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

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

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

ENFORCEMENT BUREAU'S REPLY TO MCLM'S AND CHOCTAW'S REPLY COMMENTS AND OPPOSITIONS TO PETITIONS TO DENY

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SUMMARY

1. On March 28, 2013, the Wireless Telecommunications Bureau (Wireless Bureau) requested comment on the application submitted by Maritime Communications/Land Mobile, LLC (MCLM) and Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (collectively, Choctaw) for Commission consent to the assignment of certain geographic and site-based Automated Telecommunications System (AMTS) licenses from MCLM to Choctaw pursuant to the Commission's *Second Thursday* doctrine (*Second Thursday* Submission). On May 9, 2013, the Chief, Enforcement Bureau (Bureau), by her attorneys, submitted the Bureau's comments (Comments) on MCLM and Choctaw's *Second Thursday* Submission. On May 30, 2013, Choctaw and Maritime separately filed replies to the Bureau's Comments.

2. Choctaw claims the Bureau's Comments should be stricken from the record. Based on the Commission's *Second Thursday* precedent and the language of the Wireless Bureau's Public Notice, there is no basis to strike the Bureau's Comments.

3. In addition, MCLM and Choctaw have failed to demonstrate that their request for relief pursuant to *Second Thursday* should be granted. First, MCLM and Choctaw have failed to provide sufficient information to demonstrate that the proposed assignment will benefit creditors other than Choctaw and that Sandra and Donald DePriest will either derive no benefit from the proposed transaction or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. Second, neither MCLM nor Choctaw have demonstrated that Choctaw must acquire all of MCLM's licenses in order to satisfy the debt owed to innocent creditors. MCLM and Choctaw still offer no precedent for expanding the narrow *Second Thursday* exception to allow transfers of licenses beyond those needed to repay innocent

creditors. Third, MCLM and Choctaw have not articulated a persuasive basis for why, after MCLM previously conceded that Issue (g) should be resolved in the pending license revocation hearing proceeding, and the Presiding Administrative Law Judge issued an Order that Issue (g) shall continue to hearing, the Commission should now remove Issue (g) from the hearing proceeding and waive MCLM's construction and operational requirements.

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ENFORCEMENT BUREAU'S REPLY TO MCLM'S AND CHOCTAW'S REPLY COMMENTS AND OPPOSITIONS TO PETITIONS TO DENY

1. On May 9, 2013, the Chief, Enforcement Bureau (Bureau), by her attorneys, submitted the Bureau's comments (Comments) on the application submitted by Maritime Communications/Land Mobile, LLC (MCLM) and Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (collectively, Choctaw) for Commission consent to the assignment of certain geographic and site-based Automated Telecommunications System (AMTS) licenses from MCLM to Choctaw pursuant to the Commission's *Second Thursday* doctrine (*Second Thursday* Submission).[1] These Comments raised significant questions about whether, based on

[1] *See* Comments of the Enforcement Bureau on MCLM and Choctaw's Second Thursday Submission, filed in WT Docket No. 13-85, on May 9, 2013.

the information provided by MCLM and Choctaw in their Submission, *Second Thursday* relief was appropriate. On May 30, 2013, Choctaw and Maritime separately filed replies to the Bureau's Comments.[2] The Bureau herein submits its reply to issues raised in MCLM's and Choctaw's respective reply comments.

ARGUMENT

2. In their *Second Thursday* Submission and their reply comments, MCLM and Choctaw have attempted to portray this matter as nothing more than a routine *Second Thursday* application. It is not. Like other licensees in *Second Thursday* proceedings, MCLM is in a license revocation hearing raising questions about its basic character qualifications to hold a license, and MCLM has sought bankruptcy protection. But that is where the similarity between this case and a routine *Second Thursday* application ends.

3. In a typical *Second Thursday* proceeding, a third party has agreed to purchase the license(s) in question for a specified price, which will be used to repay in part debts owed to the licensee's creditors.[3] At the time of a request for *Second Thursday* relief, therefore, the Commission knows how much the creditors are owed and how much they are to be repaid as a result of the proposed transaction for which the applicants are seeking approval. In addition, the Commission is aware of the amount, if any, of personal guarantees provided by alleged

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[2] *See* MCLM's Reply Comments and Opposition to Petitions (MCLM's Reply), filed in WT Docket No. 13-85, on May 30, 2013; Choctaw's Reply Comments and Opposition to Petitions to Deny (Choctaw's Reply), filed in WT Docket No. 13-85, on May 30, 2013.

[3] *See, e.g., In re Eddie Floyd*, 26 FCC Rcd 5993, 5995 ¶ 6 (MB 2011) (proceeds of the sale of the station distributed to creditors); *Family Broadcasting, Inc.*, 25 FCC Rcd at 7595 ¶ 12 (2010) ("Under the Plan, Family's creditors will receive 100 percent of the purchase price paid by Caledonia ..."); *In re Litton*, 22 FCC Rcd 641, 646 ¶ 3 (2007) (using purchase price for the stations to reduce the bankrupt entities' obligations); *KOZN FM Stereo 99 Ltd.*, 6 FCC Rcd 257, 257 ¶ 6 (1991) (sale proceeds of $250,000 available to pay $280,000 in total claims); *Cosmopolitan Enterprises, Inc.*, 73 FCC 2d 700, ¶ 14 (1979) (purchase price applied to pay creditors' claims); *Hertz Broadcasting of Birmingham, Inc.*, 57 FCC 2d 183, 184 ¶ 3 (1976) (purchase price distributed to creditors). In one instance, when the amount of the negotiated sale proceeds was insufficient to reimburse the unsecured creditors, the Commission allowed the unsecured creditors to acquire an ownership interest in the entity that had acquired the licenses as full payment of the debt owed to them. *See MobileMedia Corp.*, 14 FCC Rcd 8017, 8019 ¶ 6 (1999).

wrongdoers that would be satisfied if the Commission approved the proposed transaction.[4] Under these circumstances, the Commission has been able to make well-informed decisions on *Second Thursday* applications.

