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Federal Communications Commission
Office of the Secretary

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

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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

COMMENTS ON PETITION FOR RECONSIDERATION

NetfreeUS, LLC (“NetfreeUS”), by counsel, hereby submits comments regarding the Petition for Reconsideration (“MEC Petition”) filed by McElroy Electronics Corporation (“MEC”) in connection with the Commission’s August 31, 2007 *Order*¹ that dismissed applications seeking authority to provide services in the 2155-2175 MHz band, including applications filed by NetfreeUS (the “NetfreeUS Application”) and MEC (the “MEC Application”). The MEC Petition requests reinstatement *nunc pro tunc* of the MEC Application, stating that the dismissal violated Commission procedures and that MEC has an “equitable interest” in enforcement of a March 2, 2007 cut-off date for applications filed for this spectrum. As described below, to the extent that the Commission declines to grant NetfreeUS’s Petition for Partial Reconsideration² of the *Order* and thereby upholds the denial of NetfreeUS’s March 2,

¹ *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*”).

² See Petition for Partial Reconsideration of NetfreeUS LLC, WT Docket Nos. 07-16 and 07-30 (filed Oct. 1, 2007) (“*Petition for Partial Reconsideration*”).

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2007 Petition for Forbearance,³ then if the Commission grants the MEC Petition, it must also reinstate the NetfreeUS Application because the two parties are similarly situated.⁴

Discussion

On January 31, 2007, the Commission issued a *Public Notice*⁵ announcing that it had accepted for filing the application filed by M2Z Networks, Inc. (“M2Z”) for a license to provide wireless broadband service in the 2155-2175 MHz band. The *Public Notice* announced that “additional applications for spectrum in [the 2155-2175 MHz] band may be filed while the M2Z application is pending.”⁶ In reliance on the *Public Notice*, NetfreeUS expended significant time and resources to prepare the NetfreeUS Application, which it filed on March 2, 2007. NetfreeUS proposed a free, nationwide, advertiser-supported “open network” wireless broadband service subject to a number of conditions and obligations demonstrating benefits to the public interest. The NetfreeUS Application was one of several applications, including the MEC Application, submitted by March 2, 2007.

Concurrently with the NetfreeUS Application, NetfreeUS submitted the Forbearance Petition, which proposed an alternative to awarding licenses by competitive bidding under

³ See Petition for Forbearance of NetfreeUS, LLC, WT Docket Nos. 07-16 & 07-30 (filed Mar. 2, 2007) (“Forbearance Petition”).

⁴ Except as specified herein, NetfreeUS takes no position at this time regarding the rights of any other applicants whose applications were dismissed in the *Order*. NetfreeUS has stated that M2Z Networks, Inc. did not meet the standard for grant of M2Z’s application under Section 7 of the Communications Act of 1934, as amended, 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), and on October 10, 2007, NetfreeUS filed a Notice of Intention to Intervene in that case. Additionally, NetfreeUS takes no position with respect to the Petition for Reconsideration filed by Open Range Communications, Inc. See *Applications for License and Authority to Operate in the 2155-2175 MHz Band; Petitions for Forbearance Under 47 U.S.C. § 160* Petition for Reconsideration of Open Range Communications, Inc. WT Docket Nos. 07-16 and 07-30 (filed Oct. 1, 2007).

⁵ *Public Notice*, “Wireless Telecommunications Bureau Announces that M2Z Networks, Inc.’s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing,” DA 07-492, rel. Jan. 31, 2007 (“*Public Notice*”).

⁶ *Public Notice* at 2.

Section 309(j) of the Act.⁷ The Forbearance Petition proposed a process, based on Commission precedent, whereby the Commission would establish a cut-off date by May 1, 2007 for accepting applications and would thereafter issue a public notice listing all applicants deemed to have submitted substantially complete applications and to have satisfied the Commission's threshold eligibility requirements. The Commission would announce by public notice a fixed settlement period during which applicants could jointly propose engineering amendments or other proposals to remove any conflicts that would otherwise result in all or some of the applications being declared mutually exclusive. The Commission could then act on joint requests for approval of settlement plans, or if there was no acceptable agreement, the Commission could proceed without delay to auction the spectrum or to assign the spectrum by other means.⁸

In the *Order*, the Commission found the NetfreeUS Application to be acceptable for filing.⁹ Yet the *Order* dismissed the NetfreeUS Application and the other competing applications, stating that "the public interest is best served by first seeking public comment on how the band should be used and licensed. We therefore dismiss all pending applications and related pleadings, without prejudice, in recognition of our plan ... to expeditiously initiate a rulemaking process to consider service rules for the 2155-2175 MHz band."¹⁰ The *Order* also denied the NetfreeUS Forbearance Petition. As noted above, NetfreeUS has sought partial reconsideration of the *Order*.

In the MEC Petition, MEC requests reinstatement of the MEC Application and argues that the issuance of the *Public Notice* triggered a requirement that applications filed in response to the *Public Notice* "would not be dismissed pending the completion of a rulemaking to

⁷ 47 U.S.C. §309(j).

⁸ See Forbearance Petition at 18-19.

