

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re)	
)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC)	WT Docket No. 13-85
)	FRN: 0013587779
)	
Participant in Auction No. 61 and Licensee of Various Authorizations in the Wireless Radio Services)	Application File No. 0005552500
)	
and)	
)	
CHOCTAW HOLDINGS, LLC)	
)	
Applicant for Assignment of Various Authorizations in the Wireless Radio Services)	

To: Marlene H. Dortch, Secretary
Attention: Chief, Mobility Division, Wireless Telecommunications Bureau

**COMMENTS OF THE ENFORCEMENT BUREAU ON MCLM AND CHOCTAW'S
SECOND THURSDAY SUBMISSION**

1. On January 23, 2013, Maritime Communications/Land Mobile, LLC (MCLM) and Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (collectively, Choctaw), submitted to the Chief, Mobility Division, Wireless Telecommunications Bureau (Wireless Bureau), an application for Commission consent to the assignment of certain geographic and site-based Automated Maritime Telecommunications System (AMTS) licenses from MCLM to Choctaw (Application).¹ Accompanying this application is a document entitled "Description of

¹ See Application, on FCC Form 603, File No. 0005552500, submitted to the Wireless Bureau on January 23, 2013, which seeks Commission consent to the assignment and transfer from MCLM to Choctaw of four geographic AMTS authorizations (WQGF315, WQGF316, WQGF317, and WQGF318) and fifty-nine (59) locations associated with the following site-based AMTS authorizations: KAE889, WHG693, WHG701-WHG703, WHG705-WHG754, WHV733, WHV740, WHV833, and WRV374 (collectively, Licenses).

Transaction, Public Interest Statement and *Second Thursday Showing*” (*Second Thursday Submission*) in which MCLM and Choctaw seek to avail themselves of the Commission’s *Second Thursday* doctrine.² MCLM and Choctaw also seek a waiver and extension of any construction and operational requirements that might otherwise impair the ability of MCLM to transfer its site-based licenses to Choctaw.³ MCLM and Choctaw further request that the Commission terminate the pending hearing discussed below.⁴

2. On March 28, 2013, the Wireless Bureau requested comment on MCLM and Choctaw’s Application.⁵ The Chief, Enforcement Bureau (Bureau), by her attorneys, hereby submits the Bureau’s comments on MCLM and Choctaw’s request for relief.

BACKGROUND

3. On April 19, 2011, the Commission commenced a hearing proceeding before an Administrative Law Judge (Presiding Judge) to determine, among other things, whether MCLM is qualified to be and remain a Commission licensee and, as a consequence thereof, whether its Licenses should be revoked.⁶ Specifically, the Hearing Designation Order (HDO) raises substantial and material questions of fact as to whether MCLM “(i) violated the designated entity rules and received a credit on its obligations to the United States Treasury of approximately \$2.8 million to which it was not entitled; (ii) repeatedly made misrepresentations to and lacked candor with the Commission in connection with its participation in Auction No. 61 and the claimed bidding credit; [and] (iii) failed to maintain the continuing accuracy and completeness of

² See Application and accompanying Description of Transaction, Public Interest Statement and *Second Thursday Showing* submitted to the Wireless Bureau on January 23, 2013.

³ See *Second Thursday Submission* at pp. 10-12.

⁴ See *id.* at pp. 2, 17.

⁵ See Comment Sought on Application to Assign Licenses Under *Second Thursday* Doctrine, Request for Waiver and Extension of Construction Deadlines, and Request to Terminate Hearing, Public Notice, WT Docket No. 13-85, rel. Mar. 28, 2013.

⁶ See *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, 26 FCC Rcd 6520 (2011) at ¶¶ 62(h) and (i).

information furnished in its still pending long-form application.”⁷ The Commission also designated for hearing the issue of whether MCLM’s site-based facilities were constructed (*i.e.*, placed in operation) within two years of their grant, as required by Section 80.49(a)(3) of the Commission’s rules (Rules), and whether operations of any of MCLM’s site-based facilities have been permanently discontinued pursuant to Section 1.955(a) of the Rules.⁸ In the hearing proceeding, this issue has been referred to as Issue (g).

4. On August 1, 2011, MCLM filed for bankruptcy protection pursuant to Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Mississippi.⁹ Also on August 1, 2011, MCLM filed in the hearing proceeding a motion to stay all designated issues to allow MCLM to seek approval from the Bankruptcy Court to assign the Licenses and to submit a request for extraordinary relief to the Wireless Bureau under the Commission’s *Second Thursday* doctrine.¹⁰ The Bureau opposed MCLM’s motion to stay.¹¹

5. After considering the parties’ pleadings on this subject, and arguments proffered at an October 25, 2011 prehearing conference – including MCLM’s concession that Issue (g) should be resolved in the hearing and not by application of the *Second Thursday* doctrine¹² – the Presiding Judge effectively stayed the hearing on all designated Issues other than Issue (g).¹³ The Presiding Judge ruled from the bench that Issue (g) “has to be litigated, and there’s no

⁷ HDO at ¶ 2.

⁸ See HDO at ¶¶ 2, 61 and 62(g).

⁹ See *Second Thursday* Submission at p. 7.

¹⁰ See MCLM’s Motion to Defer All Procedural Dates, filed in EB Docket No. 11-71 on August 1, 2011 (Motion to Defer).

¹¹ See Enforcement Bureau’s Opposition to Motion to Defer All Procedural Dates, filed in EB Docket No. 11-71 on August 10, 2011 and Enforcement Bureau’s Supplement to Its Opposition to Motion to Defer All Procedural Dates, filed in EB Docket No. 11-71 on September 16, 2011.

¹² See Motion to Defer at fn. 6 and *see, e.g.*, October 25, 2011 Prehearing Conference Transcript (10/25/11 Transcript) in EB. Docket No. 11-71 at pp. 250-51, 253-254, submitted herewith as Exhibit 1.

¹³ See, *e.g.*, 10/25/11 Transcript (Exhibit 1) at pp. 249-257.

reason to hold it up.”¹⁴ As a result, the Presiding Judge allowed discovery on Issue (g) to move forward, and since October 2011, the parties have devoted extensive time and resources to developing the record related to Issue (g). Discovery on Issue (g) closed on March 1, 2013.¹⁵ On March 21, 2013, the Presiding Judge stayed all Issues designated for hearing except Issue (g) until the Application is decided.¹⁶ The Presiding Judge’s Order confirmed that “Issue (g) shall continue to hearing.”¹⁷ The Bureau is ready to proceed with summary motions on Issue (g) and a hearing, if necessary. On May 8, 2013, MCLM filed a motion for summary decision in the hearing proceeding.¹⁸

SUMMARY OF ARGUMENT

6. As discussed more fully below, MCLM and Choctaw’s request for *Second Thursday* relief raises significant concerns about whether it should be granted. First, MCLM and Choctaw have failed to demonstrate that the proposed assignment of the Licenses from MCLM to Choctaw meets the prerequisites for granting *Second Thursday* relief. Specifically, MCLM and Choctaw’s *Second Thursday* Submission does not include sufficient information to demonstrate that (a) the proposed assignment will benefit creditors other than Choctaw; (b) the alleged wrongdoers, Sandra and Donald DePriest, will not have any role in the proposed operations of the Licenses; and (c) Sandra and Donald DePriest will either derive no benefit from the proposed transaction or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.

7. Second, there is no *Second Thursday* precedent – and MCLM and Choctaw’s

¹⁴ Id. at p. 257.

¹⁵ See Limited Joint Stipulations Between Enforcement Bureau And Maritime And Proposed Discovery Schedule, filed in EB Docket No. 11-71 on November 28, 2012.

¹⁶ See Order, FCC 13M-6 (ALJ, rel. Mar. 21, 2013) released in EB Docket No. 11- 71.

¹⁷ Id.

¹⁸ See MCLM’s Motion for Summary Decision on Issue G, filed in EB Docket No. 11-71 on May 8, 2013.

Submission offers none – in which any one creditor received a windfall from the proposed transaction. Here, Choctaw seeks to acquire licenses with a value that far exceeds what is necessary to satisfy the innocent creditors, resulting in an estimated \$12 million windfall to Choctaw. In other words, Choctaw would not need to sell all of the Licenses it now seeks to acquire in order to satisfy the innocent creditors. There is no precedent – and MCLM and Choctaw’s Submission offers none – for expanding the narrow *Second Thursday* exception to allow transfers of licenses beyond those needed to repay innocent creditors.

