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

Federal Communications Commission
Office of the Secretary

In re)
)
NetfreeUS, LLC)
Petition for Forbearance Under)
47 U.S.C. §160(c) Concerning)
Application of Sections 1.945(b) and (c) and)
Other Regulatory and Statutory Provisions)
)
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)
)
M2Z Networks, Inc.)
Application for License and Authority to Provide)
A National Broadband Radio Service in the)
2155-2175 MHz Band)

ORIGINAL

WT Docket No. 07-30

WT Docket No. 07-16

To The Commission

PETITION FOR FORBEARANCE

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NETFREEUS, LLC PETITION FOR FORBEARANCE UNDER
47 U.S.C. §160(C) CONCERNING
APPLICATION OF SECTIONS 1.945(B) AND (C) AND
OTHER REGULATORY AND STATUTORY PROVISIONS

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EXECUTIVE SUMMARY

NetfreeUS, LLC, a wholly owned subsidiary of Speedus Corp. (“NetfreeUS”), hereby submits its Petition for Forbearance in connection with its concurrently filed application to construct and operate a nationwide broadband radio service in the 2155-2175 MHz band (the “Application”). By this Petition, NetfreeUS requests, to the extent necessary, forbearance from Section 1.945 of the Commission’s Rules to permit the acceptance and grant of the Application. In light of M2Z’s pending application for a national broadband radio service, adoption of the plan described in this Petition may afford M2Z, NetfreeUS and other applicants the opportunity to have applications for the 2155-2175 MHz band considered on an expedited basis without being subject to auction or other time-consuming licensing processes. As explained below, such forbearance can be achieved by allowing a limited opportunity for new applications to be filed and a short period of time for applicants to resolve application conflicts. The Commission would then act on the proposed resolution by the applicants. If no resolution is reached, the Commission could move forward with an alternative licensing solution without delay

Forbearance is requested for Sections 1.945(b) and (c), which relate to procedures for acceptance and grant of license applications, and any and all other provisions of the Communications Act of 1934, as amended, or Commission rules that are inconsistent with the immediate consideration and grant of the Application. Section 1.945(b) generally prohibits grant of an application that is not subject to competitive bidding 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, Section 1.945(c) permits grant of an application without a hearing if it is proper on its face and the Commission finds 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.

Forbearance from enforcement of these rules is proper because Congress has encouraged the Commission to use forbearance to help achieve Commission's statutory mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The Petition satisfies the three statutory criteria for forbearance. First, enforcement of these rules with respect to the Application is unnecessary to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, because the Application proposes that the service be regulated as a Commercial Mobile Radio Service, which imposes similar "just and reasonable" and anti-discrimination obligations. Second, enforcement of these rules is unnecessary for consumer protection because the rules are procedural, not consumer-protection obligations. Third, enforcement is consistent with the public interest due to the many benefits identified in the Application, including among other things promotion of ubiquitous broadband service, enhancement of public safety, advancement of competition and innovation and provision of a revenue stream for the U.S. Treasury.

The Application may be granted without a hearing. There are no substantial and material questions of fact, and NetfreeUS is legally, technically, financially, and otherwise qualified to hold the license. The Application fully describes how the proposed service would serve the public interest, convenience and necessity. Grant of the Application would not involve modification, revocation, or non-renewal of any other existing license because incumbents in the

2155-2175 MHz band already are subject to Commission-mandated relocation procedures.

Finally, grant of the Application should not preclude the grant of any mutually exclusive application because NetfreeUS proposes that the Commission use regulatory tools other than competitive bidding to license the 2155-2175 MHz band, as follows:

- *Cut-off date.* The Commission should 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 should 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 should 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 FCC has afforded applicants an opportunity to reach negotiated settlements. During the settlement window, applicants may submit engineering amendments or other settlement proposals for FCC approval.
- *Action on applications.* The Commission should 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.

By establishing procedures to permit consideration of multiple applications for the 2155-2175 MHz band, the Commission would encourage applicants to negotiate mutually acceptable resolutions. NetfreeUS respectfully submits that the public interest favors NetfreeUS's proposal, which allows other parties to have their applications considered

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M2Z Networks Inc.)	
Application for License and Authority to Provide)	WT Docket No. 07-16
A National Broadband Radio Service in the)	
2155-2175 MHz Band)	
To		The Commission

PETITION FOR FORBEARANCE

NetfreeUS, LLC, a wholly owned subsidiary of Speedus Corp. (“NetfreeUS”), hereby submits its Petition for Forbearance pursuant to Section 10 of the Communications Act of 1934, as amended (the “Act”), and Section 1.53 of the Commission’s Rules’ in connection with its concurrently filed application to construct and operate a nationwide broadband radio service in the 2155-2175 MHz band (the “Application”).² By this Petition, NetfreeUS requests, to the

¹ See 47 U.S.C. §160(c); 47 C.F.R. §1.53.

