

Part I

This memo discusses Choctaw¹ as an agent of and co-controller of MCLM licenses under the MCLM Chapter 11 Plan approved by the US Bankruptcy Court (herein, the “Choctaw Plan” or the “Plan”) including as meant in the Communications Act 47 U.S.C. § 217.

In sum, since under the Choctaw Plan, Choctaw has certain de jure rights of control as to these licenses, and also has acted on this before the FCC (including in the Hearing under docket 11-71) exerting substantial de facto control, Havens (and SkyTel-E [defined in the Opposition], on the conditional basis in the Hearing, as noted in the Opposition filed on May 22, 2013) assert that the Maritime (“MCLM”) Motion for Summary Decision (“MSD”) is or may be defective since:

(i) this Choctaw de jure and de facto control may be found to have caused a transfer of control which required FCC approval, yet there was no approval obtained, and

(ii) without Choctaw joinder in the MCLM MSD,² the MSD is at odds with and may not be authorized under the Plan, yet MCLM must follow the court approved Plan under bankruptcy law.

Either or both of ‘(i)’ and ‘(ii)’ render the MSD as defective or potentially defective. They at least pose factual and legal disputes, just indicated, to be resolved that underlies the MSD. Havens SkyTel-E brought up the above issues in past pleadings in this Hearing, and the issues remain pending. They are raised again here in relation to the MSD.

In addition, the MSD effectively seeks relief that MCLM and its successor, Choctaw, have no obligation to operate the AMTS for any service at any particular point in time: they fail to assert the facts as to when and how they will use the spectrum for operations-service. As the following Plan excerpts show, Choctaw has no liability or obligation to take any action under the Plan including to operate the subject licenses. This creates a further dispute of facts relevant to

¹ The two “Choctaw” entities that MCLM seeks to assign its FCC licenses to, now pending in an assignment application before the Wireless Bureau)

² Choctaw entered this Hearing, and sought relief consistent with the MCLM MSD, but then withdraw in the face of discovery demands by the FCC EB. Havens and SkyTel-E opposed the withdrawal including since it was obvious that Choctaw had valuable evidence as to issue (g) and other aspects of the Hearing. However, the Judge permitted the withdraw. *We believe that was in error, and possibly reversible error,* given that Choctaw was the party with the most full and direct access to the MCLM licenses and stations evidence, since Choctaw seeks to acquire all of these under the Plan, and since it is made up of the secured lenders in MCLM that loaned to MCLM with these licenses and stations as the collateral (these assets, and economic results thereof).

the MSD since FCC law, including rules and Orders specific to AMTS, require actual operations and service—the sole purpose of the site-based licenses subject of the MSD—and MCLM-Choctaw, under the Plan, have no commitment at all to use of the licenses for operations-service. With no factual showing and commitment to operations and service, the MSD appears to have an unlawful purpose, and may be rejected (on this basis alone). It is contrary to the Communications Act and FCC rules to obtain and keep FCC licenses to warehouse and sell them off. A motion that has purposes contrary to, and in any case that would perpetuate violations of, this law should be rejected.

Part II

Below, we have compiled certain language found in Maritime’s Plan, Maritime’s Third Amended Disclosure Statement, the Choctaw Proposal, and the Confirmation Order which attempts to set forth and/or describe: (1) the relationship between Choctaw and Maritime; (2) Choctaw’s primary responsibilities under the Plan; and (3) the key post-confirmation activity of Choctaw/Holding and Maritime.

We have placed emphasis on some language (highlighting, italics, etc.) but the full excerpts should be read for better understanding.

In the below, “Holding” is one of the Choctaw entities subject of the Plan and assignment of MCLM FCC licenses. These Choctaw entities are described in the Plan, including the following excerpts (most fully near the end below).³

Excerpts from the Maritime’s First Amended Plan

“After final FCC approval of Holding as the owner and holder of the FCC Spectrum Licenses, Choctaw will market and sell the FCC Spectrum Licenses in its sole and absolute discretion⁴; subject only to FCC’s regulatory approval of all sales. Choctaw shall distribute all revenue, products and proceeds of the FCC Spectrum Licenses to Choctaw for final and ultimate distribution to the Choctaw Investors until such time as the Choctaw Investors have received the full amounts of their Claims. Included within the revenue, products and proceeds of the FCC Spectrum Licenses that will be distributed to all creditors are those proceeds from the sale of Spectrum Licenses that have already been approved by the Court in prior hearings consistent with the Debtor’s various motions to assume executory asset purchase agreements with various purchasers for Spectrum Licenses, as well as any other sales of Spectrum Licenses that may be approved by the Court until such time as the FCC approves Holding as the owner of the FCC

³ The layers of these entities appear to be created to shield actions and liability, including from challenges from Sky/Tel entities and the FCC (which were the cause of the bankruptcy, as MCLM owners and agents testified to, and evidence obtained showed, in contested actions in the MCLM bankruptcy proceeding).