8. Third, the Commission does not need to grant Choctaw’s request for assignment of every MCLM License, including the site-based licenses, and suspend the hearing proceeding, in order to process pending third-party applications to acquire only certain portions of MCLM’s four geographic licenses that MCLM and Choctaw allege promote the Commission’s policies concerning public safety. There is already a mechanism in place by which the Commission can assess these third-party applications without granting Choctaw wholesale relief under the *Second Thursday* doctrine.

9. Finally, MCLM and Choctaw’s *Second Thursday* Submission does not articulate a persuasive basis for why, after MCLM previously conceded that Issue (g) should be resolved in the hearing and not by application of the *Second Thursday* doctrine,¹⁹ the Commission should now remove Issue (g) from hearing and “waive any construction and operational requirements that might otherwise impair the ability of MCLM to transfer” the site-based licenses to Choctaw.²⁰ In fact, the *Second Thursday* Submission does not cite any precedent in which the Commission has used the *Second Thursday* process as a vehicle for deciding a substantive question subject to the Presiding Judge’s jurisdiction. Nor does the *Second Thursday*

¹⁹ See *supra* note 12.

²⁰ See *Second Thursday* Submission at p. 12.

Submission cite to any precedent in which construction deadlines have been waived and/or extended in cases involving authorizations that were designated for hearing.²¹ Instead, in their *Second Thursday* Submission, MCLM and Choctaw primarily argue that the Commission should waive MCLM's operational requirements because the Commission "has never explained what constitutes permanent discontinuance in the context of AMTS stations,"²² and applying Section 1.955(a)(3) of the Rules to MCLM's site-based licenses would violate MCLM's due process rights.²³ As explained below, the relevant regulations, precedent and public statements by the Commission plainly demonstrate that MCLM had fair notice that by not operating its AMTS site-based stations for multiple years it risked automatic termination of these Licenses.²⁴

ARGUMENT

I. MCLM and Choctaw's *Second Thursday* Submission Fails To Meet the *Second Thursday* Criteria

10. Commission policy generally prohibits the transfer of a license in the face of unresolved questions about the licensee's basic character qualifications to hold a license.²⁵ This policy "reflects the Commission's understanding that permitting a licensee to evade the consequences of alleged or adjudicated misconduct by transferring his interest or assigning his license will diminish the deterrent effect that revocation or renewal proceedings should have on . . . licensees."²⁶ In *Second Thursday Corp.*,²⁷ the Commission carved out a narrow exception to this general prohibition if certain requirements are satisfied. Under the *Second Thursday* doctrine, the Commission may allow an assignment or transfer by a licensee with basic character

²¹ See *id.* at pp. 10-11.

²² *Id.* at p. 11.

²³ See *id.* at pp. 11-12.

²⁴ See *infra* ¶¶ 40-50.

²⁵ See *Jefferson Radio Company v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

²⁶ See *Family Broadcasting, Inc.*, 25 FCC Red 7591, 7596 ¶ 17 (2010).

²⁷ See *Second Thursday Corp.*, 22 FCC 2d 515 (1970).

qualifications issues outstanding only when three conditions are present. First, the licensee in question must be in bankruptcy. Second, the Commission must determine that, notwithstanding unresolved questions about the licensee's basic character qualifications, the proposed transaction will benefit innocent creditors. Third, the Commission must find that "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 considerations in favor of innocent creditors."²⁸

11. As filed, MCLM and Choctaw's *Second Thursday* Submission does not demonstrate that (a) the proposed transaction of the assignment of the Licenses from MCLM to Choctaw will benefit innocent creditors; (b) the alleged wrongdoers, Sandra and Donald DePriest, will not have any role in the proposed operations of the Licenses; and (c) Sandra and Donald DePriest will either derive no benefit from the proposed transaction or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.

A. There is Insufficient Information in MCLM and Choctaw's *Second Thursday* Submission To Demonstrate How the Proposed Transaction Will Benefit Innocent Creditors

12. The *Second Thursday* doctrine is intended to accommodate the policies of the Communications Act with the policies of federal bankruptcy law that protect innocent creditors.²⁹ A prerequisite for granting *Second Thursday* relief, therefore, must be a showing that the proposed transaction benefits innocent creditors. MCLM and Choctaw's *Second Thursday* Submission does not meet this basic requirement.

13. In all other cases in which the Commission has granted *Second Thursday* relief, a bankruptcy trustee or receiver has requested approval of a transaction that would assign the

²⁸ See *Second Thursday Corp.*, 22 FCC 2d at 516 ¶ 5.

²⁹ See, e.g., *Second Thursday Corp.*, 22 FCC 2d at 518 ¶ 9; *LaRose v. FCC*, 494 F.2d 1145, 1146 and 1149 (1974).

license(s) at issue to a third party who had agreed to acquire the bankrupt entity's assets for a specified purchase price.³⁰ The proceeds from this "sale" of the assets were then used to repay any innocent creditors.³¹ Here, unlike the applicants in all other cases in which the Commission granted *Second Thursday* relief, neither MCLM nor Choctaw is a court-appointed fiduciary, whose principal job is to maximize the value of the bankrupt estate's assets for the benefit of the creditors. Choctaw is also not a third party who has offered to purchase MCLM's assets for a specified amount of cash. Rather, Choctaw is a small group of MCLM's creditors who are "willing to assume control of the licenses for the benefit of all of the creditors of MCLM"³² and to "proceed as the licensee to maintain the licenses according to the Commission's rules and diligently pursue its business plan"³³ in exchange for proceeds from the subsequent sale of MCLM's Licenses.³⁴ There is no precedent – and the *Second Thursday* Submission cites none – in which the Commission has granted *Second Thursday* relief that was requested by creditors of the bankruptcy estate.

14. MCLM and Choctaw's *Second Thursday* Submission does not explain how Choctaw's acquisition of the Licenses and the diligent pursuit of its "business plan" will benefit the remaining MCLM creditors. It does not even provide a description of this business plan.

³⁰ See, e.g., *In re Eddie Floyd*, 26 FCC Rcd 5993, 5995 ¶ 6 (MB 2011) (proceeds of the sale of the station distributed to creditors); *Family Broadcasting, Inc.*, 25 FCC Rcd at 7595 ¶ 12 (2010) ("Under the Plan, Family's creditors will receive 100 percent of the purchase price paid by Caledonia ..."); *In re Litton*, 22 FCC Rcd 641, 646 ¶ 3 (2007) (using purchase price for the stations to reduce the bankrupt entities' obligations); *KOZN FM Stereo 99 Ltd.*, 6 FCC Rcd 257, 257 ¶ 6 (1991) (sale proceeds of \$250,000 available to pay \$280,000 in total claims); *Cosmopolitan Enterprises, Inc.*, 73 FCC 2d 700, ¶ 14 (1979) (purchase price applied to pay creditors' claims); *Hertz Broadcasting of Birmingham, Inc.*, 57 FCC 2d 183, 184 ¶ 3 (1976) (purchase price distributed to creditors).

³¹ See *supra* note 30. In one instance, when the amount of the negotiated sale proceeds was insufficient to reimburse the unsecured creditors, the Commission allowed the unsecured creditors to acquire an ownership interest in the entity that had acquired the licenses as full payment of the debt owed to them. See *MobileMedia Corp.*, 14 FCC Rcd 8017, 8019 ¶ 6 (1999).

³² See *Second Thursday* Submission at p. 2.

³³ See *id.* at p. 2.

³⁴ See, e.g., *id.* at p. 3, 8; see also First Amended Plan of Reorganization (Plan), dated September 25, 2012, as confirmed by the Bankruptcy Court, submitted herewith as Exhibit 2, at p. 10.

Instead, it simply suggests that MCLM's Plan of Reorganization (Plan), as confirmed by the Bankruptcy Court, "will result in payments to innocent MCLM creditors."³⁵ MCLM and Choctaw did not submit a copy of this Plan with their *Second Thursday* Submission.³⁶ Nor do they explain how the proposed assignment of MCLM's Licenses to Choctaw is addressed in this Plan or how this Plan "is structured so as to maximize the likelihood that innocent creditors will be compensated."³⁷ Based on its review of the Plan, the Bureau is concerned that the proposed assignment of MCLM's Licenses to Choctaw may benefit only the select number of creditors who comprise Choctaw and no other creditors.

