

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

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

Reply to Oppositions to Petition to Deny,
and Reply to Comments (initial and reply comments)

The undersigned LLC entities (herein, “Skytel-L”)^{1 2} hereby submit this pleading to (i) reply to the oppositions to the Skytel entities’ petition to deny the Application (including its request for extraordinary relief, including under the so-called “Second Thursday” doctrine, related to “footnote 7,” and for rule waivers) (the “Oppositions”), and (ii) reply to comments in

¹ All of the “Skytel” entities are listed in FCC MCLM HDO hearing, docket 11-71, and identified on the signature page below. Each Skytel entity reserves the right, as a distinct legal entity (which the FCC has recognized numerous times prior to the Maritime bankruptcy was commenced) to submit further pleadings in this docket on 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.

² Further, (i) when “SkyTel” is used herein, it means the “Skytel-L” entities, and (ii) “SkyTel-L” and “SkyTel” each mean, when used herein in references to past pleadings or matters all of the “SkyTel” entities involved in said past pleading or matter. Other terms may be used herein or in appended matter such as “Havens” entities, which also mean the Skytel entities as just described.

the Docket by other entities (initial and reply comments) to comments (or “reply comments”) to the comments submitted in the Docket. Capitalized terms herein not defined herein have meanings given in the Skytel-HS Entities’ petition to deny (that also included comments) (“PD”) filed in this Docket.

SkyTel-L agrees with, and refers to and incorporates herein, the substance of the pleading of today filed by the SkyTel-HS entities on the above captioned matter, and in addition, presents additional materials herein.

Skytel-L 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. However, in case the FCC did not mean that, Skytel-L 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.

By replying to the Oppositions, Skytel-L also replies to the comments (including reply comments) in this docket since the issues and assertions in the comments are effectively contained in the Oppositions.

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Introduction and Summary

The Federal Communications Commission has designated for hearing the basic qualifications of Maritime Communications/Land Mobile, LLC (MCLM) to be a Commission licensee. *See Maritime Communications/Land Mobile, LLC*, 26 F.C.C.R. 6520 (2011) [hereinafter *OSC/HDO*]. MCLM filed an application to assign four geographic and 59 site-based AMTS licenses to Choctaw Telecommunications, LLC and Choctaw Holdings, LLC. Public Notice DA 13-569 (March 28, 2013) invites comment on the following issues:

whether the Commission should: (1) consent to the assignment of some or all of MC/LM's AMTS licenses to Choctaw under *Second Thursday*;³ (2) consent to the assignment of some of MC/LM's AMTS licenses pursuant to footnote 7 of the *OSC/HDO*;⁴ (3) waive the construction and discontinuance-of-service rules for MC/LM's AMTS site-based stations; and (4) terminate its formal hearing, partially or otherwise, regarding MC/LM's basic qualifications [p. 3].

Pursuant to the Public Notice, SkyTel companies⁵ filed a petition to deny MCLM's application. MCLM and Choctaw have filed oppositions to the SkyTel petition to deny. The Southern California Regional Railroad Authority and a consortium of Critical Infrastructure Industry parties have filed comments and reply comment. SkyTel hereby replies to those oppositions and comments.

MCLM and Choctaw have not demonstrated how granting *Second Thursday* relief, as opposed to allowing the FCC to complete its review of MCLM's basic qualifications, would advance the public interest, convenience, and necessity as demanded by 47 U.S.C. § 310(d). MCLM's application to assign its AMTS licenses to Choctaw is a brazen abuse of this equitable exception to the Commission's policy, as articulated in *Jefferson Radio Corp. v. FCC*,

³ *Second Thursday Corp.*, 22 F.C.C.2d 515, *reconsid. Granted*, 25 F.C.C.2d 112 (1970).

⁴ *OSC/HDO*, 26 F.C.C.R. at 6523 n.7.

⁵ Environmental LLC, Intelligent Transportation & Monitoring Wireless LLC, Telesaurus Holdings GB LLC, Verde Systems LLC, and V2G LLC.

340 F.2d 781 (D.C. Cir. 1964), that licensees whose basic qualifications have come under question may not transfer their licenses. MCLM would effectively launder geographic licenses that it obtained on the basis of undeserved bidding credits secured through misrepresentations to the Commission. The transaction proposed by MCLM and Choctaw would permit Sandra DePriest as the sole officer of MCLM — and an admitted wrongdoer whose misconduct triggered the hearing designation order in the first place — to preside over a massive transfer of wealth to insiders who are far from innocent creditors. MCLM and Choctaw’s professed (self-)interest in compensating creditors fails to conceal an equally ugly reality: the windfall that would be generated by this transfer of licenses would directly benefit Don DePriest, whose personal guarantees and personal wealth, in the absence of the Commission’s approval of this transfer application, would supply a considerable amount of compensation for MCLM’s legitimate, innocent creditors. To grant *Second Thursday* relief under the foregoing circumstances would make a mockery of the public interest.

So-called footnote 7 relief is likewise unwarranted. The removal of MCLM’s proposed license transfer to Southern California Regional Rail Authority (SCRRA) from the ambit of the *Order to Show Cause/Hearing Designation Order* would represent an abrupt, arbitrary, and capricious departure from *Jefferson Radio* and other well established aspects of Commission policy. Even if footnote 7 of the *OSC/HDO* is regarded as a lawful exercise of the Commission’s discretion, granting relief on that basis would not advance the public interest. The only party named in footnote 7, the SCRRA, has not demonstrated a compelling need for AMTS spectrum. SCRRA has implemented positive train control through 220 MHz spectrum leased from PTC-220. Indeed, SCRRA appears to treat MCLM’s AMTS spectrum not so much as indispensable electromagnetic infrastructure, but rather as a good bargain and a potentially profitable asset suitable for resale. Finally, the Commission has no basis for expanding the scope of footnote 7 to other would-be transferees of MCLM’s licenses seeking regulatory relief on the

basis of claimed similarity to positive train control. The five utility companies filing comments as “Critical Infrastructure Industry” parties do *not* fall within the terms of footnote 7; their petitions for reconsideration of the *OSC/HDO* remain pending before the Commission. Identical analysis counsels keeping the transfer application of the Duquesne Light Company within the ambit of the *OSC/HDO*.

Nor should the Commission waive § 1.955 of its rules for the benefit of MCLM and Choctaw. Of the 63 AMTS licenses at issue in the *OSC/HDO*, only four — all of them geographic licenses acquired in Auction 61 on the basis of improperly obtained bidding credits — have come under question due to misrepresentations and dishonesty on the part of MCLM’s president (Sandra DePriest) and her husband (Donald DePriest) as the undisclosed real party in interest. The other 59 licenses, all awarded before Auction 61 under what was then the Commission’s site-based approach for allocating AMTS spectrum, are subject to automatic termination, without further Commission action, because of MCLM’s failure to meet construction, coverage, and/or continuity of service obligations imposed by Rule 1.955. There is no legal support for Choctaw’s extraordinary (and extraordinarily brazen) attempt to evade automatic termination of as many as 59 site-based licenses by shoehorning these licenses into a *Second Thursday* petition. As recognized in “Issue G” of the *OSC/HDO*, Rule 1.955 provides an independent basis, wholly apart from MCLM’s misrepresentations and lack of candor with respect to bidding credits for geographic licenses in Auction 61, for automatic termination of MCLM’s site-based licenses. Choctaw’s argument that application of Rule 1.955 to these licenses would be inequitable or even unconstitutional is entirely without merit. There is no ambiguity, let alone vagueness implicating Fifth Amendment due process, in the time limits and sufficiency of service requirements that 47 C.F.R. §§ 1.955 and 80.49 impose on AMTS licensees. Although the Commission’s rules do not adopt a specific time-based definition for determining when an AMTS licensee has “permanently discontinued” service, those rules and

the Commission's orders have more than adequately notified MCLM that failure to provide service for no fewer than five years — more than twice the length of time allotted for initial construction under a site-based AMTS license and the provision of service to at least one unaffiliated subscriber — constitutes a basis for automatic termination for permanent discontinuance.

In light of the foregoing, there is absolutely no basis for terminating the Commission's ongoing hearing into MCLM's basic qualifications to be a licensee and granting MCLM's application to assign its AMTS licenses to Choctaw. Instead, the Commission should fully investigate the two independent grounds that will ultimately lead to termination or revocation of MCLM's spectrum. True to the *OSC/HDO*, the Commission should evaluate the misrepresentations and less-than-candid statements and actions of Sandra and Donald DePriest. Substantial benefit to the DePriests and the potential of a windfall to Choctaw's investors foreclose the application of *Second Thursday*. SCRRA has not demonstrated why the Commission, pursuant to footnote 7 of the *OSC/HDO*, should remove its proposed purchase of MCLM's spectrum from the ambit of that order. Neither Maritime nor Choctaw has established the basis for a waiver under Rule 1.925 of the Commission's construction and continuity of service requirements for AMTS licensees.

A. The Commission Should Deny Choctaw's *Second Thursday* Application

1. Denial of Choctaw's *Second Thursday* Application will neither frustrate the Bankruptcy Court's decision nor undermine the Bankruptcy Code.