⁴ This is one of a handful of examples where what the Plan says was varied somewhat at Confirmation.

Spectrum Licenses, together with any revenue, products and proceeds received by Holding for the sale of Spectrum Licenses subsequent thereto.”⁵

...

“Choctaw shall provide upon request from the Liquidating Agent, a monthly report that shall include a summary of all operating expenses incurred by Choctaw in operating its business for the month prior to the Liquidating Agent’s request. Choctaw shall provide the report within thirty days of such request. The Liquidating Agent shall have twenty-one days to respond to such report, and otherwise object to the reasonableness of the expenses.”⁶

...

“As of the date of the Plan, [Maritime] has not applied for Second Thursday treatment for any of its licenses, because the Commission will generally not act upon assignment or transfer applications by a debtor prior to approval of the proposed transaction by the bankruptcy court.”⁷

...

“The Plan of Reorganization contemplates that Maritime and the proposed buyers (Choctaw or Council Tree), will seek Second Thursday relief from the FCC. Procedurally that will involve the submission of an application requesting FCC consent to the assignment of Maritime’s licenses to Choctaw or Council Tree. The application would include and/or be accompanied by a request for special relief from or waiver of the Jefferson Radio policy. This would include showings that”⁸

...

“On or after the Effective Date, Choctaw ... may enter into such transactions and may take such actions as may be necessary or appropriate to affect its business consistent with the terms of the Plan, subject to the FCC’s rights and powers as described in VI(D)(2), *supra*. The Bankruptcy Court will not retain jurisdiction over Choctaw ... and Choctaw ... will not otherwise be subject to oversight by the Bankruptcy Court. The Bankruptcy Court will retain jurisdiction over the Debtor until such time funds are fully distributed in accordance with this Plan.”⁹

⁵ See *In re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss.), MCLM’s First Amended Plan, Dkt. # 669 at p. 10.

⁶ *Id.*

⁷ *Id.* at p. 17.

⁸ *Id.*

⁹ *Id.* at p. 19.

...

“**Reardon** functions as an operating officer, counsel, marketer of assets, negotiator for sales of Spectrum and drafter of documents of the Debtor. Reardon has served as the primary salesman of the FCC Spectrum Licenses over the past few years. Mr. Reardon has over 15 years of experience working with the utility, railroad, and oil and gas communications industries. Mr. Reardon has negotiated all of the pending transactions with lessees and buyers. Mr. Reardon will renegotiate his terms of continued employment with **Choctaw**.”¹⁰

...

“Commencing on the Confirmation Date, the Debtor shall work with the Liquidating Agent to facilitate a smooth transition of the responsibility of the wind down of the Estate to the Liquidating Agent.”¹¹

...

“If the FCC does not approve the transfer of any FCC Spectrum License from the Debtor to Holding ... such FCC Spectrum License shall remain the property of the Debtor.

The Debtor has held, and will continue to hold, the FCC Spectrum Licenses pending the approval of the Plan, and it will continue to hold the FCC Spectrum Licenses unless and until an assignment of transfer thereof is approved by the FCC, consistent with the provisions of Section VII(D)(3) hereof.

As previously noted, in the event the FCC Spectrum Licenses become property of the Debtor¹², it will use every reasonable effort to monetize those assets through sales or other dispositions of them in order to achieve the highest and best prices for the FCC Spectrum Licenses, depending upon market conditions, results of Choctaw’s ... FCC application process and related factors.”¹³

...

“If **Choctaw, Holding** ... determine, **in their sole and absolute discretion**, that obtaining FCC approval of the transfer of any FCC Spectrum License from Maritime is cost prohibitive,

¹⁰ *Id.* at p. 19.

¹¹ *Id.* at p. 20.