4. In this case, on the other hand, Choctaw has not agreed to purchase MCLM's licenses for a specified price. Instead, Choctaw has agreed to acquire all of MCLM's licenses, previously valued at $45.2 million,[5] in full satisfaction of Choctaw's claims,[6] which Choctaw suggests amount to just under $15 million.[7] In addition, the Bankruptcy Court has ordered Choctaw to "use their best efforts to sell, subject to the approval of the FCC, sufficient [MCLM] Licenses in order to satisfy the [remaining] Allowed Claims in full."[8] Critical facts about these potential future sales and how they will benefit the remaining creditors (and possibly the DePriests) remain unknown. In particular, MCLM and Choctaw have failed to identify:

- the current market value of MCLM's licenses;
- the total amount owed to MCLM's creditors;
- the identity of any potential buyers for MCLM's licenses;
- when Choctaw intends to sell MCLM's licenses;

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

[5] *See* Exhibit A-Pt. 1, Schedule B to Third Amended Disclosure Statement for Maritime Communications/Land Mobile, LLC, dated September 25, 2012, submitted as Exhibit 9 to the Bureau's Comments, at p. 6 of 32. As the Bureau noted in its Comments, it understands that Choctaw has a more recent valuation of MCLM's licenses. *See* Bureau's Comments at pp. 11-12.

[6] *See* MCLM's First Amended Plan of Reorganization (MCLM's Plan), dated September 25, 2012, as confirmed by the Bankruptcy Court, submitted as Exhibit 2 to the Bureau's Comments, at p. 10.

[7] *See* Choctaw's Reply at p. 18. Based on the Bureau's review of MCLM's bankruptcy filings, however, Choctaw's secured claims amount to $15,045,204.33. *See* MCLM's Plan at p. 9. Together with Mr. Trammell's unsecured claim, Choctaw's claims amount to $15,181,204.88. *See id.*; Amended Summary of Schedules (MCLM's Amended Schedules), dated November 15, 2011, submitted as Exhibit 3 to the Bureau's Comments, at Amended Schedule F, page 19 of 29.

[8] Order Confirming Plan of Reorganization (Confirmation Order), submitted as Exhibit B to MCLM and Choctaw's *Second Thursday Submission*, at p. 8.

- which of MCLM's licenses Choctaw intends to sell and for how much;
- the total amount that is to be paid to Choctaw under MCLM's First Amended Plan of Reorganization (Plan);
- the total amount that is to be paid under the Plan to each of the remaining creditors; and
- the amount of any personal guarantees offered by Mr. DePriest that may be satisfied if creditors are repaid.

In its Comments, the Bureau pointed out each of these deficiencies in the record.[9] The failure by MCLM and Choctaw to even attempt to fill this evidentiary void raises serious concerns about whether *Second Thursday* relief is appropriate in this case.

I. There Is No Basis For Striking The Bureau's Comments From The Record

5. Choctaw requests that the Bureau's Comments be stricken from the record, alleging that the Bureau has no delegated authority to submit comments in licensing proceedings.[10] The Wireless Bureau should deny Choctaw's request.

6. The Public Notice released by the Wireless Bureau concerning MCLM and Choctaw's *Second Thursday* Submission invited comment from any "[i]nterested parties" without limitation.[11] The Bureau submitted its Comments pursuant to Sections 0.311 and 0.111(b) of the Commission's rules (Rules),[12] which grant the Bureau delegated authority to serve as trial staff in hearing proceedings. As a party to the pending administrative hearing proceeding concerning the same licenses that are the subject of MCLM and Choctaw's *Second Thursday* Submission, the Bureau indisputably has an interest in this proceeding. In particular, the Bureau has an interest in ensuring that the Wireless Bureau has the information necessary to

[9] *See, e.g.,* Bureau's Comments at pp. 7-12; 15-16.

[10] *See* Choctaw's Reply at n.3.

[11] *See* Comment Sought in Application to Assign Licenses Under Second Thursday Doctrine, Request for Waiver and Extension of Construction Deadlines, and Request to Terminate Hearing, Public Notice, 28 FCC Rcd 3358 (2013).

[12] 47 C.F.R. §§ 0.311, 0.111(b).

consider whether MCLM and Choctaw's Submission meets the *Second Thursday* criteria. In addition, the Bureau has an interest in ensuring that the Wireless Bureau has a complete record concerning the site-based licenses for which MCLM and Choctaw are now seeking a waiver of construction and operational requirements. Moreover, there is ample precedent in which hearing trial staff has submitted comments under similar circumstances.[13] Accordingly, there is no basis for Choctaw's request to strike the Bureau's Comments.

II. MCLM And Choctaw Have Failed To Adduce Sufficient Evidence In The Record For The Commission To Assess Whether The *Second Thursday* Criteria Have Been Met

7. The Bureau's Comments identified several deficiencies in MCLM and Choctaw's *Second Thursday* Submission. In particular, MCLM and Choctaw's *Second Thursday* Submission failed to provide sufficient information to demonstrate that (a) the proposed assignment of MCLM's licenses to Choctaw will benefit any creditors other than the four creditors who formed Choctaw, and (b) the DePriests will either derive no benefit from the proposed transaction or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.[14] Neither MCLM nor Choctaw cured these deficiencies in their

