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

In Re Application of	)	
	)	
MCELROY ELECTRONICS CORPORATION	)	
	)	WT Docket No. 07-16
For Authorization to Construct and	)	
Operate a Nationwide Wireless Broadband	)	
Network in the 2155–2175 MHz Band	)	

To: The Commission

PETITION FOR RECONSIDERATION

McElroy Electronics Corporation ("MEC"), by its attorney, and pursuant to § 405(a) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 405(a), and § 1.106(a)(1) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(a)(1), hereby requests reconsideration of the Commission's action dismissing MEC's above-captioned application without prejudice. *See Applications for License and Authority to Operate in the 2155-2175 MHz Band*, FCC 07-161, at 21 (Aug. 31, 2007) ("*Order*").[1] In support thereof, the following is respectfully submitted:

FACTS

On January 31, 2007, the Wireless Telecommunications Bureau ("WTB") released a public notice announcing that it had accepted for filing the application of M2Z Networks, Inc. ("M2Z") for authorization to provide a national "Broadband Radio Service" using frequencies in the 2155–2175 MHz band.[2] The WTB accepted M2Z's application for filing in WT Docket No.

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[1] Obviously, MEC's interests were adversely affected by the dismissal of its 2155-2175 MHz band application. Accordingly, MEC has standing to seek reconsideration of the *Order*. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(b)(1).

[2] *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*, 22 FCC Rcd 1955 (WTB 2007) ("*M2Z Acceptance PN*").

07-16 pursuant to the Commission's "general statutory authority" under § 309 of the Act, 47 U.S.C. § 309, "rather than pursuant to an established framework of processing rules."[3] By accepting M2Z's application pursuant to the Commission's authority under § 309 of the Act, instead of applying its processing rules, the WTB effectively waived the application requirements and procedures set out in Subpart F of Part 1 of the Rules, *see* 47 C.F.R. §§ 1.911-1.959, for applicants filing competing applications in WT Docket 07-16.[4]

The WTB warned that the acceptance of M2Z's application for filing did not imply any judgment on the merits of the application. Furthermore, the WTB made it clear that its action did not preclude the dismissal of M2Z's application "as defective under existing rules or any future rules that the Commission may promulgate by notice and comment rulemaking."[5]

When it accepted M2Z's application for filing, the WTB confirmed that petitions to deny the M2Z application could be filed within 30 days under § 309(d)(1) and that the Commission would not act on the application prior to the expiration of the 30-day protest period.[6] The WTB also announced that "additional applications may be filed using the Commission's Electronic Filing System (ECFS) or by filing paper copies."[7]

In reliance on the WTB's public announcement, MEC incurred substantial expenses preparing a competing application for authority to operate a nationwide 2155-2175 MHz band

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[3] *M2Z Acceptance PN*, 22 FCC Rcd at 1955. *See WTB Sets Pleading Cycle for Application by M2Z Networks, Inc. to Be Licensed in the 2155-2175 MHz Band*, 22 FCC Rcd 4442, 4442 (WTB 2007) ("*M2Z Procedures PN*").

[4] *See M2Z Acceptance PN*, 22 FCC Rcd at 1955.

[5] *Id.*

[6] *Id.*, at 1955-56 & n.5. The WTB subsequently extended the 30-day protest period until March 16, 2007. *See M2Z Procedures PN*, 22 FCC Rcd at 4443.

