

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

ORIGINAL

In the Matter of)
)
Applications for License and Authority to Operate) WT Docket No. 07-16
in the 2155-2175 MHz Band)
)
Petitions for Forbearance Under 47 U.S.C. § 160) WT Docket No. 07-30

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OF NETFREEUS, LLC

NETFREEUS, LLC

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Summary

NetfreeUS, LLC (“NetfreeUS”) hereby seeks reconsideration of the Commission’s August 31, 2007 *Order*¹ that denied its Petition for Forbearance (“Petition”) and dismissed its application proposing nationwide service in the 2155-2175 MHz band (“Application”). The Petition should be granted, and the Commission should reinstate the Application.

In the Application, NetfreeUS proposed to provide a free, nationwide broadband service under a “private commons” model that would enable peer-to-peer and business-to-business communications. Embracing its public interest obligations, NetfreeUS pledged to provide first responders with a special access code that would enable them to preempt communications in times of emergency. NetfreeUS also proposed “substantial service” build-out requirements, interoperability and “open network” architecture that would enable any technologically capable device to connect to the network without discrimination. NetfreeUS further agreed to contribute five percent of advertising revenues from its wireless broadband service to the U.S. Treasury.

In the Petition, NetfreeUS demonstrated that the Commission should forbear from apply its competitive bidding rules under the three prongs of Section 10 of the Communications Act of 1934, as amended (the “Act”). NetfreeUS proposed a process by which competing applicants could have an opportunity to resolve their conflicts, while still preserving the Commission’s right to require competitive bidding if the applicants were unable to achieve a satisfactory resolution. NetfreeUS also showed that grant of the Application without the prior adoption of licensing and service rules was consistent with precedent and the public interest.

In the *Order*, the Commission discussed the proposals of M2Z Networks, Inc. (“M2Z”) at some length, but gave scant attention to NetfreeUS’s proposals. In view of the conclusory statements in the *Order* that suggest pre-disposition of the Application and the Petition, the Commission has failed to discharge its statutory obligations under Section 10 of the Act and the Administrative Procedure Act (the “APA”). Working backward from its decision to neglect its own solicitation of comments and petitions and to bypass the substantial record that developed so that it could instead initiate a rulemaking proceeding, the Commission failed to articulate a rational basis between the facts and its dismissal of the Application, an application it found to be acceptable for filing.

Notwithstanding the public interest benefits warranting forbearance from its rules, without any discussion, the Commission in a footnote found that grant of the Petition would compromise the development of competitive market conditions such that the “public interest” prong of the Section 10 forbearance standard was not met. This conclusory statement is all the Commission musters – there is no discussion of the competitive benefits that NetfreeUS proposed. Moreover, there is no connection between the Commission’s suggestion that market conditions would be undermined by limiting the eligible applicants to a specific class and not requiring applicants to obtain licenses at auction. Finally, the Commission erroneously concluded that grant of the Petition would cut off consideration of competitive bidding and give NetfreeUS an application for free. This ignores NetfreeUS’s proposal to establish a settlement

¹ *Order*, FCC 07-161, rel. Aug. 31, 2007.

period after which, if no settlement was achieved, the Commission could auction the spectrum. It also fails to weigh the benefits of NetfreeUS' contribution of revenues to the government.

At bottom, the Commission deferred to its "typical" process of conducting a lengthy rulemaking proceeding to adopt licensing and service rules rather than NetfreeUS's proposals. This decision ignored any meaningful discussion of the public interest benefits offered by NetfreeUS. The Commission also failed to recognize the substantial record that developed in this proceeding in response to the Commission's invitation. In dismissing the Petition, the Commission did not comply with its statutory mandate to examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"²

Likewise, the Commission's dismissal of the Application was erroneous and contrary to law. The Commission's statement that the Application involved "issues of general applicability" cannot be supported in light of NetfreeUS's proposal for a single nationwide license that would occupy all 20 MHz of the 2155-2175 MHz band. The Commission also failed to even consider previous licensing regimes where licenses were filed, processed and granted before service rules were adopted. Further, the Commission does not attempt to find any procedural or substantive defect with the Application, which addressed all of the points the Commission indicated it would consider in its rulemaking proceeding. The Commission provided the public with ample notice and an opportunity to participate in the proceeding, and the substantial record demonstrates that there was significant debate on the relevant issues. Finally, the Commission's reliance on "flaws" cited elsewhere in the *Order* improperly refer to discussions of M2Z's application, not NetfreeUS's Application and further reflects the Commission's casual and bare boned treatment of NetfreeUS.

On reconsideration, the Commission should grant NetfreeUS's Petition and reinstate its Application.

