Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of M2Z Networks, Inc. for	)	
Forbearance Under 47 U.S.C. § 160(c)	)	WT Docket No. _______
Concerning Application of Sections 1.945(b)	)	
And (c) of the Commission's Rules and	)	
Other Regulatory and Statutory Provisions	)	
	)	

To: The Commission

PETITION OF M2Z NETWORKS, INC. FOR FORBEARANCE

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EXECUTIVE SUMMARY

This Petition presents a rare opportunity for this Commission to bring a new, free, and nationwide broadband communications service to the American people. In the 20th century, the Commission played an instrumental role in bringing free over-the-air broadcast services to the nation. These services have served the public well and have become a staple of American life by providing affordable access to useful information relevant to the health and safety of Americans. Today, in the Internet era, there currently is no service that delivers nationwide broadband service free of recurring charges. Four months ago, M2Z submitted a license application to the Commission proposing to do just that. This Petition provides the Commission with the means to accept and grant M2Z's Application without further delay. In so doing, the Commission will shape the communications landscape of the 21st century by allowing M2Z to bring free broadband Internet access service to the American people.

M2Z's Application provides an ideal case for the Commission to exercise its forbearance authority under Section 10 of the Act, in furtherance of Section 1 and Section 7's goals of bringing new competitive and affordable services and technologies to the public on an expedited basis. Consistent with these policies and Congressionally-imposed deadlines, this Petition provides the Commission with the mechanism to remove any statutory or regulatory stumbling block that may prevent the acceptance and grant of M2Z's Application. To that end, M2Z is herein petitioning the Commission to forbear, to the extent applicable, from Sections 1.945(b) and (c) of its rules, and from any other administrative rule, statutory provision, or Commission policy which may otherwise impair, impede, or prevent the acceptance and grant of M2Z's Application. M2Z easily satisfies the standard for forbearance from these provisions.

First, enforcement of Sections 1.945(b) and (c), associated statutory requirements, and other more general administrative rules and policies, is unnecessary for the protection of

consumers or to ensure that M2Z's charges, practices, classifications, and regulations are just, reasonable and non-discriminatory. Not only will M2Z's basic service be provided free of charge, but forbearance in this case will speed competitive entry and thereby help to check the market power of the dominant incumbent broadband providers.

Second, forbearance as requested herein will serve the public interest by facilitating swift action, consistent with Section 7 of the Act, on M2Z's underlying Application to provide National Broadband Radio Service. Grant of M2Z's Application, in turn, will help to promote facilities-based competition in the provision of broadband commercial mobile radio service, increase broadband penetration, and make more efficient use of a national spectrum resource currently lying fallow.

Finally, as applied to M2Z's Application, the rules in question serve none of the ordinary purposes they were designed to address, because M2Z's Application is complete in form and in substance. Therefore, to the extent that grant of this Petition would result in forbearance from rules that conflict with or are otherwise inconsistent with the terms, conditions, and standards of service set forth in the Application, they are unnecessary. Moreover, to the extent the Act and the rules in question require the Commission to engage in a substantive public interest review of M2Z's Application, this Petition provides the means for conducting that review on an expedited basis. Indeed, in filing this Petition, M2Z seeks first and foremost a prompt, robust, and transparent debate on its proposal conducted by the Commission. The Commission should take this opportunity, therefore, to act on this Petition.

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PETITION OF M2Z NETWORKS, INC. FOR FORBEARANCE

Pursuant to Section 10(c) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 160(c), and Section 1.53 of the rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.53, M2Z Networks, Inc. ("M2Z") respectfully files this petition ("Petition") to request that the Commission forbear from applying Sections 1.945(b) and (c) of its rules, and any other rule, provision of the Act, or Commission policy, to M2Z's Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (the "Application"),[1] to the extent such rules, statutory provisions, or policies impede the acceptance and grant of the Application.[2]

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[1] *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) ("*Application*").

[2] In the interest of establishing a more complete record in this matter, concurrently with the filing of this Petition, M2Z is amending its Application under separate cover to incorporate this Petition by reference pursuant to Section 1.927 of the Commission's rules. *See* 47 C.F.R. § 1.927. Moreover, because the Application contains supporting background information which is germane to the Commission's review of this Petition, the Application is incorporated by reference herein. To be clear, however, this Petition is filed as a separate pleading in relation to the Application, and accordingly is identified and captioned as a petition requesting that the Commission exercise its forbearance authority under Section 10 of the Act, 47 U.S.C. § 160. *See* 47 C.F.R. § 1.53.