Choctaw, MCLM, and others mistakenly argue that denial of Choctaw's *Second Thursday* application will "frustrate" both the Bankruptcy Court's Confirmation Order and the "national policy underlying . . . bankruptcy"⁶ Denial of Choctaw's application, however,

⁶ See e.g. Choctaw Reply, at p. iii, 5.

will do no such thing. If anything, it is the grant of Choctaw's application that undermines both bankruptcy law and the public interest standard that animates the Communications Act.

First, the Bankruptcy Court repeatedly made clear that (1) it was not deciding whether the Commission ought to grant *Second Thursday* relief, and (2) that the decision to grant *or deny* Choctaw's Applications rested solely with the Commission:

Now, there is absolutely no guarantee that Second Thursday is going to be granted by the FCC. And I'm not sitting up here trying to say to the FCC, you've got to grant Second Thursday. That's not my function. That's the function of the FCC and I said that from the time this case started. I am not trying to superimpose this Court's judgment on that agency.⁷

The Bankruptcy Court's Order Confirming MCLM's Bankruptcy Plan is equally clear:

No injunction contained in the Plan, or in this Order, shall impair the FCC's authority, including but not limited to its authority to commence and prosecute administrative proceedings, to enforce the Communications Act of 1934, as amended, or the rules, regulations, and orders promulgated thereunder by the FCC.⁸

Notwithstanding anything to the contrary that may be contained in the Plan, this Order, or otherwise, nothing in the Plan, this Order, or otherwise shall be deemed to be a finding or adjudication that the Debtor owns or otherwise has the right to hold the FCC Spectrum Licenses or any FCC licenses, or a finding or adjudication as to the value of the FCC Spectrum Licenses or any FCC licenses, the Court ***having expressly recognized that:*** (a) the Court is not attempting [through] its orders or otherwise to superimpose this Court's ruling or judgments on the FCC; (b) the Court's rulings and orders herein are contingent on what the FCC ultimately decides regarding the subject FCC licenses and the Debtor's rights to hold and/or transfer same; (c) the Court has not been asked to value, has not valued, and has not ruled upon the value of the subject FCC licenses⁹

⁷ See Confirmation Hearing Transcript, Vol. II at p. 183, Exhibit "F" to SkyTel's Petition to Dismiss or Deny, and Comments of SkyTe-1 Entities (filed May 9, 2013).

⁸ See Confirmation Order (the "Confirmation Order"), *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. # 980, at p. 7.

⁹ See Confirmation Order, *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. # 980, at pp. 11-12.

Indeed, at the Confirmation Hearing counsel for MCLM and Choctaw reiterated that the decision to grant *or deny* Choctaw's *Second Thursday* Application was one for the Commission alone:

Counsel for MCLM: We believe . . . the proof will show that we have certainly an arguably colorable position to present to the FCC for Second Thursday status . . . Whether the FCC agrees is something we'll have to find out in the future. And as the Court has stated many, many times, this Court is not the FCC, you're not intruding on their territory, don't intent to, and that risk that will be granted FCC approval under Second Thursday is certainly a risk of the plan.¹⁰

Counsel for Choctaw: [T]here's no request by Choctaw for this Court—and the Court doesn't have any authority to do anything to take away any of the authority or the obligations of the FCC, you don't—we're not requesting it. That process will go on under the regulations of the FCC.¹¹

Accordingly, the pleadings, transcripts, and orders entered in the Bankruptcy Court could not be clearer: it is up to the Commission alone to decide whether to grant *or deny* Choctaw's *Second Thursday* Application. And denial will certainly not “frustrate” the Bankruptcy Court's decision, as the Bankruptcy Court expressly left that decision to the FCC.

Second, denial of Choctaw's *Second Thursday* Application will not “frustrate” the purposes of the Bankruptcy Code. In bankruptcy, it is not uncommon for Chapter 11 plans—such as MCLM's here—to fail, thereby sending the matter back to the bankruptcy court. As one commentator has noted:

Undoubtedly, there are instances of confirmed Chapter 11 plans that turn out to be unfeasible despite court findings to the contrary. Given the uncertainties of investment projections and capital markets, however, the occasional failure of Chapter 11 plans is not necessarily a greater evil than alternatives such as liquidation . . . Chapter 11 is, by its very definition, a hit-or-miss ventures; thus, it misses occasionally. Some confirmed Chapter 11 plans fail. So what?¹²

¹⁰ See Confirmation Hearing Transcript, Vol. I, at p. 28, Exhibit “F” to SkyTel's Petition to Dismiss or Deny, and Comments of SkyTe-1 Entities (filed May 9, 2013).

¹¹ See Confirmation Hearing Transcript, Vol. I, at p. 33, Exhibit “F” to SkyTel's Petition to Dismiss or Deny, and Comments of SkyTe-1 Entities (filed May 9, 2013).

¹² See Stephen H. Case, *Some Confirmed Chapter 11 Plans Fail. So What?* 47 B.C.L. Rev. 59 (2005).

As such, the Bankruptcy Code specifically provides for post-confirmation scenarios where a debtor fails to consummate or carry out its Chapter 11 plan. By way of example only, the Bankruptcy Code provides that a party-in-interest or the debtor may (1) move to convert the case to Chapter 7, wherein a United States Trustee will be appointed to liquidate the assets of the estate;¹³ (2) a party-in-interest may move to dismiss the case despite the existence of innocent creditors;¹⁴ and (3) a plan proponent may modify the plan post-confirmation.¹⁵ Thus, the denial of Choctaw’s Application will not result in the parade of horrors Choctaw and MCLM suggest. Instead, the matter will return to the Bankruptcy Court, where the Bankruptcy Code provides other alternatives—such a scenario is hardly unprecedented.¹⁶

In fact, at the Confirmation Hearing MCLM’s CEO John Reardon opined on the consequences of Choctaw’s failure to achieve *Second Thursday* relief. For example, MCLM’s counsel asked Reardon “[i]n the event . . . for whatever reason Choctaw exercises its discretion and decides not to continue funding and/or decide not to pursue *Second Thursday* treatment with the FCC, is the debtor just going to give up?”¹⁷ To which Reardon responded that MCLM “would at that point go forward to market the spectrum to other potential buyers if that were to happen.”¹⁸ Reardon further testified that if *Second Thursday* is denied, MCLM could and would attempt “fix” their proposal and try again.¹⁹

¹³ 11 U.S.C. 1112.

¹⁴ *Id.*

¹⁵ 11 U.S.C. § 1128(b).

¹⁶ *See, e.g.,* Frank R. Kennedy, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. Rev. 621 (1993); Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 Com. L.J. 297 (1992).

¹⁷ *See* Confirmation Hearing Transcript, at Vo. I, at p. 99, Exhibit “F” to SkyTel’s Petition to Dismiss or Deny, and Comments of SkyTe-1 Entities (filed May 9, 2013).

¹⁸ *Id.*

¹⁹ *Id.* at 114-115.

Moreover, as the Enforcement Bureau correctly noted, in all other cases in which the Commission has granted *Second Thursday* relief, a bankruptcy *trustee or receiver* (not insider creditors) filed a *Second Thursday* application, wherein the trustee sought to assign a debtor's licenses to a third-party (not insider creditors) who would then purchase the debtor's assets to pay *innocent* creditors.²⁰ Therefore, and also by way of example only, if the Commission denies Choctaw's current Application, MCLM's Bankruptcy Case could be converted to Chapter 7 and a United States Trustee could presumably then pursue *Second Thursday* relief. The Trustee could take other action, such as seeking a settlement with SkyTel and the FCC.²¹ These alternatives belie Choctaw, Maritime, and Liquidating Agent's arguments that the Choctaw proposal is the only option available to MCLM's allegedly "innocent" creditors.

2. The Bankruptcy Court made no findings or conclusions under *Second Thursday*.

As noted above, the Bankruptcy Court rightfully left the *Second Thursday* determination entirely to the Commission. And, as noted above, counsel for both MCLM and Choctaw made clear that they were not asking the Bankruptcy Court to make findings or conclusions as to *Second Thursday* and were not asking the Court to value MCLM's licenses. Interestingly, but not surprisingly, Choctaw and MCLM are *now* asserting that the Bankruptcy Court rightly

²⁰ See Enforcement Bureau Comments, at pp. 7-8.