² *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OF NETFREEUS, LLC

NetfreeUS, LLC (“NetfreeUS”), by counsel and pursuant to Section 405 of the Communications Act of 1934, as amended (the “Act”)³ and Section 1.106 of the Commission’s Rules,⁴ hereby respectfully petitions for reconsideration of those portions of the Commission’s August 31, 2007 *Order*⁵ that dismissed its application seeking authority to provide free, nationwide broadband services in the 2155-2175 MHz band (“Application”) and denied its Petition for Forbearance (“Petition”) showing that the public interest warranted grant of a license to NetfreeUS without the use of competitive bidding. As demonstrated below, the Commission erred in denying the Petition without undertaking the forbearance analysis required by Section 10 of the Act and without discussing NetfreeUS’s proposal for processing of conflicting applications.⁶ The Commission also erred in dismissing the Application without any finding that it was procedurally or substantively defective and without justifying its reasons. Accordingly,

³ 47 U.S.C. §405(a).

⁴ 47 C.F.R. §1.106.

⁵ *Applications for License and Authority to Operate in the 2155-2175 MHz Band; Petitions for Forbearance Under 47 U.S.C. § 160*, Order, FCC 07-161, rel. Aug. 31, 2007 (the “Order”)

⁶ 47 U.S.C. §160(a).

the Commission should grant the Petition and should reinstate and process the Application to facilitate expeditious commencement of broadband service across the country.⁷

Background

NetfreeUS filed its Application on March 2, 2007 following release of the Commission's public notice announcing the acceptance for filing of M2Z's application and stating that "additional applications for spectrum in this band may be filed while the M2Z application is pending."⁸ NetfreeUS proposed to provide an entirely free, nationwide broadband service ("Wireless Public Broadband," or "WPB") under a "private commons" model to facilitate peer-to-peer and device-to-device communications and to promote local operation by Internet service providers, new entrants and municipalities. NetfreeUS also promised to provide first responders with a special software override code for clearing traffic in times of emergencies and for enabling effective public communication. The Application proposed a "substantial service" build-out requirement, interoperability requirements and an "open network" architecture to permit any technologically capable device to attach to the network on a nondiscriminatory basis.⁹ NetfreeUS agreed to contribute five percent of the WPB service's advertising revenues to the United States Treasury.¹⁰ As NetfreeUS explained:

NetfreeUS's goal is to establish a free broadband marketplace with near-ubiquitous access throughout the country, with actual service to be provided by

⁷ With one exception, NetfreeUS takes no position at this time regarding the rights of any other applicants whose applications were dismissed in the *Order*. NetfreeUS agrees with the Commission that M2Z Networks, Inc. ("M2Z") did not meet the standard for grant of M2Z's application under Section 7 of the Act because M2Z's application did not propose a "new service or technology." See 47 U.S.C. § 157. On September 11, 2007, M2Z filed a Notice of Appeal of the *Order* with the United States Court of Appeals for the District of Columbia Circuit (Case No. 07-1360).

⁸ *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") at 2.

⁹ NetfreeUS' sister company, Wibiki Corp., has recently commercially deployed the core technology that would drive the revenue-based portion of NetfreeUS' WPB proposal.

¹⁰ For a detailed description of the public interest benefits of the Application and proposed licensing and service obligations, see Application at 5-7 & Exhibit 2 thereto.

third parties through a secondary market mechanism. Universal access to broadband for consumers and a nationwide interoperable public safety data broadband network are national priorities. NetfreeUS's unique WPB proposal achieves these priorities by allowing entrepreneurs and the public (even municipalities) to build and operate a truly affordable broadband network for both consumers and public safety, potentially resulting in enormous economic and public interest benefits.¹¹

Simultaneously with filing its Application, NetfreeUS filed the Petition, which sought the Commission's forbearance from applying Sections 1.945(b) and (c) of the Commission's Rules or any other rules that would preclude the processing and grant of the Application. Pursuant to the first prong of the three-part analysis prescribed by Section 10(a) of the Act, NetfreeUS explained that these rules need not be enforced to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory because no subscriber fees would be charged for WPB.¹² Even so, as a Commercial Mobile Radio Service ("CMRS") operator, NetfreeUS would be subject to Sections 201 and 202 of the Act, which provide that all charges, practices, classifications and regulations be just and reasonable and which prohibit unjust and unreasonable discrimination.¹³ Under the second prong of Section 10(a), NetfreeUS stated that Sections 1.945(b) and (c) are procedural requirements, not consumer protection rules, such that enforcement of those rules was not necessary to protect consumers.¹⁴ Under the third prong of Section 10(a), NetfreeUS demonstrated that forbearance would be consistent with the public interest for the reasons articulated at length in its Application.¹⁵

As an alternative to competitive bidding under Section 309(j) of the Act,¹⁶ NetfreeUS presented a detailed proposal by which its Application – and any others filed for the same spectrum within a given time period – could be considered together. Under this process, which

¹¹ *Id.* at 6-7.

