

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

In the Matter of)	
)	
M2Z NETWORKS, INC.)	
)	
Application for License and Authority to)	WT Docket No. 07-16
Provide National Broadband Radio Service)	
In the 2155-2175 MHz Band)	
)	
Petition for Forbearance Under)	WT Docket No. 07-30
47 U.S.C. § 160(c) Concerning Application of)	
Sections 1.945(b) and (c))	
Of the Commission's Rules and Other)	
Regulatory and Statutory Provisions)	
)	
and)	
)	
NEXTWAVE BROADBAND INC.)	WT Docket No. 07-16
)	
Application for License and Authority to)	
Provide Nationwide Broadband Service)	
In the 2155-2175 MHz Band)	
)	
and)	
)	
OPEN RANGE COMMUNICATIONS, INC)	WT Docket No. 07-16
)	
Application for License to Construct and)	
Operate Facilities for the Provision of Rural)	
Broadband Radio Services in the 2155-2175)	
MHz Band)	
)	
and)	
)	
COMMNET WIRELESS, LLC)	WT Docket No. 07-16
)	
Application for License and Authority to)	
Construct and Operate a System to Provide)	
Nationwide Broadband Service in the)	
2155-2175 MHz Band)	
)	

NETFREEUS, LLC)	WT Docket No, 07-16
)	
Application for License and Authority to		
Provide Wireless Public Broadband Service in)	
The 2155-2175 MHz Band)	
)	
and)	
)	
MCELROY ELECTRONICS		WT Docket No. 07-16
CORPORATION)	
)	
Application for a Nationwide 2155-2175 MHz)	
Band Authorization)	
)	
and)	
)	
TOWERSTREAM CORPORATION)	WT Docket No 07-16
)	
Application for a Nationwide 2155-2175 MHz)	
Band Authorization)	

To: Chief, Wireless Telecommunications Bureau

OPPOSITION TO CONSOLIDATED MOTIONS TO DISMISS

McElroy Electronics Corporation (“McElroy Electronics”), by its attorneys and pursuant to § 1.45(b) of the Commission’s Rules (“Rules”), hereby opposes the Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals (“Motion to Strike”) and the redundant Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals (“Motion to Dismiss”) filed in WT Docket No. 07-16 by M2Z Networks, Inc. (“M2Z”) by stating as follows:

MOTION TO STRIKE

M2Z’s first attempt to rid itself of McElroy Electronics is manifestly silly. Citing cases in which *pleadings* were treated as petitions to deny,¹ M2Z claims that McElroy Electronics’

¹ See Motion to Strike, at 6 n.22. In the two cases cited by M2Z in which it treated a pleading as a petition to deny, the Commission decided the “petition” on its substantive merits rather than dismissing it on procedural grounds. See *Western Wireless Corp. and ALLTEL Corp.*, 20 FCC Rcd 1.350.3, 1.3091n.264

application should be similarly treated solely because it contained the following statement: “By allowing competing applications to be filed, the [Wireless Telecommunications Bureau (“WTB”)] effectively rejected M2Z’s extraordinary request that its application be both insulated from competing applications and treated as a non-auctionable license application.” See Motion to Strike, at 8 (quoting McElroy Electronics’ FCC Form 601, Ex. 1 at 2 (“Application”)). That statement merely reflects McElroy Electronics’ reading of the public notice announcing the acceptance of M2Z’s application for filing.² The statement cannot be read as a request that the Commission take any action with respect to that application.

The irreducible minimum required to be a petition to deny is the presence of a request that the Commission deny an application., McElroy Electronics’ application does not seek that form of relief. The only relief sought is for the Commission to find that: (1) McElroy Electronics’ application is acceptable for filing under §§ 308 and 309 of the Communications Act of 1934, as amended (“Act”); (2) McElroy Electronics is qualified under §§ 308(b) and 309(j)(5) of the Act; and (3) the grant of its application would serve the public interest. See Application, Ex. 1 at 10.

