

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

In the Matter of
FlexCom Mobile, LLC

SECOND ORDER ON RECONSIDERATION

Adopted: February 27, 2007

Released: February 27, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this Order, we deny the August 19, 2002 Petition for Further Reconsideration ("Further Recon Petition"), filed on behalf of FlexCom Mobile, LLC ("FlexCom").

II. BACKGROUND

2. In 2000, the Commission adopted rules that for the first time established procedures for granting initial licenses for using frequencies from 24.25 to 24.45 GHz and 25.05 to 25.25 GHz ("24 GHz band") to provide fixed services, the type of license sought by FlexCom.

1 Petition for Further Reconsideration filed on August 19, 2002 ("Further Recon Petition").

2 See Letter to Thomas J. Dougherty, Jr., counsel for FlexCom Mobile, LLC, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau dated July 18, 2002, 17 FCC Rcd 13878 (2002) ("Division Letter").

3 Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934 (2000) ("24 GHz Report and Order"); see Further Recon Petition at 2.

4 See Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service, Order, 12 FCC Rcd 3471, 3473 (1997) ("DEMS Relocation Order"). Before that time, the 24 GHz band had been allocated for radionavigation services. However, the Commission never issued any 24 GHz radionavigation services licenses to non-Government users. See Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, Notice of Proposed Rulemaking, 14 FCC Rcd 19263, 19269 (1999) ("24 GHz NPRM"). In 1997, the National Telecommunications and Information Administration ("NTIA") deleted the co-allocation for the Government radionavigation service in the 24 GHz band to permit relocation of DEMS from the 18 GHz band, as part of the effort to resolve interference issues in the 18 GHz band. See DEMS Relocation Order, 12 FCC Rcd at

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existing 18 GHz DEMS licensees and did not authorize any new parties to be licensed in the 24 GHz band.<sup>5</sup> In 2000, in the *24 GHz Report and Order*, the Commission adopted service rules for the 24 GHz band to govern both relocated incumbent 18 GHz DEMS licensees and new licensees.<sup>6</sup> The Commission permitted “open eligibility for 24 GHz band licenses” by making parties other than existing 18 GHz DEMS licensees eligible for 24 GHz licenses.<sup>7</sup> In addition, the Commission decided to adopt a geographic licensing approach, consistent with its tentative conclusion in the *24 GHz NPRM* to do so.<sup>8</sup>

3. In the *24 GHz Report and Order*, the Commission also adopted rules governing applications for new licenses in the band. The Commission concluded that pursuant to the Communications Act, in light of its decision to establish a geographic area licensing approach under which mutually exclusive applications may be filed, “mutually exclusive initial applications for the 24 GHz band must be resolved through competitive bidding.”<sup>9</sup> Accordingly, the Commission stated that it would employ the Part 1, Subpart Q competitive bidding rules “governing . . . application issues, . . . procedures and timing issues,” and various other matters.<sup>10</sup>

4. The *24 GHz Report and Order* also adopted Sections 101.531 and 101.537, respectively, providing that “[a]pplications for initial authorizations of 24 GHz facilities are filed on FCC Form 175 in accordance with . . . subpart Q of part 1” and that “[m]utually exclusive initial applications for licenses in the 24 GHz band are subject to competitive bidding procedures.”<sup>11</sup> The general competitive bidding rules in Part 1, Subpart Q have been in place since 1994.<sup>12</sup> Those rules include Section 1.2105(a), which provides that short-form applications to participate in an auction of licenses (FCC Form 175) “will be due: (i) [o]n the date (s) specified by public notice; or (ii) [i]n the case of application filing dates which occur automatically by operation of law (*see, e.g.*, 47 CFR 22.901) on a date specified by public notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.”<sup>13</sup> Pursuant to that rule, the Commission routinely has opened auction-specific windows for FCC Form 175’s to be filed in every Commission auction of wireless licenses since the inception of the competitive bidding program.

5. By letter dated December 4, 2000, the date that the foregoing rules went into effect for the 24 GHz band, FlexCom sent the former Auctions and Industry Analysis Division (“Division”) of the

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3473. The Commission deleted the non-Government radionavigation service allocations in the 24 GHz band in 2000. *24 GHz Report and Order*, 15 FCC Rcd at 16941.