¹² *See* Petition at 8-10.

¹³ *Id.* at 9-10.

¹⁴ *Id.* at 11-13.

¹⁵ *See* Petition at 11-13; 20-22.

¹⁶ 47 U.S.C. §309(j).

NetfreeUS showed had been successfully used by the Commission in previous cases involving multiple applicants,¹⁷ the Commission would establish a clear cut-off date for the acceptance of applications and would then issue a public notice listing all applicants deemed to have submitted substantially complete applications and to have satisfied the Commission's threshold eligibility requirements. Once it finalized the applicant pool, the Commission would announce by public notice a deadline by which applicants could jointly propose to settle the applications to remove any conflicts that would otherwise result in all or some of them being declared mutually exclusive. During this fixed settlement period, applicants could submit engineering amendments or other settlement proposals for Commission approval. If the applicants agreed to a common plan, the Commission could then act on the joint request; if there was no acceptable agreement, the Commission could proceed without delay to auction the spectrum or to assign the spectrum by other means.

The record in this proceeding reflected strong support for a free, nationwide broadband service. U.S. Rep. Frank Pallone, Jr. requested quick Commission action on the NetfreeUS Application on its merits, stating that "I believe that marking spectrum available for a nationwide broadband service should be the FCC's top priority."¹⁸ The Dallas Independent School District expressed its support for "free internet broadband service in Dallas as well as the rest of the country" and for making the Internet "more accessible to our children and American families."¹⁹ Representative Lon Burnham, in Texas District 90, expressed support for "[M2Z's and other] proposals that will provide easier and more affordable [broadband] access to the working

¹⁷ See Petition at 18-19.

¹⁸ See Letter dated April 19, 2007 from Rep. Frank Pallone, Jr., 6th District, New Jersey to Chairman Kevin J. Martin in WT Docket Nos. 07-16 and 07-30.

¹⁹ See Letter dated April 12, 2007 from Jerome Garza, First Vice President, Dallas Independent School District in Docket No. 07-16. (expressing hope that the Commission would review proposals in addition to M2Z's).

families and small businesses of our nation.”²⁰ In the extensive record of this proceeding, which included more than 1,000 filings, no party opposed the concept of free broadband service.²¹

Despite this record, on August 31, 2007, the Commission adopted and released its *Order* denying the NetfreeUS Petition as well as the petition for forbearance filed by M2Z (“M2Z Petition”) and dismissing all of the applications for the 2155-2175 MHz band, including NetfreeUS’s Application. The Commission found that the Petition and the M2Z Petition did not demonstrate that forbearance was in the public interest, summarily stating that “[n]either M2Z nor NetfreeUS provided any convincing reasons to conclude that their proposed licensing approaches have advantages that would outweigh the public interest benefits of” Sections 1.945(b) and 1.945(c) and that such decision was supported by “various filings” made in the proceeding.²² In a footnote, in apparent but token acknowledgment of the public interest analysis required by Section 10(b), the Commission stated without support that granting any of the applications “would appear to compromise the development of competitive market conditions.”²³ The Commission then reasoned that, because forbearance was not found to be in the public interest, it need not consider the first two prongs of the Section 10 analysis.²⁴ Speaking only in summary and conclusory fashion, these statements look backward from a desired – if not pre-determined – conclusion, and thus do not satisfy the requirements of Section 10 of the Act. Moreover, the Commission failed to address the detailed licensing process described in the Petition, which showed how the Commission could permit the applicants to resolve application

²⁰ See Letter dated June 27, 2007 from State Rep. Lon Burnam, District 90, Fort Worth, Texas in Docket No. 07-16.

²¹ M2Z seeks Commission grant of an application to provide a free Internet service, but unlike NetfreeUS, coupled that proposal with a plan to provide a “premium” service that it has not defined. See M2Z application at 12.

²² *Order* at ¶ 9.

²³ *Id.* at n.34.

²⁴ *Id.*

conflicts and which proposed that the Commission could rely on competitive bidding if the applicants were unable to resolve those conflicts.

While the bulk of the *Order* addresses the M2Z Petition, the Commission determined that the public interest could best be served by following the “typical” process of establishing service rules and licensing procedures before acting on any of the applications.²⁵ The Commission also referenced other “flaws” in the NetfreeUS Application, citing earlier paragraphs of the *Order* that do not even apply to NetfreeUS.²⁶ Here again, the Commission failed to consider the public interest benefits, service obligations and licensing conditions that NetfreeUS proposed in connection with its Application and its practice of processing applications in advance of adopting service rules, instead deferring to its typical, but hardly consistent, practice of first establishing service rules.

