- *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

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[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 of

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[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.

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,

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[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 statements[184] 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."

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[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.

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[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

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[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 broadband

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[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").

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

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[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

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[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

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[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.

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[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

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[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

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[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]

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[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

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[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

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[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

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[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 talks in 2007

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[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).

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]

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[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]

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[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

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[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]

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[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-