15. The Plan confirms that Choctaw was formed by a group of three secured creditors (Secured Creditors), who are defined as the "holders of the Class 1, 2 and 3 Claims,"³⁸ and an unsecured creditor, Patrick Trammell.³⁹ The Secured Creditors and Mr. Trammell also comprise the entity referred to in the Plan as the "Choctaw Investors."⁴⁰ Under the Plan, Choctaw and/or Choctaw Investors are to receive the following distributions:

- MCLM will transfer, assign, and sell to Choctaw all of MCLM's rights, title and interest in the Licenses in exchange for, and in consideration and full satisfaction of Choctaw's claims against MCLM and Choctaw's release of MCLM from all liability to Choctaw on account of those claims.⁴¹
- Choctaw shall distribute all revenue, products and proceeds from the Licenses to the Choctaw Investors until such time as the Choctaw Investors have received the full amounts of their claims.⁴²

³⁵ See *Second Thursday* Submission at p. 2.

³⁶ To ensure that the Commission has complete information when considering the issues before it, the Bureau submits the Plan herewith. See Exhibit 2.

³⁷ See *Second Thursday* Submission at p. 2.

³⁸ See Plan (Exhibit 2) at p. 8. See also MCLM's Amended Summary of Schedules (Amended Schedules), dated November 15, 2011, submitted herewith as Exhibit 3, at Amended Schedule D.

³⁹ See Plan (Exhibit 2) at p. 10; Amended Schedules (Exhibit 3) at Amended Schedule F, page 19 of 29.

⁴⁰ See Plan (Exhibit 2) at p. 3.

⁴¹ See *id.* at p. 10.

⁴² See *id.*

- The Choctaw Investors shall be entitled to receive Monthly Accruals⁴³ totaling \$90,000 per month until the last of the Secured Creditors' claims is paid.⁴⁴

The Plan further clarifies that “[o]ther than as set forth herein, no creditor junior or subordinate to the Secured Creditors shall receive any distribution from the sale of FCC Spectrum Licenses until such time as the Secured Creditors” have recovered the amount of these Monthly Accruals.⁴⁵

16. Thus, it appears that MCLM’s creditors (other than the four who comprise Choctaw) shall be repaid only if Choctaw subsequently sells the Licenses to third parties.⁴⁶ In Choctaw’s filings before the Bankruptcy Court, it stated that it “has worked extensively to develop a comprehensive plan for marketing the FCC Licenses in an efficient manner which will repay all creditors in the most expeditious manner possible”⁴⁷ and has “developed a network of contacts and potential purchasers with ready interest in purchasing” the Licenses.⁴⁸ However, the Plan does not describe Choctaw’s marketing plan or any marketing efforts Choctaw has made or the results of any such efforts. The Plan also fails to include any information about the potential purchasers that Choctaw represents are ready to purchase the Licenses. It also does not identify any timeline for repayment to MCLM’s other creditors. Although the Bankruptcy Court’s Order confirming the Plan requires that Choctaw use its “best efforts to sell ... sufficient

⁴³ “Monthly Accruals” are defined in the Plan as “payments totaling \$90,000 per month from the Effective Date to Choctaw for financing post-confirmation operations of Choctaw.” *See* Plan (Exhibit 2) at p. 7. As the Bureau understands it, the Monthly Accruals are an obligation of the bankruptcy estate that only just arose in January 2013, upon confirmation of the Plan. They are not part of the Choctaw Investors’ previous claims on the estate.

⁴⁴ *See* Plan (Exhibit 2) at pp. 10-11.

⁴⁵ *Id.* at p. 11.

⁴⁶ *See, e.g., id.* at pp. 10-13; *see also Second Thursday* Submission at p. 8.

⁴⁷ *See* Exhibit C-2 to Third Amended Disclosure Statement for Maritime Communications/Land Mobile, LLC (Amended Disclosure), dated September 25, 2012, submitted herewith as Exhibit 4, at p. 3 of 5.

⁴⁸ *See id.*

FCC Licenses in order to satisfy the Allowed Claims in full,⁴⁹ neither the Confirmation Order nor the Plan specifies what constitutes “best efforts” or requires Choctaw to obtain any particular return on any such sales. Instead, the Plan provides Choctaw with “**sole and absolute discretion**”⁵⁰ to market and sell the Licenses, subject only to the Commission’s regulatory approval of those sales.⁵¹ Should Choctaw not sell the Licenses for a sufficient amount to satisfy the Allowed Claims, the Plan does not explain how any other creditors are to be repaid.

17. In addition, the Plan does not specify how much Choctaw or other creditors are owed individually or how much Choctaw – or indeed any other MCLM creditor – is likely to receive from proceeds from any sales of the Licenses to third parties. For example, the Commission submitted a proof of claim in excess of \$6 million,⁵² but it is unclear whether the Commission would be paid anything under the Plan even if all of the Licenses were sold. At a minimum, Choctaw should be required to identify the amount of debt owed to each of MCLM’s creditors.⁵³ Choctaw should also be required to identify the current market value of the Licenses so that the Commission can assess whether, and to what extent, sales of these Licenses may satisfy MCLM’s obligations to creditors other than those who comprise Choctaw. In fact, the Bureau understands that Choctaw has already placed a value on the Licenses. In the hearing proceeding, the Bureau served Choctaw with interrogatories requesting this very information. Choctaw refused to provide it, claiming that “[t]he valuation placed on the identified licenses by

⁴⁹ See Order Confirming Plan of Reorganization (Confirmation Order), submitted as Exhibit B to the *Second Thursday Submission*, at p. 8.

⁵⁰ See Plan (Exhibit 2) at p. 10 (emphasis added).

⁵¹ It appears that Choctaw intends to honor agreements previously entered into by MCLM and approved by the Bankruptcy Court concerning assignment of certain of the Licenses. See *Second Thursday Submission* at p. 8.

⁵² See Third Amended Disclosure Statement for Maritime Communications/Land Mobile, LLC (Amended Disclosure), dated September 25, 2012, submitted herewith as Exhibit 5, at p.17; see also Proof of Claim, submitted by and on behalf of the Commission, on January 30, 2012, submitted herewith as Exhibit 6.

⁵³ The \$30 million figure Choctaw states in its *Second Thursday Submission* (see *Second Thursday Submission* at p. 1) appears to include the more than \$6.8 million dollars owed to the alleged wrongdoers, Sandra and Donald DePriest. See Amended Schedules (Exhibit 3) at Amended Schedule F, pages 14 of 29 and 20 of 29.

Choctaw, and the steps taken to arrive at any such valuation, is irrelevant to the specific issues designated for hearing.”⁵⁴ That information is undoubtedly relevant here.

18. In the absence of “a detailed statement of the pertinent facts and circumstances concerning the obligations of [MCLM] and the disposition of any funds to be received in the event the proposed ... assignments are approved,”⁵⁵ there is insufficient information in the record for the Commission to assess whether the proposed transaction benefits innocent creditors other than Choctaw and whether *Second Thursday* relief is appropriate.

B. There is Insufficient Information in the *Second Thursday* Submission To Demonstrate That the Alleged Wrongdoers Will Have No Ongoing Role With the Licenses

19. In order for the Commission to grant relief under the *Second Thursday* doctrine, it must be assured that the alleged wrongdoers will not have any future involvement with the Licenses in question.⁵⁶ Here, the alleged wrongdoers are Sandra and Donald DePriest.⁵⁷ Although MCLM and Choctaw’s *Second Thursday* Submission states that the DePriests “will play no future role with respect to any of the licenses subject to the instant application,”⁵⁸ the only evidence cited in support of this assertion is the declaration submitted by Patrick Trammell, Manager of Choctaw. Mr. Trammell’s declaration states that “Sandra and Don DePriest have not had, nor will they have, any role with Choctaw Telecommunications, LLC or Choctaw

⁵⁴ See Choctaw’s Objections and Responses to the Enforcement Bureau’s First Set of Interrogatories, served on January 28, 2013 in EB Docket No. 11-71, and filed herewith as Exhibit 7, at Response to Interrogatory No. 12; see also Response to Interrogatory No. 13.

⁵⁵ *Second Thursday Corp.*, 22 FCC 2d at 516 ¶ 5.

⁵⁶ See, e.g., *Second Thursday*, 22 FCC 2d at 516 ¶ 2 (“assignment applications pending before us may be made only if the individuals charged with misconduct will have no part in the proposed operations”); *In re Eddie Floyd*, 26 FCC Rcd at 5994 ¶ 4 (“Floyd provided a signed declaration stating that he would play ‘no role in the operation of the station following the assignment’”); *KOZN FM Stereo 99 Ltd.*, 6 FCC Rcd at 257 ¶ 7 (alleged wrongdoer’s general partner will have no part in the future operation of the station); *In re Litton*, 22 FCC Rcd at 646 (“no debtor party will have an interest in or control over the Stations following grant of the Assignment Applications”).