Discussion

Section 405 of the Act provides that the Commission may grant reconsideration “if sufficient reason therefor be made to appear.”²⁷ Reconsideration is appropriate where the petitioner shows a material error or omission in the original order.²⁸ Commission action also is bound to the Administrative Procedure Act (the “APA”), which prohibits Commission action that is arbitrary, capricious, an abuse of discretion or not in accordance with law.²⁹ The Supreme Court explained this standard in *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co.*:

²⁵ See *id.* at ¶¶ 28-29.

²⁶ See *id.* at p. 20 and n.115, citing paragraphs 11, 14 and 15 of the *Order*. Paragraphs 14 and 15 relate solely to M2Z’s claims under Section 7 of the Act, an argument that NetfreeUS opposed. Paragraphs 14 and 15 do not even mention NetfreeUS.

²⁷ 47 U.S.C. § 405.

²⁸ See, e.g., 47 C.F.R. § 1.106(c); *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

²⁹ 5 U.S.C. § 706(2)(A).

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” ... In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” ... Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given...³⁰

As demonstrated below, the Commission did not follow these standards. In denying the Petition, the Commission failed to conduct a full and appropriate analysis under Section 10 of the Act, rendering its denial contrary to the evidence provided by NetfreeUS. In particular, the Commission did not even attempt to show how the process described for NetfreeUS to resolve application conflicts was inconsistent with the public interest, instead relying on conclusory statements about broad spectrum policy principles. In dismissing the Application, the Commission failed to discuss the merits of the Application at all, instead jumping to the same unsupported conclusion that it reached in denying forbearance – that a rulemaking proceeding would serve the interests of the public more than adjudicating the applications. Given that the Commission provided notice to the public that competing proposals could be considered, invited comments from the public and subsequently found the Application to be acceptable for filing following the compilation of a full record, dismissal of the Application runs counter to the evidence. By failing to examine the record and to articulate a rational connection between the facts, the law and the dismissal of the Application, the Commission failed to meet its statutory obligations under Section 10 and under the APA.

³⁰ 463 U.S. 29, 42 (1983) (citations omitted).

I. THE COMMISSION’S DENIAL OF NETFREEUS’S PETITION FOR FORBEARANCE WAS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

The Petition requests, to the extent applicable, forbearance from Sections 1.945(b)³¹ 1.945(c) of the Commission’s Rules,³² Section 309(j) of the Act, and any other provisions of the Act or rules that would preclude grant of the Application. The Commission asserted that the benefits associated with expedited licensing and deployment of broadband service under NetfreeUS’s proposal are somehow outweighed by the procedural benefits of Sections 1.945(b) and (c) and by Section 309(j) of the Act. In so doing, the Commission misinterpreted or ignored critical facts about the Petition, drew erroneous conclusions from those facts and found that forbearance would be inconsistent with the public interest. By short-circuiting its analysis to achieve a pre-determined result, the Commission failed to satisfy its obligations under the APA.

As the Petition notes, Section 10(a) of the Act requires 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 –

³¹ See Petition at 5-13. 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.”

³² 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.

- (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.³³

To find that a forbearance petition is inconsistent with the public interest, pursuant to Section 10(b) of the Act, the Commission *must* consider whether forbearance will enhance competition:

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.³⁴

Despite this statutory mandate to give due consideration to forbearing from applying the rules, the *Order* erred by misstating or ignoring relevant facts in the record and by failing to articulate a satisfactory or reasonable explanation for denying the Petition.

a. The Order failed to provide any meaningful consideration of whether forbearance would promote competitive market conditions.

The Commission's erroneous and perfunctory treatment of the "competitive market conditions" analysis required by Sections 10(a)(3) and (b) must be reconsidered. The Commission relegated this statutory touchstone to footnote status and avoided any meaningful explanation or analysis of the merits of the competitive benefits of the NetfreeUS proposal. In so doing, the Commission violated the explicit requirements of Section 10 as well as the APA.

Footnote 34 of the *Order* states that:

³³ See 47 U.S.C. § 160(a) (emphasis added).

³⁴ See 47 U.S.C. § 160(b).

grant of any of the pending applications, by cutting off consideration of a competitive bidding licensing framework and precluding consideration of other potential applicants for this spectrum, would appear to compromise the development of competitive market conditions. Because M2Z and NetfreeUS fail the third prong of the forbearance test, we need not consider the first two prongs.... That said, compromising the development of competitive market conditions would have adverse effects on the matters covered by the first two prongs of the forbearance test – ensuring that a carrier’s rates and practices are just, reasonable, and nondiscriminatory, and the protection of consumers.³⁵

This is the *only* consideration the Commission gave to its Section 10(b) obligations – a few sentences in a footnote that, rather than discussing “competitive market conditions,” instead ignored the facts and leaped to a conclusion no doubt prejudiced by its desire to move the discussion to a rulemaking proceeding. In so doing, the Commission paid lip service to its statutory obligations to consider competitive market conditions in finding that NetfreeUS’s request for forbearance from Section 309(j) would not be in the public interest. The Commission’s finding is erroneous for several reasons.

