

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

In re Applications of) WT Docket No. 13-85
)
MARITIME COMMUNICATIONS/LAND)
MOBILE, LLC, DEBTOR-IN-POSSESSION, *Assignor*,)
)
and) File No. 0005552500
)
CHOCTAW HOLDINGS, LLC, *Assignee*)
)
For assignment of four geographic and 59 site-based Automated)
Maritime Telecommunications Service (AMTS) licenses)
)
In re Applications of)
)
MARITIME COMMUNICATIONS/LAND)
MOBILE, LLC, *Assignor*,)
)
and) File Nos. 0004153701
) and 0004144435
)
SOUTHERN CALIFORNIA REGIONAL)
RAIL AUTHORITY, *Assignee*)
)
For change in regulatory status of a geographically)
partitioned portion of the license area of Station WQGF318,)
assignment of partitioned portion and related waiver requests)

TO: Marlene H. Dortch, Secretary

For transmission to the Commission

COMMENTS OF SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY

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SUMMARY

As Southern California Regional Rail Authority (“SCRRA”) has repeatedly urged for several years already, its above-captioned applications to acquire spectrum in order to implement Congressionally-mandated Positive Train Control (“PTC”) technology should be granted as soon as possible. Deployment of PTC is a matter not only of statutory dictate, but also of overriding public safety concern. The Commission’s more-than-three-year delay in approving SCRRA’s acquisition of the spectrum in question has already put thousands of Americans at risk, in direct contravention of the Congress’s specific direction in Section 151 of the Communications Act. That section requires the Commission to “*promot[e]* safety of life and property” (emphasis added), *not* increase risks to life and property.

In the present context of this proceeding, resolution of the Maritime Communications/Land Mobile, LLC (“MC/LM”) hearing through the well-established *Second Thursday* process is plainly warranted. All factors historically necessary for *Second Thursday* relief are present here. All of those factors support such relief. No factors weigh against such relief.

In particular, the urgent need to grant the SCRRA Applications presents a compelling equitable consideration that must be accorded substantial weight here. Such considerations constitute an important element of the *Second Thursday* analysis.

While SCRRA has previously pressed for grant of its applications pursuant to Footnote 7 of the Hearing Designation Order (“HDO”) which initiated the MC/LM hearing, SCRRA believes at this point that it would be appropriate for the Commission to resolve all aspects of that hearing – including the SCRRA Applications – under the *Second Thursday* rubric. When Footnote 7 first appeared (in the HDO), MC/LM was not in bankruptcy, there was no plan of

reorganization (let alone a plan already approved by a bankruptcy court), no independent third-party proposing a *Second Thursday*-type transaction. Now, all of those factors are present, as a result of which the entire MC/LM matter may be resolved, for once and for all, through the *Second Thursday* doctrine. To the extent that such resolution presents the quickest avenue by which SCRRA may, finally, obtain the spectrum it needs, SCRRA supports a *Second Thursday*-based approach here. (Still, if for whatever reason the Commission is reluctant to take such an approach, SCRRA urges the Commission to implement the approach outlined in Footnote 7.)

Finally, SCRRA observes that any resolution of this case – whether by *Second Thursday* or Footnote 7 – will require action in the first instance by the full Commission. No subordinate official(s) within the Commission (other than the Media Bureau, which clearly has no involvement here) has the delegated authority to do so. Moreover, action by the Commission is in any event desirable here as that would eliminate at least one additional level of potential administrative litigation and thereby expedite *final* resolution of this matter.

TABLE OF CONTENTS

Summary ii

Preliminary Statement..... 1

Background 2

Discussion 4

 I. Equitable Factors to be Considered Under the *Second Thursday* Doctrine4

 II. *Second Thursday* Relief is Warranted in this Case.6

 III. *Second Thursday* v. Footnote 7 Relief9

 IV. Action on the Captioned Matters Must be Taken by the Full Commission.....10

1. Southern California Regional Rail Authority (“SCRRA”) hereby submits its Comments in response to the Public Notice, DA 13-569, released March 28, 2013 (“Public Notice”), inviting comments on the above-captioned application (“the Choctaw Application”) to assign four geographic and 59 site-based Automated Maritime Telecommunications Service (AMTS) licenses from Maritime Communications/Land Mobile, LLC (“MC/LM”) to Choctaw Holdings, LLC (“Choctaw”). In their application, MC/LM and Choctaw seek processing pursuant to the Commission’s *Second Thursday* doctrine¹. In the second set of applications and related waiver requests (“the SCRRA Applications”) listed in the caption above² – which were filed nearly three years prior to the Choctaw Application – SCRRA proposes to acquire some of the authorizations held by MC/LM.

