under the HDO also.

Other Relief Sought

Due to the discovery deadline, SkyTel submitted the above at this time. It will, in the next available time, submit a request for related relief, and provide additional reasons to the above as to why the discovery deadline should be reasonably extended in this Hearing.

Respectfully submitted,

/s/
Warren Havens
Individually and for SkyTel legal entities
(previously defined in this case)

2509 Stuart Street
Berkeley CA 94705
510 841 2220, 848 7797

Dated: February 28, 2013

Declaration

I declare under penalty of perjury the facts I present above are true and correct.

/s/
Warren Havens

Dated: February 28, 2013

From *US v RCA*, 358 U.S. 334 (emphasis added):

18. This conclusion is re-enforced by the Commission's disavowal of either the power or the desire to foreclose ... antitrust actions aimed at transactions which the Commission has licensed. This position was taken both before the district judge below, and in a Supplemental Memorandum filed in this Court, page 8:

"Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall...an antitrust suit challenging those transactions."

.....

This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served ..., for this Court has held the contrary.

From *McKeon Construction v. McClatchy Newspapers*. 1969 U.S. Dist. LEXIS 10593; 1969 Trade Cas. (CCH) P73, 212, citing *US v RCA* (above) (emphasis added; asterisks in original):

The question of whether F.C.C. approval bars action under the antitrust laws was considered in a different factual situation in *United States v. Radio Corporation of America, et al.*, 1959, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354. The F.C.C. approved the exchange. The United States brought a civil suit, grounded on a Section 1, Sherman Act violation.

The defendant advanced the argument that the F.C.C. approval foreclosed subsequent Government action. It was stipulated that the Commission had all the information available to the Court before it and "that the F.C.C. decided all issues relative to the antitrust laws that were before it". For R.C.A. to prevail, the Court held, it would be necessary to demonstrate the extent to which Congress authorized the Commission to pass on antitrust questions.

The Court, after examining the history of the Radio Act of 1927 held that "[while] this history compels the conclusion that the F.C.C. was not intended to have any authority to pass on antitrust violations as such, it is equally clear that courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." (358 U.S. at 343, 344.) Subsequent amendments, retracting language in the Radio Act concerning antitrust violations did not dispose of the overriding policy, as it "apparently [was] considered that inherent in the scheme

of the Act was the right to challenge under the antitrust laws even transactions approved by the Commission * * *". (358 U.S. at 345).

Finally the Court held, "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." (358 U.S. at 346). 27

27 In holding that the Commission did not have primary jurisdiction over the antitrust laws, the Court stated:

"This is not to imply that federal antitrust policy may not be considered in determining whether the 'public interest, convenience, and necessity' will be served by proposed action of a broadcaster, for this Court has held the contrary. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met.... (358 U.S. at 351, 352).

Defendant would restrict *United States v. Radio Corporation of America*, to its facts, and have the court hold that F.C.C. approval can only be overturned by the antitrust laws when the antitrust violations occurred prior to the Commission's license grant. While factually distinguishable, I see no reason to so restrict *United States v. R.C.A. Even though F.C.C. approval has been granted, transactions are not immunized from challenge under the antitrust laws*. It would be inconsistent to grant immunity to those who gain Commission approval and receive licenses before engaging in actions in restraint of trade ... and subject those who act before F.C.C. approval to the full force of the antitrust laws. This conclusion receives support from 47 U.S.C. § 313 [in the Communications Act], which states in pertinent part:

"(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to * * * interstate or foreign radio communications. * * *

From the Opinion, 2011 U.S. Dist. LEXIS 148654, on the Maritime motion to dismiss in *Havens [and Skytel entities] v. Mobex, Maritime, et al.*, Civ. Action No. 11-993, US District Court, NJ ("MCLM Antitrust Case") (emphasis added):

Defendants argue that the FCA established an elaborate framework under which the FCC regulates radio frequency allocation, and that the FCA therefore preempts Sherman Act claims because those claims may interfere with FCC radio frequency determinations. Absent from defendants' argument, however, is any authority to suggest that a court should abstain from hearing a case within its jurisdiction merely because it touches on an area subject to sophisticated agency regulation. Cf. *Raritan Baykeeper v. Edison Wetlands Ass'n, Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (in context of primary jurisdiction doctrine, noting that "[w]hen 'the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility'" (quoting *MCI Telecomms. Corp. v.*

Teleconcepts, Inc., 71 F.3d 1086, 1094 (3d Cir. 1995) (further citations omitted))).