First, the Commission avoided any meaningful discussion of the competitive benefits that NetfreeUS proffered in the Application but rather relied on cursory and dismissive efforts to avoid considering all of the relevant factors. In the Application, NetfreeUS stated its desire 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.³⁶ NetfreeUS’s advertiser-supported service would be offered free of charge to everyone on a nondiscriminatory basis. In many markets, NetfreeUS would itself be a new entrant and would lack market power in those areas. Yet despite these numerous pro-competitive benefits, the *Order* did not consider those benefits against the benefits of auctioning

³⁵ *Order* at n. 34.

³⁶ *See* Application at 13-15.

the spectrum. Thus, the *Order* failed to consider an important aspect of the Petition, in violation of the APA.

Second, the Commission erred in concluding that grant of any of the pending applications “would appear to compromise the development of competitive market conditions.”³⁷ This statement is unsupported by the record, and the Commission’s use of ambiguous and conditional language falls far short of a meaningful determination on the merits. No matter how charitably one interprets the Commission’s obligation to *explain* its decision to grant or deny a petition for forbearance,³⁸ it is implausible to suggest that the mere statement that it “would appear to compromise the development of competitive market conditions” could possibly satisfy that obligation given the speculative and conditional nature of this finding.

Moreover, it is illogical for the Commission to suggest that market conditions are undermined by merely limiting the eligible applicants to a specific class and not requiring the applicants to obtain the license at auction. As NetfreeUS pointed out in its Petition, there is sufficient precedent for such an approach in the Commission’s licensing in certain satellite services, Wireless Radio Services and broadcast services.³⁹ The Commission’s silence on this precedent speaks loudly. If the Commission’s position holds, then it is tantamount to a statement that the process used to assign licenses in those services – where parties that filed mutually exclusive applications for a service are given opportunities to reach a settlement or other resolution to avoid auction of that spectrum – compromises the development of competitive market conditions. By making a disconnected declaration in a footnote, the Commission neglected its obligations under the APA to “examine the relevant data and articulate a

³⁷ *Order* at n. 34.

³⁸ See 47 U.S.C. § 160(c).

³⁹ NetfreeUS’ Petition noted such precedents in procedures for issuing Ka-band licenses, the Wireless Radio Services and the broadcast services. See Petition at 19-20.

satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁴⁰

Third, the Commission apparently ignored the facts of NetfreeUS’s proposal in stating that “grant of any of the pending applications [would cut] off consideration of a competitive bidding licensing framework” and that NetfreeUS’s proposal “precludes even the possibility of an auction and would simply give [NetfreeUS] spectrum for free.”⁴¹ In fact, as the *Order* acknowledges elsewhere, the procedures proposed by NetfreeUS do not “cut off” consideration of competitive bidding because the Commission can proceed without delay to auction the spectrum if no joint settlement is proposed or accepted by the Commission.⁴² The specter of an auction would encourage applicants to reach an effective settlement that advances the public interest. The Commission thus erred when it stated that NetfreeUS’s proposal “precludes even the possibility of an auction.”⁴³ Moreover, grant of the Petition and the Application simply would not “give [NetfreeUS] spectrum for free.”⁴⁴ Even if NetfreeUS emerged as the only applicant to obtain a license in this band (albeit with numerous spectrum lessees), the spectrum is not “free” but rather would be subject to a five-percent fee payable to the U.S. Treasury out of advertising revenues from its wireless services.

Fourth, and similarly, the *Order* erroneously states that “grant of any of the pending applications [would preclude] consideration of other potential applicants for this spectrum.”⁴⁵ Of course, any time the Commission grants an application for a spectrum license, it precludes consideration of other as yet unnamed potential applicants. Likewise, any time the Commission

⁴⁰ *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). (quotations omitted).

⁴¹ *Order* at ¶ 11.

⁴² See *Order* at ¶ 6, Petition at 18.

⁴³ *Order* at ¶ 11.

⁴⁴ *Id.*

⁴⁵ *Id.* at n. 34.

assigns spectrum through a process that limits consideration of a class of applications (*e.g.*, via a filing window), the Commission by definition, limits consideration of other “potential applicants.” But this reed is too slender to support the Commission’s proposition that such procedures “would appear to compromise competitive market conditions.” Here, the Commission issued the *Public Notice* to announce that it was accepting for filing M2Z’s application and *expressly invited the submission of competing applications by a date certain*.⁴⁶ Several applicants have in fact accepted the invitation, and in fact the Commission has had ample opportunity to consider these competing applications. While the Commission appears concerned that incumbent broadband service providers have yet to provide their views for this spectrum,⁴⁷ if this is the case, it is not for a lack of notice and opportunity. The Commission’s holding that the lack of “consideration of other potential applicants for the spectrum” is belied by the facts and by procedures the Commission itself adopted.