PRELIMINARY STATEMENT

2. SCRRA seeks to acquire spectrum for use in its Positive Train Control system (“PTC”), to be deployed in compliance with urgent public safety-related requirements expressly imposed by Congress.³ Congress has set a 2015 deadline for SCRRA and other rail operators to implement PTC; time is, therefore, of the essence.

3. The SCRRA Applications have been pending for over three years. Between March, 2010, when the SCRRA Applications were filed, and October, 2012, there were 249 head-on, rear-end, and side train collisions that caused nine fatalities, 82 injuries, and over \$44

¹ See *Second Thursday Corp.*, 22 FCC2d 515 (1970).

² See File Nos. 0004153701 and 0004144435.

³ See Rail Safety Improvement Act of 2008 (“RSIA”), Pub. L. No. 110-432, 122 Stat. 4848 (2008).

million of damage.⁴ The National Transportation Safety Board (NTSB) has concluded that such collisions ordinarily are caused by human factors against which PTC is designed to compensate – indeed in many cases the NTSB investigation has concluded that PTC would have prevented an accident.⁵

4. Every day that the Commission delays in acting, it prolongs the dangers to which Americans nationwide are subjected – rail passengers, companies shipping their goods by rail, rail employees, and anyone who might through misfortune find himself or herself physically or financially harmed by an otherwise preventable rail incident.

5. The issuance of the Public Notice gives rise to hope that the Commission finally agrees that further inaction is unacceptable. Indeed, the Commission now has an opportunity to take prompt action consistent with all conceivable legal standards and federal policies. By contrast, anything other than prompt action is contrary to the public interest.

BACKGROUND

6. As set out in the Public Notice, MC/LM's licenses were designated for hearing in April, 2011, with respect to issues relating to whether MC/LM and certain of its principals are qualified to remain Commission licensees.⁶ The Commission will ordinarily not approve the assignment of a license when the qualifications of the assignor/licensee are in serious doubt. *See Jefferson Radio, Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). Accordingly, the pending SCRR

⁴ Source – Federal Railroad Administration Office of Safety Analysis – Section 3.09 Accident Summary Tables.

⁵ NTSB “Most Wanted List: Implement Positive Train Control Systems”, http://www.nts.gov/safety/mwl_2012_fact_sheet/ptc.pdf (last viewed May 9, 2013).

⁶ Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (“HDO”), FCC 11-64, released April 19, 2011.

Applications – as well as other proposed assignments of MC/LM spectrum – have been held in abeyance since the issuance of the HDO. However, recognizing the safety-of-life considerations underlying SCRRA’s proposed acquisition of the spectrum – and the statutory mandate compelling that acquisition – the Commission, in Footnote 7 to the HDO, invited SCRRA and MC/LM to submit showings in support of removal of their applications “from the ambit” of the MC/LM hearing.⁷ Despite timely, and repeated, responses to this invitation and the passage of more than two years, the Commission has taken no action.

7. In August, 2011, MC/LM filed for bankruptcy protection, and in January, 2013, the Bankruptcy Court approved a Plan of Reorganization pursuant to which MC/LM’s licenses (including those to be assigned to SCRRA) would be assigned to Choctaw.⁸ The Choctaw Application seeks Commission approval for the implementation of the reorganization plan. In their application, MC/LM and Choctaw expressly invoke the Commission’s *Second Thursday* policy (addressed in further detail below), which affords an exception to the *Jefferson Radio* policy.

8. In the Public Notice, the Commission seeks comment on whether it should:
- (a) consent to the assignment of some or all of MC/LM’s AMTS licenses to Choctaw under *Second Thursday*;
 - (b) consent to the assignment of some of MC/LM’s AMTS licenses pursuant to Footnote 7 of the HDO;
 - (c) waive the construction and discontinuance-of-service rules for MC/LM’s AMTS site-based stations; and

⁷ See HDO, note 7. In response, SCRRA and MC/LM submitted such showings, and the Enforcement Bureau in turn supported the removal of the MC/LM-SCRRA applications for the hearing. SCRRA has supplemented its initial showing three times. Regrettably, in the intervening two years the Commission has taken no action on any of those showings.

⁸ See *Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-DWH (N.D. Miss Bank. Ct., Nov. 15, 2012).

- (d) terminate its formal hearing, partially or otherwise, regarding MC/LM's basic qualifications.

