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FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

M2Z NETWORKS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

07-1360

NOTICE OF APPEAL

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

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

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

FCC has not promulgated specific service and technical rules and assignment mechanisms for this spectrum, use of the band is governed by 47 U.S.C. §§ 307 and 309 and 47 C.F.R. § 1.945(b)-(c). The FCC accepted M2Z's application for filing under the authority of § 309. Citing the significant public interest benefits its license would achieve, M2Z on September 1, 2006, filed a petition for forbearance pursuant to 47 U.S.C. § 160(c) and 47 C.F.R. § 1.53.

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

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

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

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

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

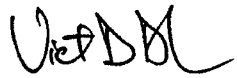
(4) The FCC violated 47 U.S.C. § 157 by wrongly concluding that M2Z is not offering a "new technology or service"; by failing to place on the opponents of M2Z's proposal the burden of demonstrating that the proposal is not in the public interest, as § 157(a) requires; by failing to give any legal effect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

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

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

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

Respectfully submitted,



Viet D. Dinh
Lizette Benedi
Perry Barber
BANCROFT ASSOCIATES PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
(202) 234-0900

Uzoma C. Onyeije
Vice President, Legal and Regulatory Affairs
M2Z NETWORKS, INC.
2000 North 14th Street
Suite 600
Arlington, VA 22201
(703) 894-9500

Counsel for Appellant
M2Z Networks, Inc.

September 11, 2007

CERTIFICATE OF SERVICE

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

Hon. Alberto R. Gonzales
Attorney General
United States Department of Justice
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Samuel Feder, General Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W., Rm. 8-C750
Washington, D.C. 20554

Michael F. Altschul
Christopher Guttman-McCabe
Paul W. Garnett
Brian M. Josef
CTIA – The Wireless Association
1400 16th Street, N.W., Suite 600
Washington, DC 20036

Shant S. Hovnanian
Speedus Corp., Managing Member of
NetfreeUS, LLC
9 Desbrosses Street, Suite 402
New York, NY 10013

Stephen E. Coran
Rudolfo L. Baca
Jonathan E. Allen
Rini Coran, PC
1615 L Street, NW, Suite 1325
Washington, DC 20036
Counsel to Speedus Corp. and NetfreeUS, LLC

Louis Tomasetti
Commnet Wireless, LLC
400 Northridge Road, Suite 130
Atlanta, GA 30350

David J. Kaufman
Brown Nietert & Kaufman, Chartered
1301 Connecticut Ave., NW, Suite 450
Washington, DC 20036
Counsel to Commnet Wireless, LLC

Jennifer McCarthy
NextWave Broadband Inc.
12670 High Bluff Drive
San Diego, CA 92130

Russell D. Lukas
Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tysons Boulevard, Suite 1500
McLean, VA 22102
Counsel to McElroy Electronic Corporation

John T. Scott III
Verizon Wireless
1300 Eye Street, NW, Suite 400 West
Washington, DC 20005

Nancy J. Victory
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Counsel to Verizon Wireless

Steve B. Sharkey
Motorola, Inc.
1455 Pennsylvania Ave., NW, Suite 900
Washington, DC 20004

Thomas Sugrue
Kathleen O'Brien Ham
Sara Leibman
T-Mobile USA, Inc.
401 9th Street, NW, Suite 550
Washington, DC 20004

Andrew Kreig
The Wireless Communications Association International, Inc.
1333 H Street, NW, Suite 700 West
Washington, DC 20005

Paul K. Mancini
Gary L. Phillips
Michael P. Goggin
David C. Jatlow
AT&T Inc.
1120 20th Street, NW
Washington, DC 20036

George E. Kilguss
TowerStream Corporation
Tech 2 Plaza
55 Hammarlund Way
Middletown, RI 02842

Gregory W. Whiteaker
Donald L. Herman, Jr.
Bennet & Bennet, PLLC
10 G Street NE
Suite 710
Washington, DC 20002
Counsel to TowerStream Corporation and The Rural Broadband Group

Stephen C. Liddel
Open Range Communications, Inc.
Suite 820
6465 South Greenwood Plaza Blvd.
Centennial, CO 80111

Joe D. Edge
Drinker, Biddle & Reath, LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005
Counsel to Open Range Communications, Inc.

Viet D. Dinh

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

In the Matter of	)	
	)	
Applications for License and Authority to Operate in the 2155-2175 MHz Band	)	WT Docket No. 07-16
	)	
Petitions for Forbearance Under 47 U.S.C. § 160	)	WT Docket No. 07-30

ORDER

Adopted: August 31, 2007 **Released:** August 31, 2007

By the Commission: Chairman Martin and Commissioner Copps issuing separate statements; Commissioner Adelstein concurring and issuing a statement.

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I. INTRODUCTION

1. In this Order, we dismiss without prejudice the above-captioned applications to provide service in the 2155-2175 MHz band, which has been allocated for fixed and mobile services, including Advanced Wireless Services (AWS).[1] We also deny petitions for forbearance associated with two of the

[1] Advanced Wireless Services is the collective term we use for new and innovative fixed and mobile terrestrial wireless applications using bandwidth that is sufficient for the provision of a variety of applications, including those using voice and data (such as Internet browsing, message services, and full-motion video) content. Although AWS is commonly associated with so-called third generation (3G) applications and has been predicted to build on the successes of such current-generation commercial wireless services as cellular services and Broadband Personal Communications Services (PCS), the services ultimately provided by AWS licensees are limited only by the fixed and mobile designation of the spectrum that we allocate for AWS and the service rules that we ultimately adopt for the bands. With regard to the 20-megahertz block at 2155-2175 MHz, the 2160-2165 MHz band was already allocated for non-Federal Government fixed services and mobile services. *See* 47 C.F.R. Parts 21, 22, and 101. In (continued....)

above-captioned applications, and we dismiss related petitions to deny and a petition for reconsideration as moot. We find that the petitions for forbearance are not in the public interest. In addition, we find that the public interest is best served by first seeking public comment on how the band should be used and licensed. We therefore dismiss all pending applications and related pleadings, without prejudice, in recognition of our plan set out below to expeditiously initiate a rulemaking process to consider service rules for the 2155-2175 MHz band (also referenced herein as the "AWS-3" band).

II. FORBEARANCE PETITIONS

A. Background

2. On May 5, 2006, M2Z Networks, Inc. (M2Z) filed an application seeking an exclusive, nationwide 15-year license in the 2155-2175 MHz band to operate a wireless broadband network using Time Division Duplexing (TDD), Orthogonal Frequency Division Multiple Access (OFDMA), and Advanced Antenna System (AAS) technology.[2] M2Z proposed that this spectrum be licensed to it free of charge, with a portion of certain receipts based on its services paid to the U.S. Treasury.[3] On September 1, 2006, M2Z filed a related forbearance petition, under Section 10(c) of the Communications Act of 1934, as amended (the Act), and Section 1.53 of the Commission's rules,[4] in connection with its

(Continued from previous page)
the *AWS Allocation Third Report and Order*, the 2165-2180 MHz band was reallocated for fixed and mobile services, including AWS. *See* Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258, *Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order,* 18 FCC Rcd 2223, 2238 ¶ 28 (2002) (*AWS Allocation Third Report and Order & NPRM*). In the *AWS Allocation Eighth Report and Order*, the Commission allocated 2155-2160 MHz for fixed and mobile services, including AWS, and designated the entire 2155-2175 MHz band as AWS spectrum. *See AWS Allocation Eighth Report and Order*, 20 FCC Rcd at 15872 ¶ 9.

[2] *See* Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (filed May 5, 2006) (M2Z Application). On September 1, 2006, M2Z amended the Application to incorporate by reference a separately filed forbearance petition. *See* Letter from W. Kenneth Ferree, Esq., to Marlene Dortch, Secretary, FCC (Amendment to Pending Application, filed Sept. 1, 2006). *See also infra* note 5; Wireless Telecommunications Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band, WT Docket No. 07-16, *Public Notice*, 22 FCC Rcd 4442 (2007) (*PN Setting Pleading Cycle on M2Z Application*).

[3] M2Z proposes as a license condition that it "may make available 'Premium Service' on a subscription basis, in which event it shall pay to the U.S. Treasury, on an annual basis, a voluntary usage fee of 5% of the gross revenues derived from such Premium Service." *See* M2Z Application at Appendix 2, Section 10(c).

[4] *See* 47 U.S.C. § 160(c); 47 C.F.R. § 1.53.

application.[5] On March 2, 2007, NetfreeUS, LLC (NetfreeUS) filed a similar forbearance petition in connection with its application to provide service in the same band.[6]

3. In seeking forbearance, M2Z states that it is not asking the Commission to abdicate its responsibility to determine whether "the public interest, convenience, and necessity will be served" by accepting and granting M2Z's application.[7] Rather, M2Z avers that the forbearance process itself provides a specific public interest standard of review for its petition and, by reference, M2Z's application.[8] M2Z also notes that Section 7 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."[9] M2Z asserts that the Commission repeatedly 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."[10]

4. M2Z seeks forbearance from Sections 1.945(b) and (c) of the Commission's rules, to the extent that the enforcement of any provision of these rules would block the acceptance and grant of M2Z's application. Section 1.945(b) provides that "[n]o application that is not subject to competitive bidding under Section 309(j) of the Communications Act will be granted by the Commission prior to the 31st day following the issuance of a Public Notice of the acceptance for filing of such application or of any substantial amendment thereof, unless the application is not subject to Section 309(b) of the Communications Act."[11] Section 1.945(c) sets forth the standard for granting wireless license

[5] *See* Petition of M2Z Networks, Inc. for Forbearance under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(b) and (c) of the Commission's Rules and Other Regulatory and Statutory Provisions, filed Sept. 1, 2006 (M2Z Petition); On February 16, 2007, the Bureau invited public comment on the M2Z Petition. *See* Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its Application for a License to Provide Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-30, *Public Notice*, 22 FCC Rcd. 3351 (2007). As set forth in the February 16, 2007, Public Notice, given the issuance of the *PN Setting Pleading Cycle on M2Z Application*, to the extent that M2Z has asked for forbearance to accept its application for filing, that portion of the Forbearance Petition is moot. *See id.*

[6] Petition for Forbearance under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(b) and (c) of the Commission's Rules and Other Regulatory and Statutory Provisions, filed by NetfreeUS, LLC, on March 2, 2007 (NetfreeUS Petition).

