

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

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

Petition to Dismiss or Deny, and Comments
of SkyTel-1 Entities

The undersigned entities, together herein the “SkyTel-1 Entities” or “SK1,” hereby petition to deny the Application including all of its component requests (the “PD”). SK1 also submits this filing as Comments in the Docket as called for in the PN.¹ Certain terms are defined in the caption above for efficiency. If other entities that are affiliated with SK1 do not file by the end of today, May 9, 2013 a separate petition challenging the Application, then they join in this PD: these other entities are listed on the signature page below.²

¹ The term “PD” also means these Comments.

² Each entities identified on the signature page as a “SkyTel” entity reserves the right, as a distinct legal entity (which the FCC has recognized numerous times prior to the Maritime bankruptcy was commenced) to submit further pleadings in this docket on and individual basis. Also, each such entity was recognized as a distinct party in FCC 11-64 that commenced the Maritime hearing under docket 11-71, which in turn triggered the bankruptcy.

Maritime Communications/Land Mobile, LLC (MCLM), and Choctaw Telecommunications, LLC, and Choctaw Holdings, LLC (collectively, “Choctaw”), have petitioned the Commission for consent to assign Automated Maritime Telecommunications System (AMTS) licenses held by MCLM to Choctaw. This filing memorandum (the “PD”) outlines reasons why this petition should be denied.

SK-1 also references the SK-2 Petition to Deny and Comments of “SkyTel-2” (or “SK-2”) filed today, May 9, 2013, and incorporates herein said SK-2 filing.

This PD includes Exhibits A to __ referenced in the text below, and in addition includes other appended material supportive of the assertions and arguments herein.

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Introduction and Summary

The Contents descriptive listings above provide an initial summary.

Maritime Communications/Land Mobile, LLC (MCLM), and Choctaw Telecommunications, LLC, and Choctaw Holdings, LLC (collectively, “Choctaw”), have petitioned the Commission for consent to assign Automated Maritime Telecommunications System (AMTS) licenses held by MCLM to Choctaw. This filing memorandum (the “PD”) outlines reasons why this petition should be denied. Instead, the Commission should follow the presumptive, baseline approach of *Jefferson Radio* as a fundamental policy in furtherance of the Commission’s obligation under 47 U.S.C. § 310(d) to ensure that every transfer, assignment, or disposal of a construction permit or station license serves the public interest, convenience, and necessity. *Second Thursday* is an exceptional doctrine that grants relief from *Jefferson Radio* if and only if strict conditions are satisfied.

MCLM and Choctaw have not demonstrated and cannot demonstrate those conditions. They fail to satisfy *Second Thursday* on no fewer than seven distinct grounds.

First, the alleged wrongdoers, particularly Donald DePriest, stand to benefit from the transaction. The proposed transaction would release Mr. DePriest from personal guarantees

worth more than \$10 million. Moreover, MCLM has assumed another \$7 million in debts connected to Donald DePriest and his wife, Sandra, the chief operating officer of MCLM.

Second, testimony by two of MCLM's officers, Sandra DePriest and John Reardon, makes it amply clear that MCLM declared bankruptcy for the express purpose of circumventing the Commission's hearing designation order and the *Jefferson Radio* doctrine. This is a wholly inappropriate abuse of *Second Thursday*.

Third, this transaction does not advance *Second Thursday*'s goal of compensating innocent creditors. Choctaw is comprised of MCLM's creditors. These creditors — who are more accurately described as investors — are not innocent. They became entangled with MCLM with full knowledge of the conduct that prompted the Commission to order MCLM to show cause and to designate MCLM's qualifications as a licensee for hearing.

Fourth, because this proposed transaction may yield proceeds far in excess of creditors' claims against MCLM, the Choctaw investors stand to reap a huge windfall should the Commission grant *Second Thursday* relief. Again, this narrow exception from a Commission policy crafted to vindicate the public interest standard of 47 U.S.C. § 310(d) should not be abused as the vehicle for laundering licenses and circumventing the Commission's mechanisms for safeguarding the public interest.

Fifth, MCLM has made no effort to satisfy its creditors' claims by invoking Donald DePriest's personal guarantees and/or other remedies available under state law. This failure to exhaust remedies shy of resort to *Second Thursday* makes invocation of that equitable doctrine quite improper.

Sixth, in a fashion heretofore unseen in cases applying *Second Thursday*, excusing MCLM from its hearing designation order would imperil the competing rights of Warren Havens and affiliated SkyTel companies. If the Commission ultimately does conclude that MCLM's conduct disqualifies it to hold licenses issued by the Commission, Mr. Havens and SkyTel may

become the rightful licensee for AMTS spectrum currently controlled by MCLM. The potential deprivation of a competing licensee's rights makes this case a particularly inappropriate candidate for application of the *Second Thursday* doctrine.

Seventh and finally, to the extent that the Commission wishes to grant MCLM and Choctaw waivers from regulatory obligations that MCLM has failed to uphold, the appropriate vehicle for such relief lies in the Commission's waiver policies rather than the extraordinary remedy of *Second Thursday*.

This memorandum now turns to each of the foregoing reasons for denying the *Second Thursday* relief requested by MCLM and Choctaw and instead subjecting MCLM and its licenses to *Jefferson Radio* and to the Commission's hearing designation order.

We also provide comments under the PN within various sections below, and in a separately stated section suggesting clarifications of FCC policy on extraordinary relief.

Part I

Background and Second Thursday doctrine or policy

The AMTS licenses at issue have been designated for hearing with respect to issues relating to MCLM's qualifications to hold licenses issued by the Commission. *See Maritime Communications/Land Mobile, LLC*, 26 F.C.C.R. 6520 (2011). Longstanding Commission policy provides that the Commission will not consider an application to assign licenses where the qualifications of the licensee have come into question. *See Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1974). The so-called *Second Thursday* doctrine permits the Commission to grant relief from this prohibition when all of the following conditions are satisfied:

- 1 Alleged wrongdoers (i.e., those whose conduct have brought the licensee's qualifications into question) must not be involved in the management of the new licensee.
- 2 Wrongdoers must receive no more than de minimis benefit from the proposed transfer of licenses.

- 3 Transfer is the only practical means of providing recovery by innocent creditors.
- 4 The overall balance of equities favors the public interest and therefore approval of the transfer notwithstanding disqualifying behavior by the licensee and/or individuals associated with the licensee

See In re Second Thursday Corp., 22 F.C.C.2d 515 (1970), *reconsideration granted in part*, 25 F.C.C.2d 112 (1970).

1. *Improper personal benefit to Donald DePriest*

A prohibition on benefit to wrongdoers is the very heart of *Second Thursday*. By conferring considerable economic benefits on Donald DePriest, the very actor whose conduct (along with that of his wife, Sandra DePriest) triggered MCLM's hearing designation order, the proposed transfer of licenses would violate this condition.

A large portion of Mr. DePriest's potential economic benefit subsists in personal guarantees that he will, in all likelihood, never be asked to honor if the Commission grants *Second Thursday* relief and thereby enables Choctaw to sell MCLM's licenses and pay MCLM's creditors. The ultimate practical effect of granting Choctaw's *Second Thursday* petition is the eventual forgiveness of Mr. DePriest's personal guarantees.

Although Mr. DePriest's personal guarantees (and the loan documents related to them) are marked *Highly Confidential, Attorney's Eyes Only*, valuable information regarding the guarantees was publicly filed or was the subject of testimony in MCLM's bankruptcy case. First, MCLM's Schedules and Statement of Financial Affairs describe Donald DePriest as a co-debtor of MCLM.³ While the MCLM's schedules as debtor do not specify the amount of MCLM debt

³ See Maritime's Statement of Financial Affairs, Dkt. No. 46; Summary of Schedules, Dkt. No. 46; Amended Statement of Financial Affairs, Dkt. No. 170; Amended Summary of Schedules,

that Donald DePriest guaranteed, Sandra DePriest testified at the 11 U.S.C. § 341 “meeting of the creditors” that that amount was approximately \$8 million.⁴ Furthermore, the competing (and ultimately withdrawn) reorganization proposal submitted by Council Tree, Inc., identifies troubling issues regarding Mr. DePriest’s guarantees. CTI’s analysis estimates that the amount guaranteed is approximately \$11.5 million.⁵

Our own analysis of Donald DePriest’s personal guarantees approaches CTI’s estimate. We estimate that consummation of this transfer, if approved by the Commission, would effectively and ultimately relieve Donald DePriest of nearly \$11.2 million in obligations under personal guarantees issued by Mr. DePriest to creditors of MCLM:

Creditor	Amount
C. Chris Dupree	\$2,782,293.06
R. Hayne Hollis III	\$2,784,293.06
Watson & Downs, LLC	\$2,784,293.06
Clark and Whitney deR. Bullock	\$250,000.00
Bruce A. Davis, M.D.	\$80,000.00
Michael P. Dunn	\$97,576.70
Fred C. Goad	\$191,699.00

Dkt. No. 170, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

⁴ See 341 Transcript at p. 112, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

⁵ See CTI Proposal, Dkt. #688-8, at p. 24, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011) (“The Choctaw plan does not acknowledge or address the large benefit that Choctaw provides the DePriests in forgiving an est. \$11.5 million in DePriest personal guarantees. The guarantees are forgiven by the individual SECF lenders, including those same entities that are owners of the proposed Maritime acquirer, Choctaw.”).