In response to the Public Notice, SCRRA reiterates the message it has already presented several times over: the public interest clearly supports prompt grant of the SCRRA Applications. That being the case, SCRRA enthusiastically supports the immediate grant of the SCRRA Applications. As discussed below, whether the Commission acts in reliance on *Second Thursday* or Footnote 7 is a difference largely without distinction. Indeed, in view of the fact that *Second Thursday* treatment would permit final resolution of all aspects of the long-pending MC/LM matter – and consequent termination of the MC/LM proceeding⁹ – consistently with the public interest, such treatment would be desirable. Finally, SCRRA recommends that any action on these matters must be taken by the full Commission, and *not* the Wireless Bureau.

DISCUSSION

I. Equitable Factors to be Considered Under the *Second Thursday* Doctrine

9. As noted above, the *Jefferson Radio* policy ordinarily precludes favorable action on proposed license assignments where the licensee/proposed assignor has been charged with misconduct that throws into question its basic qualifications to remain a licensee. But for more than 45 years, the Commission has, on a case-by-case basis, recognized exceptions to that policy.

10. Those exceptions, starting even before the eponymous *Second Thursday* case in 1970¹⁰, have entailed a balancing of equitable, public interest-based considerations. Generally,

⁹ SCRRA offers no opinion at this time about the appropriate treatment of MC/LM's site-based licenses insofar as the construction and continuance-of-service rules are concerned.

¹⁰ The equitable approach articulated in *Second Thursday* was based on a similar approach utilized by the Commission in *Image Radio, Inc.*, 15 FCC2d 317 (1968) and *Twelve Seventy, Inc.*, 2 FCC2d 973 (1966).

Second Thursday holds that, where a proposed assignor's basic qualifications are in question, the Commission will grant the assignment

only if the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefits from favorable action on the applications or only a minor benefit which is outweighed by equitable consideration in favor of innocent creditors.

Second Thursday, 22 FC2d at 516. This affords the Commission and interested parties an analytical roadmap for resolving situations such as the instant proceeding. That is, in assaying a proffered *Second Thursday* showing, the Commission will, as a threshold matter, consider three important factors: (a) the extent to which the proposal would preclude the alleged wrongdoer(s) from further involvement in the licensed activities; (b) the nature and extent to which the alleged wrongdoer(s) might be said to derive any benefit from the proposal; and (c) whether equitable considerations countervail any benefits which might arguably flow to the alleged wrongdoer. *Id.*

11. It is important to recognize that, in undertaking this analysis, the Commission has historically taken an expansive view of the third prong of the three-prong test. In particular, “equitable considerations” have *not* been limited to financial benefits running to innocent creditors.¹¹ Rather, the potential benefits weighed by the Commission have included a range of “public interest” factors consistent with the agency’s statutory mandate to act “in the public interest, convenience and necessity”. Such factors have included the fact that favorable action on proposed assignments would permit continued use of the underlying spectrum.¹² That concept has been ratified as recently as 2010, in *Family Broadcasting, Inc.*, 25 FCC Rcd 7591, 7599, ¶26

¹¹ Even were protection of innocent creditors the sole basis for equitable relief, in the instant case, the interests of innocent MC/LM creditors will be protected through *Second Thursday* relief, as outlined in the Choctaw Application.

¹² See, e.g., *Second Thursday*, 25 FCC2d 112, 114 (1970) (including among the “substantial equities” weighing in favor of relief the “public interest in the resumption of service” on the spectrum in question).

(2010), where the Commission stated that “[a]voiding loss of service to the public is a recognized benefit of our *Second Thursday* doctrine.”¹³ Similarly, the conservation of the Commission’s administrative resources has also been cited as a “recognized benefit” of the *Second Thursday* doctrine. *Id.*

12. In other words, the focus of any *Second Thursday* analysis is necessarily broad, encompassing a wide range of factors that may be said to affect the public interest.

II. *Second Thursday* Relief is Warranted in this Case.

13. The instant case is tailor-made for application of the *Second Thursday* doctrine and satisfies the three-prong test described in paragraph 12, above. MC/LM, whose basic qualifications to remain a licensee have clearly been called into serious question, is in bankruptcy. A plan of reorganization, already approved by the Bankruptcy Court after extensive proceedings, precludes involvement in the licensed activities by MC/LM, the alleged wrongdoer, and expressly calls for the assignment of MC/LM’s licenses to Choctaw, which does not include any parties identified in the HDO as potentially unqualified. That plan has been carefully designed to eliminate the possibility that any of the alleged MC/LM wrongdoers might derive any appreciable benefit from the assignment.¹⁴ And compelling public interest considerations support *Second Thursday* treatment here.

¹³ See also *Eleonora Miranda*, 22 FCC Rcd 17311 (Audio Div. 2007) (other public interest factors supporting *Second Thursday* relief include the “continued and non-interrupted service” provided by the licensed operation at issue).