²¹ Of course, if MCLM had not engaged in the misrepresentations and false statements that triggered the *OSC/HDO*, then it could stage its defense directly in a hearing before the Commission or a presiding judge. Under those circumstances, MCLM would not need to undergo bankruptcy, much less to seek special relief under *Second Thursday* and/or footnote 7 of the *OSC/HDO*. MCLM entered all of these proceedings with unclean hands. It now compounds its inequity by making false assertions in response to Public Notice DA 13-569. Bankruptcy law and the Communications Act require petitioners to be candid and clean. However, MCLM and now Choctaw appear unable to meet this threshold requirement of honesty. Their duplicity should weigh heavily against the grant of any relief.

determined—to the exclusion of the Commission—(1) the innocence of the creditors, and (2) the value of MCLM’s licenses.²²

First, Choctaw claims that the Commission should reject SkyTel’s arguments that the creditors are not innocent, because “[t]he question of ‘innocent creditors’ is an issue for the Bankruptcy Court.”²³ But creditor innocence is a key element of the *Second Thursday* doctrine, which arises from the FCC’s equitable power over enforcement of the Communications Act and therefore lies in the sole province of the Commission. And, as it previously represented to the Bankruptcy Court, Choctaw never asked the Bankruptcy Court to make a *Second Thursday* determination. Indeed, at the Confirmation Hearing, MCLM’s FCC attorney and expert witness testified and represented to the Bankruptcy Judge that the determination as to innocent creditors was an FCC issue—not a bankruptcy issue:

I know that one of the issues that have been raised in [SkyTel’s] objection was that we also—there had been no effort to determine who the innocent creditors are—yeah, who the innocent creditors are and who the alleged wrongdoers are. ***And my first point about that is again, this is an FCC issue, not a bankruptcy court issue, number one.***²⁴

Second, in addressing the windfall issue, Choctaw claims it paid \$42,033.929.16 in “consideration” for MCLM’s licenses, which “approximates the value placed on the Licenses during the bankruptcy hearing.”²⁵ Choctaw, however, fails to note that the Bankruptcy Judge expressly refused—at all the parties’ request—to value Maritime’s licenses.²⁶

3. Allowing Choctaw to receive a windfall is contrary to the *Second Thursday* doctrine.

²² See Choctaw Reply, at p. 14 (“The question of ‘innocent creditors’ is an issue for the Bankruptcy Court unless the creditors were identified as potential wrongdoers by the Commission.”).

²³ See Choctaw Reply, at p. 14.

²⁴ See Confirmation Hearing Transcript, Vol. I, at p. 179, Exhibit “F” to SkyTel’s Petition to Dismiss or Deny, and Comments of SkyTe-1 Entities.

²⁵ See Choctaw Reply, at p. 17.

²⁶ See Confirmation Order, *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. # 980, at pp. 11-12.

As to the windfall issue, Choctaw further claims 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 [because] [s]uch an approach would undermine the willingness of parties to step forward in the bankruptcy process.”²⁷ This claim is double-barreled error. Choctaw is wrong in its interpretation of the Communications Act and in its implementation (in this setting) of bankruptcy law and policy.

Under *Second Thursday* and other “rare cases where the Commission, prior to final resolution of a renewal hearing, has approved transfers” in furtherance of the public interest and with full awareness of the consequences of departing from *Jefferson Radio*, “the transfer was made with a substantial monetary penalty to the transferor.” *Coalition for Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1360 (D.C. Cir., 1990), *vacated en banc on different grounds*, 931 F.2d 73 (D.C. Cir.), *cert. denied*, 502 U.S. 907 (1991); *see also, e.g., Northland Television, Inc.*, 42 Rad. Reg. 2d 1107, 1110 (1978). True to the purposes underlying *Jefferson Radio*, the financial penalty exacted in these cases has sometimes been substantial. *RKO General, Inc.*, 3 F.C.C.R. 5057 (1988) is illustrative and instructive: “RKO will not simply be able to walk away from this proceeding with the full economic value of its license Instead, RKO will receive \$105 million less than the total purchase price.” *Id.* at 5062. The *transferee* has often shared in the economic hardship occasioned by the transferor’s misconduct. In *George E. Cameron Jr. Communications*, 56 Rad. Reg. 2d 825 (1984), the transferors received no compensation at all, while the transferee assumed \$6.5 million in debt, relinquished rights in another station, and undertook at its expense to return a third station to the air. *See id.* at 828.

²⁷ *See* Choctaw Reply, at p. 18.

As a matter of bankruptcy law, *creditors* need not step forward in the bankruptcy process to achieve *Second Thursday*. As the Enforcement Bureau correctly argues, typically (if not exclusively), a bankruptcy *trustee or receiver* (not creditors) requests *Second Thursday* relief, wherein the trustee requests the Commission to transfer the debtor's licenses to *an independent third party* (not creditors) for a specified amount. Then, the trustee distributes those proceeds to creditors. Thus, in bankruptcy, there is no need for creditors to create a shell entity, invest in that entity, and seek *Second Thursday* themselves, with the possibility that those creditors will be paid far more than they are owed.

Choctaw is little more than a shell entity devised for the express purpose of funneling MCLM's licenses to selected creditors (who have cloaked themselves anew as "investors") in hopes of a massive windfall. Choctaw has raised no cash to buy MCLM's licenses. Choctaw's Chapter 11 Plan is essentially an exclusive option, but not an obligation, to procure the MCLM licenses if the FCC grants extraordinary relief, and to then sell them to others, and pocket the windfall. Choctaw is fully aware of the value of the licenses, as demonstrated by SkyTel filings that document actual market sales which MCLM counsel "inadvertently" disclosed in the Hearing and to parties such as Spectrum Bridge, MCLM's spectrum broker, in breach of its confidentiality obligations. Even those sales, conducted while MCLM has been under FCC investigation for serious allegations of wrongdoing that may lead to termination and/or revocation of its licenses, took place at price levels that will very likely result in a windfall to Choctaw. What passes for Choctaw's "investment" in MCLM consists primarily of its investors' own loans to MCLM secured by those licenses and proceeds from license sales. Those loans were hardly "innocent" debt, since they were made at times when SkyTel challenges had cast doubt on the validity of those licenses and the basic qualifications of MCLM to be an FCC licensee, the very grounds underlying the *OSC/HDO*.

It is a bedrock principle of bankruptcy law that *creditors* are not to be paid more than they are owed.²⁸ By contrast, and in defiance of the public interest that animates 47 U.S.C. § 310(d) and the Communications Act at large, investors in Choctaw stand to gain far more than they are owed, thereby undermining both the Communications Act and the Bankruptcy Code. As can be derived from MCLM’s schedules filed in the bankruptcy case, the Choctaw Members—Collateral Plus Fund I, LLC; Watson and Downs Investments, LLC; Robert H. Hollis, III; and Patrick Trammell—collectively hold claims totaling approximately \$15.6 million.²⁹ Collectively, these claims represent roughly 60 percent of the \$25,855,142.24 in pre-petition claims that in turn constitute the lion’s share of the \$42 million “consideration” offered by Choctaw under its Chapter 11 Plan. *See also* Attachment A (SkyTel’s Schedule of Maritime Debt Excluded from *Second Thursday*). The Choctaw Members assigned, or will assign, their claims in exchange for ownership interests in Choctaw.³⁰ According to MCLM’s schedules, MCLM’s debt totals approximately \$31,240,965.12.³¹ And according to MCLM’s own conservative valuation found in its bankruptcy schedules—a valuation SkyTel disputes and alleges is much higher—MCLM’s licenses are worth approximately \$46,542,751.63. Thus, even using MCLM’s conservative valuation, the Choctaw Members have assigned approximately \$15.6 million in debt in order to receive—in addition to payment of their claims in full—approximately \$15 million in profit.

²⁸ *See e.g. In re Milk Palace Dairy, LLC*, 2005 Bankr. LEXIS 995, at *14 (Bankr. D. Kan. May 19, 2005) (Crediting bidding “was devised to protect creditors from cram down in a down market by allowing them to force debtors to pay their claim in full or surrender the property. It protects a creditor’s “upside,” **but not beyond the creditor’s actual debt. While there is no doubt that MetLife is entitled to realize its collateral’s full value, MetLife is not entitled to collect more than it is owed.**”).

²⁹ *See* Debtor’s Amended Summary of Schedules, *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. # 171 (filed November 15, 2011).

³⁰ *See* Choctaw Proposal, *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. #

³¹ *See* Debtor’s Amended Summary of Schedules, *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. # 171, at p. 1 (filed November 15, 2011).

But as set forth in Exhibit “N” to SkyTel’s Petition to Dismiss or Deny, and Comments of SkyTel Entities, filed under seal in this proceeding on May 9, 2013, MCLM’s licenses are worth considerably more.³² According to the valuation set forth in Exhibit “N”, MCLM’s licenses are potentially worth \$135,656,853.00.

This potential windfall vitiates Choctaw and MCLM’s arguments that MCLM’s Bankruptcy Plan “[l]essened the rights of secured creditors to ensure repayment of unsecured creditors would occur more quickly.”³³ Indeed, the Choctaw Members stand to gain far more than they are owed. They will likely realize several multiples of their “investment.” The Bankruptcy Plan hardly “lessens” the rights of the Choctaw Members. Instead, it entitles them to far more than the Bankruptcy Code provides them.

4. The Liquidating Agent provides little protection to innocent creditors.

MCLM and Choctaw next argue that the Liquidating Agent, Warren Averett, LLC, will ensure that Choctaw complies with the Bankruptcy Plan.³⁴ The Liquidating Agent itself submitted a Reply, in which it asserts that the Bankruptcy “Plan give[s] the Liquidating Agent certain powers which ensure the Plan is implemented in accordance with the Court’s order,”³⁵ and that will “allow the Liquidating Agent to ensure that Choctaw is performing all of its obligations under the confirmed Plan for the benefit of unsecured creditors.”³⁶ Confusingly, however, the Plan purports to insulate Choctaw from any attempts by the Liquidating Agent or the Bankruptcy Court to control or monitor Choctaw.

³² See SkyTel’s Petition to Dismiss or Deny, and Comments of SkyTe-1 Entities, Exhibit “N,” filed under seal.

³³ See e.g. Choctaw Reply, at p. ii.

³⁴ See Choctaw Reply, at p. iii; MCLM Reply, at 7 n. 18.

³⁵ See Warren Averett, LLC’s Reply, at 5.