David Shelton	\$125,000.00
Douglas C. Sellers	\$48,788.35
Harrison J. Shull	\$177,000.00
James L. Teel	\$320,000.00
James Tatum	\$88,500.00
Justin Shelton	\$250,000.00
Lynette A. McCary	\$177,000.00
Retzer Resources	\$250,000.00
Sexton, Inc.	\$390,306.80
The Maritime Communications Group	\$110,000.00
William Isaacson	\$250,000.00
Total	\$11,156,750.03

Release from these personal guarantees is hardly the only benefit that Donald DePriest would realize. In litigation against Donald DePriest and affiliated companies, Oliver Phillips secured a Mississippi court judgment for nearly \$9.4 million in damages and attorney’s fees. Pursuant to a settlement described in the bankruptcy court as Proof of Claim No. 66, Mr. Phillips settled that claim for \$6.5 million. According to the order and judgment of the Chancery Court of Lowndes County, Mississippi, in *Phillips v. DePriest*, Cause No. 2007-0526 (June 30, 2009) [attached as Exhibit ___], roughly \$6 million in damages involved DePriest-controlled companies besides MCLM. Another \$3 million in damages stemmed from promissory notes dated between 2000 and 2004 — before the formation of MCLM. MCLM’s election to assume this debt and to subject it to the bankruptcy court for the Northern District of Mississippi confers a direct benefit on Donald DePriest.

The *Second Thursday* doctrine regards a reduction in debts owed to third parties as a benefit to a wrongdoer. *See, e.g., In re Grayson Enterprises, Inc.*, 77 F.C.C.2d 152, 154 (1980). Together, the effective forgiveness of nearly \$11.2 million in personal guarantees and MCLM's assumption of Oliver Phillips's \$6.5 million claim constitute nearly \$17.6 million (\$17,656,750.03, to be exact) in benefit that would accrue to Mr. DePriest upon the transfer of MCLM's licenses to Choctaw.

Remarkably, this does not exhaust Mr. DePriest's potential gain. Scotland House holds a \$350,000 claim in MCLM's bankruptcy proceeding. According to the State of Mississippi's corporate records, Donald and Sandra DePriest are directors or officers of Scotland House. Before 2012, Mr. and Mrs. DePriest were the sole directors and officers of Scotland House. [See **Exhibit(s) ____**.] If the effective satisfaction of this \$350,000 claim is credited to Mr. DePriest, it would raise his total economic benefit from the Choctaw transaction to almost exactly \$18 million (\$18,006,750.03).

By any of the foregoing measures, the amounts at issue are substantial. In absolute and in relative terms, Donald DePriest, the alleged wrongdoer who has cast a shadow on MCLM's qualifications to be licensed by the Commission, stands to profit richly from any grant of *Second Thursday* relief. Far more modest amounts have obstructed the application of *Second Thursday*. For instance, in *In re Shell Broadcasting*, 38 F.C.C.2d 929 (1973), the Commission recognized that a \$30,500 benefit to the mother of an alleged wrongdoer "would require denial" of a *Second Thursday* petition. *Id.* at 931 (acknowledging that the wrongdoer and his mother had filed a waiver of that claim in a state court). Whether computed as \$11.2 million, \$17.6 million, or \$18.0 million, the benefit to Donald DePriest is quite substantial relative to the \$31.2 million in

total debt that MCLM reported in its confirmation hearing before the bankruptcy court. The benefit to Donald DePriest ranges roughly from 35 to 58 percent of the total of MCLM's debt.

Mr. DePriest's considerable wealth, estimated by the *Knoxville News Sentinel* to be \$98 million as of 1999, *see* <http://www.knoxnews.com/news/2009/apr/12/tax-trouble-and-lawsuits>, poses a further barrier to *Second Thursday* relief. In cases applying this doctrine, the Commission has given weight to the fact that a wrongdoer, even after receiving some benefit from a transfer of licenses, would continue to bear debts exceeding his or her assets and would continue to be subject to the supervision of a bankruptcy court. *See In re Pyle Communications of Beaumont, Inc.*, 4 F.C.C.R. 8625, 8626 (1989); *In re Oyate, Inc.*, 3 F.C.C.R. 6579, 6762 (1988). Whatever the actual magnitude of his wealth today, Mr. DePriest presumably is far from insolvent. Nor has he declared bankruptcy. Under these circumstances, the benefit that Mr. DePriest would reap from the proposed transfer would catapult him far beyond the reach of federal regulatory or judicial authority.

2. *MCLM's motivation in petitioning for bankruptcy — and for Second Thursday relief*

In administering requests for relief under *Second Thursday*, the Commission has taken pains to detect whether a licensee, already under suspicion of having committed acts that have cast doubt on its qualifications to be licensed, "is utilizing federal bankruptcy law merely to escape the consequences of its failure to abide by obligations imposed by the Communications Act, or by the Commission's rule[s] and policies." *In re Family Broadcasting, Inc.*, 25 F.C.C.R. 7591, 7602 & n.62 (2010). Where a wrongdoer "has attempted to use the fact of" a licensee's "indebtedness to create a scenario which would bring him within the *Second Thursday* doctrine for his own interests," the Commission should and does deny *Second Thursday* relief. *In re*

Debrine Communications, Inc., 8 F.C.C.R. 5462, 5463 (1993); *see also Oyate*, 3 F.C.C.R. at 6764 (Dennis, Comm’r, dissenting) (“The evidence suggests that [the licensee] assumed the debt, and then declared bankruptcy, in an attempt to exploit the *Second Thursday* doctrine for its own advantage.”).

There is strong evidence that MCLM has done just this — MCLM appears to have put itself into bankruptcy in order to trigger *Second Thursday* and to dodge thereby the potentially devastating consequences of *Jefferson Radio* and the Commission’s hearing designation order. MCLM filed for Chapter 11 protection only after the Commission issued a show cause/hearing designation order that cast doubt on MCLM’s basic qualifications to be licensed. Sandra DePriest, chief executive officer of MCLM, testified before the bankruptcy court that the hearing designation order, coupled with *Jefferson Radio*’s bar on the transfer of licenses by a licensee whose qualifications have come under question, had hobbled MCLM’s efforts to complete its transactions. Mrs. DePriest openly admitted that a declaration of bankruptcy would facilitate *Second Thursday* relief and enable MCLM to escape the consequences of the Commission’s hearing designation order.

John Reardon, another MCLM employee (and later CEO in his own right), went even further. On August 1, 2011, approximately four months after the Commission ordered MCLM to show cause and designate the matter for hearing, MCLM filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Mississippi. The next day, Mr. Reardon called “Chris” of CoServ Electric with “good news” and left the following voice mail message:

Hey Chris. I actually have some interesting news to share with you. I think it’s good news, but it doesn’t sound like it. We filed chapter 11 yesterday in [the]

Northern District of Mississippi in Federal Court. And what that does is it stops the hearing at the FCC from taking place and allows the bankruptcy judge to essentially tell the FCC to approve the transactions that are pending [*i.e.*, the pending asset purchase agreements between MCLM and various counterparties such as CoServ] and then the money would just go into an escrow account with the bankruptcy court and they would pay out our lenders. The benefit of that is innocent third parties such as CoServ get their spectrum and are not injured as a result of any wrong doing by our former owner Sandra DePriest and her husband. She and her husband just basically walked away and filed chapter 11 yesterday
.....⁶

Mr. Reardon took active delight in describing the benefits that MCLM expected to reap from a bankruptcy filing and an eventual petition for *Second Thursday* relief. Mr. Reardon's behavior bears a striking, uncanny resemblance to that of a radio station general manager who described the station's decision to file for bankruptcy "was the best way to protect [its] license from being revoked" by the Commission. *Oyate*, 3 F.C.C.R. at 6764 & n.1 (Dennis, Comm'r, dissenting). Among the purposes that animate *Second Thursday*, a naked desire to evade the Commission's investigative jurisdiction and substantive policies has no legitimate place.

3. *The Choctaw Investors are not "innocent" creditors*

Although *Second Thursday* emphatically strives to strip wrongdoers of economic benefit from a transfer of licenses and managerial involvement in the new licensee, Mr. and Mrs. DePriest, MCLM, and the principals of the Choctaw companies are thoroughly entangled. So close are those relationships that the creditors who stand to benefit most from this proposed transfer cannot meaningfully be considered "innocent."

⁶ See SkyTel's Objection to Confirmation, Dkt. #806 at p. 51 n.223, *In re MCLM Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011). This voice mail message was played into the record at the Confirmation Hearing (see Confirmation Hearing Transcript Vol. I, at p. 131:7), and a transcription thereof was entered into evidence at the Confirmation Hearing as SkyTel Exhibit 2. See Witness and Exhibit List, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

Four existing creditors, R. Hayne Hollis III; Watson & Downs, LLC; Patrick B. Trammell; and Collateral Plus Fund 1, L.P., (collectively the “Choctaw Investors”), who collectively hold overwhelmingly secured rather than unsecured debt, will own all of Choctaw.⁷ A closer look at the circumstances under which each of these creditor/investors became financially involved with MCLM reveals the Choctaw Investors’ lack of innocence:

1. Mr. Hollis and the Watson & Downs group extended credit on a secured basis to MCLM after Auction 61 and after Warren Havens challenged the geographic licenses that MCLM acquired in that auction. On the basis of the Commission’s Universal Licensing Service, these creditors knew (or at least had every reason to know) of challenges to MCLM’s ownership and of the basis for those challenges. Mr. Hollis has asserted a secured claim in the bankruptcy case in the amount of \$2,784,293.06, allegedly arising out of a loan Hollis extended to MCLM on December 29, 2005⁸ — four months after Auction 61 closed⁹ and one month after Mr. Havens filed a *Petition to Deny Maritime’s Form 601 Application for Auction 61*.¹⁰
2. Watson & Downs has asserted a secured claim in the bankruptcy case in the amount of \$3,046,665.28, allegedly arising out of a loan extended to MCLM on December

⁷ The following claims in MCLM’s bankruptcy proceeding, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011), are associated with the Choctaw Investors:

1 ⁷Mr. Hollis: Claim Nos. 72-1, 72-2

2 ⁷Watson & Downs: Claim Nos. 75-1, 75-2, 75-3

3 ⁷Mr. Trammell: Claim No. 74-1

4 ⁷Collateral Plus: Claim Nos. 46-1, 48-1, 48-2, 49-1, 49-2

⁸ See Claim Nos. 72-1, 72-2.