⁵⁷ See HDO at ¶¶ 1-61.

⁵⁸ See *Second Thursday* Submission at p. 8.

Holdings.”⁵⁹ Mr. Trammell’s declaration is silent on the issue of whether the DePriests will play any future role with respect to the Licenses. If it is Choctaw’s intention to market and sell the Licenses to third parties, MCLM and Choctaw must demonstrate that neither the DePriests nor any entity with which the DePriests are affiliated will have any involvement with the Licenses through any of these future transactions.

20. Moreover, the *Second Thursday* Submission fails to demonstrate that Critical RF, Inc. (Critical RF), a subsidiary in which MCLM holds a 95% ownership interest,⁶⁰ will not use or acquire any of the Licenses. As the Bureau understands it, Critical RF is not being acquired by Choctaw but will remain under the control of Donald DePriest and MCLM.⁶¹ Critical RF makes, and provides to customers, Radio over Internet Protocol (ROIP) hardware and software that enables communications between two-way radios on one frequency band with two-way radios on another frequency band.⁶² Before the Commission can consider whether the DePriests will have any future involvement with the Licenses, MCLM and Choctaw should confirm that Critical RF does not intend to use MCLM’s licensed spectrum.

C. There Is Insufficient Information in The *Second Thursday* Submission To Demonstrate That the Alleged Wrongdoers Will Not Receive A Benefit

21. For the Commission to grant relief under the *Second Thursday* doctrine, it must be assured that the alleged wrongdoers – Mr. and Mrs. DePriest – “will either derive no benefits from favorable action on the application[] or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.”⁶³ MCLM and Choctaw’s *Second*

⁵⁹ See Declaration, signed by Patrick Trammell, attached to the *Second Thursday* Submission.

⁶⁰ See Amended Disclosure (Exhibit 5) at p. 14.

⁶¹ See *id.* at p. 15.

⁶² See *id.* at p. 14. See also <http://www.criticalrf.com/services.html> and http://www.criticalrf.com/files/CRF_prod_brochure_4p.pdf.

⁶³ See, e.g., *Second Thursday*, 22 FCC 2d at 516 ¶ 5 (“a grant without hearing of the renewal, extension, and assignment applications pending before us may be made only if the individuals charged with misconduct ... will

Thursday Submission fails to demonstrate this.

22. Specifically, the *Second Thursday* Submission asserts that “Mr. and Mrs. DePriest will not receive any portion of the purchase price associated with the operation or sale of the licenses as set forth in the Plan.”⁶⁴ However, the Plan appears to preclude only “[h]olders of Class 10” from receiving any distribution from the sale of any of the Licenses.⁶⁵ Class 10 is defined in the Plan as “Membership Interests in the Debtor.”⁶⁶ MCLM has repeatedly taken the position in the hearing proceeding that the “only membership interests” in MCLM are held by S/RJW Partnership, L.P., which itself is 100% owned by Sandra DePriest, and by Fred Goad.⁶⁷ Thus, the Plan appears to preclude only Sandra DePriest from receiving “any portion of the purchase price associated with the operation or sale of the licenses.”⁶⁸ The Plan appears to be silent as to what Donald DePriest can recover.⁶⁹

23. In addition, Mr. Trammell’s declaration states that “Sandra and Don DePriest will receive no compensation or other direct benefit as a result of the proposed transaction.”⁷⁰ But the only “proposed transaction” before the Commission is the transfer of the Licenses from MCLM to Choctaw.⁷¹ Thus, all that Mr. Trammell has verified is that the DePriests “will receive no compensation or other direct benefit” from Choctaw’s acquisition of the Licenses. He

either derive no benefits from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors”).

⁶⁴ *Second Thursday* Submission at p. 8.

⁶⁵ See Plan (Exhibit 2) at p. 14.

⁶⁶ See *id.* at p. 9.

⁶⁷ See MCLM’s Response to Interrogatories, served on August 31, 2012 in EB Docket No. 11-71, submitted herewith as Exhibit 8, at Response to Interrogatory 13: “[T]he only members of Maritime are S/RJW Partnership, L.P. and Fred Goad.”

⁶⁸ *Second Thursday* Submission at p. 8.

⁶⁹ The Bankruptcy Court’s Order confirming this Plan only precludes Sandra and Donald DePriest, and any entities under their ownership and/or control, from receiving distributions “made by the Administrative Agent/Liquidating Agent under or in connection with the Plan.” Confirmation Order at p. 11. It does not preclude the DePriests from receiving distributions from Choctaw or any of the other creditors directly.

⁷⁰ See Declaration attached to the *Second Thursday* Submission.

⁷¹ See Application and *Second Thursday* Submission.

has not verified that the DePriests will not receive any proceeds from any future sales and assignments of the Licenses by Choctaw to third parties. Unlike other *Second Thursday* cases, the DePriests have not submitted declarations in connection with MCLM and Choctaw's *Second Thursday* Submission in which they have affirmatively waived any benefit from the proceeds of any such sales transactions.⁷²

24. Moreover, as the *Second Thursday* Submission acknowledges, a benefit may accrue to the DePriests as a result of "the satisfaction of a personal loan guarantee provided by Mr. DePriest" for certain loans made to MCLM.⁷³ Despite the *Second Thursday* Submission's assertion to the contrary,⁷⁴ the Commission has always recognized that the elimination of such secondary liability is a benefit that must be weighed against any benefits that might inure to innocent creditors.⁷⁵ As a means for measuring these competing benefits, the Commission has compared the purchase price for the assets at issue to the amount of secondary liability to be eliminated.⁷⁶ When the eliminated secondary liability represents too great a percentage of the purchase price, the Commission has denied the request for extraordinary relief pursuant to *Second Thursday*. In *Mid-State Broadcasting Co.*,⁷⁷ for example, the Commission denied

⁷² See, e.g., *Second Thursday Corp.*, 25 FCC 2d 112, 113 ¶ 2 (1970) (principal stockholders of alleged wrongdoer proposed to waive all claims as creditors); *Family Broadcasting, Inc.*, 25 FCC Rcd at 7597 ¶ 21 (alleged wrongdoers submitted sworn statements specifically waiving any right to any portion of the sale proceeds); *KOZN FM Stereo 99 Ltd.*, 6 FCC Rcd 257, 257 ¶5 (1991) (the purchase agreement was modified to provide that the alleged wrongdoers waived all rights to any proceeds from the sale of KOZN).

⁷³ See *Second Thursday* Submission at p. 9.

⁷⁴ See *id.*

⁷⁵ See, e.g., *Second Thursday*, 25 FCC 2d at 114 ¶ 6 ("While it is an indirect benefit, a reduction in losses is nevertheless a benefit which must be considered in determining whether the public interest will be served by a grant of the applications pending before us."); *MobileMedia*, 14 FCC Rcd at 8023 ¶ 21 (recognizing that the Commission examines a variety of factors in determining whether to grant *Second Thursday* relief including whether suspected wrongdoers are likely to receive an indirect benefit such as reduction of liability).

⁷⁶ See, e.g., *Shell Broadcasting, Inc.*, 38 FCC 2d 929, ¶¶ 10-11 (1973) (comparing amount of reduction in secondary liability to the purchase price to determine whether indirect benefit precluded favorable action on the pending applications); see also *Mid-State Broadcasting Co.*, 61 FCC 2d 196, ¶ 7 (1976); *Capital City Communications, Inc.*, 33 FCC 2d 703, ¶ 26 (1972).

⁷⁷ 61 FCC 2d 196 (1976).

Second Thursday relief because the proposed transaction would relieve the wrongdoers of secondary liability on obligations that represented 60% of the purchase price.⁷⁸ Similarly, in *Capital City Communications, Inc.*,⁷⁹ the Commission refused to approve a transaction that would relieve alleged wrongdoers of secondary liability on obligations that represented more than 20% of the purchase price.⁸⁰ Here, MCLM and Choctaw's *Second Thursday* Submission does not identify either the amount of Mr. DePriest's personal loan guarantees or the purported purchase price being offered for the Licenses. In the absence of such information, the Commission cannot fully assess whether the elimination of Mr. DePriest's personal loan guarantees is a benefit that precludes *Second Thursday* relief.

