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

Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(b) and (c) and Other Regulatory and Statutory Provisions	)	WT Docket No. 07-30
M2Z Networks Inc. Application for License and Authority to Provide A National Broadband Radio Service in the 2155-2175 MHz Band	)	WT Docket No. 07-16

To: the Commission
Chief, Wireless Telecommunications Bureau

REPLY OF NETFREEUS, LLC TO CONSOLIDATED OPPOSITION OF M2Z NETWORKS, INC. TO PETITIONS TO DENY

NetfreeUS, LLC ("NetfreeUS"), applicant for a new nationwide wireless broadband service authorization in the 2155-2175 MHz band,[1] hereby requests that the Commission strike and dismiss with prejudice the above-referenced Consolidated Opposition[2] filed by M2Z Networks, Inc. ("M2Z") on March 26, 2007, as applied to NetfreeUS. As a procedural matter, the Commission must reject M2Z's assertion that the Commission is required to act on the M2Z

[1] *See* NetfreeUS Application for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band, WT Dockets 07-16 and 07-30 (filed Mar. 2, 2007) ("NetfreeUS Application").

[2] *See* Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny, WT Docket Nos. 07-16 and 07-30 (filed Mar. 26, 2007) ("Consolidated Opposition"). In addition to the Consolidated Opposition, M2Z also filed a Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals ("Consolidated Motion") and a Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals ("Motion to Dismiss"). Concurrently herewith, M2Z is filing an Opposition to the Consolidated Motion to oppose M2Z's mischaracterization of the NetfreeUS Application as a petition to deny. NetfreeUS also plans to oppose in a separate filing the substantive arguments contained in the Motion to Dismiss regarding the NetfreeUS Application. NetfreeUS takes no position on the petitions to deny or applications filed by other participants in these proceedings, or on M2Z's response thereto in the Consolidated Opposition.

Application by May 5, 2007, a claim that is predicated on an inapplicable statutory provision. In the alternative, the Commission should, consistent with the public interest, forbear from enforcing that provision because it would preclude consideration of competing applications, including NetfreeUS's.

Discussion

THE COMMISSION IS NOT REQUIRED TO ACT ON THE M2Z APPLICATION BY MAY 5, 2007.

M2Z mistakenly relies upon language in Section 7(b) of the Communications Act of 1934, as amended (the "Act")[3] stating that the Commission "shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed," *i.e.*, by May 5, 2007.[4] Contrary to M2Z's assertion,[5] the M2Z Application proposes neither a "new technology" nor a "new service." Moreover, the M2Z Application as originally submitted on May 5, 2006 was incomplete because M2Z had not yet filed its Petition for Forbearance; thus May 5, 2006 is not the starting point for establishing the one-year period under Section 7(b). Even if M2Z had satisfied the procedural prerequisites of proposing a "new technology or service," the Commission still has discretion to forbear from enforcing the one-year timetable in light of the public interest benefits that full consideration of alternative proposals will promote. Accordingly, the Commission has no obligation to grant the M2Z Application by May 5, 2007.

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[3] 47 U.S.C. §157(b).
[4] *Id. See also* Consolidated Opposition at 23.
[5] *See, e.g.,* Consolidated Opposition at 23-27.

A. M2Z does not propose a new service or a new technology.

The M2Z Application proposes to operate a wireless broadband service and in fact classifies itself as a "Broadband Radio Service" with the service code "BR."[6] Broadband Radio Service is an existing service,[7] and wireless broadband is not a new service. Users seeking wireless broadband Internet access have several high-speed access options, with speeds in excess of 200 kbps in at least one direction.[8] Service providers are offering wireless broadband services through licensed spectrum using Orthogonal Frequency Division Multiplexing ("OFDM") technology – for example, operators in the Wireless Communications Service, the Educational Broadband Service and the Broadband Radio Service are providing these services today.

Moreover, these services use many new technologies. Service providers such as Clearwire already are providing service using technologies such as WiMax, OFDM and TDD, the same technologies M2Z characterizes as novel.[9] Standardized wireless equipment is being developed to allow users to obtain high-speed Internet access through Wireless Local Area Networks, based most commonly on Wi-Fi standards. To the extent that M2Z proposes technology that is already deployed elsewhere or is merely a variation of deployed technologies,

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[6] M2Z Application at Appendix 1.