⁹ See *Auction of AMTS Closes*, 20 F.C.C.R. 13,747 (2005).

¹⁰ See *Petition to Deny Application*, FCC File No. 0002303355 (filed Nov. 2005) (Report No. AUC-61-G (Auction No. 61)).

29, 2005¹¹ — also four months after Auction 61 closed and one month after Mr. Havens filed his *Petition to Deny Maritime's Form 601 Application for Auction 61*.

3. Collateral Plus became involved under even more egregious circumstances. According to proofs of claim filed in MCLM's bankruptcy case, Collateral Plus has asserted secured claims against Maritime in the total amount of \$9,426,618.76.¹² Of that amount, Collateral Plus assumed \$9,004,203.60 from Pinnacle National Bank on November 15, 2011¹³ — *three months after MCLM filed for bankruptcy*.¹⁴ Collateral Plus was fully informed of all threats to its likelihood of recovering its investment.
4. Mr. Trammell has somehow transformed a single unsecured claim worth approximately \$136,000.00¹⁵ to a 10 percent stake in Choctaw.¹⁶

The upshot of all this evidence is both simple and disturbing. Choctaw was formed solely to facilitate efforts to obtain MCLM's licenses through the bankruptcy case and through a *Second Thursday* petition before the Commission. As set forth above, all of the Choctaw Investors — Mr. Hollis, Watson & Downs, Collateral Plus, and Mr. Trammell — are or were creditors of MCLM.

This is to say nothing of the Choctaw Investors' many entanglements with MCLM, Mr. and Mrs. DePriest, and Southeastern Commercial Finance ("SECF"), MCLM's DIP lender.

¹¹ See Claim Nos. 75-1, 75-2, 75-3.

¹² See Claim Nos. 46-1, 49-2.

¹³ See Claim No. 49-2.

¹⁴ See Petition, Dkt. 1, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

¹⁵ See Claim No. 74-1.

¹⁶ See Confirmation Hearing Transcript Vol I, 201:11-15, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

Three Choctaw Investors are also members of SECF.¹⁷ Those members are Watson & Downs member John H. Watson, Mr. Hollis, and Mr. Trammell.¹⁸ Mr. Trammel is also the DIP lender's managing member,¹⁹ and Messrs. Trammell, Watson, and Hollis are collectively the sole members of the DIP lender's Board of Managers.²⁰ From 1996 until June of 2012,²¹ Donald DePriest held a 10.52% membership interest in the DIP lender.²²

Further connections link certain Choctaw Investors to Donald DePriest.²³ For example, Donald DePriest was at one time the Chairman of MCT Corp, and Messrs. Watson and Trammell both made minimal equity investments in MCT in 1998.²⁴ Further, Lucius Burch, who holds an 11% membership interest in Collateral Plus, served on MCT's Board of Directors.²⁵

¹⁷ See Choctaw Proposal, Dkt. #668-5, p. 1, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See generally Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 188:19-20, 196:11-17, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

²² See Choctaw Proposal, Dkt. #668-5, at p. 2, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

²³ For a detailed chart describing the intertwining connections between Choctaw, Mr. and Mrs. DePriest, and MCLM, see CTI Proposal, Dkt. #688-8, at pp. 22-23, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011). As noted above, "CTI" stands for Council Tree, Inc., the proponents of a competing reorganization plan withdrawn on the eve of the confirmation hearing before the bankruptcy court.

²⁴ See Choctaw Proposal, Dkt. #668-5, at p.2, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

²⁵ See Choctaw Proposal, Dkt. #668-5, at pp. 2-3.

Under the Choctaw Proposal, filed in the bankruptcy case, the Choctaw Investors assigned their respective claims to Choctaw Telecommunications, LLC.²⁶ In exchange for and in satisfaction of Choctaw Telecommunication, LLC's claims against the MCLM, the Chapter 11 plan proposes that the MCLM will transfer the licenses at issue here to Choctaw Holding, LLC, a subsidiary of Choctaw, subject to and upon approval by the Commission.²⁷

For its part, SECF has almost too consciously undersupplied the \$90,000 per month that MCLM has identified as the amount needed to sustain ordinary business operations.²⁸ Yet SECF has seen fit to lend the very money that the Choctaw Investors need to conduct what is tantamount to a leveraged buyout of MCLM's FCC-regulated assets.²⁹ At the bankruptcy confirmation hearing, Trammell testified that SECF will fund Choctaw's operations through a "\$2 million line of credit loan to be drawn as needed."³⁰

In short, these are not innocent creditors within the meaning of *Second Thursday*. They are knowing creditors. They are opportunistic investors.

²⁶ See Choctaw Proposal, Dkt. #668-5, at p. 3.

²⁷ See, e.g., Choctaw Proposal, Dkt. #668-5, at p. 3; Plan, Dkt. #669, at p. 10, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

²⁸ See Confirmation Hearing Transcript Vol I, 88:15-18 *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011) (testimony by John Reardon regarding MCLM's "burn rate" of \$90,000 a month); *id.* at 123:19-25 (testimony by John Reardon acknowledging that SECF's post-petition financing was not available to MCLM prior to its filing for bankruptcy).

²⁹ See Confirmation Hearing Transcript Vol I, 206-208, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

³⁰ See Confirmation Hearing Transcript Vol. I, 207:17-22.

4. *The Choctaw Investors stand to reap an astonishing and inappropriate windfall*

The exceedingly close relationship between MCLM, Mr. and Mrs. DePriest, and the Choctaw Investors leads to a distinct basis for viewing this proposed transfer of AMTS licenses with extreme suspicion and ultimately for denying *Second Thursday* relief. The value of the spectrum that MCLM proposes to transfer to Choctaw exceeds the total amount of debt at stake by a considerable margin. If the Commission grants *Second Thursday* relief, the interlocking web of connections and claims that comprises Choctaw's proposal would lead to an unprecedented transfer of wealth from a licensee to insiders whose preexisting associations and specific actions at or soon after MCLM's bankruptcy petition suggest complete awareness of MCLM's economic potential — and of the economic obstacles posed by the Commission's hearing designation order. Allowing this group of investors to exploit *Second Thursday* would convert a doctrine intended for the protection of innocent creditors into an instrument of crony capitalism.

According to the amended schedules that MCLM filed before the bankruptcy court, MCLM owes total debt in the amount of \$31,240,965.12.³¹ At the confirmation hearing, John Reardon testified that MCLM's scheduled debt totaled "somewhere around \$32 to \$34 million."³² By any measure, MCLM's licenses are worth considerably more. According to MCLM's amended schedules, MCLM's licenses are worth approximately \$45,200,000.00.³³ At

³¹ See Amended Summary of Schedules at p.1, Dkt. # 171, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

³² See Confirmation Hearing Transcript Vol. I, 125:19-20, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

³³ See Amended Summary of Schedules at p. 5.

the confirmation hearing, Mr. Reardon testified that MCLM's licenses were worth approximately \$40 million, on the assumption that the Commission grants *Second Thursday* relief and SkyTel's "various appeals and complaints and the like are also, you know, put to the wayside."³⁴ On the other hand, Warren Havens and SkyTel have calculated — as reflected in the relevant exhibits accompanying SkyTel's Objection to Confirmation in the bankruptcy court — that the value of MCLM's licenses ranges from \$135,656,853 to \$521,511,015. According to Exhibit G, MCLM's licenses site-based licenses *alone* were worth approximately \$197,469,579 at the time Mobex assigned its licenses to MCLM.

This gap between MCLM's indebtedness and the value of its licenses the creates the distinct and disturbing possibility of a huge windfall, most of which would accrue to four investors out of the entire class of MCLM's creditors. If MCLM's amended schedules are treated as the most comprehensive and accurate of the competing measures of debt and value, *Second Thursday* relief would net the Choctaw Investors roughly \$14 million upon the sale of Choctaw's newly acquired AMTS spectrum (\$45.2 million in licenses, less \$31.2 million in claims). Indeed, the amounts accruing to Mr. Hollis, Watson & Downs, Collateral Plus, and Mr. Trammell could be expected to dwarf the \$14 million spread between MCLM's indebtedness and the value of its spectrum. Collectively, the four Choctaw Investors have filed claims worth \$15,393,577.10, nearly half the \$31.2 million in claims reported by MCLM in its amended schedules before the bankruptcy court. The total windfall to be reaped by these investors could therefore approach \$30 million. Combining that \$30 million with the \$17 million in benefits that Donald DePriest stands to gain yields a figure that uncannily approximates the \$45.2 million that MCLM's spectrum is believed to be worth.

³⁴ See Confirmation Hearing Transcript Vol I., 101:15-24

The Choctaw proposal's potential to create a massive windfall for certain creditors poses a very serious barrier to the grant of *Second Thursday* relief. The very notion of creditors realizing a windfall of this magnitude has been and remains patently repugnant to the narrow, equitable purposes of the *Second Thursday* exception. Until now, it appears that no one has been brazen enough to propose a plan so crassly calculated to enrich a privileged sliver of the creditor class. Creditors are supposed to be innocent. The creditors who comprise the Choctaw Investors are not innocent. They lent to MCLM with full knowledge of weaknesses in that company's inventory of licenses. The single biggest creditor in the group, Collateral Plus, added itself to the roster of creditors *after* MCLM petitioned for bankruptcy protection.