Tacitly recognizing that McElroy Electronics has not sought the denial of its application, M2Z contends that the language quoted above represents an “attack” on the “merits” of its application which transforms McElroy Electronics’ application into a petition to deny. See Motion to Strike, at 6-8. Setting aside the fact that McElroy Electronics’ interpretation of the *M2Z Acceptance PN* does not reach the merits of M2Z’s application, there is no reported case in

(2005); *Columbia Broadcasting System, Inc.*, 37 FCC 2d 181, 182-83 (1972)

² See *WTB Announces that M2Z Networks, Inc.’s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band Is Accepted for Filing*, DA 07492 (WTB Jan. 31, 2007) (“*M2Z Acceptance PN*”)

which the Commission treated an application as a petition to deny for attacking the merits of a competing application or for any other reason.

The plain fact of the matter is that McElroy Electronics used a standard FCC Form 601 to request a license to operate a wireless broadband network on frequencies in the 2155-2175 MHz band. That request constitutes an “application” under the Rules. See 47 C.F.R. § 1.907. It must be treated as such.

MOTION TO DISMISS

M2Z immodestly contends that McElroy Electronics’ application is not acceptable for filing because the application allegedly (in M2Z’s unbiased view) does not measure up to the high standards set by its “groundbreaking” application. See Motion to Dismiss, at 9. The Commission is urged to limit “the pool of potential applicants to those that will provide service under the same terms and conditions proposed by M2Z.” *Id.* at 15. After contending that McElroy Electronics’ application should be dismissed because the proposal was not identical to its application in twelve respects, *see id.* at 14-15, M2Z pirouettes and argues that McElroy Electronics’ application should be dismissed as a “copy-cat” imitation of its proposal., See *id.* at 70.

M2Z feels free to announce the standards by which applications are to be judged because it jumped the gun and filed its application before the Commission promulgated standards or “service rules” as required by the Administrative Procedure Act. See 5 U.S.C. § 553. M2Z gained that headstart, and assumed the mantle of rule maker, by requesting the exercise of the Commission’s discretion under § 160(a) of the Act, to forbear from applying any regulation that stands as an obstacle to the grant of its application³ Although it authorizes forbearance with

³ See Petition of M2Z Networks, Inc for Forbearance, WT Docket No. 07-30, at 1 (Sept. 1, 2006).

respect to provisions of the Act or the Rules, § 160(a) does not empower the Commission to ignore the dictates of due process. See 47 U.S.C. § 160(a). And as M2Z correctly argues, adequate notice is “fundamental to the due process” that the Commission must afford applicants in the processing of their applications. Motion to Strike, at 12.

Traditional concepts of due process incorporated into administrative law preclude the Commission from penalizing a party for violating a rule without first providing adequate notice of the substance of the rule., *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 607 (D.C. Cir. 2002). The dismissal of an application is a sufficiently grave sanction to trigger the Commission’s duty to provide clear and explicit notice of all applicable requirements. See *State of Oregon v. FCC*, 102 F.3d 583, 585 (D.C. Cir. 1996). The Commission affords due process by providing notice that is adequate to allow a party acting in good faith to be able “to identify with ascertainable certainty, the standards with which the agency expects parties to conform.” *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *General Electric Co v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)). In this case, McElroy Electronics was given no notice of the applicable licensing standards

The only notice afforded McElroy Electronics was provided by the *M2Z Acceptance PN* where the WTB announced that it accepted M2Z’s application for filing pursuant to the Commission’s “general statutory authority” under § 309 of the Act “rather than pursuant to an established framework of processing rules.”⁴ However, the WTB gave no notice of the standards it applied in the initial review of M2Z’s application to find it acceptable for filing under § 309. And McElroy Electronics could not look for the standards among the licensing rules in Parts 1 and 27 of the Rules. The WTB effectively waived those rules when they were abandoned in this

⁴ *M2Z Acceptance PN*, at 1. See *WTB Sets Pleading Cycle for Application by M2Z Networks, Inc. to Be Licensed in the 21.5.5-217.5MHz Band*, DA 07-987, at 1 (WTB Mar. 9, 2007).

proceeding in favor of the exercise of the Commission's general authority under § 309. In the absence of articulated standards and applicable rules, due process will not permit the Commission to dismiss McElroy Electronics' application on the grounds that it failed to meet some "burden of proof" of uncertain origin⁵ or that its application is "defective" in comparison to M2Z's proposal. See Motion to Dismiss, at 70-72