³⁶ *Id.*

For example, the Bankruptcy Plan provides that “[t]he Bankruptcy Court will not retain jurisdiction over Choctaw . . . and Choctaw . . . will not otherwise be subject to oversight by the Bankruptcy Court.”³⁷ The Plan then states that “Choctaw will market and sell the FCC Spectrum Licenses *in its sole and absolute discretion*; subject only to the FCC’s regulatory approval of all sales.”³⁸ And, to add insult to injury, the Plan finally pronounces that “*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.*”³⁹

In light of the above language, and despite the Confirmation Order’s requirement that Choctaw use “best efforts” to obtain and sell Maritime’s licenses,⁴⁰ it is hard to image what — if *anything* — the Liquidating Agent can actually do to ensure that Choctaw complies with the Plan.

5. The Choctaw Plan entrusts disposition of MCLM assets to Sandra DePriest, an admitted wrongdoer whose misconduct triggered the OSC/HDO.

The absence of a professional, responsible fiduciary is one reason why SkyTel vigorously opposed the Plan and before it, the Plan Disclosure Statement. MCLM did not have, as it easily could have had, a professional trustee handling the bankruptcy who would not have been subject to MCLM management. Unwilling and unable to deny years of wrongdoing by the DePriests, which have undermined the legal validity of MCLM’s sole material asset (its FCC licenses), MCLM staged no defense on the merits of the allegations made by the Commission in the

³⁷ See MCLM’s First Plan of Reorganization, *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. # 669, at p. 19.

³⁸ *Id.* at p. 10.

³⁹ *Id.* at p. 26.

⁴⁰ See Confirmation Order, *In re MCLM*, Bankr. N.D. Miss., Case No. 11-13463-DWH (Now NPO), Dkt. # 980 at p. 8.

OSC/HDO. Instead, MCLM filed bankruptcy as part of an opportunistic scheme to use bankruptcy as a cover to launder wealth threatened by the company's failure to uphold its responsibilities under the Communications Act and the rules and policies of the Commission.

Both MCLM and Choctaw would have the Commission believe that the direct sale of licenses by MCLM and/or Choctaw is legally indistinguishable from the disposition of those licenses by a bankruptcy trustee, *see* Choctaw Reply, at 15-16; MCLM Reply, at 7 n.18, because bankruptcy law allegedly deems a debtor-in-possession to have the fiduciary obligations that a trustee owes to creditors. Section 1107 of the Bankruptcy Code does provide that “a debtor in possession ... shall perform all the duties ... of a trustee serving in a case under” Chapter 11 of the Code. 11 U.S.C. § 1107. This provision has a crucial exception: the debtor in possession obligation to perform the functions and duties of a trustee does *not* extend to “the duties specified in sections 1106(a)(2), (3), and (4).” *Id.* Section 1106 imposes extremely significant limitations on the performance of a trustee's duties by a debtor in possession. Among the duties not entrusted to a debtor in possession is the duty to “investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.” 11 U.S.C. § 1106(a)(3). Subsection (a)(4) makes absolutely clear why this limitation matters so critically such as this one. A bankruptcy trustee, but not a debtor in possession, must “file a statement of any investigation conducted under paragraph (3) of this subsection, *including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor*, or to a cause of action available to the estate.” *Id.* § 1106(a)(4)(A) (emphasis added).

Make no mistake. Sandra DePriest, an admitted wrongdoer, is the sole officer of MCLM. Choctaw and MCLM would ask the Commission to entrust her with the task of selling MCLM's licenses for the benefit of innocent creditors. These parties do so under color of the Bankruptcy

Code’s supposed equivalence between debtors in possession and trustees. Choctaw asserts that “the terms ‘trustee’ and ‘debtor in possession’ ... are *essentially* interchangeable” as a matter of bankruptcy law and that “by virtue of being a debtor-in-possession, MCLM operated not only as a business entity, but *essentially* as a trustee as well.” Choctaw Reply, at 16 (emphases added). Choctaw thus misses the *essence* of the Bankruptcy Code: trustees, but not debtors in possession, are charged with and entrusted with the duty to investigate “fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor” — the very conduct by Sandra and Donald DePriest that has brought MCLM’s basic qualifications into doubt.

6. MCLM has already transferred *de facto* control to Choctaw, in violation of 47 U.S.C. § 310(d)

Already fatal, the flaws in MCLM’s managerial structure run even deeper. Choctaw is already in *de facto* control of MCLM’s licenses. Its acquisition of such *de facto* control without the approval of the Commission represents a violation of 47 U.S.C. § 310(d). That violation compounds the already overwhelming demonstration that transfer of licenses from MCLM to Choctaw would disserve the public interest, in violation of section 310(d).

Section 310(d) provides that “[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. § 310(d). In interpreting this provision, the Commission has found that the transfer of control can occur on a *de facto* basis. *See Ellis Thompson Corp.*, 10 F.C.C.R. 12,554 (1995). Mindful that “it is essential that the licensee at all times retain exclusive responsibility for the

operation and control of [its] facilities,” the Commission remains vigilant against unauthorized transfers of control. *Id.* at 12,555. The normal minimum incidents of *de facto* control include “the unfettered use of all facilities and equipment used in connection therewith; day to day operation and control; determination of and the carrying out of policy decisions, including the preparation and filing of applications with this Commission; employment, supervision, and dismissal of personnel; payment of financial obligations including expenses arising out of operation; and the receipt of moneys and profits derived from the operation of the microwave facilities.” *Intermountain Microwave*, 12 F.C.C.2d 559, 559-60 (1963). “Uncertainty on the part of the licensee or counsel as to the legal consequences of a transfer is no excuse for failure to comply,” as “such uncertainty should be resolved by bringing the complete facts to the attention of the Commission in advance of the consummation of such transaction.” *Id.* at 560.

MCLM, through Sandra DePriest as its lone officer, has consistently failed to list a large number of affiliates on its applications to transfer licenses, including Mrs. DePriest’s husband, Donald DePriest. This has been a deliberate and deceptive pattern of behavior. *See* Petition to Deny, Maritime Communications/Land Mobile LLC’s Form 601 Application for Auction No. 61, File No. 002303355 at 8 (Nov. 10, 2005). Sandra DePriest is a sock puppet and the defacto control of these licenses lies elsewhere. This lack of control suggests that Choctaw is the actual de facto controlling party and that an unlawful transfer has occurred.

These entanglements between MCLM, the DePriests, and Choctaw invalidate the MCLM/Choctaw petition for *Second Thursday* relief. The *Second Thursday* doctrine requires that wrongdoing parties such as the DePriests realize no more than *de minimis* benefits from a proposed transaction — and that such wrongdoers have no involvement whatsoever with business conducted under a license from the Commission. Because MCLM’s sole officer is disqualified, the actions of MCLM under her exclusive control, including the assignment

application and its indispensable request for *Second Thursday* relief, are likewise disqualified.

SkyTel has contended and continues to contend that MCLM is a sham corporation.⁴¹ Specifically, he asserts that MCLM abused the Commission's processes, evaded ownership regulations, and repeatedly concealed material facts that would have demonstrated the true party in control, and that therefore the assignments by this sham corporation, including the assignment application and the its request for *Second Thursday* relief, are procedurally invalid.

7. The DePriests will receive a substantial benefit if the Commission grants Choctaw's *Second Thursday* Application.

Under the *Second Thursday* doctrine, the Commission will deviate from *Jefferson Radio* only where the alleged wrongdoers will derive no benefit, direct or indirect, from the assignment at issue or will derive only minor benefit that is outweighed by the equities in favor of innocent creditors. Here, the DePriests will receive a substantial benefit if the Commission approves Choctaw's Application.

If the Commission approves Choctaw's *Second Thursday* Application, Don DePriest stands to be forgiven for roughly \$11.5 million in personal guarantees. Although these personal guarantees (and the loan documents related to them) were marked *Highly Confidential* in the Bankruptcy Case, information regarding the guarantees was publicly filed or was the subject of testimony in the Bankruptcy proceeding. First, MCLM's schedules describe Don DePriest as a co-debtor of MCLM, and the values of that co-debt are plainly set forth in the schedules.⁴²

⁴¹ See *Petition to Deny, and in the Alternative Section 1.41 Request, Maritime Communications/Land Mobile LLC and Southern California Regional Rail Authority Applications to Modify License and Assign Spectrum for Positive Train Control Use, and Request Part 80 Waivers*, DA 10-556, WT Docket No. 10-83, File Nos. 004153701, 0004144435, 0002303355 at 16 (Apr. 28, 2010) (citing *Trinity Broadcasting of Florida, Inc.*, 10 F.C.C.R. 12,020 (1995)).

