

lower prices for broadband service; the benefits from increasing broadband access to consumers with no prior access without the use of new universal service subsidies; and the voluntary usage fee payments to be made by M2Z pursuant to the conditions proposed in the Application.⁴³ The analysis explicitly forgoes consideration of numerous other potential consumer benefits, including benefits to subscribers switching from other Internet service providers to M2Z's NBRS or premium services.⁴⁴

3. The Undeniable Public Safety Benefits from M2Z's Proposed NBRS are Spelled Out in the Application

M2Z's proposed NBRS also would provide a wide range of significant public safety benefits. As the Application noted, public safety organizations have estimated the cost of building out a nationwide, interoperable network to be as high as \$18 billion,⁴⁵ and the Department of Homeland Security and public safety organizations have estimated that the cost of replacing the existing public safety land mobile radio systems to achieve interoperability could reach as much as \$40 billion.⁴⁶ Under M2Z's proposal, any federal, state, county, or municipal public safety organization willing to utilize the NBRS will be able to do so for free, without any limit as to the number of devices it may attach to the network.⁴⁷ The equipment that public safety officers would use to communicate via M2Z's wide area network would also be capable of operating over local area networks, where extremely data rich applications may be possible.⁴⁸

⁴³ See Wilkie, "Consumer Welfare Impact," at 2.

⁴⁴ See *id.* at 21.

⁴⁵ See Application at 24 (citing Federal Communications Commission, Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal State and Local Emergency Response Providers, ¶ 25 (rel. Dec. 2005)).

⁴⁶ *Id.*, Appendix 4, at 2 (citing The State of Public Safety Communications, International Symposium on Advanced Radio Technologies, SAFECOM (Mar. 2, 2004) at 9, available at www.safecomprogram.com).

⁴⁷ *Id.* at 25.

⁴⁸ *Id.*, Appendix 4, at 4.

As noted in the Application, assuming an initial cost of \$250 for each such piece of customer equipment, every public safety official in the country could utilize M2Z's NBRS service for an estimated \$625 million – an amount that pales in comparison to the multi-billion dollar estimates noted above.⁴⁹ Annually, the availability to public safety agencies of free broadband service via the NBRS “could result in benefits to the Public in 2008 dollars averaging about \$380 million per year with an aggregate value of about \$3.5 billion.”⁵⁰

Broadband capabilities provided by the NBRS would allow public safety agencies across the country to take advantage of a wide range of bandwidth intensive applications (including data transmission and retrieval, data analysis, and some video applications) that are not available to such agencies ubiquitously today via a wide area network. These benefits would be provided consistent with the expedited buildout schedule set forth in the Application. Moreover, once fully deployed, M2Z's network would support full interoperability in geographic areas encompassing at least 95 percent of the U.S. population, available at the option of each public safety entity.

When considered in this light, it is easy to understand why statements made by AT&T and other Petitioners questioning the public safety benefits of M2Z's proposal should be rejected out of hand.⁵¹ Furthermore, it is the height of hypocrisy for AT&T and others that oppose pending Congressional proposals that would allocate additional spectrum for public safety interoperability to now cite those very proposals as evidence that M2Z's offer of free service to

⁴⁹ *Id.*

⁵⁰ Liopiros at 2–3.

⁵¹ *See, e.g.*, AT&T Petition to Deny at 7–8, 16–17; WCA Petition to Deny at 6. Despite the long list of public interest benefits to be obtained from M2Z's proposed service, incumbent carriers such as T-Mobile contend that M2Z fails to demonstrate that grant of the Application would serve the public interest. *See* T-Mobile Petition to Deny at 8. M2Z respectfully submits that the record in this proceeding conclusively demonstrates the public interest, consumer welfare, and public safety benefits that would be realized from the Commission's grant of the Application.

public safety officials might not be needed.⁵² M2Z's commitment to serving the public safety community would provide real, sustainable benefits, and provides a compelling, independent basis for granting M2Z's request.

4. The Application Promises Substantial Universal Service Fund Savings from Deployment of M2Z's Proposed NBRS

Grant of the Application also would advance rural network deployment and relieve pressure to expand federal Universal Service Fund ("USF") expenditures to subsidize such deployment in high-cost areas. It is beyond dispute that deployment of M2Z's proposed NBRS would increase the provision of broadband services in rural areas. As noted in the Application, M2Z proposes that the Commission condition its 2155-2175 MHz license on M2Z's success in meeting construction buildout requirements that would result in the NBRS covering 95 percent of the nation's population within 10 years of license grant and M2Z's commencement of operations.⁵³ This construction commitment is unprecedented, and would bring broadband services to many areas where it does not exist today.

Despite this fact, certain Petitioners implausibly assert that M2Z's proposal might actually have a *negative* impact on the deployment of broadband services in rural areas by discouraging other potential providers from deploying their networks.⁵⁴ Of course, in reality, consumers who are located in regions that are currently without broadband service do not have

⁵² Compare AT&T Petition to Deny at 17 with Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) From Commercial Use, Comments of Cingular Wireless LLC, RM No. 11348, at 2 (submitted Nov. 29, 2006) (opposing Cyren Call's Petition for Rulemaking and stating that "[p]ublic safety communications needs are extremely important, but Cyren Call's proposal is not the solution"); Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) From Commercial Use, Opposition to Petition for Reconsideration, AT&T Inc., RM No. 11348, at 4-5 (submitted Mar. 16, 2007) (arguing that "Cyren Call's proposal is not the solution," and that it "would not serve the public interest"). Verizon Wireless and CTIA have also been vocal opponents of the Cyren Call proposal. See, e.g., *O'Brien Lashes Out at Verizon Wireless, CTIA for Opposing Public Safety Network Plan*, TR Daily, Feb. 23, 2007.

⁵³ Application, Appendix 2, at 2.

⁵⁴ See, e.g., AT&T Petition to Deny at 18-19; see also Rural Broadband Group Petition to Deny at 3, 7-8.

the luxury of waiting until the existing broadband providers decide that it would be economically advantageous, consistent with their business models, to deploy in such areas: these consumers need broadband service comparable to wireline broadband service offerings in more densely populated areas more quickly than incumbent carriers have been willing to deploy. Thus, M2Z's Application, if granted, would result in the rapid delivery of significant benefits to those consumers. AT&T and other Petitioners perversely argue that the Commission should deny the Application so as to *encourage* the provision of advanced services, claiming that grant of M2Z's proposal would be less beneficial for spurring broadband competition than holding out hope for long-promised facilities-based deployment by other providers.⁵⁵ The Commission should reject this counter-intuitive and self-serving advice from parties that have everything to gain⁵⁶ from delaying the entry of new broadband providers and the introduction of new services, and should grant M2Z's concrete proposal to construct the NBRS according to the timeframe proposed in the Application.⁵⁷

M2Z's proposed network buildout would also provide policymakers with significant flexibility as they grapple with the difficult issue of whether, in light of the tremendous benefits of broadband deployment, changes should be made to the USF to achieve universal broadband service. As noted above, M2Z's aggressive network buildout schedule would bring broadband service to many high-cost areas where such service currently is not available. Just as the entry of Personal Communications Service ("PCS") licensees into the mobile telephony market forced

⁵⁵ See AT&T Petition to Deny at 18-19.