⁹ See *Order* at ¶ 30.

¹⁰ *Id.* at ¶1.

promulgate processing rules.”¹¹ MEC also asserts that the *Public Notice* triggered a 30-day notice and cut-off filing period under Section 22.131 of the Commission’s Rules,¹² and that the Commission’s dismissal of the MEC Application violated MEC’s “equitable interest in the enforcement of the cut-off rule” and the principle that the Commission is “bound to follow its rules.”¹³ MEC further argues that “MEC and four other applicants diligently filed mutually exclusive applications prior to the March 2, 2007 cut-off date initiated by” the *Public Notice* and that these applicants, including NetfreeUS, are entitled to participate with M2Z in an auction for the 2155-2175 MHz spectrum.¹⁴

Granting *nunc pro tunc* reinstatement of the MEC Application obviously would impact NetfreeUS, which is similarly situated to MEC. The *Order* dismissed all applications without mention of any specific deficiencies, despite finding the applications “acceptable for filing.”¹⁵ MEC argues that the *Order* would allow latecomers to obtain rights to participate in competitive bidding for the 2155-2175 MHz spectrum, despite the existence of cut-off rules. As noted above, NetfreeUS’s Forbearance Petition proposed new application processing procedures and requested that the Commission adopt a new cut-off date for parties to submit applications in accordance with those procedures. In the alternative, if the Commission declines to reverse its denial of the NetfreeUS Forbearance Petition on reconsideration, NetfreeUS would be entitled to *nunc pro tunc* reinstatement to the same extent as MEC. Like MEC, NetfreeUS acted diligently to prepare and file its application within 30 days of the issuance of the *Public Notice*, with a

¹¹ MEC Petition at 7.

¹² *Id.* at 8. MEC argues that Part 22 applies to Advanced Wireless Services in the 2155-2175 MHz band through operation of 47 C.F.R. §22.99 and §27.3(f).

¹³ *Id.* at 8-9; see also *McElroy Electronics Corp. v. FCC*, 88 F.3d 248, 257 (D.C. Cir. 1996); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993).

¹⁴ MEC Petition at 8. As noted herein, NetfreeUS’s Forbearance Petition proposed an alternative to awarding spectrum by competitive bidding.

¹⁵ *Order* at ¶30.

significant expenditure of time and resources.¹⁶ NetfreeUS also shares MEC's legitimate expectation that the Commission will enforce its processing rules.¹⁷ Accordingly, should the Commission reinstate the MEC Application *nunc pro tunc*, NetfreeUS is entitled to the same relief for the NetfreeUS Application.¹⁸

As MEC states and NetfreeUS agrees, the *McElroy* decisions recognize the equitable interests that diligent applicants have in enforcement of cut-off rules. Nevertheless, the Commission cites the *Bachow*¹⁹ case in support of its decision to dismiss all the pending applications for 2155-2175 MHz licenses in light of the Commission's stated desire to issue a Notice of Proposed Rulemaking to consider service rules for the band. However, *Bachow* is inapposite. In that case, the D.C. Circuit Court of Appeals upheld the Commission's decision not to process pending mutually exclusive 39 GHz applications where the Commission was transitioning from a comparative application process to a competitive bidding process for awarding that spectrum. The Court in *Bachow* found that the Commission's decision was made without violating Commission rules, but MEC argues that the Commission did violate Commission rules and procedures in dismissing applications filed in response to the *Public Notice*.²⁰ Moreover, the Court in *Bachow* distinguished *McElroy* on the grounds that the former cases involved cellular applications filed even before the Commission had "formulated rules for those licenses," while *Bachow* involved a transition between licensing regimes.²¹ Of course, the Commission's desire to adopt service rules that don't yet exist for the 2155-2175 MHz bands is precisely the *Order's* stated reason for dismissing all of the applications filed in response to the

¹⁶ MEC Petition at 2-3

¹⁷ *Id.* at 8.

¹⁸ See, e.g., *Melody Music v. FCC*, 345 F.2d 730 (1965) (requiring adequate Commission explanation for treating similarly situated parties differently).

¹⁹ *Bachow Communications v. FCC*, 237 F.3d 683 (D.C. Cir. 2001).

²⁰ See MEC Petition at 7-9.

²¹ See *Bachow*, 237 F.3d at 688.

Public Notice. Thus, the instant facts are governed by the “equitable interests” precedent set by the *McElroy* decisions, both with respect to the MEC Application and the NetfreeUS Application.

Conclusion

For the foregoing reasons, to the extent that the Commission declines to grant the NetfreeUS Petition for Partial Reconsideration and Forbearance Petition and MEC is granted reinstatement of the MEC Application *nunc pro tunc*, NetfreeUS requests *nunc pro tunc* reinstatement of the NetfreeUS Application for further processing.

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October 16, 2007

Certificate of Service

I, Kenneth B. Wolin, a legal assistant with the law office of Rini Coran, PC, hereby certify that on this 16th day of October, 2007, I caused a copy of the foregoing Comments on Petition For Reconsideration of NetfreeUS, LLC to be delivered by First-Class United States mail to the following, unless otherwise noted:

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