

NETFREEUS, LLC	)	WT Docket No. _____
)	
Application for License and Authority to	)	File No. _____
Provide Wireless Public Broadband Service in)	
the 2155-2175 MHz Band)	
)	
and)	
)	
MCELROY ELECTRONICS	)	WT Docket No. _____
CORPORATION)	
	)	File No. _____
Application for a Nationwide 2155-2175 MHz)	
Band Authorization)	
)	
and)	
)	
TOWERSTREAM CORPORATION	)	WT Docket No. _____
)	
Application for a Nationwide 2155-2175 MHz	)	File No. _____
Band Authorization)	

To: Chief, Wireless Telecommunications Bureau

**CONSOLIDATED MOTION OF M2Z NETWORKS, INC.
TO DISMISS ALTERNATIVE PROPOSALS**

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March 26, 2007

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EXECUTIVE SUMMARY

There are problem solvers, and then there are opportunists. M2Z is a problem solver, having filed its Application that will, when granted, help remedy lagging U.S. broadband deployment. The parties who have filed Alternative Proposals attempting to piggyback on the M2Z Application did so to slow the realization of M2Z's bold and innovative proposal, enter into a beneficial negotiation with M2Z, or extend their own spectrum holdings. The Commission should not allow the regulatory gamesmanship of these parties to stand in the way of satisfying its paramount duty of serving the public interest.

The record in this proceeding is clear on several key factual points. First, for years there has been no defined use, service rules, or assignment mechanism for the 2155-2175 MHz band. Second, in the absence of a defined use, M2Z proposed a plan to use this otherwise fallow spectrum to provide the public with enormous, tangible and quantifiable benefits. Third, for the better part of a year, while awaiting official public notice of the acceptance of M2Z's Application for filing, other parties had ample opportunity, if the interest really existed, to develop innovative proposals of their own for use of this spectrum. Finally, instead of receiving similarly innovative proposals, the Commission has received only "copy-cat" or otherwise dubious applications designed, it seems, not so much to make a case for a license but to attempt to create mutual exclusivity and thereby slow or frustrate M2Z's plan to build a nationwide broadband platform. While the Alternative Proposals facially appear to track M2Z's, they fall short in significant and substantial respects.

In this Motion, M2Z carefully analyzes each of the Alternative Proposals both against its groundbreaking Application and on their individual merit. The results: (1) none of the Alternate Proposals come close to offering the panoply of public interest benefits that M2Z has committed

to provide and (2) each of the parties proposing alternatives appear to have objective weaknesses in their business plans, financing, or prior relationship with the Commission, among other things, that calls the proposals into question.

In comparing the Alternate Proposals to M2Z's Application, we look at a myriad of public interest benefits embedded in the M2Z proposal: (1) the provision of free broadband service on a nationwide basis, at speeds at least 384 kbps down/128 kbps up; (2) a commitment to meet aggressive and unprecedented buildout milestones; (3) a pledge not to accept Universal Service funds; (4) a voluntary obligation to provide filtering of pornographic, indecent, and obscene content on the free service; (5) a commitment to provide public safety entities with free, interoperable broadband service; (6) a commitment to make ongoing spectrum usage payments; (7) the ability to bring new competition from a company without current spectrum assets to the broadband market; (8) the promise of stimulating the economy and other public welfare benefits; (9) a commitment to meet Part 27 interference protection standards and incumbent relocation obligations comparable to those specified for other AWS spectrum; (10) a commitment to advance the Commission's goal of spectral efficiency; (11) a meaningful showing of financial ability; and (12) a commitment to comply with obligations placed on Commercial Mobile Radio Service ("CMRS") carriers.

As explained in great detail below, on each of these criteria, the vast majority of the Alternate Proposals miss the mark. In fact, on several of these issues, *none* of the Alternative Proposals commit to do what M2Z has promised. This is for good reason. The standard set by M2Z's Application is a high one. M2Z has committed to a time-limited construction of a nationwide wireless broadband system that will provide free high-speed service to the public. Never before has a private enterprise proposed a project of this scope so thoroughly invested in

the public interest. M2Z's network will enhance and supplement federal universal service programs, protect children from unsuitable Internet content, promote competition in the broadband and customer equipment markets, enhance public safety communications, generate revenue for the U.S. Treasury, promote efficient spectrum use, and stimulate general economic growth. The Alternative Proposals may, more or less, parrot M2Z's commitments but in the end they offer much less.

Each of the Alternative Proposals has significant and immediately apparent gaps and flaws. Pursuant to Section 309(j) of the Communications Act, the Commission may only accept mutually exclusive applications when doing so advances the public interest. Under the circumstances here, that test has not been met and the Commission need not and should not accept the Alternative Proposals. One may pick up an apple in the market without initially noticing the worm hole, but upon a cursory inspection the rotten apple is immediately tossed away. Though it is nominally still an apple, no additional scrutiny is necessary to determine if it is acceptable.

In addition to examining the Alternative Proposals against M2Z's Application, which has been reviewed and found acceptable for filing, the Alternative Proposals were also examined in light of the public information available on the individual proposal or its sponsor. The result of this analysis finds the following: (1) one party has a defective application and is ill equipped to move forward effectively on this spectrum band (which is the case with Open Range); (2) one party proposes duplicative and unnecessary services, the construction of which it likely cannot reliably finance (which is the case for NextWave); (3) one party faces significant financial uncertainty (which is the case for Commnet); (4) one party has been unable to meaningfully live up to its prior build-out commitments to the Commission and is in no financial position to do so

here (which is the case for NetfreeUS); and (5) two parties have filed nothing more than blatant “copy cat” unoriginal proposals that, on their face, suggest a lack of rigor, resolve, and commitment (which is the case for McElroy and TowerStream).

Either prong of M2Z’s analysis leads to the same conclusion – the Commission cannot reasonably find that these alternatives are acceptable for filing.

In any event, the Wireless Telecommunications Bureau cannot lawfully accept the Alternative Proposals, without first giving the Commission an opportunity to render a substantive decision on the Forbearance Petition filed by M2Z in association with its Application. A key point of M2Z’s Forbearance Petition is that the public interest benefits of M2Z’s pending application obviate the acceptance of other applications. If the Bureau were to accept the Alternative Proposals, it would inappropriately prejudge the Forbearance Petition by creating precisely the mutual exclusivity that M2Z has asked the Commission to avoid through its broad forbearance authority. Accordingly, until the full Commission rules on the merits of M2Z’s Forbearance Petition and its related Application, the Bureau should dismiss the Alternative Proposals and decline to accept additional applications for licenses in the 2155-2175 MHz band.

Moreover, in light of the lack of adequate alternative proposals, the paucity of genuine legal arguments (as explained in our companion Opposition) and the impending Section 7 deadline of May 5, 2007, the Commission should immediately take up this matter and approve M2Z’s Application either directly or through its forbearance authority.

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

In the Matter of)	
)	
M2Z NETWORKS, INC.)	
)	
Application for License and Authority to	)	WT Docket No. 07-16
Provide National Broadband Radio Service)	
In the 2155-2175 MHz Band)	
)	
Petition for Forbearance Under	)	WT Docket No. 07-30
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)	
)	
and)	
)	
NEXTWAVE BROADBAND INC.	)	WT Docket No. _____
)	
Application for License and Authority to	)	File No. _____
Provide Nationwide Broadband Service)	
In the 2155-2175 MHz Band)	
)	
and)	
)	
Open Range COMMUNICATIONS, INC.	)	WT Docket No. _____
)	
Application for License to Construct and	)	File No. _____
Operate Facilities for the Provision of Rural)	
Broadband Radio Services in the 2155-2175)	
MHz Band)	
)	
and)	
)	
COMMNET WIRELESS, LLC	)	WT Docket No. _____
)	
Application for License and Authority to	)	File No. _____
Construct and Operate a System to Provide)	
Nationwide Broadband Service in the)	
2155-2175 MHz Band)	
)	
and)	
)	

NETFREEUS, LLC)	WT Docket No. _____
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Application for a Nationwide 2155-2175 MHz)	File No. _____
Band Authorization)	

To: Chief, Wireless Telecommunications Bureau

**CONSOLIDATED MOTION OF M2Z NETWORKS, INC.
TO DISMISS ALTERNATIVE PROPOSALS**

Pursuant to Section 308(a) of the Communications Act of 1934, as Amended (the “Act”),¹ and Sections 1.41 and 1.934 of the rules of the Federal Communications Commission (“FCC” or “Commission”),² M2Z Networks, Inc. (“M2Z”) respectfully submits this Consolidated Motion to Dismiss (“Motion”) against the following alternative proposals filed in the above-referenced proceedings:³

¹ 47 U.S.C. § 308(a).

² 47 C.F.R. §§ 1.41 & 1.934.

³ Rather than moving to dismiss each application in a separate pleading, M2Z submits this consolidated Motion against all of the proposals in the interest of administrative efficiency. This consolidated Motion allows M2Z to organize its arguments in a manner that eliminates any duplication, thereby facilitating the Commission’s review of the issues and minimizing the

- Application of Open Range Communications, Inc. (“Open Range”) for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band (the “Open Range Proposal”);⁴
- Application of NextWave Broadband Inc. (“NextWave”), for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band License (the “NextWave Proposal”);⁵
- Application of Commnet Wireless, LLC (“Commnet”) for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Radio Service in the 2155-2175 MHz Band (the “Commnet Proposal”);⁶
- Application of NetfreeUS, LLC (“NetfreeUS”) for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band (the “NetfreeUS Proposal”);⁷

burden on the Commission and all parties to this proceeding. *See, e.g., Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Order, 21 FCC Rcd 8731, ¶ 4 (WTB 2006)* (“We find that filing consolidated oppositions and replies would be more efficient for interested parties and the Commission staff and would enable the issues to be analyzed more quickly . . .”); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Order, 20 FCC Rcd 1606, ¶ 5 (WTB 2005)* (“We agree that permitting interested parties to . . . file consolidated oppositions and replies instead of individual oppositions and replies would not only reduce the amount of paper filed, but would also assist Commission staff in analyzing the issues . . .”).

⁴ *See* Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) (“Open Range Proposal”).

⁵ *See* Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) (“NextWave Proposal”).

⁶ *See* Application of Commnet Wireless, LLC for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) (“Commnet Proposal”). M2Z defined what constitutes Nationwide Broadband Radio Service in its Application. As explained below, what Commnet proposes is something far less than Nationwide Broadband Radio Service and its caption to the contrary is incorrect.

⁷ *See* Application of NetfreeUS, LLC for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) (“NetfreeUS Proposal”).

- Application of McElroy Electronics Corporation (“McElroy”) for a Nationwide 2155-2175 MHz Band Authorization (the “McElroy Proposal”);⁸ and
- Application of TowerStream Corporation (“TowerStream”) for a Nationwide 2155-2175 MHz Band Authorization (the “TowerStream Proposal”)⁹ (collectively referred to herein as the “Applicants” and the “Alternative Proposals”).

For the reasons discussed herein, the Alternative Proposals should be promptly dismissed as defective and insufficient and not accepted for filing.¹⁰ Moreover, consideration of the Alternative Proposals will divert precious Commission resources to these insubstantial filings, prejudice M2Z’s forbearance petition, and result in unnecessary delay in processing M2Z’s pending Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (the “M2Z Application”).¹¹ Accepting the Alternative Proposals for filing will therefore disserve the public interest.

At the outset, contrary to assertions of some of the Applicants, none of the Alternative Proposals are mutually exclusive with the M2Z Application. For example, NextWave states that

⁸ See Application of McElroy Electronics Corporation for a Nationwide 2155-2175 MHz Band Authorization, WT Docket No. 07-16 (filed Mar. 2, 2007) (“McElroy Proposal”).

⁹ See Application of TowerStream Corporation for a Nationwide 2155-2175 MHz Band Authorization, WT Docket No. 07-16 (filed Mar. 15, 2007) (“TowerStream Proposal”).

¹⁰ M2Z has an interest in the disposition of the alternative proposals filed in this proceeding because it has an Application, which has been accepted for filing, for a license to operate in the 2155-2175 MHz band on a nationwide exclusive basis. The Applicants seek to use the same spectrum band for which M2Z previously has applied. As such, M2Z is a party in interest in this proceeding and in any proceeding established to dispose of the alternative proposals for the 2155-2175 MHz band. See Affidavit of Uzoma C. Onyeije, attached hereto as Exhibit A.

¹¹ See Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (filed May 5, 2006) (“M2Z Application”). The M2Z Application was amended on September 6, 2006, to incorporate by reference M2Z’s subsequently filed petition for forbearance. 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, WT Docket No. 07-30 (filed Sept. 1, 2006) (“M2Z Forbearance Petition”). The Application also was amended on March 1, 2007 to provide updated information pursuant to Section 1.65 of the Commission’s rules. See 47 C.F.R. § 1.65.

its proposal is “mutually exclusive” with the M2Z Application because M2Z has requested an exclusive license in the 2155-2175 MHz band, whereas NextWave has requested a non-exclusive license in the same spectrum.¹² However, mutual exclusivity does not arise merely by the filing of two applications that cannot both be granted as NextWave and other Applicants imply. Rather, under both the Act and Commission precedent, mutual exclusivity would be triggered only if one or more of the Alternative Proposals were accepted for filing.¹³ Thus, only the Commission, and not the Applicants, may determine the existence of mutual exclusivity. As discussed in detail below, acceptance of the Alternative Proposals is not warranted and indeed would be inconsistent with the public interest.

I. THE FUNDAMENTAL TASK FOR THE COMMISSION IS TO DETERMINE THE HIGHEST AND BEST USE FOR THE 2155-2175 MHZ BAND

A. In May 2006, M2Z Presented the Commission with a Transparent, Innovative, and Consumer Welfare Enhancing Use for the 2155-2175 MHz Band.

Nearly one year ago, M2Z proposed in its Application to make available free broadband Internet access to nearly every consumer, business, non-profit, and public safety entity in the

¹² See NextWave Proposal at 7 and n.2.

¹³ See 47 U.S.C. § 309(j)(1) (“If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications *are accepted* for any initial license or construction permit, except as provided in paragraph (2), the Commission shall grant the initial license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this section.”) (emphasis added). Likewise, Commission decisions discussing mutual exclusivity tie it to applications that are “accepted for filing.” See, e.g., “Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007,” Public Notice, DA 06-2448 (rel. Nov. 2, 2006) (when two or more short-form applications specifying the same FM allotment are accepted for filing, mutual exclusivity exists for auction purposes); “Closed Auction of 400 MHz Air-Ground Radiotelephone Service Licenses Scheduled for August 23, 2006,” Public Notice, DA 06-388 (rel. Mar. 3, 2006) (if only one short-form application is accepted for filing for a particular license, that license will be removed from the auction; if more than one short-form application for a license is accepted for filing, mutual exclusivity for auction purposes will have been established, even if only one applicant submits an upfront payment).

United States—the National Broadband Radio Service (“NBRS”).¹⁴ To make this service possible, M2Z filed an application for an exclusive, nationwide license using 20 MHz in the largely unoccupied, unpaired spectrum at 2155-2175 MHz.¹⁵ Further, M2Z assumed specific and enforceable public interest obligations, including, among others: (1) rapid deployment of its free network in accordance with strict construction benchmarks; (2) mandatory filtering of obscene and/or indecent material; (3) provision of a free interoperable wireless broadband platform for public safety organizations; and (4) a voluntary five percent revenue-based spectrum usage fee paid to the U.S. Treasury annually.¹⁶ In turn, a broad range of public economic benefits will flow from M2Z's new offering, including: reduced universal service spending, reduced spending on network services by public safety entities, more competitive markets for broadband services, and the stimulation of billions of dollars in economic growth by the U.S. economy.

The benefits of M2Z's NBRS have been noted and lauded by hundreds of public commenters, many in advance of official public notice of the Application. In particular, these parties have identified wide-ranging public interest benefits that the M2Z Application, when granted, will generate including: (1) bolstering the competitiveness of small and independent businesses;¹⁷ (2) creating a more competitive broadband marketplace,¹⁸ (3) increasing diversity

¹⁴ See M2Z Application at 22-32.

¹⁵ See *id.* at 15-19.

¹⁶ See *id.* at 22-26.

¹⁷ See Comments of the California Association of Local Economic Development, WT Docket Nos. 07-16 & 07-30 (filed Feb. 14, 2007) (widespread governmental interest in deploying broadband stems from recognition that broadband access fosters economic development; M2Z's innovative proposal will help the government expand broadband access using private funds); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (positing that Internet is crucial to the success of all small and independent businesses, which account for over 99% of all companies, and asserting

in management and ownership of communications outlets;¹⁹ (4) enhancing educational opportunities,²⁰ (5) bridging the digital divide,²¹ (6) supplementing and enhancing public safety

that “a free, nationwide broadband Internet access service would extend the potential of e-commerce to all businesses.”)

¹⁸ Comments of the Electronic Retailing Association, WT Docket Nos. 07-16 & 07-30 (filed Feb. 6, 2007 & Feb. 27, 2007) (states that only 35% of small businesses currently have websites and only 57% use the Internet for business related activities. “This further exemplifies the need for affordable, reliable solutions to the significant, and often times insurmountable, cost of broadband connectivity.”); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (relates the necessity of readily available broadband access for small and independent businesses to remain successful in an increasingly electronic world); Comments of Center for the Digital Future, WT Docket No. 07-16 (filed Feb. 27, 2007) (with increased competition and subsequent lower prices for broadband, more people chose broadband internet over dial-up.).

¹⁹ Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (“[w]ith one of the most diverse ownership and management teams of any communications business,” M2Z is “a model of diversity for other communications businesses to follow”).

²⁰ Comments of the National PTA, WT Docket No. 07-16 (filed Mar. 1, 2007) (M2Z’s proposal is an “innovative and equitable way to ensure that broadband is an educational resource available to all Americans – parents, children and educators.”); Comments of the Higher Education Wireless Access Consortium, WT Docket Nos. 07-16 & 07-30 (filed Feb. 28, 2007) (supports M2Z’s proposal stating that it will help bridge the gap of wireless connectivity in the classrooms of those schools with fewer resources); Comments of the League for Innovation in the Community College, WT Docket Nos. 07-16 & 07-30 (filed Feb. 28, 2007) (while computer and Internet access has increased, there still remains a substantial information divide. “[T]here are still communities that do not have adequate access to the Internet and technology-based training, resources, and services.”); Comments of the College Parents of America, WT Docket Nos. 07-16 & 07-30 (filed Feb. 28, 2007) (with the cost of colleges rising faster than “income, consumer prices, or even health insurance,” a free broadband service would provide great financial relief to struggling parents. It would also allow for more students to participate in distance learning programs.); Comments of Educause, WT Docket No. 07-16 (filed Feb. 28, 2007) (a free nationwide Internet service would be beneficial to students, as well as all Americans. “In particular, the widespread availability of affordable broadband communications would make both campus-based and distance learning more accessible and effective.”).

²¹ Comments of the Association of Community Organizations for Reform Now, WT Docket Nos. 07-16 & 07-30 (filed Feb. 6, 2007 & Feb. 27, 2007) (current Internet providers are more interested in the bottom line through service to wealthier Americans with high monthly subscription rates. M2Z’s proposal would not only fix the problem of availability with the digital divide, it would fix the affordability component.); Comments of One Economy Corporation, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (“[w]e believe that this type of market innovation will further One Economy’s mission, benefit an underserved portion of our

communications,²² (7) promoting spectral efficiency,²³ and (8) protecting children from objectionable online materials,²⁴ among many other benefits. Moreover, as demonstrated in the study performed by Professor Simon Wilkie, M2Z's entry into the broadband marketplace will increase consumer welfare by up to 25 billion dollars.²⁵

On January 31, 2007, the Wireless Telecommunications Bureau (the "Bureau") released a Public Notice announcing that M2Z's Application was accepted for filing (the "M2Z Application Public Notice").²⁶ On March 2, 2007, in response to the M2Z Application Public Notice,²⁷ five

country, and serve the public interest."); Comments of Center for the Digital Future, WT Docket No. 07-16 (filed Feb. 27, 2007) ("The granting of M2Z's application will so much to end the great broadband divide . . .").

²² Comments of the National Troopers Coalition, WT Docket Nos. 07-16 & 07-30 (filed Feb. 6, 2007 & Feb. 27, 2007) ("M2Z's proposed network will provide another layer of redundancy to bolster existing and planned public safety-operated networks and help law enforcement stay operational in disasters.").

²³ Comments of Alion Science & Technology, WT Docket Nos. 07-16 and 07-30, at 2 (submitted Mar. 2, 2007) ("Alion Science & Technology Comments") (concluding, after review of M2Z's proposal, that "M2Z's proposed network will use the most spectrally efficient technologies that are currently available for commercial radio systems").

²⁴ Comments of Internet Keep Safe Coalition, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (expresses approval of M2Z's network-level filtering of indecent and pornographic material); Comments of Enough is Enough, WT Docket Nos. 07-16 & 07-30 (filed Mar. 13, 2007) (M2Z has developed "an innovative balance" between rapid deployment of broadband internet and "protecting children and families from on line pornography and sexual predators"); Comments of Most Reverend Paul S. Loverde, Bishop of Arlington, WT Docket Nos. 07-16 & 07-30 (filed Mar. 2, 2007) (filtering at the network level will help families protect themselves from indecent online material. "Furthermore, this service will offer the great educational benefits of the Internet to families in a much safer way than is currently available.").

²⁵ See Simon Wilkie, PhD., "The Consumer Welfare Impact of M2Z Network Inc.'s Wireless Broadband Proposal," WT Docket Nos. 07-16 & 07-30 (filed Mar. 2, 2007) (conservatively estimating the net present value of the consumer welfare benefits of M2Z's NBRS at \$18 - \$25 billion, including a reduction in broadband prices due to increased competition, greater access to free broadband service, and royalty payments to the U.S. Treasury from premium subscriber fees) (the "Wilkie Consumer Welfare Study").

²⁶ See "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

Applicants filed their Alternative Proposals advocating various uses of the 2155-2175 MHz band. On March 9, 2007, the Commission issued another Public Notice (the “March Public Notice”) establishing a pleading cycle which extended²⁸ the date for petitions to deny, and other filings pertaining to the Application.²⁹ In response to the March Public Notice, one more party filed an Alternative Proposal. Taken together, the Alternative Proposals, however, stand in stark contrast to the M2Z Application. Unlike the Alternative Proposals, which merely seek to piggyback on M2Z’s groundbreaking proposal, the M2Z Application is complete unto itself. M2Z’s Application sets forth a specific and complete proposal to provide NBRSS, including applicable service rules, interference standards, buildout requirements, licensing conditions, and any and all other criteria against which competing proposals might be measured.³⁰ M2Z also has demonstrated that it is legally, technically, financially, and otherwise qualified to be a Commission licensee.³¹ Finally, M2Z outlined in great detail and depth the concrete public interest benefits that will flow from grant of its Application.³²

MHz Band Is Accepted for Filing,” Public Notice, WT Docket No. 07-16, DA 07-492 (rel. Jan. 31, 2007) (“M2Z Application Public Notice”).

²⁷ *See id.* at 2 (“additional applications for spectrum in this band may be filed while the M2Z application is pending”).

²⁸ The Commission’s rules provide that petitions to deny an application subject to Section 309(d) of the Communications Act of 1934, as amended, must be filed no later than thirty days after the date of the public notice listing the application as accepted for filing. *See* 47 C.F.R. § 1.939(a)(2).

²⁹ “Wireless Telecommunication Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band,” Public Notice, WT Docket No. 07-16, DA 07-987 (rel. Mar. 9, 2007) (the “March Public Notice”).

³⁰ *See* M2Z Application at Appendix 2 (Conditions for Grant of M2Z’s License and Operation of Its Network).

³¹ *See id.* at 6-8.

³² *See id.* at 22-32.