<sup>5</sup> *See DEMS Relocation Order*, 12 FCC Rcd at 3484 (adopting 47 C.F.R. § 101.147(r)(9) and making the 24 GHz band “available only to existing 18 GHz DEMS licensees”).

<sup>6</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16936.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, 15 FCC Rcd at 16942.

<sup>9</sup> *Id.*, 15 FCC Rcd at 16964-65.

<sup>10</sup> *Id.*

<sup>11</sup> 47 C.F.R. §§ 101.531 and 537 (2001). In a subsequent order making conforming edits to rules in various services subject to competitive bidding, the Wireless Telecommunications Bureau deleted Section 101.531 as unnecessary and made minor changes to the language of Section 101.537. *See* Amendment of Parts 1, 21, 22, 24, 25, 27, 73, 74, 80, 90, 95, 100, and 101 of the Commission’s Rules – Competitive Bidding, *Order*, 17 FCC Rcd 6534, 6537-39 (WTB 2002) (“*Competitive Bidding Conforming Edits Order*”).

<sup>12</sup> *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rd 2348 (1994).

<sup>13</sup> 47 C.F.R. § 1.2105(a).

Wireless Telecommunications Bureau (“Bureau”) an FCC Form 175 Application to Participate in an FCC Auction, or a short-form application, seeking 24 GHz Service licenses.<sup>14</sup> The Division returned FlexCom’s short-form application as premature, as no filing window for short-form applications seeking 24 GHz Service licenses existed pursuant to Section 1.2105 at the time.<sup>15</sup> FlexCom sought reconsideration of the Division’s action. FlexCom contended that the 24 GHz channels listed in its short-form application became available on December 4, 2000, when the rules for the 24 GHz Service became effective.<sup>16</sup>

6. After reviewing FlexCom’s argument that the effective date of the rules for the 24 GHz Service opened a window for filing short-form applications, the Division concluded it would have been contrary to the Commission’s rules to process FlexCom’s short-form application before the Commission issued a public notice pursuant to Section 1.2105(a) specifying the period for filing such applications.<sup>17</sup> The Division noted that the Commission had provided in the *24 GHz Report and Order* that the competitive bidding rules, including Section 1.2105(a), would apply to applications for licenses in the 24 GHz band.<sup>18</sup> Pursuant to that rule, the Commission will specify by public notice when short-form applications may be filed.<sup>19</sup> However, the Commission did not specify in the *24 GHz Report and Order* that such applications could be filed on the effective date of the new rules.<sup>20</sup> Consequently, pursuant to the applicable rules, FlexCom’s short-form application was premature.<sup>21</sup> The Division observed that, under Section 1.2105, submitting an application does not create a window for filing one.<sup>22</sup>

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<sup>14</sup> According to FlexCom’s cover letter and accompanying short-form application, FlexCom sought licenses to provide 24 GHz Radio Service on all 24 GHz channels in nearly half of the relevant geographic areas. Letter from Russ Taylor, counsel for FlexCom Mobile, LLC, to the Federal Communications Commissions, dated December 4, 2000 (transmitting short-form application).

<sup>15</sup> Letter from Kathryn M. Garland, Chief, Auctions Operations Branch, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau, to Russ Taylor, counsel for FlexCom, dated December 8, 2000.

<sup>16</sup> Petition for Reconsideration filed by Thomas J. Dougherty, Jr., Russ Taylor, counsel for FlexCom, dated December 22, 2000 (“Petition for Reconsideration”).

<sup>17</sup> *Division Letter*, 17 FCC Rcd 13878, 13880.