² NetfreeUS expects that its Application will be considered in the same proceeding as the application of M2Z Networks, Inc. (“M2Z”). See *Public Notice*, “Wireless Telecommunications Bureau Announces that M2Z Networks, Inc.’s Application for Licensee and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing,” DA 07-492, rel. Jan. 31, 2007 (“*Public Notice*”). Accordingly, a copy of the Application is being submitted via ECFS, as the *Public Notice* permits. The Application and this Petition for

extent necessary, forbearance from Section 1.945 of the Commission's Rules to permit the acceptance and grant of the Application. In light of the pending M2Z application for a national broadband radio service, forbearance under the plan described in this Petition may afford M2Z, NetfreeUS and other applicants the opportunity to have applications for the 2155-2175 MHz band considered on an expedited basis without being subject to auction or other time-consuming licensing processes. As explained below, such forbearance can be achieved by establishing a limited opportunity for new applications to be filed and a short period of time for applicants to resolve application conflicts. The Commission would then act on the proposed resolution by the applicants. If no resolution is reached, the Commission could move forward with an alternative licensing solution without delay.

I. SUMMARY OF THE NETFREEUS APPLICATION

By this Petition, NetfreeUS requests forbearance of applicable Commission procedural rules to permit immediate consideration and grant of its Application. The Application proposes a unique secondary market licensing system to enable new entrants, entrepreneurs and municipalities to expeditiously provide free, wireless broadband radio services on a "public commons" basis, with limited Commission involvement. In particular, NetfreeUS's approach can accomplish the same objectives of providing free, nationwide broadband service as M2Z's Application, but with additional benefits of promoting the public interest by adding new, viable competitors to the broadband marketplace, by fostering localism, by facilitating ubiquitous coverage to the country (including rural areas), by enabling new opportunities for entrepreneurs, and by providing the federal government with an ongoing revenue stream.

Forbearance are being filed within 30 days from the release of the *Public Notice*. The Application is hereby incorporated by reference.

In the Application, NetfreeUS requests a nationwide authorization containing the following requirements and conditions:³

- *Free Broadband Service.* Like viewers of over-the-air television, consumers of NetfreeUS's Wireless Public Broadband ("WPB") service will never incur monthly fees. To access WPB, a consumer would need only to download free NetfreeUS-certified software from the Internet, a feature also available to users of existing 802.11 wireless devices. WPB would facilitate the deployment of software-defined radios for public use in a manner to permit software-based methods to detect and remedy potential harmful interference.
- *Secondary Market Deployments.* Unlike M2Z's closed proprietary system proposal, NetfreeUS desires to have others participate in the nationwide development of broadband services in the 2155-2175 MHz band. To enable such participation without the delays associated with a protracted license allocation process, NetfreeUS proposes the following:
 - NetfreeUS would hold a nationwide authorization for the 2155-2175 MHz band. Within 60 days of receiving its license, NetfreeUS would be required to offer to entrepreneurs, new entrants, municipalities and other members of the public the opportunity to lease the spectrum. NetfreeUS anticipates that there will be significant demand for leasing by entities resident in the local area they desire to serve.
 - Using existing secondary market rules and procedures, NetfreeUS and third-party lessees would apply to the Commission (if a *de facto* spectrum lease) or would notify the Commission (if a spectrum manager lease).⁴ Initially, no lessee would be authorized to operate more than fifty wireless access points ("WAPs").⁵
 - Any lease fees payable to NetfreeUS would be limited to NetfreeUS's transaction costs in negotiating any lease and in obtaining any required Commission approval of the leasing arrangement.
 - NetfreeUS could remain the licensee and service provider in the areas not leased to third parties, but NetfreeUS would be limited to a maximum number of fifty WAPs nationwide except as necessary to facilitate compliance with construction milestones that are conditions of the license.

³ The proposed license conditions and operating obligations also appear at Exhibit 2 to the Application.

⁴ See 47 C.F.R. §1.9001 *et seq.*

⁵ A WAP consists of a medium-power transmitter having a range of approximately one mile. It allows for users of wireless devices, such as laptops, mobile phones and personal digital assistants to access the Internet from any location within the WAP footprint. NetfreeUS estimates that WPB would involve the deployment of more than one million WAPs nationwide.