¹² This apparently should say “stay” or “remain” property of the Debtor, generally consistent with the rest of the Plan.

¹³ *Id.* at p. 25.

Choctaw, Holding ... shall so inform the Liquidating Agent and such FCC Spectrum License will remain the property of the Debtor.”¹⁴

...

“The party that prevails under the Plan, whether Council Tree or Choctaw, shall not have any liability to the Liquidating Agent, any Creditor, or any other party for the failure of the FCC to approve the transfer of any FCC Spectrum License for any reason, including but not limited to the prevailing party’s failure or refusal to request such approval in its sole and absolute discretion. Neither Choctaw Investors nor Council Tree is obligated to make any continuing investment to fund ongoing operations of Council Tree, Choctaw or Holding. Any determination by either Council Tree or Choctaw Investors to make additional investments as they deem necessary and prudent, other than as set forth in their respective Offers, shall not create a course of dealing between the parties or a right of Council Tree, Choctaw, Holding, the Liquidating Agent or any Creditor. Other than as set forth in their respective Offers, any determination by either Council Tree or Choctaw Investors to make additional investments as they deem necessary and prudent is not a commitment to any further investments.”¹⁵

....

“While the Plan calls for the sale of the FCC Spectrum licenses, and other assets to Choctaw/Holding ... the Debtor is, in effect, “owners financing” the sale of those assets to Choctaw/Holding ... because it will not receive an immediate cash payment for those assets in the event the Court sees fit to approve the Plan. As all creditors know, and as the Plan clearly provide, substantial cash payments from Choctaw/Holding ... will not occur until after FCC approval, and then only after execution and consummation of the asset purchase agreements that exist, and that will exist, that call for the sale of FCC Spectrum Licenses to Choctaw/Holding ... (or other purchasers in the event Choctaw/Holding ... cannot obtain FCC approval). As a result, the Debtor, through the Liquidating Agent, and otherwise, will continue in an active posture by monitoring and assisting in the FCC approval process. Additionally, the Debtor will continue to prosecute objections to claims, post-confirmation, and the Debtor or the Liquidating Agent will pursue litigation, including, but not limited to, all avoidance claims and causes of action that may exist, especially with respect to transfers listed in the Debtor’s schedules and books and records involving payments made with the ninety (90) days prior to the filing of the Petition and payments or other transfers in the two (2) years prior to the filing of the Petition herein.”¹⁶

¹⁴ *Id.* at p. 25.

¹⁵ *Id.* at p. 26.

¹⁶ *Id.* at pp. 28-29.

“In the event Choctaw/Holding ... cannot obtain FCC approval, or they abandon that pursuit, then the FCC Spectrum Licenses will be returned to the Debtor”¹⁷, as noted in various prior sections of the Plan. In that event, the Debtor will become active and aggressive with respect to seeking a purchaser for the FCC Spectrum License (and “accompanying” assets) that are being returned to the Debtor. Since it is contemplated that FCC approval will not occur overnight, these post-confirmation functions and obligations of the Debtor (and the Liquidating Agent as well), and the contingency that the FCC Spectrum License may be returned to the Debtor cause the Debtor to be engaging in business post-confirmation. The Debtor will also be required, as noted, to monitor the ongoing FCC application process and, to the extent necessary, participate therein. The Debtor will likely remain obligated to participate in the FCC Enforcement Bureau litigation as well, post-confirmation.”¹⁸

...

“Once the Plan is in effect, Holding or Council Tree will be able to effectively manage the business and focus on maintaining or increasing the revenue produced by the sales of the FCC Spectrum Licenses.”¹⁹

Third Amended Disclosure Statement

“The Debtor continues to market its FCC Spectrum Licenses and has already gained Bankruptcy Court approval to sell certain of its FCC Spectrum Licenses, subject to FCC Approval. The Debtor obtained the DIP Financing to meet its ordinary and necessary operating expenses while it markets its FCC Spectrum Licenses”²⁰

¹⁷ While one may believe that this should say will “stay with” or “remain property of” the Debtor, generally consistent with the rest of the Plan, the rest of this cited item shows otherwise, and this Plan was vetted for long time, by teams of attorneys for MCLM and Choctaw including their FCC counsel. This illustrates the underlying actual purposes and relations between MCLM and Choctaw (made up of MCLM secured lenders)—that they Plan and its real purpose, and de facto operations, vests in Choctaw the control over the FCC licenses, which will be “returned to Debtor” MCLM “in the event Choctaw/Holdings... cannot obtain FCC approval.” It is Choctaw that is described as being in charge of the licenses under the Plan, at least co-control. This shows de jure control, and the actions before the FCC have shown de facto control as well, at least co-control.