Although the M2Z Application was not placed on public notice until January, 31, 2007, there has been active public debate regarding the application ever since it was filed, as demonstrated by the wide-ranging views presented in various news stories.³³ Two conclusions flow inevitably from the thorough and transparent nature of the M2Z Application and the public

³³ See *Company Seeks 2155-2175 MHz Band Spectrum to Build Nationwide Broadband Network*, TR Daily, May 12, 2006; Jeremy Pelofsky, *Silicon Valley backs US wireless broadband plan*, Reuters News, May 16, 2006; Ben Hammer, *Group makes play to build \$400M wireless network*, Washington Business Journal, May 22, 2006; Harold Furchtgott-Roth, *Spectrum is Too Valuable to Give Away*, The New York Sun, May 22, 2006 at 10; Steve Rosenbush, *Free Broadband for the Masses; Backed by VC cash, a former FCC official's startup is out to provide no-fee, ad-supported wireless service*, Business Week Online, May 22, 2006; Jeffrey Silva, *Muleta-backed firm seeks free spectrum for national broadband service*, RCR Wireless News, May 22, 2006 at 17; Chuck Taylor, *M2Z Proposes Free Radio Spectrum*, Billboard Radio Monitor, May 23, 2006; *Copps Says FCC Should Get More Involved in Creating Security, Broadband Policy*, TR Daily, May 23, 2006; Matt Marshall, *Start-up plans U.S. network for free wireless broadband*, The Mercury News, May 23, 2006 at BU1; Matt Richtel, *Company Asks U.S. to Provide Radio Space for Free Internet*, New York Times, May 23, 2006 at C3; Natali Del Conte, *Startup Pitches Free, Nationwide Wireless Broadband; National Free Wireless Broadband Proposed*, ExtremeTech.com, May 24, 2006; Matt Richtel, *Free Web access? Firm pushes broadcast model*, International Herald Tribune, May 25, 2006 at 13; *Does M2Z's Broadband Petition Give The FCC More Options?*, Telecom Policy Report, May 29, 2006; Michael Rau, *Free Wi-Fi Access for All is Good Idea*, Daily Press (Newport News, VA), May 29, 2006 at C8; *USA – M2Z Plans Free Wireless Broadband for the US Public*, Tarifica Alert, May 30, 2006; *Firm Wants 20 MHz of Spectrum To Build Broadband Network*, Telecommunications Reports, June 1, 2006; *Test-Bed Proposal Imperils Spectrum Incumbents, FCC Told*, Communications Daily, July 26, 2006; Lynette Luna, *Winds of Change*, Mobile Radio Technology, Aug. 1, 2006 at 14; *Cyren Call, M2Z Prepared to Peacefully Coexist if Necessary*, Communications Daily, Aug. 10, 2006; *Fresh Companies, Fresh Ideas*, InformationWeek, Aug. 14, 2006 at 23; *Need for Interoperability and Broadband, 800 MHz Band Concerns Among Hot Topics at APCO Conference*, Telecommunications Reports, Aug. 15, 2006; *Wireless Industry Representatives, State Commissioners Disagree on Preemption*, TR Daily, Sept. 13, 2006; *New Group to Fight for Auctions, Against 'Sweetheart Deals'*, Communications Daily, Sept. 29, 2006; *FCC Seeks Comments on Cyren Call Plan; CTIA Reiterates Objections to Proposal*, TR Daily, Oct. 31, 2006; Ben Hammer, *FCC Denies Group's Request for Rights to Public Airwaves*, Washington Business Journal, Nov. 13, 2006; *NARUC Panelists Debate Best Path to Ubiquitous Broadband*, TR Daily, Nov. 15, 2006; Naomi Synder, *Tech Experts Gaze into 2007 and Beyond*, The Tennessean (Nashville, TN), Dec. 30, 2006 at 1E; Jon M. Peha, *Improving public safety communications: today's system puts the lives of first responders and the public at risk. What's needed is a nationwide broadband network, and policymakers now have a perfect opportunity to act*, Issues in Science and Technology, Jan. 1, 2007 at 61.

debate surrounding it. First, the initiation of a further rulemaking is unnecessary, counter-productive, and would be, no doubt, duplicative. Second, and more to the point, M2Z's proposal for NBRS at 2155-2175 provided an opportunity for those with comparable or potentially superior proposals to come forth and have their approach tested against the M2Z benchmark. None of the Alternative Proposals can pass that test.

In context, the Alternative Proposals are dwarfed by the overwhelming public interest showing in the record of the companion M2Z proceedings, and do not purport to offer the level of service M2Z has proposed to provide to the nation. Moreover, as explained below, accepting the Alternative Proposals for filing would be inconsistent with: (1) the Commission's threshold obligations to identify the highest and best uses of the 2155-2175 MHz band, (2) the Commission's obligations concerning M2Z's pending forbearance petition, and (3) the public interest. For these reasons, the Alternative Applications should be dismissed with prejudice and not accepted for filing.

B. For Several Years, There Has Been No Defined Use, Service Rules, or Licensing Mechanism for the 2155-2175 MHz Band.

The great aims of the FCC are not to issue rules, preside over disputes among competing interests, or restrain, through enforcement proceedings, recalcitrant licensees. These and the other quotidian pursuits of the agency are merely the instruments of policy. Rather, the highest calling for the FCC is articulated in Section 1 of the Commission's organic Act: to “[m]ake available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”³⁴ In the area of spectrum management, the Commission's *raison d'être*

³⁴ 47 U.S.C. § 151.

requires a single-minded focus on assigning spectrum to those who will put it to the highest and best use, and do so with alacrity.

Grant of M2Z's Application, which calls for designation of 2155-2175 MHz to NBRB and a license for M2Z to provide nationwide service in the band, would allow the FCC to tap into a rich vein of public interest benefits in a band where few were expected to be found. In its Application, M2Z proposed to construct a nationwide broadband wireless network that will reach 95% of U.S. households, just ten years after M2Z deploys its network, in a band of spectrum heretofore badly underused. Like James Marshal's discovery of gold at Sutter's Mill, however, M2Z's proposal has spawned follow-on prospectors and speculators who, with wild-eyed dreams of the mother-lode, can offer nothing at present but fool's gold. The Commission should not allow these "claim-jumpers" to further delay the use and utilization of this valuable national resource.

The recent history of the 2155-2175 MHz band demonstrates, if nothing else, that swift and decisive action is needed if the potential of this band is to be realized in the first quarter of the Twenty-First Century. As many as fifteen years ago, the Commission began deliberations on a permanent allocation for large segments of the 2 GHz band.³⁵ At the time, initial consideration was being given to allocating the spectrum for third generation ("3G") wireless technologies. Although an incumbent licensee petitioned to defer action in the band,³⁶ the Commission reallocated a large portion of the 2 GHz band to PCS.³⁷ That action, however, did not resolve the use of 2155-2175 MHz and, nearly a decade later, the Commission was prevailed upon to

³⁵ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Notice of Proposed Rulemaking, 7 FCC Rcd 1542 (1992).

³⁶ See *id.* ¶¶ 7–8.

³⁷ See *id.* (reallocating 1850-1910/1930-1990 MHz to PCS from fixed microwave services).

issue an NPRM asking, among other things, whether 2110-2170 MHz would be suitable for 3G services.³⁸ Now, yet six more years later, and although a number of large incumbent wireless operators have supported speedy reallocation of the 2155-2175 MHz band for advanced wireless services,³⁹ the band remains devoid of permanent occupants (all current incumbents have been ordered to relocate to other bands as soon as practicable) and no final plan for future use of the band has been adopted.⁴⁰ Compounding the difficulty of assigning the band is the fact that 2155-2175 MHz is unpaired spectrum and therefore not suitable for the services typically offered by many wireless providers. As explained in the M2Z Application, “this band is essentially an unpaired, undefined, and uncluttered block of spectrum in need of a long-term useful occupant.”⁴¹ M2Z’s unpaired service proposal using TDD technology would make immediate use of the untapped potential at 2155-2175 MHz.

³⁸ *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000*, Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596, ¶¶ 50–57 (2001) (“*Implementation of WRC-2000 Order*”).

³⁹ *Petition for Rule Making of the Cellular Telecommunications Industry Ass’n Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT -2000* (July 12, 2000) (*CTIA Petition*); *Petition for Rule Making of the Cellular Telecommunications Industry Ass’n Concerning Implementation of WRC-2000*, RM-9920 (2000) (Comments of Qualcomm Inc.); *Review of Spectrum and Regulatory Requirements for IMT-2000*, RM-9920 (2000) (Comments of AT&T Wireless Services, Inc.); *Review of Spectrum and Regulatory Requirements for IMT-2000*, RM-9920 (2000) (Comments of Verizon Wireless).

⁴⁰ Two types of services occupy the 2155-2175 MHz band – Broadband Radio Service (“BRS”) and Fixed Microwave Service (“FS”). See *BRS R&O* ¶¶ 37-38 (ordering the relocation of users from the 2150-2156 MHz and 2156-2160 MHz bands to 2496-2502 MHz and 2618-2624 MHz respectively); *AWS 8th R&O* ¶¶ 6, 9 (ordering the relocation of users of the Fixed and Mobile Service allocations in the 2155-2160 MHz band and designating the 2155-2175 MHz band for AWS use).

⁴¹ M2Z Application at 16.

C. Ten Months After M2Z's Filing, Six Parties Have Offered Mere Shadow Alternatives for Use of the 2155-2175 MHz Band.

Nearly a year has passed since M2Z filed its Application and, as Spring slips north to Washington once again, the Commission's long awaited public notice of the Application has summoned a gaggle of the usual suspects still looking for spectrum. Yet, these many months later, with all of the time that has elapsed during which any other party could have perfected its proposal, all of the Alternative Proposals, when weighed in the balance against the M2Z Application, are found wanting.

There is, therefore, simply no benefit to the public or to the Commission of entertaining other proposals that cannot, and do not, compare to the Application that M2Z has pending before the Commission. Indeed, given that the Commission already has accepted the M2Z Application for filing, and that M2Z's service will provide public interest benefits that far exceed those offered by the vast majority of Commission licensees, the Commission should establish NBRS, as M2Z has defined it, as the highest, best and only appropriate use of the band. No application to offer services at 2155-2175 MHz should be seriously entertained unless it meets all of the public interest standards set by the M2Z Application, including:

- 1) A commitment to provide free broadband service on a nationwide basis, at speeds of at least 384 kbps down/128 kbps up;
- 2) A commitment to meet buildout milestones comparable to those M2Z has proposed;
- 3) A commitment to not seek Universal Service Funds ("USF") to build and operate its network;
- 4) A commitment to provide filtering of pornographic, indecent, and obscene content on the free service;
- 5) A commitment to provide public safety entities with free, interoperable broadband service;
- 6) A commitment to make ongoing spectrum usage payments;

- 7) The promise of new competition in the broadband market (*i.e.*, the applicant is not an incumbent provider of broadband wireline or wireless service);
- 8) The promise of stimulating the economy and other public welfare benefits;
- 9) A commitment to meet Part 27 interference protection standards and incumbent relocation obligations comparable to those specified for other AWS spectrum;
- 10) A commitment to advance the Commission's goal of spectral efficiency;
- 11) Evidence of the ready availability of at least 400 million dollars to construct a network and commence operations; and
- 12) A commitment to comply with obligations placed on Commercial Mobile Radio Service ("CMRS") carriers.

The Commission has the authority to narrow the scope of the applications it will accept for filing.⁴² Establishing the above criteria as the absolute minimum for a NBRS applicant is appropriate where, as here, the public interest so requires. Accordingly, the Commission should establish criteria limiting the pool of potential applicants to those that will provide service under the same terms and conditions proposed by M2Z. In doing so, each of the Alternative Proposals should be dismissed.

D. When Reviewed in the Context of the Record and Section 7 of the Telecommunications Act, M2Z's Proposed Use of the Band is Far Superior to the Alternative Proposals.

As summarized above, the record is replete with evidence that M2Z has proposed the highest and best use for this spectrum band. Further, and in accordance with Section 7 of the Communications Act, 47 U.S.C. § 157, those whose proposals challenge that of M2Z have the burden of rebutting the presumption that M2Z's Application is in the public interest and must demonstrate that M2Z's Application is, in fact, *inconsistent* with the public interest. As all of the Applicants have either explicitly opposed grant of the Application or proposed that the band be

⁴² The Commission has the authority to establish a preference for applicants that meet certain criteria. *See, e.g., Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

used for some inferior offering, each of the Applicants has challenged the grant of M2Z's Application and must therefore rebut the presumption that grant of the Application is in the public interest. None of the Applicants can bear that burden.

Section 7 of the Act provides that the Commission "shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed."⁴³ This statutory provision was enacted to: (1) "encourage the availability of new technology and services to the public"; (2) prevent the Commission from "hamper[ing] the development of new services"; and (3) allow "the forces of competition and technological growth [to] bring many new services to consumers."⁴⁴

As Congress recognized when it enacted the statutory provision, a "major reason for delays in authorizing new services is the fact that competitors to the companies proposing to offer the new service, not wanting to see increased competition, file in opposition to new services."⁴⁵ Along these lines, Congress also made it explicitly clear that "the intent of [Section 7 is] to preclude the Commission from considering the claim of adverse economic effect on an existing licensee when such claim is raised" against a petition or application proposing a new service or technology.⁴⁶

⁴³ 47 U.S.C. § 157(b). Over the years, the Commission repeatedly has invoked Section 7 to promote "innovative policies and licensing models that seek to increase communications capacity and efficiency of spectrum use, and make spectrum available to new uses and users." *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604 (2003); *see also Application of Hye Crest Management, Inc. for License Authorization in the Point-to-Point Microwave Radio Service in the 27.5 to 29.5 GHz Band and Request for Waiver of the Rules*, 6 FCC Rcd 332 (1991).

⁴⁴ Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984).

⁴⁵ *Id.* at E73.

⁴⁶ *Id.*

Indeed, Congress found the rapid deployment of new services and technologies to the public to be of such paramount importance, and the potential of competing providers to use regulatory maneuvers to delay the process so great, that it incorporated a burden-shifting mechanism into Section 7.⁴⁷ Thus, Section 7 provides that parties who oppose a new technology or service “have the burden to demonstrate that such proposal is inconsistent with the public interest.”⁴⁸ As Representative Dingell succinctly stated at the time: “If not blocked by the FCC, the forces of competition and technological growth would bring many new services to consumers.”⁴⁹ This burden-shifting procedure “is intended to shift the balance of the process in favor of new services” and “allow the FCC, on an expedited time frame, to review [an] application” proposing a new service or technology.⁵⁰

⁴⁷ See House Floor Debate on H.R. 2755, 129 Cong. Rec. 33347 (Nov. 17, 1983) (discussing backlog of applications).

⁴⁸ 47 U.S.C. § 157(a); see also *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission’s Rules Concerning Use of Subsidiary Communications Authorization*, 98 F.C.C.2d 792 (1984) ¶ 24 (Section 7 creates “a presumption that new services are in the public interest”).

⁴⁹ Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984) (discussing multi-year delays in the introduction of cellular service and cable television service).

⁵⁰ *Id.* The Commission repeatedly has invoked Section 7 to promote “innovative policies and licensing models that seek to increase communications capacity and efficiency of spectrum use, and make spectrum available to new uses and users.” *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604 (2003); see also *1998 Biennial Regulatory Review—Testing New Technology*, Policy Statement, 14 FCC Rcd 6065 (1999); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, n.67 (2004); *Revision of Part 15 of the Commission’s Rules Regarding Ultra-Wideband Transmission Systems*, 15 FCC Rcd 12086 (2000); *Amendment of Parts 2 and 15 of the Commission’s Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, 9 FCC Rcd 7078 (1995); *Amendment of Parts 1 and 21 of the Commission’s Rules to Redesignate the 27.5 to 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service*, 9 FCC Rcd 1394 (1994).

M2Z's Application is entitled to Section 7's presumption that a grant is in the public interest. As set forth in the Application, M2Z has proposed a new and innovative service, using new technologies, in 20 MHz of underutilized and unpaired spectrum. Although they have had months to prepare their applications, none of the Applicants has proposed a service that is more than a shadow of that proposed by M2Z.

II. THE ALTERNATIVE PROPOSALS HAVE FAILED TO MEET THEIR BURDEN OF PROOF UNDER SECTION 7 OF THE ACT.

The Alternative Proposals seek to oppose the M2Z Application because, at bottom, they all seek the approval of some other lesser service that is not NBRIS. Indeed, in their Alternative Proposals, almost all of the Applicants argue explicitly against the grant of the M2Z Application.⁵¹ Therefore, under Section 7, the Applicants have the burden to demonstrate that grant of the M2Z Application is inconsistent with the public interest. In this respect, the Applicants have failed to meet such burden or to reach the high public interest bar established by the M2Z Application.⁵² Unlike the Applicants, M2Z proposes specific and enforceable public interest obligations that will govern its conduct as conditions of the requested license. As

⁵¹ See NextWave Proposal at 7-8 (attacking M2Z's interpretation of the Commission's authority under Section 309(j)(6)(E) of the Act to grant spectrum licenses without conducting an auction); NetfreeUS Proposal at 4 (arguing that "[t]he question for the Commission . . . is not whether M2Z can fulfill its business plan, but whether other alternatives can better serve the public interest than the single-license, single-provider approach urged by M2Z"); Commnet Proposal at Exhibit 7, p. 1 (attacking the M2Z Application as "defective and not acceptable for filing"); McElroy Proposal at Exhibit 1, pp. 2-3 (arguing that the Commission has rejected M2Z's "extraordinary request that its application be both insulated from competing applications and treated as a non-auctionable license application"); TowerStream Proposal at Exhibit A, p. 8 (arguing that "[i]t would be manifestly inconsistent with the public interest for the Commission to grant M2Z's application").

⁵² See, e.g., Comments of the National Association of State Utility Consumer Advocates, WT Docket Nos. 07-16 & 07-30, at 10-12 (filed Mar. 19, 2007) (arguing that the Alternative Proposals do not make as strong a public interest showing as M2Z).

demonstrated below, the Alternative Proposals pale in comparison to the abundance of public interest benefits that would result from the grant of the M2Z Application.⁵³

A. The Alternative Proposals Will Not Provide Free Broadband Service to the Entire Nation.

M2Z proposes to offer *free* broadband Internet access to anyone who wants this service within its nationwide footprint. Thus, grant of the M2Z Application will guarantee that everyone in the country has access to broadband, regardless of income. With the exception of the McElroy Proposal, which, as discussed below, is merely a speculative and non-substantive “copy-cat” proposal attempting to duplicate most but not all of the M2Z Application, none of the Alternative Proposals will provide a free service:

- *Open Range.* Open Range proposes to charge subscribers \$34.95/month for broadband access, with additional recurring charges for the lease of consumer premises equipment (“CPE”).⁵⁴ Thus, the Open Range Proposal would, at best, result in a handful of people having an additional option for the purchase of broadband Internet access services. Although Open Range reports that it will offer free service to schools and certain health care providers, these entities already qualify for free services under USF programs,⁵⁵ so it is not clear that any new services will be offered to the public at no charge.
- *NextWave.* The NextWave Proposal does not specify how much NextWave will charge subscribers for its proposed service. Presumably, however, NextWave’s proposed service would not be provided free of charge; otherwise, NextWave would have stated as much in its proposal.
- *Commnet.* Commnet plans to charge subscribers \$11.95/month for a 384 kbps service, \$26.95/month for its 576 kbps service, and \$34.95/month for 1.158 Mbps service. It also will offer bulk rates to businesses and government

⁵³ See *supra* Section I. A chart comparing the M2Z Application with the Alternative Proposals is provided in Exhibit B hereto.

⁵⁴ Open Range Proposal at 8. Open Range’s VoIP service costs another \$24.99, with a required CPE lease that costs another \$2/month.

⁵⁵ See 47 U.S.C. § 254(h)(1)(A) (providing universal service support for service to rural health care providers); 47 U.S.C. § 254(h)(1)(B) (providing universal service support for service to educational providers and libraries).

subscribers with multiple units. Commnet plans to offer no free services.⁵⁶ Having failed to develop a business plan that will generate anything close to the public interest benefits of M2Z's proposal, Commnet makes the baseless contention that there is no way to do so.⁵⁷ The fact that Commnet was unable to develop such a plan to its own satisfaction has no bearing on the quality of M2Z's plan, which has managed to withstand the scrutiny of longtime experts in regulation, engineering, and investment in the telecommunications infrastructure and technology fields.⁵⁸ Commnet's unsupported suggestion that M2Z plans to engage in post-licensing re-negotiations with the Commission post-licensing should be ignored.⁵⁹ Commnet's baseless sniping serves only to demonstrate the feebleness of its proposal.

- *NetfreeUS*. NetfreeUS would establish itself as a spectrum clearinghouse within the band.⁶⁰ As a result, all of its guarantees about what services will be available, when, and at what rates are dependent upon its identification and management of spectrum lessees. It states that it will offer a free service called Wireless Public Broadband ("WPB") at no monthly fee,⁶¹ but it only plans to retain control over 50 wireless access points ("WAPs").⁶² NetfreeUS estimates that one million WAPs will be needed to fully deploy the network.⁶³ With the network open to thousands of third parties who are yet to be identified, it is unclear how or when free WPB service will become widely available, which severely curtails the potential public interest impact of the NetfreeUS Proposal.
- *McElroy*. Although McElroy proposes to provide its service free of charge, it offers no specifics as to how or when such a service would be deployed to the

⁵⁶ See Commnet Proposal at Exhibit 2, pp. 1-2.

⁵⁷ See *id.* at Exhibit 2, n.2.

⁵⁸ See M2Z Application at 6-8 (discussing the qualifications, investment successes, and technical expertise of M2Z's principals and investors).

⁵⁹ See Commnet Proposal at Exhibit 2, n.2.

⁶⁰ NetfreeUS proposes a secondary market licensing system that would allow them to be a manager for new entrants on a "public commons" basis. NetfreeUS Proposal at 5-6 (citing 47 C.F.R. § 1.9080). Within 60 days of receiving authorization, NetfreeUS would begin offering spectrum to third-parties, who can hold no more than 50 wireless access points ("WAPs"). See *id.* at 5. NetfreeUS would be subject to the same limitation, except that any area not covered by a third-party could be administered by NetfreeUS in order to ensure compliance with milestone conditions of the license. See *id.*

⁶¹ See *id.* NetfreeUS proposes a minimum speed of 384 kbps downlink and 128 kbps uplink.

⁶² See *id.*

⁶³ See *id.* at 5, n.13.

entire nation or how McElroy will finance such a nationwide network.⁶⁴ As discussed below, because McElroy also has made no firm commitments to build out its network in any part of the country, let alone to all of the U.S., its pledge to provide free service rings hollow.

- *TowerStream*. On the one hand TowerStream requests an exclusive nationwide license in the 2155-2175 MHz, but in the same breath TowerStream proposes to serve only the country's top 200 Metropolitan Statistical Areas ("MSAs").⁶⁵ Wherever TowerStream actually intends to provide service, two things are clear: (1) it will not be truly nationwide service; and (2) it will not be free service as "TowerStream does not propose to offer 'free' service to the public."⁶⁶

B. The Alternative Proposals Do Not Commit to Providing Nationwide Service or to Adhere to Specific and Firm Buildout Obligations.

M2Z has committed to constructing its network and deploying service according to the following milestones: M2Z's network will be deployed to 33% of the U.S. population (*i.e.*, 100 million people) within three years of licensing and commencement of service, 66% of U.S. population (*i.e.*, 200 million people) within five years of licensing and commencement of service, and 95% of the U.S. population (*i.e.*, 285 million people) within ten years of licensing and commencement of service.⁶⁷ M2Z has even proposed these expedited construction milestones be included as conditions on its license, even though they far exceed the standard "substantial service" requirement that applies to the vast majority of wireless licenses.⁶⁸ The Alternative Proposals do not contain specific and comprehensive nationwide buildout commitments similar to those to which M2Z has committed itself:

⁶⁴ See McElroy Proposal at Exhibit 1, p.9.

⁶⁵ See TowerStream Proposal at Exhibit A, pp. 1-2.

⁶⁶ TowerStream Proposal at Exhibit A, p. 2.

⁶⁷ These numbers were derived by multiplying each percentage by 300 million, which approximates the current U.S. population. M2Z is committed to providing service to 33, 66, and 95 percent of whatever the total U.S. population actually is at the time of each construction milestone.

⁶⁸ See M2Z Application at 23 & n.60.

- *Open Range.* Open Range proposes to serve just 553 communities nationwide, and anticipates that it will reach a total population of 6.2 million people (approximately 3% of the U.S. population) during its fifth year of providing service.⁶⁹ The Open Range Proposal contains no specific commitments to offer service to anyone by a particular point in time.

Perhaps more disturbing than Open Range's lack of buildout requirements is the manner in which Open Range has "cherry-picked" the communities it plans to serve. A review of the communities Open Range proposes to serve, listed in Annex A of the Open Range Proposal, reveals that a majority of the areas that would be served are not actually "rural" as this term is defined by the Commission for purposes of the wireless services.⁷⁰ Indeed, many of the cities identified are small towns or suburbs that are very close to urban areas, ensuring that deployments to the smaller cities on the list also require deployment to an urban area in the immediate vicinity.⁷¹ Open Range's method of selecting its service areas calls into question the true impact of its proposal on rural communities. The Open Range Proposal will, at best, affect only 10% of rural Americans and is severely limited in its coverage of population and geography. This only underscores the need for the Commission to move forward on M2Z's NBRS proposal, which, by its very license conditions, would bring free broadband to hundreds of millions of Americans throughout the country within a specified timeframe.

- *NextWave.* NextWave does not specify any buildout requirements for its proposed system. Instead, NextWave makes a general commitment to adhere to the same terms, conditions, and technical requirements that the Commission adopted for operations in the 3.65 GHz band.⁷² Under those rules, however,

⁶⁹ See Open Range Proposal at 12. Although Open Range mentions 553 communities in the text of its proposal, Annex A of the proposal lists only 522 communities.