⁵⁶ See discussion *infra* Part II.A.5 regarding incumbent carriers' incentives and ability to warehouse spectrum in order to delay or prevent entry by potential competitors.

⁵⁷ In fulfilling the policy goal of promoting widespread deployment of facilities-based broadband service and competition among broadband providers, it is of course axiomatic that the Commission considers "the extent to which [a Commission decision or rule] serves the Commission's 'public interest' mandate to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry." *In re Review of the Prime Time Access Rule*, Report and Order, 11 FCC Rcd 546, ¶ 18 (1995).

the incumbent cellular carriers to expand and upgrade their networks, the same dynamic would likely occur as a result of M2Z's market entry. This competitive dynamic would spur innovation, exert downward pressure on the cost of service and bring many of the technological innovations currently available only in urban and suburban areas to high-cost and rural areas as well. M2Z's network buildout would thus provide policymakers with additional flexibility as they assess the true cost of expanding the USF to facilitate universal access to broadband services.

M2Z has demonstrated that its proposal to bring ubiquitous broadband services to consumers in rural, high-cost areas would promote universal service while reducing pressure for increases in USF subsidies.⁵⁸ NextWave and T-Mobile are among the Petitioners to address this issue, and both fail to refute M2Z's showing in this regard.⁵⁹ As shown in the economic study attached to the Application, the M2Z proposal could save Americans over \$20 billion in USF payments over the long-term when compared to the funding levels proposed in USF legislation that would cover broadband services.⁶⁰ NextWave mistakenly argues that M2Z's estimates are too high, both for the expected growth of the fund and the expected USF savings due to deployment of the NBRIS. NextWave is wrong in contending that the likely expansion of the USF to fund broadband in rural and high-cost areas depends solely on proposed legislation⁶¹ to

⁵⁸ See Application at 29–31 and Appendix 5 at 13–25.

⁵⁹ See NextWave Petition to Deny at 25–26; T-Mobile Petition to Deny at 10 (briefly arguing that “M2Z’s purported universal service savings are wholly speculative” because of the uncertain classification of broadband for USF purposes).

⁶⁰ See Application, Appendix 5, at 24.

⁶¹ See Universal Service for the 21st Century Act, S. 711, 110th Cong. § 5 (2007) (Senate legislation sponsored by Sens. Smith (R-Or.), Dorgan (D-N.D.), and Pryor (D.-Ark.) and introduced on Feb. 28, 2007). NextWave contends that Senator Smith’s proposed legislation “did not gain any appreciable traction and never made it out of committee, dying at the end of the 109th Congress.” NextWave Petition to Deny at 25. The argument is utterly incredible – and, quite frankly, embarrassing – considering the fact the legislation had been re-introduced in the 110th Congress two days *before* NextWave filed its Petition to Deny.

create a new \$500 million fund to subsidize broadband service.⁶² While that proposal appears to be gaining traction,⁶³ it is by no means the only way in which the USF is likely to be expanded so as to fund broadband.⁶⁴ Even without new legislation, the existing Act provides for expanding the USF to support services that “are essential to education, public health, or public safety,” have “been subscribed to by a substantial majority of residential customers,” and “are consistent with the public interest.”⁶⁵ Thus, should the Commission determine that these criteria

⁶² NextWave mischaracterizes the discussion of this issue in Appendix 5 to the Application, which postulated a potential 80% savings in the \$500 million new fund proposed in Senator Smith’s Universal Service for the 21st Century Act. See NextWave Petition to Deny at 25–26. NextWave first points out the obvious fact that Congress has not passed new USF legislation regarding broadband services, asserts that there is no guarantee that any such legislation would eventually provide \$500 million in funding, and quibbles with the assertion that grant of the Application could eliminate 80% of the USF funding that might otherwise be necessary to subsidize broadband deployment. See *id.* NextWave’s complaints miss the mark entirely. In the M2Z study prepared Drs. Rosston and Wallsten and submitted as Appendix 5 to the Application, the figures cited were never intended to pinpoint the precise amount of USF savings that M2Z’s proposed service would yield, but rather to suggest by way of example a reasonable, hypothetical scenario that could result from grant of the Application. See Application, Appendix 5, at 20. By focusing solely on the specific amount of USF savings that M2Z’s service would generate, NextWave impliedly concedes the key issue for Commission review: that granting the Application would in fact promote the Commission’s universal service and broadband deployment goals while simultaneously constraining the size of the USF. Therefore, granting the M2Z Application undoubtedly would be in the public interest.

⁶³ See, e.g., *Rural Senators Want USF to Support Broadband*, Communications Daily, Mar. 2, 2007 (quoting Senator Pryor’s statements that “[t]he future is wireless and broadband” and “[w]e have to make sure that all Americans have access to broadband”, and noting support voiced by Chairman Inouye and Senators Rockefeller and Snowe for universal service broadband reform); *Talk Heats up on Overhaul Of USF, Revising Funding, Shifting Support to Broadband*, Telecommunications Reports, Mar. 15, 2007 (reporting that Senators Dorgan and Rockefeller focused at the March 1 USF oversight hearing of the Senate Commerce Committee on the need to both obtain USF contributions from broadband providers and, according to Senator Rockefeller, to require USF recipients “to transition networks into next-generation broadband networks”; see also *House Dems Grill Commissioners, Promise Continued Oversight*, Telecom Policy Report, Mar. 19, 2007 (reporting statements of Rep. Edward J. Markey, chairman of the House Subcommittee on Telecommunications and the Internet, at March 14th Federal Communications Commission oversight hearing, indicating that “[a]n overarching goal for this subcommittee during this Congress will be to develop a plan for achieving ubiquitous, affordable broadband service to every American,” and that the Commission should “explore ways to create incentives for investment in new technologies . . . , to modernize and rationalize universal service, and [] to ensure that wireless broadband networks, municipal broadband networks and others can interconnect with the incumbent in an efficient and cost-effective way”).

⁶⁴ See, e.g., *Universal Service: Hearing Before the Senate Comm. On Commerce, Sci. & Transp.*, Written Statement of Comm’r Deborah Taylor Tate, 110th Cong., at 6 (Mar. 1, 2007) (“As we look ahead to the long-term goals of the universal service program, we must balance the goal of encouraging competitive entry with the other challenges, such as the further deployment of advanced services. For instance, Alltel recently filed a novel proposal to allocate funding for broadband in unserved areas through competitive bidding.”).

⁶⁵ 47 U.S.C. § 254(c)(1)(A), (B), and (D).

are met based on its analyses of the importance of broadband and residential subscribership, expansion of the USF to encompass broadband already is authorized by the Act.