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[13] *See, e.g.*, Enforcement Bureau's Comments on Petition for Extraordinary Relief, filed in MB Docket No. 10-157, on March 11, 2011; Enforcement Bureau's Comments on Supplement to Petition for Extraordinary Relief, filed in MB Docket No. 10-157, on March 18, 2011. Many of the *Second Thursday* cases pre-date the creation of the Enforcement Bureau in 1999. Prior to the Bureau's creation, each of the individual bureaus had staff who participated in administrative hearing proceedings. The Commission's record is replete with examples of the individual bureaus' hearing staff filing comments in response to petitions for *Second Thursday* relief. *See, e.g.*, Wireless Telecommunications Bureau's Consolidated Comments on Applications For Transfer of Control and Petition to Terminate and for Special Relief, filed in WT Docket No. 97-115, on Nov. 16, 1998; Mass Media Bureau's Comments on Petition for Extraordinary Relief, filed in Docket No. 91-227, on Feb. 3, 1992; Mass Media Bureau's Comments on Supplement to Petition for Extraordinary Relief, filed in Docket No. 91-227, on May 18, 1992; Mass Media Bureau's Further Comments on Supplements to Petition for Extraordinary Relief, filed in Docket No. 91-227, on July 20, 1992; Mass Media Bureau's Comments on Further Supplement to Petition for Extraordinary Relief, filed in Docket No. 91-227, on Aug. 12, 1992; Mass Media Bureau's Comments on John Durkay's 07/17/89 Petition for Extraordinary Relief, filed in Docket No. 89-3, on Aug. 1, 1989.

[14] *See* Bureau's Comments at pp. 7-12, 15-16. The Bureau also argued that MCLM and Choctaw had failed to demonstrate that the alleged wrongdoers, Sandra and Donald DePriest, will not have any role in the proposed operations of MCLM's licenses. *See id.* at pp. 12-13. Because Sandra and Donald DePriest have now submitted declarations with MCLM's Reply in which they attest that they will not directly or indirectly "have any future involvement with the licenses" or "be involved in any way with operations pursuant to these licenses," the Bureau is

Replies.

A. MCLM And Choctaw Have Failed To Demonstrate That The Proposed Transaction Will Benefit Innocent Creditors

8. As the Bureau noted in its Comments, Commission policy generally prohibits the transfer of a license in the face of unresolved questions about the licensee's basic character qualifications to hold a license.[15] The Commission carved out a narrow exception to this general prohibition when a licensee is bankrupt, and when certain other requirements are satisfied, in order to protect the interests of innocent creditors.[16] Therefore, before granting *Second Thursday* relief, the Commission must be assured that the proposed transaction benefits innocent creditors.

9. In all other cases in which the Commission has granted *Second Thursday* relief, this was a relatively simple analysis because the bankruptcy trustee or receiver requested approval of a transaction that would assign the license(s) at issue to a third party who had agreed to acquire the bankrupt entity's assets for a specified purchase price.[17] The proceeds from this "sale" of the assets were then used to repay any innocent creditors.[18] Here, Choctaw has not offered to purchase MCLM's assets for a specified upfront cash payment that in turn would be used to pay the remaining creditors. Instead, Choctaw has agreed only to acquire MCLM's licenses and then to act as a broker to sell some or all of the licenses to repay the remaining creditors an unspecified amount within an unspecified period of time.

10. Instead of providing essential details concerning these future transactions and how they will satisfy the debt owed to the remaining creditors, Choctaw argues that because the United States Bankruptcy Court for the Northern District of Mississippi (Bankruptcy Court)

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satisfied that MCLM and Choctaw have demonstrated that the DePriests will not have any role in the proposed operations of the licenses.

[15] *See* Bureau's Comments at pp. 6-7; *Jefferson Radio Company v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

[16] *See Second Thursday Corp.*, 22 FCC 2d 515 (1970).

[17] *See supra* note 3.

[18] *See supra* note 3.

approved MCLM's Plan – which neither Choctaw nor MCLM submitted to the Wireless Bureau with their *Second Thursday* Submission – the Commission should not question whether the proposed assignment of MCLM's licenses to Choctaw benefits the innocent creditors.[19] According to Choctaw, only the Bankruptcy Court has the authority to evaluate "creditor issues pursuant to *Second Thursday*,"[20] and the Commission's role in a *Second Thursday* analysis is limited only to assessing "the future role and benefits that will flow to purported wrongdoers as a result of a proposed transaction."[21] However, there is no precedent – and Choctaw cites none – which suggests that the Commission's role in assessing a request for *Second Thursday* relief is so limited.[22] Even the Bankruptcy Court recognized that the Commission is not obligated to simply adopt the Bankruptcy Court's rulings or judgments.[23] Rather, it is the Bankruptcy Court's rulings or judgments that "are contingent on what the FCC ultimately decides."[24]

11. Based on the information and documentation that MCLM and Choctaw have produced to date, if the proposed assignment is approved, the only creditors that the Wireless Bureau knows for a fact will be repaid are the four who formed Choctaw. Although MCLM's Plan may "contemplate[] a full repayment"[25] to the remaining creditors, there is nothing in the record before the Wireless Bureau that demonstrates how much any other creditor will be paid, if

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[19] *See* Choctaw's Reply at pp. 13-14.

[20] *Id.* at p. 14.

[21] *Id.* at pp. 13-14.

[22] Choctaw cites to *LaRose v. FCC*, 492 F.2d 1145, 1146 n.2 (D.C. Cir. 1974). *See* Choctaw's Reply at n.48. Yet, *LaRose* suggests nothing more than that the Commission should consider assignments pursuant to *Second Thursday* "in light of the public interest in the protection of innocent creditors." *LaRose,* 492 F.2d at 1146 n.2. It says nothing about limiting the Commission's authority to question whether the proposed assignment protects those creditors.

[23] *See* Confirmation Order at p. 11 (the Bankruptcy "Court is not attempting through its orders or otherwise to superimpose this Court's rulings or judgments on the FCC").

[24] *Id.*

[25] *See* Choctaw's Reply at p. 14.

at all, and when.[26] As a result, there is insufficient information in the record for the Commission to assess whether the proposed transaction benefits innocent creditors other than Choctaw and whether *Second Thursday* relief is appropriate.

