

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
SEP 11 2007
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M2Z NETWORKS, INC.

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FILED SEP 11 2007
CLERK

Appellant,

v.

07-1360

FEDERAL COMMUNICATIONS
COMMISSION,

Appellee.

NOTICE OF APPEAL

Pursuant to 47 U.S.C. § 402(b)(1) and Federal Rule of Appellate Procedure 15(a), M2Z Networks, Inc. ("M2Z") hereby appeals from the August 31, 2007 decision and order of the Federal Communications Commission ("FCC") styled *In the Matter of Applications for License and Authority to Operate in the 2155-2175 MHz Band, Petitions for Forbearance Under 47 U.S.C. § 160*, WT Docket Nos. 07-16 & 07-30, Order, FCC 07-161 (adopted and released Aug. 31, 2007) ("Order"). ^{1/} A copy of the Order is attached hereto.

On May 5, 2006, M2Z filed with the FCC an application for a license to operate a wireless broadband network in the 2155-2175 MHz band. M2Z proposed to use that spectrum to offer a nationwide broadband service that would be free of charge and family-friendly (by blocking access to indecent and obscene material). In 2003, the FCC reallocated the 2155-2175 MHz band, which is unpaired commercial spectrum, to fixed and mobile advanced wireless services and sought comments for the highest and best new use of the spectrum. Because the

^{1/} To the extent that any decision or order of the FCC that M2Z seeks to challenge in this Court must be raised on a petition for review under 47 U.S.C. § 402(a) rather than in an appeal under § 402(b), M2Z hereby requests that the Court treat this notice of appeal, or so much of it as is necessary, as a petition for review.

FCC has not promulgated specific service and technical rules and assignment mechanisms for this spectrum, use of the band is governed by 47 U.S.C. §§ 307 and 309 and 47 C.F.R.

§ 1.945(b)-(c). The FCC accepted M2Z's application for filing under the authority of § 309. Citing the significant public interest benefits its license would achieve, M2Z on September 1, 2006, filed a petition for forbearance pursuant to 47 U.S.C. § 160(c) and 47 C.F.R. § 1.53.

In the Order, the FCC dismissed without prejudice, and in so doing effectively denied, M2Z's license application. The FCC in the Order also expressly denied M2Z's petition for forbearance.

M2Z is entitled to relief from this Court for several reasons, including but not limited to the following:

(1) In concluding that forbearance was not in the public interest, and on that basis denying M2Z's petition for forbearance, the FCC, in violation of 47 U.S.C. § 160(b), failed adequately to consider—indeed, failed to consider at all—whether forbearance would promote competitive market conditions, including the extent to which forbearance would enhance competition among telecommunications service providers.

(2) The FCC also violated 47 U.S.C. § 160(a)-(c) by failing to make a substantive decision on whether granting M2Z's petition for forbearance would be in the public interest. Instead of making a substantive decision, the FCC concluded that it would be in the public interest to commence a rulemaking, *i.e.*, to go through still more process.

(3) The Order rests in part on a legally erroneous predisposition to award spectrum through a competitive bidding process. Under 47 U.S.C. §§ 309(j)(1), 309(j)(3), and 309(j)(6)(E), however, the FCC has a legal duty to avoid mutual exclusivity—and hence auctions—if another method of assigning spectrum would better serve the public interest.

(4) The FCC violated 47 U.S.C. § 157 by wrongly concluding that M2Z is not offering a “new technology or service”; by failing to place on the opponents of M2Z’s proposal the burden of demonstrating that the proposal is not in the public interest, as § 157(a) requires; by failing to give any legal effect to the burden of proof provision in § 157(a); by failing to make a public interest determination within one year, as § 157(b) requires; and by failing to conclude that M2Z’s proposal is in the public interest. Because the FCC failed to make the statutorily-required public interest determination within one year after M2Z in its license application presented its proposal to the FCC, the proposal should be deemed to be in the public interest as a matter of law.

(5) The FCC erred by failing to conclude pursuant to 47 U.S.C. § 307(a) that M2Z’s license application would serve the public convenience, interest, or necessity; by failing even to determine whether issuing M2Z a license would serve the public convenience, interest, or necessity; and by failing to issue M2Z’s requested license.

(6) The Order is arbitrary, capricious, an abuse of discretion, not in accordance with law, contrary to constitutional right, in excess of statutory authority and limitations, without observation of procedures required by law, and otherwise violative of 5 U.S.C. § 706. The Order violates M2Z’s rights under the Due Process Clause of the Fifth Amendment.

Accordingly, M2Z respectfully requests that this Court hold unlawful and set aside the Order, including all actions, findings, and conclusions therein; compel the FCC to grant M2Z the license the FCC unlawfully withheld; and grant M2Z all other just and proper relief.

Respectfully submitted,



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September 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2007, a true copy of the foregoing Notice of Appeal was served by overnight delivery upon each of the following:

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