⁴² See Maritime's Statement of Financial Affairs, Dkt. No. 46; Summary of Schedules, Dkt. No. 46; Amended Statement of Financial Affairs, Dkt. No. 170; Amended Summary of Schedules,

Further, Sandra DePriest testified at the 11 U.S.C. § 341 “meeting of the creditors” that Don DePriest guaranteed approximately \$8 million of MCLM’s debt.⁴³ Further, the competing (and ultimately withdrawn) reorganization proposal submitted by Council Tree Investors, Inc., estimated that the amount Don DePriest personally guaranteed totaled, approximately, \$11.5 million.⁴⁴ Indeed, using the numbers set forth in the Debtors’ schedules—as set forth in Council Tree Investors’ Comments in this proceeding⁴⁵—Don DePriest’s guarantees can be valued as follows:

Creditor	Amount
C. Chris Dupree	\$2,782,293.06
R. Hayne Hollis III	\$2,784,293.06
Watson & Downs, LLC	\$2,784,293.06
Clark and Whitney deR. Bullock	\$250,000.00
Bruce A. Davis, M.D.	\$80,000.00
Michael P. Dunn	\$97,576.70
Fred C. Goad	\$191,699.00
David Shelton	\$125,000.00
Douglas C. Sellers	\$48,788.35
Harrison J. Shull	\$177,000.00
James L. Teel	\$320,000.00
James Tatum	\$88,500.00

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

⁴³ See 341 Transcript at p. 112, *In re Maritime Communications/Land Mobile LLC*, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011).

⁴⁴ See CTI Proposal, Dkt. #688-8, at p. 24, Case No. 11-13463-NPO (Bankr. N.D. Miss. 2011) (“The Choctaw plan does not acknowledge or address the large benefit that Choctaw provides the DePriests in forgiving an est. \$11.5 million in DePriest personal guarantees. The guarantees are forgiven by the individual SECF lenders, including those same entities that are owners of the proposed Maritime acquirer, Choctaw.”).

⁴⁵ See Council Tree Investors Comment, at p. 11-14.

Justin Shelton	\$250,000.00
Lynette A. McCary	\$177,000.00
Retzer Resources	\$250,000.00
Sexton, Inc.	\$390,306.80
Maritime Communications Group	\$110,000.00
William Isaacson	\$250,000.00
Total	\$11,156,750.03

In addition, MCLM assumed, on behalf of Donald DePriest, a Donald DePriest personal debt to Oliver Phillips for approximately \$6 million that stems from a Mississippi court judgment rendered against Donald DePriest, not MCLM. SkyTel has discussed this transaction in its petition to deny Choctaw’s *Second Thursday* application, in its filings in the *OSC/HDO*, and in its challenges to the Form 601 submitted by MCLM in Auction 61. Peter Harmer, in his comments responding to Docket 13-85, likewise discusses MCLM’s assumption of Donald DePriest’s personal debt to Oliver Phillips. Thus, repayment of the Phillips debt by MCLM will personally benefit Donald DePriest by approximately \$6 million, raising the total benefit to Donald DePriest closer to \$18 million.

In spite of all of the foregoing evidence, Choctaw and MCLM contend that because the Bankruptcy Plan does not specifically or expressly forgive Don DePriest’s guarantees, Don DePriest will therefore not receive a benefit under the Plan.⁴⁶ For example, Choctaw argues:

“If we had some ham, we could have some ham and eggs, if we had some eggs.” That is, if the Commission imagines that the secured lenders agreed to forbear, and if the Commission imagines that the DePriests agreed to support the Choctaw plan, then the only conclusion that the Commission can come to is that the DePriests receive a benefit from forbearance on the guarantees. However, there is no ham and there are no eggs; the secured lenders never made a deal to forbear

⁴⁶ See Choctaw Reply, at pp. 20-21; MCLM Reply, at p. 5.

on their guarantees and the DePriests never made a deal to support the Choctaw plan.⁴⁷

Of course, to determine that Don DePriest will receive a substantial benefit if the Plan succeeds, the Commission need not *imagine* that the secured lenders agreed to forbear or *imagine* that the DePriests agreed to support the Choctaw Plan. If the Commission grants Choctaw's Application, and MCLM's debt is paid, the granting of Choctaw's Application *necessarily forgives Don DePriests' personal guarantees*. This is a logical conclusion that Choctaw and MCLM cannot ignore. The cholesterol-choked nature of their "ham and eggs" argument cannot obscure the simple truth: granting *Second Thursday* relief and transferring MCLM's licenses to Choctaw allows the new entity's creditors — primarily the opportunistic investors who have created this shell company — to satisfy their claims through the sale of AMTS spectrum rather than the enforcement of Donald DePriest's personal guarantees.

The ongoing, brooding omnipresence of Donald DePriest's soon-to-be-forgiven personal guarantees looms over this proposed transaction. Those guarantees, and the failure of the MCLM/Choctaw Plan to definitively hold Mr. DePriest to those guarantees for the benefit of all creditors (and not just the Choctaw Members), stand as a major obstacle to *Second Thursday*. If Mr. and Mrs. DePriest and Choctaw were truly earnest about eliminating this roadblock to regulatory relief, they have an easy solution: Mr. DePriest could simply have honored his personal guarantees and enabled MCLM to use those proceeds to honor its debts, MCLM might thereby have avoided bankruptcy, to say nothing of this facet of the proceedings.

But Mr. DePriest has made no move whatsoever to honor his personal guarantees. Under the control of the DePriests (certainly at least Sandra DePriest as MCLM's lone officer), MCLM did not seek a better deal from the market at large, relative to the no-cash, self-serving offer the Choctaw extended. Consummate MCLM insiders, the Choctaw Members are secured lenders

⁴⁷ See Choctaw Reply, at pp. 20-21.

who funded MCLM through all of its misconduct before the Commission and then secured their loans against the proceeds those wrongfully procured FCC licenses. Alongside the DePriests and John Reardon, Choctaw concocted a transparently self-serving stratagem, speciously described as a Chapter 11 plan for reorganization. Along the way, MCLM turned down economically superior alternatives such as SkyTel's settlement offer (as described in SkyTel's petition to deny the MCLM/Choctaw application).

At the risk of sounding paranoid, SkyTel believes that this is the stuff of which conspiracies are made. Real conspiracies, with legal consequences. MCLM's failure to enforce Donald DePriest's personal guarantees, coupled with MCLM's failure to seek a superior offer for its lone asset and the lopsided windfall that the Choctaw Members would reap, indicates a highly suspicious combination of behavior that is at once economically destructive to MCLM's legitimate creditors and highly beneficial to the DePriests and to the Choctaw Members. Antitrust law routinely treats this combination of economically erratic behavior and motivation to conspire as persuasive, even compelling evidence of a conspiracy.⁴⁸ In evaluating this transaction under the inherently equitable tests of *Second Thursday* and the Communications Act's broader public interest standard, the Commission should do no less.

Had MCLM gone into the actual fair market, and done so with an objective professional trustee, it would have been apparent, that the licenses were worth a large multiple of MCLM's total debt. That revelation, however, would have defeated any *Second Thursday* claim, since the sale of licenses to be sold to cover "innocent" debt, or even total debt, would leave many licenses intact and thereby require the Commission to bring its hearing designation and its revocation proceedings to their logical conclusion. Since all those insiders (the DePriests and the Choctaw

⁴⁸ See, e.g., *Blomkest Fertilizer v. Potash Corp.*, 203 F.3d 1028, 1037 (8th Cir.) (en banc), cert. denied, 531 U.S. 815 (2000); *In re Citric Acid Litig.*, 191 F.3d 1090, 1100 (9th Cir. 1999), cert. denied, 529 U.S. 1037 (2000); *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1243-45 (3d Cir. 1993).

Members) knew that MCLM could not survive such a hearing, they must have rationally concluded that the DePriests' misconduct would disqualify MCLM as an FCC licensee and subject all of MCLM's licenses to termination and/or revocation. This artificial, self-serving bankruptcy filing and even more contrived application for *Second Thursday* relief, with all of their overlapping layers of misrepresentation and outright manipulation, confirms what these players have done throughout the history of this proceeding. MCLM and its cronies have demonstrated a consistent pattern and practice of defrauding the government (including the Commission and the bankruptcy courts) in their unrelenting pursuit of unjust windfalls.

**B. Transferring Licenses Under Footnote 7 of the OSC/HDO
Cannot and Does Not Serve the Public Interest**

In footnote 7 of its *Order to Show Cause/Hearing Designation Order*, the Commission raised the possibility that it would, "upon an appropriate showing by the Parties, consider whether, and if so, under what terms and conditions, the public interest would be served by allowing the Metrolink application [for transfer of spectrum to SCRRA, the Southern California Regional Rail Authority] to be removed from the ambit of this Hearing Designated Order." 26 F.C.C.R. at 6523 n.7. Removing SCRRA's Metrolink application from the scope of the Commission's hearing into MCLM's basic qualifications cannot and ultimately does not advance the public interest, which is the prerequisite under 47 U.S.C. § 310(d) to Commission approval of an application to transfer any license. The Commission's purported rationale for removing the SCRRA's transfer application from the ambit of the *OSC/HDO* would represent an abrupt, arbitrary, and capricious departure from longstanding Commission policies regarding the transfer of licenses. Even if footnote 7 represents a proper articulation of new (or changed) Commission policy regarding the transfer of licenses, the specific removal of SCRRA's transfer application from the ambit of the *OSC/HDO* would not serve the public interest. Finally, the Commission

has no occasion to expand footnote 7 to remove further applications, such as those submitted by Duquesne Light Company and by the parties that have jointly filed comments in response to Public Notice DA 13-569 as members of the “Critical Infrastructure Industry” (CII).

1. Removing the MCLM-Metrolink license transfer from the ambit of the *OSC/HDO* conflicts with fundamental Commission precedent and is arbitrary and capricious.