There is virtual unanimity among policymakers that, to date, the deployment of broadband to rural and high-cost areas has been unacceptably slow, and that USF expansion may be required to remedy this problem.⁶⁶ Indeed, the USF is already growing in part due to increased expenditures on broadband-related facilities by rural carriers that already receive funding (although, as noted above, this spending has not yielded the penetration levels desired by policymakers).⁶⁷ Contrary to NextWave's assertions, M2Z's proposal has great potential to reduce the need to increase USF spending to cover broadband services. Once M2Z's service is

⁶⁶ See, e.g., *House Democrat Rolls Out USF Broadband Expansion Bill*, TR Daily, Jan. 12, 2007 (discussing H.R. 42, a bill introduced by Rep. Nydia Velazquez (D-N.Y.) that would expand the Lifeline and Link Up programs to include broadband and other advanced telecom services); *Senators Mull Subsidizing Broadband Services to Speed Deployment, Tapping Them For Support*, TR Daily, Mar. 1, 2007; Universal Service: Hearing Before the Senate Comm. On Commerce, Sci. & Transp., Statement of Sen. Bill Nelson, 110th Cong. (Mar. 1, 2007) ("As we move towards the future, I look forward to exploring possible new uses of Universal Service funds, such as targeted support to bridge the urban-rural divide in broadband service penetration. Consumers in rural areas of Florida should have the same access to broadband services that consumers in urban areas, such as Miami or Tampa, have available."); Universal Service: Hearing Before the Senate Comm. On Commerce, Sci. & Transp., Statement of Sen. Amy Klobuchar, 110th Cong. (Mar. 1, 2007) ("And that brings me to my top priority in this area: bridging the digital divide and bringing high-speed broadband to every community in Minnesota and every corner of this country . . . Here is another troubling statistic: more than 1 in 10 of the most rural counties do not even have a single high-speed Internet connection – in the entire county . . . A community that is left without affordable broadband access is a community that will be left behind . . . Broadband deployment will lag behind in rural areas because the private sector gets a much higher return in areas of high population density and high income."); Universal Service: Hearing Before the Senate Comm. On Commerce, Sci. & Transp., Testimony of John Burke, Vermont Public Service Board, 110th Cong. (Mar. 1, 2007) ("Section 254 directs that access to advanced services should be provided in all regions of the nation. Yet many states have large areas where broadband is available only by satellite. It has been widely reported that the United States is falling behind, year by year, in the percentage of our citizens who buy broadband . . . The Joint Board should give serious consideration to adding Broadband to the official list of supported services."); Full Committee Markup - Communications Reform Bill: Hearing Before the Senate Commerce Committee, Statement of Sen. Gordon H. Smith, 109th Cong. (June 22, 2006) ("[W]e must ensure that the Universal Service fund is utilized to deploy *advanced communications services*, like broadband, to more Americans. This will spur economic development in rural areas and make America more competitive globally. Of course, the universal service system provides little direct funding for broadband networks today.") (emphasis in original); Drew Clark, *GOP Senators Voice Frustration At Hearing On USF Distribution*, National Journal's Technology Daily (Mar. 2, 2007) available at <http://www.njtelecomupdate.com/lenya/telco/live/tb-AKDO1141676544919.html> (noting that at the Senate Commerce Committee hearing on USF "[s]everal [Republican] senators said the fund, which aims to deliver affordable communications services to rural and low-income Americans, is creating disincentives to investment and to the rollout of high-speed Internet services").

⁶⁷ *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244, ¶ 200 (2001) (rural carriers' investment in "plant capable of providing access to advanced services" is "eligible for support" from the High-Cost Loop fund).

available virtually ubiquitously in rural and high-cost areas, there will be much less need – and less public policy demand – for expanding the USF to fund broadband services.

C. Section 7 of the Act Requires Decisive Action to Grant M2Z's Application by May 5, 2007, as No Party Has Rebutted M2Z's Showing that the Application Proposes a New Service Using New Technology that Would Serve the Public Interest

Section 7(b) of the Act, 47 U.S.C. § 157, 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.”⁶⁸ This provision was enacted specifically 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.”⁶⁹ Moreover, because Congress found these objectives to be of such paramount importance, Section 7(a) places the burden on those who oppose a proposal for new technology or services to demonstrate that the proposal is inconsistent with the public interest.⁷⁰ This burden-shifting procedure “is intended to shift the balance of the process in favor of new services”⁷¹ and creates “a presumption that new services are in the public interest.”⁷²

⁶⁸ 47 U.S.C. § 157(b).

⁶⁹ Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984) (“Dingell Remarks”).

⁷⁰ See 47 U.S.C. § 157(a) (“Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.”). Furthermore, Section 309(d)(1) itself also places the burden on Petitioners to set forth in their petitions to deny “specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with” the public interest. As demonstrated in this Opposition, all of the Petitioners failed to make such a prima facie showing.

⁷¹ See Dingell Remarks, at E74. In addition, Section 7(a) is intended 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. *Id.*

⁷² *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, Memorandum Opinion and Order, 98 F.C.C.2d 792, ¶ 24 (1984). In this Memorandum Opinion and Order, the Commission explained that:

Over the years, the Commission has invoked Section 7 to promote “innovative polices and licensing models that seek to increase communications capacity and efficiency of spectrum use, and make spectrum available to new uses and users.”⁷³ M2Z likewise proposes to bring an innovative new service to the public, using new technologies in 20 MHz of underutilized and unpaired spectrum.⁷⁴ For this reason, the Commission’s consideration of M2Z’s proposal is subject to Section 7’s one-year statutory deadline for resolving proposals for new technologies or services and the statute’s presumption in favor of such proposals.

It is clear from the express terms of Section 7 that none of the Petitioners carries their burden under Section 7(a) to demonstrate that M2Z’s proposal is inconsistent with the public interest. Section 7 disciplines both competitors and the regulatory process as a whole: its one-

Congress has recently re-emphasized the importance of eliminating regulatory obstacles that hinder the development of new and additional uses of the spectrum. The Federal Communications Commission Authorization Act of 1983, Public Law 98-214, adds a new Section 7 to Title I of the Communications Act which . . . requires the FCC to encourage the development of new services and provides a presumption that new services are in the public interest. A similar provision was previously included in Senate Bill S. 66, Senate Report No. 98-67. In explaining the objectives of that previous provision, the Senate Report emphasized that “the development of new technologies and the efforts of competitors seeking to respond to consumer demands will bring more service to the public than will administrative regulations.” In further elaboration, the Senate Report states that “a claim that the new or additional service will provide competition that will take revenue from another service, either existing or proposed, will not be a valid rebuttal.” The regulatory process, the Report states, “should not act as a barrier to those who wish to provide new and additional services.”

⁷³ See, e.g., *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, ¶ 57 (2003) (subsequent history omitted); 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*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 18 n.67 (2004); *Revision of Part 15 of the Commission’s Rules Regarding Ultra-Wideband Transmission Systems*, Notice of Proposed Rulemaking, 15 FCC Rcd 12086, ¶ 8 (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*, Notice of Proposed Rulemaking, 9 FCC Rcd 7078, ¶ 10 (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*, Second Notice of Proposed Rulemaking, 9 FCC Rcd 1394, ¶ 27 (1994).