B. MCLM And Choctaw Have Not Demonstrated That The DePriests Will Not Benefit From The Transaction

12. For the Commission to grant relief under the *Second Thursday* doctrine, it must be assured that the alleged wrongdoers – Mr. and Mrs. DePriest – "will either derive no benefits from favorable action on the application[] or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors."[27] MCLM and Choctaw's *Second Thursday* Submission acknowledged that a benefit may accrue to the DePriests as a result of "the satisfaction of a personal loan guarantee[s] provided by Mr. DePriest" for certain loans made to MCLM.[28] However, MCLM and Choctaw's Submission failed to identify either the amount of Mr. DePriest's personal loan guarantees or the purported purchase price being offered for MCLM's licenses – information that the Commission has deemed essential to its analysis of whether the elimination of such secondary liability is a benefit that outweighs any benefits that might inure to innocent creditors.[29] MCLM and Choctaw also failed to provide this information in their Replies.

13. Instead, both MCLM and Choctaw persist in arguing that "the mere possibility of a reduction of secondary liabilities is not sufficient to outweigh the public interest benefit of

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[26] Choctaw suggests that because it credit bid the amount of its secured debt ($14.9 million) and because it assumed the remaining debt, and agreed to pay the administrative expenses, "the minimum consideration to MCLM for the Licenses is $42,033,929.16." Choctaw's Reply at p. 18. However, until MCLM's licenses are resold, this purported "consideration" is speculative. It is not consideration that can be used to repay the remaining creditors.

[27] *Second Thursday*, 22 FCC 2d at 516 ¶ 5.

[28] *See* MCLM and Choctaw's *Second Thursday* Submission at p. 9.

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

providing relief to innocent creditors."[30] This is not the law. The Commission has repeatedly recognized that the elimination of such secondary liability may be a benefit that outweighs any benefits of providing relief to innocent creditors and that may preclude a grant of *Second Thursday* relief.[31] To determine if the elimination of such liability outweighs the benefits to innocent creditors, the Commission compares the purchase price for the assets at issue (which reflects the amount to be repaid to the innocent creditors) to the amount of secondary liability to be eliminated.[32] In instances where the eliminated secondary liability represents a large percentage of the purchase price, the Commission has denied the request for *Second Thursday* relief.[33] The cases on which MCLM and Choctaw rely in their reply comments do not refute this.[34]

14. In addition, Choctaw mistakenly suggests that the Bureau argued in its Comments that "an impermissible benefit may accrue to the DePriests as a result of an alleged release of personal loan guarantees provided by Mr. DePriest to some of MCLM's many creditors."[35] As a result, in its Reply, Choctaw suggests that the cases on which the Bureau relied in its Comments

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[30] MCLM's Reply at p. 5; *see also* Choctaw's Reply at p. 11.

[31] *See, e.g.*, *Second Thursday*, 25 FCC 2d 112, 114 ¶ 6 (1970) (when alleged wrongdoer would be relieved from paying 80% of accounts he guaranteed, it is "a benefit which must be considered in determining whether the public interest will be served by a grant of the applications pending before us"); *MobileMedia*, 14 FCC Rcd at 8023 ¶ 21 (recognizing that the Commission examines a variety of factors in determining whether to grant *Second Thursday* relief including whether suspected wrongdoers are likely to receive an indirect benefit such as reduction of liability).

[32] *See supra* note 29.

[33] *See Mid-State Broadcasting Co.*, 61 FCC 2d at ¶¶ 6 -7; *Capital City*, 33 FCC 2d at ¶¶ 24, 26. In *Mid-State Broadcasting* and *Capital City*, the Commission denied *Second Thursday* relief because the proposed transactions would relieve the wrongdoers of secondary liability on obligations that represented 60% and 20% of the purchase price, respectively.

[34] *See, e.g., KOZN FM Stereo 99 Ltd.*, 6 FCC Rcd 257, 257 (1991) (after comparing the amount of secondary liability eliminated to the amount repaid to the innocent creditors, the benefits to the alleged wrongdoers were minimal when compared to the benefits of repaying the innocent creditors); *Pyle Communications of Beaumont, Inc.*, 4 FCC Rcd 8625, 8626 (1989) (same).

[35] Choctaw's Reply at p. 10.

– *Mid-State Broadcasting Co.*[36] and *Capital City Communications, Inc.*[37]– are distinguishable because, unlike those cases, here "[t]here has been no such release."[38] Choctaw has misread both the Bureau's argument and the cases on which the Bureau relied.

15. The Bureau did not argue, as Choctaw suggests, that a benefit may accrue to an alleged wrongdoer only if the creditor has forgiven the alleged wrongdoer's secondary liability. Rather, the Bureau relied on *Mid-State Broadcasting* and *Capital City* as examples of two instances in which the Commission denied *Second Thursday* relief when the alleged wrongdoers' secondary liability was reduced by virtue of payments to the creditors under the proposed transaction.[39] In *Mid-State Broadcasting*, for example, the alleged wrongdoers were personally accountable for over $200,000 to creditors of the bankrupt estate.[40] The Commission recognized that, as a result of partial payments made to these creditors pursuant to the bankruptcy plan, the alleged wrongdoers would be relieved of the obligation to pay more than $173,000 of its secondary liability.[41] Because this amount represented sixty percent (60%) of the purchase price – *i.e.*, the amount to be repaid to the creditors – the Commission concluded that the alleged wrongdoers received a benefit that outweighed any benefit that might accrue to the creditors from the proposed transaction and denied the request for *Second Thursday* relief.[42] Similarly, in *Capital City*, the alleged wrongdoers guaranteed promissory notes to two creditors for approximately $51,000.[43] Although one of the creditors released one of the six alleged wrongdoers from his personal liability, the Commission did not rely on this release as the basis