[7] 47 U.S.C. § 309(a).

[8] *See* 47 U.S.C. § 160(a)(3).

[9] M2Z Petition at 16 *citing* 47 U.S.C. § 157(b).

[10] M2Z Petition at 16 n.55 (quoting 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), and citing Application of Hye Crest Management, Inc. for License Authorization in the Point-to-Point Microwave Radio Service in the 27.5 to 29.5 GHz Band and Request for Waiver of the Rules, *Memorandum Opinion and Order*, 6 FCC Rcd 332, ¶ 28 (1991), which granted an exclusive license for 1,000 megahertz of underutilized spectrum in the 28 GHz band for an innovative video distribution service comprised of multiple low power transmitters because the proposed service was "imaginative, technically feasible, and consistent with the statutory mandate of Section 7 of the Communications Act, which charges the Commission to encourage the provision of new technologies and service to the public"). *See also* NetfreeUS Petition at 15 (noting that Hye Crest Management was a predecessor-in-interest to Speedus Corp., which owns NetfreeUS).

[11] 47 C.F.R. § 1.945(b).

applications and provides that the Commission will grant a wireless license application without a hearing if the application is proper on its face and if the Commission finds that the following five criteria are met: (1) there are no substantial and material questions of fact; (2) the applicant is legally, technically, financially, and otherwise qualified; (3) a grant of the application would not involve modification, revocation, or non-renewal of any other existing license; (4) a grant of the application would not preclude the grant of any mutually exclusive application; and (5) a grant of the application would serve the public interest, convenience, and necessity.[12]

5. M2Z contends that enforcement of these rules in the context of M2Z's application is not necessary to protect consumers or to ensure that M2Z's charges, practices, classifications, and regulations are just and reasonable and are not unjustly or unreasonably discriminatory.[13] Moreover, M2Z contends that forbearance from Sections 1.945(b) and (c) in this instance satisfies Section 10's public interest test, which requires us to consider whether forbearance will promote competitive market conditions,[14] because it will increase the level of competition in the broadband and telecommunications market by allowing new entry by M2Z as a Commercial Mobile Radio Service (CMRS) provider.[15] According to M2Z, a grant also will deliver additional public interest benefits by spurring innovation in the consumer electronics market, augmenting universal service, and promoting economic growth through broadband deployment.[16] For these reasons, M2Z contends that the Commission must forbear from applying any provision of Sections 1.945(b) and (c) that would block the acceptance and grant of M2Z's application.

6. NetfreeUS's forbearance petition is premised upon many of the same arguments as M2Z's petition.[17] Like M2Z, NetfreeUS proposes to provide free, nationwide broadband service, although NetfreeUS proposes to provide this service "under a unique plan for nationwide secondary-market licensing that allows entrepreneurs, new entrants and municipalities to participate in providing services on a 'private commons' basis."[18] While agreeing with M2Z that the Commission must forbear from applying Section 1.945 to avoid a determination of mutual exclusivity, NetfreeUS also argues that "no determination of nonexclusivity should be construed to give M2Z the right to foreclose Commission consideration of competing applications."[19] Rather, NetfreeUS contends that we should exercise forbearance by using regulatory tools other than competitive bidding to license the 2155-2175 MHz band. Specifically, NetfreeUS proposes that we establish a May 1, 2007 cutoff date for applications to use the 2155-2175 MHz band. If there are multiple applications, NetfreeUS states that the Commission should announce a 60-day deadline by which applicants may jointly propose a settlement to remove any

[12] *See* 47 C.F.R. § 1.945(c).

[13] *See* M2Z Petition at 21-24.

[14] *See* 47 U.S.C. § 160(b) (quoted in paragraph II.B, *infra*).

[15] *See* M2Z Petition at 24-32 (claiming that forbearance will promote competitive entry into multiple product markets, that a free service will promote service and price competition, and that forbearance will speed M2Z's delivery of the many public interest benefits of its proposal).

[16] *Id.*

[17] *See* NetfreeUS Petition at 5-17. *See also* NetfreeUS Reply to M2Z Consolidated Opposition to Petitions to Deny at 6-8.

[18] NetfreeUS Petition at 11.

[19] NetfreeUS Reply to M2Z Consolidated Opposition to Petitions to Deny at 17.

conflicts that would otherwise result in all or some of the applications being declared mutually exclusive.[20] If no joint settlement is filed and accepted by the Commission, NetfreeUS states that the Commission can then proceed without delay to auction or use other means of assignment.

7. Many parties filed comments regarding M2Z's forbearance petition.[21] At the same time, M2Z filed additional comments, supporting its original forbearance petition.[22] M2Z argues that under both Sections 7 and 10 of the Act, the Commission should grant M2Z's application, asserting that the public interest in granting this application is paramount over unnecessary regulation.[23] M2Z contends that the "public interest is best served when beneficial technologies are made available without undue delay."[24] They argue that deploying new services to the public in a rapid manner is a key feature of both Sections 7 and 10.[25]

B. Discussion

8. Section 10(a) of the Act requires the Commission to forbear from applying any regulation or provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that the following three criteria are satisfied:

(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

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[20] *Id.* at 18-20.

[21] *See, e.g.,* AT&T Comments in Opposition to M2Z Petition for Forbearance, WT Docket No. 07-30 (filed March 2, 2007); CTIA Opposition to M2Z Petition for Forbearance, WT Docket No. 07-30 (filed March 19, 2007); NATOA Comments on M2Z Application and Petition for Forbearance, WT Docket No. 07-30 (filed March 19, 2007); NASUCA Comments on M2Z Application and Petition for Forbearance, WT Docket No. 07-30 (filed March 19, 2007); and WCA Opposition to M2Z Petition for Forbearance, WT Docket No. 07-30 (filed March 19, 2007). *See also* MetroPCS Reply to M2Z Consolidated Opposition to Petitions to Deny at 11-14; Verizon Wireless Reply to M2Z Consolidated Opposition to Petitions to Deny at 2-5. Some reply commenters challenge M2Z's assertion that it proposes a new service using new technology under Section 7 of the Act. *See, e.g.,* CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 12-15; Verizon Wireless Reply to M2Z Consolidated Opposition to Petitions to Deny at 4-5.

[22] *See* M2Z Comments (filed March 19, 2007); M2Z Consolidated Opposition to Petitions to Deny (filed March 29, 2007) (M2Z Consolidated Opposition to Petitions to Deny); M2Z Consolidated Motion to Strike and Dismiss Petitions to Deny and Alternative Proposals (filed March 29, 2007); Supplement to M2Z Consolidated Opposition to Petitions to Deny (filed March 28, 2007); M2Z Consolidated Motion to Dismiss Alternative Proposals (filed March 29, 2007).

[23] *See* M2Z Comments at 3-7. *See also* M2Z April 3, 2007 Reply Comments. M2Z also asserts that its forbearance petition is not rendered moot by the existence of alternative proposals. *Id.* at 13-16.

[24] *See* M2Z Comments at 12.

[25] *See* M2Z Comments at 12.

(3) Forbearance from applying such provision or regulation is consistent with the public interest.[26]

Section 10(b) of the Act specifies that, in making the public interest determination under the third prong of the three-part forbearance standard, "the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[27] Section 10(b) further specifies that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[28] Section 10(c) provides that "[a]ny telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers."[29]

9. As noted above, a petition under Section 10 must demonstrate that forbearance from applying a provision or regulation is consistent with the public interest. We find that the petitions of M2Z and NetfreeUS for forbearance from Sections 1.945(b) and 1.945(c) fail to demonstrate that such action is in the public interest.[30] These provisions are designed, in large part, to ensure that the Commission has a sufficient basis upon which to determine whether the grant of a given license application will best serve the public interest. For example, under Section 1.945(b), the Commission provides opportunities for challenging an application in order to develop a full public record upon which to evaluate the application, while Section 1.945(c) ensures that the Commission considers such relevant factors as the applicant's technical, financial, and other qualifications.[31] Neither M2Z nor NetfreeUS has provided any convincing reasons to conclude that their proposed licensing approaches have advantages that would outweigh the public interest benefits of these rules. While their proposed approaches may result in the issuance of a license sooner than conforming to established processes, such licensing would come at the expense of establishing a complete record that enables the Commission to consider all of the relevant factors in determining whether to grant a license without a hearing. In short, a potentially speedy but ill-considered licensing process does not serve the public interest. Moreover, as set out in detail below, the various filings made in this proceeding that oppose M2Z's and NetfreeUS's applications

[26] 47 U.S.C. § 160(a).

[27] 47 U.S.C. § 160(b).

[28] *Id.*

[29] 47 U.S.C. § 160(c).

[30] In addition, we note that even if we granted the petitions for forbearance, this would not result in an automatic grant of the license. Indeed, all M2Z and NetfreeUS are seeking is relief from imposition of certain Commission rules relating to how and when the Commission could consider their applications for license in the 2155-2175 MHz band.