⁷⁴ The Commission has ruled that, in order to be eligible for consideration under Section 7, an application or petition must propose a “new” service or technology, rather than “an extension of an existing service utilizing existing technology.” *Amendment of Part 74, Subpart E of the Commission’s Rules Pertaining to FM Broadcast Translator Stations*, Memorandum Opinion and Order, 98 F.C.C.2d 35, ¶ 30 (1984). M2Z’s Application to provide NBRS satisfies this standard. The NBRS will be a new nationwide wireless service that uses state-of-the-art, spectrally efficient advanced technology. See Application at 13–15.

year deadline for decision-making ensures that new entrants seeking to provide new services do not become trapped in a never-ending regulatory process;⁷⁵ and its burden-shifting provision ensures that thinly veiled anti-competitive arguments put forward by entrenched incumbents and speculators do not prevent substantial advances such as those offered by M2Z's proposal. As explained above, the Petitioners have failed to rebut the presumption that M2Z's proposal is in the public interest and failed to refute the demonstrated potential for such public interest benefits based on the robust record in this proceeding. Therefore, the Commission must grant the Application pursuant to the timeframe established by Section 7. The Commission may not ignore this provision and thereby "stray[] from its sole duty – that is to implement the laws as passed by the Congress."⁷⁶

Section 706, which was enacted contemporaneously with the forbearance provisions of Section 10 and is set forth as a note to Section 7, provides an additional basis for establishing the NBRS, consistent with the service rules and conditions proposed in the Application, and thereafter granting the Application. As the Commission has recently noted, Section 706 "directs the Commission to encourage broadband deployment by utilizing 'measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment.'"⁷⁷ Moreover, the Court of Appeals for the District of Columbia has held that the Commission may

⁷⁵ See, e.g., *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, ¶ 22 (rel. Mar. 5, 2007) (noting with disapproval the documented failure of local franchising authorities to resolve cable franchising requests of local exchange carrier franchise applicants in less than one year).

⁷⁶ *Markey Tells FCC More Hearings in Store*, Communications Daily, Mar. 15, 2007 (quoting Rep. John Dingell, Chairman of the House Committee on Energy and Commerce, speaking at March 14, 2007, Subcommittee on Telecommunications & the Internet Federal Communications Commission oversight hearing).

⁷⁷ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, ¶ 62 (rel. March 5, 2007) (citing 47 U.S.C. § 157 nt.) ("*Local Cable Franchising Order*").

“consider the goals of Section 706” when formulating policy under the Act.⁷⁸ Consistent with this understanding, the Commission has taken a wide variety of deregulatory actions to eliminate unnecessary barriers that prevent the rapid deployment of broadband services.⁷⁹

Cognizant of the requirements of Section 706 and recognizing that retail prices affect broadband deployment, the Commission has established a strategic goal to ensure that every American has “affordable access to robust and reliable broadband products and services,”⁸⁰ and has identified several specific steps necessary to achieve this goal.⁸¹ Among other things, the Commission has stated that it will “encourage and facilitate an environment that stimulates investment and innovation in broadband technologies and services.”⁸²

A Commission decision to adopt MZZ’s proposed NBRS and grant the Application would be consistent with previous actions taken pursuant to Section 706 to eliminate unnecessary regulatory barriers to the rapid deployment and adoption of broadband service. Yet, such a decision would have a far greater positive impact on the deployment of broadband

⁷⁸ *Local Cable Franchising Order*, ¶ 4 (citing *USTA v. FCC*, 359 F.3d 554, 579–80 (D.C. Cir. 2004)).

⁷⁹ *See, e.g., Local Cable Franchising Order*, ¶ 62 (noting the Commission’s obligation under Section 706 and stating that “[t]he record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated. Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well”); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶¶ 69, 76 (1998) (noting that Section 706 “directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services” and to “further Congress’ objective of opening all telecommunications markets to competition”).

⁸⁰ *See FCC 2006–2011 Strategic Plan at 5*, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf.

⁸¹ *See id.* The Strategic Plan identifies several specific objectives necessary to meet the Commission’s broadband goal. It states that the Commission shall: (1) promote the availability of broadband to all Americans; (2) define broadband in a technologically neutral fashion that includes any platform capable of transmitting high-bandwidth intensive services, applications, and content; (3) ensure harmonized regulatory treatment of competing broadband services; (4) encourage and facilitate an environment that stimulates investment and innovation in broadband technologies and services; and (5) continue to monitor the deployment of advanced telecommunications capability in order to provide ongoing national and international policy leadership and consumer education in the emerging broadband area. *Id.* at 5-6.

⁸² *Id.*

services in unserved and under-served markets than any other Commission action previously taken under that statute. In view of the Commission's obligations under Section 706, and the Commission's long tradition of taking deregulatory actions pursuant to that provision, Section 706 provides another basis for making the 2155-2175 MHz band available for the NBRS and granting the Application. Grant of the Application by May 5, 2007, thus would both comply with Section 7's specific terms as well as with the mandates of Section 706 of the Telecommunications Act, and would further the Act's and the Commission's stated goals of removing all unnecessary barriers to the development and deployment of new services and technologies.

D. The Commission Must Consider M2Z's Petition for Forbearance and Render a Decision on the Merits of that Petition Before Taking Certain Actions with Respect to the Application or Recently Suggested Alternative Proposals

Another statutory ground for swift action on M2Z's Application is found in Section 10(a) of the Act, 47 U.S.C. § 160(a). Section 10(a) obligates the Commission to "forbear from applying *any* regulation *or any* provision of [the Act] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines" that the situation satisfies the three components of the statutory forbearance test:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.⁸³

M2Z submitted a Petition for Forbearance on September 1, 2006, and amended the *Application to incorporate the Petition for Forbearance by reference*. The Petition for Forbearance is the subject of a separate docket,⁸⁴ in which M2Z seeks forbearance from the application of laws, rules, and policies that could otherwise be applied to prohibit M2Z from acquiring a nationwide license to operate a wireless broadband service using spectrum at 2155-2175 MHz. The Commission has an obligation to consider the merits of the Petition for Forbearance prior to acting on M2Z's Application. Thus, contrary to the assertions of some Petitioners that request immediate dismissal of the Application,⁸⁵ the Commission cannot dismiss the Application or take any other action prior to ruling on the merits of the Petition for Forbearance that would moot M2Z's request for relief from "specific regulations and any other statutory and regulatory requirements [] the enforcement of which would disserve the public interest by delaying the acceptance and grant of M2Z's Application."⁸⁶

In 2005, the D.C. Circuit reviewed a Commission decision on a forbearance petition submitted by SBC (now AT&T) in which the Commission originally denied a petition seeking forbearance from any Title II common carrier regulation applicable to SBC's "IP Platform Services."⁸⁷ The Commission reasoned that forbearance pursuant to Section 10 is appropriate only for statutes and regulations that already apply to a service; that consideration of contingent

⁸³ 47 U.S.C. § 160(a) (emphases added); see also *AT&T Inc. v. Federal Communications Commission*, 452 F.3d 830, 832 (D.C. Cir. 2006) (confirming that Section 10(a) "requires the Federal Communications Commission to 'forbear' from enforcing communications statutes and regulations in certain specified circumstances") (emphasis added).