Removing SCRRRA’s license transfer application from the ambit of the *OSC/HDO* would effect an abrupt course change from multiple longstanding Commission policies regarding the transfer of licenses. Indeed, the potential change in policy would be so abrupt and unjustified that its effectuation would not survive judicial review under the Administrative Procedure Act. “It is the recognized policy of the Commission that assignment of broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization.” *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). Although the policy articulated in *Jefferson Radio* is not absolute, the Commission’s practice of imposing harsh sanctions for dishonesty has deep roots, nearly as old as the Communications Act and the Commission itself. *See FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

The Commission’s power to revoke licenses procured with less than full candor, *see* 47 U.S.C. § 312(a) would be hollow if licensees, having come under threat of revocation for dishonesty or other misconduct, could escape the Commission’s regulatory reach by assigning their licenses on favorable terms. *See Cellular System One of Tulsa, Inc.*, 102 F.C.C.C.2d 86, 90 (1985). In the vivid language of the D.C. Circuit, “the threat of a hearing and the hearing process itself would become less effective as deterrents if the ‘awesome loss’ associated with revocation or non-renewal of a license were to be neutralized” through sale on favorable terms. *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1030 (D.C. Cir. 1981). As a result, exceptions to *Jefferson Radio* are narrowly limited to longstanding Commission policies such as the *Second Thursday* doctrine, which makes the transfer of a license contingent upon “a showing that

alleged wrongdoers will derive no benefit, either directly or indirectly, from the sale or will derive only minor benefit which is outweighed by the equities in favor of innocent creditors.” *LaRose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir., 1974) (citing *Shell Broadcasting, Inc.*, 38 F.C.C.2d 929, 931 (1973)). It is a violation of administrative procedure for “the Commission to [make] an *ad hoc* exception to the policy upheld in *Jefferson Radio* without articulating a clear rationale for this departure.” *Coalition for Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1359 (D.C. Cir., 1990), *vacated en banc on different grounds*, 931 F.2d 73 (D.C. Cir.), *cert. denied*, 502 U.S. 907 (1991).

If the Commission elects to entertain MCLM’s application to transfer licenses to SCRRA outside the ambit of the *OSC/HDO*, the Commission would thereby consider the assignment of a license before determining whether the assignor has forfeited its authorization and, with it, any right to assign that license. This is squarely contrary to the policy enunciated in *Jefferson Radio*. Simultaneously, because SCRRA is not a creditor, but rather a purchaser of spectrum, the *Second Thursday* doctrine simply does not apply. There are no “innocent creditors” to protect, and no public interest consideration to offset the Commission’s interest in negating (or at least minimizing) economic benefit to the alleged wrongdoer. Furthermore, although the Commission mentions that its ultimate decision to authorize the transfer of these licenses beyond the scope of the *OSC/HDO* would involve a consideration of whether the “public interest would be served,” footnote 7 fails to prescribe how the Commission would exact a substantial monetary penalty from the transferor, which (as demonstrated earlier) has been a hallmark of recognized exceptions to *Jefferson Radio* (including *Second Thursday*). In light of the foregoing, a decision by the Commission to remove the SCRRA application from the scope of the *OSC/HDO* could prompt a reviewing court to conclude that the Commission made no “consideration of the relevant factors” and instead committed a “clear error of judgment,” resulting in decisionmaking that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law.” *Citizens To Preserve Overton Park, Inc v. Volpe*, 401 U.S. 402, 416 (1971) (quoting 5 U.S.C. § 706(2)(A)).

Moreover, the Supreme Court has made explicit that “[a]n agency may not...depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). “[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Id.* Footnote 7 fails to recognize that any transfer of a license by MCLM outside the HDO would be a substantial policy change from the previously established types of license transfers by an assignor that have been allowed prior to a determination regarding the forfeiture of that license. The Commission undoubtedly remains “free to change [any] doctrine,” even one as established and well reasoned as *Jefferson Radio*, but it must “explain[] why and what it is doing, and complies with” all applicable “process requirements.” *Hispanic Broadcasting*, 893 F.2d at 1360.

2. A transfer of licenses outside the ambit of the HDO is not in the public interest.

Even if the Commission has made the showing needed to sustain footnote 7 as a novel exception to *Jefferson Radio*, approval of the transfer of licenses to SCRRA outside the ambit of the *OSC/HDO* would not serve the public interest. In contemplating the possibility of removing the MCLM-to-SCRRA transfer from the *OSC/HDO*, the Commission focused on SCRRA’s representation that it would use the spectrum to comply with the Rail Safety Improvement Act of 2008’s requirement that “passenger trains implement positive train control systems and other safety controls to enable automatic braking and to help prevent train collisions,” which involves “potential safety of life concerns.” 26 F.C.C.R. at 6523 n.7. However, the Rail Safety Improvement Act’s provisions on implementing positive train control systems are silent as to specific bands of spectrum, like AMTS, that would be required for successful

implementation. Rather, “positive train control system” is broadly defined as “a system designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position.” Rail Safety Improvement Act of 1998, 49 USC § 20157(i)(3). To date, the record lacks any specific, detailed showing that the spectrum covered by MCLM’s license is superior, or that granting transfer of this license to SCRRA would be more in the public interest, or more successfully remedy “potential safety of life concerns” than implementation using other spectrum that SCRRA has admitted being able to acquire. *See Application for Assignment of Authorization*, Third Supplement to “Showing Pursuant to Footnote 7” and Second Renewal of Request for Prompt Agency Action, FCC File Nos. 0004153701 and 0004144435 (admitting that SCRRA has a leasing arrangement in place with PTC 220 LLC for use of their spectrum.) Rather, SCRRA has only cursorily declared that this spectrum arrangement alone is not permanent, and not that there has been a demonstrated inability for them to obtain spectrum through other means that ultimately threaten the public interest and unnecessarily jeopardize public safety.

Moreover, as SkyTel has previously been demonstrated to the Commission but believes to be worth repeating, SCRRA’s CEO has readily admitted that SCRRA does not need all 1 MHz of the AMTS spectrum at issue for positive train control purposes. Rather, because the price is so good, SCRRA wants to buy this spectrum and deploy it for voice services or, alternatively, sell the spectrum to yet another party for profit. Specifically, the CEO has asserted

[T]he 1 MHz held by MC/LM is probably more than will be necessary for SCRRA’s short and mid-term PTC needs. As SCRRA will not immediately need the entire 1 MHz for PTC, it may use excess spectrum for other communications needs, for instance a system maintenance voice channel or may sell or lease any excess spectrum, or may determine not to purchase the entire 1 MHz in the first instance. At this time, staff anticipates purchasing the entire 1 MHz as the pricing for that quantity reflects a volume discount such that there will be only a limited financial benefit to purchasing less than the

entire 1 MHz.⁴⁹

This correspondence clearly demonstrates that removing the MCLM-SCRRRA license transfer from the ambit of the *OSC/HDO* would not promote public safety and health or otherwise serve the public interest. Other evidence corroborates the glaring absence of genuine need by SCRRRA for the full 1 MHz in AMTS spectrum.⁵⁰ It is not an abiding interest in positive train control, but rather the opportunity to profit from the fire sale prices offered by MCLM that fundamentally motivates SCRRRA to exclude this prospective license transfer from the ambit of the HDO. Instead, the public interest would be better served by intercepting SCRRRA's apparent intention to hoard AMTS spectrum or to use it for any purpose besides direct, immediate implementation of the railroad's public safety obligations under the Rail Safety Improvement Act. The public interest is best served if the Commission maintains the status quo and leaves these licenses within the ambit of the *OSC/HDO*. Only by subjecting these licenses to the pending hearing can the Commission ensure that parties with credible, established plans to deploy licenses for direct public benefit — such as the SkyTel companies — will have the chance to acquire these licenses.

⁴⁹ Exhibit 1 to Reply to Comments of Havens and the SkyTel Entities, Maritime Communications/Land Mobile LLC and Southern California Regional Rail Authority Applications to Modify License and Assign Spectrum for Positive Train Control Use, and Request Part 80 Waivers, DA 10-556, WT Docket No. 10-83, File Nos. 004153701, 0004144435, 0002303355 (May 10, 2010) (Attachment B to this filing).

⁵⁰ According to FCC ULS records (including lease applications between PTC-220 and SCRRRA), PTC-220 LLC holds approximately 480 kHz of 220-222 MHz spectrum in SCRRRA's area of operation. Per SkyTel's filings in FCC Docket 11-79, filings by Ron Lindsey in the same docket, and public requests for proposal issued by Amtrak and other passenger railroads for spectrum for positive train control (whereby Amtrak, New Jersey Transit, and others seek only between 100-150 kHz of spectrum for PTC), that 480 kHz of spectrum is more than enough to meet both PTC-220's and SCRRRA's PTC needs. Even if that amount were insufficient to cover both PTC-220 and SCRRRA, then the fact that PTC-220 LLC needs at most 480 kHz of spectrum for positive train control in SCRRRA's area of operation confirms that SCRRRA does not need the full 1 MHz of MCLM's AMTS spectrum to conduct positive train control.