In sum, the Commission has shirked its obligations under the APA to provide a satisfactory explanation for denying the Petition insofar as NetfreeUS requested forbearance from Section 309(j), and has ignored the specific elements of NetfreeUS’s Petition that address the Commission’s stated objections to assigning licenses without competitive bidding. The Court has instructed that “conclusory statements cannot substitute for the reasoned explanation” required under the APA,⁴⁸ but the thin and conclusory statements in the *Order* demonstrate that the Commission did not follow this legal requirement. As a result, the Commission has committed material error, and reconsideration is warranted.

⁴⁶ See *Public Notice* at 2.

⁴⁷ See *Order* at n. 31.

⁴⁸ See *Arco Oil & Gas Co. v. FERC*, 932 F.2d 1501, 1504 (D.C. Cir. 1991).

b. By asserting that forbearance from Section 1.945(b) and 1.945(c) is not in the public interest, the Order runs counter to the evidence in the record.

The *Order* acknowledges that NetfreeUS's proposals would potentially expedite licensing of the 2155-2175 MHz spectrum, but claims that forbearance from Section 1.945(b) and 1.945(c) "would come at the expense of establishing a complete record" and therefore would not be in the public interest.⁴⁹ The Commission's position is devoid of reasoned decision making, in violation of the APA.

The Commission provided no explanation of any specific deficiency in any portion of the Application and no real explanation of what information is needed to provide a "more complete record." Though the Commission cited examples of issues for which notice and comment must be given, it ignored the fact that the Application and the Petition have addressed each of these issues.⁵⁰ Paradoxically, the Commission's stated concerns about an incomplete record are contradicted by the extensive and substantial record the Commission considers incomplete, and its decision cannot withstand scrutiny.

Moreover, the Commission risks judicial nullification of the *Order* because its conflation of substantive and procedural requirements is tantamount to an effort to evade the statutory deadline to issue a decision on the merits. The D.C. Circuit Court of Appeals recently rejected a Commission decision finding a forbearance petition to be in violation of the public interest prong of Section 10(a)(3). In *AT&T v. FCC*, the Commission found that the petition would have required the Commission to decide to forbear "before the Commission has fully considered

⁴⁹ *Order* at ¶ 9.

⁵⁰ According to the *Order*, "[t]hese issues include whether spectrum should be licensed on an exclusive basis and the processes by which such licenses should be assigned. They also include spectrum block size and geographic area coverage; technical issues such as emission and power limits, protection of incumbents, and interference standards; and other regulatory issues such as permitted uses, license term, renewal criteria, performance requirements, and, assignment and transfer (including disaggregation and partitioning)." In fact, as discussed *infra*, the Petition and the Application have addressed each of these issues, and there have been ample opportunities for the public to consider and address these issues.

whether and under what technical conditions the requirements apply in the first place. To do so could preclude fully considered analysis, particularly in light of the statutory deadline for acting on forbearance petitions.”⁵¹ There, the Commission found that the public interest requirement of Section 10(a)(3) was violated if the Commission were to forbear without “fully considered analysis.” The Court rejected this position, finding that the very purpose of Section 10(a)(3) is to *force the Commission to act within the statutory deadline and provide a “fully considered analysis.”*⁵² Here, the Commission’s protestations that a “more complete record” is necessary ring the same dissonant note, and the Court has previously rejected a similar rationale. The Commission has pointed to no aspect of the Petition that fails on the merits, instead opting to contrive procedural objections under the “public interest analysis” rubric to avoid making a substantive decision. This decision must be reconsidered.

The Commission’s position essentially means that NetfreeUS’s efforts to expedite broadband deployment have been deemed too hasty and “ill-considered.”⁵³ In fact, the Commission is under a statutory mandate to “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.”⁵⁴ The Petition and the Application propose just such a means to accelerate widespread broadband deployment, but the Commission failed to discuss much less contradict these benefits. The public and potential

⁵¹ *AT&T v. FCC*, 452 F.3d 830, 834-835 (D.C. Cir. 2006).

⁵² *Id.* at 836.

⁵³ *Order* at ¶ 9

⁵⁴ Petition at 18; 47 U.S.C. § 157(note) (emphasis added).

competing applicants have had ample opportunity to submit comments or competing applications, and commenters and applicants have had a full and fair opportunity to make objections to any proposed service rules. To invoke this supposed reason now strains credulity.