- Consistent with “private commons” principles in Section 1.9080, NetfreeUS and its spectrum lessees would make spectrum usage rights available on a “private commons” basis to facilitate peer-to-peer and device-to-device communications. These spectrum usage rights and the technical and operating terms and conditions of use would be defined consistent with the operating conditions of the NetfreeUS license. NetfreeUS or its spectrum lessees would retain *de facto* control over the spectrum by users within the private commons. Mesh networks would be encouraged in certain areas where backhaul facilities are limited, and non-proprietary mesh networks can be integrated into the WPB to encourage bandwidth-efficient communications.
- *Public Safety.* NetfreeUS will provide first responders with a special software override code that would clear traffic in times of emergencies. Similar to the Emergency Alert System, public safety officials will be able to effectively communicate with the public and with each other over the Internet before, during and after natural disasters and homeland security alerts.
- *Substantial Service.* A license condition would require the provision of substantial service to at least 50 percent of the nation’s 734 Cellular Market Areas (CMAs) within four years of initial license grant, to 75 percent of the nation’s CMAs within six years of license grant and 95 percent of the nations CMAs within 10 years of license grant. “Substantial service” could be demonstrated by these deadlines through certain safe harbors. NetfreeUS will commit to a license condition that would require NetfreeUS to maintain a database of WAPs to identify areas where service is available. The database would be uploaded on a weekly basis as new WAPs are deployed.
- *Interoperability and Spectrum Efficiency.* All WAPs would be required to provide interoperability to facilitate nationwide roaming, assist public safety and enhance competitiveness with other broadband networks. Through the “license-and-lease” process, NetfreeUS will help coordinate construction and operation of the various local networks. WAP would provide software to allow the deployment of sectorized and dynamic networks that would promote spectral efficiency through the **use** of cognitive radio technology.
- *Open Network.* NetfreeUS and its spectrum lessees would use an open network architecture to facilitate maximum flexibility for uses by end users. NetfreeUS would not censor content transmitted over WPB networks but instead leave these matters to individual and parental discretion.
- *Revenue Contribution.* The WPB will be supported through advertising revenue. NetfreeUS will make an annual payment to the U.S. Treasury of five percent (5%) of its gross revenues.

II. IN CONSIDERING APPLICATIONS FOR THE 2155-2175 MHZ BAND, THE COMMISSION SHOULD FORBEAR FROM APPLYING SECTIONS 1.945(B) AND (C), AND ANY OTHER PROVISIONS OF THE ACT OR THE RULES THAT WOULD HINDER THE GRANT OF SUCH APPLICATIONS.

NetFreeUS concurs with M2Z that the Commission should exercise its forbearance authority pursuant to Section 10 of the Act to facilitate licensing of new services in the 2155-2175 MHz band.⁶ Through forbearance, the Commission may fulfill its statutory obligation to further deployment of broadband services, consistent with the public interest and with Congressional intent. However, contrary to the M2Z Forbearance Petition, NetFreeUS believes that the Commission should not grant M2Z exclusive access to this spectrum but rather should consider other applications filed for this band, including NetFreeUS's Application, pursuant to a process described in Section III.D hereof. NetFreeUS requests, therefore, that the Commission forbear from applying Sections 1.945(b) and (c) or any other rules that would hinder the processing and grant of the Application.

These rules relate to procedures for acceptance and grant of license applications. 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.”⁷ Section 1.945(c) provides that:

⁶ See generally *Petition of M2Z Networks, Inc. for Forbearance under 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*, WT Docket No. 07-30 (filed Sept. 1, 2006) (“M2Z Forbearance Petition”).

⁷ See 47 C.F.R. §1.945(b). **An** application is not subject to Section 309(b) if it is not an application for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or for an instrument of authorization for industrial radio positioning stations for which frequencies are assigned on an exclusive basis, aeronautical en route stations,

{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.⁸

In considering whether to forbear from enforcing these provisions, the Commission should observe that Congress has given the Commission authority to use forbearance as a tool to encourage provision of communications services. Congress has charged the Commission to “make available, so far as possible, to all the people of the United States . . . a rapid, efficient. Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges”⁹ In addition, the Commission has a statutory mandate to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”¹⁰ The Act states that the Commission

aeronautical advisory stations, airdrome control stations, aeronautical fixed stations, and “such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe.” 47 U.S.C. §309(b). In addition, Section 309(c) details certain types of applications that are deemed not to be subject to Section 309(b). 47 U.S.C. §309(c). None of these application types apply to the Application, which requests a new nationwide license in the Commercial Mobile Radio Service, as described herein and in the Application.

⁸ See 47 C.F.R. §1.945(c).

⁹ 47 U.S.C. §151.

¹⁰ See 47 U.S.C. §157(note).

shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, *regulatory forbearance*, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.¹¹

Accordingly, Congress encouraged the Commission to use forbearance as a critical tool to accomplish these deployment objectives

The Commission’s forbearance authority appears in Section 10 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.¹²

¹¹ *Id.* (emphasis added).

¹² **See** 47 U.S.C. §160(a) (emphasis added). NetfreeUS qualifies as a “telecommunications carrier” eligible to submit a petition for forbearance under Section 160(c) of the Act, which is defined in the Act as “any provider of telecommunications services.” 47 U.S.C. §153(44). The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.” 47 U.S.C. §153(46). NetfreeUS’s WPB service will be provided on a for-profit basis, with revenues derived from nominal lease fees obtained from spectrum lessees and from revenues from “User Designated Advertising” services, a way for consumers to request the advertising and public service messages they receive over the Internet. While WPB will be provided free of charge to the end user, WPB is provided “for a fee.” NetfreeUS believes that the public interest should not require NetfreeUS to charge end users a fee for its services as a condition of seeking forbearance and having its Application considered. If the Commission nevertheless deems it necessary for consideration of the Application pursuant to Section 160(c), NetfreeUS agrees to a license condition requiring NetfreeUS and its lessees to charge WPB end users nominal fees, such as initiation fees or software-download fees.