<sup>18</sup> *Division Letter*, 17 FCC Rcd at 13879; *24 GHz Report and Order*, 15 FCC Rcd at 16941-16942, 16965. The Part 1 competitive bidding rules are codified at 47 C.F.R. §§ 1.2101 *et seq.* Pursuant to those rules, on March 12, 2004, consistent with Section 1.2105(a)(i), the Commission, through the Wireless Telecommunications Bureau, issued a Public Notice announcing that short-form applications for initial 24 GHz licenses could be “filed at any time beginning at noon ET on May 25, 2004, until 6:00 p.m. ET on June 4, 2004.” See Auction of 24 GHz Service Licenses Scheduled for July 28, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Auction Procedures, *Public Notice*, 19 FCC Rcd 4355 (2004) (“*Auction No. 56 Procedures Public Notice*”) at 15. FlexCom did not file an application. See 24 GHz Service Spectrum Auction, Status of FCC Form 175 Applications to Participate in the Auction, *Public Notice*, 19 FCC Rcd 10723 (2004) (“*Auction No. 56 Status Public Notice*”). After reviewing the applications filed, the Commission concluded that three qualified applicants had filed mutually exclusive applications for all the licenses available in the auction. See 24 GHz Service Spectrum Auction, 3 Qualified Bidders, *Public Notice*, 19 FCC Rcd 12,906 (2004) (“*Auction No. 56 Qualified Bidders Public Notice*”), Attachment B (listing licenses selected in the applications of three qualified bidders). Accordingly, the Commission conducted an auction, accepting competing bids for the licenses beginning on Wednesday, July 28, 2004. See *Auction No. 56 Qualified Bidders Public Notice*, 19 FCC Rcd 12,906 at 1. On August 2, 2004, the Commission announced the winning bidders in the auction. See 24 GHz Service Spectrum Auction Closes, *Public Notice*, 19 FCC Rcd 12,906 (2004) (“*Auction No. 56 Closing Notice*”).

<sup>19</sup> 47 C.F.R. § 1.2105(a).

<sup>20</sup> *Division Letter*, 17 FCC Rcd at 13879; see *24 GHz Report and Order*.

<sup>21</sup> *Division Letter*, 17 FCC Rcd at 13879. The Division also noted that FlexCom entered “N/A” in the space on the application where an Auction Number was required, acknowledging that no auction had yet been scheduled. In

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7. In its Further Recon Petition, FlexCom argues that its application was timely pursuant to rules predating the *24 GHz Report and Order*.<sup>23</sup> More particularly, FlexCom asserts in its Further Recon Petition that its application was seeking “Private Operational Fixed Microwave Service (‘POFMS’) licenses” in the 24 GHz band.<sup>24</sup> FlexCom now contends that its application for licenses in the 24 GHz band should have been governed by Commission rules for determining when competing applications for POFMS licenses are entitled to a comparative hearing if mutually exclusive. FlexCom claims that its purported POFMS application triggered a one-day window for the filing of competing applications pursuant to Sections 1.227(b)(4) and 101.45(d) of the Commission’s rules.<sup>25</sup> Those particular rules provide that a POFMS application must be filed within one day of a mutually exclusive application in order to be entitled to a comparative hearing with the other application.

### III. DISCUSSION

8. We here deny FlexCom’s Petition for Further Reconsideration. In the *24 GHz Report and Order*, the Commission provided for the first time for new licenses for fixed services to be issued in the 24 GHz band. Following through on its proposal in the *24 GHz NPRM* to “auction new licenses in the 24 GHz band,”<sup>26</sup> the Commission provided that new licenses would be made available through its competitive bidding procedures.<sup>27</sup> The *24 GHz NPRM* and the *24 GHz Report and Order* make no reference to even the possibility of using comparative hearings to select among mutually exclusive license applications, which would have been required if the Commission had intended that applications might be governed by the rules on which FlexCom relies.<sup>28</sup> As a result, and for the additional reasons detailed below, we conclude again that the FlexCom application was correctly returned under the *24 GHz Report and Order* as premature under the rules regarding the assignment of new licenses in the 24 GHz Service.

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addition, the Division stated that FlexCom filed its short-form application manually, even though the Commission’s Part 1 rules require that short-forms be filed electronically. It emphasized that the Commission has not waived the electronic filing requirement for the 24 GHz Service, and that FlexCom’s short-form application was unacceptable for filing on this ground as well. *Division Letter*, 17 FCC Rcd at 13879.

<sup>22</sup> *Division Letter*, 17 FCC Rcd at 13880; see Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2376 (1994) (“Applications submitted before release of a Public Notice announcing an auction for particular license(s), or before the opening date of the filing window specified therein, will be returned as premature.”)

<sup>23</sup> Further Recon Petition at 2.