II. Choctaw Seeks Assignment of Licenses Beyond Those Needed to Satisfy Innocent Creditors, Resulting in a Windfall to Choctaw

25. In all other cases in which the Commission has granted *Second Thursday* relief, a bankruptcy trustee or receiver requested assignment of the license(s) at issue to a third party who had agreed to operate the licenses in exchange for a specific purchase price.⁸¹ The proceeds from this sale would be used to repay the innocent creditors and other administrative expenses.⁸² There is no *Second Thursday* precedent in which the purchase price exceeded the bankrupt entity's liabilities.⁸³

26. Here, as discussed above, Choctaw has not offered a purchase price in exchange

⁷⁸ *Mid-State Broadcasting Co.*, 61 FCC 2d at ¶ 7.

⁷⁹ 33 FCC 2d 703 (1972).

⁸⁰ *Capital City Communications, Inc.*, 33 FCC 2d at ¶ 26.

⁸¹ See, e.g., *In re Eddie Floyd*, 26 FCC Rcd at 5995 ¶ 6 (proceeds of the sale of the station to be distributed to creditors); *Family Broadcasting, Inc.*, 25 FCC Rcd at 7595 ¶ 12 (creditors will receive 100 percent of the purchase price); *In re Litton*, 22 FCC Rcd 641, 646 ¶ 3 (2007) ("The \$12,000,000 purchase price for the Stations will be used solely to reduce the bankrupt entities' obligations . . ."); *KOZN FM Stereo 99 Ltd.*, 6 FCC Rcd 257, 257 ¶ 6 (1991) (sale proceeds of \$250,000 available to pay \$280,000 in total claims); *Cosmopolitan Enterprises, Inc.*, 73 FCC 2d 700, ¶ 14 (1979) (purchase price applied to pay creditors' claims); *Hertz Broadcasting of Birmingham, Inc.*, 57 FCC 2d 183, 184 ¶ 3 (1976) (purchase price distributed to creditors).

⁸² See *supra* note 81.

⁸³ See *supra* note 81.

for acquiring MCLM's Licenses. Instead, according to the Plan, MCLM is to assign the Licenses to Choctaw in exchange for, and in consideration and full satisfaction of, Choctaw's claims against MCLM.⁸⁴ From documents filed in the Bankruptcy Court, it appears that Choctaw's claims amount to \$15,043,879.99.⁸⁵ In these same filings, however, MCLM identified a valuation for the Licenses of \$45.2 million based on a June 2008 appraisal.⁸⁶ Thus, if the Commission were to approve the assignment of the Licenses to Choctaw, Choctaw would receive Licenses that are valued at nearly three times the amount Choctaw is owed. This cannot have been what the Commission intended when it carved out the narrow *Second Thursday* exception to *Jefferson Radio*.

27. Moreover, even if it is Choctaw's intention to acquire the Licenses simply to act as a broker and sell them to third parties in order to repay the innocent creditors, Choctaw will still end up with a windfall. MCLM's bankruptcy filings indicate liabilities to creditors (other than to Sandra and Donald DePriest, who are not innocent creditors) in the amount of \$24,372,456.40.⁸⁷ In addition, it appears that MCLM owes nearly \$450,000 for post-bankruptcy financing and that the administrative claims are capped at \$1,050,000.⁸⁸ The Commission has an outstanding proof of claim in the amount of \$6,315,635.65 that reflects the proposed forfeiture penalty for the alleged wrongdoing that is the subject of the hearing proceeding.⁸⁹ Warren Havens also submitted a proof of claim in the amount of \$100,000. Based on the Bureau's calculations, MCLM's potential liabilities to innocent creditors amount to approximately \$33

⁸⁴ See Plan (Exhibit 2) at p. 10.

⁸⁵ See Amended Schedules (Exhibit 3) at Amended Schedule D and Amended Schedule F, page 19 of 29.

⁸⁶ See Exhibit A-Pt. 1, Schedule B to Third Amended Disclosure Statement for Maritime Communications/Land Mobile, LLC (Amended Disclosure), dated September 25, 2012, submitted herewith as Exhibit 9, at p. 6 of 32. As the Bureau noted above, it understands that Choctaw has a more recent valuation of the Licenses. See *supra* ¶ 17.

⁸⁷ See Amended Disclosure (Exhibit 5) at pp. 15-17; Amended Schedules (Exhibit 3) at Schedules D, E and F.

⁸⁸ See Amended Disclosure (Exhibit 5) at pp. 15-17.

⁸⁹ See *id.* at p. 17; see also Proof of Claim (Exhibit 6). It is unclear what, if anything, the Commission may be paid on this claim under the Plan. See *supra* ¶ 17.

million. If Choctaw were to market and sell the Licenses that have been valued at \$45.2 million to third parties, Choctaw likely would obtain a windfall of an estimated \$12 million after it repays all of the creditors. In other words, Choctaw would not need to sell all of the Licenses it now seeks to acquire in order to satisfy the innocent creditors. Thus, MCLM and Choctaw's *Second Thursday* Submission appears to raise the new and novel question of whether the *Second Thursday* doctrine should be expanded to approve a transfer of licenses beyond those needed to repay innocent creditors.

28. As discussed above, the *Second Thursday* doctrine was designed as a very narrow exception to the Commission's *Jefferson Radio* policy in order to accommodate the Bankruptcy Code's public interest in ensuring repayment to innocent creditors.⁹⁰ But for the need to accommodate the interests of these innocent creditors, *Jefferson Radio* would preclude the Commission's assignment of licenses otherwise subject to a basic character qualifications challenge.⁹¹ After the innocent creditors are fully paid, there would be no justification for applying the *Second Thursday* exception to any future assignment applications. Thus, if Choctaw were to first seek only the assignment of those Licenses necessary to repay the innocent creditors pursuant to the *Second Thursday* doctrine, and then, later, seek the assignment of the remaining Licenses, *Jefferson Radio* – not *Second Thursday* – would apply to, and prohibit, the assignment of those remaining Licenses. Because of the unique way Choctaw structured the transaction presently before the Commission – requesting that all of the Licenses first be assigned to Choctaw even though not all of the Licenses are needed to satisfy the debt owed to innocent creditors – the Commission must decide whether to apply *Second Thursday* to assignments that, if considered separately, would never qualify for the exception. There is no

⁹⁰ See *supra* note 27.

⁹¹ See *Jefferson Radio Company v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

precedent – and MCLM and Choctaw’s Submission offers none – for expanding the narrow *Second Thursday* exception to include the type of transaction that Choctaw now proposes.

III. Granting *Second Thursday* Relief To Assign All of Maritime’s Licenses Is Not Necessary To Achieve The Asserted Public Interest

29. MCLM and Choctaw’s *Second Thursday* Submission also suggests that granting *Second Thursday* relief and assigning all of MCLM’s Licenses to Choctaw is necessary to “advance Commission policies including enhancing public safety through the implementation of positive train control, increasing economic efficiencies, and providing access to spectrum for rural operations.”⁹² In particular, the *Second Thursday* Submission asserts that by granting Choctaw’s Application for assignment of both MCLM’s site-based and its geographic Licenses, it will clear the path for approval of applications for assignment of partitioned portions of MCLM’s geographic licenses to entities such as the Southern California Regional Rail Authority (Metrolink) and Jackson County REMC (Jackson) that were pending before the Wireless Bureau when the Commission released the HDO.⁹³ The *Second Thursday* Submission appears to suggest that the only way these transactions can be processed is for the Commission to approve Choctaw’s Application in its entirety. Even apart from the fact that this raises yet another new and novel question – whether the *Second Thursday* exception should be expanded to protect the interests of those other than innocent creditors of a bankrupt entity – the underlying premise raised by MCLM and Choctaw’s *Second Thursday* Submission is incorrect. The Commission need not grant Choctaw’s Application to acquire all of MCLM’s Licenses, including MCLM’s site-based licenses, in order to grant applications by Metrolink (and possibly others) to acquire only certain portions of MCLM’s four geographic licenses.

30. In the HDO, the Commission acknowledged that MCLM and Metrolink had

⁹² *Second Thursday* Submission at p. 13.

⁹³ See id. at pp. 13-14.

sought Commission consent to assign a partitioned portion of the MCLM geographic spectrum that would be used to implement positive train control systems and other safety controls to enable automatic braking and to help prevent train collisions in accordance with the Rail Safety Improvement Act of 2008.⁹⁴ Specifically, Metrolink sought assignment of a portion of WQGF318 – one of the four MCLM geographic licenses.⁹⁵ The Commission further acknowledged that it would, upon an appropriate showing, “consider whether, and if so, under what terms and conditions, the public interest would be served by allowing the Metrolink application to be removed from the ambit of this Hearing Designation Order.”⁹⁶ After the HDO was released, Metrolink submitted its “Showing Pursuant to Footnote 7” to the Commission.⁹⁷ The Bureau agreed that Metrolink had adequately demonstrated that the public interest would be served by removing Metrolink’s PTC-related applications from the ambit of the HDO.⁹⁸ These submissions are currently pending before the Commission.