¹⁴ The *Second Thursday* showing advanced in the above-captioned MC/LM-Choctaw assignment application addresses in considerable detail the financial aspects of the proposed transaction. SCRRA understands that the financial terms of the transaction were designed specifically to assure compliance with *Second Thursday* standards. SCRRA will not address those aspects here, although it reserves the right to do so in later responsive pleadings.

14. *Second Thursday* relief would assure that the spectrum at issue here continues to be utilized. As noted above, the Commission has consistently deemed such continuity of use as a positive attribute in the *Second Thursday* calculus.

15. In this case, that continued use can and should be accorded even greater positive weight because the spectrum will be put to use for *safety-of-life* service, as the Commission itself acknowledged in Footnote 7 of the HDO. The statistics set forth in paragraph 2, above, are sobering and confirm the public safety importance of PTC, and the clear public interest in accordance with *Second Thursday*. *A fortiori*, since the public interest clearly lies in the implementation of such safety-of-life measures, the public interest also lies in implementing them *as soon as possible*.¹⁵

16. Lest there be any doubt as to the public interest in approving the SCRRA Applications, such approval would be consistent with express Congressional direction. It is well-established that “agencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized.” *LaRose v. FCC*, 494 F.2d 1145, 1146, n.2 (D.C. Cir. 1974). Conventionally, the *Second Thursday* policy is viewed as an accommodation with federal bankruptcy law. That, of course, is true here, but in

¹⁵ In its “Third Supplement to ‘Showing Pursuant to Footnote 7’ and Second Renewal of Request for Prompt Agency Action” (filed January 24, 2013), SCRRA noted that, as a temporary, stop-gap, measure, SCRRA has entered into a lease arrangement with PTC-220, LLC, to secure access to some spectrum for PTC implementation. As explained there, the spectrum available to SCRRA pursuant to that arrangement affords, at best, a partial fix of uncertain and temporary duration. SCRRA hereby incorporates its Third Supplement herein by reference, particularly with respect to matters relating to its arrangement with PTC-220, LLC. SCRRA also notes that, in Reply Comments (at pages 9-11) filed in WT Docket No. 13-59 on April 23, 2013, PTC-220, LLC, underscored the urgent shortage of spectrum available for PTC and the very real possibility that it may not have sufficient resources to provide capacity for third-party leases. PTC-220, LLC’s comments clearly reinforce SCRRA’s own observation that the spectrum lease arrangement between the two by no means relieves the pressure that each faces in attempting to meet the Congressionally-imposed deadline for PTC implementation.

this case, further delay in granting the SCRRA Applications exacerbates, rather than minimizes, direct conflict with other incredibly clear federal policy.

17. Congress understood and underscored the national importance of prompt implementation of PTC four years ago, when it imposed the 2015 deadline for RSIA compliance. The RSIA plainly establishes that such prompt implementation is a matter of federal policy. The Commission should therefore be acting to minimize any conflict with that policy. The Commission's failure to date to act on the SCRRA Applications is obviously contrary to the Commission's own obligations.

18. That failure is especially bizarre and regrettable in view of Congress's mandate *to the Commission* to "promot[e] safety of life and property through the use of wire and radio communications". 47 U.S.C. §151. Implementation of PTC will unquestionably promote safety of life and property, thereby accomplishing one of the Commission's fundamental purposes. Continued delay to act on SCRRA's applications, by contrast, does nothing to promote safety of life and property; to the contrary, as demonstrated above, continued delay unquestionably *threatens* such safety. In this respect, then, continued delay would conflict not only with non-communications-related policies (such as federal bankruptcy law and the RSIA), but also with the express mandate of the Communications Act itself.

19. By contrast, prompt and favorable action on the SCRRA Applications will be completely consistent with those federal policies while not contravening any other federal policy, communications-related or otherwise. Under these circumstances, *Second Thursday* relief is warranted here.

III. *Second Thursday* v. Footnote 7 Relief

20. The Public Notice suggests that the Commission may view *Second Thursday* and the HDO's Footnote 7 as presenting mutually exclusive alternative courses, and that taking one of those courses might foreclose the other. To the contrary, those alternatives are fully compatible. In both the Commission would engage in a careful public interest-based balance of (a) the benefits to be realized from favorable action on the applications pending before it against (b) any potential detriments. As discussed above, the benefits arising from either approach would be several and substantial, the detriments non-existent. In other words, both *Second Thursday* and Footnote 7 lead to the same conclusion – *i.e.*, grant of the applications – for the same reasons – *i.e.*, advancement of significant public interest objectives.