¹⁸ *Id.* at p. 29.

¹⁹ *Id.* at p. 35. Choctaw-Holdings will “manage the business... of the ... Licenses,”—this is de facto control, under the FCC *Ellis Thomson* and *Intermountain* case criteria, especially considered with the other Plan language, in substantial part set forth in this memo. But MCLM has not obtained FCC approval for this transfer of control under these cases’ criteria.

²⁰ See *In re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss.), MCLM’s Third Amended Disclosure Statement, Dkt. # 668, at p. 17.

“As of the Effective Date, Debtor does not have the means to continue to operate its business as a going concern. Accordingly, it is in the best interest of the creditors for the Debtor to sell its assets **to an entity that is able to efficiently and quickly liquidate** Debtor’s assets in such a manner as to maximize the value of the Debtor’s assets and the return to creditors.”²¹

“If Choctaw ... is the successful purchaser, and in the event the FCC does not apply the Second Thursday doctrine to the FCC Spectrum Licenses involved in this case upon the post-confirmation application therefor, and/or if Choctaw ... decline[s] to pursue necessary FCC approval, the FCC Spectrum Licenses will remain with the Debtor. At that point, the Debtor will continue marketing the assets, in the manner it deems most efficient, in consultation with the Committee/Liquidating Agent. The Debtor may pursue engagement of its pre-petition broker (Spectrum Bridge) to assist it in the sale of the assets, or it may elect to request the Court’s assistance in conducting an auction for its assets/licenses **in order to determine what market is available through the auction process.**”²²

...

“[T]he Plan contemplates a disposition of the FCC Spectrum Licenses held by the Debtor to ... Choctaw **The Debtor and the Liquidating Agent (defined hereinafter) will continue to have significant duties and obligations, post-confirmation, and the process of seeking FCC approval of the transfer of the FCC Spectrum Licenses will require involvements of the Debtor going forward.** Moreover, the Liquidating Agent will have significant distribution obligations and both the Liquidating Agent and **the Debtor have significant claim objection obligations and litigation to pursue after the confirmation hearing and the Effective Date.**”²³

...

“After final FCC approval of Holding as the owner and holder of the FCC Spectrum Licenses, Choctaw will market and sell the FCC Spectrum Licenses in its sole and absolute discretion; subject only to FCC’s regulatory approval of all sales. Choctaw shall distribute all revenue, products and proceeds of the FCC Spectrum Licenses to Choctaw for final and ultimate

²¹ *Id.* at pp. 17-18. **However, this is contradicted in this Plan since Choctaw has no liability or obligations to do anything at all.**

²² *Id.* at p. 19. **This is at odds with both FCC law and Chapter 11 law.** FCC law does not allow spectrum warehousing and trafficking (including simply holding spectrum to sell off). Chapter 11 is based on reorganization to continue in business, not to sell off all the assets. This reveals an unlawful spectrum-laundering purpose of both MCLM and its secured lenders that created Choctaw (Choctaw- Holdings). **That underlies the Motion for Summary Decision** (and all other actions by MCLM and Choctaw before the FCC based on this Plan, before and after court approval thereof).

²³ *Id.* at pp. 22-23.

distribution to the Choctaw Investors until such time as the Choctaw Investors have received the full amounts of their Claims.”²⁴

....

“Nevertheless, if the FCC does not approve the Second Thursday plan as presented, Maritime will endeavor to modify the plan as necessary to address the agency’s concerns.”²⁵

Choctaw Proposal (Fully incorporated into the Plan by reference.²⁶²⁷)

“The Secured Creditors and Trammell have formed a separate entity known as “Choctaw” (defined supra) and have each assigned their respective Claims to Choctaw. Choctaw is the sole member of, and owns all equity in, Holding. In exchange for, and in consideration and full satisfaction of Choctaw’s Claims against the Debtor and Choctaw’s release of the Debtor from all liability to Choctaw on account of the Claims, the Debtor will transfer, assign, and sell to Holding all of the Debtor’s right, title, and interest in the FCC Spectrum Licenses. Such transfer is and will be subject to final approval by the FCC.”²⁸

...

