

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

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| In the Matters of:<br><br>(i) Application To Assign Licenses, and<br><br>(ii) Comment Sought On Application To Assign Licenses<br><br>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<br><br>(together, the “ <u>Application</u> ”) | File No. 0005552500 (the “ <u>Application</u> ”)<br><br>DA 13-569 (the “ <u>PN</u> ”)<br>WT Docket No. 13-85 (the “ <u>Docket</u> ”) |
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To the Secretary  
Attention, Wireless Bureau Chief

Replies to Comments, and Procedural Objections -  
by SkyTel-1 Entities

The undersigned entities, together herein the “SkyTel Entities” hereby submit reply to comments (or “reply comments”) to the comments submitted in the Docket.<sup>1</sup> Capitalized terms herein not defined herein have meanings given in the SkyTel Entities’ petition to deny (that also included comments) (“PD”) filed in this Docket.

SkyTel understands from FCC staff, as noted in Appendix 1 below, that it may file on June 20, 2013 both a reply to oppositions to its PD, and also (in the same or another filing) reply to comments (of any kind, called comment, reply comments, or other name) in this docket.

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<sup>1</sup> Each of the SkyTel Entities 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 an 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.

However, in case the FCC did not mean that, SkyTel is filing today, in the instant filing, initial reply comments, while reserving the right to file final reply comments (to comments of any kind) by June 20, 2013.

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## 1. Introduction, summary, and application to all relief sought

The Contents descriptive listings above provide a summary.

This filing's sections principally discuss "Footnote 7" (or "FN7") in the HDO, FCC 11-64,<sup>2</sup> and relief sought in relation to FN7; however, the filing's sections also apply to other extraordinary relief sought by MCLM, Choctaw (together, "M-C"), and others in support of M-C or their positions seeking said relief in this Docket and in relation to the Application. That is, e.g. the following point apply also to relief sought on the basis of the so-called "Second Thursday" ("ST") doctrine, except with regard to elements of assertions of qualification for ST relief that is specific to that doctrine, as discussed in SkyTel's PD.

This filing responds or replies to comments submitted in support of, or that advocate extraordinary relief under, FN7, or with arguments that assert elements of FN7. SkyTel submits that those comments are clearly in error for the fundamental reasons set forth below.

## 2. Procedural objections as to 47 USC §309(d).

See Appendix 2 hereto.

## 3. Other procedural objections, Including, this is the fourth proceeding on the SCRRA Application and matters that stem from it. Reference and incorporation.

See Appendix 3 hereto.

To be further presented by June 20 in a revised or replacement filing – see above.

## 4. FN7 is an impermissible, unreasoned, arbitrary and capricious departure from FCC rules, the related sections of the Communications Act, and their public interest requirement, under Section 706 of Title 5 of the USC and controlling court precedent

5 U.S.C. § 706 provides in relevant part:

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<sup>2</sup> Unless otherwise indicated, by "FN7" we mean the text of, and the apparent extraordinary rule-relief purpose and rationale of, footnote 7 in this HDO.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— ...

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ...

Footnote 7 relief, if granted by the Commission, would surely fail this standard upon judicial review. The Administrative Procedure Act directs a reviewing court to "find[] that the [Commission's] actual choice" in any discretionary policymaking setting is "not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (quoting 5 U.S.C. § 706(2)(A)). Far from giving full "consideration of the relevant factors" and avoiding "a clear error of judgment," *Overton Park*, 401 U.S. at 416, the Commission has undermined the SkyTel entities' private party rights under 47 U.S.C. § 309(d).

Permitting one railroad (SCRRA), to say nothing of other actors seeing fit to designate themselves "critical" entities, to acquire AMTS spectrum through an unprecedented and procedurally defective waiver process undermines the carefully wrought method of allocating AMTS spectrum through competitive bidding, with appropriate protection for previously assigned site-based licenses.

Footnote 7 is not based on the Commission's proper discharge of its statutory responsibilities and sound exercise of its regulatory discretion. The Commission has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). Allowing parties to acquire AMTS spectrum without bidding, to the detriment of legitimate licensees, and on no more compelling basis besides their size and their professed desire for this spectrum as a matter

of convenience would therefore represent an exercise in arbitrary and capricious decisionmaking and an abuse of discretion.