⁸⁴ See *supra* note 5.

⁸⁵ See, e.g., NextWave Petition to Deny at 6.

⁸⁶ See Petition for Forbearance at 2.

⁸⁷ *In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361 (2005) (the "SBC Order").

requests would be contrary to the public interest, consuming valuable Commission resources and forcing the rapid adoption of new policies without time for full consideration; and that SBC's petition did not set out with the requisite specificity either the services potentially to be exempted from regulation or the statutory provisions and rules from which SBC sought forbearance.⁸⁸

The D.C. Circuit rejected this Commission reading of the statute that essentially would have forbade on procedural grounds any consideration by the Commission of contingent or conditional petitions for forbearance.⁸⁹ In doing so, the court emphasized the Commission's public interest obligation to consider the competitive effects of prospective forbearance to eliminate regulatory uncertainty and encourage investment, noting that the Commission's stance would conflict with Section 10(b) of the Act⁹⁰ and virtually read that provision out of the statute altogether by making it possible for the Commission to ignore the potential market benefits of conditional forbearance requests.⁹¹

The Commission must therefore take M2Z's Petition for Forbearance into account and resolve that Petition on its merits before acting on M2Z's Application. The D.C. Circuit held

⁸⁸ See *id.*, ¶¶ 5, 6, 14.

⁸⁹ See *AT&T Inc.*, 452 F.3d at 835–36 (noting that “the Commission denied SBC’s petition on the ground that all conditional forbearance requests are, as a procedural matter, contrary to the public interest and thus require no substantive consideration” and finding that such an approach “conflicts with the statute’s plain language”) (emphasis in original). The D.C. Circuit noted AT&T’s “forceful rebuttal” of this proposition, *see id.* at 834, but did not reach the merits of the issue because the Commission had not defended this position in its brief and subsequently withdrew it at oral argument. AT&T argued that the SBC petition sought forbearance from requirements “only to the extent that they apply” to the services subject to the request – using the exact same test for forbearance advanced by the Commission in paragraph 5 of the *SBC Order*. AT&T’s brief also noted that the Commission had “acknowledged that forbearance requests are appropriate . . . even when they address rules of unclear application” by proposing in the *Cable Modem Declaratory Ruling* to “alleviate industry uncertainty by conditionally ‘forbear[ing] from applying each provision of Title II or common carrier regulation’ to cable modem service ‘[t]o the extent that [this] service may be subject to telecommunications service classification.’” See Brief for Petitioner AT&T Inc. at 17, *AT&T Inc. v. Federal Communications Commission*, 2006 WL 173445, (quoting *Cable Modem Declaratory Ruling*, ¶ 95).

⁹⁰ 47 U.S.C. § 160(b) (“In making [forbearance] determinations . . . , the Commission shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”).

⁹¹ *AT&T Inc.*, 452 F.3d at 835.

that “a forbearance request’s conditional nature gives the Commission no discretion to escape ruling on its merits.”⁹² Moreover, as indicated above, M2Z’s Application incorporates the Petition for Forbearance by reference and, as such, makes the Petition an integral part of the Application. In order to satisfy Section 10, the Commission must release a written order on the merits of the Petition for Forbearance or otherwise allow the Petition for Forbearance to be deemed granted.⁹³ The Commission cannot in the wake of the *AT&T* decision refuse to issue a decision on the merits of the M2Z Petition for Forbearance and cannot dismiss the Application or accept other applications for filing prior to ruling thereon.

Specifically, M2Z’s forbearance petition requested that the Commission “forbear from applying Sections 1.945(b) and (c) of its rules, and any other rule, provision of the Act, or Commission policy, to M2Z’s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band [], to the extent such rules, statutory provisions, or policies impede the acceptance and grant of the Application.”⁹⁴ Thus, even if the arguments advanced by Petitioners had merit, which they do not, the Commission would first need to decide pursuant to Section 10 whether it should deny the Application or instead forbear

⁹² *Id.*

⁹³ Section 10 provides, in pertinent part, that “the Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.” 47 U.S.C. § 160(c)(emphasis added). This has been interpreted by the courts to require the Commission to “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.”); see also *In re Core Communs.*, 455 F.3d 267 (D.C. Cir. 2006) (“Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue the explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation.”).

⁹⁴ Petition for Forbearance at 1.

from any provisions that stand in the way of grant of M2Z's Application.⁹⁵ The Commission has already shown a willingness in this proceeding to set aside certain procedural requirements found in Part 1 of the Commission's rules.⁹⁶ Consistent with its willingness to set aside certain procedural requirements simply in order to have the "benefit of maintaining an efficient process for developing a record in this docket,"⁹⁷ the Commission should forbear from enforcing any substantive or procedural regulations in Part 1 of the rules or elsewhere if those regulations conceivably could prevent grant of the Application.

II. THE COMMUNICATIONS ACT OBLIGATES THE COMMISSION TO ASSIGN SPECTRUM IN THE PUBLIC INTEREST BUT DOES NOT REQUIRE THE USE OF COMPETITIVE BIDDING TO ASSIGN LICENSES

Many of the Petitioners opposing the Application incorrectly argue that Section 309(j) of the Act, 47 U.S.C. § 309(j), requires the Commission to use competitive bidding mechanisms to assign initial spectrum licenses such as the 2155-2175 MHz license sought by M2Z.⁹⁸ This argument mischaracterizes the nature and extent of the Commission's authority and discretion under Section 309(j) and virtually ignores the Commission's public interest obligation under Section 309(j)(6)(E) "to use engineering solutions, negotiation, threshold qualifications, service

⁹⁵ See M2Z Consolidated Motion to Dismiss at 73-76 (further explaining that the Commission also may not accept for filing any of the alternative proposals for use of the 2155-2175 MHz band submitted in this docket without first ruling on the merits of M2Z's Application and Petition for Forbearance seeking grant of a license without a hearing and without mutual exclusivity).

⁹⁶ In the initial Public Notice in this docket and the March Public Notice, for example, the Commission essentially set aside without further explanation its rules regarding the time for filing petitions to deny against non-auctionable license applications. See 47 C.F.R. § 1.939(a)(2).

⁹⁷ March Public Notice at 2.