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[36] *See Mid-State Broadcasting Co.*, 61 FCC 2d 196 (1976).
[37] *See Capital City Communications, Inc.*, 33 FCC 2d 703 (1972).
[38] Choctaw's Reply at p. 11.
[39] *See* Bureau's Comments at pp. 15-16.
[40] *See Mid-State Broadcasting Co.*, 61 FCC 2d at ¶ 6.
[41] *See id.*
[42] *See id.* at ¶¶ 6, 7, 13.
[43] *See Capital City Communications, Inc.*, 33 FCC 2d at ¶¶ 6, 24.

for its finding. Instead, the Commission recognized that when these creditors were repaid from the proceeds of the proposed transaction, the alleged wrongdoers would be relieved of their obligation to repay the entire guaranteed amount.[44] Because the $51,000 figure represented more than twenty percent (20%) of the purchase price being used to repay the creditors, the Commission concluded that the "public interest precludes favorable [*Second Thursday*] action on the Receiver's petition ... ."[45]

16. Nevertheless, Choctaw suggests that even "[i]f the value of the licenses exceeds the MCLM debt, then grant of the Application would provide no benefit to Mr. DePriest because the debts would be paid in full and the guarantee[s] would never be triggered."[46] This reflects a misunderstanding of the law. As both *Mid-State Broadcasting* and *Capital City* make clear, it is precisely because the guarantees would never be triggered and because Mr. DePriest would be relieved of the obligation to repay the unspecified amounts of those guarantees that the DePriests would receive a benefit. Indeed, even if the creditors to whom Mr. DePriest provided guarantees were only repaid in part, a benefit may accrue to the DePriests.[47] The only question is whether any benefit that may accrue to the DePriests, when compared to the amount that would be repaid

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[44] *See id.* at ¶ 24.

[45] *See id.* at ¶ 26. Choctaw suggests that the Commission should ignore the precedential value of this case. *See* Choctaw's Reply at 12 (citing to *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974)). However, in *LaRose*, the D.C. Circuit refused to express any judgment about the Commission's application of *Second Thursday* to the first proposed sale transaction which the Commission rejected because of the indirect benefit that would have accrued to the alleged wrongdoers. *See LaRose*, 494 F.2d at 1149.

[46] Choctaw's Reply at n.39. Choctaw also suggests that the Bureau seeks to "have it both ways" arguing both that the proposed transaction should be denied because it may produce a windfall and because it may produce a shortfall implicating Mr. DePriest's guarantees. *See id.* First, the Bureau did not argue that the proposed transaction should be denied. Indeed, it did not file a Petition to Deny. Instead, in its Comments, it merely raised concerns about whether the Commission had sufficient information concerning the proposed transaction to render a *Second Thursday* decision. To the extent that, in this context, the Bureau raised questions as to whether the remaining creditors would be repaid in full and whether Choctaw may receive a windfall, it was caused by MCLM's and Choctaw's own failures to provide adequate information concerning the proposed transaction.

[47] Choctaw appears to suggest that if there is a shortfall in repaying the creditors and any portion of Mr. DePriest's guarantee remains, there can be no benefit that accrues to the DePriests. *See* Choctaw's Reply at 10. This is not accurate. In *Mid-State Broadcasting*, the Commission concluded not only that a benefit accrued to the alleged wrongdoer but that the benefit outweighed any benefit to the innocent creditors even though only 50% of the guaranteed note would be repaid under the bankruptcy plan. *See Mid-State Broadcasting Co.*, 61 FCC 2d at ¶¶ 6-7.

to MCLM's creditors, would outweigh the benefit to those creditors and preclude *Second Thursday* relief. To answer that question, the Commission must consider both the total amount of Mr. DePriest's personal loan guarantees and the total amount being repaid to the innocent creditors.[48] Because MCLM and Choctaw did not include this information in either their *Second Thursday* Submission or their Replies, the Commission has insufficient information to fully assess whether any reduction or elimination of Mr. DePriest's personal loan guarantees would be a benefit that precludes granting *Second Thursday* relief.[49]

III. Neither MCLM Nor Choctaw Deny That Choctaw Seeks Assignment of Licenses Beyond Those Needed to Satisfy Innocent Creditors

17. In its Comments, the Bureau noted that, based on documents filed in the Bankruptcy Court, it appears that Choctaw would not need to sell all of the licenses it now seeks to acquire in order to satisfy the debt owed to the remaining creditors, resulting in a "windfall" or profit for Choctaw.[50] The Bureau questioned whether *Second Thursday's* narrow exception to the Commission's general policy prohibiting the transfer of licenses in the face of unresolved questions about the licensee's basic character qualifications to hold a license[51] should be expanded to approve a transfer of licenses beyond those needed to repay innocent creditors.[52]

18. In their Replies, MCLM and Choctaw concede that Choctaw is seeking to acquire

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[48] *See, e.g., Mid-State Broadcasting Co.*, 61 FCC 2d at ¶¶ 6-7; *Capital City*, 33 FCC 2d at ¶¶ 6, 24, 26.

[49] In its Reply, Choctaw states that its "credit bid constituted a payment-in-full of the Choctaw investors' claims against MCLM, just as if MCLM's assets had been sold for cash." Choctaw's Reply at n.35. Choctaw suggests that its secured claims amount to just over $14.9 million. *See id.* at p. 18. In addition, Choctaw reveals that two of Choctaw's investors have guarantees from the DePriests that total just over $5.5 million. *Id.* at n.35. By virtue of Choctaw's credit bid, and the payment-in-full of Choctaw claims, the DePriests have received a benefit of at least the $5.5 million of Mr. DePriest's guarantees to the two Choctaw investors. This $5.5 million benefit represents approximately 33% of the $14.9 million credit bid "payment." If this $5.5 million benefit represents the total amount of Mr. DePriest's guarantees, and the $14.9 million represents the total payment to be made to the creditors, pursuant to both *Mid-State* and *Capital City*, this $5.5 million benefit would likely preclude *Second Thursday* relief. *See*, e.g., *Mid-State Broadcasting Co.*, 61 FCC 2d at ¶¶ 6-7; *Capital City*, 33 FCC 2d at ¶¶ 6, 24 26.