The content of other sections of this filing amplify the arguments of this section above.

5. Comments, including those of the FCC Enforcement Bureau, are in error factually, and did not have new evidence that further shows fatal error, as to site-based licenses, and the geographic licenses obtained by the invalid site-based licenses

The comments indicated in this section 5 caption error as follows. They are based upon the false assumption that MCLM has lawfully and fully disclosed in the hearing under the HDO FCC 11-64, docket 11-71, the documents and facts relevant to (i) its site based licenses (including their construction and operations, or lack thereof) and (ii) the site-based licenses' facts of '(i)' that were the purposes and means MCLM used to obtain the geographic licenses in Auction 61 (the principal means was not the cash spent, or the invalid bidding credits obtained by fraud, but the false assertion of the site-based licenses which meant any other bidder could not raise or commit funds in the auction to buy the spectrum underlying those false licenses—the core areas of the geographic licenses).

SkyTel references and incorporate herein in full, its Opposition to the MCLM motion for summary decision on “issue (g)” in docket 11-71. This Opposition sets forth summarizes of and hundreds of pages of evidence relating to MCLM (owners, officers, attorneys, and parties in interest including Choctaw, under 47 USC §§217 and 411) fraud before the FCC in withholding the majority of the documents and evidence as to these site-based licenses history before MCLM obtained them, and afterwards.

This withholding and fraud makes the comments in support of MCLM and FN7 relief, and “Second Thursday” and other relief, lack foundation, and also pursued for unlawful purposes and void under public policy.

However, in addition, the evidence presented in the just noted SkyTel Opposition in docket 11-71, also shows that the Watercom and Regionet licenses eventually obtained by MCLM were not, as MCLM told the FCC (in docket 11-71, and before that to the Wireless Bureau) constructed and in operation at the time MCLM obtained them. The evidence presented in the NJ USDC case, Skybridge v Mobex and MCLM, shows this (deposition of Mr. Predmore, documents he produced, and documents produced from site owners and controllers responding to subpoenas).

6. FN7 is facially defective, and ultra vires, since under APA it is a substantive rule, but created without public notice and comment, and publication in fed register.

To be presented by June 20 in a revised or replacement filing – see above.

7. FN7 is against the public interest.

This is reflected herein.

Also, to be presented by June 20 in a revised or replacement filing – see above.)

8. FN7 cannot be expanded; too late for reconsiderations.

It is specific to one railroad. This docket cannot be used for late filed requests for reconsideration, nor can any such request be to the Wireless Bureau since FN7 is in a Commission Order, FCC 11-64.

9. FN7 relief sought thereunder is subject to rule waiver standards, and those were not satisfied

To be presented by June 20 in a revised or replacement filing – see above.)

10. FN7, and relief sought, was based on misrepresentations, and participation in violation of antitrust law, and relief based thereupon cannot be granted.

FN7 was based on misrepresentations, and participation in violation of antitrust law, and relief based thereupon cannot be granted. This is shown in the special docket the FCC created for the SCRRRA application to obtain MCLM spectrum: see the SkyTel pleadings in that docket.

To be further presented by June 20 in a revised or replacement filing – see above.)

The railroad said to FCC it needed 1 MHz, in its application to get MCLM spectrum, long ago. FCC created a special docket just for this. SkyTel showed in that docket that this railroad did not need even a minor fraction of this 1 MHz, and the railroad eventually admitted that, in a footnote [where parties caught in misrepresentations tend to put their admissions] and that it was seeking this spectrum for its partner, a for-profit freight railroad, and it also knew that MCLM was not operating its site-based licenses which, its internal due diligence showed, was now MCLM bought the geographic spectrum in Auction 61. That is participation in violation of Sherman Act 1 as reflected in Skybridge v Mobex, USDJ NJ. Under 47 USC § 411, SCRRRA and others who support and seek to profit from MCLM violation of SA1 (now, perpetuated by Choctaw also), can be joined in the claims, and under 48 USC § 217 have liability.