⁷⁰ The Commission defines "rural" areas as counties in which there is a population density of one hundred people or less per square mile. Under the Commission's standard, there are 60 million people in such counties. See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, 19 FCC Rcd. 19078 (2004) ("on a going-forward basis, and unless otherwise specified in the context of specific policies or regulations governing wireless communications services, counties with a population density of 100 persons per square mile or less constitute "rural areas" for purposes of our wireless spectrum policies"). M2Z has analyzed the communities that Open Range proposes to serve, and has found that only 42% of these communities are located in counties that meet the Commission's definition of "rural." See Exhibit C attached hereto (analysis of population density of cities in Open Range Annex A).

⁷¹ See Open Range Proposal at Annex A. A few of the cities that will be covered in the BTAs highlighted by Open Range include New York City, Chicago, Denver, and Cleveland.

⁷² See NextWave Proposal at 3-4; see also *Wireless Operations in the 3650-3700 MHz Band*, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502 (2005) ("3.65 GHz

NextWave would not be subject to *any* buildout or performance requirements whatsoever. When the Commission adopted service rules for the 3.65 GHz band, it determined that buildout in the band “will be driven by market demand” and therefore “there is no need to impose a performance or build-out requirement.”⁷³ Thus, NextWave would be under no obligation to provide service to any part of the country by a date certain.

Moreover, if the 3.65 GHz band rules were applied in the 2155-2175 MHz band, as NextWave proposes, it is extremely unlikely that it would result in the provision of a nationwide service. The Commission’s licensing scheme for the 3.65 GHz band contemplates multiple licensees in a shared use band operating on the same frequencies in the same geographic areas without exclusive spectrum usage rights and interference protections.⁷⁴ However, because there are no buildout requirements under the 3.65 GHz band rules, the nominally “nationwide” licensees in reality are able to cherry-pick where they will construct facilities and which communities they will serve. Clearly, such a licensing scheme in the 2155-2175 MHz band would not engender the truly nationwide service M2Z proposes to provide.

- *Commnet*. Commnet proposes to construct sufficient cell sites to reach one third of the U.S. population within three years of licensing, two-thirds within seven years of licensing, and ninety percent within ten years of the issuance of a license.⁷⁵ Commnet would be required to meet the first two milestones as conditions of its license, while the third milestone is subject to a different standard. If Commnet doesn’t meet the third milestone, a *pro rata* portion of the licensed spectrum (presumably, that which covers the geographic area where there has been no construction) would be disaggregated and recaptured by the Commission.⁷⁶ This proposal clearly demonstrates that Commnet has no confidence in its ability to provide service to more than two-thirds of the nation. This set of license “conditions” would potentially allow Commnet to warehouse a nationwide license for ten years, during which time it has stated that it will, with few exceptions, “concentrate its initial efforts in the nation’s

Order”). Wireless broadband services in the 3.65 GHz band are governed by Subpart Z of Part 90 of the Commission’s rules. *See* 47 C.F.R. Part 90, Subpart Z.

⁷³ 3.65 GHz Order ¶ 40.

⁷⁴ *See* 3.65 GHz Order ¶ 35; *see also* 47 C.F.R. § 90.1307.

⁷⁵ Commnet Proposal at Exhibit 2, pp. 2-3. Commnet contends that its proposal is more realistic than M2Z’s plan and even suggests that M2Z does not intend to buildout its network as specified in the Application. *See id.* Commnet’s claims are baseless and should be disregarded as such. The fact that Commnet has not been able to identify a business model that can provide free nationwide broadband Internet access has no bearing on the viability of M2Z’s model.

⁷⁶ *See id.* at Exhibit 5, p. 1.

most densely populated areas.”⁷⁷ Once it has cherry-picked the areas that are most profitable to serve, Commnet would be able to simply hand the remaining spectrum back to the Commission, which would be left to identify a licensee or licensees who want to build a business plan around serving a variety of fragmented areas with no population density. Essentially, after Commnet reaches two-thirds of American households, all bets are off, with no penalties to Commnet. Commnet proffers a considerably slower, more limited, and less enforceable deployment plan than what M2Z’s NBRIS would provide.

- *NetfreeUS*. NetfreeUS proposes to meet and enforce upon lessees the “substantial service” buildout standard as a condition of license.⁷⁸ NetfreeUS provides the following timeline for the provision of substantial service: coverage of 50% of the nation’s Cellular Market Areas (“CMAs”) within four years of license grant; coverage of 75% of the nation’s CMAs within six years of license grant; coverage of 95% of the nation’s CMAs within ten years of license grant.⁷⁹ Under Netfree’s safe harbors for meeting the substantial service requirement, “coverage” can be demonstrated in a variety of ways, including: reaching just 30% of the population of the CMA; providing service to 75% of 30% of the rural areas within the CMA; providing a “specialized or technologically sophisticated” service; or providing service to niche markets or to areas outside the areas covered by other licensees. These standards will provide for a significantly slower rollout of broadband services than would M2Z’s NBRIS. Two years after commencement of operations, M2Z will reach 33% of the U.S. population. Under the NetfreeUS Proposal, there is no service guarantee by year two. At the five year mark, M2Z’s NBRIS already would provide service to 66% of the public. Under the NetfreeUS standard, lessees would have just passed the four-year mark, and will have satisfied the applicable standard even if only 15% of the U.S. population is served. Indeed, a much smaller population could be served and still satisfy the vague, subjective safe harbor standards.⁸⁰

⁷⁷ *Id.* at Exhibit 2, p. 2. Commnet proposes a safeguard under which it will deploy service to any community with a population of 10,000 or less that has no other broadband access if it files a petition signed by two hundred households or businesses. *Id.* at Exhibit 2, pp. 2-3; Exhibit 5, p. 1. This safeguard is not proposed as a license condition, rather, it would be a rule that the Commission could enforce through its usual enforcement processes.

⁷⁸ Substantial service is defined as: “service which is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal.” 47 C.F.R. §§ 27.14(a)-(b); 101.1011(a).

⁷⁹ See NetfreeUS Proposal at Exhibit 2, pp. 1-2.

⁸⁰ If the actions of Netfree’s affiliates provide any guidance regarding how NetfreeUS will interpret these safe harbors, the Commission should be very concerned about Netfree’s construction commitments. See SpeedUSNY.com, L.P., Local Multipoint Distribution Service, WLT379, Section 101.1011(a) Report and Demonstration of “Substantial Service,” FCC File No.

- *McElroy*. McElroy broadly commits to follow “a service deployment schedule with specific population coverage benchmarks” but does not specify what such schedule and benchmarks will be.⁸¹ McElroy also states that it will begin “offering service within 24 months of a grant” of its proposal, but fails to define the scope of such service.⁸² These noncommittal assertions from McElroy do not meet the high water mark M2Z has established for NBRIS. There is no guarantee from McElroy that it will ever provide nationwide service, and even if McElroy commenced some sort of service within 24 months of grant, the extent to which such service would be available in the country is entirely uncertain and unclear.

- *TowerStream*. TowerStream proposes to provide coverage to at least 50% of the population in its licensed service area within 5 years, and 75% of that population within 10 years. In addition, TowerStream states that it will provide “substantial service” to 90% of Rural Service Areas (“RSAs”) within 10 years.⁸³ However, the TowerStream Proposal is internally inconsistent regarding the areas TowerStream seeks to serve. As discussed above, TowerStream requests a nationwide license, yet proposes to serve only the top 200 of the country’s 368 MSAs, leaving nearly half of the nation’s MSAs unserved. Notwithstanding this shortfall, TowerStream also proposes to serve 90% of RSAs. So exactly where TowerStream would provide its spotty service is entirely unclear. Indeed, apparently not even TowerStream knows.

0002939453 (filed Mar. 7, 2007). Speedus was granted a conditional renewal of its license for a ten-year term through February 1, 2016, provided that it could make a showing of substantial service by March 27, 2006. Speedus filed a substantial service showing on March 7, 2007. In its substantial service showing, Speedus identifies four primary service offerings that were provided during its license term: 1) a subscription television service, which was available to 52% of the market from 1996-1998; 2) transmission of Bloomberg Information Programming to financial institutions from 1996-2000; 3) a high-speed broadband Internet access trial from 1996-2003; 4) a testing program involving XO Communications, Inc., commencing in 2004. The report does not specify what services were offered using this spectrum from 2004 to the present. Speedus contends that it has met the substantial service safe harbor for service to niche markets and populations outside of areas served by other licensees, because no other LMDS licensee was offering any service in the same area during the license period. This substantial service showing remains pending.

⁸¹ McElroy Proposal at Exhibit 1, pp. 9-10.

⁸² *See id.* at Exhibit 1, p. 9.

⁸³ *See* TowerStream Proposal at Exhibit A, p. 4.

C. The Alternative Proposals Will Not Enhance Universal Service.

Universal service does not currently encompass broadband services. There is, however, a movement afoot in Congress to change that.⁸⁴ Nevertheless, M2Z has stated that it will not accept monies from the USF and also has agreed to contribute to USF, to the extent that such requirements apply to its services,⁸⁵ all of which will result in a net benefit to the USF program and, more importantly, to consumers.⁸⁶ The grant of the M2Z Application allows the realization of universal service goals for broadband without increasing universal service funding requirements. In contrast, the Alternative Proposals do not commit concurrently to contribute to USF and to not accept USF funding:

- *Open Range*. Open Range has not offered any commitment to pay into USF and has not declined to accept USF funds. Moreover, although Open Range suggests that its offering will “relieve pressure” on the USF, it does not explain how it will do so, nor does it attempt to quantify the benefits to the USF.
- *NextWave*. NextWave makes no commitments whatsoever concerning USF. Under its proposal to operate in the 2155-2175 MHz band with “the same

⁸⁴ See, e.g., Universal Service for the 21st Century Act, S.711, 110th Cong. 1st Sess. (2007); USA Act, S.101, 110th Cong. 1st Sess. (2007); Serving Everyone with Reliable, Vital Internet, Communications, and Education Act of 2007, H.R.42, 110th Cong. 1st Sess. (2007) (each proposing to expand the universal service program to encompass broadband).

⁸⁵ See Application at 32-33, n. 101 (“M2Z anticipates that its Premium Services (for which there will be a consumer charge) would be subject to universal service contributions to the extent specified by the Commission in appropriate rulemaking proceedings . . . M2Z will work with the Commission to ensure that its service meets the relevant requirements . . .”). In a recent declaratory ruling, the Commission determined that wireless broadband Internet access services are information services, and that such services are not CMRS as that term is defined in the Act and implemented in the Commission’s rules. See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53, FCC No. 07-30 (rel. March 23, 2007) (“*Declaratory Ruling*”). Based on M2Z’s review of the item, it appears that NBRS would not be categorized as CMRS. M2Z remains committed to complying with USF obligations to the extent required by the Commission’s rules and regulations as presently formulated or adapted for various services it would provide under its NBRS license.

⁸⁶ See M2Z Application at 29-30.

terms, conditions and technical requirements that the Commission adopted for the 3.65 GHz band,”⁸⁷ however, NextWave would be able to choose to be regulated as a common carrier or non-common carrier depending on the type of service it opts to provide.⁸⁸ As a result, NextWave seeks to circumvent any and all USF obligations it might have by cherry-picking classifications of its services.⁸⁹ NextWave does not demonstrate that it can meet the changing regulatory landscape applicable to these services.

- *Commnet*. Commnet proposes to contribute to USF according to the heretofore unspecified requirements for BRS licensees. Commnet does not volunteer not to accept monies from the USF.
- *NetfreeUS*. Although NetfreeUS applauds the effects of M2Z’s proposal on the USF and suggests its proposal will have a similar impact, its plan does not specify how it will implement its goals given the subleasing arrangement it contemplates for buildout and operation of its service.⁹⁰
- *McElroy*. Although McElroy mentions in passing that it will not rely on “taxpayer dollars or disbursements from the Universal Service Fund” to construct its network,⁹¹ it does not elaborate and makes no concurrent commitment to contribute to USF to the extent required by the Act and the Commissions’ rules. Here again, McElroy has provided the most generic of assurances based on M2Z’s model, but without providing any substance.
- *TowerStream*. TowerStream has not declined to accept USF funds for the construction and operation of its network.

D. The Applicants Will Not Offer a Family-Friendly Service.

M2Z proposes to include a free filtering feature with its service that will protect minors from indecent, obscene, and pornographic content on the Internet, a private sector solution that is

⁸⁷ NextWave Proposal at 3-4.

⁸⁸ See *3.65 GHz Order* ¶ 36 (“Licensees in the 3650 MHz band may provide services on a common carrier or non-common carrier basis and will have flexibility to designate their regulatory status based on any services they choose to provide.”)

⁸⁹ See *id.* ¶ 37 (“For instance, if a wireless licensee provides Commercial Mobile Radio Services (CMRS), which makes the licensee a common carrier, other obligations attach as a result of that decision under Title II of the Communications Act or the Commission’s rules (*e.g.*, universal service, CALEA).”).

⁹⁰ NetfreeUS Proposal at 4.

⁹¹ McElroy Proposal at Exhibit 1, p. 1.

sorely needed. This content filtering will be “always on” and tamper-resistant as an essential element of M2Z’s service.⁹² Filtering functions would apply enterprise class filtering to the free component of the NBRs to restrict unauthorized access to websites purveying pornographic, obscene, or indecent material.⁹³ Open Range, NextWave, NetfreeUS, and TowerStream offer no such filtering proposal.⁹⁴ Although Commnet and McElroy purport to employ some sort of filtering to protect minors, their nonspecific proposals are not comparable to the family-friendly service M2Z will offer:

- *Commnet*. Commnet merely states that it will comply with any “current or future federal requirements for the protection of minors.”⁹⁵ It is no surprise that Commnet does not intend to offer a family-friendly service, given that its affiliates have a history of profiting from the traffic and sale of indecent, pornographic content.⁹⁶ Commnet’s proffer of compliance with federal laws is,

⁹² See M2Z Application at 24 & Appendix 3.

⁹³ See *id.* Adults who wish to access otherwise lawful material that is restricted by NBRs may do so by enrolling in one of M2Z’s Premium Service offerings. See *id.*

⁹⁴ NetfreeUS explicitly states that it will not filter such content. See NetfreeUS Proposal at 6. TowerStream states that it “will comply with all requirements for the protection of minors from access to indecent and obscene materials, and will offer its users options for filtering and blocking pornographic sites.” TowerStream Proposal at Exhibit A, p. 3. Compliance with such federal laws is to be expected from a Commission licensee, however, and since pornography blocking software is already widely available, TowerStream brings nothing new to the table by offering such “options” to its users.

⁹⁵ Commnet Proposal at Exhibit 2, p. 3.

⁹⁶ See *Offshore Dial-a-Porn Coming Under Siege: Profits Transformed Guyana Phone System, But Regulators, Carriers Want to End High Fees*, CLEVELAND PLAIN DEALER (April 4, 1999) (describing how ATNI and GT&T financed a significant portion of upgrades to Guyana’s telecommunications infrastructure through revenues from phone services that feature adult entertainment, also known as “audiotexting”). Audiotexting generated significant revenues for GT&T because of call termination fees, which were once as high as 85 cents per minute. See *Guyana Telephone & Telegraph Co., Ltd. v. Melbourne Int’l Communications Ltd.*, 329 F.3d 1241 (2003). GT&T apparently only stopped routing the traffic when it ceased to be profitable. See Atlantic Tele-Network, Inc., Securities and Exchange Commission Form 10-K, Annual Report for the fiscal year ended December 31, 1998 at 2; Atlantic Tele-Network, Inc., Securities and Exchange Commission Form 10-K, Annual Report for the fiscal year ended December 31, 2001 at 2 (GT&T’s audiotext traffic steadily declined over a five year period from a high of 122,476 minutes in 1996 to just 3,689 minutes per year in 2001). The profitability of audiotexting was dealt a final blow in January 2002, when the FCC reduced the settlement rate to

presumably, not a benefit but the minimum one can expect from any Commission licensee.

- *McElroy*. McElroy commits “to outfit its system with advanced network filtering technology for purposes of blocking access to indecent or obscene material.”⁹⁷ Without further details from McElroy, however, it is impossible to determine whether such filtering will be comparable to M2Z’s family-friendly service. For instance, McElroy does not explain how it plans to accomplish filtering on its network, whether all users will be denied access to indecent and obscene material, and what measures it will take to prevent users from tampering with or hacking its filters.

E. The Alternative Proposals Do Not Make Comparable Commitments to Serving Public Safety Entities.

M2Z pledges to provide all public safety entities nationwide with access to its free interoperable network.⁹⁸ As part of this commitment, M2Z will serve any federal, state, or municipal public safety organization with the ability to connect an unlimited number of devices to its network. Once fully constructed, M2Z’s network will guarantee public safety entities a single interoperable data platform usable across the United States. The Alternative Proposals do not approach this level of commitment to the public safety entities:

- *Open Range*. Open Range offers a vague assurance that, in the event of an emergency, public safety communications will be “prioritized” on its system.⁹⁹ Open Range does not elaborate how such priority will be accomplished.
- *NextWave*. NextWave makes no commitment whatsoever to provide a free, nationwide, and interoperable network for the benefit of public safety entities. Indeed, given that NextWave’s proposal envisions a non-exclusive licensing regime using contention-based protocols in the 2155-2175 MHz band with no interference protections,¹⁰⁰ NextWave’s proposed service would be ill suited

just 23 cents per minute. Atlantic Tele-Network, Inc., Securities and Exchange Commission Form 10-K, Annual Report for the fiscal year ended December 31, 2001 at 2.

⁹⁷ McElroy Proposal at 10.

⁹⁸ See M2Z Application at 24-26.

⁹⁹ See Open Range Proposal at 5.

¹⁰⁰ See NextWave Proposal at 3-4; see also *3.65 GHz Order* ¶ 35.

for public safety use. Because anyone could use such a network at any time, there would be no way to prioritize public safety access or to ensure the protection of priority communications from interference.

- *Commnet*. Commnet states that it will work with the public safety community to develop dual-mode voice and data handsets. When and if such CPE is developed, Commnet would offer basic broadband to public safety at no charge. As compared to M2Z's offer to provide, as a condition of its license, free access for all public safety entities for an unlimited number of devices as soon as its network is deployed, Commnet's "commitment" rings hollow. The low level of commitment to public safety is no surprise given that Commnet has been less than aggressive in its efforts to comply with the Commission's E-911 mandates. Notably, Commnet twice has sought, and twice has been denied, waiver of the wireless E-911 requirements.¹⁰¹ There is nothing *per se* wrong with seeking waiver of a Commission rule or policy, but when the waiver concerns something as fundamental, and indeed as critical to national security, as wireless E-911, Commnet's level of commitment to providing services to first responders has to be open to question.
- *NetfreeUS*. Though NetfreeUS provides a long description of the communications problems faced by public safety entities, Netfree's proposed solution does little to solve them. NetfreeUS proposes to provide public safety officials with an override code that will enable them to clear traffic in emergencies.¹⁰² NetfreeUS analogizes its proposal to the Emergency Alert System and states that the override code would enable "public safety officials to communicate with the public and each other over the Internet before, during, and after natural disasters."¹⁰³ It also states that where it offers WPB service, it will make such service available to governmental or public safety entities.¹⁰⁴ As with the other commitments NetfreeUS makes, they are comparatively limited in scale and scope given the significantly slower rollout proposed by NetfreeUS and the fact that most of the network needs to be constructed and deployed by unidentified third parties. M2Z's proposal will offer public safety entities full-time free access to an interoperable network for an unlimited number of devices. With NetfreeUS establishing itself as little more than a spectrum referee, it simply cannot commit itself to the kind of public safety offering that M2Z would provide.

¹⁰¹ See *Revisions of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 20 FCC Rcd 7709 (2005); *Revisions of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 2007 WL 445335 (Feb. 9, 2007).

¹⁰² See NetfreeUS Proposal at 17-18.

¹⁰³ *Id.* at 6.

¹⁰⁴ See *id.* at 6 and Exhibit 2, p. 4.

- *McElroy*. Although McElroy “commits to serve any federal, state, county, or municipal safety organization wishing to use its service, without regard to the number of devices utilizing the network,”¹⁰⁵ this commitment from McElroy does not withstand scrutiny. As discussed above, McElroy makes no commitment to ever construct a nationwide network, and the extent to which its network will ever be built out is entirely unclear and uncertain. As compared to M2Z’s firm commitment to build an interoperable public safety network across the country within ten years of license grant, McElroy’s attempt at mimicry falls well short of that pledge.
- *TowerStream*. TowerStream states without elaboration that it will provide “priority access” to public safety entities “operating with open standard equipment” during emergencies at no charge.¹⁰⁶ However, given that TowerStream does not commit to building a nationwide network, such “priority access” is meaningless.

F. The Alternative Proposals Do Not Offer Comparable Spectrum Usage Fees.

As explained in the M2Z Application, in addition to providing broadband free of recurring charges, M2Z also will offer a subscription-based service with such premium features as faster data rates and access to additional content and/or applications (the “Premium Service”).¹⁰⁷ M2Z has voluntarily committed to pay an annual spectrum usage fee to the U.S. Treasury in the amount of five percent of the gross revenues derived from the Premium Service, and has proposed that this commitment be included among the terms and conditions of its license.¹⁰⁸ The Alternative Proposals make no such commitment:¹⁰⁹

¹⁰⁵ See McElroy Proposal at Exhibit 1, p. 10.

¹⁰⁶ TowerStream Proposal at Exhibit A, p. 3.

¹⁰⁷ M2Z Application at 26.

¹⁰⁸ *Id.*

¹⁰⁹ Several of the Applicants instead urge the Commission to award the license at auction. See McElroy Proposal at Exhibit 1, p. 3; TowerStream Proposal at Exhibit A, p. 2; Commnet Proposal at Exhibit 7. However, as discussed below, the public interest is not best served by award of a NBRIS license at auction. See *infra* Section IV. See also, Simon Wilkie, PhD., “Auctions Are Not a Panacea: Theory And Evidence Of Anti-Competitive and Rentseeking Behavior in FCC Rulemakings and Auction Designs,” WT Docket Nos. 07-16 & 07-30 (filed Mar. 26, 2007). Moreover, any commitment from the Applicants to pay for the value of the spectrum at auction is meaningless unless the Applicants participate in and win such an auction.

- *Open Range*. Open Range, by contrast, has identified no spectrum usage fees or other means by which the Commission can meet its statutory obligation to recover a portion of the value of this spectrum for the public.¹¹⁰
- *NextWave*. NextWave also does not offer to pay spectrum usage fees. Moreover, under NextWave’s non-exclusive licensing scheme for the 2155-2175 MHz band, the Commission would not be able to satisfy its statutory obligation to recover a portion of the value of the spectrum for the public because there would never be any need to conduct an auction.¹¹¹
- *Commnet*. Commnet proposes to pay a regulatory fee of \$50 million when the grant of its license *renewal* becomes an unreviewable final order.¹¹² All of Commnet’s services are feeable and would, presumably, generate revenue for Commnet within a few years after a license issues (assuming that Commnet constructs under the schedule in its Proposal). The U.S. Treasury, on the other hand, would not see any of these proceeds for at least ten years, and that is assuming that Commnet is still operating and then only if Commnet’s license is renewed. Commnet’s regulatory fee proposal does not constitute an adequate means by which the Commission can recover a portion of the value of this spectrum for the public, making its proposal inconsistent with statutory requirements.
- *NetfreeUS*. NetfreeUS has stated that it will pay the U.S. Treasury a fee of 5% of the gross revenues that it receives from its WPB service.¹¹³ As with so many other aspects of its proposal, the impact of this proposed usage fee is substantially reduced by the fact that NetfreeUS is presently only committing itself to these payments, not the thousands of as-yet-unidentified parties that would be providing services under the proposed spectrum leasing model. Moreover, according to the NetfreeUS business plan, WPB revenues will be

¹¹⁰ Open Range apparently is willing to pay “the regulatory fee established by the FCC” for its service offering. Regulatory fees are mandatory, not voluntary, so it is unclear why Open Range mentions this payment. In any event, the payments are de minimis. For example, the current annual regulatory fee for CMRS providers is \$0.20 per subscriber per year. *Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, 21 FCC Rcd 8092 (2006).

¹¹¹ See NextWave Proposal at 7 (“the basic construct of NextWave’s application would avoid mutual exclusivity with all other applicants seeking authority to operate under the same terms and conditions set forth in the NextWave application”). Thus, the Commission would have no need to conduct competitive bidding for the spectrum if the NextWave Proposal were implemented because there would be no mutual exclusivity among applicants. See 47 U.S.C. 309(j)(i) (acceptance of mutually exclusive applications is a condition precedent to competitive bidding).