The *Order* essentially announces a policy decision that the Commission will no longer consider grant of an application unless licensing and service rules are in place. The Commission blindly states that this is “typically” the way its procedures work, even though several current radio services – such as Ka-Band Satellite Service and Local Multipoint Distribution Service – were adopted as a result of an application or waiver request filed by particular proponents in the absence of service rules for a given band.⁵⁵ FCC rules allow for other processes to assign licenses, an alternative the Commission failed to even discuss, much less attempt to distinguish.⁵⁶ Moreover, this purported reason for rejecting NetfreeUS’s Petition – an abstract need to adopt licensing and service rules – applied equally at the time the Commission agreed to accept M2Z’s application for filing in the first instance, yet the Commission did not choose at that time to dismiss either M2Z’s application or the M2Z Petition.

By definition, the relief sought by NetfreeUS is not “typical” and NetfreeUS has requested forbearance precisely because the “typical” procedures could in fact delay broadband deployment. The D.C. Circuit Court of Appeals has already warned the Commission that “Congress has established §10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different

⁵⁵ See, e.g., *Satellite Policy Branch Information: Ka-Band Satellite Applications Accepted for Filing; Request for Comment on Ka-Band Feeder Link Application*, 10 FCC Rcd 13753 (rel. Nov. 1, 1995) (announcing acceptance for filing of applications for authority to construct, launch and operate Ka-band satellite systems) (“*Ka-Band Public Notice*”); *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) (granting Hye Crest Management, Inc. a predecessor-in-interest to NetfreeUS affiliate 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).

⁵⁶ See, e.g., 47 C.F.R. § 1.935 (procedures for agreements to resolve mutual exclusivity subject to FCC approval).

regulatory mechanism.”⁵⁷ In 2001, the Court rejected the Commission’s effort to deny a forbearance petition based on the availability of an alternative regulatory mechanism that may have provided the relief sought in the petition. The Court held that the Commission is obligated to “fully consider” Section 10 petitions, even if an alternative mechanism for relief may be available.⁵⁸ Accordingly, the *Order* violates the APA by forgoing a decision on the merits of Petition in favor of vague promises to develop a “more complete record” to redress some unspecified deficiencies in what is already an extensive record in this docket.

For these reasons, the Commission must grant reconsideration of the *Order* and must grant the Petition.

II. THE COMMISSION ERRED IN DISMISSING THE APPLICATION.

In the *Public Notice*, the Commission stated that applications for the 2155-2175 MHz band “may be filed while the M2Z application is pending.”⁵⁹ On March 2, 2007, within 30 days from the release of the Public Notice, NetfreeUS filed the Application, proposing a free, nationwide, advertiser-supported “open network” wireless broadband service subject to a number of conditions and obligations demonstrating benefits to the public interest. In the *Order*, the Commission found the NetfreeUS Application to be acceptable for filing.⁶⁰ Other than a four-sentence summary of the Application, however, the Commission made no effort to address the merits of NetfreeUS’ proposal and found no procedural or substantive defect in the Application warranting dismissal -- it simply rejected the Application, stating that “the public interest is best

⁵⁷ See *AT&T Corp. v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) (granting petition for review of Commission’s denial of request for forbearance from dominant carrier regulation and finding, *inter alia*, that the although the petitioner could have sought relief via a Pricing Flexibility Order rather than forbearance, the availability of that independent avenue of relief was an insufficient basis for rejecting the forbearance petition).

⁵⁸ *Id.*

⁵⁹ *Public Notice* at 2.

⁶⁰ See *Order* at ¶ 30.

served by full consideration of the service rules and licensing mechanisms that would best promote the efficient and effective use of this spectrum.”⁶¹

This decision is erroneous for a number of reasons. First, the Commission improperly concluded that consideration of the Application involved “issues of *general* applicability” that warranted resolution through rulemaking rather than adjudication.⁶² In proposing a single license that would occupy the entire 2155-2175 MHz band, issues of general applicability that are inherently *prospective* are irrelevant to approval of a specific service proposal involving a single license; thus, there is no need for the Commission to conduct a lengthy rulemaking. By comparison, the rulemaking proceedings for the 700 MHz and AWS-1 bands involved the assignment of thousands of licenses with differing geographic areas and rules of prospective effect, and can be said to apply generally.

Second, the Commission made no effort to contradict certain of NetfreeUS’s showings that it satisfied Section 1.945(c).⁶³ It did not oppose NetfreeUS’s showings that grant of the application involves “no substantial and material questions of fact” or that NetfreeUS is “legally, technically, financially, and otherwise qualified” to hold the license.⁶⁴ Instead of analyzing these points, the Commission ignored the benefits of the Application and defaulted to its “typical” way of doing business – even though the specific circumstances do not lend themselves to such consideration.