In adopting Section 10, Congress provided the Commission with broad authority to forbear from “any regulation or any provision” to a telecommunications carrier or telecommunications service, with only narrow exceptions.¹³ The Commission thus has statutory authority to forbear from enforcing nearly all of the requirements of the Act and FCC regulations if it finds that the three statutory prongs of Section 10(a) are satisfied. As demonstrated below, because NetfreeUS’s Application satisfies these criteria, the Commission should exercise this forbearance authority and should accept and grant the NetfreeUS Application.

A. Application of Sections 1.945(b) and (c) is unnecessary to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

In the Application, NetfreeUS seeks entry into the market for broadband access through the provision of WPB service. NetfreeUS desires to introduce competitive alternatives to facilities-based providers of cable modem services, DSL and other broadband services by, among other things, leasing its spectrum to entrepreneurs, new entrants and municipalities, which would then offer service to end users under a “private commons” model. In addition to increasing consumer choice, the introduction of additional providers into the market can result in lower prices, especially where one of the providers is offering a free, advertiser-supported service.

In many markets, NetfreeUS would itself be a new entrant and would lack market power. From 1998-2003, Speedus operated a pilot program for provision of high-speed Internet access in the metropolitan New York area using Local Multipoint Distribution Service (“LMDS”)

¹³ 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.

spectrum. Grant of the Application would permit NetfreeUS to provide services across the country as a new entrant in areas outside of Speedus's authorized LMDS service area.

NetfreeUS will provide an alternative to entrenched competition, and is not a vehicle for the exercise of market power in the provision of broadband services.

In addition, NetfreeUS intends to provide WPB service without subscriber charges. NetfreeUS software will be available for download on the Internet at no cost to the user, and no special equipment will be required for WPB. NetfreeUS lacks the market power necessary to engage in discriminatory or unreasonable practices, and the Application proposes to initially limit NetfreeUS to a maximum of fifty WAPs. NetfreeUS will enter into secondary market leases with entrepreneurs and municipalities around the country to expeditiously construct the nationwide network. In this manner, NetfreeUS will be fostering local ownership of the WPB network, a Commission policy objective recognized in other contexts.¹⁴ This will create economic opportunities at the local level.

WPB would be provided as a Commercial Mobile Radio Service ("CMRS") under the Act and Section 20.9 of the Commission's Rules and would be regulated under Part 20 of the Commission's Rules.¹⁵ Accordingly, as a CMRS operator, NetfreeUS would be subject to provisions in the Act that provide that **all** charges, practices, classifications and regulations be

¹⁴ See, e.g., *In the Matter of Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (rel. July 1, 2004) (noting that localism "has been a cornerstone of broadcast regulation for decades").

¹⁵ See 47 U.S.C. §332 (d) (defining "commercial mobile service" as "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission,"); see also 47 C.F.R. §20.9. The Act's definition of "mobile service" includes "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes . . . both one-way and two-way radio communication services." 47 U.S.C. §153(27). NetfreeUS intends to provide an interconnected, for-profit service via WPB.

just and reasonable and that prohibit unjust and unreasonable discrimination.¹⁶ NetfreeUS therefore concurs with M2Z¹⁷ that enforcement of Sections 1.945(b) and (c) is unnecessary to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

B. Application of Sections 1.945(b) and (c) is unnecessary for the protection of consumers.

As M2Z correctly observed,¹⁸ Sections 1.945(b) and (c) are procedural rules, rather than consumer protection obligations. Accordingly, forbearance is proper under the second statutory criterion of Section 10 because enforcement of those rule sections is unnecessary for the protection of consumers

Section 1.945(b) adopts procedures prohibiting the Commission from granting non-auctionable license applications prior to the 31st day following the issuance of a Public Notice of the acceptance for filing of the application.” Similarly, Section 1.945(c) sets the conditions by which the Commission may grant license applications without a hearing. These rules are simply

¹⁶ See 47 C.F.R. §20.15(a), which applies many provisions of Title II of the Act to CMRS. (“Commercial mobile radio services providers, to the extent applicable, must comply with sections 201,202,206, 207, 208, 209,216, 217, 223, 225,226,227, and 228 of the [Act]”). In turn, Section 201(b) of the Act provides generally that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just **and** reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful[...].” 47 U.S.C. §201(b). Section 202(a) prohibits “unjust or unreasonable” discriminatory conduct (“It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage”). 47 U.S.C. §202(a).

¹⁷ See M2Z Forbearance Petition at 21-22.

¹⁸ *Id.* at 22-24.

¹⁹ See 47 C.F.R. §1.945(b).

tools available to the Commission for assigning frequencies and apply irrespective of the consumer protection benefits or harms that may result from a given service using those frequencies. These rules are unnecessary for consumer protection and forbearance from enforcing them thus is proper.