The Commission's history of applying *Second Thursday* reveals consistent, careful balancing of the proceeds from a proposed transfer of licenses against the claims of truly innocent creditors. Cases such as *In re Davis Broadcasting Co.*, 67 F.C.C.2d 872 (1977), where creditors "receive[d] no more than 39 cents on the dollar," *id.* at 874, typify this body of law. In instances where proceeds even approached the total claims against the licensee, the Commission has taken pains to vindicate the equitable purposes of *Second Thursday*. For example, *In re Bell*, 10 F.C.C.R. 4916 (1995), emphasized that the prospective proceeds of \$450,000 after the grant of *Second Thursday* relief would not exceed that controversy's \$469,276.92 in "claims filed by creditors and outstanding judgments." *Id.* at 4916. In *In re KOZN FM Stereo 99 Ltd.*, 5 F.C.C.R. 2849 (1990), the Commission observed that a thin \$2,000 difference between the sale price and the sum of potential claims gave the Mass Media Bureau good cause to be "rightly concerned about the possibility that [a wrongdoer] could directly benefit from [a] sale" of licenses released by the grant of *Second Thursday* relief. When further developments in that case established a lower sale price and a higher level of creditors' claims, the Commission noted with approval that

“there is less chance that any money would be left over.” *In re KOZN FM Stereo 99 Ltd.*, 6 F.C.C.R. 257, 257 (1991). In all events, the Commission noted, “any excess funds from the sale would be held in a blocked account subject to the determination of the FCC and the bankruptcy court as to how the funds should be appropriated.” *Id.* By stark contrast, Choctaw proposes in this case to retain unfettered discretion over the disposal of funds in excess of creditors’ claims.

5. *The Commission must preserve the third-party rights of SkyTel to AMTS spectrum*

The application of *Second Thursday* in this case would push the doctrine beyond its historic limits and beyond its very narrow regulatory purpose. Unlike the typical *Second Thursday* case, where the licensee faces the threat of nonrenewal, this case involves controversies whose resolution — in the absence of that doctrine — could result in the assignment of licenses to a third party: to Warren Havens or one of the SkyTel companies. That possibility creates a potential inequity that prevents the FCC from concluding that the application of the *Second Thursday* doctrine to MCLM and Choctaw would best serve the public interest.

The MCLM licenses at issue do not represent a unitary stockpile of spectrum. Broadly speaking, the hearing designation order identified two distinct grounds of inquiry. First, the order questions whether MCLM violated the designated entity rules of 47 C.F.R. §§ 1.2110 and 1.2112 and thereby secured approximately \$2.8 million in bidding credits to which it was not entitled. *See* 26 F.C.C.R. at 6521. SkyTel believes that these violations, once shown, would render MCLM’s geographic licenses void *ab initio*, *see* 47 C.F.R. § 1.2105, and should lead to the reassignment of geographic AMTS licenses purportedly purchased by MCLM in Auction 61 to SkyTel as the lawful high bidder. Second, the hearing designation order directs an inquiry, *see* 26 F.C.C.R. at 6547, into whether MCLM constructed facilities within two years of being

granted site-based AMTS licenses, *see* 47 C.F.R. § 80.49(a)(3), and whether MCLM has permanently discontinued operation of any of its site-based facilities, within the meaning of 47 C.F.R. § 1.955(a), *see* 26 F.C.C.R. at 6547. Termination or revocation of MCLM's site-based licenses on either of these grounds would lead to the reversion of each site-based license to SkyTel as the holder of the overlapping geographic license. *See* 47 C.F.R. § 80.385(c).

Although SkyTel contemplates other bases by which licenses lost by MCLM could or should be assigned to SkyTel,³⁵ voidness ab initio of geographic licenses won through improperly secured bidding credits or automatic termination of site licenses for permanent discontinuance or failure to meet construction deadlines suffices to put SkyTel's interest in these licenses squarely at issue in this *Second Thursday* petition.

No *Second Thursday* precedent permits the use of this equitable doctrine to destroy another licensee's interests in spectrum or to circumvent the public interest in market-based, geographic allocation of valuable AMTS spectrum. *See generally In re Amendment of Commission's Rules Concerning Maritime Communications*, 17 F.C.C.R. 6685 (2002). Given SkyTel's considerable interest in geographic licenses for which it would have been the lawful high bidder, but for MCLM's misconduct, and in unifying the footprint of co-channeled AMTS frequencies within a single geographic license whose holder has put that spectrum to use, the Commission should decline this invitation to undermine *Second Thursday*'s fidelity to the public interest, convenience, and necessity. To rule otherwise would be tantamount to allowing a select circle of

³⁵ SkyTel believes that the Commission could revoke MCLM's geographic licenses under 47 U.S.C. § 312 for repeated willful misrepresentations and/or lack of candor with respect to MCLM's noncompliance with the Commission's designated entity and spousal affiliation rules. In addition, if SkyTel succeeds in demonstrating that MCLM violated the antitrust laws, *see Havens v. Mobex Network Services, LLC*, Civ. Action No. 11-993 (D.N.J. filed Feb. 18, 2011), 47 U.S.C. § 313 would prescribe the revocation of MCLM's licenses.

MCLM insiders to launder AMTS spectrum, to great private profit, in the name of a putatively new licensee, Choctaw Telecommunications.

6. *MCLM should exhaust its remedies under state law before seeking Second Thursday relief*

The *Second Thursday* doctrine does not exist in isolation from the rest of federal communications law. Rather, it resides alongside a deep body of law enabling the Commission, on its own motion or upon petition showing good cause, to waive its own rules. Section 1.3 of the Commission’s Rules provide that “[t]he provisions of this chapter may be suspended, amended or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter.” 47 C.F.R. § 1.3. “Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” *Id.* The Commission “may waive specific requirements of the rules on its own motion or upon request,” *id.* § 1.925(a), as long as “[t]he underlying purpose of the rule(s) would not be served or would be frustrated by” a specific application, “and that a grant of the requested waiver would be in the public interest,” *id.* § 1.925(b)(3)(i). Alternatively, the Commission may grant a request for waiver upon a showing that “[i]n view of unique or unusual circumstances . . . , application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” *Id.* § 1.925(b)(3)(ii); accord *In re Northeast Utils. Serv. Co.*, 22 F.C.C.R. 18,652, 18,653 (2007); see also *Northeast Cellular Tel. Co. v. FCC*, 899 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

The availability of remedies under state law has a heavy bearing on whether the Commission should grant a waiver of one of its rules. A quarter century before *Second Thursday*,

the Supreme Court of the United States upheld the Commission's decision, in accord with 47 U.S.C. § 312(a)'s provision that any station license may be revoked for false statements by an applicant, to deny renewal of a radio license where the licensee had concealed the ownership of its stock by a vice-president of CBS who assured the broadcaster of help in securing network affiliation and other benefits from CBS. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). Though sympathetic to the complaint that nonrenewal punished the holders of "slightly more than 50 per cent of the [licensee's] stock," none of whom had been "found to have had any part in or knowledge of the concealment or deception of the Commission," the Court reasoned that "the fact that there are innocent stockholders can not immunize the corporation from the consequences of such deception." *Id.* at 227. Rather, the Court suggested, "presumably the State law affords adequate remedies against the wrongdoers," against "officers of the corporation [who] by such mismanagement waste its assets." *Id.*

The Commission very recently confirmed *WOKO*'s observation that the availability of state law remedies is relevant to, and perhaps dispositive of, any request for waiver of one or more of its rules. Section 1.925 of the Commission's Rules, after all, asks whether "the applicant" seeking a waiver "has no reasonable alternative." 47 C.F.R. § 1.925(b)(3)(ii). In *In re Connect America Fund*, WC Docket Nos. 10-90, 05-337 (April 30, 2013), Texas-based telecommunications carriers sought waivers from the Commission's \$250 cap on support per line, per month, in Universal Service Fund support for service to high-cost rural areas. It turned out that Texas had adopted a specific statutory mechanism to buffer the impact of the federal support cap on carriers serving fewer than 31,000 access lines, either through the state universal service fund or an increase in rates. Mindful of the availability of this remedy under state law, the Commission dismissed the Texas-based carriers' request for a waiver from the \$250 USF cap:

“The Texas petitioners should avail themselves of state remedies available to them pursuant to” the Texas Public Utility Regulatory Act.” *Id.*, at 7.

In this case, the state law remedy available to MCLM is resort to Donald DePriest’s personal guarantees against certain of MCLM’s debts. Those guarantees are estimated to cover as much as \$15.2 million of the \$31.2 million in creditors’ claims that MCLM reported in its amended statement to the bankruptcy court. Absent evidence that MCLM has taken reasonable steps to take advantage of this source of revenue and thereby to exhaust state law remedies available to it, the Commission should not entertain a *Second Thursday* petition.

7. *MCLM should petition for specific waivers from the Commission’s rules, in advance of and wholly apart from Second Thursday*

The Commission’s approach to waivers should apply to its own remedies. MCLM and Choctaw’s joint “*Second Thursday* showing” effectively concedes that these parties need waivers of 47 C.F.R. §§ 1.955(a)(2), 80.49, lest those sections of the Commission’s Rules require automatic cancellation of site-based licenses that MCLM failed to construct in timely fashion. A “potential finding that such licenses were ... automatically cancelled under 47 C.F.R. § 1.955(a)(2) may result in MCLM being unable to transfer certain licenses to Choctaw” or, for that matter, to any other would-be purchaser. The uncomfortable truth is that MCLM has had ample time, notice, and occasion to seek waivers of those rules through 47 U.S.C. § 1.925. That failure, like its failure to exhaust state law remedies by seeking enforcement of Donald DePriest’s personal guarantees, suffices on its own to defeat MCLM and Choctaw’s request for *Second Thursday* relief.

Conclusions, Part 1.