31. Additional applicants, such as Jackson and other utilities, submitted a similar request to the Commission to be considered under footnote 7 of the HDO.⁹⁹ Like Metrolink, each of these companies seeks to acquire a partitioned portion of the geographic spectrum licensed to MCLM.¹⁰⁰ In their submission to the Commission, these companies argued that, like Metrolink, they provide essential services to the public pursuant to federal mandates and use

⁹⁴ See HDO at footnote 7.

⁹⁵ See Metrolink’s Showing Pursuant to Footnote 7 (Metrolink’s Showing), submitted to the Commission on May 9, 2011, at ¶ 10.

⁹⁶ See HDO at footnote 7.

⁹⁷ See Metrolink’s Showing. On May 12, 2011, MCLM submitted a statement in support. See MCLM’s Showing Pursuant to Footnote 7 and Statement in Support, submitted to the Commission on May 12, 2011.

⁹⁸ See Enforcement Bureau’s Consolidated Comments On Showings Filed Pursuant To Footnote 7, submitted to the Commission on May 18, 2011.

⁹⁹ See Petition for Reconsideration, submitted to the Commission on May 19, 2011.

¹⁰⁰ See Petition for Reconsideration at p. 2. Duquesne Light Company also seeks the Commission’s approval for assignment of site-based license WHG750. *Id.*

their communications systems in the public interest to protect the safety of life and property.¹⁰¹

They further argued that the public interest favors removing their applications from the hearing and processing them independently.¹⁰² The filings related to the utilities' request are also currently pending before the Commission.

32. Thus, there is already a mechanism in place by which the Commission can consider whether the public interest would be served by allowing the Metrolink application (and the applications of Jackson and other applicants) to be removed from the ambit of the hearing. The Commission need not grant the expansive request for *Second Thursday* relief in response to MCLM and Choctaw's Application to act upon these other pending applications. Moreover, as discussed above, with the exception of the pending application submitted by Duquesne (which requests assignment of a single site-based license), these pending applications seek assignment of portions of MCLM's four geographic licenses.¹⁰³ Thus, the Commission does not need to suspend the hearing on MCLM's basic character qualifications and grant a wholesale assignment to Choctaw of every MCLM License, including the site-based licenses, in order to grant the pending applications and advance Commission policies concerning public safety.

IV. MCLM's Site-Based Licenses Should Not Be Assigned As Part of The Request for *Second Thursday* Relief Until It is Determined Whether They Are Invalid or Have Been Automatically Cancelled

33. In addition to MCLM's qualifications to be and remain a Commission licensee, the HDO also raised the question of whether MCLM's site-based licenses were invalidated for failure to timely construct pursuant to Section 80.49(a) of the Rules, and/or automatically cancelled due to permanent discontinuance of operations pursuant to Section 1.955(a)(3) of the

¹⁰¹ See id. at pp. 13-18.

¹⁰² See id. at pp. 13-18, 21-23.

¹⁰³ See *supra* notes 95 and 100.

Rules.¹⁰⁴ Under these Rules, a site-based license authorization terminates automatically by operation of law, without any further Commission action, if the licensee has failed to timely construct its site-based stations or permanently discontinued operations.¹⁰⁵

34. MCLM previously conceded that Issue (g) was unrelated to MCLM's qualification and should be resolved in the context of the hearing and not by application of the *Second Thursday* doctrine.¹⁰⁶ Based in part on this concession, the Presiding Judge ruled from the bench that Issue (g) "has to be litigated."¹⁰⁷ As a result, discovery on this Issue has proceeded since October 2011. The parties have devoted extensive time and resources to developing the record concerning the timing and adequacy of MCLM's construction and its discontinuance of operations at its site-based stations. This record indicates that MCLM chose to discontinue operations at nearly eighty percent of the locations of its site-based stations as of December 31, 2007, more than five years ago.¹⁰⁸ Thirty-four (34) of these discontinued stations are no longer even capable of providing service because MCLM lost access to the towers or sites for failure to maintain lease payments¹⁰⁹ or because utilities were disconnected.¹¹⁰ On March 21, 2013, the Presiding Judge confirmed that "Issue (g) shall continue to hearing."¹¹¹ MCLM and Choctaw's *Second Thursday* Submission does not present any basis for disturbing the Presiding Judge's ruling.

¹⁰⁴ See HDO at ¶¶ 61, 62(g). This is referred to in the hearing proceeding as Issue (g).

¹⁰⁵ See 47 C.F.R. §§ 80.49(a) and 1.955(a)(3).

¹⁰⁶ See *supra* note 12.

¹⁰⁷ 10/25 /11 Transcript (Exhibit 1) at p. 257.

¹⁰⁸ See Limited Stipulations Between the Enforcement Bureau and Maritime and Proposed Discovery Schedule, filed in EB Docket No. 11-71 on November 28, 2012, at ¶ 5.

¹⁰⁹ See, e.g., MCLM's Errata and Additional Information Regarding Amended and Further Supplemental Response to Interrogatories, served in EB Docket No. 11-71 on March 19, 2012 (Errata), submitted herewith as Exhibit 10, at Table 3.

¹¹⁰ See MCLM's Report Per Order FCC 12M-36, filed in EB Docket No. 11-71 on August 1, 2012 (Report Per Order FCC 12M-36), at ¶ 2; see also Errata (Exhibit 10) at Table 3.

¹¹¹ See Order, FCC 13M-6 (ALJ, rel. Mar. 21, 2013), released in EB Docket No. 11-71.

35. MCLM and Choctaw's *Second Thursday* Submission ignores material differences between the four (4) geographic MCLM Licenses, the auction of which precipitated the events that called into question whether MCLM is qualified to be and remain a Commission licensee, and the fifty-nine (59) locations of the site-based MCLM Licenses subject to Issue (g). The *Second Thursday* Submission appears to suggest that all sixty-three (63) Licenses should be assigned from MCLM to Choctaw pursuant to the *Second Thursday* doctrine. It does not cite any precedent in which the Commission has assigned licenses subject to hearing when there remained in the hearing a substantive issue other than the licensee's qualifications that affected the licenses in question. Nor does it offer any precedent in which the Commission used the *Second Thursday* process as a vehicle for deciding a substantive question subject to the Presiding Judge's jurisdiction. Nevertheless, the *Second Thursday* Submission argues that "good cause exists" here for the Commission to "waive any construction and operational requirements that might otherwise impair the ability of MCLM to transfer its licenses to Choctaw" and assign the site-based licenses to Choctaw.¹¹²

36. Pursuant to Section 1.925(a)(3) of the Rules, to obtain such a waiver, MCLM and Choctaw must demonstrate that the underlying purpose of the construction and operation rules would not be served or would be frustrated by application to the instant case, and that grant of the requested waiver would be in the public interest; or that, in view of the unique or unusual factual circumstances of the instant case, application of the construction and operation rules would be inequitable, unduly burdensome or contrary to the public interest, or that Choctaw has no reasonable alternative.¹¹³ MCLM and Choctaw have not met this standard.

37. In their *Second Thursday* Submission, MCLM and Choctaw first argue that

¹¹² *Second Thursday* Submission at p. 12.

¹¹³ See 47 C.F.R. § 1.925(a)(3).

construction deadlines have been waived and/or extended in other cases involving bankruptcy or the *Second Thursday* doctrine.¹¹⁴ However, the only two cases cited in the Submission are distinguishable from the instant case because they do not address licenses that have been designated for hearing or that were subject to a request for relief under *Second Thursday*.¹¹⁵ In addition, neither of these cases involved authorizations that arguably cancelled as a result of permanent discontinuance of operations.

38. MCLM and Choctaw next argue that the Commission should waive MCLM's construction and operation requirements because a finding that the site-based licenses automatically cancelled may result in MCLM being unable to transfer certain licenses to Choctaw and may "punish" innocent creditors.¹¹⁶ They offer no explanation, however, of how innocent creditors might be harmed if MCLM is unable to transfer its site-based licenses to Choctaw. Indeed, as discussed above, neither the *Second Thursday* Submission nor the Plan to which it refers identify which of the Licenses, if any, Choctaw intends to sell or even whether it intends to sell site-based licenses; how much money will be available for the innocent creditors if it sells the site-based licenses; or how much each such innocent creditor may receive.¹¹⁷ Thus, there is no way for the Commission to determine if innocent creditors might be harmed if Issue (g) is resolved in hearing.