[31] *See* 47 C.F.R. § 1.945(b)-(c). M2Z argues that compiling a complete public record would enable incumbent broadband providers to propose "the adoption of technical standards and service rules that fit their own business plans while creating barriers to truly new potential market entrants." M2Z Petition at 29. We believe the public interest would be better served if the Commission received the considered views of all interested parties, including incumbent providers. Once we have a complete public record, we can make a determination about the technical standards and service rules that best serve the public interest and do not unduly impede competitive entry into the broadband market.

or propose competing uses of the band support our conclusion that a grant of either of these two applications without adhering to the requirements of Section 1.945 would disserve the public interest.

10. Moreover, we find that a grant of M2Z's request that we forbear from applying the Section 309(j) competitive bidding requirements to its application,[32] as well as its generalized request for forbearance from applying "any other rule, provision of the [Communications] Act, or Commission policy" to the extent they would "impede" our acceptance and grant of its application,[33] should also be denied as inconsistent with the public interest.[34] As discussed in detail below in connection with our disposition of the pending applications, before authorizing spectrum uses, we typically first conduct a rulemaking proceeding to obtain public comment on how the band should be used and licensed.[35] Beginning with the promulgation of Section 309(j), we have most commonly determined, after consideration of the public comment filed in the applicable rule making, that a licensing framework that permits the filing and acceptance of mutually exclusive applications, which are then required by statute to be resolved through competitive bidding, would best serve the public interest for the types of spectrum use proposed by M2Z and NetfreeUS. Indeed, we have concluded in the past that this type of framework best serves the public interest because it is the one most likely to result in the selection of licensees that will value the spectrum the most and put it to its highest and most efficient use.[36]

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[32] M2Z Petition at 33-34 (to the extent necessary, M2Z asks for forbearance from Section 309(j)(1) of the Act, which requires the Commission to grant mutually exclusive applications through a system of competitive bidding). *See also* NetfreeUS Petition at 12-13 (similarly seeking forbearance from Section 309(j)(1), asserting that NetfreeUS's proposal is consistent with 309(j)(3)(c) because it provides a revenue stream to the U.S. government).

[33] M2Z Petition at 1.

[34] *See* 47 U.S.C. § 160(a)(3). We observe that the grant of any of the pending applications, by cutting off consideration of a competitive bidding licensing framework and precluding consideration of other potential applicants for this spectrum, would appear to compromise the development of competitive market conditions. Because M2Z and NetfreeUS fail the third prong of the forbearance test, we need not consider the first two prongs. *See CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003). That said, compromising the development of competitive market conditions would have adverse effects on the matters covered by the first two prongs of the forbearance test – ensuring that a carrier's rates and practices are just, reasonable, and nondiscriminatory, and the protection of consumers.

[35] *See* para. 29, *infra*.

[36] *See, e.g.*, Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd. 11956, 11974 ¶ 47 (2000) (concluding that geographic area licensing of the 928.85-929 MHz and 959.85-960 MHz bands would encourage efficient spectrum use, expeditious licensing, and the rapid delivery of new technologies to the public); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Further Rule Making*, 12 FCC Rcd 18600, 18647 ¶ 101 (1997) (predetermined service areas provide a more orderly structure for the licensing process and foster efficient utilization of the spectrum in an expeditious manner). *See also* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2744 ¶ 15 (1997); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079, 19087 ¶ 10 (1997); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941, 2944 ¶ 6 (1994) (Narrowband Personal Communications Services). *See generally* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2350 ¶¶ 4-5 (1994) (competitive bidding should place licenses in the hands of the parties able to use them most efficiently).

11. Based on the record compiled in this proceeding thus far, we conclude that the benefits of considering such a licensing regime (benefits not refuted by M2Z or NetfreeUS), even given the potentially longer timeline to the provision of actual service, outweigh the value of any purported public interest benefits of providing M2Z or NetfreeUS with a route to licensing that, by its very nature, precludes even the possibility of an auction and would simply give either company spectrum for free.[37] Neither M2Z nor NetfreeUS have convinced us that their proposals are more likely to result in service that will better serve the public interest than the spectrum use that would be made by a licensee who has obtained its license through the competitive bidding process. While it is possible that we may conclude, after compiling a more complete record through the APA notice-and-comment rulemaking process, that the public interest would be better served by employing an alternative licensing framework, at this point, the record does not justify such a conclusion. For the foregoing reasons, granting the forbearance petitions of M2Z and NetfreeUS in order to license the band as they propose would be inconsistent with the public interest.

12. We note that, in its petition for forbearance, M2Z also argues that its application proposes a new technology and service under Section 7 of the Act, which creates a presumption in favor of granting its application.[38] Moreover, in its opposition to petitions to deny its application, M2Z further argues that

[37] *See also* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. , at 253 (1993) (stating, in findings in support of legislation that first authorized the Commission to license spectrum through a competitive bidding process, that "a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the airwaves"). Moreover, we note that in withdrawing the Commission's authority to award "pioneer preferences" to license applicants, Congress has also recognized a license applicant's "significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service," are an insufficient public interest basis upon which to bypass the auctions process and thereby forego the public interest benefits of recovering for the public a portion of the value of the spectrum and of avoiding the unjust enrichment of the commercial users of that spectrum. 47 U.S.C. § 309(j)(13)(F) (withdrawing Commission authority "to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make [such] significant contributions"); *see also* H.R. Rep. 103-826(II), 103rd Cong., 2d Sess., at 8-9 (1994) (explaining that legislation altering Commission's authority to award free licenses to holders of pioneer preferences was designed to ensure that such licensees "pay an equitable amount for use of their spectrum"); *Qualcomm Inc. v. FCC*, 181 F. 3d 1370, 1380-81 (D.C. Cir. 1999) (stating that "[w]hen Congress in 1994 set the date for withdrawal of the FCC's authority to grant new pioneer's preferences, its focus was on increasing federal revenues [by requiring the FCC to recover for the public a portion of the value of the spectrum from pioneers] and not upsetting settled expectations [by making provision for pending cases]); 47 U.S.C. § 309(j)(3)(C) (listing, among the objectives that the Commission is required to promote in implementing its auctions mandate, the "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"). In sum, it appears that Congress's public interest assessment of the Commission's pioneer preference program (*i.e.*, the assessment that the public interest is not served by granting a free license to an applicant on the basis of that applicant's significant contributions to the development of a new service or technology) casts substantial doubt on M2Z's contention that the public interest would be best served by granting it a free, nationwide license on the strength of the purported significance of the service that it proposes to provide.

[38] M2Z Petition at 16-18. Section 7(a) provides that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. 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." 47 U.S.C. § 157(a).

Section 7 compels the Commission to act on M2Z's application by May 5, 2007, one year from the date M2Z filed its initial application.[39] We do not agree with these assertions.

13. First, we disagree with M2Z's assertion that its application proposes a "new service" or "new technology" falling within the scope of Section 7. Opponents contend that M2Z's proposed wireless broadband service is not a new service, and uses technologies that other service providers are already using.[40] In its application, M2Z proposes to provide wireless broadband internet access service,[41] a service that currently is being offered by other service providers to consumers using both licensed and unlicensed spectrum.[42] Moreover, as M2Z recognizes in its application, the technologies that M2Z proposes to use in the provision of wireless broadband internet access service – TDD, OFDMA, and AAT – are all proven technologies that have been deployed in other bands.[43]

14. Further, we find that the relatively slow speed of M2Z's proposed broadband service does not support its Section 7 claim that is proposing to provide a "new" technology or service. In its

[39] M2Z Consolidated Opposition to Petitions to Deny at 23-27. *See also* M2Z April 16, 2007 *Ex Parte* Response at 18-23 (stating that M2Z's application is subject to Section 7 of the Act because the proposal constitutes a "new technology or service" that is distinguishable from the broadband services currently being offered). Section 7(b) provides that "[t]he Commission shall determine whether any new technology or service proposed in a petition of application is in the public interest within one year after such petition or application is filed." 47 U.S.C. § 157(b).

[40] *See* NetfreeUS Reply to M2Z Consolidated Opposition to Petitions to Deny at 3-4 ("Service providers are offering wireless broadband services through licensed spectrum using [OFDMA] technology - for example, operators in the Wireless Communications Service, the Educational Broadband Service and the Broadband Radio Service are providing these services today. Moreover, these services use many new technologies. . . . and . . . providers . . . already are providing service using technologies such as WiMax, OFDM and TDD, the same technologies M2Z characterizes as novel. To the extent that M2Z proposes technology that is already deployed elsewhere or is merely a variation of deployed technologies, M2Z does not propose a "new" technology for purposes of Section 7(b) . . . and the Commission is not compelled to render a decision on the M2Z Application [within one year]."); CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 13 ("M2Z's proposed service and technology are clearly not new or novel in any way, and certainly do not ride to the level of new services and technologies contemplated by Section 7."). *See also* Verizon Wireless Reply to M2Z Consolidated Opposition to Petitions to Deny at 4-5.

[41] M2Z Application at 13-15.