[7] *M2Z Acceptance PN*, 22 FCC Rcd at 1956.

system. On March 2, 2007, MEC and four other applicants filed mutually exclusive applications for 2155-2175 MHz band licenses.[8] Again relying on the *M2Z Acceptance PN*, MEC filed its application both by using the ECFS and by filing paper copies (with the Commission's filing fee) at the Commission's office in Pittsburgh, Pennsylvania. M2Z filed within the 30-day protest period initially set by the WTB. The Commission found that MEC's application was acceptable for filing.[9]

Additional expenses were engendered by MEC's prosecution of its 2155-2175 MHz band application. It was forced to seek reconsideration when the hard copy of its application was returned by the Commission's Financial Operations office in Gettysburg, Pennsylvania.[10] Moreover, MEC had to respond to M2Z's various papers.[11]

Six months after the WTB invited MEC to file a competing application, and despite finding that MEC's application was acceptable for filing,[12] the Commission dismissed the application without prejudice along with all the other 2155-2175 MHz proposals.[13] It found that to proceed by rulemaking would be preferable to an *ad hoc* adjudicatory proceeding involving only license applications filed pursuant to its "general statutory authority."[14] The Commission

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[8] *See Order*, at 14 (¶ 21). The WTB subsequently noted that MEC's application had been filed in WT Docket 07-16. *See M2Z Procedures PN*, 22 FCC Rcd at 4442 & n.10.

[9] *See Order*, at 20 (¶ 30).

[10] *See id.*, at 20 n.116 (¶ 30).

[11] *See* Opposition to Consolidated Motions to Dismiss, WT Docket No. 07-16 (Apr. 10, 2007); Reply to Opposition to Petition for Reconsideration, WT Docket No. 07-16 (Apr. 23, 2007).

[12] *SeeOrder*, at 20 ¶ 30)

[13] *See id.*, at 21 (¶ 32).

[14] *Id.*, at 20 (¶ 29).

concluded that it would be contrary to the public interest to process the applications "without considering and adopting service and licensing rules."[15]

ARGUMENT

MEC seeks reconsideration and the reinstatement of its application *nunc pro tunc* under the due process principles set out in *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993) ("*McElroy I*") and *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) ("*McElroy II*"), two cases MEC obviously knows well. The facts underlying *McElroy I* and *McElroy II* are remarkably similar to those before the Commission in this case.

In *McElroy I*, MEC also filed license applications in reliance on Commission statements, but before the Commission adopted processing rules. *See* 990 F.2d at 1355-56. As it did in 2007, MEC consulted the Commission's staff prior to submitting its first application in August 1988. *See id.*, at 1356. Similar to when MEC filed its 2155-2175 MHz application, the Commission accepted MEC's applications for filing,[16] but did not issue a public notice to that effect. *See id.*, at 1364 n.13. And in *McElroy I*, MEC's applications were dismissed without prejudice to refilling once the Commission completed a rulemaking to promulgate processing rules. *See id.*, at 1356.

In *McElroy I*, the D.C. Circuit reversed the Commission's dismissal of MEC's applications and remanded the case to the Commission with instructions to reinstate the applications *nunc pro tunc*. *See id.*, at 1364. The court held that MEC had reasonably understood a Commission order to mean that its applications could be filed. *See id.*, at 1363. Or as the Commission's staff put it, "In *McElroy* [*I*], the court concluded that a Commission order

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[15] *Order*, at 20 (¶ 30).

[16] *See McElroy II*, 86 F.3d at 253 & n.7.

was vague at best and not reasonably understandable from the context of the order and from normal English language usage." *RuralVision South, Inc.*, 12 FCC Rcd 21721, 21735 (Video Serv. Div. 1997).

On remand from *McElroy I*, the Commission ultimately decided that MEC would have to enter into a lottery with hundreds of applicants that had filed applications under a one-day filing window in March 1993. *See McElroy II*, 86 F.3d at 251. On appeal, the D.C. Circuit reversed the Commission again, citing its notice and cut-off procedures under which MEC's applications were filed, wherein competing applications had to be filed within 60 days of the public notice listing MEC's applications as accepted for filing. *See id.*, at 253. The *McElroy II* court remanded the case again with instructions to dismiss the hundreds of late-filed applications. *See id.*, at 259.

In *McElroy II*, the D.C. Circuit held that a cut-off date can be established by Commission regulation, *see id.*, at 256 n.12, and that a cut-off period can be triggered by operation of law. *See id.*, at 255. The court recognized that, "as against latecomers, timely filers have an equitable interest in enforcement of the cut-off rules." *Id.*, at 257.