39. Moreover, "in every case where the Commission revokes or fails to renew a license, creditors may be hurt."¹¹⁸ The Commission has not granted renewals or assignments for

¹¹⁴ See *Second Thursday* Submission at pp. 10-11.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at p. 11.

¹¹⁷ See *supra* ¶¶ 16-17. Only one of the pending agreements previously entered into by MCLM requests assignment of a site-based license. See Petition for Reconsideration at p. 2.

¹¹⁸ *Capital City Communications, Inc.*, 33 FCC 2d at 703, ¶ 17.

that reason alone.¹¹⁹ Instead, the Commission has recognized that a “license is not a vested property right and licensees undertaking such an investment in time and money must assume, as do all investors, the risk of an unprofitable venture, whether through normal business losses or loss of the license.”¹²⁰ Here, the creditors who formed Choctaw, and who account for more than half of MCLM’s obligations, should have known about legal challenges to MCLM’s site-based licenses when they invested in MCLM. Having thus assumed the risk that the site-based licenses might automatically cancel, MCLM and Choctaw should not be allowed now to rely on the potential for an adverse finding as the basis for the Commission to take the extraordinary step of deciding an issue designated for hearing and summarily waiving its construction and operation rules.

40. MCLM and Choctaw further argue that the Commission should waive MCLM’s operational requirements because the Commission allegedly “has never explained what constitutes permanent discontinuance in the context of AMTS stations,”¹²¹ and applying Section 1.955(a)(3) to MCLM’s site-based licenses would violate MCLM’s due process rights.¹²² Choctaw raised this same challenge to the Commission’s permanent discontinuance rule in the hearing proceeding.¹²³ As the Bureau argued in response to Choctaw’s Summary Decision Motion in the hearing proceeding,¹²⁴ and incorporates as part of its Comments herein, to prevail on this due process argument, MCLM and Choctaw must show that MCLM reasonably could

¹¹⁹ *See id.*

¹²⁰ *Mid-State Broadcasting Co.*, 61 FCC 2d at 196, ¶ 11.

¹²¹ *Second Thursday* Submission at p. 11.

¹²² *See id.* at pp. 11-12.

¹²³ *See* Choctaw’s Motion for Summary Decision of Issue (g), filed in EB Docket No. 11-71 on January 24, 2013 (Summary Decision Motion). On March 11, 2013, the Presiding Judge released an Order in which he deemed this pleading moot after it was determined that Choctaw had improperly been granted the right to intervene as a party in the hearing proceeding. *See* Order, FCC 13M-4 (ALJ, rel. Mar. 11, 2013) released in EB Docket No. 11-71.

¹²⁴ *See* Enforcement Bureau’s Opposition To Choctaw’s Motion For Summary Decision, filed in EB Docket No. 11-71 on February 7, 2013, at pp. 5-15.

have interpreted the permanent discontinuance rule to mean that failure to operate a station for years on end, without any excuse, would not result in termination of the underlying license by operation of law.¹²⁵ The permanent discontinuance rule is not, as MCLM and Choctaw's *Second Thursday* Submission suggests, *per se* unlawful because it is vague; the issue is whether the rule would be unlawful as applied in this case. It would not.

41. The law is clear that MCLM had fair notice if, by reviewing the Commission's regulations and other public statements, MCLM could identify, with ascertainable certainty, the standards with which it was expected to conform in operating its AMTS site-based stations.¹²⁶ A review of the relevant regulations and public statements by the Commission demonstrates that MCLM had fair notice that by not operating its AMTS site-based stations for multiple years it risked automatic termination of these licenses.

42. It is clear, for example, that the Commission expected MCLM to construct and operate its site-based stations.¹²⁷ The Commission has a compelling interest in ensuring that scarce, valuable spectrum does not lie fallow when it could be used to provide service to the public.¹²⁸ The Commission's rules plainly indicate that the consequence of permanently

¹²⁵ See *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000) (upholding due process challenge "[w]here ... the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements"); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995) (upholding due process challenge when the agency's interpretation was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed GE of the agency's perspective"); *Gates & Fox Co., Inc. v OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (holding that agency failed to give fair notice that regulation required use of breathing equipment when the regulation "would reasonably be read" not to require that equipment).

¹²⁶ See, e.g., *Trinity Broadcasting*, 211 F.3d at 628 (citations omitted).

¹²⁷ See, e.g., 47 C.F.R. § 80.49(a) and 47 C.F.R. § 80.1 *et al*; 47 C.F.R. § 1.955(a). See also *Mobex Network Services, LLC*, 25 FCC Rcd 3390 (2010); *Northeast Utilities Service Co.*, 24 FCC Rcd 3310 (WTB 2009); *Mobex Network Services, LLC*, 22 FCC Rcd 665 (WTB Jan. 23, 2007); *Mobex Network Services, LLC*, 22 FCC Rcd 1311 (WTB Jan. 29, 2007); *Paging Systems, Inc.*, 21 FCC Rcd 7225 (WTB July 7, 2006); *Mobex Network Services, Inc.*, 19 FCC Rcd 24939 (WTB 2004).

¹²⁸ See, e.g., *Pacific Gas & Electric Co.*, 26 FCC Rcd 3465, 3467 (WTB 2011) ("The purpose of the construction and permanent discontinuance rules is [to] ensure use of licensed spectrum, and prevent licensees from warehousing spectrum"); *Northstar Technology, LLC*, 24 FCC Rcd 13476, 13479 (WTB 2009) ("We agree with the Applicants that a purpose of section 1.955(a)(3) is to ensure use of licensed spectrum and to prevent its warehousing

discontinuing operations is automatic termination of the license.¹²⁹

43. Moreover, MCLM had fair notice of what was “expected of it” with regard to the operation of its site-based stations.¹³⁰ As early as December 2004 – a year before MCLM acquired the site-based licenses in question – the Wireless Bureau made clear that “AMTS facilities must be constructed within a specified time and must remain operational in order for the license to remain valid.”¹³¹ The Wireless Bureau reiterated this same warning in July 2006 and January 2007,¹³² well before MCLM made the decision to discontinue service on many of its site-based stations in December 2007.¹³³ In articulating the standards that it expected AMTS licensees to meet, the Wireless Bureau cited to Sections 1.955(a) and 80.49(a) of the Rules. Section 1.955(a)(3) confirms that, in the absence of specific Commission action, authorizations automatically terminate if service is permanently discontinued.¹³⁴ Section 80.49(a)(3) requires that an AMTS facility be “placed in operation” within two years from the grant: “[I]f the station or frequencies authorized have not been placed in operation within two years from the date of the grant, the authorization becomes invalid and must be returned to the Commission for cancellation.”¹³⁵ These rules and the Wireless Bureau’s 2004, 2006 and 2007 AMTS-related decisions put MCLM on notice that for its site-based licenses to remain valid, its stations must be

by a licensee.”); *Northstar Technology, LLC*, 19 FCC Rcd 3015, 3022 (WTB 2004) (recognizing that the Commission’s performance requirements are intended “to ensure speedy delivery of service to the public, and to prevent stockpiling or warehousing of spectrum by licensees”).

¹²⁹ See 47 C.F.R. § 1.955(a)(3) (“Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued.”); see also 47 C.F.R. § 80.49(a)(3) (“[I]f the station or frequencies authorized have not been placed in operation within two years from the date of the grant, the authorization becomes invalid and must be returned to the Commission for cancellation.”).

¹³⁰ See Summary Decision Motion at pp. 9-10 (quoting *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (citations omitted)).

¹³¹ *Mobex Network Services, LLC*, 19 FCC Rcd at 24940.

¹³² See *Paging Systems, Inc.*, 21 FCC Rcd 7225 (WTB July 7, 2006); *Mobex Network Services, LLC*, 22 FCC Rcd 665, 666 (WTB Jan. 23, 2007) and *Mobex Network Services, LLC*, 22 FCC Rcd 1311 (WTB Jan. 29, 2007).

¹³³ See *supra* note 108.

¹³⁴ See 47 C.F.R. § 1.955(a)(3).

¹³⁵ See 47 C.F.R. § 80.49(a)(3).

placed in operation within a specified time and must remain in operation.