C. Forbearance in applying Sections 1.945(b) and (c) to the Application is consistent with the public interest.

In the Application, NetfreeUS proposes to serve and advance the public interest by providing WPB to promote nationwide broadband deployment. In light of the myriad public interest goals inherent in NetfreeUS's proposal, forbearance is an appropriate exercise of Commission authority under these circumstances.

As demonstrated in Section III of the Application, grant of the Application is in the public interest. NetfreeUS proposes to provide free, nationwide broadband service under a unique plan for nationwide secondary-market licensing that allows entrepreneurs, new entrants and municipalities to participate in providing services on a "private commons" basis and enables service to be provided more quickly than other planned nationwide build-outs. NetfreeUS's network will be fully interoperable, and will even allow users of existing IEEE 802.11 devices to immediately migrate to the new network, which will offer high-speeds and public safety access. Moreover, NetfreeUS will contribute five percent (5%) of its gross revenues to the U.S. Treasury annually. In providing this service, NetfreeUS's WPB service will help bridge the digital divide that leaves many consumers in rural and isolated areas of the country without access to broadband services. The service also will advance competition and promote innovation.

In facilitating a "private commons," NetfreeUS will enable a nationwide network of independent operators to quickly initiate service in those areas that are most in need of

broadband services, with local customer service and support. This unique secondary market licensing process facilitates simultaneous build-out to a larger part of the country than a single-source solution. Broadband access has proved to be an engine for economic growth, as information becomes more readily available to consumers, businesses and educational institutions. When applied nationwide, this economic impact cannot be overlooked in assessing the public interest benefits that would result from NetfreeUS's operations.

By equipping a special override software code for all first responders, NetfreeUS proposes to enhance interoperability by providing tools for quick clearance of channel traffic during emergencies. As discussed in the Application, our nation lacks a nationwide interoperable network for public safety use, compromising our ability to respond to natural disasters and homeland security threats. The Application helps address these concerns.

The Application further serves the public interest by proposing to provide a revenue stream to the U.S. Government. Section 309(j) (3)(c) of the Act specifies as a Commission objective to recover “*for the public . . . a portion of the value of the public spectrum resource.*”²⁰ NetfreeUS's proposal allows for this recovery in three distinct respects. First, by providing a free, nationwide broadband service, NetfreeUS will save consumers millions of dollars per year in access fees. Second, NetfreeUS will not profit from the leasing of its spectrum, but will require its local leasing partners to pay only a nominal fee to cover NetfreeUS's transaction costs.” The entry costs to local businesses are virtually nothing, substantially less than in any other known broadband business model. Third, NetfreeUS will pay the U.S. Treasury a spectrum fee of five percent of its gross revenues from the WPB. Because these payments will be made over the entire license term, and presumably will increase as subscriber counts and

²⁰ See 47 U.S.C. §309(j)(3)(c) (emphasis added).

²¹ Seen. 12, *supra*.

advertising revenues increase, the total economic benefit – including the amount consumers will save through a free service – may well exceed that which the federal government could expect in an auction. As an alternative to competitive bidding for licenses, NetfreeUS is proposing that the Commission provide a time-limited opportunity for applicants to negotiate settlements or engineering solutions to resolve conflicts in their proposals for the 2155-2175 MHz band.²² Given the proposed benefits and license conditions, NetfreeUS will not obtain a windfall in receiving a nationwide license in the 2155-2175 MHz band. The Commission should forbear from applying any and all provisions of the Act or the Rules that are inconsistent with the grant of the Application, including, to the extent necessary, the competitive bidding statute.

D. The Commission should forbear from enforcing any and all provisions of the Act or the Rules that would be inconsistent with the processing and grant of the Application.

For the above-stated reasons and for those reasons set forth in the Application, forbearance is proper here because the Application serves the public interest, convenience and necessity. NetfreeUS requests that the Commission forbear from applying any and all provisions of the Act or the Rules that are inconsistent with the immediate consideration and grant of the Application.

This request extends to enforcement of Section 309(j), regarding competitive bidding. NetfreeUS proposes that conflicting applications for the band not be deemed subject to competitive bidding and that the Commission instead adopt application-processing procedures consistent with those set forth in Section III of this Petition.

²² See Section III.D, *infra*.

III. THE APPLICATION MAY BE GRANTED WITHOUT A HEARING

The NetfreeUS Application may be granted in compliance with Section 1.945(c), which provides for Commission grant without a hearing based on a showing 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.” As shown below, the NetfreeUS Application satisfies these criteria.

A. There are no substantial and material questions of fact.

The NetfreeUS Application offers a specific, detailed, and complete proposal for WPB using the 2155-2175 MHz band. The Application provides all of the facts necessary for grant, and it contains a detailed service proposal with significant public interest benefits. The Application proposes significant and specific licensing conditions and construction obligations to help aid in broadband deployment. It articulates technical standards to help avoid harmful interference and adopts a forward-thinking (and Commission-approved) “private commons” to provide new service opportunities. Accordingly, there are no “substantial and material questions of fact” that would preclude Commission grant of the Application pursuant to Section 1.945(c)(1).