Relief under the *Second Thursday* doctrine is an *extraordinary* remedy that departs from the FCC's standing policy, as articulated in *Jefferson Radio* and implemented in full vindication of 47 U.S.C. § 310(d), of not permitting the transfer of a license when a licensee's basic qualifications have come into question. MCLM's "ongoing misrepresentations" regarding multiple aspects of its operations constitute the very sort of destructive conduct that "undermines the integrity" of the Commission's decisionmaking process. *In re Hoffman*, 12 F.C.C.R. 5224, 5229 (1997). As much as the Commission has demonstrated a commitment to innocent creditors, "the bankruptcy policy of protecting innocent creditors is not applicable in situations where ... the Commission determines that other public interest considerations outweigh this policy." *Id.* at 5229 n.9. As the Commission has acknowledged, the whole point of *Jefferson Radio*'s presumptive prohibition on license transfers is that a licensee whose basic qualifications have been called into question might lose its licenses outright. *See In re Northwest Indiana Broadcasting Corp.*, 60 F.C.C.2d 205, 210 (1976). Especially in a case such as this one, where an investigation into MCLM's qualifications could require it to forfeit geographic AMTS licenses for falsely manipulating the Commission's designated entity rules and/or to forfeit site-based licenses for failure to comply with the Commission's rules concerning construction and permanent discontinuance of service, the Commission must remain vigilant for the very real possibility that MCLM "will have nothing [left] to assign." *Id.*

MCLM and Choctaw's plea for *Second Thursday* relief boils down to an attempt to elude enforcement of the Commission's rules requiring candor, timely construction, and continuity of service. This case highlights "the countervailing and overriding public interest in the Commission's retaining effective control over the conduct of its licensees." *Id.* In furtherance of

that public interest, we respectfully request that the Commission deny *Second Thursday* relief and adhere to the longstanding policy of *Jefferson Radio*.

Part II

Expansion of Certain Text Above

The following expands upon text above on the following matter:

The Maritime licenses at issue do not represent a unitary stockpile of spectrum. There are at least four distinct bases by which Maritime may lose some or all of its licenses. The first three of those grounds have disproportionate impact on certain parts of Maritime's inventory of spectrum:

- 1 Voidness ab initio per 47 CFR § 1.2105 of geographic licenses won on the basis of bidding credits secured by less than honest means, with false certifications, and after the short-form deadline, with changes in bidding-credit size, and in this case, also changes in control.³⁶ (Auction long forms are considered along with the entrance short forms, under FCC policy and procedure.) See, for example, SkyTel entities' Application for Review as to the MCLM long form in Auction 71, filed April 2007, still pending.³⁷ *SkyTel entities assert in this Application for Review that they are the lawful high bidders for the licenses procured by Maritime by means of false certifications and rule violations, and under DC Circuit Court precedent, are entitled to acquire these licenses, and they demonstrate how they already fully paid for them.*
- 2 Revocation of geographic licenses under § 312 of the Communications Act for repeated willful misrepresentations and/or lack of candor. See, for example, FCC 11-64.³⁸

³⁶ The control changed from sole ownership and control of Sandra Depriest, asserted in the short form, to control by spousal affiliation admitted to after the short form deadline, including in the long form. Later, other evidence and admissions of co-control by Sandra and Donald Depriest were made by MCLM in the FCC proceedings under and related to the MCLM long form in auction 61, up through the Hearing in docket 11-71.

³⁷ This Application for Review is not an issue in or subject to FCC 11-64 and the hearing thereunder in docket 11-71.

³⁸ In this regard, willful repeated failure to adhere to the rules regarding surrendering to the FCC for cancellation site-based licenses that terminated automatically for failure of these construction-commencement, or permanent continuation (each as to actual CMRS service), is

- 3 Automatic termination of site licenses for abandonment or failure to meet the requirements of timely buildout or construction with commencement of service, or the subsequent requirement to keep in permanent operation (that requires actual CMRS service, for AMTS). (Issue G licenses). 47 CFR §§ 80.49, 1.946, 1.955 and other rules and law.³⁹ 47 CFR § 80.358(c) provides that site-based AMTS licenses and licensed stations that are for any reason terminated or invalidated, automatically revert to the co-channel geographic license surrounding the subject site based license or station. In the subject case, the co-channel geographic licensees are SkyTel entities.
- 4 Revocation of all of Maritime's licenses as an antitrust remedy in the New Jersey case of *Havens v. Mobex*. § 313 of the Communications Act, pursuant to §314 of the Act.

also good cause for revocation of other licenses of the licensee. Evidence in the Maritime Hearing in docket 11-71 supports such a finding. In this regard, Issue (g) in the Hearing is moving forward and not stayed by the subject Application or otherwise, including since the issues of automatic termination in Issue (g) precede the Maritime bankruptcy and moreover, licenses and stations that automatically terminated by action of law at a time preceding the bankruptcy, cannot be revived for consideration under Second Thursday or any other special-relief basis. SkyTel entities, as parties to *Skybridge v. Mobex* in the US District Court, New Jersey (that involves SkyTel entities as plaintiffs and Maritime as one defendant) intent to present evidence in the instant proceeding, once their litigation attorneys make it available for this purpose, that shows that Maritime and its predecessor Mobex, employed repeated fraud and concealment before the FCC, and false statements under penalty of perjury, to maintain automatic terminated site-based

³⁹ Appendix 1, attached below, is a memo from a SkyTel legal counsel to the FCC Judge in the Maritime Hearing in docket 11-71 that more fully discusses the relevant FCC rules, orders and policy statements as to these requirements.

Certain Further Comments on “Second Thursday”
as General Policy Needing Updating and Clarification
(and similar treatment of the “Footnote-7” rationale)

Consistent with the discussion herein, the Second Thursday general policy should be updated and clarified by the FCC, and the rationale under Footnote 7 should be clarified. Proposed policy statements should be placed on public notice for comments, and formal final statements issued and published. Parties that may be adversely affected, and parties that may seek relief under such policies, should know of such policies in advance, and understand them in relation to related regulations and statutes to which they are bound and under which they have rights.

The proposed clarifications should consider, *inter alia*, auction rules, auction competitors, CMRS competitors, licensees and applicants with lawfully presented claims to the licenses subject of a Second Thursday or Footnote-7-type relief request, exhaustion of state-law and FCC and other law remedies should be discussed, and the Supreme Courts’ statement in WOKO should be considered as to enforcement of FCC regulations and Communications Act statutes even when that results in loss to alleged or actual innocent stakeholders in the licensee entity (state law remedies are always available, and the FCC is not charged with tending to bankruptcy remedies, and has no expertise or jurisdiction to interlope therein, etc.).

If the FCC determines that Second Thursday should remain a broad policy, then it should also (and in any case it should) consider expanding it to also consider the rights of innocent parties under US antitrust law, including plaintiffs in litigation in US courts against the subject licensee on charges of violation of US antitrust law. The instant case presents this situation. Indeed, as opposed to US bankruptcy law, US antitrust law is directly part of the Communications Act, under 47 U.S.C. §§ 314 and 313, as in part discussed above.

Enforcement Bureau Comments

SK-1, the filers, agree with and reference and incorporate herein the Comments in this proceeding filed today by the FCC Enforcement Bureau (“EB”), except to any extent that these EB Comments conflict with this SK-1 PD.

Appended Materials

These are listed in Appendix 2 following the signature page below, and are separately uploaded in the docket. While the PD text may also be filed on ULS under the Application, SK-1 does not intend to also file these extensive appended materials on ULS (including since that could cause duplication of efforts by parties to review and compare the twice-filed extensive materials, including to check for any differences).

Further Conclusions

Under the PD’s request to dismiss or deny, the Application include its request for Second Thursday and other extraordinary relief, should be dismissed or denied.

Under the PD’s comments, the FCC should revisit its doctrines or policies as to so-called Second Thursday and similar extraordinary relief, and issue more clear and appropriate standards, considering the current context of auctioned licenses, competitive CMRS, antitrust concerns (which are relevant to FCC auctioned licenses and auctions, as shown for example in recent Auction “Procedures” public notices. However, in this case, it is clear that the requests of MCLM-Choctaw fail to satisfy the core requirements and purposes of the “Second Thursday” doctrine or policy, as well as the more narrow rationale in “Footnote 7.”

In addition, the MCLM- Choctaw waiver request also fails, and is frivolous as to the site-based licenses.

The FCC should not accept further wasteful frivolous filings and actions by MCLM, its new affiliate or proxy Choctaw, and other associated.

[The rest of this page is intentionally left blank.]

Respectfully,

/s/ Electronically submitted. Signature on file.

Warren Havens
President of each of the SkyTel-1 Entities:

Warren Havens
Skybridge Spectrum Foundation⁴⁰
Environmental LLC
Intelligent Transportation & Monitoring Wireless LLC

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

Dated: May 9, 2013

Note: See footnote 1 above. The noted other “SkyTel entities” are the following, each of which also have Warren Havens as President, and have the same address as given above. *For the conditional purposes of footnote 1, the following information and signature is provided:*

Telesaurus Holdings GB LLC
Verde Systems LLC
V2G LLC

/s/ Electronically submitted. Signature on file.

Warren Havens
President of each of the immediately above listed other “SkyTel entities.”

Dated: May 9, 2013

⁴⁰ For purpose of this submission, for convenience, Skybridge, which maintains its own office, uses the listed address of the LLCs.

Declaration

I declare under penalty of perjury that the facts in this pleading are true and correct.

/s/ Electronically submitted. Signature on file.

Warren Havens

President of the SkyTel parties submitting this filing, listed on the signature page above.

May 9, 2013

The appended materials are in separate files and are separately filed from this PD text.
Lists of the two categories are provided below.

List of Documents referenced in the PD text above.

Exhibit List to Petition to Deny of Maritime Communications/Land Mobile LLC Debtor-in-Possession's and Choctaw Holdings LLC's Assignment Application and Associated Request for *Second Thursday* Relief

All exhibits labeled with letters are documents specifically referenced in the petition's text.

All exhibits labeled with numbers are documents supportive of the petition's text, although they may not be specifically referenced in the petition's text.

Exhibit "A": CTI Proposal

Exhibit "B": Summary of Schedules, Statement of Financial Affairs, including amendments.