¹¹² Commnet Proposal at Exhibit 5, p. 2.

¹¹³ NetfreeUS Proposal at 6 & 23.

generated only through advertising.¹¹⁴ M2Z's spectrum usage payments are connected not to the advertising that will support its free service, but to the revenue that will be generated by its premium offerings. Because it relies solely on possible advertising revenues, the NetfreeUS proposal does not include a comparable spectrum usage commitment.

- *McElroy*. McElroy flatly states that, unlike M2Z, it will not pay a spectrum usage fee of five percent of the gross revenues generated by the provision of its premium service.¹¹⁵ While, as explained below, McElroy attempts feebly to mimic M2Z's proposal, it departs company with M2Z where it really counts—providing ongoing payments for use of the spectrum it seeks.
- *TowerStream*. The TowerStream Proposal confirms that TowerStream will not pay either a licensing fee or a renewal fee.¹¹⁶

G. The Alternative Proposals Will Not Promote New Entry.

M2Z will be a new entrant in the broadband market, not an incumbent provider of wireline or wireless broadband services. With the exception of Open Range, all of the Applicants hold wireless licenses. As M2Z has observed, such incumbents have no incentive to compete with their existing broadband offerings.¹¹⁷ Accordingly, any Alternative Proposals that do not promote entry by a new provider of wireless broadband service should be rejected:

- *NextWave*. As NextWave readily acknowledges, its spectrum portfolio includes: (1) 20 MHz or more of spectrum covering 136.4 million persons; (2) 10 MHz of spectrum covering an additional 96 million persons; and (3) 30 MHz or more of spectrum covering a number of markets, including licenses covering 11.9 million persons in New York.¹¹⁸
- *Commnet*. Commnet's Proposal fails to satisfy the threshold obligation of an NBRS applicant to promote new entry into the wireless or broadband markets. Commnet is an entrenched incumbent which controls numerous FCC licenses

¹¹⁴ NetfreeUS also will charge its lessees certain "nominal" fees for transaction costs. *Id.* proposal at 23. It is unclear whether these fees would be counted among total revenues for purposes of calculating spectrum usage payments.

¹¹⁵ See McElroy Proposal at Exhibit 1, p. 3.

¹¹⁶ See TowerStream Proposal at Exhibit A, p. 2.

¹¹⁷ See Forbearance Petition at 25-30.

¹¹⁸ See NextWave Proposal at n.5.

and is affiliated with other FCC-licensed entities. Commnet controls nine other wireless companies which, together, provide service in markets in 12 different states.¹¹⁹ Commnet's parent company, Atlantic Tele-Network, Inc. ("ATNI"), owns other communications businesses, including Choice Communications, LLC, a provider of subscription television and telecommunications services in the U.S.,¹²⁰ Sovernet, a provider of wireline services in Vermont,¹²¹ and Guyana Telephone and Telegraph abroad.¹²² Moreover, by its very nature, Commnet's business is dependent upon its relationships with the nation's wireless incumbent carriers. Commnet's entire business revolves around its roaming agreements with these carriers.¹²³

- *NetfreeUS*. Although NetfreeUS itself has no licenses, its parent company, one of its principals, and an investor all have ownership interests in entities that hold FCC licenses. Accordingly, NetfreeUS does not promote new entry into the wireless and broadband markets as would M2Z. NetfreeUS is a wholly-owned subsidiary of Speedus Corp.,¹²⁴ which, through its wholly-owned subsidiary SpeedUSNY.com, L.P., holds a Local Multipoint Distribution Service ("LMDS") license.¹²⁵ NetfreeUS's Chairman and CEO

¹¹⁹ See FCC Form 602 of Commnet Wireless, LLC (filed Feb. 27, 2007). These include Commnet Four Corners, LLC, Commnet Illinois, LLC, Commnet of Arizona, LLC, Commnet of Delaware, LLC, Commnet of Florida, LLC, Elbert County Wireless, LLC, Excomm, LLC, Gila County Wireless, LLC, and Mocelco, LLC. Commnet serves markets in Arizona, Colorado, Illinois, Missouri, New Mexico, and seven other states. See ATNI 2006 Annual Report at 3.

¹²⁰ See Atlantic Tele-Network, Inc., Securities and Exchange Commission Form 10-K, Annual Report for the fiscal year ended December 31, 2006 at 2 ("ATNI 2006 Annual Report").

¹²¹ See *id.*

¹²² See *id.*

¹²³ According past statements of its parent company, Commnet operates in "a very unusual niche market: a rural wireless network focused solely on providing service to other carriers." ATNI 2005 Annual Report, Letter to Shareholders at 4, available at: http://www.atni.com/2005_report.html. Such carriers have demonstrated an increasing willingness to make longer term commitments, and Commnet has "taken advantage of this environment by entering into long-term, preferred roaming agreements with several major wireless carriers, including Cingular, Verizon and T-Mobile." *Id.* at 3.

¹²⁴ See NetfreeUS Proposal at Exhibit 1, FCC Form 602 of NetfreeUS, LLC.

¹²⁵ Speedus secured this license in 1991 and it was renewed in 1996 for a new ten year term that expired on February 1, 2006. A conditional renewal was granted for a ten-year term through February 1, 2016, provided that it could make a showing of substantial service by March 27, 2007. The substantial service notification was filed recently and remains pending. See SpeedUSNY.com, L.P., Local Multipoint Distribution Service, WLT379, Section 101.1011(a) Report and Demonstration of "Substantial Service," FCC File No. 0002939453 (filed Mar. 7, 2007).

holds an attributable interest in VisionStar, Incorporated, a satellite communications company.¹²⁶ XO Communications, Inc., which has an indirect interest in NetfreeUS, and also wholly owns Nextlink Wireless, Inc., a wireless services provider,¹²⁷ Telecommunications of Nevada, LLC, a wireline service provider,¹²⁸ and XO Communications Services, another wireline service provider.¹²⁹

- *McElroy*. During McElroy's 80-year history in wireless communications, it has built and operated cellular telephone systems. Currently, McElroy holds 700 MHz licenses in various markets and was the first applicant in the country to file for cellular unserved areas in the Los Angeles, Phoenix, Boston, Minneapolis, and Las Cruces markets.¹³⁰
- *TowerStream*. According to the TowerStream Proposals, TowerStream is a leading fixed wireless service provider that delivers high-speed Internet access to businesses in markets such as New York City, Los Angeles, Chicago, San Francisco, Seattle, and Boston.¹³¹

H. The Alternative Proposals Will Not Stimulate the Economy or Result in Comparable Consumer Welfare Benefits.

In contrast to the Alternative Proposals, four of which, amazingly, devote no attention to the purported economic benefits of their proposals, the record contains substantial evidence of the economic benefits of M2Z's proposal.¹³² For example, using a "very conservative framework," the Wilkie Consumer Welfare Study estimates "the net present value of consumer

¹²⁶ See NetfreeUS Proposal at Exhibit 1, FCC Form 602 of NetfreeUS, LLC. Shant Hovanian, NetfreeUS's Chairman and CEO, has a 10% interest in VisionStar, Incorporated.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See McElroy Proposal at Exhibit 1, pp. 4-5. McElroy states that it will participate in an auction of the spectrum. However, as discussed below, the public interest is not best served by award of a NBRIS license at auction. See *infra* Section IV.

¹³¹ TowerStream Proposal at Exhibit A, p. 4.

¹³² The economic benefits of M2Z's proposal also are discussed in the Application. See M2Z Application at Appendix 5.

benefits that will likely result from the first-order effects of M2Z's entry" into the market for broadband access services.¹³³ The report focuses on:

[T]hree important first-order effects of M2Z's entry on consumers: (1) benefits to consumers of broadband services due to lower prices; (2) benefits from increased broadband access via either (a) the provision of broadband access to consumers without prior access to broadband or (b) an avoided new broadband universal service fund tax; and (3) royalty payments for the spectrum to be leased by M2Z.¹³⁴

Using these very conservative assumptions, the Wilkie Consumer Welfare Report estimates that M2Z's entry into the market for broadband access services "will likely result in a net present value ('NPV') as of 2007 of benefits to U.S. consumers of broadband and telecommunications services ranging from more than \$18 billion to more than \$25 billion," taking into account the reduction in broadband access prices from 2008 onwards and benefits resulting from increased broadband access made possible by M2Z's free service from 2008 to 2022.¹³⁵

According to the Wilkie Consumer Welfare Report, the most significant effect of M2Z's entry in the market for broadband services will be its impact upon the competitive dynamics of the market: "M2Z's Proposal has the potential to dramatically alter the pattern of competition in the market for broadband access."¹³⁶ Furthermore, consumers will benefit from the competitive impact of M2Z's entry by "more than \$13 billion from 2008 onwards."¹³⁷

¹³³ Wilkie Consumer Welfare Study at 2.

¹³⁴ *Id.*

¹³⁵ *Id.* at 3.

¹³⁶ *Id.* at 9.

¹³⁷ *Id.* at 12. These estimates expressly exclude the second order effects which also are likely to stem from M2Z's entry into the national broadband access market. These include "the effects of M2Z's entry on the incentives of existing broadband providers to innovate and invest in their networks" and "the significant but less tangible consumer benefits from increased innovation and

The second effect of M2Z's entry analyzed in the Wilkie Consumer Welfare Report are the benefits to consumers from expanded broadband access: "The NPV of benefits to consumers of broadband and telecommunications services from increased broadband access made possible by M2Z's free service range from more than \$5 billion to more than \$12 billion over the period 2008 to 2022."¹³⁸

Finally, the Wilkie Consumer Welfare Report conservatively estimates that "the NPV of benefits from royalty payments for the spectrum to be leased by M2Z" will range "from more than \$35 million to more than \$536 million from 2008 onwards."¹³⁹ Using less conservative but still realistic assumptions of M2Z's market penetration, the report estimates that "M2Z will make royalty payments ranging in net present value from more than \$71 million to more than \$1 billion from 2008 onwards" depending on whether it acquires one million to fifteen million customers.¹⁴⁰

A second report entitled "M2Z Networks, Inc. The Value of Public Interest Commitments and the Cost of Delay to American Consumers", offers a different perspective of the effects of M2Z's entry into the market.¹⁴¹ Using more optimistic assumptions of the overall growth of

investment in other industries as a result of increased and cheaper broadband access for U.S. consumers due to M2Z's service." *Id.* at 2.

¹³⁸ *Id.* at 9.

¹³⁹ *Id.* In addition, other filings that have been made in support of M2Z's Application contain citations to economic data. *See, e.g.*, Comments of California Association for Local Economic Development, WT Docket No. 07-16 (filed Feb. 20, 2007) (referencing a February 2006 report by the U.S. Dept. of Commerce Economic Development Administration); Comments of the Electronic Retailing Association, WT Docket No. 07-16, (filed Feb. 6, 2007) (citing online sales figures).

¹⁴⁰ Wilkie Consumer Welfare Study at 20.

¹⁴¹ Kostas Liopiros, PhD., "M2Z Networks, Inc.—The Value of Public Interest Commitments and the Cost of Delay to American Consumers" WT Docket Nos. 07-16 & 07-30 (filed March 19, 2007) at 31.

broadband penetration, as well as the effects upon competitive prices due to M2Z's entry, the report finds that, in the aggregate, the following benefits will result over the course of the initial 15-year license period:

- M2Z's entry would have positive competitive effects because it will alter the duopoly structure of the market for residential broadband access, resulting in benefits to consumers from increased competition of \$25 billion.¹⁴²
- Increased broadband access made possible by M2Z's free service would result in benefits to broadband consumers of more than \$5 billion.¹⁴³
- M2Z's commitment to offer its free interoperable network to public safety officials with priority access during emergencies would result in benefits to the public of approximately \$3.5 billion.¹⁴⁴
- M2Z's contribution to the U.S. Treasury of 5% of the revenues from its enhanced subscription service would result in direct financial benefits of about \$275 million.¹⁴⁵

Summing all these effects, consumers and the general public would gain a net value of \$34.2 billion dollars from M2Z's entry into the market. The second report also calculates the cost to society of a delay in the market entry of M2Z: a one year delay in M2Z's entry could cost American consumers \$4.7 billion in lost benefits.¹⁴⁶

In contrast, the Alternative Proposals lack a meaningful discussion of their purported economic benefits. Indeed, with the exception of Open Range and NetFreeUS, none of the Alternative Proposals even bother to address this important issue:

- *Open Range*. Open Range asserts that it "has developed a realistic, achievable plan which will provide significant economic benefit to rural Americans," but

¹⁴² *Id.* at ii, 11-13.

¹⁴³ *Id.* at iii, 14-20.

¹⁴⁴ *Id.* at iii, 20-25.

¹⁴⁵ *Id.* at iii, 25-29.

¹⁴⁶ *Id.* at ii, 29-31.

cites no figures to support that assertion.¹⁴⁷ Open Range further asserts that the availability of its services “will stimulate economic growth in rural areas and bring those areas within the modern information economy,” and that the hiring and training of the “personnel providing the construction, operating, sales, marketing and customer care functions required to operate and manage” Open Range’s network in the rural communities that it serves “will have a substantial direct and indirect economic impact on these rural communities.”¹⁴⁸ Again, Open Range provides no data or analysis to support this assertion.

- *NetfreeUS*. In its application, NetfreeUS essentially agrees with M2Z’s economic analysis, but offers little in the way of unique data to support its own proposal. NetfreeUS states that “[b]roadband access has been found to be an engine for economic growth” and cites statistics concerning wage increases from a report that appears to be based on evidence from one region of the country.¹⁴⁹ Accepting those figures at face value, they suggest that NetfreeUS US has conducted only a very limited economic analysis with regard to its own proposal and, in any event, do not provide sufficient evidence of economic benefits to justify acceptance of the NetfreeUS proposal for filing.

In sum, M2Z has supported its application with substantial evidence of the benefits to the economy and to consumer welfare that its proposal will likely bring about. The Alternative Proposals are sorely lacking in that regard. Four of the Applicants devote *no* attention to the issue, and the other two Applicants present either a conclusory, or very limited, analysis. Slowing down the review of M2Z’s Application to examine these flimsy proposals presents significant negative consequences for all Americans and thus would disserve the public interest.

I. The Alternative Proposals Have Not Proposed to Meet Interference Protection and Other Standards Under Part 27 of the Commission’s Rules.

M2Z proposes to protect incumbent co-channel and adjacent channel users on the 2155-2175 MHz band using the same standards set forth at Part 27 of the Commission’s rules.¹⁵⁰ M2Z

¹⁴⁷ Open Range Proposal at 4.

¹⁴⁸ *Id.* at 13.

¹⁴⁹ NetfreeUS Proposal at 20.

¹⁵⁰ *See* M2Z Application at Appendix 2.

has further committed to assisting incumbent users in relocating out of the band.¹⁵¹ With the exception of NetfreeUS,¹⁵² the Alternative Proposals do not propose interference protection standards. Several Alternative Proposals also fail to commit to relocating incumbent licensees in the 2155-2175 MHz band. To the extent that they fail to propose compliance with any technical requirements or interference standards, the Alternative Proposals are not only deficient as compared to M2Z's NBRs, they are also defective and subject to dismissal as incomplete:¹⁵³

- *Open Range.* As the Open Range Proposal stands, it is impossible for the Commission to address such threshold matters as how or whether Open Range will avoid interference to incumbent or adjacent licensees. Open Range itself has observed, "WiMAX propagation characteristics depend upon a number of technical and geographic characteristics," including, but not limited to, "allowable power output in the frequency band, transmission frequency, out of band emissions limits, terrain, vegetation, building density, base station power and antenna gain, CPE power and antenna gain, height of base station and CPE antennas and other factors."¹⁵⁴ Yet Open Range provides the Commission with no technical specifications that would give the Commission comfort concerning the RF environment (including emissions limits, base

¹⁵¹ See *id.* at 13 & 19 (citing *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of new Advanced Wireless Services, including Third Generation Wireless Systems, Service Rules for the Advanced Wireless Services In the 1.7 and 2.1 GHz Bands*, Ninth Report and Order, 21 FCC Rcd 4473 (2006)).

¹⁵² See NetfreeUS Proposal at 16 (proposing to comply with Parts 22, 27, and 101 of the Commission's rules); see also *id.* at Exhibit 2, p. 3 (proposing to relocate incumbents).

¹⁵³ The Commission may dismiss as defective any application that "is incomplete with respect to required answers to questions, informational showings, or other matters of a formal character." 47 C.F.R. § 1.934(d)(1). See also 47 U.S.C. § 308(b)("[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used . . . and such other information as it may require."). Applications that do not meet the standard are subject to dismissal. See, e.g., *Applications of San Diego Gas and Electric Company for Authority to Operate Multiple Address Systems Stations at Carlsbad and San Marcos, California*, Order on Reconsideration, 16 FCC Rcd 13089 (2001) (upholding dismissal of application as defective where applicant failed to include required frequency coordination showing).

¹⁵⁴ See Open Range Proposal at Annex D, p. 33.

station power levels, or CPE power levels) that will be established by Open Range's proposed deployment. The only standard with which Open Range proposes to comply, with any specificity, is the obligation to relocate incumbent licensees.¹⁵⁵ Had Open Range asserted that it would comply with a set of power limits within the FCC's rules or at least set forth some parameters with which it planned to comply, the Commission would be better able to evaluate Open Range's assertion that it will cause "no harmful interference to licensees."¹⁵⁶ Without this information, the Commission cannot make an informed analysis of whether Open Range's proposal is technically viable, nor can it be assured that incumbent and adjacent licensees will be protected from interference.

- *NextWave*. By definition, the NextWave Proposal will offer no interference protection to licensees in the 2155-2175 MHz band, let alone adhere to Part 27 interference standards. Because NextWave proposes to use the service rules the Commission adopted for the 3.65 GHz band, any licensee would have access to the 2155-2175 MHz band through a non-exclusive, nationwide licensing scheme.¹⁵⁷ Under this approach advocated by NextWave, multiple licensees would operate on the same frequencies in the same geographic areas without having exclusive spectrum usage rights and interference protections.¹⁵⁸

Moreover, although NextWave asserts that it will protect incumbent co-channel users, the contention-based technology it proposes to use has yet to be fully developed and the current level of contention-based methods are highly spectrally inefficient.¹⁵⁹ NextWave also offers no specifics as to how adjacent channel licensees will be protected from interference.¹⁶⁰

¹⁵⁵ Open Range states that it will comply with the relocation requirements adopted by the Commission. *See id.* at 4& 10.

¹⁵⁶ *See id.*

¹⁵⁷ *See 3.65 GHz Order* ¶ 25.

¹⁵⁸ *See id.* ¶ 26.

¹⁵⁹ Under NextWave's proposal, contention-based technology would be required for all users of the contention-based using omnidirectional antennas so their transmissions can be detected anywhere that a potential transmitter might cause interference to a transmitter-receiver pair in use. However, incumbent BRS and FS licensees are not omnidirectional but use high gain direction antenna systems and thus are subject to the "hidden node problem." The hidden node problem refers to a situation where an active receiver using a high gain/directional antenna to receive a signal from a transmitter with a high gain/directional antenna cannot be detected by a nearby contention-based system searching for idle spectrum. The situation is complicated by the lack of specific FCC modulation standards for BRS and FS systems thus precluding the use of extremely sensitive detectors using processing gain.

¹⁶⁰ *See NextWave Proposal* at 4.

- *Commnet*. Although Commnet specifies what regulatory treatment it should receive for purposes of USF and emergency 911 requirements, it contains no standards with respect to interference protection. It does not even offer a perfunctory statement of plans to avoid harmful interference to others. Nor does it state whether it will comply with the relocation obligations imposed by the Commission with respect to incumbents in the band. Thus, Commnet has fallen short of both the standard set by M2Z as well as the standards for completeness of applications in the Act and the Commission’s rules. As with the Open Range Proposal, the lack of technical information makes the Commnet Proposal subject to dismissal as defective.¹⁶¹
- *McElroy*. Although McElroy broadly commits to “operate its system in a manner that avoids interference to adjacent spectrum users,” it offers no specifics as to which interference standards will be used.¹⁶²
- *TowerStream*. Like McElroy, TowerStream makes a broad commitment to “construct and operate its system to comply with the Commission’s rules for the protection of adjacent and co-channel licensees” but offers no further details.¹⁶³

J. The Alternative Proposals Are Not Spectrally Efficient.

As detailed in its Application, M2Z’s NBRS will make use of technological advances such as spatial reuse and dynamic bandwidth allocation to provide broadband connectivity in an extremely efficient manner in time, space, and frequency.¹⁶⁴ Using three cutting edge

¹⁶¹ See 47 C.F.R. § 1.934(d)(1); see also 47 U.S.C. § 308(a) (“[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used . . . and such other information as it may require.”). Applications that do not meet the standard are subject to dismissal. See, e.g., *Applications of San Diego Gas and Electric Company for Authority to Operate Multiple Address Systems Stations at Carlsbad and San Marcos, California*, Order on Reconsideration, 16 FCC Rcd 13089 (2001) (upholding dismissal of application as defective where applicant failed to include required frequency coordination showing).

¹⁶² McElroy Proposal at Exhibit 1, p. 10.

¹⁶³ TowerStream Proposal at Exhibit A, p. 4.

¹⁶⁴ See M2Z Application at 13-15.

technologies: time division duplexing (“TDD”),¹⁶⁵ advanced antenna system (“AAS”) technology,¹⁶⁶ and Orthogonal Frequency Division Multiple Access (“OFDMA”) waveforms,¹⁶⁷ M2Z will leverage spectrum efficiencies and network capacity to ensure high quality wireless broadband service over just 20 MHz of spectrum while avoiding interference to the remaining incumbent FS and BRS in-band licensees and adjacent block AWS licensees. Moreover, the speed and scope of M2Z’s proposed buildout more than justifies the need for a nationwide license. By proposing a single nationwide system M2Z avoids intersystem coordination and interference near service area boundaries, which ordinarily is a problem with TDD systems that none of the applicants proposing to use TDD technology have addressed. Indeed, the Alternative Proposals will just continue the long history of underutilization of this band:

- *Open Range.* As compared with M2Z’s Application, Open Range’s proposed use is not spectrally efficient. Open Range plans to serve a very limited geographic area.¹⁶⁸ Where there is a potential for a nationwide license to be awarded to an entity that will serve the entire American public, award of that

¹⁶⁵ TDD is a transmission protocol that uses a single block of spectrum for both sending and receiving information. TDD operation exploits time synchronicity in order to forego the need for paired spectrum and thus enables more intensive and efficient use of spectrum. *See id.* at 13.

¹⁶⁶ The AAS technology that M2Z plans to use dynamically manages the network’s capabilities for range extension, interference avoidance, interference suppression, and throughput. This is accomplished by extensively using the diversity within the antenna subsystem to focus emitted energy on the specific user while “defocusing” energy on non-active users. This technology provides for a high degree of spatial reuse which, when combined with appropriately selected waveforms, creates significant increases in spectral efficiency. *See id.* at 14.

¹⁶⁷ OFDMA technology provides the capacity to dynamically select both the amount of frequency and the length of time that a particular user will have access to the spectrum. M2Z may employ different sub-banding schemes that are specific to a site depending on extraneous factors, including user density and interference coordination with adjacent and co-channel users (prior to the relocation of certain incumbents as described herein). OFDMA’s dynamic allocation of bandwidth results in significant increases in spectral efficiency because each user is only accessing the amount of spectrum he or she needs at a particular time. *See id.* at 15.

¹⁶⁸ *See* Open Range Proposal at Annex A (identifying communities proposed to be served) and Annex B (identifying Basic Trading Areas (“BTAs”) and Basic Economic Areas (“BEAs”) associated with these communities).

license to an entity that plans to serve a narrow geographic area will only result in underutilization.

- *NextWave*. Under the NextWave proposal, multiple nationwide licensees will operate in the same frequencies with currently non-existent contention-based technology and with no interference protection, and, as previously discussed, contention-based technology can not reliably protect incumbent in-band FS and BRS licensees.
- *Commnet*. Because of exemptions in its proposed license conditions, Commnet’s proposal has the potential to leave the 2155-2175 band geographically fragmented.¹⁶⁹ Specifically, Commnet proposes that if it fails to construct to 90% of U.S. households within ten years, rather than losing its license entirely, the 2155-2175 MHz would be disaggregated and recaptured by the Commission on a *pro rata* basis.¹⁷⁰ This could ultimately leave the Commission in the difficult position of trying to award licenses for an array of disparate geographic areas that may be sprinkled all over the map. Moreover, because Commnet will already have selected the most populous geographic areas, future licensees would have no ability to subsidize the costs of service to rural areas with service to more dense areas. Commnet’s approach presents too great a risk of fragmentation and further underutilization of the band.
- *NetfreeUS*. To gauge the spectral efficiency of the NetfreeUS proposal, significant additional information is needed. What is most relevant to this analysis is how NetfreeUS will technically and lawfully retune or retool existing Wi-Fi stations and handsets for use with its service. A key assumption of the NetfreeUS proposal is that existing Wi-Fi units can be reprogrammed to serve as CPE for its network.¹⁷¹ There are multiple problems with this approach. First, many such units are not OFDMA-capable, and it is unclear from the NetfreeUS Proposal that this has been considered, and, if so, how this problem can be resolved. Only software defined radios (“SDRs”) can be retuned to other bands, and even then, the change can only be legally made by the equipment manufacturer.¹⁷² Thus, retuning Wi-Fi units to the 2155-2175 MHz band would violate the Commission’s equipment certification rules.¹⁷³ It is also unclear how many Wi-Fi models are capable

¹⁶⁹ See Commnet Proposal at Exhibit 5, p. 1.