⁹⁸ See, e.g., CTIA Petition to Deny at 4 ("M2Z's proposal . . . would violate Section 309(j), which requires the Commission to assign spectrum through competitive bidding except under very tightly defined circumstances."); Verizon Wireless Petition to Deny at 2-4; AT&T Petition to Deny at 5; T-Mobile Petition to Deny at 4; WCA Petition to Deny at 2 (suggesting that the Commission may not "terminate" the process suggested by earlier AWS orders and grant a nationwide license to M2Z "without providing others an opportunity to acquire the spectrum at auction in accordance with the requirements of Section 309(j)") (emphasis added).

regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.”⁹⁹

Arguing that the Commission must hold an auction to award licenses whenever multiple parties file applications puts the cart before the horse by ignoring the Commission’s plenary authority to assign spectrum licenses in the public interest and decide whether to trigger mutual exclusivity by accepting more than one application in the first place. Of course, M2Z does not suggest that Section 309(j)(6)(E) prohibits the Commission from holding auctions.¹⁰⁰

Competitive bidding is one of the many license assignment tools that the Commission may employ, after deciding the highest and best use of spectrum and establishing such use, in order to fulfill concrete public interest objectives established in Section 309(j)(3) of the Act.¹⁰¹ As noted above in Part I, determining the highest and best use for spectrum remains the Commission’s

⁹⁹ 47 U.S.C. § 309(j)(6)(E). In this case, the Commission should cite Section 309(j)(6)(E) and refuse to accept for filing the NextWave proposal for use of the 2155-2175 MHz band and other alternative proposals like it. See M2Z Consolidated Motion to Dismiss at 70-73. Under Section 309(j)(6)(E), the Commission may establish threshold qualifications and service regulations, based on M2Z’s Application, that would disqualify NextWave and the other parties that submitted proposals which have not yet been accepted for filing. In this manner, the Commission would avoid a situation of mutual exclusivity with M2Z’s Application, the one and only application for a license in the 2155-2175 MHz band that has been accepted for filing at this point. The Application demonstrated the public interest benefits of M2Z’s proposal. The Commission should avoid mutual exclusivity here by way of threshold qualifications that differentiate between M2Z’s comprehensive Application and the defective alternative proposals discussed more fully in M2Z’s Consolidate Motion to Dismiss. The Commission also should adopt service regulations and engineering solutions described in the Application. Grant of the Application pursuant to such regulations and conditions would promote an NBRSS service employing a unitary technological solution to promote rapid deployment of M2Z’s proposed nationwide service using innovative Time Division Duplex (“TDD”) technology.

¹⁰⁰ T-Mobile falsely contends that M2Z relies on the text of Section 309(j)(6)(E) to “argue that the Commission cannot accept competing applications for an auction.” T-Mobile Petition to Deny at 5; see also Verizon Wireless Petition to Deny at 8 (“M2Z’s interpretation of this section is . . . that the [Commission] should bar all other entities from applying for a license”). M2Z acknowledges that the Commission can accept competing and even mutually exclusive applications for spectrum, but it may only do so if such actions satisfy the Commission’s obligations under Section 309(j)(6)(E) to avoid mutual exclusivity when doing so is in the public interest. In this instance, as explained in M2Z’s Consolidated Motion to Dismiss, no valid or viable applications have been filed by other parties and the statute thus requires that the Commission avoid mutual exclusivity. See M2Z Consolidated Motion to Dismiss at 17-50.

¹⁰¹ *Id.* § 309(j)(3). Section 309(j)(3) specifically establishes the public interest purposes that the Commission must seek to promote when designing competitive bidding systems. As discussed in further detail in Part II.A.3 below, the Commission has construed its Section 309(j)(6)(E) obligation to avoid mutual exclusivity to be consistent with the public interest directives of Section 309(j)(3).

core responsibility under the Act. Once that determination is made, the Commission must exercise the discretion granted to it in order to determine the licensing regime most appropriate for ensuring that spectrum will be used in fulfillment of these public interest objectives. In this instance, M2Z has demonstrated that the Commission should act in the public interest to reject other applications for the 2155-2175 MHz band and to grant the M2Z Application without auction.¹⁰²

A. Section 309(j)(6)(E) Confirms that the Commission Has an Affirmative Obligation to Avoid Mutual Exclusivity in Spectrum Licensing Proceedings When Doing So Would Satisfy the Public Interest

1. The Plain Text of Section 309(j)(1) and Section 309(j)(6)(E) Obligates the Commission to Avoid Mutually Exclusivity In Specified Circumstances

When read in context, Section 309(j)(1) and Section 309(j)(6)(E) explicitly demonstrate the Commission's discretion to assign licenses directly without acceptance for filing of alternative applications. Section 309(j)(6)(E) takes a prominent place at the outset of the recitation of the Commission's auction authority. Section 309(j)(1) mandates competitive bidding only "[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are *accepted*."¹⁰³ The Commission, however, has the duty to avoid mutual exclusivity, pursuant to Section 309(j)(6)(E) of the Act, when doing so would serve the public interest. As Section 309(j)(6)(E) itself makes clear, the Commission's competitive bidding authority must not "be construed to relieve the Commission of the *obligation* in the public interest . . . to avoid mutual exclusivity in application and licensing proceedings."¹⁰⁴ Therefore,

¹⁰² See M2Z Consolidated Motion to Dismiss at 4-14..

¹⁰³ 47 U.S.C. § 309(j)(1) (emphasis added).

¹⁰⁴ 47 U.S.C. § 309(j)(6)(E) (emphasis added).

notwithstanding the Commission's discretion¹⁰⁵ under Section 309(j)(1) to accept mutually exclusive applications and award licenses via spectrum auctions, the Commission may do so only when acceptance of mutually exclusive applications is in the public interest, as provided in Section 309(j)(6)(E).¹⁰⁶

In other words, the Commission must avoid mutual exclusivity after determining the highest and best use for a particular spectrum band if another method for assigning spectrum licenses within that band would better serve the public interest. Section 309(j)(6)(E) concludes by specifying 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 spectrum licensing process, if it determines that such an approach would better serve its public interest mandate.¹⁰⁷

Certain Petitioners nevertheless attempt to minimize the importance of Section 309(j)(6)(E) or ignore the implications of the provision altogether. CTIA and Verizon Wireless, for example, both make the same mistake in arguing that the Commission must proceed to auction whenever it faces a licensing proceeding not clearly exempted from competitive bidding by Section 309(j)(2).¹⁰⁸ M2Z makes no claim in the Application to an entitlement to one of these

¹⁰⁵ AT&T contends in its Petition to Deny that there is a "presumption" that licenses should be assigned pursuant to auctions, noting that Section 309(j)(1) *generally* requires the Commission to resolve mutually exclusive applications through competitive bidding. *See, e.g.*, AT&T Petition to Deny at 4-5 (citations omitted). Whatever the Commission's general practice may be upon acceptance of mutually exclusive applications, it cannot be disputed that Section 309(j)(6)(E) Act authorizes the Commission to avoid mutual exclusivity in the first place - and indeed, *requires* the Commission to do so - when avoiding mutual exclusivity by use of engineering solutions, negotiation, service rules, or other means would better serve the public interest.