²³ See 47 C.F.R. §1.945(c).

B. NetfreeUS is legally, technically, financially and otherwise qualified to be a Commission licensee.

NetfreeUS is a wholly-owned unit of Speedus, which is a publicly-traded company listed on the NASDAQ Capital Market (Symbol: SPDE). For more than 15 years, Speedus and its predecessors-in-interest have been innovators in providing new services, initiating new spectrum allocations and developing new telecommunications technology. In January 1991, the Commission granted Hye Crest Management, Inc. (“Hye Crest”), a predecessor-in-interest to Speedus, the first LMDS license pursuant to a waiver of the Part 21 point-to-point rules to authorize point-to-multipoint cellular video operations.²⁴ These efforts ultimately led to establishment of the LMDS and the auction of nationwide spectrum.²⁵ Speedus has received design and engineering awards from Popular Science and Popular Mechanics magazines, and holds a total of 52 patents in 28 countries, many of them for wireless technology.²⁶ These patents include U.S. Patent No. 4,747,160 (“Low Power Multi-Function Cellular Television System,”) U.S. Patent 5,594,937 (“System for the Transmission and Reception of Directional Radio Signals Utilizing a Gigahertz Implosion Concept”), U.S. Patent 5,568,610 (“LMDS Transmitter Array With Polarization-Diversity Sub-Cells”), U.S. Patent 5,949,793 (“Transmission of Digital and Analog Signals in the Same Band”); U.S. Patent 5,893,078 (relating to radio signal distortion reduction) and U.S. Patent 6,438,359 (relating to redundant

²⁴ See *Application of Hye Crest Management, Inc. for License Authorization in the Point-to-Point Microwave Service in the 27.5-29.5 GHz Band and Request for Waiver of the Rules*, Memorandum Opinion and Order, 6 FCC Rcd 332 (1991). Speedus now holds an LMDS license for eight counties in the metropolitan New York City area (Call Sign WLT379).

²⁵ See, e.g., *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission’s Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, to Reallocate the 29.5 - 30.0 GHz Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12525 (1997). High bids in the LMDS Auction (Auction 17) were \$578,663,029. See *Public Notice*, LMDS Auction Closes, DA 98-572 (rel. Mar. 26, 1998).

²⁶ Current documentation regarding Speedus patents appears at <http://www.speedus.com/patents/>.

transmitter with backup switching). The NetfreeUS Application is the most recent example of this legacy of product and service development

NetfreeUS's leadership team consists of the following individuals:

- ***Shunt S. Hovnanian*** is Chairman and Chief Executive Officer of Speedus, NetfreeUS's managing member, positions he has held since 1991. Mr. Hovnanian has served as a U.S. State Department Delegate to the World Radio Conference of the International Telecommunications Union in Geneva, Switzerland. Mr. Hovnanian also founded FCC-licensed Ka-band satellite company, VisionStar, which is now controlled by EchoStar Communications.
- ***William F. Leimkuhler*** is a director of Speedus, a position he has held since September 2000. He is the General Counsel and Director of Business Development of Paice Corporation, a privately-held developer of advanced vehicle powertrains. From 1994 through 1999, he held various positions with Allen & Company, a New York investment banking firm, initially serving as the firm's General Counsel. Prior to that, Mr. Leimkuhler was a corporate partner with the New York law firm of Werbel & Carnelutti (now Heller Ehrman White & McAuliffe).
- ***Christopher Vizas*** is a director of Speedus, a position he has held since July 2001. Mr. Vizas is a principal in the strategic advisory firm of East Wind Partners. He serves as non-executive Chairman of the Board of il, Inc., a privately-held Chinese software provider, as well as a member of the boards of a few other privately-held companies. Mr. Vizas' positions during the 1990s included Chairman of eGlobe, Inc, CEO of Quo Vadis International, Managing Director of Kouri Capital Group and its Telecommunications & Technology affiliate, and founder and Vice Chairman of Orion Network Systems. Earlier in his career, he was a founder and part of the management in Trinity Cellular and Asia Pacific Space & Communications. Mr. Vizas served in the White House Office of Telecommunications Policy in the Ford Administration, as Special Counsel to the U.S. Privacy Commission, and on congressional staff.

As shown above, the management of NetfreeUS brings significant technical, operational and financial expertise to the company. NetfreeUS thus has all requisite legal, technical and financial qualifications to be a Commission licensee, in fulfillment of Section 1.945(c)(2).

C. Grant of the NetfreeUS Application would not involve modification, revocation, or non-renewal of any other existing license.