[42] For example, mobile wireless carriers Verizon Wireless, Sprint Nextel, and Cingular are currently offering wireless broadband internet access services across the United States using network technologies such as CDMA 1xEV-DO and WCDMA/HSDPA and licensed Cellular and Broadband PCS spectrum. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eleventh Report*, 21 FCC Rcd 10947, ¶¶ 110-113 (2006) (*11th CMRS Report*). In addition, Clearwire is using licensed spectrum in the 2.5 GHz BRS/EBS band to provide portable wireless broadband Internet access services in 36 U.S. markets. *Id.*, at ¶ 30; *Clearwire Launches Wireless High-Speed Internet Service in Yakima,* News Release, Clearwire, Mar. 27, 2007. Thousands of small wireless Internet service providers (WISPs) use 802.11 Wi-Fi equipment that operates in the unlicensed spectrum bands to provide fixed, line-of-sight wireless broadband services, often in rural areas where landline broadband services are unavailable. Wireless Broadband Access Task Force Report, GN Docket No. 04-163, at 31-32 (Feb. 2005)

[43] *See, e.g.*, M2Z Application at 14 (while AAS technology is advanced, it is at the same time neither untested nor unfamiliar to industry experts [and is] based on optional modes that are compatible with the 802.16e standard, often referred to as Wi-Max."); *id.* at 21 ("[t]he Commission has already approved the operation of TDD and FDD in close spectral proximity"); M2Z Consolidated Opposition to Petitions to Deny at 70 ("M2Z's proposal is *pioneering* in economic terms, but the Application seeks no preferential treatment on the basis of the technology that M2Z proposes to deploy.")

application, M2Z proposes to provide "a robust level of broadband service..., with asymmetric engineered data rates of at least 384 kbps down[stream] and 128 kbps up[stream]." It touts this service as faster than dial up Internet access and as meeting "the Commission's definition of high speed broadband."[44] While M2Z asserts that its proposal constitutes an "innovative service . . . using new technologies" under Section 7 of the Act,[45] we note that the transmission speeds proposed by M2Z are unremarkable compared to other broadband services currently being deployed.[46] Indeed, we are currently considering whether to revise the definition of broadband service to increase the minimum threshold for reporting broadband speed information, and to establish a system whereby the "speed tiers" would be automatically adjusted upwards over time to reflect technological advances.[47] For all these reasons, we conclude that M2Z's proposed service does not exemplify a "new technology or service" contemplated by Section 7, and thus that its application does not fall within the scope of that section.[48] Moreover, in light of the relatively slow speed proposed and the evolving nature of broadband internet access service, the grant of such an application would not serve the public interest.

15. In addition, we also note that the construction benchmarks proposed by M2Z are not particularly aggressive and are misleading as far as the actual extent of their coverage. As a result, we find that M2Z's proposal does not serve the public interest, and in fact, that granting its application would prevent, rather than facilitate, widespread broadband deployment. M2Z proposes conditioning its license on compliance with the following benchmarks: (1) construction and operation of one base station in one Standard Metropolitan Statistical Area (SMSA) within 24 months; as well as (2) construction and operation of sufficient base stations to provide service to 33 percent of the U.S. population (as measured by counties) within three years of the grant, 66 percent of the population within five years, and 95

[44] *See* M2Z Application at 22-23 (citing Commission's 2004 definition of "high speed" and "broadband" services as those providing transmission rates greater than 200 kbps in at least one direction; Local Telephone Competition and Broadband Reporting, *Report and Order*, 19 FCC Rcd 22340 (2004)).

[45] *See* M2Z Petition at 17 (also citing note to Section 7, added by Section 706 of the Telecommunications Act of 1996, § 706, Pub. L. No. 104-104, codified at 47 U.S.C. § 157 nt).

[46] Indeed, M2Z also acknowledges that actual deployed speeds for its proposed network may be below the promised 384 kbps downstream, but urges the Commission to nevertheless grant its application because its proposed speeds are in excess of dial-up services. *See, e.g.,* M2Z Consolidated Opposition to Petitions to Deny at 100 (stating that regardless of the "actual rates" provided by M2Z, the Commission should "take comfort in the fact" that the speeds proposed would be more than what dial-up currently provides).

[47] *See* Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, *Notice of Proposed Rulemaking*, 22 FCC Rcd 7760, 7769-70 (2007) (asking, *inter alia,* whether to modify the broadband service speed information collected by the Commission to reflect the increased transmission speeds resulting from technological developments).

[48] *See, e.g.,* Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6, FCC 91-173, *Memorandum Opinion and Order*, 6 FCC Rcd 3760 (1991) (finding that a service proposed by US West in its tariff "new technology or service" and cannot be interpreted to endorse methods for the provision of existing services at alternate locations, or the continued use of older, outmoded technologies). For example, Clearwire offers wireless broadband Internet access services in the United States using OFDM and TDD technologies, and spectrum in the 2.5 GHz BRS/EBS spectrum band. *11th CMRS Report*, 21 FCC Rcd 10947 at ¶ 119. *See also* Intelligent Antenna Solution Unveiled by Alcatel-Lucent, TelecomWorldWire (March 28, 2007) (reporting that Alcatel-Lucent has announced the availability of its intelligent, beamforming antenna, which transmits dedicated beams to each active user, which follows them as they move through the base station's coverage area, making more efficient use of spectrum and reducing interference, resulting in capacity gains).

percent of the population within 10 years.[49] M2Z's build-out proposal is substantially less aggressive than the build-out requirements we have established for other services.[50] In particular, M2Z's proposal suggests measurement of its coverage of the U.S. population "by counties,"[51] which results in an overstatement of its coverage in a manner that fails to realize the full deployment required under a number of our construction standards in other bands. In this respect, M2Z's proposal falls short of the build out standards that we have imposed in other contexts such as 700 MHz band, and which we have found to be appropriate to spur the deployment of advanced services to rural and underserved populations.[52] In short, we conclude that M2Z's proposed construction benchmarks do not support grant of its application under Section 7, and would not serve the public interest.[53]

16. Even if we found that M2Z's application does fall within the scope of Section 7, shifting the burden to those opposing its application does not alter our analysis of the public interest. To the extent that M2Z's application proposes a new service or technology, the applications filed by other parties similarly propose new services and technologies.[54] Accordingly, these applications would be entitled to the same presumption as M2Z, thus imposing on each applicant, including M2Z, the burden of

[49] *See* M2Z Application at Appendix 2 at 2.

[50] *See, e.g.,* 47 C.F.R. § 27.14(e)(1) (Broadband Radio Service (BRS) construction requirements and safe harbors); Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Second Report and Order*, FCC 07-132 at paras. 153-177 (2007) (*700 MHz Second Report and Order*) (adopting performance requirements applicable to 700 MHz Band licenses).

[51] *See* M2Z Application, Appendix 2 at 2.

[52] *See 700 MHz Second Report and Order* at paras. 153-177. In particular, we note that M2Z's proposal that we measure its population coverage "by counties" does not specify what level of coverage, either on a geographic or population basis, would result in a particular county being included for purposes of meeting its proposed benchmark. Further, M2Z acknowledges that measurement "by counties" would not result in coverage of 95% of the population. Rather, it could result in service to "as much as 95%" of the population, but no penalty would result in failing actually to serve this number. *See, e.g.*, M2Z Consolidated Opposition to Petitions to Deny at 102. In contrast, in our recent *700 MHz Second Report and Order* we imposed strict and specific geographic and population-based benchmarks – the most stringent ever imposed by the Commission – designed to encourage prompt deployment of services. These benchmarks included specified levels of service (either to 70% of the geography or 75% of the population, depending on the block) and a keep-what-you-use provision for those areas that a licensee fails to build out. *700 MHz Second Report and Order* at paras. 153-177.

[53] For these reasons, we also conclude that grant of the forbearance petition and application would not be consistent with the goals set forth in Section 706 of the Telecommunications Act of 1996.

[54] *See, e.g.*, Commnet Application, Exhibit 2 at 1 (proposing to "construct a state-of-the art wireless broadband system utilizing [OFDM] Non-Line-of-Site WiMax technology ('802.26e') similar to that which already has been proven in the field [by other companies]."); TowerStream Application, Exhibit A at 1-2, (proposing to use TDD and AAS in the band); McElroy Electronics (MEC) Application, Exhibit 1 at 6-7 (proposing to use TDD, OFDMA, and AAS).

demonstrating that every other application is inconsistent with the public interest. In either event, Section 7 does not establish that the Commission itself has the burden to demonstrate that M2Z's proposal, or any other proposal, is inconsistent with the public interest. Section 7(a) expressly excludes the Commission from the burden of demonstrating that a Section 7 proposal is not in the public interest.[55] In any case, by filing their own, similar applications in which they propose to provide the same or similar services, we consider the six applicants for competing authorizations in this spectrum to have met the burden required under Section 7 to demonstrate that M2Z's proposal is inconsistent with the public interest.[56]

17. Lastly, although we need not reach the issue of the relevant time frame to act on M2Z's Section 7 claim, we do not believe that the one-year timeframe specified in Section 7(b) can be triggered by the filing of an application that does not purport to offer a new technology or service under section 7. Specifically, in its initial application filed on May 5, 2006, M2Z did not assert that it was proposing a new service or technology that, pursuant to Section 7, required the Commission to act within a one-year time frame. Rather, M2Z first mentioned its Section 7 claim as part of its petition for forbearance on September 1, 2006 – almost four months after its initial application was filed – and even then M2Z only appeared to invoke that provision to argue that grant of its application would be consistent with the congressional goals specified in Section 7.[57] It was not until March 29, 2007, in its opposition to petitions to deny its application, that M2Z expressly asserted that its Section 7 claim required the Commission to act within one year of the filing of its application.[58] As a result, the one-year period set forth in Section 7 could not have begun to run until September 1, 2006 at the earliest, and we are acting here within one year of that date. M2Z cannot retroactively trigger the Section 7 one-year time frame by engaging in procedural gamesmanship and later claiming that Section 7 applies to a prior-filed

[55] 47 U.S.C. § 157(a). Section 7(a) states: "Any person or party (*other than the Commission*) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest." *Id.* (emphasis added).