¹⁰⁶ *See* 47 U.S.C. § 309(j)(1). The only fair reading of Section 309(j)(1), therefore, is that the Commission may *not* accept mutually exclusive applications if and when doing so would be inconsistent with Section 309(j)(6)(E).

¹⁰⁷ *Id.* § 309(j)(6)(E).

¹⁰⁸ *See, e.g.*, CTIA Petition to Deny at 4 ("M2Z's proposal . . . would violate Section 309(j), which requires the Commission to assign spectrum through competitive bidding except under very tightly defined circumstances."). CTIA attempts to confine these "defined circumstances" to the list of licenses and permits specifically exempted from the Commission's competitive bidding authority by Section 309(j)(2). *See id.* Verizon Wireless makes

exemptions, but that fact does not seem to trouble CTIA and Verizon Wireless as they flail away at this straw man.¹⁰⁹ CTIA compounds its error in a subsequent *ex parte* letter submitted in this docket, claiming that in response to the Public Notice “at least four entities have submitted mutually exclusive competing applications” and, therefore, that the language of Section 309(j)(1) “unambiguously requires the Commission to hold an auction for the 2155-2175 MHz band.”¹¹⁰ This disingenuous argument ignores the fact that none of the alternative proposals submitted by other parties have been accepted for filing by the Commission, meaning that there are no “mutually exclusive competing applications” for the band.¹¹¹

While CTIA ignores the facts of the instant proceeding and grossly mischaracterizes Section 309(j) by ignoring subsection (j)(6)(E) altogether, AT&T grudgingly acknowledges the existence of Section 309(j)(6)(E),¹¹² yet contends that the Commission should auction the 2155-2175 MHz band because it “has previously determined that AWS spectrum awarded pursuant to a geographic licensing scheme, such as the nationwide licensing proposed by M2Z, triggers the auction requirement set forth in Section 309(j).”¹¹³ As AT&T’s Petition to Deny itself makes

essentially the same mistake, arguing that the Act “generally mandates the use of competitive bidding to select among mutually exclusive applicants for any initial license,” and focuses considerable time and attention on an attempt to distinguish M2Z’s proposed service from the types of licenses and services exempt from competitive bidding under Section 309(j)(2). *See* Verizon Wireless Petition to Deny at 2–4; *see also* T-Mobile Petition to Deny at 4–5.

¹⁰⁹ Verizon Wireless subsequently mentions Section 309(j)(6)(E), yet persists in arguing that M2Z’s reading of the provision would “completely gut Congress’ clear directive to use auctions where the three limited exceptions do not apply.” *See* Verizon Wireless Petition to Deny at 8.

¹¹⁰ *See* Letter from Christopher Guttman-McCabe to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-16, at 2 (submitted Mar. 16, 2007).

¹¹¹ CTIA’s letter may pretend otherwise, but even some of the parties that submitted alternative proposals in this docket acknowledge that the Commission has not accepted any of these alternative proposals for filing or deemed them mutually exclusive to the Application. *See* Comments of NetfreeUS, LLC, on Petition for Forbearance of M2Z Networks, Inc., WT Docket Nos. 07-16 and 07-30, at 4 n.10 (submitted Mar. 19, 2007).

¹¹² *See* AT&T Petition to Deny at 9 (“While Section 309(j) does allow the FCC to avoid mutual exclusivity (and hence the auction requirement), it may only do so where the public interest requires such an approach.”).

¹¹³ *Id.* at 5; *see also* EchoStar Opposition at 1–2. EchoStar repeats the claim that the 2155-2175 MHz band “should” be auctioned because the Commission previously established this band for AWS and “found that it ‘must resolve

clear, however, the Commission should auction spectrum only when serving the public interest does not require the avoidance of mutual exclusivity pursuant to the Commission's authority under Section 309(j)(6)(E).¹¹⁴

2. The Legislative History of Section 309(j)(6)(E) Attests to the Provision's Continuing Validity

Despite attempts by some Petitioners to write Section 309(j)(6)(E) out of the Act, this provision has always been a crucial part of Section 309(j) and remained so even after adoption of the amendments to Section 309(j) in the Balanced Budget Act of 1997. T-Mobile alludes to the fact that Congress amended Section 309(j) in 1997,¹¹⁵ but the amendments did not alter the discretionary nature of the Commission's auction authority. Consultation of legislative history is not necessary, and in the view of some courts even improper, when the statute's terms are plain and unambiguous.¹¹⁶ The meaning of Section 309(j)(1) is plain. The current Section 309(j)(1)

mutually exclusive applications for [AWS] licenses in these bands through competitive bidding.” *Id.* (citation omitted; alteration in original). Like other Petitioners, EchoStar either fails to realize or refuses to acknowledge that the Commission may accept mutually exclusive applications for filing only when the its public interest obligations under Section 309(j)(6)(E) do not require the Commission to avoid mutual exclusivity. In its brief Opposition, EchoStar joins M2Z in the conclusion “that a new nationwide wireless broadband entrant should be a pressing objective” for the Commission, but based upon this flawed reasoning then calls upon the Commission to auction the 2155-2175 MHz band as a single nationwide license on an expedited basis. *See id.* EchoStar's brief comments offer no compelling rationale for denying the Application, nothing to counter M2Z's showing on Section 309(j)(6)(E), and nothing to rebut the Section 7(a) presumption that M2Z's proposed new service is in the public interest.

¹¹⁴ *See* AT&T Petition to Deny at 9.

¹¹⁵ *See* T-Mobile Petition to Deny at 4 n.10. The statutory provision previously stated that “[i]f mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum . . . , then the Commission shall have the authority . . . to grant such license or permit to a qualified applicant through the use of a system of competitive bidding.” 47 U.S.C. § 309(j)(1) (1996) (emphasis added). The current version of the statute indicates that when faced with mutually exclusive applications “the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding.” 47 U.S.C. § 309(j)(1) (2000). What Section 309(j)(1) most assuredly does not do is require the Commission to accept for filing any and all alternative proposals that might result in mutually exclusive applications for particular spectrum bands.

¹¹⁶ *See, e.g., Consumer Electronics Ass'n v. F.C.C.*, 347 F.3d 291, 298 (D.C. Cir. 2003) (confirming that legislative history may be used at times to clarify intent when a statute is unambiguous on its face, but that such legislative history is rarely more probative of congressional intent than the plain text); *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 265 F.3d 1193, 1213 (11th Cir. 2001) (citing Supreme Court decisions such as *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001) and *Ratzlaf v. United States*, 510 U.S. 135, 147 (1994) for the proposition that there is no need to resort to legislative history when statutory text is clear); *In the Matter of*

continues to authorize Commission acceptance of mutually exclusive applications only when doing so would be consistent with the obligations described in Section 309(j)(6)(E).