As SkyTel has noted time and time again, it is the “Commission’s obligation under 47 U.S.C. § 310(d) to ensure that every transfer, assignment or disposal of a construction permit or station license serves the public interest.” SkyTel Petition to Deny, at 3. The public interest is the paramount standard, and nothing in that standard supports an opportunistic and profitable transfer of spectrum to SCRRA. To date, SCRRA has failed to meet its burden of demonstrating that its pursuit of MCLM’s licenses are motivated by anything other than profit, let alone a showing that the public interest requires its obtaining *these specific licenses* to implement its positive control systems, instead of utilizing other licenses it possesses or may otherwise obtain through other channels.

An admonition to SCRRA (and to similarly situated railroads) to seek all available sources of spectrum — as opposed to manipulating a spurious public necessity argument loosely derived its recently incurred legal obligation to implement positive train control — would be affirmatively consistent with other expressions of the Commission’s policy. In Docket 11-79, the Commission has invited comments on whether the Commission should allocate 200 MHz spectrum to railroads. Notwithstanding requests by many railroads that the Commission should reallocate parts of 220 MHz spectrum for their exclusive use, the chief counsel of the Mobility Division has responded by encouraging railroads to seek spectrum in secondary markets. This guidance suggests that no reallocation is forthcoming, since the railroads have not precisely quantified their spectrum needs and have not exhausted secondary markets for 220 MHz spectrum or for spectrum in other bands.⁵¹ Even assuming that SCRRA’s only sources for spectrum lie in the 200 MHz band (which simply is not true), SCRRA could have approached 200 MHz licensees in southern California, including Verde Systems LLC and Skybridge

⁵¹ See Richard Arsenault, *Meeting the Rail Industry’s Positive Train Control Spectrum Needs*, 2012 PTC World Congress (March 1, 2012) (cited at http://en.wikipedia.org/wiki/Positive_train_control#cite_note-FCC_Public_Comments-17) (Attachment C to this filing).

Spectrum Foundation, Paging Systems, Inc., IVDS licensees, and 220-222 MHz licensees (whose licenses may be consolidated to form wider channels). Other spectrum options in other bands abound at auction and in secondary markets. Clearly, SCRRA's only option is not MCLM's AMTS spectrum.

In light of all of the foregoing considerations, the Commission should therefore refuse to remove the MCLM-SCRRA license transfer from the ambit of the *OSC/HDO*.

3. The Commission should not grant relief to non-railroad entities, such as the “Critical Infrastructure Industry,” seeking treatment parallel to that contemplated in footnote 7.

Other parties, such as the five utility companies and cooperatives filing comments as the “Critical Infrastructure Industry” (CII), have asked the Commission, in effect, to expand footnote 7 beyond its existing narrow focus on positive train control to a broader, general interest in all forms of infrastructure. Footnote 7 is explicitly limited to SCRRA and to positive train control under the Rail Safety Improvement Act of 2008. *See* 26 F.C.C.R. at 6523 n.7. Contrary to the plain language and meaning of footnote 7, CII has invited the Commission to ignore the natural limitation of its own order and to craft yet another exception from *Jefferson Radio*. The effect of such a maneuver would be to enable CII, on equal footing with SCRRA and on a rationale parallel to (but not identical with) footnote 7, to seek removal of its members’ pending applications for license transfer from the ambit of the *OSC/HDO*.⁵² In support of this contention, they assert that the CII entities need access to MCLM’s spectrum to “support critical infrastructure communications functions,” such as “Supervisory Control and Data Acquisition (“SCADA”) related to the operation of pipelines and liquefied natural gas (“LNG”) facilities in

⁵² *See* Petition for Reconsideration of CII, In the Matter of Maritime Communications/Land Mobile, LLC, EB Docket No. 11-71, File No. EB-09-IH-1751 (May 19, 2011).

the oil and gas industry, as well as smart grid and other CII functions in the electric utility industry.”⁵³

The proposed uses of these licenses are decisively different from the purpose contemplated by SCRRA. CII’s request therefore represents a dramatic (and ultimately unwarranted) expansion of the scope of footnote 7. Assuming strictly for purposes of argument that footnote 7 does articulate a procedurally proper exception to *Jefferson Radio*, the relief contemplated in that footnote is narrowly tailored to ensuring compliance with a specific congressional mandate, under the Rail Safety Improvement Act of 2008, to implement positive train control systems and other systems that Congress has specifically found to be critical to the improvement of rail safety and (*a fortiori*) the broader public interest in safety and health. The CII, as vital as they believe themselves to be, have not and cannot establish an equally compelling public interest. Quite simply, the Commission could have included a broader interest in other forms of infrastructure within the scope of footnote 7, but it affirmatively chose not to. *Expressio unius est exclusio alterius. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

Footnote 7 is merely that – the seventh of one hundred sixty four footnotes in a 36-page order. It is not a waiver grant, and it is certainly not a doctrine, such as *Jefferson Radio*, that the Commission must follow or otherwise distinguish on rational grounds if there is to be a departure. Footnote 7 assigns itself a simple task: to consider whether the public interest would be served by removing a single license transfer application, and no other, from the ambit of the *OSC/HDO*. Giving it any more weight than this is erroneous. This implicit exclusion of CII from its scope cannot simply be ignored, and this proceeding under the HDO must timely move forward with the assignment of licenses to CII within its ambit.

⁵³ *See id.* at 5-6.

Further, as expressed in more detail above, allowing relief under footnote 7 is questionable under the APA as a significant and unexplained deviation from the Commission policy enunciated *Jefferson Radio*. Expanding its scope to include other potential assignments of licenses only further magnifies this problematic nature, and unduly benefits MCLM and the Depriests, whose wrongful conduct is the fundamental reason for the HDO. As such, expanding the footnote 7 exception to apply to additional parties contradicts the Commission’s intention that footnote 7 only apply, if at all, to SCRRA, and magnifies the problematic nature of footnote 7’s departure from the policy laid out in *Jefferson Radio*.

Finally, it bears noting that the sole relief contemplated by footnote 7 is the removal of certain license assignments from the ambit of the HDO, and the Commission should swiftly reject any contention that footnote 7 is a waiver or means by which license assignments can be granted. As noted above, the *OSC/HDO* clearly states that upon a required showing by MCLM and SCRRA, the Commission “will ... consider whether ...the public interest would be served by allowing the Metrolink application to be removed from the ambit of this Hearing Designation Order.” 26 F.C.C.R. at 6523, n.7. Thus, footnote 7 requires on its face that any relief be limited to a removal of certain licenses from the *OSC/HDO*, and not a waiver or granting of these license transfers. If removed, these licenses would then be subject to the Commission's usual license transfer authorization procedures, which are designed to ensure that the transfer advances the public interest. 47 U.S.C. § 310(d).

C. The Commission Should Continue Evaluating “Issue G”: Whether MCLM Should Forfeit Licenses for Failure to Construct in Timely Fashion or for Permanently Discontinuing Service

“Issue G” in the *OSC/HDO* addresses “whether Maritime constructed or operated any of its stations in variance with sections 1.955(a) and 80.49(a) of the Commission’s Rules.” 26 F.C.C.R. at 6547. This investigation addresses “a disputed issue of material fact” whether “the

licenses for any of Maritime’s site-based AMTS stations have canceled automatically for lack of construction [*see* 47 C.F.R. § 80.49] or permanent discontinuance of operation [*see* 47 C.F.R. § 1.955(a)].” 26 F.C.C.R. at 6546. In their replies to SkyTel’s petition to deny, MCLM and Choctaw urge the Commission to waive these Rules so that the Commission may either subsume this issue within their *Second Thursday* application or assign MCLM’s site-based spectrum outright to Choctaw.⁵⁴

The ongoing investigation of Issue G under the *OSC/HDO* should continue apace. There is no basis for waiving 47 C.F.R. §§ 1.955(a), 80.49 as those rules apply to MCLM’s site-based licenses. Even after filing for bankruptcy for the specific purpose of seeking *Second Thursday* relief, MCLM conceded that Issue G — which provides grounds for termination or revocation of 59 site-based licenses, wholly independent of the misconduct by Sandra and Donald DePriest that tainted the four geographic licenses MCLM improperly obtained in Auction 61 — was suitable for resolution under the terms of the *OSC/HDO*. Extensive litigation, including exhaustive discovery, has since ensued.

On the merits, MCLM and Choctaw’s objections to the application of 47 C.F.R. §§ 1.955(a), 80.49 are baseless. At no time have these parties properly filed requests under 47 C.F.R. § 1.925 to waive these rules.⁵⁵ Nor have MCLM and Choctaw come anywhere near the substantive standard required for waiver. They have not shown how “[t]he underlying purpose” of the Commission’s construction and permanent discontinuance of service rules “would not be

⁵⁴ *See* MCLM Reply, at 7-9; Choctaw Reply, at 21-33.

⁵⁵ Setting out the Commission’s waiver rules, 47 C.F.R. § 1.925 states: “The Commission may waive specific requirements of the rules on its own motion or upon request.” *Id.* § 1.925(a)(1). “Requests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.” *Id.* § 1.925(b)(1). “Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.” *Id.* § 1.925(b)(2). To the best of SkyTel’s awareness, the docket associated with the *OSC/HDO* reflects no timely § 1.925 petition by MCLM. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106.

served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest.” 47 C.F.R. § 1.925(a)(3)(i).