[50] *See* Bureau's Comments at pp. 16-19.

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

[52] *See supra* note 50.

licenses beyond those it may need to satisfy the debt that is owed to them or to other innocent creditors, and that Choctaw may end up with a windfall.[53] Nevertheless, they assert that "it would be a terrible precedent for the Commission now to interpret *Second Thursday* to preclude an acquiring party from making a profit upon the resale of licenses acquired through the bankruptcy process."[54] They suggest that if the Commission were to preclude an acquiring party from making a profit on a *Second Thursday* transaction, "there would be no incentive for proposed buyers to bid for the assets of a bankrupt licensee."[55]

19. MCLM and Choctaw have again misunderstood the Bureau's argument. The Bureau is not suggesting that a buyer in the *Second Thursday* context should not be entitled to earn a profit from the operation of the licenses it acquires or from reselling those licenses. Instead, the Bureau is questioning whether Choctaw should be allowed to acquire each of MCLM's fifty-nine (59) licenses when it has failed to demonstrate that each of these licenses, previously valued at $45.2 million,[56] are necessary to repay approximately $33 million in creditor liabilities.[57]

20. In each of the previous *Second Thursday* cases, it was necessary for the Commission to assign all of the assets at issue because the buyers had negotiated to acquire all of the licenses in exchange for an upfront payment (the agreed-upon purchase price for those assets) from which the innocent creditors would be repaid. Here, neither MCLM nor Choctaw have

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[53] *See* Choctaw's Reply at pp. 17-19; MCLM's Reply at p. 6.

[54] Choctaw's Reply at p. 18.

[55] MCLM's Reply at p. 6.

[56] *See supra* note 5.

[57] *See* Bureau's Comments at pp. 17-18; *see also* MCLM's Amended Schedules, submitted as Exhibit 3 to the Bureau's Comments, at page 1 of 34, which identifies MCLM's liabilities as $31,240,965.12, from which the more than $6.8 million in claims owed to the DePriests should be subtracted (*see* Schedule F at page 14 of 29 and page 20 of 29) and MCLM's Third Amended Disclosure Statement for Maritime Communications/Land Mobile, LLC, dated September 25, 2012, submitted as Exhibit 5 to the Bureau's Comments, at pp. 15-17 identifying additional claims not already set out in MCLM's Amended Schedules..

demonstrated that it is necessary for the Commission to assign Choctaw all of the licenses at issue. As discussed above, unlike the "buyers" in the previous *Second Thursday* cases, Choctaw has not agreed to make an upfront payment in exchange for all of MCLM's licenses. Instead, Choctaw has agreed only to acquire all MCLM's licenses and then act as a broker to resell some subset of these licenses to repay MCLM's creditor liabilities for a profit. MCLM and Choctaw have not provided the Commission with details about how each of MCLM's licenses will be used to repay MCLM's creditors, such as an identification of the licenses Choctaw intends to sell and for how much or the identity of any potential purchasers. Indeed, MCLM and Choctaw have not even provided any current market valuation of each of MCLM's licenses, upon which repayment to the creditors is purportedly contingent. In the absence of this information, the Commission cannot assess whether, and to what extent, sales of MCLM's licenses may even satisfy MCLM's obligations to creditors, let alone whether Choctaw needs all of the licenses to satisfy that debt.

21. The *Second Thursday* doctrine was designed as a very narrow exception to the Commission's *Jefferson Radio* policy in order to accommodate the Bankruptcy Code's public interest in ensuring repayment to innocent creditors. Without adequate information to properly assess whether it is necessary for the Commission to assign Choctaw all of the licenses at issue to repay the creditors here, the Bureau continues to question whether the Commission should expand the narrow *Second Thursday* exception to include the type of transaction that MCLM and Choctaw now propose.

IV. MCLM And Choctaw Have Not Provided Any Basis For Issue (G) To Be Removed From the Hearing Proceeding

22. The Commission designated for hearing the issue of whether MCLM's site-based licenses were invalidated for failure to timely construct pursuant to Section 80.49(a) of the Rules,

and/or automatically cancelled due to permanent discontinuance of operations pursuant to Section 1.955(a)(3) of the Rules.[58] Under these Rules, a site-based license terminates automatically by operation of law, without any further Commission action, if the licensee has failed to timely construct its site-based stations or permanently discontinued operations.[59] This issue has been referred to in the hearing proceeding as Issue (g).

23. In their *Second Thursday* Submission, MCLM and Choctaw argued that even if Issue (g) is not subsumed within their request for *Second Thursday* relief, the Wireless Bureau should waive Maritime's construction and operational requirements under Sections 80.49(a) and 1.955(a) of the Rules as they apply to the Issue (g) licenses and assign MCLM's site-based licenses to Choctaw.[60] In their Replies, MCLM and Choctaw continue to argue that such a waiver is appropriate.[61] They continue to ignore two salient facts.

24. First, even after MCLM filed for bankruptcy protection and contemplated seeking *Second Thursday* relief, it conceded that Issue (g) should be resolved in the context of the hearing.[62] Based in part on this concession, the Presiding Administrative Law Judge (Presiding Judge) twice ruled that Issue (g) should be litigated in hearing.[63] Nothing in MCLM and Choctaw's *Second Thursday* Submission presented any basis for disturbing the Presiding Judge's rulings. Neither MCLM nor Choctaw provide any such basis in their Replies.[64]

25. Second, because the Issue (g) licenses were designated for hearing, only the

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[58] *See Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (HDO), EB Docket No. 11-71, 26 FCC Rcd 6520 (2011) at ¶¶ 61 and 62(g).

[59] *See* 47 C.F.R. §§ 80.49(a) and 1.955(a)(3).

[60] *See* MCLM and Choctaw's *Second Thursday* Submission at pp. 10-12.

[61] *See* MCLM's Reply at pp. 7-9; Choctaw's Reply at pp. 21-33.