In any event, the legislative history of the statute simply clarifies and amplifies the intent evident on the face of Section 309(j)(6)(E). The Conference Report accompanying the 1997 legislation emphasized 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 section 309(j)(6)(E).”¹¹⁷ As the Conference Report explained, “[t]he conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.”¹¹⁸ Considering Congress’s determination to preserve the Commission’s discretion and associated public interest obligations in this area, it is impossible to read the provisions of Section 309(j)(6)(E) out of the Act. While this subsection does not diminish the Commission’s obligation to use competitive bidding mechanisms if it decides to accept for filing mutually exclusive applications, Section 309(j)(6)(E) cannot be read as a meaningless or superfluous rule of construction in light of the extensive legislative history and Commission precedent attesting to its continued validity.

Amendment of the Amateur Service Rules to Include Novice Class Operator License Examinations, Notice of Proposed Rule Making, 7 FCC Rcd 4608, ¶ 4 n.8 (“Because the statute is clear on its face, there is no need to resort to the legislative history.”).

¹¹⁷ H.R. Conf. Rep. No. 105-217, at 572 (1997).

¹¹⁸ *Id.*

3. Commission and Appellate Court Decisions Interpreting Section 309(j)(6)(E) Clarify the Scope of the Provision and its Connection to the Public Interest Goals Specified in Section 309(j)(3)

In its *1997 Balanced Budget Act Order*, the Commission recognized its authority and obligations under Section 309(j)(1), noting that “notwithstanding the Commission’s expanded auction authority, its determinations regarding mutual exclusivity must still be consistent with and not minimize its obligations under Section 309(j)(6)(E).”¹¹⁹ The *1997 Balanced Budget Act Order* linked the public interest test under Section 309(j)(6)(E) with the guidelines that inform the Commission’s design of competitive bidding processes according to the mandates of Section 309(j)(3).¹²⁰ Noting that its obligations under Section 309(j)(6)(E) had been in existence as long as the Commission’s auction authority itself, the Commission explained that it “has consistently interpreted this provision to mean that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed therein only when doing so would further the public interest goals of Section 309(j)(3).”¹²¹

Various Petitioners recognize this guiding principle for the Commission’s authority under Section 309(j)(6)(E), with NextWave correctly agreeing that there are other alternatives to

¹¹⁹ *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, ¶ 14 (2000) (“*1997 Balanced Budget Act Order*”).

¹²⁰ *See id.*, ¶ 21.

¹²¹ *Id.* The Commission explained as well that the use of competitive bidding processes is not disfavored, that auctions are not subordinate to Section 309(j)(6)(E), and that “avoidance of mutual exclusivity [is not] the paramount goal of the statute.” *Id.*, ¶¶ 22 – 23. The D.C. Circuit upheld the Commission’s line of reasoning in subsequent cases, with the court refusing to expand the savings clause contained in Section 309(j)(6)(E) beyond these limits. The court noted, for example, that “Subsection (j)(6)(E) affirms Congress’ view that statutory competitive bidding authority does not wholesale replace ‘engineering solutions, negotiation . . . and other means’ to avoid mutual exclusivity; [but] it does not . . . forbid resort to competitive bidding unless no other means to resolve mutual exclusivity are available.” *Bachow Communications, Inc. v. F.C.C.*, 237 F.3d 683, 691 (D.C. Cir. 2001); *see also id.* at 692 (citing *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) for the proposition that Section 309(j)(6)(E) is not a bar to Commission auctions once the Commission determines that allowing mutually exclusive applications is in the public interest).

mutual exclusivity and auctions in the 2.1 GHz band.¹²² Yet, even the Petitioners that recognize this core principle attempt to discredit the Application and argue that M2Z's proposal does not achieve the public interest goals set forth in Section 309(j)(3).¹²³ The Petitioners' arguments on this point do nothing to rebut or discredit the public interest showing made in the Application.

Section 309(j)(3) directs the Commission to consider six specific public interest factors when establishing competitive bidding processes. In light of the Commission's conclusion in the *1997 Balanced Budget Act Order*, these same factors apply when the Commission considers the public interest benefits of accepting or not accepting mutually exclusive applications pursuant to the discretion granted under Section 309(j)(6)(E). The Application satisfies all substantive provisions contained in Section 309(j)(3), including the Commission's mandate to (a) promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays"; (b) promote "economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people"; (c) recover for the public of a portion of the value of the public spectrum resource made available for commercial use; and (d) ensure efficient and intensive use of the electromagnetic spectrum.¹²⁴

¹²² See NextWave Petition to Deny at 6. As NextWave explained in its Petition to Deny, "the Commission has made clear that the threshold public interest standard for acting under Section 309(j)(6)(E) are the objectives set forth in Section 309(j)(3)." *Id.*

¹²³ See, e.g., AT&T Petition to Deny at 9; NextWave Petition to Deny at 6, 21. AT&T attempts to obscure the issue by arguing that the conditions imposed on the license are "not enough [on which] to base an affirmative finding that the proposal will serve the public interest." AT&T Petition to Deny at 7. This attempt at sleight-of-hand is informative, but only to demonstrate the depths to which Petitioners must go in their vain attempts to discredit M2Z's proposal. The affirmative showing that AT&T calls for comes not in the form of the condition that would terminate M2Z's license for failure to construct, see Application at 5, but rather in the detailed description of the public interest benefits to which grant of the Application would lead. See *id.* at 4-6, 12-13.

¹²⁴ 47 U.S.C. § 309(j)(3)(A)-(B). The four substantive public interest goals recited in Section 309(j)(3), set out below in their entirety, direct the Commission to promote the following objectives:

As discussed in more detail below, the Commission has on more than one occasion since the enactment of the competitive bidding provisions relied on Section 309(j)(6)(E) to avoid mutual exclusivity when granting and modifying wireless licenses.¹²⁵ The many tangible and enforceable public interest benefits promised by the Application, and catalogued again in Part I above, provide ample grounds for a similar Commission determination here. In considering M2Z's proposal on the merits, and weighing the tremendous benefits that grant of the Application would confer, the Commission should decide pursuant to its authority in Section 309(j)(6)(E) to accept for filing no alternative proposals and thereby avoid mutual exclusivity in the public interest.

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; [and]

(D) efficient and intensive use of the electromagnetic spectrum[.]

Id. § 309(j)(3)(A)–(D). The Application also meets the procedural requirements in paragraph (E), to the extent applicable, because there has been notice of and an opportunity to comment on the Application, and M2Z (as well as other applicants for the spectrum, albeit less thoroughly and successfully) has established a business plan. *See id.* § 309(j)(3)(E).

¹²⁵ *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, ¶¶ 73, 85 (2004) (“800 MHz Re-banding Order”) (noting that “in Section 309(j)(6)(E), Congress recognized that the Commission can determine that its public interest obligation warrants action that avoids mutual exclusivity, and that this obligation extends to ‘application and licensing proceedings’” and that “section 309(j)(6)(E) gives the Commission broad authority to create or avoid mutual exclusivity in licensing, based on the Commission’s assessment of the public interest”); *see also Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, ¶¶ 227–29 (2003) (justifying Commission decision not to accept applications for a new terrestrial wireless service from parties not currently providing mobile satellite service).