¹⁷⁰ See *id.*

¹⁷¹ See NetfreeUS Proposal at 7 (“NetfreeUS anticipates that consumers will download software to make existing equipment interoperable on the WPB network.”).

¹⁷² There are only three SDRs certified for the 2-2.5 GHz band: a Meteor Communications Corporation device (FCC ID No. BIB6100000-01) and two Cisco Systems devices (FCC ID Nos. LDK102054E and LDK102056).

¹⁷³ 47 C.F.R. § 2.932.

of being physically tuned almost 300 MHz away from their intended band because of hardware filters in both transmit and receive sections and because of frequency synthesizer tuning range issues.

- *McElroy and TowerStream*. McElroy proposes to use TDD, AAS, and OFDMA technologies, presumably for no other reason than M2Z has proposed to use TDD, AAS, and OFDMA technologies.¹⁷⁴ Similarly, TowerStream proposes to use TDD and AAS.¹⁷⁵ By proposing to use exactly the same spectrally efficient technology M2Z proposes to use, McElroy and TowerStream have again demonstrated how their proposals are charades—mere copies of the M2Z Application.

K. The Alternative Proposals Have Not Made a Comparable Showing of Financial Qualifications to Construct and Deploy Their Networks.

M2Z already has raised funds from three different private equity companies and other sources. M2Z also has reasonable assurances from various committed sources that it will be able to obtain in excess of \$400 million to help construct and operate its network.¹⁷⁶ In fact, M2Z has provided the FCC with proof of such assurances under cover of confidentiality.¹⁷⁷ By contrast, the Applicants fail to demonstrate that they are financially qualified to construct and deploy their networks.

As set forth in more detail in M2Z's Application, M2Z's financial backers are three prominent, well-established, and well-funded venture capital firms: Kleiner Perkins Caufield & Byers, Charles River Ventures, and Redpoint Ventures,¹⁷⁸ which collectively have over \$5.5 billion under management. These firms have invested in companies such as Amazon.com,

¹⁷⁴ See McElroy Proposal at Exhibit 1, pp. 6-7.

¹⁷⁵ See TowerStream Proposal at Exhibit A, pp. 1-2.

¹⁷⁶ See M2Z Application at 8. In particular, M2Z's backers have generated over \$200 billion in value to shareholders, \$40 billion in annual revenues and 80 thousand jobs through just a select number of investment in companies that have been instrumental in the growth and use of the Internet.

¹⁷⁷ See Request for Confidential Treatment of M2Z Networks, Inc., WT Docket Nos. 07-16 & 07-30 (filed Mar. 26, 2007).

¹⁷⁸ See M2Z Application at 8.

America Online, Google, Sun Microsystems, Sonus Networks, TiVo, WebTV, and MySpace.com, to name a few. After carefully examining M2Z's business plan, each of these investors concluded that every aspect of the proposal, including the financial aspects and the network construction aspects, would be implemented. M2Z's financial backers have a proven track record of success in investing in technology firms, a wealth of practical experience in attracting capital, and a strong desire to see M2Z succeed.

In contrast, each of the Alternative Proposals fails to make a showing comparable to the robust showing that M2Z has made in its Application, *i.e.*, that it has the resources to construct and deploy its proposed network:

- *Open Range.* In its proposal, Open Range states that it will finance the initial build out of its network by issuing \$140 million in preferred stock and by taking out a \$284 million loan, which will, according to Open Range, fully fund the business “through profitability.”¹⁷⁹ Open Range says that “[t]he business is projected to generate cash from year 4 onwards,” at which time Open Range expects to expand deployment. However, Open Range also states that it “is currently raising private equity and loan financing for the project and is able to demonstrate a high level of confidence in its ability to raise the required funds.”¹⁸⁰ Thus, Open Range has apparently not secured funding commitments for its business plan. Moreover, Open Range's opaque statement regarding its demonstration of confidence is meaningless, because it does not specify to whom the demonstration is being made and where the confidence in Open Range's ability to raise funds resides – with credible third parties or with Open Range itself.
- *NextWave.* NextWave's application provides no apparent details concerning its financial qualifications to build and operate the proposed network that is the subject of its application.¹⁸¹ Indeed, as explained below in Section III,

¹⁷⁹ Open Range Application at 12.

¹⁸⁰ *Id.*

¹⁸¹ NextWave states that it “plans to partner with service providers to build and operate 802.16e WiMAX-compliant networks that operate on NextWave's licensed spectrum, as well as in non-exclusively licensed bands, such as 3.65 GHz and the TV ‘white spaces,’” but it is unclear whether that statement relates to the spectrum at issue. NextWave Proposal at 2. Assuming, *arguendo*, that it does relate to the spectrum at issue, the statement provides no meaningful financial detail. The application also refers to a trial project in Henderson, Nevada. *See id.* at 3. That does not represent a meaningful showing with regard to a request for a nationwide license.

NextWave has conceded that it faces financial uncertainty in SEC filings, which, when coupled with NextWave's history of payment defaults, should give the Commission pause.¹⁸²

- *Commnet*. Commnet's business plan depends in large part upon baseless assumptions that private entities and governmental bodies will give it various things for free. It "assum[es] that cell site equipment can be acquired at favorable prices." It "assum[es] . . . the vendors of CPE will afford Commnet free access to their rooftops." It assumes that municipalities will give it "free use of space for cell sites." As Commnet acknowledges, its business plan will fail if its "assumptions" are not borne out: "[t]hese assumptions are paramount in the ability to offer basic service at such a low and affordable charge, and still have a viable business plan that will result in promises being kept." An exhibit on "funding needs" states that it contains "estimates of the sums which will be needed, and the timing of when each tranche of funds will be needed" but no such data can be found in the exhibit.¹⁸³ Another exhibit purports to outline funding sources, but contains nothing other than conclusory statements¹⁸⁴ and a reference to a "letter of confidence"—from Commnet's own parent company.¹⁸⁵ The only financial "data" in the exhibit is Commnet's general description of its assets and revenues as being in the "tens of millions of dollars."¹⁸⁶ This showing pales in comparison to the resources that M2Z has available to it, as set forth in its application and as described above. M2Z may be a new company, but it is one with very substantial financing backing from credible, well-established venture capital firms with a proven track record in the technology sector. M2Z's financial backing is of a different order of magnitude than "tens of millions of dollars."

¹⁸² See *infra* Section III.

¹⁸³ Commnet Proposal at Exhibit 3.

¹⁸⁴ *Id.* at Exhibit 4. Commnet contends that it can meet funding needs through operating revenues and by resorting to capital markets. But it provides no balance sheet to support its alleged financial fortitude, nor does it present any evidence or even an example of how capital markets view it. Elsewhere, it states that it has operating revenue of 41.5 million dollars in 2006. Since Commnet contends that no-one can construct a nationwide network even with 400 million dollars, it is entirely unclear how Commnet's 41.5 million will advance the ball farther than the vast sums of financing dollars assembled by M2Z.

¹⁸⁵ In support of its assertion that it could raise additional capital from equity markets, Commnet's application attaches a letter from its parent company, ATNI. Even though it comes from within Commnet's own corporate family, the letter contains so many qualifiers and assumptions that it hardly demonstrates any confidence that funds can be raised for Commnet's proposed operations in the 2155-2175 MHz band. See *id.* Moreover, ATNI faces its own financial challenges and uncertainty, as evidenced by its own statements in other publicly available materials. See *infra* Section III.

¹⁸⁶ Commnet elsewhere states that its operating revenues in 2006 were \$41.5 million. See Commnet Proposal at Exhibit 1.

- *NetfreeUS*. In its application, NetfreeUS asserts that it “is financially qualified to hold the requested license.”¹⁸⁷ It points to the fact that it is a wholly-owned unit of a publicly traded company, Speedus, and asserts that it “can raise additional financing through the issuance by Speedus of new shares.”¹⁸⁸ However, Speedus’s own financial condition, and thus, its ability to raise capital for NetfreeUS, is open to question.¹⁸⁹ NetfreeUS also asserts that Speedus has relevant experience in raising capital and refers to the issuance of a prior license in 1991 and to a subsequent public offering, but provides no further detail as to how those events are meaningful with regard to the present application.¹⁹⁰ In short, compared to M2Z, NetfreeUS has made a weak showing of its financial qualifications.

- *McElroy*. The extent of McElroy’s discussion of its financial qualifications is contained in the following sentences in its application: “Timely auction payments are the principal way the Commission determines the financial qualifications of a winning bidder. MEC will establish its financial qualifications paying its auction obligations in a timely fashion.”¹⁹¹ However, McElroy fails to explain *how* it will manage to make such payments. McElroy’s application thus contains only a conclusory statement about its ability to implement its proposal.

- *TowerStream*. TowerStream provides no information whatsoever concerning its financial qualifications to construct a nationwide network.

In sum, only M2Z has made a meaningful showing of its financial ability to build its proposed network.

¹⁸⁷ NetfreeUS Proposal at 10.

¹⁸⁸ *Id.*

¹⁸⁹ *See infra* Section III (discussing the financial uncertainty faced by Speedus as evidenced by information filed with the Securities and Exchange Commission).

¹⁹⁰ NetfreeUS Proposal at 10.

¹⁹¹ McElroy Application at Exhibit 1, p. 5.

L. The Alternative Proposals Have Not Specified a Regulatory Status or Considered How They Will Comply with Regulatory Obligations.

In its Application, M2Z stated that it expected to be regulated as a CMRS provider.¹⁹² As such, M2Z assumed it would be subject to, and stated explicitly that it would comply with various obligations that support critical public policy priorities at the FCC—the Communications Assistance for Law Enforcement Act (“CALEA”),¹⁹³ E-911 obligations,¹⁹⁴ consumer proprietary network information (“CPNI”) obligations,¹⁹⁵ and relevant reporting requirements for CMRS.¹⁹⁶ M2Z also has always anticipated that its Premium Services would be subject to universal service contributions to the extent specified by the Commission. M2Z has therefore built its plans around meeting all of the regulatory obligations of CMRS in the absence of an FCC ruling otherwise. In a recent declaratory ruling, the Commission determined that wireless broadband Internet access services are information services, and that such services are not CMRS as that term is defined in the Act and implemented in the Commission’s rules.¹⁹⁷ In light of these changes, it appears that NBRS would fall within the definition of an information service, and would not be not be categorized as CMRS. Although the Commission intends to subject such

¹⁹² See Application at 32-33, n. 101 and Appendix 2, Condition 10(f) (“M2Z expects that it would be regulated as a CMRS provider, and therefore will be subject to CALEA, E911, and relevant reporting requirements to the extent these provisions are applicable to CMRS and M2Z’s proposed service.”).

¹⁹³ See 47 U.S.C. § 1001 *et seq.*; see also *Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7111 ¶¶ 10, 17 (1999) (finding entities deemed to be common carriers under the Communications Act, including CMRS providers interconnected to the public switched telephone network, are all subject to CALEA).

¹⁹⁴ See 47 C.F.R. § 20.18.

¹⁹⁵ See 47 U.S.C. § 222; see also 47 C.F.R. § 64.2001 *et seq.* Congress enacted Section 222 of the Act to protect consumer privacy. The statute requires telecommunications carriers to protect the confidentiality of CPNI, which includes, among other things, customers’ calling activities and history, and billing records.

¹⁹⁶ See M2Z Application at n.101 & Appendix 2, Condition 10(f).

¹⁹⁷ *Declaratory Ruling* at ¶¶ 18-28.

services to a regulatory “light touch,” it has identified a number of requirements that remain applicable.¹⁹⁸ Specifically, the Commission: retains the authority to impose requirements concerning access for persons with disabilities;¹⁹⁹ clarifies that the re-classification of mobile wireless broadband services does not alter its past determination that broadband services are subject to CALEA;²⁰⁰ requires wireless broadband providers that use pole attachments for both information services and telecommunications to comply with pole attachment obligations;²⁰¹ requires wireless broadband providers to observe state and local zoning authority where their infrastructure also supports “personal wireless services;”²⁰² and holds that for wireless broadband providers that also are providing telecommunications services, interconnection rights and obligations will continue to apply.²⁰³ Finally, the Commission states that wireless

¹⁹⁸ *Declaratory Ruling* at ¶ 2 (stating that its decision “establishes a minimal regulatory environment for wireless broadband Internet access service that promotes [its] goal of ubiquitous availability of broadband to all Americans”).

¹⁹⁹ *Declaratory Ruling* at ¶ 59 (“We reiterate our commitment to use our Title I and Title III authority, as necessary, to give full effect to the accessibility policy embodied in section 255.”)

²⁰⁰ *Declaratory Ruling* at ¶ 47 (“Nor does our interpretation of section 332 of the Communications Act and its implementing regulations here alter either our decision in the *CALEA* proceeding to apply CALEA obligations to all wireless broadband Internet access providers, including mobile wireless providers, or our interpretations of the provisions of CALEA itself.”)

²⁰¹ *Declaratory Ruling* at ¶ 60 (“where a wireless service provider uses the same pole attachments to provide both telecommunications and wireless broadband Internet access services, section 224 would apply”).

²⁰² *Declaratory Ruling* at ¶¶ 63-65 (noting that Section 332(c)(7) preserves state and local authority over zoning and land use decisions for “personal wireless service facilities” (e.g., commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services)).

²⁰³ *Id.* at ¶¶ 66-68 (“we clarify that our classification of wireless broadband Internet access service as information service should not affect the application of section 20.11 to CMRS carriers and the application of section 251 of the Act to any wireless carriers providing both telecommunications service and information service”).

broadband providers must comply with any other requirements adopted in connection with its ongoing broadband consumer protection proceeding.²⁰⁴

In light of the changing regulatory environment, M2Z reiterates that it is committed to complying with consumer protection and other social compact obligations (*e.g.*, CPNI, CALEA, 911, and USF payments) to the extent required by the Commission's rules and regulations as presently formulated or adapted for NBRS and other future services it may provide. M2Z also will afford access to its network for persons with disabilities, to the extent that the Commission imposes and specifies such obligations to wireless broadband providers. To the extent that such obligations will affect M2Z's offerings, it also will meet pole attachment obligations, observe state and local zoning authorities, and meet interconnection obligations, as discussed in the *Declaratory Ruling*. Similarly, M2Z is committed to meeting any additional requirements that the Commission may impose upon broadband wireless providers in connection with its ongoing broadband consumer protection proceeding.

M2Z has carefully considered and pledged to meet obligations currently applicable to its service. With one exception,²⁰⁵ the Alternative Proposals, by contrast, have either failed to discuss whether or how they will comply with any particular regulatory status or have proposed a status that would minimize their regulatory burdens:

- *NextWave*. Because NextWave has proposed service rules for the 2155-2175 MHz band that mirror those the Commission adopted for the 3.65 GHz band, it is highly unlikely that NextWave or any other licensee of the 2155-2175 MHz band would be regulated as a CMRS provider. As the Commission held in the *3.65 GHz Band Order*, licensees in the 3.65 GHz band may choose to

²⁰⁴ *Id.* at ¶ 59 (noting that any consumer protections obligations adopted in another proceeding, *Consumer Protection in the Broadband Era*, WC Docket No. 05-151, will extend to wireless broadband Internet access services).

²⁰⁵ NetfreeUS Proposal at Exhibit 2, p. 4 (proposing to operate subject to CMRS regulations).

be regulated as common carriers or non-common carriers.²⁰⁶ Likewise, such licensees can choose to provide non-CMRS services and thereby avoid a host of regulatory obligations.²⁰⁷ Under the NextWave Proposal, the same would hold true in the 2155-2175 MHz band. Given the lack of certainty as to how NextWave plans to hold its services out to the public under its proposal, it is not clear whether NextWave is committed to meet any obligations as interconnection, pole attachment rule compliance, and other regulations in certain circumstances that the Commission might impose.

- *Commnet.* Commnet proposes to be regulated as a BRS licensee, not a CMRS licensee for purposes of “such matters as universal service and enhanced 911 services.”²⁰⁸ It is unclear whether Commnet has fully considered whether it can comply with such obligations as CALEA, CPNI, or other rules. Because it proposed a regulatory status that is less stringent than CMRS to begin with, the new regulatory status announced in the *Declaratory Ruling* may actually increase, not reduce, the obligations Commnet would need to meet in order to execute its proposed plans for the 2155-2175 MHz band.
- *Open Range; McElroy; TowerStream.* Other than entering the BRS service code on their respective FCC Forms (presumably because that is what M2Z did), Open Range, McElroy, and TowerStream do not specify how they intend to be regulated, so there is no way to determine whether they have the ability to satisfy relevant regulatory obligations.²⁰⁹

III. DEFECTS IN THE ALTERNATIVE PROPOSALS AND PUBLIC INFORMATION DEMONSTRATE THAT FURTHER CONSIDERATION OF SUCH PROPOSALS WOULD NOT SERVE THE PUBLIC INTEREST.

A. The Open Range Proposal Is Incomplete.

1. Open Range provides no technical information and fails to make a required waiver showing.

The Open Range Proposal must be dismissed as defective because it fails to identify what service rules will apply to its offering. As the Open Range Proposal stands, the Commission

²⁰⁶ See *3.65 GHz Order* ¶ 36 (“Licensees in the 3650 MHz band may provide services on a common carrier or non-common carrier basis and will have flexibility to designate their regulatory status based on any services they choose to provide.”)

²⁰⁷ See *id.* ¶ 37.

²⁰⁸ Commnet Proposal at Exhibit 2, p. 4.

²⁰⁹ See Open Range Proposal, FCC Form 601, p. 1; McElroy Proposal, FCC Form 601, p. 1; TowerStream Proposal, FCC Form 601, p. 1; see also M2Z Application at Appendix A (Form 601).

cannot make any determination as to how or whether Open Range will avoid interference to incumbent or adjacent licensees. With no technical or interference parameters specified, the Open Range Proposal is incomplete and subject to dismissal.²¹⁰

Dismissal also is appropriate where, as here, an applicant requests a waiver and does not meet the waiver standard or identify an alternative to waiver. Open Range states that it requests a waiver of the Commission's rules so that the Commission may accept, process, and grant its application.²¹¹ Nowhere in its application does Open Range identify a public interest basis for grant of a waiver or attempt to explain why it meets the Commission's waiver standard.²¹²

Section 1.925(b)(3) of the Commission's Rules, however, provides that the Commission may grant a request for waiver “if it is *shown* that (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly

²¹⁰ The Commission may dismiss as defective any application that “is incomplete with respect to required answers to questions, informational showings, or other matters of a formal character.” 47 C.F.R. § 1.934(d)(1). *See also* 47 U.S.C. § 308(b) (“[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used . . . and such other information as it may require.”). Applications that do not meet the standard are subject to dismissal. *See, e.g., Applications of San Diego Gas and Electric Company for Authority to Operate Multiple Address Systems Stations at Carlsbad and San Marcos, California*, Order on Reconsideration, 16 FCC Rcd 13089 (2001) (upholding dismissal of application as defective where applicant failed to include required frequency coordination showing).

²¹¹ *See* Open Range Proposal at n.1.

²¹² *See* 47 C.F.R. § 1.925(b)(3) (waiver standard for wireless applicants).

burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”²¹³

Open Range's waiver request therefore must be denied, and its application dismissed.²¹⁴

2. Use of the 2155-2175 MHz band appears to be an afterthought to Open Range.

The 2155-2175 MHz band wasn't Open Range's "first choice" for construction and operation of a rural network.²¹⁵ Open Range's plan was originally developed for operations on 50 MHz of spectrum in the 3650-3700 MHz band. According to multiple ex parte notices filed as recently as October 2006, Open Range was planning to build a rural broadband network using WiMAX to "serve 840 communities of 20,000 or fewer people in rural America."²¹⁶ Open Range indicated that it would offer this service using a combination of its own funds and funds from the United States Department of Agriculture's Rural Utilities Service ("RUS") Broadband Access Loan Program.²¹⁷ Open Range planned to offer voice, video, and data services to certain

²¹³ *Id.*

²¹⁴ *See, e.g., Biotronik, Inc., Equipment Authorization for the Medical Implant Communications Service*, 18 FCC Rcd 3027, ¶ 18 (FCC 2003) (denying waiver request because petitioner did not even attempt to demonstrate that there is a hardship or burden in complying with the rules). An application that seeks waiver and does not contain an alternative proposal in the event that the Commission denies that waiver request is subject to dismissal. *See* 47 C.F.R. § 1.934(d)(2).

²¹⁵ *See* Letter from Joe D. Edge, Drinker Biddle & Reath, counsel for Open Range Communications, Inc., to Marlene H. Dortch, Secretary, FCC (October 11, 2006) ("Open Range October Ex Parte"); Letter from Joe D. Edge, Drinker Biddle & Reath, counsel for Open Range Communications, Inc., to Marlene H. Dortch, Secretary, FCC (September 22, 2006) ("Open Range September Ex Parte"); Letter from Mark F. Dever, Drinker Biddle & Reath, counsel for Open Range Communications, Inc., to Marlene H. Dortch, Secretary, FCC (August 23, 2006) ("Open Range Legal Advisor Ex Parte"); Letter from Mark F. Dever, Drinker Biddle & Reath, counsel for Open Range Communications, Inc. and Nortel, to Marlene H. Dortch, Secretary, FCC (August 23, 2006) ("Open Range/Nortel Bureau Ex Parte"); Letter from Joe D. Edge, Drinker Biddle & Reath, counsel for Open Range Communications, Inc. and Nortel, to Marlene H. Dortch, Secretary, FCC (August 4, 2006) ("Open Range/Nortel OET Ex Parte").

²¹⁶ Open Range Legal Advisor Ex Parte at Attachment, p. 1.

²¹⁷ *See id.*

rural communities using 50 MHz of spectrum in the 3.65 GHz band.²¹⁸ Open Range sometimes was joined by Nortel in meetings with Commission staff.²¹⁹ Together, Open Range and Nortel provided detailed information on network deployment plans, clearly indicating that Nortel would assist Open Range to construct and operate its planned WiMAX network, and that equipment was in development.²²⁰ Nothing in Open Range's presentations suggested that there were any current regulatory barriers to its proposed offering.²²¹ The only relevant development that seems to have occurred since the time of Open Range's ex parte presentations is that Open Range has not yet received RUS funds for its 3.65 GHz band proposal.²²²

Although the status of Open Range's plans to deploy service in the 3.65 GHz band remains unclear, Open Range has obviously shifted focus, setting its sights on the 2.1 GHz band.

²¹⁸ Open Range/Nortel OET Ex Parte at Attachment, *Ride the Wireless Broadband Frontier*.

²¹⁹ See Open Range/Nortel OET Ex Parte.

²²⁰ See Open Range/Nortel Bureau Ex Parte at Attachment, *Business Made Simple, 802.16e WiMAX in the 3.65 GHz Band* (detailing the "Nortel Response" to Open Range's need for a WiMAX product that has a mechanism of detecting and responding to other transmissions in the band in order to comply with FCC's contention-based protocol requirements for the 3.65 GHz band). The level of detail in the plans presented to the Commission exceeds that provided in the Open Range Proposal.

²²¹ In ex parte meetings with FCC staff, Open Range proposed that the FCC synchronize its definition of rural markets to that used by the RUS. Open Range/Nortel Bureau Ex Parte at Attachment, *Ride the Wireless Broadband Frontier* at 5. Open Range also urged the Commission to permit applicants to use higher power levels in rural communities in order to enable broader coverage areas. *Id.* Nothing in the materials stated that Open Range's plan would fail absent these changes. In any event, the Commission has not denied Open Range's market definition and power limits proposals.

²²² Although RUS does not publish the results of its loan application process, Open Range cannot be found among the current RUS rolls of applicants approved for funds. See *Rural Development Broadband Loan and Loan Guarantee Program, Program Information, Feb. 26, 2007 Broadband Report: Communities Approved by Company*, available at: <http://www.usda.gov/rus/telecom/broadband/community-reports/feb26-approved.pdf>. Open Range also is not listed among the pending applicants. See *Rural Development Broadband Loan and Loan Guarantee Program, Program Information, Feb. 26, 2007 Broadband Report: Communities Pending by Company*, available at: <http://www.usda.gov/rus/telecom/broadband/community-reports/feb26-pending.pdf>.