21. The only significant difference between the two that SCRRA can perceive is that the Footnote 7 alternative was devised as a mechanism by which at least some of the benefits could be realized even in the absence of a formal bankruptcy proceeding and consequent wrapping-up of all aspects of MC/LM's regulatory situation. Since the benefits flowing from the Footnote 7 approach as initially presented in the HDO would have inured to SCRRA, SCRRA has consistently advised the Commission that it is ready, willing, able and eager to avail itself of that approach. SCRRA remains in that posture.

22. Now that the Bankruptcy Court has approved the MC/LM Plan of Reorganization and the Choctaw Application has been submitted, the Commission is squarely presented with a classic *Second Thursday* scenario that would allow action on all pending MC/LM matters, not just the SCRRA license subject to Footnote 7. Footnote 7's implicit concern that a *Second Thursday* approach may have been, as of the release of the HDO, premature is therefore moot. With the filing of the Choctaw Application and its *Second Thursday* showing, the Commission is

now in a position to resolve not just the SCRRA Application, but all other aspects of this already-hopelessly-delayed proceeding. There is no longer any reason that the FCC ought not conclude all aspects of the MC/LM proceeding now, in one fell swoop, acting pursuant to *Second Thursday*.¹⁶

23. In the unlikely event that the Commission might be reluctant, for whatever reason, to invoke *Second Thursday* to resolve all outstanding MC/LM-related issues, SCRRA urges the Commission to utilize the Footnote 7 approach to grant the SCRRA Applications immediately. As SCRRA has previously demonstrated, such grant would be consistent with the public interest by advancing imperative safety-of-life interests mandated by Congress.

24. However the Commission elects to proceed, though, SCRRA urges the agency to move as quickly as possible to grant the SCRRA Applications.

IV. Action on the Captioned Matters Must be Taken by the Full Commission.

25. In keeping with the need for utmost expedition in the disposition of the captioned applications, SCRRA notes also that any action on these matters must be taken by the full Commission, and *not* the Wireless Bureau. The Bureau does not, as far as SCRRA is aware, have delegated authority to act on such matters, whether by *Second Thursday* or through the Footnote 7 approach. As far as *Second Thursday* goes, express authority to act on requests

¹⁶ Since the SCRRA Applications currently specify MC/LM as the licensee/assignor, an amendment to those applications might be necessary to specify alternate licensee/assignor – whether MC/LM Debtor-in-Possession or Choctaw – before grant. In additions, other administrative and/or procedural matters may need to be considered to facilitate the transfer of license to SCRRA and the payment of any funds in accordance with *Second Thursday* principles. SCRRA may comment further in this proceeding on specific procedural steps necessary to bring this matter to closure. But it stands ready to take whatever such ministerial actions may be necessary to facilitate the promptest possible favorable resolution of its long-pending applications.

pursuant to *Second Thursday* must be granted by the full Commission to any of its subordinate offices.¹⁷

26. And as far as Footnote 7 goes, that alternative was initiated by the full Commission (in the HDO) without citation to any particular precedent or policy. The full Commission, then, is the only decision-making forum within the agency competent to determine the precise steps to take if the Footnote 7 approach is to be taken.

27. As a result, one way or the other, the full Commission must address and resolve these matters.

28. Such direct action by the Commission will in any event be consistent with the urgent need for prompt action here. If no preliminary action is taken pursuant to delegated authority (since, as noted, there is no such delegated authority), the parties' ability to obtain finality in this matter will be advanced considerably, possibly by several years. It is an unfortunate truth that agency action on applications for review of staff decisions often takes multiple years. Such delay can and must be avoided here, thanks to the fact that action by delegated authority is not an option.

¹⁷ As far as our research indicates, the Media Bureau is the only bureau to which the Commission has thus far delegated such authority. *See NewSouth Broadcasting, Inc.*, 8 FCC Rcd 1272 (1993). Obviously, though, the Media Bureau is not in a position to take action on the captioned matters, which are well outside the Media Bureau's purview.

WHEREFORE, for the reasons stated, Southern California Regional Rail Authority hereby urges the Commission to immediately take such action as may be necessary to grant the SCRRA Applications, whether pursuant to *Second Thursday* or Footnote 7.

Respectfully submitted,


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May 9, 2013

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 9th day of May, 2013, I caused copies of the foregoing "Comments of Southern California Regional Rail Authority" to be (a) filed electronically through the FCC's Electronic Comment Filing System and (b) placed in the U.S. mail, first class postage prepaid, or transmitted by facsimile or email (as indicated below), addressed to the following:

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