“In general, Holding will hold the FCC Spectrum Licenses.”²⁹

...

“The Choctaw Proposal contemplates that Debtor and Choctaw will seek Second Thursday relief from the FCC.”³⁰

...

“Nevertheless, if the FCC does not approve the Second Thursday plan as presented, Choctaw will endeavor to modify the Choctaw Proposal as necessary to address the agency’s concerns.”³¹

²⁴ *Id.* at pp. 24-25.

²⁵ *Id.* at p. 34.

²⁶ See *In re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss.), MCLM’s First Amended Plan, Dkt. # 669 at pp. 15-16.

²⁷ See *In re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss.), Choctaw Proposal, Dkt. 668-5.

²⁸ *Id.* at p. 3.

²⁹ *Id.* at pp. 7-8.

³⁰ *Id.* at p. 8.

...

“All Executory Contracts, including all contracts to sell FCC Spectrum Licenses, that have not been previously rejected, or are the subject of a pending motion to reject as of the Confirmation hearing, shall be assumed by the Debtor and assigned to Choctaw as of the Effective Date pursuant to Bankruptcy Code §§ 365 and 1123. Each Executory Contract assumed pursuant to this provision, as well as all other executory contracts, as to which the Court has previously approved the Debtor’s request to assume, shall vest in and be fully enforceable by Choctaw in accordance with its terms, except as modified by the provisions of the Choctaw Proposal, or any order of the Bankruptcy Court authorizing and providing for its assumption or applicable federal law. All employment contracts are rejected, and Choctaw will have no obligations with respect to any of the Debtor’s employment contracts.”³²

...

“If the FCC does not approve the transfer of any FCC Spectrum License from the Debtor to Holding, such FCC Spectrum License shall remain the property of the Debtor, and shall be subject to all of the Secured Creditors’ rights and interest therein.”³³

Confirmation Order³⁴

“However, no provision of the Plan relieves the Debtor, the Choctaw entities (Choctaw Telecommunications, Choctaw Holding, the Choctaw Investors) or the Liquidating Agent from their obligations to comply with the Communications Act of 1934, as amended and the rules regulations and orders promulgated thereunder by the FCC, including but not limited to any order issued by the FCC or settlement reached in the administrative proceeding initiated against the Debtor by the FCC in the April 19, 2011 Order to Show Cause, Hearing Designation Order and Notice and Opportunity for Hearing, and any FCC order issued in response to a Petition for

³¹ *Id.* at p. 10.

³² *Id.* at p. 13-14.

³³ *Id.* at p. 16.

³⁴ See *In re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss.), Order Confirming Plan of Reorganization, Dkt. # 980. This is the bankruptcy court order confirming, approving, the Plan. SkyTel objected to the plan in pleadings and at the confirmation hearing. The FCC via the Office of General Counsel, and its counsel from the US DOJ also attended the hearing, and raised various objections, and negotiated for some changes in the Plan adopted in the confirmation Order. This included statements by the DOJ attorney on issue (g) in this Hearing in docket 11-71 that should be considered by the Judge including with regard to the MCLM Motion for Summary Decision.

Extraordinary Relief pursuant to the FCC's *Second Thursday* doctrine filed by Debtor and Choctaw."³⁵

"It is, further, ORDERED, ADJUDGED AND DECREED, that Choctaw and Holdings shall each use their **best efforts** to obtain the FCC Licenses from Maritime and to obtain approval from the FCC for the same. Choctaw and Holdings shall further use their best efforts to sell, subject to the approval of the FCC, sufficient FCC Licenses in order to satisfy the Allowed Claims in full."³⁶

[End of memo.]

³⁵ *Id.* at pp. 6-7.

³⁶ *Id.* at p. 8. As this Plan shows (see excerpts above) and this court Order confirming-approving it shows, **only "best efforts"** are involved, and **Choctaw has no liability of obligations to do anything under the Plan—but it does have rights of co-control** under the Plan, **and powers and liability described under 47 USC §217** as long as it in fact maintains and acts under those rights—as is the current situation involving the **Motion for Summary Decision**, and the MCLM attempt to get "Second Thursday" relief in parallel.