The change in plans raises several questions regarding Open Range's overall preparedness to deploy service in the 2155-2175 MHz band. Although it apparently intends to salvage some elements of its original proposal, Open Range has substantially downgraded the proposal, stripping it of its video components,²²³ and reducing the number of communities that will be served by more than one-third (553 communities in 17 states, rather than 840 communities in 44 states).²²⁴ Though Open Range previously contended that its business and technical plans required 50 MHz of spectrum,²²⁵ it now claims that the 20 MHz allocation "will allow the planned data rates and ensure that the system has sufficient bandwidth to protect adjacent licensees."²²⁶ Further calling into question its preparedness is Open Range's recent application for yet another round of funds from the RUS.²²⁷ As compared to the level of research and development that can be found in its filings relating to the 3.65 GHz proposal, the Open Range

²²³ Among the services Open Range originally planned to offer were: Internet Protocol television ("IPTV"), portable video conferencing, video streaming, mobile video chat, and video surveillance. See Open Range/Nortel Bureau Ex Parte at Attachment, *Ride the Wireless Broadband Frontier*, pp. 2 & 6.

²²⁴ Open Range Legal Advisor Ex Parte at Attachment, p. 1.

²²⁵ See Open Range/Nortel Bureau Ex Parte at Attachment, *Issue Overview*, p. 3 ("For a competitive service, access to the full 50 MHz is required.").

²²⁶ Open Range Proposal at 1-2.

²²⁷ See *Rural Development Broadband Loan and Loan Guarantee Program, Program Information, Mar. 12, 2007 Broadband Report: Communities Approved by Company*, available at: <http://www.usda.gov/rus/telecom/broadband/community-reports/mar12-pending.pdf> (listing Open Range as an applicant for funds to serve nearly the same communities identified at Annex A of the Open Range Proposal). Even Open Range's market research appears to have been repurposed for its new interest in the 2.1 GHz band. Materials distributed to staff during ex parte meetings regarding the 3.65 GHz proposal state that 24,000 rural consumers were polled and that "a material number of respondents were interested in Open Range's proposed service offerings." Open Range Legal Advisor Ex Parte at Attachment, p. 1. Even though Open Range's new service proposals are considerably different from its 3.65 GHz plans, it appears that the same research is now being used as evidence of consumer interest in the services proposed in Open Range's application. See Open Range Proposal at 4 (a nationally recognized U.S. market research firm polled over 24,000 consumers and businesses across 47 states and found a "34.1% interest level" in Open Range's proposed service offerings).

Proposal lacks specific detail as to the technical specifications rules necessary for deployment. Comparison of the two proposals suggests that the Open Range proposal actually is better suited to the 3.65 GHz band for several reasons. First, the plan originally contemplated by Open Range would have supplied consumers with a broader suite of services, with the potential to increase competition in the data, voice, *and* video markets in certain areas. Second, Open Range's presentations to FCC staff implied that research and development of equipment to deploy its network in the band were well underway.²²⁸ Moreover, the 3.65 GHz plan proposed to serve many more communities than are identified in the Open Range Proposal.

If allowed to move forward through the application process, the Open Range Proposal will likely result in further delay in deploying service within the 2155-2175 MHz band. Open Range has failed to demonstrate that it is technically or financially prepared to offer the services proposed in its application. It is highly unlikely that Open Range plans to build two systems to address the needs of rural communities – one at 3.65 GHz and one at 2.1 GHz – therefore, the Commission should be concerned about Open Range's commitment to build out either of these bands. The Commission, therefore, should decline to consider the Open Range Proposal.

B. NextWave Is Not the Ideal Candidate for a 2155-2175 MHz License.

In addition to not meeting its burden of proof under Section 7 and the public interest bar M2Z has established for providing NBRS in the 2155-2175 MHz band, the NextWave Proposal

²²⁸ See Open Range/Nortel Bureau Ex Parte at Attachment, *Business Made Simple*, 802.16e WiMAX in the 3.65 GHz Band. Presentations also suggested that certain characteristics of the band were more suitable for the technology Open Range intends to use. See Open Range/Nortel Bureau Ex Parte at Attachment, *Ride the Wireless Broadband Frontier* at 4 (Open Range asserts that WiMAX “will only arrive” in rural areas “through a 3.65 spectrum license” because of the unique ability to provide greater coverage to less dense population areas with minimal additional capital expenditures).

suffers from additional defects. For the reasons discussed below, the Commission should not accept the NextWave Proposal for filing.

1. NextWave’s proposed service is unnecessary and redundant.

NextWave proposes that the Commission license the 2155-2175 MHz band on a shared basis “pursuant to the same terms, conditions and technical requirements that the Commission adopted for the 3.65 GHz band.”²²⁹ Two years ago, the Commission adopted service rules for 50 MHz of spectrum in the 3.65 MHz band, providing for nationwide, non-exclusive licensing of that band using technology with minimal regulatory barriers to encourage multiple entrants.²³⁰ At the time, the Commission observed that the 3.65 GHz band could be used to address “a clear need for additional spectrum for [wireless] broadband use.”²³¹ In addition, the Commission has set aside 20 MHz of spectrum for similar contention-based uses in the unlicensed PCS bands.²³² Now, just two years after the Commission allocated 50 MHz of spectrum for contention-based technology, NextWave proposes to use an additional 20 MHz of spectrum in the 2155-2175 MHz band in exactly the same manner. Given the amount of spectrum already available for the service NextWave proposes, there is simply no need to dedicate an additional 20 MHz of spectrum to it or to create a duplicative service in the 2155-2175 MHz band.²³³

²²⁹ NextWave Proposal at 3-4.

²³⁰ *See 3.65 GHz Order.*

²³¹ *Id.* ¶ 13.

²³² *See 47 C.F.R. § 15.301 et seq.* (governing Unlicensed Personal Communications Services operations in the 1910-1930 MHz band).

²³³ Of course, it is in NextWave’s competitive interests to forestall the M2Z Application since M2Z’s free service would be in direct competition with the subscription service NextWave someday plans to provide on the large swaths of spectrum NextWave has accumulated over the years.

Although the Commission envisioned that the 3.65 GHz band would be used by wireless Internet service providers (“WISPs”) to bring broadband services to consumers,²³⁴ two years later that vision still has yet to come to fruition. Under the Commission’s nonexclusive licensing scheme for the 3.65 MHz band, which NextWave would have the Commission apply in the 2155-2175 MHz band, licensees are required to use technology that includes a contention-based protocol.²³⁵ Such technology allows multiple users to share the same spectrum and define rules by which each device is provided with an opportunity to operate.²³⁶ However, as NextWave acknowledges, such technology still may be several years away from commercial deployment.²³⁷ In the mean time, the 50 MHz of spectrum currently available for WISP use will continue to remain unexploited. Thus, until the contention-based technology the Commission envisions for the 3.65 MHz band is developed, it would be premature to adopt a similar shared licensing approach in the 2155-2175 MHz band as NextWave proposes.

2. NextWave has failed to build out its licensed facilities and continues to face financial uncertainty.

NextWave states that over the years it has “accumulated” the following spectrum:²³⁸ (1) 20 MHz or more of spectrum covering 136.4 million persons; (2) 10 MHz of spectrum covering an additional 96 million persons; and (3) 30 MHz or more of spectrum covering a number of markets, including licenses covering 11.9 million persons in New York.²³⁹ Yet with so much spectrum to its name, NextWave can point to only one concrete achievement in all the many

²³⁴ See 3.65 GHz Order ¶ 2.

²³⁵ See *id.* ¶ 16.

²³⁶ See *id.*

²³⁷ See NextWave Proposal at n.9.

²³⁸ *Id.* at 2.

²³⁹ See *id.* at n.5.

years it has held these spectrum licenses: it has deployed a mobile WiMAX network on a trial basis in Henderson, Nevada.²⁴⁰ In fact, notwithstanding the sheer volume of licenses it has “accumulated” and despite having been in business for more than a decade, NextWave still considers itself to be “an early-stage wireless technology company.”²⁴¹ As NextWave freely admits, commercial deployment of the technology it needs to support the buildout of its planned networks still may be years away, if such equipment is ever certified.²⁴²

One consequence of this uncertainty surrounding the technology necessary to make NextWave’s business plan viable is NextWave’s persistent need to seek extensions of its construction deadlines. For example, in 2006, NextWave sought and obtained a three-year extension, until 2010, to satisfy the buildout requirements for its Wireless Communications Service (“WCS”) licenses.²⁴³ The nation cannot afford similar delays in broadband deployment, particularly when M2Z will commit, as a condition of its license, to deploy NBRS to 95 percent of the population within ten years of license grant. In the same amount of time it took NextWave to build out its initial trial network in one community, M2Z could be providing NBRS to much of the nation.

Indeed, there is considerable uncertainty surrounding NextWave's ability to finance the service it proposes for the 2155-2175 MHz band. As the Commission is undoubtedly aware, NextWave recently emerged from Chapter 11 bankruptcy after having defaulted on \$4.7 billion

²⁴⁰ See NextWave Wireless, Inc. SEC Form S-1 at 1 (dated Dec. 29, 2006).

²⁴¹ *Id.*

²⁴² *Id.* at 9.

²⁴³ See *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses; Request of WCS Wireless, LLC for Limited Waiver of Construction Deadline for 16 WCS Licenses*, Order, 21 FCC Rcd 14134 (2006).

in installment payments for broadband PCS licenses NextWave won at auction in 1996.²⁴⁴

Today, despite its considerable spectrum holdings and having been in business from more than a decade, as NextWave admits, it continues to have "limited relevant operating history [and] commercial operations" in wireless services and has "never generated any material revenues" except through its PacketVideo subsidiary.²⁴⁵ More troubling, NextWave expects to continue "to realize significant operating losses for the next few years" yet requires "substantial investment" to make its wireless broadband products and technologies "commercially viable."²⁴⁶ Given the financial uncertainties NextWave faces in deploying service in the spectrum the company already holds, it makes little sense to compound these risks by awarding NextWave additional spectrum at this time. For these reasons, the NextWave Proposal should be dismissed.

C. Commnet's Financial Status Raises Questions About Its Basic Qualifications.

Commnet has not provided sufficient indicia of financial stability to meet M2Z's high bar, but it also fails even the standard that applications must generally meet in order to be acceptable for filing.²⁴⁷ As discussed above, Commnet's primary evidence of its financial qualifications is a letter of confidence from its parent company, ATNI.²⁴⁸ Given Commnet's

²⁴⁴ See *F.C.C. v. NextWave Pers. Communs. Inc.*, 537 U.S. 293 (2003).

²⁴⁵ NextWave Wireless, Inc. SEC Form S-1 at 3 (dated Dec. 29, 2006).

²⁴⁶ *Id.* at 7 & 9.

²⁴⁷ See 47 U.S.C. § 308(b)("[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station"); see also 47 C.F.R. § 1.903(b).

²⁴⁸ Commnet states that it will meet its funding needs through a combination of operating revenues and the capital markets. Commnet further states that if it chooses to raise funds through equity markets, ATNI would conduct a secondary offering or conduct an offering to sell equity in Commnet to outside investors. As Commnet has not provided any balance sheet concerning its operating revenues nor any letter of confidence from an independent entity, the only evidence in the record regarding its financial qualifications is the letter of confidence from ATNI.

reliance on ATNI to demonstrate its financial qualifications worth, the Commission should consider the financial stability of ATNI.

ATNI acknowledges that it faces a great deal of financial uncertainty. As its most recent annual report indicates, 60% of ATNI's revenue is generated by Guyana affiliate GT&T, the monopoly provider of local exchange and long distance services in Guyana.²⁴⁹ This revenue stream is, however, subject to "significant political and regulatory risk" due to the unstable regulatory environment in Guyana.²⁵⁰ According to a recent ATNI SEC filing, "[f]rom time to time . . . Guyana Government officials have publicly stated their intention to *revoke or terminate* [GT&T's] license."²⁵¹ Government officials also have made efforts to enact legislation that would end ATNI's status as the exclusive licensee,²⁵² have questioned the validity the exclusivity terms of GT&T's license,²⁵³ and have recently informed ATNI of its desire to "hold

²⁴⁹ See ATNI 2006 Annual Report at 20 ("We are highly dependent on GT&T for a substantial majority of our revenues and profits.")

²⁵⁰ *Id.*

²⁵¹ *Id.* (emphasis added).

²⁵² *Id.* ("President Bharrat Jagdeo has publicly stated that it is a priority of his administration to enable other telecommunications companies to provide wireline services covered by our exclusive license, as well as to increase the number of wireless service providers . . . While we would seek to enforce our rights under the exclusive wireline license and believe that we would be entitled to damages for any termination of that license, we cannot guarantee that we would prevail in any court or arbitration proceedings.").

²⁵³ *Id.* ATNI has taken various steps to prevent Guyanese regulators from introducing competition into the broadband and telecommunications markets in Guyana. See Bert Wilkinson, Global Information Network, *Telecom Company Sues to Protect Monopoly* (Jul. 4, 2002) (describing ATNI's efforts to block a loan from Inter-American Development Bank to Guyanese government which was slated for use to develop information technology centers). See also *Atlantic Tele-Network Inc., Plaintiff v. Inter-American Development Bank, et al., Defendants*, 251 F.Supp.2d 126 (2003) (holding that ATNI had no standing against the bank, that Guyana did not waive foreign immunity by contract with ATNI, and that the proper forum for the case was Guyana).

talks in 2007 regarding the exclusivity terms of the license.”²⁵⁴ As ATNI is well aware, changes to its regulatory status as an exclusive provider of telecommunications services in Guyana would “adversely affect a substantial majority of [its] revenues and profits and diminish the value of [its] investment in Guyana.”²⁵⁵ In spite of all of the risks faced by ATNI, Commnet would have the Commission rely upon ATNI’s confidence that it can raise funds for Commnet.

The uncertainty surrounding ATNI’s financial future stems not only from the potential for legislative or regulatory change in Guyana, but also from GT&T’s ongoing disputes with Guyana’s taxation authorities. GT&T has received “various income tax assessments” from Guyana tax authorities for past periods that claim GT&T owes approximately \$23.5 million in additional income taxes.²⁵⁶ If Commnet intends to turn to ATNI to raise funds for it, then ATNI’s current financial status and prospects for the future have a significant potential impact on Commnet’s ability to raise funds to deploy its network. Based solely on publicly available material provided by ATNI itself, there is significant financial uncertainty ahead for ATNI.

Compounding this problem is the precarious nature of Commnet’s own financial affairs. Commnet’s business plan makes it entirely dependent upon a handful of wireless carriers. Indeed, the vast majority of Commnet’s revenues—90%—are generated by its roaming agreements with just three carriers.²⁵⁷ As ATNI has observed, “Commnet’s relationships with its customers generally are much more financially significant for Commnet than its customers, which can give its customers significant leverage in negotiating pricing and other terms.”²⁵⁸

²⁵⁴ *Id.*

²⁵⁵ ATNI 2006 Annual Report at 20.

²⁵⁶ *Id.* at 21.

²⁵⁷ *Id.* at 22.

²⁵⁸ *Id.* at 23.

Under these circumstances, if Commnet were to lose just *one* customer, it would have a material adverse effect on Commnet's financial condition.²⁵⁹ If one roaming agreement goes wrong, the “significant collateral” and “resources” that Commnet claims it will bring to bear to secure financing and to pay for network buildout would be gone. The Commission should dismiss the Commnet Proposal without accepting it for filing, rather than place the provision of free nationwide broadband service in financial limbo.

D. NetfreeUS Already Faces Considerable Operational Challenges.

1. NetfreeUS's affiliate has failed to meet buildout requirements for its existing license.

NetfreeUS's parent company, Speedus Corp. (“Speedus”) has another wholly-owned subsidiary, SpeedUSNY.com, which has held a LMDS license to serve the New York City metropolitan area since 1991. After 16 years as a licensee in a densely populated, affluent market full of early technology adopters, one might presume that Speedus would be providing advanced services to a significant number of subscribers or other users throughout its service area, and that compliance with mere “substantial service” milestones would have been accomplished years ago. To the contrary, Speedus is still struggling to identify a viable business and technical model for its use of this spectrum and to provide consistent service. Although Speedus periodically tests various business and technical options, spectrum that could have been used to provide a vibrant source of competition to existing video, voice, or data services in the region is more often being warehoused.²⁶⁰

²⁵⁹ *Id.*

²⁶⁰ A Local Multipoint Distribution Service (“LMDS”) system is capable of offering subscribers a variety of one- and two-way broadband services, such as video programming distribution; video teleconferencing; wireless local loop telephony; and high speed data transmission, *e.g.*, Internet access.

The Commission hoped that because of its multiple potential applications, LMDS would become a competitor to local exchange and cable television services.²⁶¹ In establishing rules for LMDS service, the Commission held that licensees would be entitled to a renewal expectancy if the record of the renewal applicant for the relevant license period provides sufficient evidence that the applicant has furnished substantial service during its license term.²⁶² The Commission adopted the same standard as a buildout requirement for LMDS licensees at the 10-year mark.²⁶³ The Commission defined substantial service by an LMDS provider as “service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.”²⁶⁴ In adopting this requirement, the Commission sought to fulfill its obligations under Section 309(j)(4)(B) of the Act,²⁶⁵ which requires the Commission to establish “performance requirements, such as appropriate deadlines and penalties for performance failures . . . to prevent stockpiling and warehousing of spectrum by licensees or permittees.”²⁶⁶ Such buildout requirements also are consistent other spectrum management policies such as anti-trafficking restrictions and unjust enrichment, which are intended to ensure participation by designated entities in the provision of spectrum based services and to deter “participation in the licensing

²⁶¹ 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) CC Docket No. 92-297 Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Order on Reconsideration, 13 FCC Rcd 4856 ¶ 1 (1998).

²⁶² 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 Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 ¶¶ 260-262 (1997) (“*LMDS Second Report & Order*”).

²⁶³ See *LMDS Second Report & Order*, 12 FCC Rcd at 12659-12661 ¶¶ 266-272.

²⁶⁴ See *id.* at 12657 ¶ 261.

²⁶⁵ See *id.* at 12661 ¶ 271; see also 47 U.S.C. § 309(j)(4)(B).

²⁶⁶ 47 U.S.C. § 309(j)(4)(B).

process by those who have no intention of offering service to the public.”²⁶⁷ Under the rules, failure to meet the buildout requirement results in the forfeiture of the license and the licensee becoming ineligible to regain it.²⁶⁸ The Commission also reserves the right to review its construction requirements or to consider complaints regarding warehousing of LMDS spectrum.²⁶⁹

NetfreeUS states that Speedus secured its LMDS license in 1991.²⁷⁰ Much of the spectrum awarded to Speedus has subsequently been assigned by Speedus to others.²⁷¹

²⁶⁷ *Implementation of The Commercial Spectrum Enhancement Act and Modernization of The Commission's Competitive Bidding Rules and Procedures*, Order on Reconsideration, 21 FCC Rcd 6703, n. 8 (2006) (citing H.R. REP. NO. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. CONF. REP. NO. 103-213, at 483 (1993))).

²⁶⁸ 47 C.F.R. § 101.1011. In interpreting the substantial service requirements for LMDS licensees in a subsequent order, the Commission further stated that it would “not hesitate to act aggressively to eliminate the warehousing of spectrum if such activity comes to [its] attention.” *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 Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Report and Order, 15 FCC Rcd 11857, 11867 (2000).

²⁶⁹ *LMDS Second Report & Order*, 12 FCC Rcd at 12661 ¶ 272.

²⁷⁰ NetfreeUS Proposal at 8 (citing *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)).

²⁷¹ Although Speedus references the receipt of the first LMDS license by its “predecessor-in-interest,” Hye Crest, it omits the fact that it retains only portions of the spectrum once licensed to Hye Crest. At one time, Speedus’ predecessors-in-interest held as much as 1300 MHz of spectrum in the New York, NY area. *See* Speedus Corp., Securities and Exchange Commission Form 10-K, Annual Report for the fiscal year ended December 31, 2000 at 13-14 (Speedus 2000 Annual Report). Speedus assigned 850 MHz of its licensed spectrum to Winstar Communications, Inc. in 1998. *See id.* (citing the need for “an alternative source of financing”). Another 150 MHz was assigned away the following year. *See* Speedus 2000 Annual Report at 13; *see also*, *Wireless Telecommunications Bureau Public Safety and Private Wireless Division Grants Consent to Assign Authorization of SpeedUSNY.Com and Nextlink Communications, Inc.*, Public Notice, 14 FCC Rcd 13887 (1999) (approving Speedus’s disaggregation and assignment of a portion of the spectrum included in its A Block LMDS authorization in BTA321). Arguably, one of the most significant “uses” of the LMDS license held by Speedus and its predecessors-in-

Speedus's LMDS license was renewed in 1996 for a new ten year term that expired on February 1, 2006. The Commission later granted a second renewal term for a ten-year period expiring on February 1, 2016. The Commission had to coddle Speedus into making its required substantial service showing by conditioning its approval of the license renewal on the filing of a showing of substantial service by no later than March 27, 2007. The substantial service notification was filed recently and remains pending.²⁷²

Speedus's substantial service filing identifies four primary service offerings that were provided during the 1996-2006 license term: (i) a subscription television service, which was available to 52% of the market from 1996-1998; (ii) transmission of Bloomberg Information Programming to financial institutions from 1996-2000; (iii) a high-speed broadband Internet access trial from 1996-2003; and (iv) a testing program involving its affiliate, XO Communications, Inc., commencing in 2004.²⁷³ The report does not specify what services were offered—or even tested—during the period from 2004 to the present. Speedus contends that it has met the substantial service safe harbor for service to niche markets and populations outside of areas served by other licensees because no other LMDS licensee was offering any service in the same area during the license period.

The filing is entirely unpersuasive, even as measured against the low bar set by the substantial service standard, and is inconsistent with the Commission's rules as well as the

interest has been to raise funds through assignments of portions of the license, rather than to provide service to the public.

²⁷² See SpeedUSNY.com, L.P., Local Multipoint Distribution Service, WLT379, Section 101.1011(a) Report and Demonstration of "Substantial Service," FCC File No. 0002939453 (filed Mar. 7, 2007).

²⁷³ See SpeedUSNY.com, L.P., Local Multipoint Distribution Service, WLT379, Section 101.1011(a) Report and Demonstration of "Substantial Service," FCC File No. 0002939453 (filed Mar. 7, 2007).

statutory and public policy objectives of buildout requirements outlined above. Speedus's use of its LMDS license has dwindled over the course of its license term, rather than growing, expanding, and becoming more stable. There certainly are benefits to be realized by the public where a Commission licensee demonstrates flexibility and a willingness to change over time to meet the needs of those within its service area. Speedus, however, has gone from providing video service to half of its market at the start of its license term, to providing programming content from a single source to a collection of financial institutions, to an unspecified Internet access "trial," and then another testing program involving an affiliated company. This pattern suggests that Speedus's use of the license is not maturing and evolving—it is declining and devolving. Indeed, other public statements by Speedus suggest that it has no plans to deploy service unless and until marketplace conditions change.²⁷⁴ The Commission should not take the risk that NetfreeUS will follow the lead of its parent company, starting its license term with lofty service goals but winding up using the spectrum as little more than an asset to be sold when financial challenges arise, or as an occasional testing ground for its affiliates' business plans.

2. NetfreeUS/Speedus has an unstable business model.

As evidenced by the substantial service filing described above, Netfree's parent Speedus is facing considerable challenges in making its service offerings a reality. Some of the barriers are technical; others are economic. Speedus already has its hands full trying to implement an

²⁷⁴ In its most recent annual report, Speedus states that it "will not commence a full marketing effort using [its] LMDS technology until new LMDS equipment becomes commercially available with cost and performance that allow implementation of an economically viable business model." In addition, Speedus "cannot determine when this will occur and this equipment may never be available to [it] on this basis." Speedus Corp., Securities and Exchange Commission Form 10-K, Annual Report for the fiscal year ended December 31, 2005 at 4 & 20 ("Speedus 2005 Annual Report").

LMDS strategy in a single market.²⁷⁵ It should not now become a candidate for execution of a nationwide broadband strategy.

Speedus reports a spotty financial history and concedes that it may *never* be profitable.²⁷⁶ Specifically, Speedus has “recorded operating losses and negative operating cash flows in all reporting periods since inception.”²⁷⁷ As of December 31, 2005, Speedus had an accumulated deficit of approximately \$63.9 million.²⁷⁸ Speedus predicts that its financial situation is unlikely to improve “until such time as [it] substantially increase[s] its customer base and/or form[s] a strategic alliance for use of [its] capabilities in the future.”²⁷⁹

Speedus also faces “ongoing technical difficulties” that it may be unable to resolve.²⁸⁰ At the time of its initial public offering, Speedus was primarily a subscription television service. Speedus terminated this service in November 1998 and began a limited pilot program for the delivery of high-speed Internet access.²⁸¹ It encountered technical difficulties in this pilot program and “reoriented [its] business on wireless data and other services” but has not yet generated any significant revenue from these businesses.²⁸² The reason for this is that Speedus continues to face technical challenges in its new business lines, lacking necessary equipment

²⁷⁵ See SpeedUSNY.com, L.P., Local Multipoint Distribution Service, WLT379, Section 101.1011(a) Report and Demonstration of “Substantial Service,” FCC File No. 0002939453 (filed Mar. 7, 2007).