Exhibit "C": 341 Transcript

Exhibit "D": Oder and Judgment of the Chancery Court of Lowndes County, Mississippi: *Phillips v. DePriest*, Cause No. 2007-0526 (June 30, 2009)

Exhibit "E": Scotland House, Inc., State of Mississippi Secretary of State 2012 Corporate Annual Report.

Exhibit "F": Confirmation Hearing Transcript Vol. I

Exhibit "G": Confirmation Hearing Transcript Vol. II

Exhibit "H": Witness and Exhibit List

Exhibit "I": R. Hayne Hollis III Proofs of Claim, Claim Nos. 72-1, 72-2.

Exhibit "J": Watson & Downs Proofs of Claim, Claims Nos. 75-1, 75-2, 75-3.

Exhibit "K": Patrick Trammell Proof of Claim, Claim No. 74-1.

Exhibit "L": Collateral Plus Claim Nos. 46-1, 48-1, 48-2, 49-1, 49-2.

Exhibit "M": Choctaw Proposal

Exhibit "N": CONFIDENTIAL—Filed Confidentially with the FCC: SkyTel Valuations, including Exhibits "A" and "G" to SkyTel's Objection to Confirmation and SkyTel's Walters Report

Note: Exhibits F and G are excerpts from the Maritime bankruptcy case Confirmation Hearing that include the excerpts and highlighting by SK-1. This includes: (i) text where Sandra Depriest explains why MCLM (Maritime) sought Second Thursday relief; (ii) John Reardon's comments about MCLM's intent in filing bankruptcy; (iii) John Reardon's comments on

creditors' potential knowledge of MCLM's FCC troubles/ SkyTel litigation; (iv) where the John Reardon Voicemail was played into the record; (v) all of Bob Keller's Testimony for MCLM (as to Second Thursday); (vi) all of Sam Feder's testimony for Choctaw (as to Second Thursday); and (vii) all of Pat Trammell's testimony for Choctaw and the Choctaw-based MCLM Chapter 11 Plan that the court approved.

List of additional supporting documents.

1. Maritime's Third Amended Disclosure Statement and Exhibits A-E
2. Maritime's First Amended Plan of Reorganization
3. Judge Houston's Bench Opinion Confirming the Plan of Reorganization
4. MCLM Bankruptcy Petition
5. SkyTel's Objection to Confirmation and Exhibits A-G
6. Order Confirming Plan
7. John Reardon November 3, 2012 Deposition Transcript (both a clean copy and a highlighted, excerpted copy).
8. Full Transcripts of the Confirmation Hearing, which includes Bob Keller and Sam Feder's testimony.

Discussion of some of these additional supporting materials:

“[668-10] Exh E (SkyTel's Views on 2d Thurs etc)”: This document was attached as an exhibit to the Debtor's Third Amended Disclosure Statement, and it sets forth SkyTel's arguments as to why the Plan is unfeasible and why the Debtor will likely fail to achieve *Second Thursday* relief.

· **“Objection to Confirmation”**: This document contains various arguments as to why the Plan is unfeasible, why the Debtor will fail to achieve *Second Thursday* relief, and arguments as to Maritime's bad faith in filing the Plan. Also included in the general-documents folder are all exhibits to SkyTel's objection to the Plan and confirmation.

· **“Objection to MCLM Discl Stmt”**: This document contains a small, highlighted portion of argument regarding Plan feasibility and both SkyTel's challenges before the FCC and the New Jersey Litigation.

· **“Motion for Direct Cert to 5th Cir”**: This document contains a detailed factual background of the Debtor, the FCC proceedings, and the Bankruptcy Case. The relevant information is highlighted.

· **“Motion for Stay Pending Appeal”**: This document contains arguments regarding why the Plan is unfeasible (specifically, why the Debtor will not achieve *Second Thursday*) and Maritime's bad faith in filing the Bankruptcy Petition.

· “[668-8] Exh D Pt 1 (CTI Proposal)” & “[668-9] Exh D Pt 2 (CTI Proposal)”: The CTI proposal sets forth (1) a chart showing the detailed web of connections between Maritime, the DePriests, Choctaw, and others; (2) addresses the issues of Don DePriest’s personal guarantees; and (3) sets forth why CTI believes Choctaw will not and cannot achieve *Second Thursday* relief.

· “[169] Document (Form B 26) re [72] and Critical RF.111511”:

This document sets forth information regarding the value of Critical RF.

· “**The Debtor’s Plan**”: Maritime’s Chapter 11 Plan sets forth:

o That Choctaw will employ John Reardon. *See* Debtor’s First Amended Plan at p. 19.

· “**341 Transcript**”: Included, are both the full 341 Transcript and a copy of highlighted excerpts. At the 341 meeting, Sandra DePriest testified about the Bankruptcy filing. This testimony included the following:

o **Don’s Role with Maritime**: The U.S. Trustee asked Sandra DePriest about Maritime’s management, and Mrs. DePriest recognized that Don DePriest “does some things as manager, as well.” *See* 341 Transcript at p. 12. Mrs. DePriest further testified that Don DePriest had a “management contract.” *See* 341 Transcript at pp. 28-29, 109-110.

o **Intent in Filing Bankruptcy**: The U.S. Trustee asked Mrs. DePriest to detail Maritime’s pre-bankruptcy history, and Mrs. DePriest mentioned trouble and litigation before the FCC and needing “relief” to close certain transactions. *See* 341 Transcript at pp. 25-27. This is possibly relevant to showing Maritime’s intent in filing for bankruptcy to achieve *Second Thursday*.

§ The U.S. Trustee then asked Mrs. DePriest why she believed Maritime would be able to successfully reorganize under the Bankruptcy Code, to which Mrs. DePriest opined that *Second Thursday* would allow Maritime to succeed under Chapter 11. *See* 341 Transcript at 29-31.

§ Mrs. DePriest notes that Maritime filed a motion to stay the FCC proceedings “immediately after” the bankruptcy petition was filed. *See* 341 Transcript at p. 138.

o **The Guarantee’s**: Mrs. DePriest noted that Don Depriest is a co-debtor of Maritime and asserted that the amount of Maritime debt Don personally guaranteed is around \$8 million. *See* 341 Transcript at pp. 69, 112.⁴¹

o **Critical RF’s value**: Mrs DePriest asserts that Critical RF’s current value of \$50,000 is based on an “internal estimate” and that Maritime bought its 90% interest in Critical RF for around \$600,000. *See* 341 Transcript at pp. 112-113.

⁴¹ Other Maritime documents put this number substantially higher. See exhibit ____.

· **John Reardon's Redacted Deposition Transcript of November 3, 2012:** Included, are both a clean copy of the redacted deposition transcript and a highlighted, excerpted version. The highlighted portions contain the following information:

o **SkyTel Proposal:** Pages 20-40; 46-48; 112-116 contain SkyTel's questions to Reardon regarding the SkyTel proposal and Reardon's answers.

§ Specifically, John Reardon stated that when he first saw the SkyTel Proposal, he thought it constituted "green mail." See Reardon's Deposition Transcript at p. 21. Reardon further opined that the Proposal was "impossible" to consummate, because, among other things, SkyTel may not be a qualified licensee. See Reardon's Deposition Transcript at pp. 21, 25.

o **Potential Windfall to Choctaw:** Reardon stated that, after Maritime's debt is paid, any remaining licenses will remain with Choctaw. See Reardon Deposition Transcript at pp. 50-51.

o **Intent in Filing Bankruptcy:** Reardon states that obtaining *Second Thursday* was "one of the purposes" of filing for bankruptcy. See Reardon Deposition at p. 177.

o **CoServ Voicemail:** Reardon reads the transcript of the CoServe Voicemail into the record and explains what he meant and his understanding of *Second Thursday*. See Reardon Deposition Transcript at pp. 123-126.

· **Confirmation Hearing Transcript Vol. I:** We have provided both a clean copy and a highlighted, excerpted version. The Vol. I excerpts include the following information:

o p. 53 Reardon says he worked for Sandra DePriest and "*the DePriests*"

o p. 62 Reardon says he "was asked by *Don DePriest* to really spend more time working with our spectrum broker."

o p. 81 "Is consummation of these orders and the underlying asset purchase agreements subject to FCC approval?" "Yes."

o p. 90 Reardon testified that "[i]t's a plan where we obviously would require FCC approval, but no matter what we do with the licenses, it will require FCC approval."

o p. 124: Reardon states that he "would rely upon Sandra and Don DePriest to effectively raise money or borrow money for the company."

o p. 126: Reardon testifies that NRTC was aware of FCC challenges before it took on its secured debt.

- o p. 127: Reardon testifies that Don DePriest did personally guarantee MCLM debt.
- o 128: Reardon notes that he “remember[s] that in the Council Tree Plan in particular, there was a discussion of the guarantees issue.”
- o SkyTel moves to admit guarantees.
- o P. 129: Court admits the guarantees into evidence.
- o P. 131: SkyTel’s Counsel plays Reardon voicemail to “Chris” at CoServe. Reardon admits that he left the voicemail the day after the Bankruptcy Petition was filed.
- o 132: Voicemail is admitted into evidence.
- o P. 140: Reardon admits that if licenses left over after debt is paid, those licenses stay with Choctaw Holdings.
- o P. 166-183: Keller’s Testimony on Second Thursday
- o P. 187-244: Patrick Trammel testimony
- o Specific Trammel Testimony
- o P. 234 Trammel states that if there were licenses or value remaining after MCLM’s debt were paid in full “that would be wonderful, you know”
- o P. 244-: Feder Testimony

Confirmation Hearing Transcript Vol. II: We have provided both a clean copy and a highlighted, excerpted version. The Vol. II excerpts include the following information:

- o **P. 14:** Sandra DePriest’s Cross Examination begins.