#### 11. FN7 relief cannot subvert private party rights under 48 USC §309(d)

SkyTel has petitions to deny of not only the subject MCLM-Choctaw assignment Application, but all of the MCLM assignments to the entities seeking FN7 or FN7-like relief: the railroad and various power companies. This Docket cannot be used to reopen those closed pleading cycles, or to subject the SkyTel petitions to new attacks. 47 USC 309(d) and 405 petitions are based on Article III standing, private property rights, and the FCC cannot take those away, or impinge or devalue those by a new proceeding, and comments and reply comments of entities that are not parties to those formal proceedings.

Taking of such rights, apart from a proper eminent domain process, is a Constitutional tort, subject to a Bivens Action lawsuit, and other injunctive and damage relief, including against

the agency and employees executing the unlawful taking. It could not be more clear, including since SkyTel keeps repeating it, that SkyTel has pending, these 309 and 405 challenges, not only those just noted closest to the matters in the Docket, but as to the invalidity of all of the MCLM spectrum: these began before Mobex sold the site based licenses to MCLM, and continued against MCLM's unlawful

12. The FN7 assertions by this railroad, and other self-designated "critical" entities, undermines their public duties, and any actual public interest basis.

To be presented by June 20 in a revised or replacement filing – see above.

13. Parties advocating FN7 relief must face the same, but they oppose it

To be further presented by June 20 in a revised or replacement filing – see above.

The FN7 relief, stripped down, is a sort of eminent domain assertion. Railroad and power utilities exist, in large part, by eminent domain-- federal and state, to run their infrastructure (tracks, power lines, etc.). But they oppose others trying to piggy back on the infrastructure they built on public lands and rights of way, under any basis including eminent domain.

Under FN7 logic, SkyTel can assert rights to use railroad track rights of way, and power company power poles and facilities, if we convince the FCC we are sufficient "critical," and we are pursuing far more critical purposes, with better tech, far more spectrum efficient tech and systems, etc., and we fairly and squarely obtained our FCC licenses. Under FN7 logic, we can ask the FCC to kick power companies and railroad off of their spectrum so we can use it, and to stop them from use of 900 ISM/ Part 15 band spectrum that underlies our Part 90 M-LMS spectrum for Intelligent Transportation Systems. We have not done that, but instead actively for over a decade seek to assist public and private transport and energy systems, with spectrum, tech, networks, programs, etc including on a nonprofit basis. But we will fight those in these sectors

that act against the public interest and against core laws in the wireless field, and that includes pursuit of FN7 relief by some in these fields.

The fact is that all these entities seeking FN7 relief showed, in the proceedings already completed on their assignment applications to get the MCLM spectrum, is that they like AMTS spectrum since it allows easier cheaper coverage, and for the railroad, since its freight-rail partners are using 220 MHz and want to sell it their proprietary radios for PTC (that, for over 5 years, are not even available for any actual systems).

Further, these entities did not even go into the AMTS market for spectrum, they simply bought MCLM spectrum since it was being sold in a fire sale. It is because the spectrum was defective and challenged by Skytel and the FCC, for termination and revocation, that it was cheap. That is the "critical" need of these buyers. They fail to meet any public interest standard. Actions for or that benefit or flow from, illegal purposes and assets, are unlawful and cannot be granted. It is against public policy.

#### 14. Conclusion

Comments to date (prior to May 30, 2013) in this Docket (however labeled) submitted in support of, or that advocate extraordinary relief under, FN7, or with arguments that assert elements of FN7, are contrary to established, controlling law, the public interest, and protected private interests, and are irresponsible assertions of parties alleged high value in and duties to the nation's "critical" infrastructure or services, are contrary to their own practices and concerns, and all these and other reasons given above, should be rejected.

As indicated above, SkyTel reserves rights to, and expects to, expand upon these reply comments, and may replace these reply comments, on or before the due date for SkyTel's Reply to Oppositions to its PD.