<sup>24</sup> Further Recon Petition at 2. We note that the rules for Private Operational Fixed Point-to-Point Microwave Services, 47 C.F.R. §§ 101.601, et seq., apply across a range of frequencies available for fixed services. See 47 C.F.R. § 101.603. We also note that Further Recon Petition is the first instance in which FlexCom has asserted expressly that it was seeking POFMS licenses in its application and not simply 24 GHz Service licenses.

<sup>25</sup> Further Recon Petition at 3.

<sup>26</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16938.

<sup>27</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16941-44, 16996-66.

<sup>28</sup> Further Recon Petition at 2(citing 47 C.F.R. §§ 1.227(b)(4) and 101.45(d)). Section 1.227 is a rule for determining which applications may be consolidated for a single comparative hearing, when such a hearing is necessary to resolve mutually exclusive applications. 47 C.F.R. § 1.227. Section 1.227(b)(4) in particular provides that with respect to applications in the POFMS “mutual exclusivity will occur if two or more acceptable applications that are in conflict are filed on the same day.” 47 C.F.R. § 1.227(b)(4). Section 101.45(d) affirms that “[p]rivate operational fixed point-to-point microwave applications for authorization under this part will be entitled to comparative consideration with one or more conflicting applications in accordance with the provisions of § 1.227(b)(4) of this chapter.” 47 C.F.R. § 101.45(d). We further note that the *24 GHz NPRM* and the *24 GHz Report and Order* make no mention of the Private Operational Fixed Microwave Service or whether 24 GHz licenses might be subject to the rules for that Service.

9. Contrary to FlexCom's first more detailed argument, Section 101.45(d)'s recognition of the continuing utility and applicability of Section 1.227(b)(4) after the advent of Commission auction authority does not dictate that the Commission made applications for new licenses in the 24 GHz Service subject to pre-existing POFMS application processes.<sup>29</sup> Those rule provisions continue to be needed for the multiplicity of other bands in which new POFMS licenses continue to be available.<sup>30</sup> Those provisions do not override the express decisions by the Commission in the *24 GHz Report and Order* "that mutually exclusive initial applications for the 24 GHz band must be resolved through competitive bidding."<sup>31</sup>

10. FlexCom argues that the *24 GHz Report and Order* did not "state that [short-form] applications will be received only in a Commission-announced filing window or that [Section] 1.2105 would apply to these applications."<sup>32</sup> There was no need for any such statement, given effectiveness of the Part 1, Subpart Q rules, including Section 1.2105, and the well-established implementation of those rules since the beginning of the auctions program.<sup>33</sup> The Commission unambiguously adopted the competitive bidding rules of Part 1, Subpart Q, in the *24 GHz Report and Order*.<sup>34</sup> Indeed, in the *24 GHz Report and Order*, the Commission adopted Section 101.531, which provided that "[a]pplications for initial authorization of 24 GHz facilitates are filed on FCC Form 175 in accordance with . . . Subpart Q of Part 1."<sup>35</sup> The text of the *24 GHz Report and Order* and Section 101.531 make any further explicit statements regarding filing windows unnecessary.<sup>36</sup>

11. FlexCom reads portions of rules adopted in the *24 GHz Report and Order* as indicating that the Commission intended to preserve a pre-existing regulatory scheme for POFMS licenses.<sup>37</sup>

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<sup>29</sup> See Further Recon Petition at 2, n.5.

<sup>30</sup> See, generally, 47 C.F.R. 101.601, et seq. (regarding POFMS).

<sup>31</sup> *24 GHz Report and Order* at 16965. Section 101.45(d) was adopted four years prior to the *24 GHz Report and Order*. See In the Matter of Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, 11 FCC Rcd 13449 (1996) (1996 Commission *Report and Order* adopting 47 C.F.R. § 101.45(d)).

<sup>32</sup> Further Recon Petition at 3.

<sup>33</sup> FlexCom suggests that Section 1.2105 applies only after mutually exclusive applications have been filed and competitive bidding will occur, asserting that "[i]f there is no auction, this rule [Section 1.2105] is meaningless." Further Recon Petition at 3. The plain language of Section 1.2105, however, establishes when "[a]ll short-form applications will be due[.]" 47 C.F.R. § 1.2105. The fact that the rule discusses filing as a prerequisite to bidding does not mean that the rule does not apply until mutual exclusivity exists.