More to the point, defendants' argument ignores 47 U.S.C. § 152, in which an uncodified amendment states that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, § 601(b)(1) (1996). The amendment further clarifies that the term "antitrust laws" includes the Sherman Act. Pub. L. No. 104-104, § 601(e)(4). The legislative history of this amendment clarifies that when Congress enacted the Telecommunications Act of 1996, it sought to ensure that the FCC could not "confer antitrust immunity" through the course of its decision making. See S. Rep. No. 104-230, at 178-79 (1996) (Conf. Rep.). Thus, Congress envisioned a system in which the FCC could consider antitrust matters when reaching decisions, but that the FCC's decisions would not preclude the operation of independent antitrust statutes. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (holding that notwithstanding arguments for implied immunity, "the savings clause preserves those claims that satisfy established antitrust standards" (citation and quotation marks omitted)). Accordingly, the FCA does not preempt plaintiffs' Sherman Act claim.

* * * *

3. Sherman Act Section 1 Claim

A claim under section one of the Sherman Act, 15 U.S.C. § 1, consists of four elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action[was] illegal; and (4) . . . [plaintiff] was injured as a proximate result of the concerted action." *Howard Hess Dental Labs., Inc.*, 602 F.3d at 253 (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005)). Defendant alleges that the complaint fails to satisfy the first element because it does not allege that defendants "conspired or agreed to act in concert with any other party, let alone the other defendants." (Defs.' Br. Supp. Mot. Dismiss 39.) See also *Twombly*, 127 S. Ct. at 1961 (in antitrust case, insufficient to allege "parallel conduct unfavorable to competition" without "some factual context suggesting agreement, as distinct from identical, independent action").

The facts here, however, are distinguishable from the facts in *Twombly*. Here, plaintiff has stated sufficient facts to "allow[] the court to draw the reasonable inference that" defendants had the requisite intent to act in concert. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 127 S. Ct. at 1965). First, plaintiff alleges specific reasons for the defendants' decisions to act in concert, such as that the defendants made a spectrum-splitting arrangement to allow each to share in the benefits of the AMTS licenses. (See Second Am. Compl. ¶ 36.) Moreover, Havens learned through communications with PSI that PSI and Mobex were cooperating and had an intertwined financial stake in the AMTS spectrums at issue. (*Id.* ¶ 38.) Cooperation could also be seen in other areas, such as Mobex and PSI locating stations at the same sites in order to reduce costs. (*Id.* ¶ 39.) This cooperation

extended beyond physical interactions, as Mobex and PSI jointly petitioned the FCC on certain matters regarding the licenses. (Id. ¶ 41.)

The complaint alleges a history of cooperation and interactions between the companies on the very licenses at issue in this case. This makes plausible plaintiffs' allegation of concerted action, and plaintiffs have therefore stated a claim on which relief can be granted.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SKYBRIDGE SPECTRUM FOUNDATION, a
Delaware nonprofit corporation, WARREN C.
HAVENS, an individual; TELESARUS VPC,
LLC, a Delaware Limited Liability Company;
AMTS CONSORTIUM, LLC, a Delaware
Limited Liability Company;
INTELLIGENT TRANSPORTATION
& MONITORING WIRELESS, LLC, a Delaware
Limited Liability Company; and
TELESARUS HOLDINGS GB, LLC, a
Delaware Limited Liability Company,

Plaintiffs,

vs.

MOBEX NETWORK SERVICES, LLC, a
Delaware Limited Liability Company, MOBEX
COMMUNICATIONS, INC., a Delaware
corporation, MARITIME COMMUNICATIONS /
LAND MOBILE, LLC, a Delaware Limited
Liability Company, PAGING SYSTEMS, INC., a
California corporation; TOUCH TEL
CORPORATION, a California corporation, and
DOES 1-100,

Defendants,

Civil Action No: 2:11-cv-00993-KSH-PS

Civil Action

**ORDER STRIKING THE ANSWER OF AND
ENTRY OF DEFAULT AGAINST THE
MOBEX DEFENDANTS**

THIS MATTER having been opened to the Court upon the Motion of Winne, Banta, Hetherington, Basrallian & Kahn, P.C., attorneys for Plaintiffs, for an Order striking the Answer of and entry of default against Defendants Mobex Network Services, LLC and Mobex Communications, Inc., and the Court having considered the papers filed for and against Plaintiffs' Motion, and for good cause having been shown:

IT IS ON THIS 14th of February 2013.

[REDACTED]

1 **ORDERED** that the Plaintiffs' Motion to strike the Answer of and for entry default against Defendants
2 Mobex Network Services, LLC and Mobex Communications, Inc. is hereby **GRANTED** in its entirety;
3 and it is

4 **FURTHER ORDERED** that the Answer of Mobex Network Service, LLC and Mobex
5 Communications, Inc. be and is hereby stricken with prejudice and the Default be and is hereby entered
6 against said defendants; and it is

7 **FURTHER ORDERED** that a copy of this Order be served on all counsel of record within seven
8 (7) days of receipt of same by counsel for Plaintiffs.
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12 PATTY SHWARTZ, S.M.J.
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14 USDJ
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 28, 2013, I caused a true copy of the foregoing filing in FCC docket 11-71 to be served by USPS first class mail (with courtesy email copies, using emails of record) to:

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/s/

Warren Havens