[56] *See* 47 U.S.C. § 157(a) (providing, in pertinent part, "Any person or party . . . who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest"). *See also* Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band (filed March 2, 2007); Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band License (filed March 2, 2007); Application of Commnet Wireless, LLC for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Radio Service in the 2155-2175 MHz Band (filed March 2, 2007); Application of NetfreeUS, LLC for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band (filed March 2, 2007); Application of McElroy Electronics Corporation for a Nationwide 2155-2175 MHz Band Authorization (filed March 2, 2007); and Application of TowerStream Corporation for a Nationwide 2155-2175 MHz Band Authorization (filed March 15, 2007).

[57] *See* M2Z Petition at 16-18. Although M2Z asserts, in its April 16, 2007 *Ex Parte* Response, that it first claimed its application was subject to Section 7 when it filed its September 1, 2006, Forbearance Petition (*see Ex Parte* Response at 23), in fact the Forbearance Petition does not expressly request Section 7 treatment for the application.

[58] *See* M2Z Consolidated Opposition to Petitions to Deny at 23-27.

application.[59] Further, NetfreeUS and CTIA dispute whether the Commission is even required to act on the M2Z Application within one year under Section 7.[60]

18. For the foregoing reasons, we deny M2Z's and NetfreeUS's petitions for forbearance. Also, based on the above, we have concluded that the technology and services proposed in M2Z's application are insufficient to fall within the scope of Section 7 of the Communications Act or, in the alternative, to warrant a determination under Section 7 that they are in the public interest.

III. APPLICATIONS TO PROVIDE SERVICE IN THE 2155-2175 MHZ BAND AND RELATED PETITIONS TO DENY

A. Background

19. M2Z's Application. As noted above, on May 5, 2006, M2Z filed an application seeking a free, exclusive, nationwide 15-year license in the 2155-2175 MHz band to operate a wireless broadband network.[61] In lieu of service rules and licensing by competitive bidding, M2Z proposes that we grant it a license with ten public-interest conditions that include the provision of fixed and portable broadband data services "at engineered data rates" of 384 kbps downstream and 128 kbps upstream "free of airtime or service charges" to ninety-five percent of the U.S. population "measured by counties" within ten years of license grant and "commencement of operations;"[62] blocking of access to indecent or obscene material; and payment to the U.S. Treasury of a "voluntary usage fee" of five percent of gross revenues derived from "Premium Service" offered on a subscription basis.[63] According to M2Z, the 2155-2175 MHz band is unpaired, is not yet the subject of a long-term plan for use, and will likely remain underused or fallow for many years due to the limited number of carriers with the ability to operate in unpaired spectrum.[64] M2Z further argues that the Commission has the authority to grant its application without allowing competing applications and assigning the licenses by competitive bidding.[65]

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[59] *Cf. In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004) (holding that the Commission was not required to act in response to a letter because, among other reasons, the letter did not specify "the statutory and/or regulatory provisions . . . on which a request for FCC review might have been based") (internal quotations omitted).

[60] *See* NetfreeUS Reply to M2Z Consolidated Opposition to Petitions to Deny at 2-6; CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 12-15 (noting that the courts have characterized Section 7 as a "broad policy statement, rather than an affirmative obligation with which the Commission must comply").

[61] *See* para. 2 *supra*.

[62] M2Z states that its service will commence within 24 months of license grant. M2Z proposes that it "will have constructed sufficient base stations to provide service to: 33% of the U.S. population measured by counties within 3 years of license grant and commencement of operations; 66% of the U.S. population measured by counties within 5 years; and 95% of the U.S. population measured by counties in 10 years. M2Z Application at Appendix 2 at 2.

[63] M2Z Application at Appendix 2. *See also*, M2Z August 24, 2007 Ex Parte at Exhibit 1 ("M2Z's Commitment to Free and Wholesale Services Using An Open Device Platform") at 1-2 (M2Z "commit[s] to provide subscription based wholesale broadband services" and reaffirms that it will "publish and make openly available a certification process so that devices built to the M2Z standards will be able to register and interoperate on the M2Z network"); M2Z August 29, 2007 Ex Parte at 2-3 ("reiterate[s] [M2Z's] commitment to a meaningful, nondiscriminatory wholesale offering . . . and to operate the network on an 'open devices' platform.").

[64] *See* M2Z Application at 16.

[65] *See, e.g.*, M2Z Application at 36, 38-39 *citing* 47 U.S.C. § 309(j)(6)(E) (grant of competitive bidding authority does not "relieve the Commission of the obligation in the public interest to continue to use engineering solutions, (continued....)

20. On January 31, 2007, the Wireless Telecommunications Bureau (WTB or Bureau) accepted the M2Z application for filing under the Commission's general statutory authority of 47 U.S.C. § 309 (rather than pursuant to an established framework of processing rules).[66] The Bureau noted that its action did not imply any judgment or view about the merits of the M2Z application, nor did it preclude a subsequent dismissal of the M2Z application as defective under existing rules or under future rules that the Commission may promulgate by notice and comment rulemaking.[67] The Bureau also noted that additional applications for spectrum in the 2155-2175 MHz band may be filed while the M2Z application is pending.[68]

21. Additional Applications to Provide Service in the 2155-2175 MHz Band. On March 2, 2007, five additional applications for license and authority to operate in the 2155-2175 MHz band were filed in WT Docket No. 07-16; one additional application was filed on March 15, 2007. Commnet Wireless, LLC (Commnet) and McElroy Electronics Corp. (MEC) each seek a nationwide, exclusive license for all twenty megahertz, while TowerStream Corporation (TowerStream) seeks an exclusive license for all twenty megahertz in the top 200 MSAs.[69] All three of these applicants emphasize that, if there are mutually exclusive applications, the Commission should assign licenses for this band by competitive bidding.[70] MEC and TowerStream do not propose an annual payment to the U.S. Treasury based on gross revenues, explaining that one of the primary objectives of the Commission's auction rules is to ensure that only financially qualified applicants receive licenses so that the provision of service to the public is expedited.[71] MEC states that it will establish its financial qualifications by paying its auction obligation in a timely manner.[72]

(Continued from previous page)
negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing"); Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, 19 FCC Rcd 14969, 15013-15 ¶¶ 69, 71-74 (2004) (*Public Safety Order*); 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, 2071-72 ¶ 228 (2003) (*MSS/ATC Order*).

[66] *See* "Wireless Telecommunications Bureau Announces that M2Z Networks, Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing," WT Docket No. 07-16, *Public Notice*, DA 07-492 (rel. Jan. 31, 2007) (*M2Z Application Public Notice*). *See also PN Setting Pleading Cycle on M2Z Application,* 22 FCC Rcd 4442.

[67] *See id.* at 1.

[68] *Id.* at 2.

[69] TowerStream Application, Exhibit A at 1-2. TowerStream states that it supports licensing of the 2.1 GHz band in rural areas to rural operators. *Id.* at 3, n.2.

[70] Acknowledging that its proposal does not include a free basic service and has construction benchmarks set less aggressively than M2Z's, Commnet states that its thresholds are potentially achievable and are not being proffered with the intention of renegotiating with the Commission post-licensing. *See* Commnet Application, Exhibit 2 at 2. *See also* TowerStream Application, Exhibit A at 8.

[71] MEC Application, Exhibit 1 at 5, *citing, e.g.,* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and procedures, 20 FCC Rcd 11268, 11287 (2005); TowerStream Application, Exhibit A at 3.

[72] *See* MEC Application, Exhibit 1 at 5.

22. NetfreeUS also seeks a nationwide authorization to use the entire 2155-2175 MHz band subject to conditions including an annual "usage fee" to the U.S. Treasury of five percent of its gross revenues.[73] NetfreeUS proposes a "license-and-lease" secondary market licensing regime under which it would hold a nationwide license and be obligated to offer to entrepreneurs, new entrants, municipalities and other members of the public the opportunity to lease the spectrum for Wireless Access Points (WAP) that would have a range of approximately one mile.[74] NetfreeUS's Wireless Public Broadband (WPB) network would be advertiser supported[75] and lease payments would be limited to NetfreeUS' costs.[76] No lessee (or NetfreeUS itself) could lease or operate more than fifty WAPs, consumers would not pay monthly fees, and existing Wi-Fi equipment could operate on the WPB after a free software upgrade.[77] NextWave Broadband, Inc. seeks a shared, nonexclusive, nationwide license modeled after the licensing approach that the Commission adopted for the 3650-3700 MHz band.[78] Finally, Open Range Communications, Inc. seeks an exclusive license for "rural" "regional anchor communities" that have populations between 50,000 and 150,000.[79]

23. Petitions to Deny. On March 2, 2007, a number of parties also filed petitions asking the Commission to deny M2Z's application.[80] These petitioners assert that it would be inconsistent with the law and the public interest to grant the license to M2Z. They argue that there are substantial and material questions of fact as to whether granting the application would be in the public interest, would create

[73] *See* NetfreeUS Application at 13.

[74] *Id.* at 5. NetfreeUS states that it would ensure that half of the nation's 734 cellular market areas had substantial service within four years, which would reach 75% within six years, and 95% within 10 years. *Id.* at 12.

[75] *Id.* at 7.

[76] NetfreeUS notes that the WPB network that it proposes would follow the "private commons" model (peer-to-peer, relatively low-power devices that form ad hoc, "mesh" communications between devices in a non-hierarchical network arrangement that does not utilize the network infrastructure of the licensee or spectrum lessee). *Id.* at 13-14 (*quoting* Promotion of Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) at ¶¶ 91-92. *See also* 47 C.F.R. § 1.9080).