[62] *See* MCLM's Motion to Defer All Procedural Dates, filed in EB Docket No. 11-71, on August 1, 2011, at fn. 6.

[63] *See* October 25, 2011 Prehearing Conference Transcript (10/25/11 Transcript) in EB Docket No. 11-71, submitted as Exhibit 1 to the Bureau's Comments, at p. 257; Order, FCC 13M-6 (ALJ, rel. Mar. 21, 2013), released in EB Docket No. 11-71.

[64] Both MCLM and Choctaw do not address either MCLM's earlier concession in the hearing proceeding or the Presiding Judge's Order in their Replies.

Presiding Judge has jurisdiction to resolve questions pertaining to them. MCLM and Choctaw still do not cite any precedent that would authorize stripping the Presiding Judge of jurisdiction over the Issue (g) licenses. Indeed, they do not even address the issue. Instead, MCLM and Choctaw continue to rely on the same two cases they cited in their *Second Thursday* Submission – *Carson City Broadcasting Corp.*[65] and *Manning Telecasting, Inc.*[66] – to suggest that construction deadlines have been waived and/or extended in other cases involving bankruptcy or the *Second Thursday* doctrine.[67] These cases remain distinguishable from the instant case because neither *Carson City* nor *Manning Telecasting* addressed licenses that have been designated for hearing or that were subject to a request for *Second Thursday* relief.[68]

26. MCLM and Choctaw also cite *LaRose v. FCC*,[69] but this case is inapposite. Therein, the D.C. Circuit Court of Appeals merely determined that the Commission, after rejecting a first proposed sale of licenses designated for hearing and proceeding with the hearing, should not have refused to consider a second proposed sale of the licenses on the grounds of administrative finality.[70] This decision offers no support for MCLM's and Choctaw's suggestion that the Wireless Bureau has the jurisdiction to address a substantive issue presently before the Presiding Judge and to waive MCLM's construction and operational requirements as they apply

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[65] *Carson City Broadcasting Corp.*, 26 FCC 2d 694 (BB Dec. 14, 1970).

[66] *Manning Telecasting, Inc.*, 1986 WL 292657 (MMB Feb. 14, 1986).

[67] *See* MCLM and Choctaw's *Second Thursday* Submission at pp. 10-11; MCLM's Reply at pp. 8-9; Choctaw's Reply at pp. 23-24.

[68] *See* Bureau's Comments at p. 24. In its Reply, Choctaw erroneously suggests that the Bureau is drawing an artificial distinction between the present case and *Carson City* and *Manning Telecasting* on the grounds that these two cases did not involve "licenses" but instead involved construction authorizations. *See* Choctaw's Reply at n.82. It is plain from the Bureau's Comments, however, that this is not the distinction the Bureau made. *See* Bureau's Comments at p. 24. Choctaw also suggests that *Carson City* is not distinguishable because it cites to *Second Thursday*. *See* Choctaw's Reply at n.82. However, merely citing to *Second Thursday* for the general proposition that the Commission should consider the equities of the creditor when dealing with a bankrupt licensee does not demonstrate that *Carson City* considered whether the licenses at issue should be transferred pursuant to the *Second Thursday* test.

[69] *See* Choctaw's Reply at pp. 22-23; MCLM's Reply at pp. 8-9.

[70] *See LaRose*, 494 F.2d at 1148-1150.

to MCLM's site-based licenses.[71]

27. MCLM and Choctaw persist in arguing that waiver is warranted because strict application of the Commission's permanent discontinuance rule would be fundamentally inequitable on due process grounds.[72] They suggest that because the Part 80 AMTS rules do not "'set forth a specific period of non-operation after which the operation will be deemed to have permanently discontinued,'"[73] MCLM was not given fair notice of what would trigger termination of its licenses.

28. As the Bureau demonstrated in its Comments, the relevant Commission regulations and public statements provided MCLM with ample notice that by not operating its AMTS site-based stations for multiple years it risked automatic termination of these licenses.[74] In particular, the Wireless Bureau's 2004, 2006 and 2007 AMTS-related decisions put MCLM on notice that for its site-based licenses to remain valid, its stations must remain in operation.[75] In addition, *Northeast Utilities Service Co.*,[76] and *Mobex Network Services, LLC*,[77] provided MCLM with notice that the Commission would "evaluate claims of permanent discontinuance on a case-by-case basis."[78] The key facts in this case are that MCLM has not operated equipment at

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[71] Choctaw also seems to be relying on a Wireless Bureau ruling in which it waived the permanent discontinuance rule in a case involving the assignment of certain Personal Communications Services (PCS) licenses where the licensee was in bankruptcy. *See* Choctaw's Reply at pp. 27-28. This ruling, too, is distinguishable from the present case because the PCS licenses had not been designated for hearing. Thus, the Wireless Bureau retained jurisdiction to act upon the licenses.

[72] *See* Choctaw's Reply at pp. 24-31; MCLM's Reply at pp. 8-9.

[73] Choctaw's Reply at p. 26 (quoting *Northeast Utilities Service Co.*, 24 FCC Rcd 3310, 3313 (WTB 2009)).

[74] *See* Bureau's Comments at pp. 25-31.

[75] *See Mobex Network Services, LLC*, 19 FCC Rcd 24939, 24940 ¶ 3 (WTB 2004); *Paging Systems, Inc.*, 21 FCC Rcd 7225 ¶ 2 (WTB 2006); *Mobex Network Services, LLC*, 22 FCC Rcd 665, 666 ¶ 2 (WTB 2007) and *Mobex Network Services, LLC*, 22 FCC Rcd 1311 ¶ 2 (WTB 2007).

[76] 24 FCC Rcd 3310 (WTB 2009).

[77] 25 FCC Rcd 3390 (2010).