Third, when warranted by the public interest, the Commission has processed applications before service rules were adopted. In a case remarkably similar to the proposed licensing of the 2155-2175 MHz band, prior to adopting service rules for the Ka-band Satellite Service, several

⁶¹ *Id.* at ¶ 29.

⁶² *Id.* at ¶ 28 (emphasis added).

⁶³ See Application at 23-27.

⁶⁴ See 47 C.F.R. §1.945(c).

parties filed an initial application to provide service using those frequencies. Thereafter, the Commission issued a public notice announcing a deadline for the filing of other applications for the band,⁶⁵ and then initiated a proceeding to adopt service and technical rules.⁶⁶ The licensing process ended *before* service and technical rules were adopted, and licensees understood that their authorizations were subject to the rules that would be adopted in the rulemaking proceeding.⁶⁷

The Commission could have and should have followed the same procedures here. In fact, because the Ka-band proceeding ultimately led to two separate processing rounds, a stronger case can be made that it involved “issues of general applicability” that would have been more appropriately addressed in a rulemaking proceeding. The Commission’s failure to adequately justify its decision contravenes the APA.

Fourth, while the Commission suggests that limiting its consideration to only the applications before it is not in the public interest because it “silences debate” on certain “technical, operational, regulatory, and licensing issues,”⁶⁸ it cites no issue that was not addressed in the applications or in the pleadings. In fact, the Application addressed all of the issues that the Commission claims would be better considered in a rulemaking proceeding, and

⁶⁵ See *Ka-Band Public Notice* (noting filing of applications by Hughes Communications Galaxy, Inc.; KaStar Satellite Communications, Inc.; Loral Aerospace Holdings, Inc.; PanAmSat Corporation; and Teledesic Corporation).

⁶⁶ *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 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Notice of Proposed Rulemaking, FCC No. 95-287, 11 FCC Red 53 (1995). Technical and service rules were adopted the next year. See *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 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Red 19005 (1996) (“28 GHz Band First Report and Order and FNPRM”).

⁶⁷ See, e.g., Hughes Communications Galaxy, Inc., *Order and Authorization*, 13 FCC Red 1351 (1997), modified by Hughes Communications Galaxy, Inc., *Order and Authorization*, 16 FCC Red 2470 (2001), further modified by Hughes Communications Galaxy, Inc., *Order and Authorization*, 16 FCC Red 12627 (2001) (1997 Order and Authorization conditioned on compliance with rules adopted in the 28 GHz Report and Order and FNPRM).

⁶⁸ Order at ¶ 29.

the record is replete with further discussion on these points.⁶⁹ NetfreeUS stated that a 20-MHz nationwide license should be assigned on an exclusive basis, a view that was opposed by parties to the proceeding.⁷⁰ NetfreeUS also proposed technical limits and showed that Part 27 rules were already in place regarding protection to and relocation of incumbents.⁷¹ The Application further proposed a ten-year license term with flexible use and “substantial service” performance obligations. Again, all of these points were in the record, the public had ample opportunity to review and respond to these proposals, and the record included significant debate on these and other issues. For the Commission to suggest that the public did not have an opportunity to participate in the consideration of the issues and applications conveniently ignores its statements in the *Public Notice* inviting comment and the extensive record of this proceeding showing that the authorization of a single, nationwide license for free wireless broadband service would promote the public interest.

Finally, the Commission did not, as it states, find “other flaws” in the Application that were discussed elsewhere in the *Order*.⁷² Paragraphs 14 and 15 relate solely to M2Z’s petition for forbearance under Section 7 of the Act, an argument that NetfreeUS did not make. Paragraphs 14 and 15 do not even mention NetfreeUS. In fact, the Commission devotes the bulk of the *Order* to M2Z’s Petition and M2Z’s application, while apparently treating NetfreeUS’s proposals as an afterthought and ignoring key aspects of those proposals.

The Commission failed to discharge its obligations to justify the dismissal of the Application as consistent with the public interest. It made no attempt to discuss the merits of the Application and the record demonstrating a full dialogue on the issues it presented, much less

⁶⁹ See *id.*

⁷⁰ See *id.* at ¶ 22 (noting that NextWave Broadband, Inc. sought a non-exclusive nationwide license and Open Range Communications, Inc. sought an exclusive license for designated rural communities).

⁷¹ See Application at 16-17.

⁷² *Order* at ¶ 29 citing paragraphs 11, 14 and 15 of the *Order*.

balance the public interest benefits of the proposals contained in the Application with the “typical” process of adopting licensing and service rules before acting on applications. The Commission thus should reconsider those aspects of the *Order* that dismissed its Application, and should reinstate the Application.

Conclusion

The foregoing demonstrates that the Commission erred in denying the Petition and in dismissing the Application. For those reasons, on reconsideration the Commission should grant the Petition and should reinstate the Application for further processing consistent with the procedures proposed in the Petition.

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