[77] *Id.* As an exception to this limit, NetfreeUS could operate more than 50 WAPs if necessary to facilitate compliance with construction milestones that would be conditions of the license. Also, public safety representatives would have a software code that would give them priority access during emergencies.

[78] Nextwave Application at 3-4 (*citing* 47 C.F.R. Part 90, Subpart Z, and Wireless Operations in the 3650-3700 MHz Band, ET Docket No. 04-151, Rules for Wireless Broadband Services in the 3650-3700 MHz Band, WT Docket No. 05-96, *Report and Order and Memorandum Opinion and Order,* 20 FCC Rcd 6502 (2004)) (*recon. granted in part, Memorandum Opinion and Order*, FCC 07-99 (rel. June 7 2007).

[79] *See* Open Range Application at Annex A (lists the 553 rural communities that Open Range will serve through its initial build out), Annex B (lists the Commission-designated BTAs where those communities are located as well as additional rural areas of the United States that Open Range will serve following the initial build out) and Annex C (lists the Commission-designated BEAs where the communities in Annex A are located as well as additional rural areas of the United States that Open Range will serve following the initial build out). Open Range notes that it seeks licensed service areas consistent with the market designations that the Commission ultimately selects for this frequency band. *See* Open Range Application at 1, n.2.

[80] *See* Petitions to Deny filed by AT&T, CTIA; Motorola, Nextwave, T-Mobile, Verizon, and WCA. Rural Carriers and TowerStream also filed Petitions to Deny on March 15 and 16, 2007, respectively. *See also* NextWave Reply to M2Z Consolidated Opposition to Petitions to Deny at 3-8.

harmful interference, and would result in an anticompetitive windfall.[81] These petitioners urge the Commission to conduct a rulemaking proceeding regarding the service rules, as the Commission indicated it would when it allocated the spectrum.[82] In addition, they maintain that Section 309(j) of the Communications Act requires that this spectrum be awarded by competitive bidding.[83] They believe that the Commission should auction this spectrum to ensure that a portion of the value of the spectrum is put to its best and highest use, no party is unjustly enriched, and a portion of the value of the spectrum is recovered for the benefit of the public.[84]

24. M2Z's Responses. On March 29, 2007, M2Z filed an opposition to the petitions to deny, a motion to dismiss alternative proposals submitted in the docket, as well as subsequent *ex parte* responses to replies and oppositions to its own submissions opposing alternative proposals.[85] In its opposition, M2Z urges the Commission to determine the best use of the 2155-2175 MHz band by granting the license it seeks.[86] M2Z argues that nothing in the Communications Act or the Commission's rules or policies prevents the Commission from licensing the band without opening a formal rulemaking.[87] M2Z disputes

[81] *See, e.g.,* Motorola Petition to Deny at 2-3; CTIA Petition to Deny at 3-4, 6; AT&T Petition to Deny at 10-16. *See also* CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 11-12; MetroPCS Reply to M2Z Consolidated Opposition to Petitions to Deny at 9; Verizon Wireless Reply to M2Z Consolidated Opposition to Petitions to Deny at 5-8.

[82] *See, e.g.,* AT&T Petition to Deny at 25-28; CTIA Petition to Deny at 6; Motorola Petition to Deny at 1; Rural Carriers Petition to Deny and Comments at 3-5; T-Mobile Petition to Deny at 2-3; TowerStream Petition to Deny at 3-5; WCA Petition to Deny at 7. *See also* CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 3-8; MetroPCS Reply to M2Z Consolidated Opposition to Petitions to Deny at 3-9; Verizon Wireless Reply to M2Z Consolidated Opposition to Petitions to Deny at 2-5.

[83] *See, e.g.,* AT&T Petition to Deny at 4-9; CTIA Petition to Deny at 4-6; Rural Carriers Petition to Deny and Comments at 5-6; T-Mobile Petition to Deny at 3-5; TowerStream Petition to Deny at 5-6; Verizon Petition to Deny at 2-6. *See also* CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 3-8; MetroPCS Reply to M2Z Consolidated Opposition to Petitions to Deny at 3-9; NextWave Reply to M2Z Consolidated Opposition to Petitions to Deny at 8.

[84] *See, e.g.,* AT&T Petition to Deny at 4-9; CTIA Petition to Deny at 4-5; Rural Carriers Petition to Deny and Comments at 5-7; T-Mobile Petition to Deny at 3-5; TowerStream Petition to Deny at 5-7; WCA Petition to Deny at 3-4.

[85] *See* M2Z Consolidated Opposition to Petitions to Deny; Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals; M2Z Networks, Inc. *Ex Parte* Response to Replies and Oppositions, WT Docket Nos. 07-16 and 07-30 (filed April 16, 2007) (M2Z April 16, 2007 *Ex Parte* Response); Letter from Christopher Tygh, Counsel for M2Z Networks, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-16 and 07-30 (filed April 19, 2007) (M2Z April 19, 2007 *Ex Parte*). M2Z asserts that, under the Act, the Commission must consider its forbearance petition before it can dismiss the Application. *See* M2Z Consolidated Opposition to Petitions to Deny at 27-31 (citing Section 10(a) of the Communications Act, 47 U.S.C. § 160(a)). *See also* M2Z April 3, 2007 Reply at 17-31.

[86] *See* M2Z Opposition at 10-11. *See also id.* At 13-23 (asserting that grant of the application would benefit the public interest, consumers, public safety, and the federal treasury).

[87] See *id.* at 11-13. *See also id.* at 75-87 (stating that the Commission has the authority to grant M2Z a license without a formal rulemaking, and it should not delay deployment of services in the under-utilized band by conducting further proceedings). M2Z also argues that Section 7 of the Act compels the Commission to grant its Application because no party has rebutted its showing that the Application proposes a new service using new technology that would serve the public interest. *See id.* at 23-27 (citing Section 7(b) of the Communications Act, 47 U.S.C. § 157(b)).

that Section 309(j) of the Act requires the Commission to assign licenses through competitive bidding, and instead argues that the Commission must avoid mutual exclusivity when doing so would be in the public interest.[88] M2Z contends that, because the Communications Act prohibits the Commission from considering potential revenues in determining spectrum use decisions, Petitioners' estimates of potential auction revenues for the spectrum band are irrelevant and flawed.[89] M2Z contends that its proposed system will not cause harmful interference to existing 2155-2175 MHz licensees or licensees operating in adjacent bands, and that additional technical study is unnecessary to develop service rules for the band.[90] Furthermore, M2Z maintains that the petitioners have not raised any substantial or material questions regarding the benefits of M2Z's proposal or its legal validity.[91] Reply commenters dispute M2Z's assertions.[92] M2Z also filed two letters, under requests for confidential treatment that M2Z states are relevant to our review of its financial qualifications[93] and described a plan to provide matching funds to non-profit organizations for the purchase and distribution of modems to access M2Z's proposed network.[94]

25. In its Motion to Dismiss Alternative Proposals, M2Z asks the Commission to dismiss six applications filed in this proceeding that offer alternatives to M2Z's proposal for use of the 2155-2175

[88] *See* M2Z Opposition at 31-53. M2Z cites other instances in which the Commission has granted initial spectrum authorizations without the use of competitive bidding. *See id.* at 54-60. *See also* M2Z April 16, 2007 *Ex Parte* Response at 5-14 (asserting that Section 309(j)(6)(E) requires the Commission to grant M2Z's application due to the public interest benefits that would result).

[89] *See* M2Z Opposition at 64-69. M2Z also denies that its proposal seeks to revive the Pioneer's Preference Program, nor does it resemble the Commission's installment payment program. *See id.* at 69-74.

[90] *See id.* at 87-99. *See also* M2Z April 16, 2007 *Ex Parte* Response at 23-27.

[91] *See* M2Z Opposition at 99-114. M2Z asserts that petitioners' arguments against its proposed voluntary spectrum usage fee are meritless, and the Commission's acceptance of the proposal would not violate the Act or other applicable laws or precedent. *See id.* at 103-111. *See also* M2Z April 16, 2007 *Ex Parte* Response at 27-37.

[92] *See, e.g.,* CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny (claiming, *inter alia,* that M2Z's public interest claims are based on flawed assumptions); MetroPCS Reply to M2Z Consolidated Opposition to Petitions to Deny (asserting that public safety would not be aided by M2Z's proposal); NextWave Reply to M2Z Consolidated Opposition to Petitions to Deny (noting anti-competitive nature of M2Z's proposal); Verizon Wireless Reply to M2Z Consolidated Opposition to Petitions to Deny (questioning, *inter alia,* M2Z's financial showing). *See also* Letter from Stephen E. Coran, Counsel to NetfreeUS, LLC, to Marlene H. Dortch, Secretary, FCC, in WT Docket Nos. 07-16 and 07-30 (filed May 9, 2007) (commenting on M2Z April 16, 2007 *Ex Parte* Response and M2Z April 19, 2007 *Ex Parte*) (NetfreeUS May 9, 2007 *Ex Parte*); Reply to Motion to Strike and Motion to Dismiss filed by NextWave, WT Docket No. 07-16 (filed April 27, 2007) (NextWave Reply to Motion to Strike); Reply to Opposition to Petition for Reconsideration filed by MEC, WT Docket No. 07-16 (filed April 23, 2007) (MEC Reply to Opposition to Petition for Reconsideration).