Unable to prevail by an ordinary application of the Commission’s Rules, MCLM and Choctaw have waged a constitutional attack on the rules animating Issue G. This argument must be construed, if it is to be deemed properly lodged, as an plea for Rule 1.925 waiver on these grounds: “In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” *Id.* § 1.925(a)(3)(ii). On the basis of the Commission’s notice of proposed rulemaking regarding a uniform framework for license renewal, discontinuance of operation, and geographic partitioning and spectrum disaggregation,⁵⁶ MCLM and Choctaw argue that the Commission’s existing rules, particularly 47 C.F.R. §§ 1.955(a)(3), 80.49, 80.60 & 80.475, provide constitutionally inadequate notice of what the Commission will deem to be permanent discontinuation of service.⁵⁷

There is no ambiguity in the continuity-of-service rules governing AMTS. Section 1.955 of the Commission’s Rules unambiguously provides that “[a]uthorizations automatically terminate, without specific Commission action, if service is permanently discontinued.” 47 C.F.R. § 1.955(a)(3). That rule then delegates “the definition of permanent discontinuance for purposes of” § 1.955 to either “[t]he Commission authorization or the individual service rules.” *Id.*⁵⁸ Although the rules governing AMTS, found in 47 C.F.R. part 80, do not currently define

⁵⁶ See *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 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 F.C.C.R. 6996 (2010) [hereinafter *Renewal and Discontinuance NPRM*].

⁵⁷ MCLM Reply, at 8-9; Choctaw Reply, at 24-31.

⁵⁸ With respect to deadlines for construction, Rule 1.955 likewise delegates the designation of “applicable construction or coverage requirements” to specific rules governing each service. 47 C.F.R. § 1.955(a)(2). MCLM and Choctaw do not allege any ambiguity, let alone an ambiguity rising to levels of constitutional significance, in AMTS rules governing construction deadlines.

“permanent discontinuance” of AMTS in precise temporal terms (akin, perhaps, to the one-year benchmark laid down in 47 C.F.R. § 90.157(a)),⁵⁹ the Commission’s regulatory framework has provided MCLM (and, derivatively, Choctaw) ample notice that permanent discontinuance of service provides grounds for automatic termination of AMTS licenses.

The relevant notice to AMTS licensees proceeded in three steps. First, AMTS rules that governed all of MCLM’s site-based licenses until 2002 (well within the time period relevant to the *OSC/HDO*) required AMTS applicants to demonstrate “continuity of service along more than 60% of ... navigable inland waterways.” 7 C.F.R. § 80.475(a) (2001). Those rules likewise required “AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline” to “define a substantial navigational area and [to] show how the proposed system will provide continuity of service” for it. *Id.* Although the Commission removed the continuity of service requirement in 2002,⁶⁰ that requirement aligned the AMTS band’s service requirement with its construction requirement, which 47 C.F.R. § 80.49(a) has defined in terms of “service” even as that same rule laid down specific time limits.⁶¹ The AMTS rules governing construction and permanent discontinuation of service are therefore rules *in pari materia* and accordingly should be construed harmoniously with each other.

A geographic licensee “must make a showing of substantial service within its service area within ten years of the initial license grant.” *Id.* § 80.49(a)(3). A site-based licensee must place a new station or newly authorized frequencies “in operation within two years from the date of the grant.” *Id.* Although the alleged failure of MCLM to satisfy *these* rules is also at stake in Issue G, *see OSC/HDO*, 26 F.C.C.R. at 6546-47, MCLM and Choctaw seek a waiver on the application of these rules as well. That is not waiver, but complete and abject abdication. There is no basis whatsoever for not holding these parties accountable for MCLM’s failure to construct stations and deploy new frequencies in compliance with 47 C.F.R. § 80.49(a).

⁵⁹ *See Renewal and Discontinuance NPRM*, 25 F.C.C.R. at 7017-18 (acknowledging “regulatory disparities” between rules adopting bright temporal lines and rules adopting other approaches to defining permanent discontinuance).

⁶⁰ *See Amendment of the Commission’s Rules Concerning Maritime Communications*, 17 F.C.C.R. 6685, 6737 (2002) (amending 47 C.F.R. § 80.475(a)).

⁶¹ *See supra* note 55 (identifying a two-year deadline for placing a new license or additional operating frequencies in operation).

Second, as the Enforcement Bureau noted in its comments on MCLM and Choctaw's *Second Thursday* applications (at 27-28), the Wireless Telecommunications Bureau issued no fewer than four orders, from 2004 through 2007, all notifying MCLM that an AMTS licensee, in order to avoid automatic termination under any provision of 47 C.F.R. § 1.955(a), must put its stations into operation within a time certain and must keep those stations operating.⁶² This was emphatically not an instance in which “the agency itself struggles to provide a definitive reading of [its] regulatory requirements.” *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000).

Finally, Rule 1.955(a) itself requires “[a] licensee who discontinues operations” to “notify the Commission of the discontinuance of operations by submitting FCC Form 601 or 605 requesting license cancellation.” 47 C.F.R. § 1.955(a)(3). This requirement applies to all classes of licenses, without regard to rules varying by service.⁶³ MCLM filed no such forms. The Commission's pending rulemaking proceeding to impart uniformity to rules on license renewal, discontinuance of service, and geographic partitioning and spectrum disaggregation, 25 F.C.C.R. at 6996, suggests congruence between this situation and the early Communications Act precedent of *United States v. Petrillo*, 332 U.S. 1 (1947). As in *Petrillo*, which involved the original Act's prohibition against coercing a broadcast licensee “to employ or agree to employ ... persons in excess of the number needed by such licensee to perform actual services,” 47 U.S.C. § 506 (repealed), the Commission's failure to define specific time limits before all services would be deemed permanently discontinued suggests that the Commission might have chosen “[c]learer and more precise language.” *Petrillo*, 332 U.S. at 7. Even though *Petrillo* acknowledged that

⁶² See *Mobex Network Servs., LLC*, 19 F.C.C.R. 24,939, 24,940 (2004); *Paging Sys., Inc.*, 21 F.C.C.R. 7225, 7225 (2006); *Mobex Network Servs., LLC*, 22 F.C.C.R. 665, 666 (2007); *Mobex Network Servs., LLC*, 22 F.C.C.R. 1311, 1311 (2007).

⁶³ Cf. *Renewal and Discontinuance NPRM*, 25 F.C.C.R. at 7017 n.155 (observing that some services, citing 47 C.F.R. §§ 27.66(b), 63.71, require “a licensee [to] obtain prior Commission authorization before voluntarily discontinuing service).

neither Congress nor the Commission set a definite numerical limit on persons “needed by [a] licensee to perform actual services,” the language of § 506 “convey[ed] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” 332 U.S. at 8.

MCLM plainly understood that abandoning service on its AMTS licenses for extended periods might, and eventually would, be deemed permanent discontinuance of service. Because “few words,” not even those in title 47 of the Code of Federal Regulations, “possess the precision of mathematical symbols,” it was far from “unfair” for the Commission “to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”⁶⁴

Conclusion

MCLM and Choctaw have demonstrated absolutely no basis for terminating the *OSC/HDO* and truncating Commission’s ongoing investigation into MCLM’s basic qualifications. Nor have these parties qualified for a 47 C.F.R. § 1.925 waiver of the Commission’s construction and continuity of service requirements for AMTS licensees. For its part, SCRRA has not demonstrated why the Commission, pursuant to footnote 7 of the *OSC/HDO*, should remove its transfer application from the ambit of that order.

As a result, the procedural path forward in this matter is straightforward. The Commission should fully investigate the two independent grounds that will ultimately lead to termination or revocation of MCLM’s spectrum. Proceedings addressing Issue G in the *OSC/HDO* have already begun examining the extent to which MCLM should be stripped of site-based licenses for failure to construct on a timely basis or for discontinuance of service. These

⁶⁴ *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); accord, e.g., *United States v. \$122.043.00 in United States Currency*, 792 F.2d 1470, 1477-78 & n.11 (9th Cir. 1986).

proceedings should continue. Moreover, true to the *OSC/HDO*, the Commission should fully evaluate the misrepresentations and less-than-candid statements and actions of Sandra and Donald DePriest. Substantial benefit to the DePriests and the potential of a windfall to Choctaw's investors preclude the application of *Second Thursday*. Footnote 7 provides no basis for removing SCRRA's application from the *OSC/HDO*, much less for creating an illusory and unlawful exception by which any entity claiming a remote connection with "infrastructure" may dodge the Communications Act and the rules and policies of the Commission.

/ / /

Respectfully submitted,

/s/ Electronically submitted. Signature on file.

Warren Havens
President of each of the Skytel-L Entities:

Environmental LLC
Verde Systems LLC
Intelligent Transportation & Monitoring Wireless LLC
Telesaurus Holdings GB LLC
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Dated: June 20, 2013

Note: As indicated above, the following other “Skytel-HS” entities are filing today their separate pleading on the above captioned matters: said pleading supplements the instant filing.

Warren Havens, an individual
Skybridge Spectrum Foundation

Respectfully submitted,

/s/ Electronically submitted. Signature on file.

Warren Havens
President of each of the Skytel-HS Entities, listed above.

Declaration

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

/s/ Electronically submitted. Signature on file.

Warren Havens

June 20, 2013

Certificate of Service

The undersigned certifies that he has, on June 20, 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.*⁶⁵

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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

* The PN states (emphasis added):

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

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

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

⁶⁵ 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.