The NetfreeUS Application proposes licensing in the 2155-2175 MHz band. The Commission has ordered relocation of all incumbents in this band to other spectrum bands.²⁷ Grant of the NetfreeUS Application will not require modification, revocation or non-renewal of these incumbent licensees because the Commission has already adopted relocation procedures, which will apply irrespective of the Application. Accordingly, the Application satisfies Section 1.945(c)(3).

D. Grant of the NetfreeUS Application should not be precluded by determinations of mutual exclusivity.

“Mutual exclusivity,” as defined in Section 1.945(c)(4), should not bar grant of the NetfreeUS Application. As an initial matter, NetfreeUS agrees with M2Z that the Commission must avoid determinations of mutual exclusivity when the public interest requires.²⁸ However, no determination of nonexclusivity should be construed to give M2Z the right to foreclose Commission consideration of competing applications. As noted above, to the extent that the Commission must forbear from applying Section 1.945 to avoid a determination of mutual exclusivity, NetfreeUS respectfully requests that the Commission do so, consistent with the process described below

Section 309(j)(6)(E) of the Act provides that the Commission’s authority to grant licenses based on competitive bidding of mutually exclusive applications is conditioned on the

²⁷ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (2004); *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Ninth Report and Order and Order, 21 FCC Rcd 4473 (2006) (“*Ninth R&O*”).

²⁸ See M2Z Forbearance Petition at 24.

Commission's "obligation in the public interest to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." NetfreeUS proposes that the Commission should comply with this obligation by using regulatory tools other than competitive bidding to license the 2155-2175 MHz band, as follows:

- *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 FCC has afforded applicants an opportunity to reach negotiated settlements. During the settlement window, applicants may submit engineering amendments or other settlement proposals for FCC 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.

NetfreeUS observes that this proposed procedure may defer licensing assignments until after the statutory deadline for action on the M2Z Forbearance Petition – *i.e.*, September 1, 2007

or November 30, 2007.²⁹ To the extent necessary, the FCC should act on the M2Z Forbearance Petition in a manner that allows the above-described process to move forward.

There is ample Commission precedent for the assignment of licenses based on settlements among competing applicants rather than by competitive bidding. For example, in granting licenses for new orbital locations for GSO space stations in the Ka-band, the Commission's International Bureau adopted an orbital assignment plan as "the direct result of the applicants' successful efforts to resolve their conflicts over orbital locations for satellites in all portions of the world."³⁰ In the Ka-band context, the Bureau noted that the Commission preferred that applicants resolve orbital-location coordination "because they can best weigh the technical and economic tradeoffs involved in changes in orbit locations and operating parameters."³¹ Similarly, in the Wireless Radio Services, mutually exclusive applicants are afforded opportunities to enter into settlement, with Commission approval.³² In the broadcast services, certain applicants generally are permitted to resolve mutual exclusivity by means of engineering solutions or settlements during a limited period after the filing of short-form applications." Consistent with these precedents, NetfreeUS proposes that the Commission

²⁹ The Act provides that a "petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a)." 47 U.S.C. §160(c). Accordingly, Commission action is required on the M2Z Petition by September 1, 2007, or by November 30, 2007 if the Commission issues the 90-day extension.

³⁰ See *In the Matter of Assignment of Orbital Locations to Space Stations in the Ka-Band*, Order, 13 FCC Rcd 1030 (Int. Bur. 1997).

³¹ See *In the Matter of Assignment of Orbital Locations to Space Stations in the Ka-Band*, Memorandum Opinion and Order, 16 FCC Rcd 8476 (Int. Bur. 2001) at ¶7.

³² See 47 C.F.R. 51.935.

³³ See 47 C.F.R. §73.5002(c).

should permit multiple applicants for services in the 2155-2175 MHz band to attempt to negotiate mutually acceptable resolutions.

The Commission already has accepted for filing M2Z's amended application to provide services using 2155-2175 MHz spectrum, but M2Z **seeks** to have the Commission avoid accepting mutually exclusive applications.³⁴ The Commission implicitly rejected this position and invited competing proposals.³⁵ NetfreeUS respectfully submits that the public interest favors NetfreeUS's licensing proposal, which allows other parties to have their applications considered, and that the Commission should not summarily reject an opportunity to consider this proposal and to subject it to the rigors of public debate. Accordingly, the Commission is obligated to consider other applications that may involve higher and better uses for the spectrum.

E. Grant would serve the public interest, convenience and necessity.

Grant of the NetfreeUS Application would promote numerous public-interest benefits and would serve the public interest, convenience and necessity. NetfreeUS's approach would promote universal broadband nationwide. In addition to the public interest benefits discussed above and in the Application, NetfreeUS has pledged to adhere to several public-interest conditions and specific milestones for the provision of service as an express part of its license:

- NetfreeUS will be licensed on a nationwide basis for a 10-year renewable term, with the obligation to lease spectrum, on a location-by-location basis, to entrepreneurs, new entrants, municipalities and other independent entities. NetfreeUS and any lessee will be limited initially to a maximum of fifty WAPs. Lessees need only pay a nominal fee to cover NetfreeUS's transaction costs associated with the leasing arrangement. The lease process will be subject to the Commission's existing secondary market rules, as set out in Section 1.9001 *et seq.*

³⁴ See M2Z Forbearance Petition at 42-45.