[7] *See* Subpart M of Part 27 of the Commission's Rules, 47 C.F.R. §§ 27.1200 *et seq.*

[8] In other instances, the Commission has defined "broadband" services as those services with more than 200 kbps capability in at least one direction. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, 14855, ¶1 (2005), *petitions for review pending*,

[9] *See, e.g.*, Clearwire Corporation, Amendment No. 6 to SEC Form S-1 at 61, 70-71.

M2Z does not propose a "new" technology for purposes of Section 7(b).[10] Hence, M2Z is not proposing a new service or technology for purposes of Section 7(b), and the Commission is not compelled to render a decision on the M2Z Application by May 5, 2007.

B. Even if M2Z Were Deemed to Propose a New Service or Technology, M2Z Submitted an Incomplete Application on May 5, 2006.

On September 1, 2006, M2Z amended the M2Z Application and incorporated by reference a separate Petition for Forbearance filed that same day. Before that date, M2Z had not requested forbearance from application of Sections 1.945(b) and (c) of the Commission's Rules. By definition, those rules served as barriers to acceptance and grant of the M2Z Application in the face of competing applications; otherwise, the Petition would have been unnecessary.[11]

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[10] M2Z proposes using three technologies to provide service: Time Division Duplex ("TDD"), Advanced Antenna System ("AAS") and Orthogonal Frequency Division Multiple Access ("OFDMA"). *See* M2Z Application at 13-15. M2Z has failed to provide any meaningful details about its AAS technology.

[11] Section 1.945(b) provides that "[n]o application that is not subject to competitive bidding under § 309(j) of the Communications Act will be granted by the Commission prior to the 31st day following the issuance of a Public Notice of the acceptance for filing of such application or of any substantial amendment thereof, unless the application is not subject to § 309(b) of the Communications Act."

Section 1.945(c) provides that "[i]n the case of both auctionable license applications and non-mutually exclusive nonauctionable license applications, the Commission will grant the application without a hearing if it is proper upon its face and if the Commission finds from an examination of such application and supporting data, any pleading filed, or other matters which it may officially notice, that:

(1) There are no substantial and material questions of fact;

(2) The applicant is legally, technically, financially, and otherwise qualified;

(3) A grant of the application would not involve modification, revocation, or non-renewal of any other existing license;

(4) A grant of the application would not preclude the grant of any mutually exclusive application; and

(5) A grant of the application would serve the public interest, convenience, and necessity.

Thus, before the M2Z Petition for Forbearance was filed on September 1, 2006, the M2Z Application was incomplete and subject to dismissal under Section 1.934(d) of the Commission's Rules.[12]

In fact, M2Z recently acknowledged that the M2Z Application is incomplete. On March 26, 2007, M2Z apparently provided the Commission with financial information not included as part of its application, though details of that filing remain a secret and the M2Z Application has not been amended to provide this information.[13] Given this recent submission, a finding that M2Z had filed a complete application on May 5, 2006 triggering the one-year deadline in Section 7(b) of the Act would be inconsistent with the public interest because it would allow an applicant to derive an unwarranted procedural preference without providing the proper incentive to file a complete application at the earliest possible stage.

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[12] Section 1.934(d) provides, in relevant part, "[t]he Commission may dismiss without prejudice an application that it finds to be defective. An application is defective if: (1) It is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character; (2) It requests an authorization that would not comply with one or more of the Commission's rules and does not contain a request for waiver of these rule(s)…."). *See* 47 C.F.R. § 1.934(d). The M2Z Application could not have been granted consistent with section 1.945 without Commission grant of the forbearance relief requested in the Petition for Forbearance, so it was incomplete and was not in compliance with Commission rules. While M2Z's requested waiver of "any other Commission Rules that would prevent the processing of [the M2Z Application],"*see* M2Z Application at 46 (as filed May 5, 2006), requesting the Commission to waive application of Commission rules is not the same as requesting that the Commission exercise its forbearance authority to decline to enforce provisions of the Act.

[13] *See* Consolidated Opposition at 113, n.365; Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals, WT Docket Nos. 07-16 & 07-30, filed March 26, 2007, at 45, n.179 (referencing the filing of the confidentiality request).

C. Alternatively, the Commission May Exercise its Forbearance Authority and Withhold Action on the M2Z Application While Other Proposals are Under Consideration.