²⁷⁶ Speedus 2005 Annual Report at 5.

²⁷⁷ Speedus 2005 Annual Report at 6.

²⁷⁸ *Id.*

²⁷⁹ *Id.* Indeed, it is unclear that the provision of communications services is consistent with the company’s overall business strategy because Speedus invests in such wide-ranging business lines, including broadband patents, cafés, and medical diagnostics. *Id.* at 3-4.

²⁸⁰ *Id.* at 6.

²⁸¹ *Id.*

²⁸² *Id.*

with the features and pricing that would allow it to provide a technically and economically viable service. Given the low level of detail and the technical flaws in the NetfreeUS Proposal, it appears that Speedus is seeking to repeat its past performance using different spectrum: the 2155-2175 MHz band. NetfreeUS has failed to provide sufficient technical data to meet the standard that would make its application acceptable for filing. Accordingly, its application should be dismissed.

E. The McElroy and TowerStream “Copy-Cat” Applications Are Not *Bona Fide* Proposals.

Both McElroy and TowerStream essentially have filed “copy-cat” applications in an attempt to mimic the M2Z Application, except that both the McElroy Proposal and the TowerStream Proposal are insubstantial in comparison, speculative, and, as discussed above, fail to incorporate many of the specific and enforceable public interest obligations M2Z has proposed. The Commission has long recognized the potential for the use and abuse of “copy-cat” or “me too” applications by spectrum speculators.²⁸³ The McElroy Proposal and TowerStream Proposal have every appearance of being precisely that type of filing. Although the McElroy Proposal and the TowerStream Proposal attempt to track the M2Z Application on a superficial level, the proposals fall short on substance and fail to demonstrate that either McElroy or TowerStream is prepared to deliver the same level of service or to make the other public interest commitments that M2Z has proposed.

On the surface, the McElroy Proposal looks much like the M2Z Application. Indeed, McElroy concedes as much.²⁸⁴ For virtually every showing or commitment made by M2Z, a

²⁸³ See, e.g., *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (adopting filing windows for NCE stations to prevent “speculation and abuse” by those using “cop-cat” or “me too” applications).

²⁸⁴ See McElroy Proposal at 3.

purportedly analogous one appears in the McElroy Proposal. In some respects, the representations from McElroy are so similar that they almost could have been cut from the M2Z Application and pasted into the McElroy Proposal. For example, the echo of M2Z's commitment to filter indecent and/or obscene material rings so distinctly in the McElroy Proposal as to be unmistakable mimicry. The TowerStream Proposal also makes a weak attempt to mimic M2Z's family-friendly service by giving users the option of filtering content. Nevertheless, there is simply no suggestion from McElroy and TowerStream that any original thinking went into their proposals, and no evidence that McElroy or TowerStream ever had any intention or plan to build a nationwide wireless broadband network prior to seeing their opportunity to imitate the M2Z Application.

As discussed above, the McElroy Proposal and TowerStream Proposals fall far short of the public interest bar M2Z has set for NBRS in several material respects. Most significantly, McElroy has omitted from its proposal specific construction commitments and hard timetables and footprints for service commencement, and TowerStream flatly states that it will not provide any form of free service. In addition, unlike M2Z, McElroy and TowerStream offer no specifics as to their USF obligations, public safety commitment, or the myriad other public interest and consumer welfare benefits that M2Z's proposal will yield. These failures on McElroy's and TowerStream's part underscore the speculative and "copy-cat" nature of their proposals. Although the McElroy Proposal and TowerStream Proposals were quick to parrot the M2Z Application in a very general sense, McElroy and TowerStream would not, and in fact did not, commit to actually providing a service remotely similar to M2Z's in any meaningful way.²⁸⁵ In short, the McElroy Proposal and the TowerStream Proposal are an insubstantial shadow of the

²⁸⁵ In this sense, the service M2Z proposes should not be held hostage by a party that proves nothing other than they have a \$245 check and a word processor.

M2Z Application and raise serious questions and concerns regarding McElroy's and TowerStream's *bona fide* commitment to their proposed services.²⁸⁶

IV. BASED ON THE RECORD BEFORE THE COMMISSION, THERE IS NO POTENTIAL FOR MUTUAL EXCLUSIVITY.

A. Section 309(j)(6)(E) of the Act Requires the Commission to Avoid Mutual Exclusivity Where the Public Interest So Demands.

Even in expanding the Commission's authority to award licenses by competitive bidding, Congress never intended to reduce or change the Commission's obligations under Section 309(j)(6)(E).²⁸⁷ Section 309(j)(6)(E) figures prominently in the statute, appearing at the very outset of the Act's recitation of the Commission's auction authority. Section 309(j) grants the Commission authority to accept mutually exclusive applications, and thereafter to use competitive bidding processes to resolve such mutual exclusivity, when the Commission's

²⁸⁶ McElroy's copy-cat proposal is hardly surprising or atypical. In fact, McElroy previously has profited from filing applications to construct facilities it never built. Only weeks ago, McElroy entered into a settlement agreement to withdraw its mutually exclusive cellular applications in New Mexico, and related application for review, in exchange for monetary compensation. *See Settlement Agreement and Request for Waiver of Section 1.935 of the Commission's Rules WWC License L.L.C.; Alltel Communications of the Southwest Limited Partnership; Commnet Wireless, LLC; McElroy Electronics Corporation; McElroy Electronics Corporation; Smith Bagley, Inc.; Phase II Unserved Area Applications For New Mexico 3 RSA (Catron) Market No. 555, Block A and WWC License L.L.C. Phase II Unserved Area Applications For New Mexico 6 RSA (Lincoln) Market No. 558, Block A*, Order, DA 07-899 (rel. Feb. 28, 2007). In so doing McElroy also sought a waiver of the Commission's rule limiting the consideration McElroy may receive for entering into a settlement to its "legitimate and prudent expenses" incurred in prosecuting its application, which the Bureau granted. 47 C.F.R. § 1.935(a)(1). As a result, McElroy ultimately was able to profit merely from filing an application and seeking review of the Bureau order dismissing its application.

²⁸⁷ *See* H.R. Conf. Rep. No. 105-217, at 572 (1997). ("[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under 309(j)(6)(E). The conferees are particularly concerned that Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.")

acceptance of mutually exclusive applications is “consistent with the obligations described in paragraph (6)(E)” of Section 309(j).

Section 309(j)(1), therefore, prohibits the Commission from accepting mutually exclusive applications if doing so would not be consistent with Section 309(j)(6)(E). In other words, the Commission should avoid mutual exclusivity if there is a way to use, for example, a threshold qualification to avoid it. As Section 309(j)(6)(E) itself makes clear: “Nothing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest . . . to avoid mutual exclusivity in application and licensing proceedings.” Section 309(j)(6)(E) further states that the Commission must “continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity” in the licensing process, if it determines that such an approach would better serve its public interest mandate. Courts have interpreted this section of the Act to require the Commission to avoid mutual exclusivity by using the spectrum management tools prescribed in Section 309(j)(6)(E) when the public interest so demands.²⁸⁸

M2Z has established a baseline threshold qualification for the 2155-2175 MHz band in its Application and Petition. Indeed, the public interest benefits M2Z’s service will generate exceed those the Commission identified when it previously has applied Section 309(j)(6)(E). The Commission not infrequently has exercised its authority to promote the public interest by

²⁸⁸ See, e.g., *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, ¶ 11 (1999) (“The Commission has previously construed Section 309(j)(6)(E) to mean that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed therein only when it would further the public interest goals of Section 309(j)(3).”); see also *DirectTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997) (“Nothing in § 309(j)(6)(E) requires the FCC to adhere to a policy that it deems outmoded ‘to avoid mutual exclusivity in . . . licensing proceedings’; rather that provision instructs the agency, in order to avoid mutual exclusivity, to take certain steps, such as the use of an engineering solution, within the framework of existing policies.”).

declining to accept competing applications. As examples, M2Z has previously identified such cases as the 800 MHz re-banding proceeding, where the Commission granted to Nextel Communications, Inc. (“Nextel”) wholly new, exclusive, and nationwide spectrum rights in the 1.9 GHz band without subjecting Nextel to competing applications or the auction process based on the growing interference to public safety operations arising from Nextel’s service and other CMRS operations in the 800 MHz band.²⁸⁹ There, the Commission noted its “authority—and obligation—to impose threshold qualifications that preclude the filing of such mutually exclusive applications if we determine that the public interest requires such an approach.”²⁹⁰ M2Z also has noted that the Commission authorized Mobile Satellite Service (“MSS”) providers to integrate ancillary terrestrial component (“ATC”) frequencies into their networks without accepting competing applications.²⁹¹ In so doing, the Commission concluded that restricting eligibility for ATC frequencies to existing MSS licensees was consistent with the public interest because it would promote, among other benefits, “the development and rapid deployment of new technologies, products, and services for the benefit of the public.”²⁹² The same policy rationales underlying the Nextel and MSS-ATC decisions apply in the this case, as public safety entities will benefit from the interoperable M2Z network, and the public will receive new services.

²⁸⁹ M2Z Forbearance Petition at 43-44 (citing *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969, ¶¶ 69-74 (2004)). The Commission concluded that it has both the statutory authority and the obligation to preclude the filing of mutually exclusive applications when “higher public interest uses of spectrum” are present. *Id.* ¶ 73.

²⁹⁰ *Id.* at n.236.

²⁹¹ See *Flexibility for Delivery of Communications by Mobile Satellite Providers in the 2 GHz Band, the L-Band, and 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, ¶ 219 (2003) (subsequent history omitted) (“We find that our decision to permit MSS operators to acquire ATC authority does not establish the requisite conditions for assigning terrestrial licenses in the MSS bands through competitive bidding, pursuant to section 309(j) of the Communications Act.”).

²⁹² *Id.* ¶ 227 (quoting 47 U.S.C. § 309(j)(3)) (subsequent history omitted).

B. Accepting Any of the Alternative Proposals to Use the 2155-2175 MHz Band for Filing, at this Time, Would Impermissibly Rule on the Merits of M2Z's Forbearance Petition.

On September 1, 2006, M2Z filed a Petition for Forbearance (“Forbearance Petition”) pursuant to Section 10(c) of the Act.²⁹³ The M2Z Application was incorporated by reference into its Forbearance Petition because the Application contains supporting background information which is germane to the Commission’s review of the Forbearance Petition, and vice versa.²⁹⁴ M2Z’s Forbearance Petition requests that the Commission forbear from enforcement of Section 1.945(b) and (c) of its rules and any other rule, provision of the Act, or Commission policy, to the extent such rules, statutory provisions, or policies impede the acceptance and grant of M2Z’s Application.²⁹⁵ While the central issue raised in the Forbearance Petition is establishing a date certain answer for M2Z, another key issue is the Commission’s ability to avoid mutual exclusivity through use of its forbearance authority in the grant of M2Z’s Application.

Among the rules from which M2Z requested forbearance is the requirement in Section 1.945(c)(4) of the Commission’s rules that the grant of M2Z’s Application “not preclude the

²⁹³ See 47 U.S.C. § 160(c).

²⁹⁴ See M2Z Forbearance Petition at n.2. M2Z’s Application also was amended to incorporate the Forbearance Petition by reference for the same reasons. See M2Z Application at n.1.

²⁹⁵ See M2Z Forbearance Petition at 1. The Bureau subsequently accepted M2Z’s Application for filing. See “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,” Public Notice, WT Docket No. 07-16, DA 07-492 (rel. Jan. 31, 2007). As a result of the Bureau’s acceptance of M2Z’s Application, the Bureau later determined that the portion of M2Z’s Forbearance Petition requesting forbearance to accept the Application has been rendered moot. See “Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its Application for a License to Provide Radio Service in the 2155-2175 MHz Band,” WT Docket No. 07-30, DA 07-736 (rel. Feb. 16, 2007) (“Forbearance Public Notice”).

grant of any mutually exclusive application.”²⁹⁶ In this regard, M2Z demonstrated that, consistent with the Act’s forbearance standard,²⁹⁷ enforcement of this requirement, to the extent it applies to M2Z’s Application, is not necessary to protect consumers or to ensure that M2Z’s charges, practices, classifications, and regulations are just and reasonable and are not unjustly or unreasonably discriminatory.²⁹⁸ M2Z further demonstrated that forbearance from Section 1.945(c)(4) satisfies the Act’s public interest standard for forbearance because a license grant will allow new entry by M2Z and increase the level of competition in the broadband and telecommunications marketplace.²⁹⁹ More broadly, M2Z requested in its Forbearance Petition that the Commission forbear from applying any procedural or substantive rule, provision of the Act, or policy that would prevent, prohibit, or impede the acceptance and grant of M2Z’s Application or the deployment of its nationwide wireless broadband service.³⁰⁰

²⁹⁶ 47 C.F.R. § 1.945(c)(4); *see also* M2Z Forbearance Petition at 20.

²⁹⁷ *See* 47 U.S.C. § 160(a).

²⁹⁸ *See* M2Z Forbearance Petition at 21-24.

²⁹⁹ *See id.* at 24-32. M2Z also demonstrated that the existence of mutual exclusivity should not preclude the grant of its Application because: (1) the Commission has the statutory authority and the obligation to avoid mutual exclusivity when the public interest so demands; (2) the Commission previously has avoided accepting mutually exclusive applications; (3) the public interest benefits of M2Z’s proposed service outweigh the need to accept mutually exclusive applications; and (4) grant of the Application will establish a generous revenue stream for the U.S. Treasury in the form of voluntary five percent spectrum usage payments derived from M2Z’s premium service offerings. *See id.* at 41-49.

³⁰⁰ *See id.* at 33-35. As explained in the Forbearance Petition, the Commission may not deny a request for forbearance based on the level of specificity, particularly when the Commission has addressed equally broad requests in the past. *See id.* at 35-36, citing *AT&T v. FCC*, No. 05-1186, slip op. at 15 (D.C. Cir. June 27, 2006); *see also Idaho Power Co. v. FERC*, 312 F.3d 454, 464 (D.C. Cir. 2002) (vacating agency action because, among other things, the challenged orders were inconsistent with both prior and subsequent agency actions). Thus, because M2Z’s Forbearance Petition is no less cognizable, nor more broadly phrased, than other forbearance petitions that have been filed and granted before, the Commission is obliged to address this Petition on the merits. *See* Forbearance Petition at 35-36, citing *Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (FCC preempted an

Until the matters M2Z raises in its Forbearance Petition are decided on the merits, the Bureau should not accept for filing the Alternative Proposals or any additional license applications in the 2155-2175 MHz band. The public debate on M2Z's proposal is only just beginning,³⁰¹ and the Commission has yet to rule the merits of M2Z's Forbearance Petition and related M2Z Application. However, if the Bureau now accepts the Alternative Proposals for filing, it would in effect be rendering a substantive decision on a central issue raised in M2Z's Forbearance Petition—whether the public interest benefits of M2Z's proposal outweigh the need to accept mutually exclusive applications. Indeed, if the Bureau were to accept the Alternative Proposals for filing, it would be creating the very mutual exclusivity that M2Z asks the Commission to avoid through its forbearance process.

The Bureau is without authority to effectively deny M2Z's Forbearance Petition in this manner. Section 10(c) of the Act requires the Commission to rule on the merits of a forbearance petition and to explain its decision in writing within one year after receipt of the petition.³⁰² By accepting mutually exclusive applications for filing through the issuance of a Public Notice the Bureau would fail to satisfy this standard. Such a Public Notice would be an impermissible substitute for a written decision “on the merits” from the Commission, particularly in the forbearance context. A mere Public Notice would offer no reasoned or substantive analysis of the M2Z Forbearance Petition and would not establish the record necessary for a court to review. Moreover, by issuing a Public Notice accepting mutually exclusive applications for filing, the

order of the Minnesota Public Utilities Commission applying its traditional “telephone company” regulations to Vonage's DigitalVoice service).

³⁰¹ Comments on M2Z's Application were filed on March 2, 2007. Comments on M2Z's Forbearance Petition were filed on March 19, 2007, and reply comments are due on April 3, 2007. *See* Forbearance Public Notice at 1.

³⁰² *See* 47 U.S.C. § 160(c).

Bureau would be substituting its judgment with that of the full Commission on a forbearance petition that remains pending before the Commission. Decisions on the merits of forbearance petitions are the exclusive domain of the full Commission. Given the importance of M2Z's proposal to the nation, a decision on M2Z's Forbearance Petition and related M2Z Application likewise must be made by the full Commission in a written decision.³⁰³

Accordingly, until the full Commission rules on the merits of M2Z's Forbearance Petition and related M2Z Application, the Bureau should dismiss the Alternative Proposals and decline to accept additional applications for licenses in the 2155-2175 MHz band.

³⁰³ *See id.* In particular, the Commission must “fully consider” a petition for forbearance within the statutory one-year period and provide a “fully considered analysis” of the petition. *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (“[U]nder the Commission's view, nothing would stop it from finding that the statutory deadline permits ‘fully considered analysis’ of only narrow petitions, and thus adopting a rule that any petition seeking forbearance from more than one regulation is contrary to the public interest. This cannot be correct. Nothing in section 10(a)(3) allows the Commission to avoid ruling on the merits of a forbearance petition whenever it finds the statutory deadline inconvenient. Quite to the contrary, section 10(a)(3)'s very purpose is to force the Commission to act within the statutory deadline.”).

LIST OF EXHIBITS

EXHIBIT A: Affidavit of Uzoma C. Onyeije in Support of Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals

EXHIBIT B: Chart Comparing M2Z Proposal with Alternative Proposals

EXHIBIT C: Analysis of Population Density of Cities in Open Range Annex A

Exhibit A

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

In the Matter of)	
)	
M2Z NETWORKS, INC.)	
)	
Application for License and Authority to	)	WT Docket No. 07-16
Provide National Broadband Radio Service)	
In the 2155-2175 MHz Band)	
)	
Petition for Forbearance Under	)	WT Docket No. 07-30
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)	
)	
and)	
)	
NEXTWAVE BROADBAND INC.	)	WT Docket No. _____
)	
Application for License and Authority to	)	File No. _____
Provide Nationwide Broadband Service)	
In the 2155-2175 MHz Band)	
)	
and)	
)	
OPEN RANGE COMMUNICATIONS, INC.	)	WT Docket No. _____
)	
Application for License to Construct and	)	File No. _____
Operate Facilities for the Provision of Rural)	
Broadband Radio Services in the 2155-2175)	
MHz Band)	
)	
and)	
)	
COMMNET WIRELESS, LLC	)	WT Docket No. _____
)	
Application for License and Authority to	)	File No. _____
Construct and Operate a System to Provide)	
Nationwide Broadband Service in the)	
2155-2175 MHz Band)	
)	
and)	
)	

NETFREEUS, LLC	)	WT Docket No. _____
)	
Application for License and Authority to	)	File No. _____
Provide Wireless Public Broadband Service in)	
the 2155-2175 MHz Band)	
)	
and)	
)	
MCELROY ELECTRONICS	)	WT Docket No. _____
CORPORATION)	
	)	File No. _____
Application for a Nationwide 2155-2175 MHz)	
Band Authorization)	
)	
and)	
)	
TOWERSTREAM CORPORATION	)	WT Docket No. _____
)	
Application for a Nationwide 2155-2175 MHz	)	File No. _____
Band Authorization)	

To: Chief, Wireless Telecommunications Bureau

**AFFIDAVIT OF UZOMA C. ONYEIJE
IN SUPPORT OF CONSOLIDATED MOTION OF M2Z NETWORKS, INC.
TO DISMISS ALTERNATIVE PROPOSALS**

I, Uzoma C. Onyeije, do hereby declare under penalty of perjury the following:

1. I am Vice President for Regulatory Affairs of M2Z Networks, Inc. (“M2Z”).
2. I have read the alternative proposals in the above-captioned proceedings filed by the following applicants: (1) Open Range Communications, Inc.; (2) NextWave Broadband, Inc.; (3) NetfreeUS, LLC; (4) Commnet Wireless, LLC; (5) McElroy Electronics Corporation; and (6) TowerStream Corporation (collectively, the “Applicants” and the “Alternative Proposals”).
3. M2Z has an interest in the disposition of the alternative proposals filed in this proceeding because it has an Application, which has been accepted for filing, for a license to operate in the 2155-2175 MHz band on a nationwide exclusive basis. The Applicants seek to use the same spectrum band for which M2Z previously has applied.
4. I have read the foregoing Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals, and any facts stated therein, of which the Federal

Exhibit B

**COMPARISON OF M2Z PROPOSAL
WITH ALTERNATIVE PROPOSALS**

	M2Z	OPEN RANGE	NEXTWAVE	COMMNET	NETFREEUS	MCELROY	TOWERSTREAM
Licensing Regime	Nationwide exclusive license, single operator	Exclusive license for rural areas	Nationwide non-exclusive licenses, multiple licensees and operators	Nationwide exclusive license, single operator	Will operate a secondary market to re-lease spectrum to operators	Nationwide exclusive license, single operator	Nationwide exclusive license in top 200 MSAs
Free Service	Free consumer broadband service at 384 kbps	No free service	No free service	No free service	Lessees are responsible for delivering free service	“Substantially similar to M2Z”	No free service
Buildout Commitments	95% of US w/intermediate milestones – condition of license	No commitment - estimates coverage of 6.2M ‘rural’ pops; network forecasted to serve 428,000 subs after 5 years	No buildout commitments	Commits to serve up to 2/3 of U.S. population as license condition; expects to serve 90% within 10 yrs.; slower intermediate milestones	“Substantial service” to 50% of markets in 4 years, 75% in 6 years, and 95% in 10 years; BUT vague and limiting safe harbors	“Substantially similar to M2Z”	50% of MSA population in licensed service area in 5 years, 75% in 10 years, and 90% of RSAs in 10 years
Net Benefit to USF	Will not take from USF and will pay into USF; reduces USF funding requirements	No, partial benefit to USF through free services to K-12 education and medical facilities	Not addressed	Not addressed	Not addressed	No, will not take from USF	Not addressed
Family Friendly	Content filtered in network; safe for children	Not addressed	No	No	No	“Substantially similar to M2Z”	Optional filtering
Public Safety	Free as primary or secondary network, prioritized traffic, pre-emption in emergencies	Only ‘Priority’ for first responders in emergencies	None	Basic service will be free for PS. No prioritization or pre-emption	Yes. No prioritized traffic, but will do pre-emption in emergencies	“Substantially similar to M2Z”	Only “priority” for public safety entities

	M2Z	OPEN RANGE	NEXTWAVE	COMMNET	NETFREEUS	MCELROY	TOWERSTREAM
Spectrum Usage Fee	5% of premium revenues	None	None	\$50M upon first renewal of license	5% of gross revenues, no clear business model	Will not make 5% payment	Will not make 5% payment
New Entrant	Yes	Yes	No	No	No	No	No
Economic and Consumer Welfare Benefits	\$18B-\$25B in consumer benefit over 15 year term of license	Not quantified	Not quantified	Not addressed	Not quantified	Not quantified	Not addressed
Interference Protection and Other Specific Technical Service Rules	Will protect incumbents under Part 27 rules	No specified technical and service rules	Will operate under 3.65 GHz service rules	No specified technical and service rules	Will protect incumbents under Parts 22, 27, and 101 rules	No specified technical and service rules	No specified technical and service rules
Spectrally Efficient Technologies	TDD, AAS, and OFDMA technologies	Not specified	Contention-based technology	OFDMA/WiMax	Reprogrammed Wi-Fi technology (not viable)	TDD, AAS, and OFDMA technologies	TDD and AAS
Financial Qualifications	\$400M in secured funding	No secured funding	No details on funding	No details on funding	No details on funding	No details on funding	No details on funding
CMRS Obligations	Regulated as CMRS provider	Not specified	Not specified	No, regulated as BRS provider	Regulated as CMRS provider	Not specified	Not specified

COLOR KEY: = Substantially similar to M2Z Application
 = Somewhat similar to M2Z Application
 = No showing or substantially different from M2Z Application