³⁵ See *Public Notice*.

- NetfreeUS and any lessee will be required to commence service within six months of grant of Commission authorization, and will comply with deployment benchmarks as follows:

NetfreeUS and its lessees would be required to provide “substantial service”³⁶ to 50 percent of the nation’s 734 Cellular Market Areas (“CMAs”) within four years of initial license grant, to 75 percent of the nation’s CMAs within six years of license grant and 95 percent of the nation’s CMAs within 10 years of license grant. Service to a CMA would be deemed “substantial” if it falls within certain safe harbors modeled on other broadband services,” including:

- o Coverage to at least 30 percent (30%) of the population of the CMA; or
 - o Coverage to “rural areas” (a county (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data) and areas with limited access to telecommunications services, where coverage is provided to at least 75% of the geographic area of at least 30% of the rural areas within its service area; or
 - o Providing specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; or
 - o Providing service to niche markets or to areas outside the areas covered by other licenses.
- If any lessee fails to meet these requirements, NetfreeUS would have the right to terminate the lease and then would have six months following termination to meet the milestone. If NetfreeUS does meet the milestone requirement within that time period, the leased area would automatically revert to the Commission for re-allocation.
 - NetfreeUS will maintain a database of WAPs. The database would be uploaded on a weekly basis as new WAPs are deployed. This database will be used to assist coordinate and network management and will help identify areas where “substantial service” is being provided.
 - NetfreeUS will make WPB service available at minimum engineered data rates of 384 kbps downstream and 128 kbps upstream, free of airtime or service charges, throughout the United States. Data rates will be based on link budgets and would exceed these minima based on the number of WAP users.
 - Consumers need only purchase a low-cost NetfreeUS reception device. Existing users of 802.11 devices would be able to migrate to the WPB by upgrading the software on their existing devices.

³⁶ For other wireless services, the Commission has defined “substantial service” as “service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal.” *See, e.g.*, 47 C.F.R. §27.14(e).

³⁷ The Commission has adopted similar safe harbors for the Broadband Radio Service and Educational Broadband Service. *See* 47 C.F.R. §27.14(e)(1).

- NetfreeUS will serve any federal, state, or municipal public-safety organization willing to utilize WPB, with no limitation on the number of devices on the network other than technical limits. The service will commence once the organization constructs its network and makes service generally available in the public safety agencies' service area.
- NetfreeUS will contribute to the U.S. Treasury a "usage" fee equal to five percent (5%) of the gross revenues. The usage fee is based on the digital broadcast television model, which provides that stations that provide "ancillary and supplementary" subscription services must annually remit to the Commission a fee of five percent (5%) of gross revenues from such services."
- NetfreeUS will ensure that its network operates in such a manner that permits all then-existing Commission licensees to be free of harmful interference. NetfreeUS will strictly comply with the Commission's relocation rules for Broadband Radio Service and Fixed Microwave Service incumbents operating in the 2155-2175 MHz band.³⁹

For these and all of the above-discussed reasons, the Commission may grant the Application without a hearing.

IV. CONCLUSION

The foregoing Petition for Forbearance demonstrates that forbearance from enforcement of certain Commission procedural rules will facilitate expedited consideration of applications for the 2155-2175 MHz band and thus benefit the public by speeding deployment of broadband service nationwide without the delays inherent in spectrum auctions or other time-consuming licensing processes. Consideration of the applications pursuant to the settlement process proposed herein would provide the Commission with a means to expeditiously place the spectrum in the hands of private interests that could immediately advance important public interest benefits such as service to rural and underserved areas of the country, facilities-based competition to incumbent providers, public participation in the provision of broadband service and enhancements to public safety communications. Forbearance from applying the specified

³⁸ See 47 C.F.R. §73.624(g).

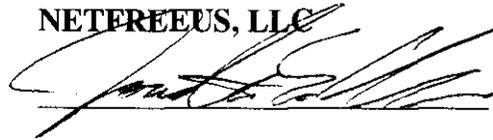
³⁹ See generally *Ninth R&O*.

provisions of the Act and Commission rules would serve these important goals and would advance the public interest. NetfreeUS respectfully requests grant of the instant Petition.

Respectfully submitted,

NETFREEUS, LLC

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March 2, 2007

Certificate of Service

I, Kenneth B. Wolin, a paralegal with the law office of Rini Coran, PC, hereby certify that on this 2nd day of March, 2007, I caused a copy of the foregoing Petition for Forbearance of NetfreeUS, LLC to be delivered by First-class United States mail to the following:

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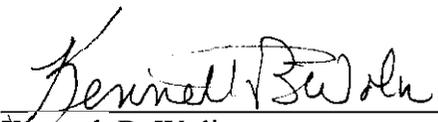
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