[93] *See* Request for Confidential Treatment filed March 26, 2007 (uploaded to ECFS on May 8, 2007) and Request for Confidential Treatment filed June 4, 2007 (Confidentiality Requests). On June 20, 2007, AT&T filed a Response to the Confidentiality Requests, to which M2Z filed a Motion to Strike on July 16, 2007; AT&T's Opposition to Motion to Strike followed on July 16, 2007. *See also* Freedom of Information Act Request of NetfreeUS (FOIA Control No. 2007-258) and Freedom of Information Act Request of AT&T, Inc. (FOIA Control No. 2007-414).

[94] *See, e.g.,* Letter from Uzoma C. Onyeije, Esq., to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-16 and 07-30 (filed July 19, 2007).

MHz Band.[95] M2Z asserts that the alternative proposals are "mere shadow alternatives" compared to its own proposal,[96] and that the other applicants fail to demonstrate that grant of the M2Z application is inconsistent with the public interest, which M2Z asserts is the applicable burden of proof required under Section 7 of the Act.[97] Because of these alleged defects in each alternative proposal,[98] M2Z contends that the Commission should dismiss them all and decline to accept additional applications for licenses in the 2155-2175 MHz band until it has ruled on M2Z's forbearance petition.[99]

26. In its Consolidated Motion to Strike and Dismiss Petitions to Deny and Alternative Proposals,[100] M2Z contends that, regardless of how the other petitioners and applicants have stylized

[95] M2Z Motion to Dismiss at 2-3. M2Z seeks dismissal of the following applications filed in Docket 07-16: Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band (filed March 2, 2007) ("Open Range Proposal"); Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band License (filed March 2, 2007) ("NextWave Proposal"); Application of Commnet Wireless, LLC for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Radio Service in the 2155-2175 MHz Band (filed March 2, 2007) ("Commnet Proposal"); Application of NetfreeUS, LLC for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band (filed March 2, 2007) ("NetfreeUS Proposal"); Application of McElroy Electronics Corporation for a Nationwide 2155-2175 MHz Band Authorization (filed March 2, 2007)("McElroy Proposal"); and Application of TowerStream Corporation for a Nationwide 2155-2175 MHz Band Authorization (filed March 2, 2007) ("TowerStream Proposal").

[96] *See* M2Z Motion to Dismiss at 5-18. M2Z asserts that the parties submitting the other applications would not provide free nationwide broadband service, adhere to specific build-out obligations, enhance universal service, offer a "family-friendly" service, make comparable commitments to serving public safety entities, offer comparable spectrum usage fees, promote new entry, or produce comparable consumer welfare benefits. *Id.* at 18-39. M2Z also argues that the alternative proposals are not spectrally efficient, nor do they purport to meet interference protection and other standards applicable under Part 27 of the Commission's rules. *Id.* at 39-45. M2Z also claims that the alternative proposals do not contain meaningful showings of the applicants' financial qualifications, nor have they specified the regulatory status of their respective proposals. *Id.* at 45-52.

[97] *See id.* at 18 (citing 47 U.S.C. § 157).

[98] M2Z argues that the Open Range Proposal lacks technical information and fails to support its waiver request. *Id.* at 52-57. M2Z describes NextWave's Proposal as "unnecessary and redundant" to its spectrum holdings in the 3.65 GHz band. *Id.* at 58-61. M2Z claims Commnet has not provided sufficient evidence of its financial qualifications. *Id.* at 61-64. M2Z suggests that NetfreeUS presents an unstable business model, and has an affiliate which is an LMDS licensee but has failed to meet build-out requirements, a performance history which may be repeated in this band. *Id.* at 64-70. M2Z asserts that the McElroy and TowerStream Proposals are "copy-cat" applications which fail to demonstrate the same level of service or public interest commitments proposed by M2Z. *Id.* at 70-72.

[99] *Id. at* 75-78. M2Z also claims that we should dismiss the NextWave, Open Range, and Tower Stream, applications because these applicants made filings in the Commission's proceeding governing the 3650-3700 MHz band, *see supra* note 78, supporting the nationwide, nonexclusive licensing rules that we recently affirmed. According to M2Z, this action provides these companies with the regulatory certainty needed to move forward with plans for the 3650-3700 MHz band. *See* Letter from Erin L. Dozier, Esq., to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-16 and 07-30 (filed June 11, 2007).

[100] Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals, In the Matter of M2Z Networks, Inc.. Application for License and Authority to Provide National Broadband Radio Service In the 2155-2175 MHz Band and Petition for Forbearance Under 47 U.S.C § 160(c) Concerning Application of Sections 1.945(b) and (c) of the Commission's Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-16, WT Docket No. 07-30, filed Mar. 26, 2007 (M2Z's *Consolidated Motion to Strike and Dismiss*).

their respective filings, these pleadings and proposals are technically petitions to deny[101] because they attack the merits and request denial of M2Z's application and forbearance petition. As such, M2Z contends all of these pleadings and proposals are subject to and fail to meet the minimum requirements for petitions to deny under Section 309(d) of the Act.[102] M2Z argues that these pleadings and proposals fail to present a substantial and material question of fact and do not specifically allege facts sufficient to show the granting of M2Z's application would be inconsistent with the public interest.[103]

27. M2Z also argues that the parties opposing its application failed to follow the procedural steps necessary for the proper filing of petitions to deny set forth in 47 U.S.C. § 309(d)(1) and Section 1.939(d) of the Commission Rules.[104] Specifically, M2Z argues that that the Commission should dismiss all opposing petitions because M2Z did not receive proper service.[105] M2Z also suggests the opposing petitions should be dismissed for lack of standing.[106] CTIA asserts that M2Z's allegations of procedural defects in opposing pleadings are overstated, and the opposing pleadings do not warrant dismissal.[107] NetfreeUS, Nextwave, and MEC filed responses challenging on procedural and substantive grounds M2Z's Motion to Strike and M2Z's other submissions challenging the opposing petitions.[108]

B. Discussion

28. As an initial matter, we are not persuaded that assignment of this spectrum without first conducting a rule making proceeding to consider service and licensing rules would serve the public interest. Although the Commission has wide latitude to choose whether it will proceed by adjudication (*e.g.*, waiver proceedings) or by rulemaking,[109] it is nevertheless the case that guidance from the courts indicates that issues of general applicability are more suited to rulemaking than to adjudication.[110] In this

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[101] *M2Z's Consolidated Motion to Strike and Dismiss* at 6.

[102] *Id.* at 8. *See* 47 U.S.C. § 309(d)(1).

[103] Consolidated Motion at 8. *See also* M2Z April 16, 2007 *Ex Parte* Response at 27-37.

[104] Consolidated Motion at 9. For instance, Section 309(d)(1) mandates a petitioner serve a copy of its petition on the party it opposes, and M2Z asserts that the parties currently opposing its application, except for NetfreeUS and Nextwave, failed to meet this rule. *See* Erratum to Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals, filed by M2Z on March 28, 2007.

[105] *Id.* at 13.

[106] *Id.* at 15. According to M2Z, only AT&T and NextWave submitted the requisite affidavits with their petitions. *Id.* at 16.

[107] *See* CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 20-23.

[108] *See* NetfreeUS May 9, 2007 *Ex Parte*; NextWave Reply to Motion to Strike; MEC Reply to Opposition to Petition for Reconsideration.

[109] *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."). *See also Telocator Network of America v. FCC*, 691 F.2d 525, 551 (D.C. Cir. 1982) ("It is well-settled that the Commission may elect to utilize its rulemaking power in lieu of adjudication when the pertinent issues involve legislative rather than adjudicative facts, and have prospective effect and classwide applicability.")

[110] *See National Small Shipment Traffic Conf. v. I.C.C.*, 725 F.2d 1442, 1447-48 (D.C. Cir. 1984) ("Trial-like procedures are particularly appropriate for retrospective determination of specific facts ... [while] [n]otice-and-(continued....)

case, we find that public interest is best served by full consideration of the service rules and licensing mechanisms that would best promote the efficient and effective use of this spectrum for the benefit of the public, rather than attempting to act upon these applications in an *ad hoc* adjudicatory proceeding.[111] We therefore plan to issue a Notice of Proposed Rule Making to seek comment on service rules for the AWS-3 band.

29. Prior to accepting applications and granting licenses for Wireless Radio Services,[112] the Commission typically establishes service rules addressing technical, operational, regulatory, and licensing issues. These issues include whether spectrum should be licensed on an exclusive basis and the processes by which such licenses should be assigned. They also include spectrum block size and geographic area coverage; technical issues such as emission and power limits, protection of incumbents, and interference standards; and other regulatory issues such as permitted uses, license term, renewal criteria, performance requirements, and, assignment and transfer (including disaggregation and partitioning).[113] It does not serve the public interest to silence debate on these issues by considering only those proposals presented in license applications filed pursuant to our general statutory authority. Rather, giving all interested parties the opportunity to comment on these types of important issues in a rulemaking proceeding – rather than an *ad hoc* adjudicatory proceeding as proposed by M2Z – is the most effective, fairest and efficient way to arrive at a result that will best serve the public interest.[114] Moreover, as detailed above,[115] we find that other flaws in the M2Z and NetfreeUS proposals render their proposals contrary to the public interest, and accordingly denied their petitions for forbearance.

(Continued from previous page)
comment procedures ... are especially suited to determining legislative facts and policy of general, prospective applicability.").

[111] *See* 47 C.F.R. § 1.2102(a) ("mutually exclusive initial applications are subject to competitive bidding), (b), (c) (applications for public safety radio services, initial applications for certain DTV licenses, and noncommercial educational, certain public broadcast stations, and applications in certain services or classes of service are not subject to competitive bidding).

[112] *See, e.g.,* 47 U.S.C. §§ 1. 907, 1.911, 1.913.