§ Specifics:

- **15-16:** Sandra explains that FCC proceedings prevented MCLM from closing transactions and why *Second Thursday* was needed.

- **p. 16:** Sandra DePriest testifies that Pinnacle was aware at all times of the status of all FCC proceedings.

- **P. 17:** Sandra states that secured lenders were notified of FCC proceedings before lending took place.

· **P. 18-20:** Sandra acknowledges Don DePriests personal guarantees as well as collection efforts on those guarantees, including fact that Creditors may have stopped collection efforts in light of bankruptcy and attempts at Second Thursday.

· **P. 21-22:** Sandra states that Collateral Plus Fund was assigned a portion of Pinnacle’s debt *after* the bankruptcy petition was filed—thereby suggesting actual knowledge of the proceedings.

· **P. 23:** Sandra states that Don DePriest was an authorized signer of Maritime.

· **P. 24:** Sandra states that Don DePriest “does some things as a manager as well.”

· **Bench Opinion Confirming Plan:** This document is an excerpt from the Confirmation Hearing Transcript Vol. II, Part 2. The following portions are highlighted:

o **FCC Authority:** In Confirming Maritime’s Plan, Judge Houston noted that his decision does not affect the FCC’s authority to make a decisions as to *Second Thursday* or otherwise: “Now, there is absolutely no guarantee that *Second Thursday* is going to be granted by the FCC. And I’m not sitting up here trying to say to the FCC, you’ve got to grant *Second Thursday*. That’s not my function. That’s the function of the FCC and I said that from the time this case started. I am not trying to superimpose this Court’s judgment on that Agency.” *See* Bench Opinion Confirming Plan at p. 183.

o **Windfall to Choctaw:** Judge Houston found that, as to *Second Thursday*, a windfall to Choctaw was not relevant: “Number one it’s sort of self-preservation at one point. But [Choctaw is] taking a risk. Ans sometimes when you take a risk, you expect a little may not – no telling how big the pot of gold might be at the end of the rainbow, it might be little bitty, it might be good. But you’re not out there for philanthropic effect on the economy. You’re there to make a living and make money and, I mean, I understand that and I think that’s what makes our country go.” *See* Bench Opinion Confirming Plan at p. 185.

o **Personal Guarantees:** Judge Houston further noted that a potential indirect benefit to Don DePriest may exist: “Look at the personal guarantee issue that’s been talked about a lot. Don DePriest may very well receive an indirect benefit and if this transaction succeeds, this plan succeeds and these creditors are paid. But who knows?” *See* Bench Opinion Confirming Plan at p. 185.

o **New Jersey Claims:** In concluding, Judge Houston noted that SkyTel’s New Jersey claims were preserved and that the bankruptcy court would revisit the issue as to treble damages in the future, if that issue ever arises. *See* Bench Opinion Confirming Plan at p. 189.

Important Bankruptcy Pleadings: Also in this folder are:

- o “[669] First Amended Plan.092512”
- o “[668] Third Am. Discl. Stmt.092512”:

§ Maritime’s Third Amended Disclosure Statement sets forth that, after plan confirmation, Maritime will retain Critical RF, Inc., which is a subsidiary of Maritime. *See* Third Amended Disclosure Statement at p. 14. According to Maritime, Critical RF has a nominal value of \$ 50,000. *See* Third Amended Disclosure Statement at p. 15.”

- o “MCLM Bankruptcy Petition”
- o “The Order Confirming the Plan”

- End of this Appendix.

Appendix 2 – certain authorities as to Issue (g)

The following pages contain a memo from an attorney, James Chen, on behalf of Skytel entities, in the Maritime Hearing under docket 11-71. This is referenced in the PD text above.

///

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

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

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

**AUTHORITIES IN SUPPORT OF THE HAVENS/SKYTEL DEFINITION OF
“CONSTRUCTED” AND “CONSTRUCTION”**

In Order No. 12M-53, the Honorable Richard L. Sippel, Chief Administrative Law Judge, directed me as “new counsel for Mr. [Warren] Havens and SkyTel companies ... to submit authorities relied on by Mr. Havens for his proposed definition of [the] term ‘constructed.’” I respectfully offer the following recitation and analysis of legal authorities in support of Mr. Havens's and SkyTel companies’ definition of the term “constructed” and its variants, especially “construction.”

- I -

With respect to the core definition of “constructed” and related basic law, Mr. Havens and SkyTel companies propose to define the term “constructed” according to the following core description:

An incumbent Automated Maritime Telecommunications System is deemed to be “constructed” if all the necessary equipment¹ and each station in the system and system authorization are in place, and the system has been built in compliance with the terms of the then-current authorization.

The following authorities and analysis support and explain this core definition.

Initially, all FCC authorizations (licenses) are issued and may remain valid based upon the applicable rules in effect at the time of their issuance. Failure to comply with those rules and with terms based on those rules is cause for revocation, *see* 47 U.S.C. § 312(a)(4), and, under some circumstances, “automatic termination.” As I shall clarify

¹ Although it is beyond the scope of this summary memorandum to provide details of required station equipment, I note that AMTS is common carrier CMRS. *See* 47 U.S.C. §20.9(a)(3) (describing AMTS as a form of “public coast” service). CMRS requires Interconnection. *See* § 20.5 (defining CMRS). Moreover, since a base station cannot support subscribers solely by one-way signals from the station to subscribers, CMRS service requires station equipment that allows subscribers (who, as I argue below, are a *sine qua non* of “construction”) to communicate back to the base station.

further, this core definition incorporates the relevant rules, including those defining “constructed” and “construction.”

Section 1.946 of the FCC’s rules, 47 C.F.R. § 1.946, sets forth the Commission’s “[c]onstruction and coverage requirements”: “For each of the Wireless Radio Services, requirements for construction and commencement of service or commencement of operations are set forth in the rule part governing the specific service.” § 1.946(a). The term “construction period” refers to “the period between the date of grant of an authorization and the date of required commencement of service or operations.” *Id.*

Licenses in certain wireless radio services must also satisfy “geographic coverage” or “substantial service” requirements: “In certain Wireless Radio Services, licensees must comply with geographic coverage requirements or substantial service requirements within a specified time period. These requirements are set forth in the rule part governing each specific service.” § 1.946(b).³ The term “coverage period” refers to “the period between the date of grant of an authorization and the date that a particular degree of coverage or substantial service is required.” *Id.*

The failure to meet either the obligation to construct (to “commence[.]” required “service or operations”) or to cover (to satisfy a requirement of “a particular degree of coverage or substantial service”) leads to the automatic termination of a licensee’s authorization: “If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires.” §

³ “Geographic” coverage requirements refer to a wider area, with multiple sites.

1.946(a). Section 1.955 of the Commission’s rules confirm that authorizations held by licensees who fail to meet applicable construction or coverage requirements will be automatically terminated: “Authorizations automatically terminate (in whole or in part as set forth in the service rules), without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements. *See* § 1.946(c).” 47 C.F.R. § 1.955(a)(2).

Strict enforcement of the Commission’s construction and coverage deadlines prevents licensees “who fail promptly to construct facilities” from “preclud[ing] other applicants who are willing, ready, and able to construct from access to limited and valuable spectrum.” *Miami MDS Company and Boston MDS Company*, 7 F.C.C.R. 4347, 4348-49 (1992), *review denied sub nom. Miami MDS Co. v. FCC*, 14 F.3d 658 (D.C. Cir. 1994). Strict enforcement prevents licensees from “delaying, or even denying, service to the public.” *Id.*

AMTS is a species of CMRS. For commercial mobile radio services, the “construction period” is defined as “[t]he period between the date of grant of an authorization and the date of required commencement of service.” 47 C.F.R. § 22.99. This definition, which applies to AMTS as a species of CMRS, reinforces the interdependence between “construction” and the “commencement of service.” Construction is what must take place between the “grant of an authorization” and the “commencement of service” required of the holder of that authorization.

Practically and axiomatically, “commencement of service” requires physical “construction.” In turn, “construction” serves strictly to provide “service” to customers.

Construction and coverage requirements “are set forth in the rule part governing each specific service.” 47 C.F.R. § 1.955(b); *cf.* § 1.955(a) (providing that “[f]or each of the Wireless Radio Services,” construction requirements “are set forth in the rule part governing the specific service”). Part 80 of the Commission's rules sets forth the construction and coverage requirements governing AMTS. Section 80.49 prescribes the rules governing AMTS licenses. The relevant subsection begins by reciting the requirements expected of AMTS geographic licensees:

Each AMTS coast station geographic area licensee must make a showing of substantial service within its service area within ten years of the initial license grant, or the authorization becomes invalid and must be returned to the Commission for cancellation. “Substantial” service is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.

§ 80.49(a)(3). The rule then prescribes the rules governing site-based AMTS licenses:

For site-based AMTS coast station licensees, when a new license has been issued or additional operating frequencies have been authorized, if 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.

§ 80.49(a)(3). In sum, an AMTS geographic licensee “must make a showing of substantial service within its service area within ten years of the initial license grant.” A site-based AMTS licensee must place a new station or new frequencies “in operation within two years from the date of the grant.”

- II -

I turn now to the regulatory treatment of AMTS as a system, and *system coverage* as part of the required construction:

The acronym AMTS (including as used in §80.49(a)(3)) stands for a “system.” The provision of AMTS service under site-based system licenses requires not merely a

single station, but rather a series of stations comprising an entire system. *See, e.g.*, 47 C.F.R. § 80.475(a) (2001) (referring to “each ... station in a system”); *In re Fred Daniel d/b/a Orion Telecom*, 11 F.C.C.R. 5764, 5764 n.1 (1996) (“The AMTS provides automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system ... for vessels to use along a waterway. *AMTS offers improved services over those available from individual public coast stations.*” (emphasis added)). The site-based licenses at issue in this proceeding derive their authorization from the pre-2002 version of the FCC’s rules, which demand continuity of service of all providers of AMTS service:

AMTS applicants proposing to serve inland waterways *must* show how the proposed system will provide *continuity of service* along more than 60% of each of one or more navigable inland waterways. ... AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline *must* define a substantial navigational area and show how the proposed system will provide *continuity of service* for it.