44. There is also Commission precedent directed to the question of permanent discontinuance of an AMTS license raised by Issue (g). In its March 2009 decision in *Northeast Utilities Service Co.*,¹³⁶ the Wireless Bureau placed MCLM on notice that “Part 80 licensees may not cease operations indefinitely without the license terminating for permanent discontinuance,”¹³⁷ and that the Wireless Bureau would “evaluate claims of permanent discontinuance on a case-by-case basis.”¹³⁸ In *Northeast Utilities*, the licensee suspended operations at the licensed location – the World Trade Center in New York City – when it was destroyed by the September 11, 2001 terrorist attack. The Wireless Bureau concluded that the licensee’s due diligence to secure a new space to operate demonstrated that the discontinuance was not yet permanent.¹³⁹ In reaching that conclusion, the Wireless Bureau considered evidence of communications, beginning in 2005, between the licensee and the entity administering the Freedom Tower antenna concerning the licensee’s request to operate on the new tower.¹⁴⁰ Thus, as of March 2009, MCLM had fair notice that it could cease operations at a site without the license terminating for permanent discontinuance if (1) operations were discontinued due to events beyond its control, like a terrorist attack; and (2) objective evidence showed that it was making reasonable efforts to resume operations at the site.

45. A year later, in *Mobex Network Services, LLC*,¹⁴¹ the Commission provided MCLM with additional guidance concerning the circumstances in which it would deem AMTS operations permanently discontinued. Therein, the Commission concluded that evidence that a

¹³⁶ 24 FCC Rcd 3310 (WTB 2009).

¹³⁷ *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 3316 n. 19 and n. 40.

¹⁴¹ 25 FCC Rcd 3390 (2010).

licensee had failed to maintain or operate equipment at a licensed location for multiple years “is sufficient to demonstrate permanent discontinuance of operation.”¹⁴² The evidence in question was an affidavit stating that the licensee had removed equipment from the licensed location nearly three years earlier and had not received electric power supply to its equipment after that date. This decision was released on March 16, 2010. At the very least, it provided MCLM with fair notice as of 2010 that if it did not have equipment at any of its licensed locations for multiple years or if any of its equipment did not receive electricity for multiple years, the Commission would consider those stations permanently discontinued.

46. From the AMTS precedent alone, a reasonable person would have understood the Commission’s rules and precedent as requiring an AMTS licensee to maintain operations at its stations for the licenses to remain valid.¹⁴³ A reasonable person would also have understood that an AMTS licensee could not cease operations of its stations indefinitely without that license terminating for permanent discontinuance.¹⁴⁴ In addition, a reasonable person would have understood that, in considering the particular circumstances of a discontinuance of AMTS operations, the Commission would look to such factors as whether the licensee maintained equipment at the licensed location, whether electric power was being supplied to equipment at the licensed location, and the licensee’s due diligence in re-commencing operations at the licensed location or an alternative location.¹⁴⁵ A reasonable person would have also understood that the Commission would consider how many years the stations had not been operating and why operations had been discontinued.¹⁴⁶

¹⁴² *Mobex Network Services, LLC*, 25 FCC Rcd at 3395.

¹⁴³ See *Mobex Network Services, LLC*, 19 FCC Rcd at 24940; *Paging Systems, Inc.*, 21 FCC Rcd at 7225; *Mobex Network Services, LLC*, 22 FCC Rcd at 666 and *Mobex Network Services, LLC*, 22 FCC Rcd at 1311.

¹⁴⁴ See *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314.

¹⁴⁵ See *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314; *Mobex Network Services, LLC*, 25 FCC Rcd at 3395.

¹⁴⁶ See *supra* note 145.

47. The Commission’s definitions of “permanent discontinuance” in rules governing other wireless services further enabled MCLM to identify, with ascertainable certainty, that it could not discontinue operations of its site-based licenses for multiple years without risking termination of its authorizations. Section 22.317 of the Rules, for example, states that “any station that has not provided service to subscribers for 90 continuous days is considered to have been permanently discontinued, unless the applicant notified the FCC otherwise prior to the end of the 90 day period and provided a date on which operation will resume, which date must not be in excess of 30 additional days.”¹⁴⁷ Section 90.157(a) of the Rules defines permanent discontinuance as suspension of operations for one year or more.¹⁴⁸

48. In light of this precedent, a reasonable person also would have been able to identify, with ascertainable certainty, that it could not meet its operating requirements by simply having equipment at the licensed locations that was capable of providing service but was not doing so. Merely building a facility that was capable of utilizing the licensed spectrum but then allowing it to sit dormant for years without using the spectrum would be at odds with the Commission’s licensing structure as a whole and would make a mockery of the Commission’s long-standing policy against warehousing spectrum.¹⁴⁹

49. MCLM and Choctaw’s *Second Thursday* Submission is wrong, therefore, when it asserts that “there is no legal basis upon which either the Presiding Judge or the Commission can lawfully conclude that the site-based licenses automatically cancelled due to permanent discontinuance.”¹⁵⁰ As the Bureau has demonstrated above, there is clearly AMTS-specific precedent from which the Presiding Judge (and later, the Commission) may render such a

¹⁴⁷ See 47 C.F.R. § 22.317.

¹⁴⁸ See 47 C.F.R. § 90.157(a).

¹⁴⁹ See *supra* note 128.

¹⁵⁰ *Second Thursday* Submission at p. 11.

judgment. This precedent, together with other Commission rules and policies, provided MCLM with fair notice of what would constitute permanent discontinuance of an AMTS site-based station. MCLM had fair notice that, in considering whether MCLM's site-based authorizations should be terminated for permanent discontinuance of operations, the Presiding Judge – and the Commission – would consider the specific facts of this case, including that MCLM has not operated equipment at certain licensed locations since it acquired the licenses in late 2005;¹⁵¹ that it removed equipment or dismantled towers at certain of its locations as early as 2009;¹⁵² that utilities were discontinued at other locations as early as 2009;¹⁵³ and that it chose to discontinue operations at a majority of its site-based stations as of December 31, 2007, more than five years ago.¹⁵⁴

50. Even if the Commission, and not the Presiding Judge, were to adjudicate whether MCLM's site-based licenses are invalid and have been automatically cancelled, MCLM and Choctaw's *Second Thursday* Submission has failed to show that "good cause exists for the Commission to waive any construction and operational requirements that might otherwise impair" MCLM's ability to transfer its Licenses to Choctaw.¹⁵⁵ Instead, in accordance with the Commission's precedent concerning permanent discontinuance of AMTS licenses, the Commission should consider the factual record developed in the hearing proceeding before reaching a conclusion on MCLM's site-based licenses.

¹⁵¹ See Report Per Order FCC 12M-36 ¶ 2; Errata (Exhibit 10) at Table 3.

¹⁵² See *supra* note 151.

¹⁵³ See, e.g., Errata (Exhibit 10) at Table 3.

¹⁵⁴ See *supra* note 108.

¹⁵⁵ See *Second Thursday* Submission at p. 12.

Respectfully submitted,

P. Michele Ellison
Chief, Enforcement Bureau



Pamela S. Kane
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau

Brian J. Carter
Attorney
Investigations and Hearings Division
Enforcement Bureau

Federal Communications Commission
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

May 9, 2013

CERTIFICATE OF SERVICE

Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 9th day of May, 2013, sent by first class United States mail copies of the foregoing "**COMMENTS OF THE ENFORCEMENT BUREAU ON MCLM AND CHOCTAW'S *SECOND THURSDAY* SUBMISSION**" to:

Roger Noel
Chief, Mobility Division, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554 (by hand, courtesy copy)

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554 (by hand, courtesy copy)

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

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

Sandra DePriest
Maritime Communications/Land Mobile LLC
218 North Lee Street
Suite 318
Alexandria, Virginia 22314

Dennis C. Brown
8124 Cooke Court
Suite 201
Manassas, VA 20109
Counsel for Maritime Communications/Land Mobile LLC

Jeffrey L. Sheldon
Levine, Blaszak, Block & Boothby, LLP

2001 L Street, NW, Suite 900
Washington, DC 20036
Counsel for Puget Sound Energy, Inc

Jack Richards
Wesley Wright
Keller & Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001

Counsel for Atlas Pipeline – Mid Continent LLC; DCP Midstream, LP; Enbridge Energy Co., Inc.; EnCana Oil and Gas (USA), Inc.; and Jackson County Rural Membership Electric Cooperative

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

Paul J. Feldman
Harry F. Cole
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, VA 22209
Counsel for Southern California Regional Rail Authority

Matthew J. Plache
Albert J. Catalano
Catalano & Plache, PLLC
3221 M Street, N.W.
Washington, D.C. 20007
Counsel for Dixie Electric Membership Corp.
Counsel for Pinnacle Wireless Corp.


Makia Day