[113] Parties who filed Petitions to Deny argue that M2Z's application fails to adequately address these licensing elements which should be addressed through the rulemaking process. *See, e.g.,* AT&T Petition to Deny at 10-14, 27-28; CTIA Petition to Deny at 6; Motorola Petition to Deny at 1; Rural Carriers Petition to Deny and Comments at 3-5; T-Mobile Petition to Deny at 2-3, 6-7; Verizon Petition to Deny at 16, 19; WCA Petition to Deny at 4, 10. *See also* Information Technology Industry Council (ITTI) Letter at 2 (filed March 16, 2007); Commnet Application Exhibit. 7.

[114] *See* AT&T Forbearance Comments at 4.

[115] *See, e.g., supra* paras. 11, 14, 15.

30. Although we find the other applications are acceptable for filing,[116] we conclude that processing the applications before us without considering and adopting service and licensing rules would be inconsistent with the principles cited above and therefore contrary to the public interest. Accordingly, we are dismissing each application, including M2Z's application, in view of our plan to issue a Notice of Proposed Rule Making to consider service rules, including how best to assign licenses for this band.[117] Similarly, because we are dismissing all applications for the 2155-2175 MHz band, all related petitions to deny are now moot. To the extent that parties believe that any of the proposals or conditions set forth in the applications should be considered as service rules for this band, however, they may propose such rules in response to the Notice of Proposed Rule Making.

31. Further, while we are not convinced by M2Z's argument in its Opposition and Motion to Strike and Dismiss that the alternative proposals are veiled petitions to deny, we need not decide that issue here. Because we are dismissing all applications for the 2155-2175 MHz band and, as a result, are dismissing all petitions to deny as moot, we need not address the merits of M2Z's claims. As to the failure of process argument, however, we note that M2Z had actual notice of the other applications as evidenced by its response to these applications in its filings and therefore we see no evidence that M2Z was harmed by the alleged failure to receive proper service.

IV. CONCLUSION

32. Therefore, we deny M2Z's and NetfreeUS's petitions for forbearance because we find it is not in the public interest to grant them for the reasons outlined above. Further, because we plan to issue a Notice of Proposed Rule Making to seek comment on service rules for the AWS-3 band, we dismiss all applications to provide service in the 2155-2175 MHz band, without prejudice, and dismiss as moot all related petitions to deny and subsequent motions filed in WT Dockets 07-16 and 07-30.

V. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that the Petition for Forbearance Under 47 U.S.C. § 160, filed by M2Z Networks, Inc., on September 1, 2006, is DENIED.

34. IT IS FURTHER ORDERED that the Petition for Forbearance Under 47 U.S.C. § 160 filed by NetfreeUS, LLC, on March 2, 2007, is DENIED.

35. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by McElroy Electronics Corp., on March 30, 2007, is DISMISSED AS MOOT.

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[116] In addition to filing their applications electronically on ECFS, as described in the *M2Z Application Public Notice*, several applicants also submitted original hard copies with fee remittances that were returned by the Commission's Financial Operations office in Gettysburg, Pennsylvania, for reasons such as an invalid radio service code or a failure to file electronically. *See, e.g.*, Petition for Reconsideration filed by McElroy Electronics, Corp. on March 30, 2007. Ordinarily, application packages that are immediately returned by the Financial Operations office are not considered to be pending. However, the applications filed in WT Docket No. 07-16 were not filed pursuant to any particular service rules and the Bureau specifically instructed interested parties to file their applications electronically using ECFS. Accordingly, given these unique circumstances, the filing date and status of each application filed in WT Docket no. 07-16 is governed by the date of electronic filing on ECFS, except for the M2Z application, which pre-dated Bureau's instructions. We emphasize, however, that this is an exceptional case—ordinarily, license applications are not filed on ECFS and applications returned by the Financial Operations office are not considered to be pending.

[117] *See Bachow Communications v. FCC*, 257 F.3d 683 (D.C. Cir. 2001).

36. IT IS FURTHER ORDERED that the applications for license and authority to operate in the 2155-2175 MHz band filed by M2Z Networks, Inc., on May 5, 2006, and by Commnet Wireless, LLC, McElroy Electronics Corp.; NetfreeUS, LLC; NextWave Broadband, Inc.; and Open Range Communications, Inc., each on March 2, 2007, and by TowerStream Corporation on March 15, 2007, ARE DISMISSED without prejudice.

37. IT IS FURTHER ORDERED that the Petitions to Deny filed by AT&T, CTIA, Motorola, Nextwave, T-Mobile, Verizon, and WCA, on March 2, 2007, and the Petitions to Deny filed by Rural Carriers and TowerStream on March 15, and March 16, 2007, respectively, as well as subsequent motions filed in WT Dockets 07-16 and 07-30, are DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF CHAIRMAN KEVIN J. MARTIN

Re: Applications for License and Authority to Operate in the 2155-2175 MHz Band, WT Docket No. 07-16; Petitions for Forbearance Under 47 U.S.C. § 160; WT Docket No. 07-30

Promoting broadband deployment and increasing penetration has been, and continues to be, one of my highest priorities. This spectrum has the potential to encourage the provision of a variety of broadband services and by a variety of different competitors in support of this goal. As several commenters have urged in recent days, the public interest is best served by considering fully the best use of this spectrum in a Notice of Proposed Rulemaking, rather than through forbearance petitions seeking exclusive use for a single entity filed by M2Z and NetfreeUS. The Commission received multiple proposals for innovative use of this spectrum apart from those proposed by M2Z and NetfreeUS, and they deserve due consideration as well. For example, many have suggested that we should auction this spectrum, while still others suggest that due to the high demand for this spectrum we should consider unlicensed use of the band. Each of these proposals has merit, and consideration of either would be inappropriately foreclosed by granting forbearance in this instance. We plan to issue this Notice of Proposed Rulemaking shortly to address these issues and adopt flexible rules that will encourage the innovative use of this unique piece of spectrum.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Applications for License and Authority to Operate in the 2155-2175 MHz Band; Petitions for Forbearance Under 47 U.S.C. § 160, Order

I support today's *Order* denying the application and petition for forbearance seeking a direct grant of the AWS-3 spectrum. I believe that the proper way to allocate this spectrum—in the manner that best serves the public interest—is to conduct a general rulemaking, which the Commission will initiate shortly. Such a rulemaking should consider the following options: (1) opening this band to unlicensed use, as has proved so productive in other bands; (2) designating it for an open access model that would combine wholesale broadband access and a *Carterfone* mandate; (3) using it to provide free, advertiser-supported broadband service (as initially proposed by M2Z and one other applicant) as well as a fee-based premium broadband service; or (4) allocating it through a traditional, largely unconditioned auction.

Conducting this inquiry in the context of a general rulemaking will provide the broadest opportunity for interested parties from industry and the public interest community—as well as members of the public—to weigh in on these important choices. I look forward to working with my colleagues to make sure that we can complete this rulemaking in an expeditious fashion.

I am also mindful of the issues raised in this proceeding by Section 7 of the Communications Act, which requires the Commission to act within one year on petitions for a new service or technology. While I have serious doubts that a direct grant of a license for a valuable portion of the people's airwaves is what Congress meant by the phrase "new technology or service," I certainly agree that the Commission must act quickly on all matters brought before it—that is why I have consistently encouraged the Commission to put innovative proposals out for comment. Indeed, I am a firm believer that the public interest requires regulators to allow companies to bring new and valuable products to market as soon as possible. While today's decision—rendered one year after the Section 7 claim was first raised in this proceeding—complies with the plain language of the statute, I believe it has been clear for some time that opening a general rulemaking is the right procedural path to allocating this spectrum band. Nevertheless, even if the decision we announce today comes considerably later than I would have preferred, I fully support this item as well as the NPRM we will release shortly.

CONCURRING STATEMENT OF COMMISSIONER JONATHAN ADELSTEIN

Re: Applications for License and Authority to Operate in the 2155-2175 MHz Band; Petitions for Forbearance Under 47 U.S.C. § 160, WT Docket Nos. 07-16, 07-30.

There has continued to be keen interest over the past years in the 2155-2175 MHz band which holds great promise for operators to introduce new offerings of innovative wireless broadband services to American consumers. This spectrum has inexcusably remained fallow since the Commission first determined that it was ideally suited for fixed and mobile services, including advanced wireless systems. It continues to be critical that we make vibrant, spectrum-based communications opportunities available to more consumers and companies. We need to promote opportunities to expand wireless connectivity, and move faster to ensure available and desired spectrum is put to its highest valued use.

So I'm disappointed that despite the aggressive interest in and availability of this spectrum, the Commission is only now expressing its intent to seek comment on service rules for this band. I am also concerned that we have not considered more seriously M2Z's proposal as offering a new technology or service under Section 7 of the Communications Act. The directive under Section 7 is clear. That is – the Commission should be encouraging the development of new technologies and services for the benefit of consumers. Our job at the FCC is to do whatever we can to promote spectrum-based opportunities and I am not convinced that we have done so adequately here. We must continually evaluate whether our actions, or lack of action, undercut the ability of wireless innovators to get access to new or unused spectrum.

And while I am pleased that this Commission has indicated that it will finally move forward with plans to put into place a mechanism for allocating the spectrum and requirements for offering service in the 2155-2175 band, I urge my colleagues not to wait for months until we issue an order allowing for the innovative use of this spectrum. The Commission has already accumulated a substantial record in this proceeding on the best uses of this spectrum. It is high time for the Commission to seek comment on these issues and it is regrettable that we have not already done so. I encourage the Commission to move expeditiously to issue a Notice on the services rules in the band. We simply cannot afford to waste any more time. For all of these reasons, I must concur in this item.