Respectfully,

*/s/ Electronically submitted. Signature on file.*

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

Warren Havens  
Skybridge Spectrum Foundation<sup>3</sup>  
Environmental LLC  
Intelligent Transportation & Monitoring Wireless LLC

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

Dated: May 30, 2013

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 30, 2013

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<sup>3</sup> 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 30, 2013

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**From:** Jeff Tobias <Jeff.Tobias@fcc.gov>  
**To:** 'Warren Havens' <warren.havens@sbcglobal.net>  
**Cc:** Scot Stone <Scot.Stone@fcc.gov>; Jimmy Stobaugh <jstobaugh@telesaurus.com>  
**Sent:** Thursday, May 30, 2013 8:26 AM  
**Subject:** RE: Request for a clarification re DA 13-569, WT Docket No. 13-85

Mr. Havens,

SkyTel need not file both reply comments and a reply to oppositions. Should SkyTel wish to only file a single responsive pleading, and that on June 20, the deadline for replies to oppositions, that's fine. I would only remind you that a reply (as opposed to reply comments) may only address matters raised in oppositions. See 47 C.F.R. § 1.45(c). Although that limitation may not have any practical impact in this particular proceeding, we could not say so definitively prior to reviewing the oppositions (if any) and the reply comments (if any) that are filed today.

Jeffrey Tobias  
Federal Communications Commission  
Wireless Telecommunications Bureau  
Mobility Division  
(202) 418-1617

Procedural objections as to 47 USC §309(d).

Regarding 47 USC §309(d), FCC rule FCC rule §§ 1.939 and 1.45(c) (here, the "Law") (see text of the first two of these rules below):

A petition to deny ("PD") under the Law is not be subject to "comments" or "reply comments," only to timely oppositions by parties that submitted the subject license application (or any other party with standing).

However, where the FCC has called for comments and allow reply comments, a party that submitted a petition to deny may expect those to effect the FCC decision on the PD.

A reply under the Law is limited to what is in oppositions to the PD. Also, the "Commission will dismiss or deny the petition... disposing of all substantive issues raised in the petition" -- and not anything raised in comments or reply comments on the subject license application. But where the FCC has allows said comments and reply comments, this appears to create an ultra vires change of 1.939, and an impermissible impingement on 309(d).

There is nothing in the statute, 47 USC §309(d) that allows PD (a decision on the PD, and any appeals of that decision) to be subject to any filing other than a timely opposition (or any other pleading with FCC permission to file granted) by a party with standing. The FCC has been clear and strict on this. Otherwise, it turns upside down the essential law on Article III standing that both the FCC and courts have insisted on for obvious reasons (otherwise, anyone can challenge any agency action by parties with direct interests and alleged injury).

For the above reason, SkyTel objects in the case that the FCC imposes upon the SkyTel PD, consideration of any comments in this Docket (by whatever name, e.g, "comments," "reply comments," or other name). *In addition, if the FCC does cause the case just noted, then SkyTel*

*makes this instant filing, and any other “comments” or “reply comments” it files in this docket part of its PD and Reply to Oppositions to its PD.*

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47 USC §309 (emphasis added)

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

FCC rule § 1.939 Petitions to deny (emphasis added)

(a) Who may file. Any party in interest may file with the Commission a petition to deny any application listed in a Public Notice as accepted for filing, whether as filed originally or upon major amendment as defined in § 1.929 of this part.

\* \* \* \*

(f) Oppositions and replies. The applicant and any other interested party may file an opposition to any petition to deny and the petitioner may file a reply thereto in which allegations of fact or denials thereof, except for those of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof. Time for filing of oppositions and replies is governed by § 1.45 of this part for non-auctionable services and § 1.2108 of this part for auctionable services.

\* \* \* \*

(h) Grant of petitioned application. If a petition to deny has been

filed and the Commission grants the application, the Commission will dismiss or deny the petition by issuing a concise statement of the reason(s) for dismissing or denying the petition, disposing of all substantive issues raised in the petition.

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Other procedural objections

SkyTel references and incorporates herein all of its filings made in relation to the Application prior to its filing of its PD of the Application. These contained various procedural objections to the Application and the FCC procedures to process and take pleadings from persons (with party interest, and otherwise) regarding the Application including the special relief sought in relation to the Application.

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Certificate of Service

The undersigned certifies that he has, on May 30, 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.\*<sup>4</sup>

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Counsel for “Choctaw” (defined in the filing)

And parties that filed Comments  
[Their names may be filled in, in an amended Certificate of Service,  
which, if made, will be filed in the docket.]

*/s/ [Filed Electronically. Signature on File]*

\_\_\_\_\_  
Warren Havens

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\* 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,<sup>17</sup>

\_\_\_\_\_  
<sup>4</sup> Copies mailed may be 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.