Exhibit C

Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
1	Alexander City	AL	Tallapoosa	56
2	Alexandria CDP	AL	Calhoun	185
3	Andalusia	AL	Covington	36
4	Athens	AL	Limestone	122
5	Bay Minette	AL	Baldwin	98
6	Beaverton Town	AL	Lamar	24
7	Boaz	AL	Marshall	149
8	Brewton	AL	Escambia	40
9	Calera	AL	Shelby	210
10	Chicasaw	AL	Mobile	324
11	Clanton	AL	Chilton	60
12	Creola Town	AL	Mobile	324
13	Daphne	AL	Baldwin	98
14	Demopolis	AL	Marengo	23
15	Fairfield	AL	Jefferson	590
16	Fairhope	AL	Baldwin	98
17	Foley	AL	Baldwin	98
18	Forkland Town	AL	Greene	15
19	Fort Rucker	AL	Dale	88
20	Gadsden	AL	Etowah	193
21	Glencoe	AL	Etowah	193
22	Gulf Shores	AL	Baldwin	98
23	Hamilton	AL	Marion	40
24	Hartselle	AL	Morgan	195
25	Jackson	AL	Clarke	22
26	Jacksons' Gap town	AL	Tallapoosa	56
27	Jasper	AL	Walker	88
28	Lanett	AL	Chambers	59
29	Midfield	AL	Jefferson	590
30	Monroeville	AL	Monroe	23
31	Moody	AL	St. Claire	111
32	New Site town	AL	Tallapoosa	56
33	Northport	AL	Tuscaloosa	126
34	Ozark	AL	Dale	88
35	Riverside Town	AL	St. Claire	111
36	Roanoke	AL	Randolph	38
37	Russellville	AL	Franklin	48
38	Saks	AL	Calhoun	185
39	Sanford Town	AL	Covington	36
40	Satsuma	AL	Mobile	324
41	Sheffield	AL	Colbert	91
42	Southside	AL	Etowah	193
43	Spanish Fort	AL	Baldwin	98
44	Steele Town	AL	St. Claire	111
45	Sylvan Springs Town	AL	Jefferson	590
46	Talladega	AL	Talladega	108
47	Tillmans corner	AL	Mobile	324
48	Tuscumbia	AL	Colbert	91
49	Valley	AL	Chambers	59
50	Wetumpka	AL	Elmore	117

Gray Shading=Community is Not "Rural" Under Applicable FCC Standards

Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
51	Adona Town	AR	Perry	16
52	Arkadelphia	AR	Clark	27
53	Batesville	AR	Independence	45
54	Bentonville	AR	Benton	214
55	Blytheville	AR	Mississippi	53
56	Bryant	AR	Saline	124
57	Buckner City	AR	Lafayette	16
58	Cabot	AR	Lonoke	77
59	Caldwell Town	AR	St. Francis	45
60	Colt City	AR	St. Francis	45
61	De Queen	AR	Sevier	28
62	Dumas	AR	Desha	19
63	East End	AR	Saline	124
64	Emmet City	AR	Nevada	15
65	Everton Town	AR	Boone	59
66	Fayetteville	AR	Washington	17
67	Greenwood	AR	Sebastian	220
68	Harrison	AR	Boone	59
69	Heber Springs	AR	Cleburne	27
70	Hope	AR	Hempstead	32
71	Hot Springs Village	AR	Garland	137
72	Houston Town	AR	Perry	16
73	Humnoke city	AR	Lonoke	77
74	Lowell	AR	Benton	214
75	Magnolia	AR	Columbia	32
76	Marion	AR	Crittenden	84
77	Menifee Town	AR	Conway	37
78	Monticello	AR	Drew	22
79	Morrilton	AR	Conway	37
80	Mountain Pine City	AR	Garland	137
81	Ozan City	AR	Hempstead	32
82	Plumerville City	AR	Conway	37
83	Reed Town	AR	Desha	19
84	Rogers	AR	Benton	214
85	Rudy Town	AR	Crawford	95
86	Springdale	AR	Washington	17
87	Stuttgart	AR	Arkansas	20
88	Tillar City	AR	Drew	22
89	Tull Town	AR	Grant	27
90	Ulm Town	AR	Prairie	14
91	Van Buren	AR	Crawford	95
92	Winchester City	AR	Drew	22
93	Wynne	AR	Cross	31
94	Adelanto	CA	San Bernadino	95
95	Alta Sierra	CA	Nevada	126
96	Avenal	CA	Kings	101
97	Beale AFB	CA	Yuba	102
98	Bermuda Dunes	CA	Riverside	256
99	Big Bear City	CA	San Bernadino	95
100	Cabazon CDP	CA	Riverside	256

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Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
101	California City	CA	Kern	90
102	Calipatria	CA	Imperial	37
103	Canyon Lake	CA	Riverside	256
104	Castroville	CA	Monterey	126
105	Cherry Valley	CA	Riverside	256
106	Coalinga	CA	Fresno	145
107	Corning	CA	Tehama	20
108	Dinuba	CA	Tulare	82
109	Durham	CA	Butte	130
110	East Hemet	CA	Riverside	256
111	Fillmore	CA	Ventura	437
112	Firebaugh	CA	Fresno	145
113	Fortuna	CA	Humboldt	36
114	Galt	CA	Sacramento	1411
115	Golden Hills	CA	Kern	90
116	Gonzales	CA	Monterey	126
117	Granite Bay	CA	Placer	214
118	Greenfield	CA	Monterey	126
119	Heber CDP	CA	Imperial	37
120	Holtville	CA	Imperial	37
121	Imperial	CA	Imperial	37
122	Ione	CA	Amador	63
123	Kettleman City CDP	CA	Kings	101
124	King City	CA	Monterey	126
125	Lake Arrowhead	CA	San Bernadino	95
126	Lamont	CA	Kern	90
127	Lathrop	CA	San Joaquin	465
128	Live Oak	CA	Sutter	143
129	Livingston	CA	Merced	123
130	Marysville	CA	Yuba	102
131	Mckinleyville	CA	Humboldt	36
132	Mentone	CA	San Bernadino	95
133	Millville CDP	CA	Shasta	47
134	Mira Monte	CA	Ventura	437
135	Newman	CA	Stanislaus	338
136	Olivehurst	CA	Yuba	102
137	Orland	CA	Glenn	21
138	Orosi	CA	Tulare	82
139	Pacific Grove	CA	Monterey	126
140	Palm Desert	CA	Riverside	256
141	Palo Cedro CDP	CA	Shasta	47
142	Patterson	CA	Stanislaus	338
143	Phoenix Lake-Ceder Ridge	CA	Tuolumne	26
144	Prunedale	CA	Monterey	126
145	Red Bluff	CA	Tehama	20
146	Rio Del Mar	CA	Santa Cruz	571
147	Ripon	CA	San Joaquin	126
148	Riverbank	CA	Stanislaus	338
149	Rosamond	CA	Kern	90
150	Running Springs	CA	San Bernadino	95

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Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
151	Salida	CA	Stanislaus	338
152	Seeley CDP	CA	Imperial	37
153	Selma	CA	Fresno	145
154	Shafter	CA	Kern	90
155	Shasta Lake	CA	Shasta	47
156	Soledad	CA	Monterey	126
157	Stanford	CA	Santa Clara	1322
158	Susanville	CA	Lassen	8
159	Taft	CA	Kern	90
160	Thermalito	CA	Butte	130
161	Thousand Palms	CA	Riverside	256
162	Truckee	CA	Nevada	126
163	Tupman CDP	CA	Kern	90
164	Twentynine Palms	CA	San Bernadino	95
165	Waterford	CA	Stanislaus	338
166	Watsonville	CA	Santa Cruz	571
167	Westmorland City	CA	Imperial	37
168	Winters	CA	Yolo	95
169	Winton	CA	Merced	123
170	Berthoud	CO	Larimer	104
171	Eaton	CO	Weld	56
172	Erie	CO	Boulder	384
173	Evans	CO	Weld	56
174	Fort Collins	CO	Larimer	104
175	Fort Lupton	CO	Weld	56
176	Frederick	CO	Weld	56
177	Greeley	CO	Weld	56
178	Johnstown	CO	Weld	56
179	Kersey Town	CO	Weld	56
180	Laporte	CO	Larimer	104
181	Longmont	CO	Boulder	384
182	Loveland	CO	Larimer	104
183	Mead	CO	Weld	56
184	Milliken	CO	Weld	56
185	Pierce Town	CO	Weld	56
186	Platteville	CO	Weld	56
187	Windsor	CO	Weld	56
188	Bear	DE	New Castle	1225
189	Brookside	DE	New Castle	1225
190	Claymont	DE	New Castle	1225
191	Edgemoor	DE	New Castle	1225
192	Elsmere	DE	New Castle	1225
193	Glasgow	DE	New Castle	1225
194	Hockessin	DE	New Castle	1225
195	Milford	DE	Sussex	185
196	North Star	DE	New Castle	1225
197	Wilmington	DE	New Castle	1225
198	Wilmington Manor	DE	New Castle	1225
199	Lake Lorraine	FL	Okaloosa	196
200	Ocean City	FL	Okaloosa	196

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Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
201	Pensacola	FL	Escambia	454
202	Valparaiso	FL	Okaloosa	196
203	Demorest City	GA	Habersham	142
204	Eatonton	GA	Putnam	58
205	Fairview	GA	Walker	142
206	Fort Benning South	GA	Chattahoochee	84
207	Harrison Town	GA	Washington	30
208	Milledgeville	GA	Baldwin	174
209	Oconee	GA	Washington	30
210	Perry	GA	Houston	333
211	Richmond Hill	GA	Bryan County	63
212	Sandersville	GA	Washington	30
213	Savannah	GA	Chatham	540
214	Toccoa	GA	Stephens	140
215	Vidalia	GA	Toombs	73
216	Wilmington Island	GA	Chatham	540
217	Andalusia Village	IL	Rock Island	345
218	Arlington Village	IL	Bureau	40
219	Bingham Village	IL	Fayette	30
220	Bonfield Village	IL	Kankakee	158
221	Bourbonnais	IL	Kankakee	158
222	Bradley	IL	Kankakee	158
223	Butler Village	IL	Montgomery	43
224	Carlinsville	IL	Macoupin	57
225	Chatham	IL	Sangamon	222
226	Clinton	IL	DeKalb	152
227	Colona	IL	Henry	62
228	Dana Village	IL	La Salle	99
229	De Witt Village	IL	De Witt	42
230	Effingham	IL	Effingham	72
231	Fairfield	IL	Bureau	40
232	Geneseo	IL	Whiteside	87
233	Golden Gate Village	IL	Wayne	24
234	Greenville	IL	Bond	48
235	Harvel Village	IL	Montgomery	43
236	Hoopeston	IL	Vermilion	92
237	Johnsonville Village	IL	Wayne	24
238	Keenes Village	IL	Wayne	24
239	Kewanee	IL	Henry	62
240	Lee Village	IL	Lee	49
241	Litchfield	IL	Montgomery	43
242	Macomb	IL	McDonough	56
243	Manteno	IL	Kankakee	158
244	Milan	IL	DeKalb	152
245	Moline	IL	Rock Island	345
246	Monticello	IL	Piatt	38
247	Pana	IL	Christian	49
248	Paris	IL	Edgar	31
249	Princeton	IL	Bureau	40
250	Rantoul	IL	Champaign	191

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Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
251	Robinson	IL	Crawford	39
252	Rochelle	IL	Ogle	71
253	Rockton	IL	Winnebago	560
254	Sciota Village	IL	McDonough	56
255	Spring Valley	IL	Bureau	40
256	Springerton Village	IL	White	30
257	Streator	IL	La Salle	99
258	Troy Grove Village	IL	La Salle	99
259	Vandalia	IL	Fayette	30
260	Vernon Village	IL	Lake	1568
261	Waggoner Village	IL	Montgomery	43
262	Walshville Village	IL	Montgomery	43
263	Wapella Village	IL	De Witt	42
264	Wheeler Village	IL	Jasper	20
265	Bluffton	IN	Wells	76
266	Cedar Lake	IN	Lake	985
267	Clinton	IN	Vermillion	64
268	Columbia City	IN	Whitley	96
269	Decatur	IN	Macon	189
270	Dunlap	IN	Elkhart	414
271	Ellettsville	IN	Monroe	316
272	Fowlerton Town	IN	Grant	171
273	Garrett	IN	DeKalb	115
274	Gentryville Town	IN	Spencer	51
275	Grandview Town	IN	Spencer	51
276	Hartford City	IN	Blackford	84
277	Huntingburg	IN	Dubois	94
278	Kendallville	IN	Noble	115
279	Lake Station	IN	Lake	985
280	Linton	IN	Sullivan	49
281	Mecca town	IN	Parke	39
282	Nappanee	IN	Elkhart	414
283	New Haven	IN	Allen	524
284	Newberry Town	IN	Greene	62
285	Portland	IN	Jay	57
286	Salem	IN	Washington	54
287	Saratoga Town	IN	Randolph	59
288	Scottsburg	IN	Scott	125
289	Sellersburg	IN	Clark	270
290	South Haven	IN	Porter	371
291	St. John	IN	Lake	985
292	Switz City Town	IN	Greene	62
293	Tell City	IN	Perry	49
294	Terre Haute	IN	Vigo	259
295	Troy Town	IN	Perry	49
296	Whiting	IN	Lake	985
297	Winchester	IN	Randolph	59
298	Bee Village	NE	Seward	29
299	Elkhorn	NE	Douglas	1460
300	McCook	NE	Red Willow	16

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Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
301	Nebraska City	NE	Otoe	25
302	North Platte	NE	Lincoln	14
303	Plattsmouth	NE	Cass	49
304	Seward	NE	Seward	29
305	South Sioux City	NE	Dakota	78
306	Washington Village	NE	Hall	100
307	Wayne	NE	Wayne	21
308	Absecon	NJ	Atlantic	480
309	Atlantic City	NJ	Atlantic	480
310	Belmar	NJ	Monmouth	1356
311	Brigantine	NJ	Atlantic	480
312	Budd Lake	NJ	Morris	1044
313	Cresskill	NJ	Bergen	3857
314	Fairview	NJ	Bergen	3857
315	Fanwood	NJ	Union	5147
316	Hammonton	NJ	Atlantic	480
317	Highland Lake	NJ	Sussex	296
318	Highlands	NJ	Highlands	1356
319	Hopatcong	NJ	Sussex	296
320	Lake Mohawk	NJ	Sussex	296
321	Lincroft	NJ	Monmouth	1356
322	Linwood	NJ	Atlantic	480
323	Little Silver	NJ	Monmouth	1356
324	Long Branch	NJ	Monmouth	1356
325	Manasquan	NJ	Monmouth	1356
326	Margate City	NJ	Atlantic	480
327	Mendham	NJ	Morris	1044
328	Mystic Island	NJ	Ocean	882
329	Northfield	NJ	Atlantic	480
330	Ocean City	NJ	Cape May	399
331	Oceanport	NJ	Monmouth	1356
332	Peapack and Gladstone Borough	NJ	Somerset	1043
333	Phillipsburg	NJ	Warren	313
334	Pleasantville	NJ	Atlantic	480
335	Point Pleasant	NJ	Ocean	882
336	Point Pleasant Beach	NJ	Ocean	882
337	Rumson	NJ	Monmouth	1356
338	Somers Point	NJ	Atlantic	480
339	Spring Lake Heights	NJ	Monmouth	1356
340	Villas	NJ	Cape May	399
341	Wanaque	NJ	Passaic	2708
342	Washington	NJ	Warren	313
343	West Long Branch	NJ	Monmouth	1356
344	Yardville-Groveville	NJ	Mercer	1626
345	Boulder City	NV	Clark	210
346	Carson City	NV	Carson City	395
347	Dayton	NV	Lyon	22
348	Enterprise	NV	Clark	210
349	Fernley	NV	Lyon	22
350	Gardnerville Ranchos	NV	Douglas	64

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Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
351	Incline Village-Crystal Bay	NV	Washoe	61
352	Laughlin	NV	Clark	210
353	Lemmon Valley-Golden Valley	NV	Washoe	61
354	Mesquite	NV	Clark	210
355	Aurora Village	NY	Cayuga	118
356	Corning	NY	Steuben	71
357	East Rochester	NY	Monroe	1119
358	Fulton	NY	Schoharie	51
359	Gates-North Gates	NY	Monroe	1119
360	Gloversville	NY	Fulton	112
361	Greece	NY	Monroe	1119
362	Hilton	NY	Monroe	1119
363	Johnstown	NY	Fulton	112
364	Mechanicville	NY	Saratoga	264
365	Millport Village	NY	Chemung	221
366	Oneida	NY	Madison	108
367	Saranac Lake	NY	Franklin	31
368	Seneca Falls	NY	Seneca	110
369	Southport	NY	Chemung	221
370	Wellsburg Village	NY	Chemung	221
371	West Elmira	NY	Chemung	221
372	Westvale	NY	Onondaga	592
373	Bellbrook	OH	Greene	368
374	Bellefontaine	OH	Logan	102
375	Campbell	OH	Mahoning	601
376	Casstown Village	OH	Richland	258
377	Clay Center Village	OH	Ottawa	162
378	Clayton	OH	Perry	87
379	Coalton Village	OH	Jackson	79
380	Cortland	OH	Trumbull	357
381	Crestline	OH	Wayne	205
382	Deersville Village	OH	Harrison	40
383	Dover	OH	Tuscarawas	162
384	East Sparta Village	OH	Stark	655
385	Galion	OH	Crawford	114
386	Girard	OH	Trumbull	357
387	Greenville	OH	Darke	88
388	Harrisville Village	OH	Harrison	40
389	Heath	OH	Licking	223
390	Howland Center	OH	Trumbull	357
391	Hubbard	OH	Trumbull	357
392	Jackson	OH	Jackson	79
393	Kettlersville Village	OH	Shelby	119
394	Kirkersville Village	OH	Licking	223
395	Marysville	OH	Union	103
396	Midland Village	OH	Clinton	103
397	Midvale Village	OH	Tuscarawas	162
398	Moraine	OH	Montgomery	1192
399	Mount Vernon	OH	Knox	110
400	New Carlisle	OH	Clark	357

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Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
401	New Philadelphia	OH	Tuscarawas	162
402	Newton Falls	OH	Trumbull	357
403	Orrville	OH	Wayne	205
404	Pittsburg Village	OH	Darke	88
405	Port Washington Village	OH	Tuscarawas	162
406	Rossford	OH	Wood	201
407	Russia Village	OH	Shelby	119
408	Shelby	OH	Richland	258
409	Sherrodsville Village	OH	Carroll	76
410	St. Clairsville	OH	Belmont	129
411	St. Marys	OH	Auglaize	117
412	Steubenville	OH	Jefferson	174
413	Struthers	OH	Mahoning	601
414	Tipp City	OH	Miami	248
415	Trenton	OH	Butler	745
416	Uhrichsville	OH	Tuscarawas	162
417	Verona Village	OH	Preble	100
418	Wauseon	OH	Fulton	105
419	Wellston	OH	Jackson	79
420	Wilmington	OH	Clinton	103
421	Wilmot Village	OH	Stark	655
422	Youngstown	OH	Mahoning	601
423	Zanesfield	OH	Muskingum	129
424	Alburtis Borough	PA	Lehigh	937
425	Archbald	PA	Lackawanna	457
426	Bear Lake Borough	PA	Luzerne	350
427	Bellefonte	PA	Centre	130
428	Brodheads ville CDP	PA	Monroe	266
429	Burlington Borough	PA	Bradford	54
430	Carbondale	PA	Lackawanna	457
431	Catasauqua	PA	Lehigh	937
432	Centerville Borough	PA	Washington	239
433	Clarendon Borough	PA	Warren	48
434	Columbia	PA	Lancaster	515
435	Corry	PA	Erie	349
436	Dickson City	PA	Lackawanna	457
437	East Stroudsburg	PA	Monroe	266
438	Edinboro	PA	Erie	349
439	Elizabethtown	PA	Lancaster	515
440	Felton Borough	PA	York	444
441	Freeburg Borough	PA	Snyder	115
442	Huntingdon	PA	Huntingdon	53
443	Julian CDP	PA	Centre	130
444	Lancaster	PA	Lancaster	515
445	Lewisburg	PA	Union	136
446	Lititz	PA	Lancaster	515
447	Macungie Borough	PA	Lehigh	937
448	Madisonburg CDP	PA	Centre	130
449	Mapleton Borough	PA	Huntingdon	53
450	Mill Creek Borough	PA	Huntingdon	53

Gray Shading=Community is Not "Rural" Under Applicable FCC Standards

Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
451	Mill Village Borough	PA	Erie	349
452	Millersville	PA	Lancaster	515
453	Mont Alto Borough	PA	Franklin	175
454	Mount Joy	PA	Lancaster	515
455	Nanticoke	PA	Luzerne	350
456	New Berline Borough	PA	Union	136
457	Northampton	PA	Northampton	760
458	Northwest Harborcreek	PA	Erie	349
459	Orrstown Borough	PA	Franklin	175
460	Orrtanna CDP	PA	Adams	190
461	Palmerton	PA	Carbon	159
462	Parkville	PA	York	444
463	Penns Creek CDP	PA	Snyder	115
464	Plymouth	PA	Luzerne	350
465	Prompton Borough	PA	Wayne	68
466	Sayre	PA	Bradford	54
467	Seven Valleys Borough	PA	York	444
468	Shiloh	PA	York	444
469	Shippensburg	PA	Cumberland	405
470	Snydertown Borough	PA	Northumberland	202
471	Springboro Borough	PA	Crawford	88
472	St. Marys	PA	Elk	41
473	Taylor	PA	Lackawanna	457
474	Titusville	PA	Crawford	88
475	Unionville Borough	PA	Chester	620
476	Venango Borough	PA	Crawford	88
477	Vintondale Borough	PA	Cambria	215
478	Warren	PA	Warren	48
479	Waynesboro	PA	Franklin	175
480	Weigelstown	PA	York	444
481	Wellsville Borough	PA	York	444
482	West Middletown Borough	PA	Washington	239
483	West Pittston	PA	Luzerne	350
484	Westmont	PA	Cambria	215
485	Willow Street	PA	Lancaster	515
486	Wilmore Borough	PA	Cambria	215
487	Barnwell	SC	Barnwell	43
488	Berea	SC	Greenville	509
489	Buffalo CDP	SC	Union	56
490	Camden	SC	Kershaw	76
491	Centerville	SC	Anderson	242
492	Conway	SC	Horry	192
493	Dillon	SC	Dillon	77
494	Forest Acres	SC	Richland	446
495	Gantt	SC	Greenville	509
496	Greenville	SC	Greenville	509
497	Hanahan	SC	Berkeley	135
498	Laurel Bay	SC	Beaufort	235
499	Little River	SC	Horry	192
500	Lugoff	SC	Kershaw	76

Gray Shading=Community is Not "Rural" Under Applicable FCC Standards

Population Densities of Communities Proposed to Be Served by Open Range Communications, Inc.

	City	State	County	Pop Per Square Mile*
501	Mauldin	SC	Greenville	509
502	Moncks Corner	SC	Berkeley	135
503	Newberry	SC	Newberry	59
504	North Augusta	SC	Aiken	139
505	North Myrtle Beach	SC	Horry	192
506	Red Bank	SC	Lexington	331
507	Red Hill	SC	Horry	192
508	Sans Souci	SC	Greenville	509
509	Socastee	SC	Horry	192
510	Union	SC	Union	56
511	Appleton	WI	Outagamie	265
512	Arlington Village	WI	Columbia	71
513	Arpin Village	WI	Wood	95
514	Baraboo	WI	Sauk	69
515	Beaver Dam	WI	Dodge	99
516	Brownsville Village	WI	Dodge	99
517	Dane Village	WI	Dane	380
518	Delafield	WI	Waukesha	679
519	Delavan	WI	Walworth	178
520	Elkhorn	WI	Walworth	178
521	Embarrass Village	WI	Waupaca	71
522	Fairwater Village	WI	Fond du Lac	137
	TOTAL	221 of 522, or 42%, of listed communities qualify as rural**		
	<p>* Population and square mileage data used in this exhibit were obtained from the 2005 Claritas Demographic Update, a source of up-to-date market research analysis and target marketing research about the population, consumer behavior, consumer spending, households and businesses in the United States. Claritas uses census data trends to make annual predictions about demographic information. More information about the Claritas data is available at: http://www.tetrad.com/demographics/usa/claritas.</p>			
	<p>**The Commission defines "rural" areas as counties in which there is a population density of one hundred people or less per square mile. See <i>Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services</i>, 19 FCC Rcd. 19078 (2004). Although Open Range states that it will serve 553 communities, only 522 communities are identified in the Open Range Proposal at Annex A. The communities shaded in gray fail to meet the definition of "rural" used by the FCC.</p>			

CERTIFICATE OF SERVICE

I, Erin L. Dozier, an attorney in the law office of Sheppard Mullin Richter & Hampton, LLP, hereby certify that I have on this 26th day of March 2007 caused a copy of the foregoing Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals to be delivered by first-class mail to the following:

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In addition, courtesy copies of the foregoing Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals were delivered by hand upon the following:

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