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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

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OCT 09 2007
FCC-MAILROOM

In the Matter of)
)
Applications for License and Authority to) WT Docket No. 07-16
Operate 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 RECONSIDERATION

Open Range Communications Inc., ("Open Range") by its attorneys, hereby petitions the Federal Communications Commission (the "Commission") to reconsider its order dismissing Open Range's Application for License to Construct and Operate Facilities for the Provision of Rural Broadband Services in the Frequency Range 2155-2175 MHz¹. For the reasons stated below, the Commission should reconsider and reverse its decision to dismiss the Open Range application. Alternatively, the Commission should clarify that, should any of the applications dismissed in the *Order* be reinstated, or otherwise considered by the Commission, the Open Range application will be reinstated and/or considered simultaneously therewith.

I. Introduction

On May 5, 2006, M2Z Networks (M2Z) filed an application seeking a nationwide license to operate in the 2155-2175 MHz band². M2Z indicated that its proposed network would provide wireless broadband services to up to 95% of the U.S. population. On February 16, 2007, the FCC's Wireless Telecommunications Bureau issued a *Public Notice* establishing a pleading cycle

¹ Applications for License and Authority to Operate in the 2155-2175 MHz Band, WT Docket 07-16 released August 31, 2007 (the "Order")

² Application of M2Z Networks, Inc., for license and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band ("M2Z Application").

with regard to the M2Z application, and its parallel forbearance petition. The Commission also invited the filing of applications by other parties³.

On March 2, 2007, Open Range, filed an application for authority to operate in the 2155-2175 MHz band. The Open Range application sought authority to provide wireless broadband services in 553 rural communities identified in the application. Open Range demonstrated that its application would serve the public interest by bringing wireless broadband services to a substantial number of unserved and underserved rural communities. Pleadings were filed regarding the M2Z application and subsequently regarding the other applications filed by various parties, including Open Range. No further proceedings were held on the Open Range application until the Commission's *Order* was released on August 31, 2007 dismissing the application without prejudice.

II. The Dismissal of the Open Range Application is Inconsistent with the Communications Act

Section 309(a) of the Communications Act provides that:

"...the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application and if the Commission upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

The Commission's *Order* dismissing the Open Range application acknowledges receipt of the Open Range application on March 2, 2007 and accepts the application for filing. The

³ See *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*, filed Sept. 1, 2006 ("M2Z Petition")

Commission's discussion in the *Order*, specifically directed at the Open Range application, consists of a single sentence and an attached footnote:

"Finally, Open Range Communications, Inc. seeks an exclusive license for "rural" regional anchor communities that have populations between 50,000 and 150,000

⁷⁹See Open Range Application at Annex A (lists the 553 rural communities that Open Range will serve through its initial build out), Annex B (lists the Commission-designated BTAs where those communities are located as well as additional rural areas of the United States that Open Range will serve following the initial build out) and Annex C (lists the Commission-designated BEAs where the communities in Annex A are located as well as additional rural areas of the United States that Open Range will serve following the initial build out). Open Range notes that it seeks licensed service areas consistent with the market designations that the Commission ultimately selects for this frequency band. See Open Range application at 1, n.2.⁴

Elsewhere in the *Order*, the Open Range application is included in listings with other applications. For example, at footnote 95, the Open Range application is listed as one of those for which M2Z sought dismissal. At footnote 99, the Open Range application is listed as one of those where the filing entity had also filed comments in a separate FCC rulemaking. Nowhere in the *Order*, however, does the Commission analyze the Open Range proposal nor does it purport to make public interest findings that would support specifically either grant or denial of the Open Range application, and yet the application was dismissed.

Section 309(d)(1) of the Act provides for the filing of petitions to deny regarding radio license applications. Such a petition was filed against the Open Range application by M2Z.⁵ The Commission made no findings regarding the arguments raised in the M2Z petition with

⁴ The Commission misstates the size of the communities identified in the Open Range application. The 553 Open Range communities have an average population of less than 10,000 persons.

⁵ *Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals*, filed March 26, 2007.

respect to Open Range. Section 309(e) provides that if a substantial and material question of fact is raised by a petitioner or otherwise and if the Commission is "unable to make the finding specified" in Section 309(a), then it shall "formally designate the application for hearing".

Here, although a petition was filed by M2Z against the Open Range application, the Commission did not analyze whether the petition raised facts that would preclude a public interest finding supporting grant of the application. Nor did the Commission designate the application for hearing because it was unable to make such a finding. In fact, the Commission made no findings specifically with regard to the Open Range application anywhere in its *Order*, and yet the application was dismissed.

Similarly, the Commission did not seek to determine whether the Open Range application was in fact mutually exclusive with any other application pending with regard to the 2155-2175 MHz band. Open Range made the point that because M2Z proposed service to up to 95% of the U.S. population and because the Open Range application covered only approximately 6% of the U.S. population (and was limited to rural areas), it was not clear whether the applications were in fact mutually exclusive⁶. Again, the Commission did not analyze this factor nor seek to determine whether mutual exclusivity actually existed.

Although the Commission has plenary authority to regulate radio licensing, this authority must be exercised in accordance with the Communications Act and the Administrative Procedure Act. The Commission accepted the Open Range application for filing, but dismissed it without making any specific findings regarding the application. Similarly, the Commission received a Petition to Deny filed against the Open Range application but did not analyze the Petition or the

⁶ See *Opposition of Open Range Communications to Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals*, filed April 10, 2007 at 4 n.6, 15.

arguments therein, nor did it determine that the Petition raised substantial and material questions of fact precluding a grant of the application. The Commission may not simply dismiss an application while making no findings regarding the application whatsoever and because it has done so it must reverse its action and reinstate the Open Range application.

III. The Commission Failed to Explain the Effect of its Dismissal Without Prejudice

The Commission's ordering clause respecting the Open Range application provides as follows:

"It is further ordered that the applications for license and authority to operate in the 2155-2175 MHz band filed by M2Z Networks, Inc. on May 5, 2006 and by ComNet Wireless LLC, McElroy Electronics Corp., NetFree U.S., LLC, Next Wave Broadband, Inc., and Open Range Communications, Inc., each on March 2, 2007 and by Power Stream Corporation on March 15, 2007 are dismissed without prejudice."

Nowhere in the Commission's *Order* does it explain the effect of a dismissal without prejudice in this context. The Commission does not suggest that the dismissed applications will be reinstated at a later time nor does it indicate that for any purpose the applications remain pending. M2Z has already challenged the Commission's *Order* in the Court of Appeals. Other parties may challenge the *Order* in court or before the Commission. One or more of those challenges may lead to the reinstatement of a party's application. If that occurs, then the Open Range application should be reinstated as well. Alternatively, the Open Range application should be reinstated and remain pending for the duration of the rulemaking that the Commission promised in its *Order*.

Because the Commission does not specify what effect is intended by its dismissal without prejudice, Open Range seeks reconsideration and reversal of the Commission's action so that the

Open Range application will remain pending should the Commission or the courts make a decision leading to reinstatement of any of the dismissed applications.

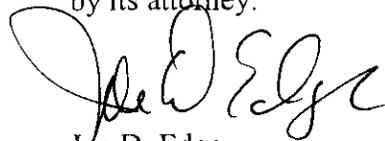
IV. Conclusion

The Commission dismissed the Open Range application without making any Open Range-specific findings regarding the application. Furthermore, the Commission dismissed the application without prejudice without explaining the purpose and effect of such an action. Open Range seeks reconsideration of the Commission's action and reinstatement of its dismissed application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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