Unlike in *McElroy I*, the *M2Z Acceptance PN* was clear and explicit in two critical respects. First, the public notice announced that "additional applications for spectrum in this [2155-2175 MHz] band may be filed while the M2Z application is pending." *M2Z Acceptance PN*, 22 FCC Rcd at 1956. Second, it contained the representation that M2Z's application would remain pending unless it was found to be "defective under *existing rules* or under *future rules* that the Commission may promulgate by notice and comment rulemaking." *Id.*, at 1955 (emphasis added). Since the Commission had not followed any existing rules, MEC reasonably understood that 2155-2175 MHz band applications would be processed unless and until they

were rendered defective by the retroactive application of new rules adopted by the Commission in a notice and comment rulemaking.

In one significant respect, the *M2Z Acceptance PN* was vague in the extreme. It stated only that M2Z's application had been "found, upon initial review, acceptable for filing pursuant to [the Commission's] general statutory authority" under § 309 of the Act. 22 FCC Rcd at 1955. *See Order*, at 14 (¶ 20); *M2Z Procedures PN*, 22 FCC Rcd at 3352. However, no notice was given as to the standards under which the M2Z application had been initially reviewed and found to be acceptable for filing under § 309. And MEC could not look for the applicable standards in the Rules, because they had been effectively waived in favor of the exercise of the Commission's § 309 authority. All MEC knew was that its application was acceptable for filing under the same standards that had been applied to M2Z's application.[17]

Absent an articulated acceptability for filing standard, MEC knew that its application was not susceptible to dismissal as unacceptable for filing.[18] It also knew that the Commission's

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[17] MEC disclosed in its application that it was being filed in reliance on the *M2Z Acceptance PN* and that MEC intended to "make substantially the same threshold qualifications showings and public interest commitments that were made by M2Z." MEC Application, Ex. 1 at 3. However, MEC 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.* MEC 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 I*, 990 F.2d at 1365 ("we remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment").

[18] 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, MEC was afforded

general authority under § 309 limited it to disposing of mutually exclusive applications in a full hearing or in an auction. *See* 47 U.S.C. § 309(e), (j)(1). MEC reasonably *thought* that its application could not be dismissed without prejudice pending the completion of a rulemaking to promulgate processing rules. In the words of the *McElroy I* court, MEC "justifiably understood" the *M2Z Acceptance PN* to mean that its application would not be dismissed unless and until the Commission completed a rulemaking and promulgated rules that rendered the application defective. 990 F.2d at 1358.

Section 0.445(e) of the Rules entitled MEC to rely on the Commission's published announcement that 2155-2175 MHz band applications could be filed and would be processed under its § 309 authority unless they became defective under a retroactive application of new rules. *See* 47 C.F.R. § 0.445(e). Quite apart from the Rules, once it publicly announced that 2155-2175 MHz band applications could be filed, the Commission created a "reasonable expectation" in MEC that it could file its application, *see Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976), in accordance with its reasonable construction of the *M2Z Acceptance PN*. *See McElroy I*, 990 F.2d at 1359. Having created the expectation, and having accepted MEC's application for filing, the Commission became bound to process the application in accordance with the *M2Z Acceptance PN*. *See Gardner*, 530 F.2d at 1089-90.

Under Part 22 of the Rules, which currently applies to Part 27 and 2155-2175 MHz band

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no notice whatsoever of the standards of acceptability for filing that are applied pursuant to the Commission's general statutory authority under § 309. Legal research suggests that this case represents the first time that the Commission explicitly exercised its § 309 authority to accept an application for filing.

applications,[19] mutually exclusive applications are processed in filing groups. *See* 47 C.F.R. § 22.131(b); *Smith-Bagley, Inc.*, 20 FCC Rcd 2361, 2361 (WTB 2005). If the earliest application accepted for filing is for an initial authorization, the Commission releases a public notice initiating a 30-day notice and cut-off filing period for competing applications. *See* 47 C.F.R. § 22.131(c)(iii); *Smith-Bagley,* 20 FCC Rcd at 2361. Mutually exclusive applications whose filing date falls outside the 30-day period are dismissed as defective. *See* 47 C.F.R. § 22.131(b).