47 C.F.R. § 80.475(a) (2001) (emphases added); *see also In re Amendment of Parts 2 and 80 of the Commission’s Rules Applicable to Automated Maritime Telecommunications Systems (AMTS)*, 6 F.C.C.R. 437, 440 (1991) (acknowledging that “continuity of service has always been a goal” of AMTS regulation and describing steps that the Commission would take to “ensure continuity of service” along the Atlantic, Pacific, and Gulf of Mexico coasts). Although the Commission in 2002 removed the “continuity of service” requirement from § 80.475(a), *see Amendment of the Commission’s Rules Concerning Maritime Communications*, 17 F.C.C.R. 6685, 6737 (2002) (amending 47 C.F.R. § 80.475(a)), the previous rule’s “continuity of coverage” requirement had already served its purpose. By 2002, construction deadlines for all site-based licenses subject to this

coverage requirement had passed.⁴ Inasmuch as the pre-2002 version of § 80.475(a) (whose applicability to licenses granted under its authority — namely, all site-based AMTS licenses — has never been questioned) and ongoing Commission practice has continued to uphold the public interest in uninterrupted service along the waterway for which the multi-site system license was issued, continuity of service constitutes a required element of an incumbent AMTS licensee’s obligation to “construct” its system according to the terms of its authorization.

In a 2009 declaratory ruling issued under 47 C.F.R. § 1.2 to Maritime, the Wireless Bureau has expressly recognized the applicability of the “continuity of service” requirement imposed by the pre-2002 version of § 80.475(a):

It is our understanding that MC/LM is concerned that, unless Section 80.385(b) is interpreted as requested, there exists the potential for a geographic AMTS licensee to interpose a station between two of the incumbent’s stations. The Commission has concluded, however, that such a scenario will not occur if the incumbent licensee *constructed its system* in compliance with the *then-existing requirement to maintain continuity of service, see 47 C.F.R. § 80.475(a) (1999)*. See Amendment of the Commission’s Rules Concerning Maritime Communications, Third Memorandum Opinion and Order, PR Docket No. 92-257, 18 FCC Rcd 24391, 22401 ¶¶ 23-24 (2003).

Request by Maritime Communications/Land Mobile, LLC for Clarification of Sections 80.385 and 80.215 of the Commission’s Rules, DA 09-793 (April 8, 2009) (emphases added).

- III -

⁴ As to operations following construction and commencement of service, the FCC has consistently reasoned “that allowing incumbent licenses to continue operating under the terms of their current station licenses will further the public interest by avoiding interruption of the services they provide,” *id.* at 6699; *accord In re Maritime Communications*, 18 F.C.C.R. 24,391, 24,400 & n.84 (2003).

I shall now discuss *service to customers* as part of the construction requirement:

Section 80.60 of the Commission’s rules shed further light on the meaning of “construct,” “construction,” and other derivatives of those words. Under § 80.60(d)(3), the “original construction deadline[s] ... as set forth in § 80.49” apply to “[p]arties seeking to acquire a partitioned license or disaggregated spectrum from a site-based AMTS ... licensee.” 47 C.F.R. § 80.60(d)(3). Such parties “will be required to construct *and commence ‘service to subscribers’* in all facilities acquired through such transactions within the original construction deadline for each facility as set forth in § 80.49.” § 80.60(d)(3). Again, licensees who fail to meet this deadline face the automatic termination of their authorizations: “Failure to meet the individual construction deadline will result in the automatic termination of the facility’s authorization.” *Id.*⁵

Section 80.60’s specific requirement of “service to subscribers” indicates why and how construction and coverage requirements ensure the actual provision of service to the public and prevent the hoarding of FCC-licensed spectrum. “Service to subscribers” is defined under the Commission’s CMRS rules as “[s]ervice to at least one subscriber that is not affiliated with, controlled by or related to the providing carrier.” 47 C.F.R. § 22.99. In adopting rules designed to harmonize its treatment of commercial and private mobile radio services, the FCC reasoned that the requirement of provision of service to at least one subscriber — a requirement that the Commission characterized as “hardly burdensome” — would provide “an added safeguard against” evasive behavior by a licensee who “could chose to construct minimal facilities in order to warehouse spectrum

rather than provide actual service.” *In re Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 7988, 8075 (1994).⁶

- IV -

This memorandum’s summary of AMTS site-based licenses’ construction requirements and their regulatory purposes is reflected in various FCC decisions. The decision by the Chief of the Wireless Bureau in 2002 in *In re Paging Systems, Inc.*, 15 F.C.C.R. 23,983 (2000), is particularly instructive:

AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels. [note 2] Pursuant to Section 80.49(a)(2) of the Commission’s Rules AMTS stations must be [*constructed and*] placed in operation within eight months of the license grant. [note 3] ... We note that under Section 1.955(a)(2) of the Commission’s Rules, authorizations *automatically terminate, without specific Commission action*, if the licensee fails to meet applicable *construction* or *coverage* requirements. [note 9] ... We may waive Section 1.955(a)(2) of the Commission’s Rules in order to consider PSI’s request for an extension of the *construction* deadline if a) the underlying *purpose* of the rule would not be served or would be frustrated by application to the instant case, and grant of a waiver would be in the public interest; or b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. [note 10] We conclude that PSI has not demonstrated that a waiver is warranted under either standard. First, we

⁶ The relevant passage from this decision is illuminating and worth quoting at greater length:

“[S]ervice to subscribers” is defined to mean provision of service to at least one party unaffiliated with, controlled by, or related to the providing carrier. This *requirement* serves the interests of regulatory symmetry by imposing a uniform definition of service commencement on *all CMRS* services.... The requirement of securing one customer is hardly burdensome.... [I]t remains possible that a licensee could choose to *construct* minimal facilities *in order to warehouse spectrum rather than provide actual service*. Thus, the *service commencement requirement* serves as an added safeguard against such behavior.

Id. at 8075 (emphases added).

believe that the *underlying purpose of the rule, i.e., to ensure that service is provided to the public within a reasonable time following grant of the license*, [note 11] is furthered by applying the rule to this case.

[note 2] See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), First Report and Order, GEN Docket No. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991).

[note 3] 47 C.F.R. § 80.49(a)(2). In Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, FCC 00-370, ¶17 (rel. Nov. 16, 2000), the Commission extended the *construction requirement* for new [site-based] AMTS stations from eight months to two years. The new rule will not become effective until 30 days after publication in the Federal Register. *Id.* at ¶ 87.

[note 9] 47 C.F.R. § 1.955(a)(2).

[note 10] 47 C.F.R. § 1.925(b)(3).

[note 11] See Miami MDS Company and Boston MDS Company for Extension of Time to Construct a Channel 2 Multipoint Distribution Service Station (WLK 230) at Miami, Florida, and Station (WGW339) at Boston, Massachusetts, Memorandum Opinion and Order, 7 FCC Rcd 4347, 4348-49 ¶ 12 (1992) (*strict enforcement of construction deadline to ensure that service is not delayed or denied to the public*).

Id. at 23,983-84 (emphases added; footnotes retained).

Further support for Mr. Havens's and SkyTel's proposed definition of "constructed" and "construction" can be found in the online glossary for the FCC's Universal Licensing System (ULS). The Universal Licensing System's online glossary defines "Construction Requirements" as "[r]ules requiring wireless licensees to construct facilities and commence service within a specified time after the license grant date (the construction period)." <http://wireless.fcc.gov/uls/index.htm?job=glossary>. The ULS glossary further explains: "If the licensee fails to construct and commence service within the construction period, and does not receive an extension of time, the license

automatically terminates. ‘Commencement of service’ refers to commencing actual operation of the facility.” *Id.*

For further expressions of the views of Mr. Havens and SkyTel companies on “constructed,” “construction,” and other related terms at issue in this proceeding, see *Objections to Maritime’s First Draft Glossary* (filed by Robert H. Jackson, Esq., Oct. 2, 2012), *Substantive Objections to Maritime’s First Draft Glossary* (filed by Robert H. Jackson, Esq., on Oct. 2, 2012), and the exhibits attached to those memoranda.

Respectfully submitted,



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Dated: December 5, 2012

CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 5, 2012, I caused a true copy of the foregoing filing in FCC docket 11-71 to be served by USPS first class mail (with complimentary email copies, using emails of record) to:

Hon. Richard L. Sippel
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/s/

Warren Havens

Appendix 3 – the “SkyTel Plan” in the Maritime bankruptcy

A copy is attached.

This is referenced in the PD text above.

(This may also be in a separately uploaded Exhibit, and if so, the duplication is unintentional.)

///

Certificate of Service

The undersigned certifies that he has, on May 9, 2013, caused to be served a copy of the foregoing filing to the below-listed persons and entities (i) by compliance with the instructions in the PN as to submitting on ECFS the filing including the appended materials,* and (ii) while not required, by supplemental service by placing a paper copy of the filing into the USPS mail system with first-class postage affixed to the below listed persons ad entities:⁴²

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Manassas, VA 20109-7406
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Wilkinson Barker Knauer, LLP
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Washington, DC 20037
Counsel for “Choctaw” (defined in the filing)

/s/ [Filed Electronically. Signature on File]

Warren Havens

* The PN states (emphasis added):

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

We will permit parties and commenters to file pleadings and comments using ECFS. ...

Parties who choose to [only] file by paper must comply with the Commission’s requirements for service of documents to parties in a restricted proceeding.¹⁷

⁴² The mailed copy being placed into a USPS drop-box today may be after business hours and thus may not be processed and postmarked by the USPS until the next business day.