<sup>34</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16965. Indeed, the Balanced Budget Act of 1997 required the use of competitive bidding to resolve mutually exclusive applications in the 24 GHz Service. See *24 GHz Report and Order*, 15 FCC Rcd at 16964-65. Consequently, the Commission could not have applied the comparative hearing rules FlexCom invokes even had it desired to do so.

<sup>35</sup> 47 C.F.R. § 101.531 (2001). The Commission subsequently deleted Section 101.531 as unnecessary, given that Section 101.537 provides that "[t]he general competitive bidding procedures set forth in part 1, subpart Q of this chapter will apply unless otherwise provided in this subpart." 47 C.F.R. § 101.537; see *Competitive Bidding Conforming Edits Order*, 17 FCC Rcd at 6539.

<sup>36</sup> FlexCom also notes that Section 22.503(d) of the Commission's rules governing paging frequencies specifically provides that applications for paging geographic area authorizations are only accepted during filing windows, and that the Commission issues Public Notices announcing in advance the dates of the filing windows. Further Recon Petition at 5. FlexCom questions why Part 101 of the Commission's rules does not have a similar rule to Section 22.503(d). *Id.* As discussed *supra*, Commission's intent to apply Part 1's competitive bidding rules to applications for 24 GHz licenses is clearly stated in the *24 GHz Report and Order* and the rules adopted therein.

<sup>37</sup> Further Recon Petition at 2.

FlexCom quotes the changes the *24 GHz Report and Order* made to Section 101.147(r)(9) as “confirm[ing] the inapplicability of [Section] 1.2105(a)” to its application.<sup>38</sup> Prior to the *24 GHz Report and Order*, the first sentence of Section 101.147(r)(9) read: “The following frequencies are available for point-to-multipoint DEMS Systems, except that channels 35-39 are available only to existing 18 GHz DEMS licensees as of March 14, 1997.”<sup>39</sup> The *24 GHz Report and Order* modified the Section so that it read: “The following frequencies are available for point-to-multipoint DEMS Systems, except that channels 35-39 were available only to existing 18 GHz DEMS licensees as of March 14, 1997 and are now available by geographic area licensing in the 24 GHz Service to be used as the licensee desires.”<sup>40</sup> FlexCom asserts that making “now available” frequencies previously licensed to DEMS licensees preserves the regulatory scheme previously applicable to those DEMS licensees.<sup>41</sup>

12. The premise underlying this argument is flawed. The rule change adopted in the *24 GHz Report and Order* to Section 101.147(r)(9) was needed, and merely served, to implement the geographic area licensing regime adopted for the new licenses to be offered by the Commission pursuant to competitive bidding procedures in the 24 GHz band.<sup>42</sup> As described above, there was no pre-existing regulatory scheme for initial fixed services licenses in the 24 GHz band prior to the adoption of the *24 GHz Report and Order*.<sup>43</sup> Rather, the Commission had limited those frequencies “only to existing 18 GHz DEMS licensees as of March 14, 1997.” The general POFMS rules on which FlexCom relies never applied to initial licenses to use 24 GHz frequencies. The *24 GHz Report and Order* therefore cannot have intended to preserve the effectiveness of those rules with respect to licenses in the 24 GHz band. In any event, a full reading of the *24 GHz Report and Order* demonstrates that the changes made to Section 101.147(r)(9) do not relate to how parties may apply for licenses. The *24 GHz Report and Order* addressed in detail the history behind the Commission’s relocation of 18 GHz DEMS licensees to the 24 GHz band.<sup>44</sup> Considered in this context, the phrase “now available” in Section 101.147(r)(9) references the fact that frequencies previously available only to 18 GHz DEMS incumbents to facilitate their relocation now will be available to other qualified applicants.<sup>45</sup> In other words, the “availability” of frequencies refers to which parties may be licensees, not when or how they may apply for those frequencies. The Commission’s adoption of the Part 1 competitive bidding rules governing “application issues . . . and procedure and timing issues” for 24 GHz band licenses simultaneously with the changes to

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<sup>38</sup> Further Recon Petition at 3.

<sup>39</sup> See 47 C.F.R. § 101.147(r)(9) (2000) (adopted in 1997, in *DEMS Relocation Order*).