Alternatively, the Commission may exercise its authority under Section 10 of the Act,[14] and on its own motion, forbear from enforcing the one-year timeline in Section 7(b). Congress provided the Commission with broad authority to forbear from applying "any regulation or any provision" to a telecommunications carrier or telecommunications service, with only narrow exceptions not applicable here.[15] Section 7(b) is not among the exceptions.

Forbearance here is proper under the three-prong test of Section 10(a). First, it is unnecessary to grant the M2Z Application by May 5, 2007 as a means to "ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not

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[14] The Commission's forbearance authority appears in Section 10(a) of the Act, which provides that:

> the Commission *shall forbear* from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

See 47 U.S.C. §160(a) (emphasis added).

[15] Section 160(d) provides that, with limited exceptions for certain rural telephone companies, the Commission may not forbear from interconnection requirements (47 U.S.C. §251(c)) or requirements regarding Bell Operating Company entry into inter-LATA services (47 U.S.C. §271) unless these requirements have been fully implemented.

unjustly or unreasonably discriminatory is consistent with the public interest." The timing of any grant or denial is procedural in nature and has no bearing on rates or charges. Second, and similarly, the timing of such grant or denial is irrelevant to consumer protection. There is no consumer protection purpose for the procedural rule of Section 7(b), which was implemented to reduce regulatory burdens to the introduction of new services. Third, the public interest supports deferring action on the M2Z Application. Grant of the M2Z Application on or before May 5, 2007 would be tantamount to a rejection of NetfreeUS's pending Petition for Forbearance,[16]

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[16] NetfreeUS's Petition for Forbearance proposes adopting the following procedure for considering applications for the 2155-2175 MHz band:

- *Cut-off date.* The Commission would establish a clear cut-off date for the acceptance of applications in the 2155-2175 MHz bands by no later than May 1, 2007.
- *Announcement of Eligible Applicants.* Within 10 days after the cut-off date, the Commission would issue a public notice announcing a list of all applicants deemed to have submitted substantially complete applications and to have satisfied the Commission's threshold eligibility requirements. Nonqualifying applications would be listed separately as incomplete applicants, and the Commission would notify these applicants by letter regarding any identified deficiencies. Applicants with defective applications would have 15 days from the day of the Public Notice to amend their applications to correct any deficiencies.
- *Settlement period.* Once the pool of applicants is finalized, the Commission would announce by public notice a deadline by which applicants may jointly propose to settle the applications to remove any conflicts that would otherwise result in all or some of them being declared mutually exclusive. NetfreeUS recommends a 60-day settlement period. The settlement window approach serves the public interest because competing applications would not be deemed "mutually exclusive" until after the Commission has afforded applicants an opportunity to reach negotiated settlements. During the settlement window, applicants may submit engineering amendments or other settlement proposals for Commission approval.
- *Action on applications.* The Commission would take action on the applications based on responses submitted during the settlement window. If no joint settlement is proposed or accepted by the Commission, the Commission can proceed without delay to auction the spectrum or assign the spectrum by other means.

See Petition for Forbearance of NetfreeUS, LLC, WT Docket Nos. 07-16 & 07-30 (filed Mar. 2, 2007).

which requests that the Commission afford the applicants an opportunity to resolve application conflicts during a settlement period that would extend beyond May 5, 2007. The Commission is obligated to consider NetfreeUS's Petition for Forbearance on its merits rather than rejecting the Petition indirectly through a premature grant of the M2Z Application. NetfreeUS's licensing proposal would allow other parties to have their applications considered on the merits once the Commission accepts those applications for filing in light of the Commission's obligation to consider other applications that may involve higher and better uses for the spectrum – a determination that has not yet been made. For these reasons, the public interest requires the Commission to defer action on the M2Z Application as set forth above.

Conclusion

As it pertains to the NetfreeUS Application, the Commission must dismiss or deny the Consolidated Opposition. In addition, the Commission should take notice that the Communications Act does not require Commission action on the M2Z Application by May 5, 2007.

Respectfully submitted,

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April 3, 2007

Certificate of Service

I, Kenneth B. Wolin, a legal assistant with the law office of Rini Coran, PC, hereby certify that on this 3rd day of April, 2007, I caused a copy of the foregoing Reply of NetfreeUS, LLC to Consolidated Opposition of M2Z Networks, Inc. to Petitions To Deny to be delivered by First-Class United States mail to the following, unless otherwise noted:

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