M2Z's application was for an initial authorization. Accordingly, when the *M2Z Acceptance PN* announced that M2Z's application had been found "acceptable for filing," a 30-day notice and cut-off filing period was triggered. 22 FCC Rcd at 1955. Considering that notice was given two weeks later that M2z's application had appeared on public notice as "accepted for filing" on January 31, 2007, *see M2Z Procedures PN*, 22 FCC Rcd at 3352, a "reasonably diligent interested party" was put on notice that its right to file a 2155-2175 MHz band application was "at stake." *McElroy II*, 86 F.3d at 257. MEC and four other applicants diligently filed mutually applications prior to the March 2, 2007 cut-off date initiated by the *M2Z Acceptance PN*. Under the current Rules, the timely-filed applicants were entitled to participate with M2Z in an auction for the 2155-2175 MHz band spectrum. *See* 47 C.F.R. § 22.131(c)(4)(ii)(A); *Smith-Bagley,* 20 FCC Rcd at 2362.

Consistent with *McElroy II*, the Commission "has long recognized that diligent applicants have a legitimate expectation that [it] will enforce the cut-off rules." *Id.*, at 2369 n.64. By dismissing MEC's application, the Commission not only acted in derogation of MEC's "equitable interest in the enforcement of the cut-off rule," *McElroy II*, 86 F.3d at 257, it ran afoul

[19] Advanced Wireless Services ("AWS") in the 2155-2175MHz band would be considered Public Mobile Services. *See* 47 C.F.R. § 22.99. Moreover, Part 22 of the Rules currently applies to AWS authorized by Part 27. *See id.* § 27.3(j).

of the *Accardi* doctrine, which holds that agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267-28 (1954); *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32, 34 n.3 (D.D.C. 1998). As with all federal agencies, the Commission is bound by the express terms of its rules until it amends or revokes them. *See, e.g., Tunik v. Merit Systems Protection Bd.*, 407 F.3d 1326, 1345 (Fed. Cir. 2005). Thus, it was bound by the notice and cut-off provisions of § 22.131 of its Rules unless and until they are amended or revoked. Consequently, the Commission violated § 22.131, and hence the *Accardi* doctrine, when it failed to dispose of MEC's application in accordance with competitive bidding procedures. *See* 47 C.F.R. § 22.131(c)(4)(ii)(A).

CONCLUSION

The decision to accept M2Z's application for filing and to invite competing applications had legal consequences that the Commission surely did not intend or foresee. That decision, and the manner by which it was publicly announced, triggered procedures that the Commission is bound to follow and engendered procedural rights the Commission is bound to respect. Those consequences cannot be avoided by the expedient of dismissing MEC's application without prejudice. MEC has acquired equitable interests that can only be divested by new rules adopted in the current rulemaking in WT Docket No. 07-195 and the Commission's retroactive application of the new rules that "reflects its balancing of all relevant interests involved in retroactivity decisions." *McElroy I*, 990 F.2d at 1365. As of now, however, the equities, elemental fairness, and due process dictate that MEC's application be reinstated *nunc pro tunc*.

For all the foregoing reasons, MEC respectfully requests that the *Order* be reconsidered and that its 2155-2175 MHz band application be reinstated *nunc pro tunc* as of March 2, 2007

and processed pursuant to the Commission's authority under § 309 of the Act and in accordance with its current Rules.

Respectfully submitted,

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October 1, 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 1st day of October, 2007, caused to be mailed, postage pre-paid, a copy of the foregoing Petition for Reconsideration to the following:

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