M2Z makes much of the allegation that McElroy Electronics filed a "copy cat" application, See *id.* at 70-71. McElroy Electronics disclosed in its application that it was being filed in reliance on the *M2Z Acceptance PN* and that it intended to "make substantially the same threshold qualifications showings and public interest commitments that were made by M2Z." Application, Ex. 1 at 3. However, McElroy Electronics also explained that it was following M2Z's lead only to ensure that its application would be deemed acceptable for filing under the same standards that the WTB had applied in finding M2Z's application acceptable for filing under § 309. See *id.* McElroy Electronics was seeking the protection of the *Melody Music* doctrine under which the Commission must treat similarly situated parties alike. See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1987). See also *McElroy Electronics Corp v FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) ("we remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment")

The Commission should disregard M2Z's attempt to make something out of the fact that McElroy Electronics finally agreed to settle a licensing case involving mutually exclusive Phase II cellular unserved area (in New Mexico) applications. See Motion to Dismiss, at 72 n.286.

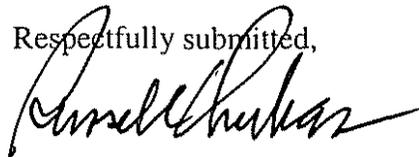
⁵ See Motion to Dismiss, at 18-52. Assuming that M2Z is proposing a "new technology or service," § 157(a) of the Act only imposes a burden of proof on a party that opposes that "new technology or service." 47 U.S.C. § 157(a). McElroy Electronics has not opposed either the technology that M2Z proposes to employ or the service it proposes to provide. It only seeks the opportunity to use the same technology to provide the same service.

McElroy Electronics' decision to resolve that "long-standing and litigious dispute" came nearly five years after it filed the first of the contested applications. See *WWC License L.L.C.*, 22 FCC Rcd 4027, 4032 (Mob. Div. 2007). Contrary to M2Z's allegation, the Commission found no evidence that McElroy Electronics had "any expectation of profiting" from any of its filings in the New Mexico case. *Id.* at 4031. McElroy Electronics' understandable decision to settle that dispute met with the Commission's approval and cannot possibly detract from the bona fides of its application in this proceeding

Finally, McElroy Electronics notes that it has demonstrated its "commitment" to providing the services it proposes by constructing and operating wireless systems as a Commission licensee. That is more than M2Z can say

For all the foregoing reasons, McElroy Electronics respectfully requests the Commission to deny M2Z's Motion to Strike and Motion to Dismiss insofar as they relate to McElroy Electronics' application and to accept the application for filing under the authority of § 309 of the Act.

Respectfully submitted,



Russell D. Lukas
Steven M Chernoff

LUKAS, NACE, GUTIERREZ & SACHS, CHARTERED
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102
(703) 584-8578

Attorneys for
McElroy Electronics Corporation

April 10, 2007

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, Chartered, hereby certify that I have, on this 10th day of April, 2007, caused to be mailed, postage pre-paid, a copy of the foregoing Opposition to Consolidated Motions to Dismiss to the following:

Stephen C. Liddell
Open Range Communications, Inc
6465 S. Greenwood Plaza Blvd.
Centennial, CO 80111

Donald L. Herman, Jr.
Bennet & Bennet, PLLC
4350 East West Highway, Ste. 201
Bethesda, MD 20814
Counsel for Towerstream Corp.

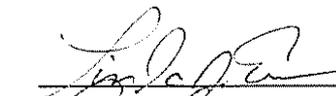
Stephen E. Coran
Rudolfo L. Baca
Jonathan E. Allen
Rini Coran, PC
1615 L St., N.W., Ste. 1325
Washington, D.C. 20036
Counsel for NetfreeUS, LLC

David J. Kaufman
Brown, Nietert & Kaufman, Chartered
1301 Connecticut Ave., N.W., Ste. 450
Washington, D.C. 20036
Counsel for Commnet Wireless, LLC

Carly T. Didden
Patton Boggs, LLP
2550 M St., N.W.
Washington, D.C. 20037-1350
Counsel for NextWave Broadband, Inc.

Jennifer McCarthy
Vice President, Regulatory Affairs
NextWave Broadband, Inc.
12670 High Bluff Dr.
San Deigo, CA 92130

W. Kenneth Ferree
Erin L Dozier
Chiistopher G Tygh
Sheppard Mullin Richter & Hampton LLP
1300I Street, N.W
11th Floor East
Washington, D.C. 20005
Counsel for M2Z Networks, Inc.



Linda J. Evans