[78] 24 FCC Rcd at 3314.

certain licensed locations since it acquired the licenses in late 2005;[79] that it removed equipment or dismantled towers at certain of its locations as early as 2009;[80] that utilities were discontinued at other locations as early as 2009;[81] and that it chose to discontinue operations at a majority of its site-based stations as of December 31, 2007, more than five years ago.[82] The *Mobex* decision put MCLM on notice that if it did not have equipment at any of its licensed locations or if any of its equipment did not receive electric power supply for nearly three years, the Commission would consider those stations permanently discontinued.[83] In light of this AMTS precedent and the Commission's rules and policies, no reasonable licensee would conclude that Section 1.955(a)(3) of the Rules permits discontinuance of operations at a station for five years (or 10 or 20, as Choctaw suggests).[84]

29. Nevertheless, MCLM and Choctaw still argue that there is no clear permanent discontinuance standard for Part 80 AMTS licenses. Choctaw relies on the Commission's Notice of Proposed Rule Making (NPRM)[85] as evidence that both the Wireless Bureau and the Commission acknowledged the absence of a clear standard.[86] The Commission's NPRM does not suggest that Part 80 AMTS licensees, such as MCLM, might reasonably conclude that they "'could discontinue service for a long period without fear of automatic license termination.'"[87]

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[79] *See* MCLM's Report Per Order FCC 12M-36, filed in EB Docket No. 11-71, on August 1, 2012, at ¶ 2.

[80] *See supra* note 79; MCLM's Errata and Additional Information Regarding Amended and Further Supplemental Response to Interrogatories, served in EB Docket No. 11-71 on March 19, 2012 (Errata), submitted as Exhibit 10 with the Bureau's Comments, at Table 3

[81] *See, e.g.*, Errata at Table 3.

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

[83] *See* 25 FCC Rcd 3390 (2010).

[84] *See* Choctaw's Reply at p. 29.

[85] *See* Amendment of Parts 1, 22, 24, 27, 74, 80, 95 and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services, 25 FCC Rcd 6966 (2010).

[86] *See* Choctaw's Reply at pp. 26, 28-29.

[87] Choctaw's Reply at p. 29 (quoting NPRM, 7017-18 ¶ 52).

This statement was limited to Part 24 and Part 27 licensees – and did not even mention Part 80. In fact, Part 80 AMTS licensees appear to be distinguishable from both Part 24 and Part 27 licensees because there is precedent that places Part 80 AMTS licensees on notice that the Commission expects its licenses to remain in operation to be valid,[88] and that a licensee cannot cease operations indefinitely without risking that license terminating for permanent discontinuance.[89] There does not appear to be similar precedent in the context of Part 24 or Part 27 licenses. Thus, unlike a Part 24 or Part 27 licensee, a Part 80 licensee, such as MCLM, could ***not*** reasonably conclude that it "could discontinue service for a long period without fear of automatic license termination."[90]

30. Even if the Wireless Bureau (or the Commission), and not the Presiding Judge, were to adjudicate whether MCLM's site-based licenses are invalid and have been automatically cancelled, MCLM and Choctaw have failed to show that "good cause exists for the Commission to waive any construction and operational requirements that might otherwise impair" MCLM's ability to transfer its licenses to Choctaw.[91] Instead, in accordance with the Commission's precedent concerning permanent discontinuance of AMTS licenses, the Commission should consider the factual record developed in the hearing proceeding before reaching a conclusion on MCLM's site-based licenses.

V. Choctaw Concedes That Granting *Second Thursday* Relief Is Not Necessary To Achieve Asserted Public Interests

31. In their *Second Thursday* Submission, MCLM and Choctaw suggested that granting *Second Thursday* relief and assigning all of MCLM's licenses to Choctaw was necessary for approval of applications for assignment of partitioned portions of MCLM's

[88] *See supra* note 75.

[89] *See Northeast Utilities Service Co.*, 24 FCC Rcd at 3314.

[90] NPRM, 7017-18 ¶ 52 (emphasis added).

[91] *See* MCLM and Choctaw's *Second Thursday* Submission at p. 12.

geographic licenses to entities such as the Southern California Regional Rail Authority (Metrolink) and Jackson County REMC (Jackson) that were pending before the Wireless Bureau when the Commission released the HDO.[92] In its Comments, the Bureau noted that there is already a mechanism in place pursuant to footnote 7 of the HDO by which the Commission can consider whether the public interest is served by removing the relevant licenses from the hearing proceeding and approving these pending third-party applications.[93] The Bureau argued that the Commission did not need to grant MCLM's and Choctaw's *Second Thursday* request in order to act on these pending applications and advance Commission policies concerning public safety.[94]

32. In its Reply, Choctaw concedes that "*Second Thursday* relief is not the only avenue available for the Commission"[95] to assign the MCLM spectrum to Metrolink, Jackson and other third-parties whose applications have been pending before the Wireless Bureau. Choctaw now recognizes that footnote 7 of the HDO provides "a mechanism by which the Commission can resolve the outstanding issues in these applications."[96] MCLM's Reply is silent on this issue. Accordingly, the Commission does not need to reach the questions raised by MCLM and Choctaw's *Second Thursday* Submission in order to ensure that Metrolink, Jackson and others acquire the licenses they seek.

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[92] *See id.* at pp. 13-14.
[93] *See* Bureau's Comments at pp. 19-21.
[94] *See id.* at p. 21.
[95] *See* Choctaw's Reply at p. 33.
[96] *Id.* at p. 34.

Respectfully submitted,

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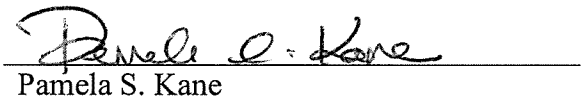

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June 20, 2013

CERTIFICATE OF SERVICE

Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 20th day of June, 2013, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S REPLY TO MCLM'S AND CHOCTAW'S REPLY COMMENTS AND OPPOSITIONS TO PETITIONS TO DENY" to:

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