<sup>40</sup> See 47 C.F.R. § 101.147(r)(9) (2001) (adopted in 2000, in *24 GHz Report and Order*) (changes to prior wording underlined).

<sup>41</sup> Further Recon Petition at 3.

<sup>42</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16942.

<sup>43</sup> Consequently, there was no need for the Commission to adopt a freeze with respect to a pre-existing application process. See Further Recon Petition at nn. 8 and 12, noting the absence of an application filing freeze as of the date FlexCom submitted its application.

<sup>44</sup> As the Commission explained, in order to accommodate the relocation of DEMS operations from the 18 GHz band to the 24 GHz band, the Commission amended the Table of Frequency Allocations and Part 101 of the Commission’s rules governing the Fixed Microwave Service to permit fixed service use of the 24 GHz band. *24 GHz Report and Order*, 15 FCC Rcd at 16938. Thereafter, the Commission proposed licensing and service rules to govern both incumbents and new licensees in the 24 GHz band. Specifically, it proposed “to auction new licenses in the 24 GHz band and to apply the Part 101 service rules, as modified to reflect the particular characteristics and circumstances of the band, to both these new licensees and to the relocated incumbents.” *24 GHz Report and Order*, 15 FCC Rcd at 16938, referencing Amendments to Parts 1, 2, and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Notice of Proposed Rulemaking*, 14 FCC Rcd 19263 (1999).

<sup>45</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16938.

Section 101.147(r)(9) further emphasizes that those changes should not be construed to address application, procedure and timing issues.<sup>46</sup>

13. As an alternative to its reliance on Section 1.227(b)(4), FlexCom asserts that Section 1.2105(a)(1)(ii) authorized it to file its application.<sup>47</sup> Section 1.2105(a)(1)(ii) provides that short-form applications will be due “on a date specified by public notice after the Commission has reviewed the applications that have been filed” when “application filing dates . . . occur automatically by operation of law.”<sup>48</sup> According to FlexCom, the language in Section 101.147(r)(9) providing that the frequencies are “now available” is a law that operates to automatically create application filing dates for 24 GHz Service applications.<sup>49</sup> For the reasons detailed above, however, Section 101.147(r)(9) concerns the parties eligible to obtain licenses for particular frequencies and does not pertain to when applications for those frequencies may be filed. Consequently, Section 101.147(r)(9) does not operate “automatically” to create an application filing date.

14. Finally, FlexCom argues that the return of its application is improper for the same reasons the return of applications was improper in *McElroy v. FCC*.<sup>50</sup> However, the facts of *McElroy* are inapposite to the present circumstances. In contrast to present circumstances, *McElroy* involved a filing window that occurred automatically by operation of law.<sup>51</sup> In *McElroy*, the Commission expressly had provided that five years after the issuance of a cellular license, other parties might apply for unused spectrum subject to the license.<sup>52</sup> When the five years had run, the Commission did not accept new applications even though no new procedure had been established.<sup>53</sup> Here, in contrast, the Commission established that Section 1.2105 would govern applications for new licenses before taking any other action with respect to new licenses in the 24 GHz Service. Furthermore, other than adopting Section 1.2105, the Commission took no action that would open a filing window. Accordingly, the holding in *McElroy* does not conflict with the return of FlexCom’s application as premature.

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<sup>46</sup> *24 GHz Report and Order*, 15 FCC Rcd at 16965.

<sup>47</sup> Further Recon Petition at 4.

<sup>48</sup> 47 C.F.R. § 1.2105(a)(1)(ii).

<sup>49</sup> Further Recon Petition at 4.

<sup>50</sup> Further Recon Petition at 5 (citing *McElroy Electronics Corp. v. FCC*, 990 F2d 1351, 1360 (1993)).

<sup>51</sup> *McElroy Electronics*, 990 F2d at 1360.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1357-58 (recounting Commission action to establish new filing procedures *after* the filing date at issue occurred).

**IV. CONCLUSION**

15. For the reasons stated above, IT IS ORDERED that the Petition for Further Reconsideration filed by FlexCom Mobile, LLC IS DENIED.

16. This action is taken pursuant to delegated authority granted under provision of Sections 4(i) and 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.  
Chief, Wireless Telecommunications Bureau