On May 5, 2006, M2Z submitted a license application to construct and operate a nationwide broadband wireless network.[3] As explained in the Application, M2Z proposes to make available free, broadband Internet access to nearly every consumer, business, non-profit and public safety entity in the United States.[4] To make this service possible, M2Z requests an exclusive, nationwide authorization to operate in 20 MHz of largely unoccupied, unpaired spectrum in the 2155-2175 MHz band, with a 15-year license term.[5] In return, M2Z will assume specific and enforceable public interest obligations, including, among others: (1) rapid deployment of free wireless broadband service to the American people in accordance with strict construction benchmarks; (2) mandatory filtering of obscene and indecent material; (3) providing a free interoperable wireless broadband platform for public safety organizations; and (4) a voluntary five percent revenue-based spectrum usage fee paid to the U.S. Treasury each year.[6]

In this Petition, M2Z requests forbearance from specific regulations and any other statutory and regulatory requirements, the enforcement of which would disserve the public interest by delaying the acceptance and grant of M2Z's Application. In filing this Petition, M2Z seeks first and foremost a substantive decision from the Commission granting forbearance from these regulatory and statutory provisions. Such positive action by the Commission will satisfy the Commission's obligations under Section 10 of the Act and also will be consistent with the goals of Sections 1 and 7 of the Act to rapidly bring affordable new services and technologies to the public.

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[3] *See Application.* M2Z is authorized as a telecommunications services provider under Section 214 of the Act. *See* File No. ITC-214-20060711-00338 (granted Aug. 18, 2006). Furthermore, M2Z seeks to provide a new class of Commercial Mobile Radio Service ("CMRS").

[4] *See Application* at 22-32.

[5] *See id.* at 15-19.

[6] *See id.* at 22-26.

I. GRANT OF THIS PETITION SATISFIES THE COMMISSION'S STATUTORY OBLIGATION TO PROMOTE COMPETITION AND THE PROVISION OF NEW SERVICE OFFERINGS.

A. Grant of this Petition Is Consistent with the Commission's Most Fundamental Statutory Responsibility.

Congress created the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[7] The Commission can look to its past to find numerous successes in fulfilling this mission, perhaps the greatest of which is its central role in the development of free over-the-air broadcast television and radio. These two widely available services, which have informed the public for decades, continue to this day to provide new and important benefits, such as the Emergency Alert System, to the public. The Commission's challenge is to build upon this tradition of establishing universal service by achieving another milestone—nationwide availability of broadband Internet access. M2Z has proposed a solution that allows the Commission to meet this challenge.

Well over half of all U.S. adults do not enjoy the benefits of broadband at home—they either use dial-up access or have no Internet access at all.[8] The principal barriers to widespread broadband use are the retail cost of service and the fact that broadband infrastructure is not universally deployed.[9] Accordingly, the Commission has identified greater broadband access as

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[7] 47 U.S.C. § 151.

[8] There are 42.9 million residential broadband lines in the U.S. *See* FCC, *High-Speed Services for Internet Access: Status as of December 31, 2005*. According to the Census Bureau, there were 113 million households in the United States in 2005. *See* U.S. Census Bureau, "Households by Type, 1940 to the Present," May 25, 2006 (available at http://www.census.gov/population/socdemo/hh-fam/hh1.pdf). The percentage of households with broadband access is therefore approximately 38%.

[9] Federal Communications Commission, Strategic Plan 2006-2011 at 6 (2006) ("*FCC 2006 Strategic Plan*").

a strategic goal, stating that "[a]ll Americans should have affordable access to robust and reliable broadband products and services."[10]

In its Application, M2Z proposed to construct a nationwide broadband wireless network that will reach 95% of U.S. households just ten years after M2Z is awarded a license. Operating at a speed of 384 kilobits per second, the service will be nearly twice as fast as that which the Commission recognizes as "high-speed" service[11] today and six times faster than "dial-up" internet access.[12] Like free over-the-air broadcasting, M2Z's proposed free consumer service will be portable and always available; its users will incur no recurring costs for use of the service and need only purchase a compatible receiver. Just as television and radio viewers and listeners enjoy a wide range of options provided by a healthy, highly competitive retail market for broadcast receivers, M2Z's National Broadband Radio Service ("NBRS") receiving devices will not be M2Z proprietary equipment, but will be available at retail. While NBRS brings certain benefits of free over-the-air broadcasting to the world of two-way communications, it also improves upon broadcast offerings in several ways. For example, parents who seek to protect their children from inappropriate content would not have to purchase special software or engage a complex set of controls—M2Z's proposed NBRS would automatically filter such content.[13]

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[10] *See id.* at 5.

[11] *See* FCC, *High-Speed Services for Internet Access: Status as of December 31, 2005* at 2 (defining high-speed as 200 kbps in either direction).

[12] *Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd at 2398 ¶ 20 (1999) (the speed of dial-up access to the Internet is 56 kbps).

[13] Today, parents are so concerned about Internet content that, without appropriate filtering, parents are reluctant to accept even low-cost computers available through school programs. *See* Jessica Vascellaro, *Saying No to School Laptops: Programs to Give All Students Computers Come Under Fire Over Costs, Inappropriate Use by Kids*, WALL STREET JOURNAL, Aug. 31, 2006, at D1 (parents of students enrolled in a Henrico County, Virginia laptop program are calling for delays until the computers can be equipped with adequate content filtering; some parents in other programs have pulled their children out even where the computers cost as little as $78).

Further, all public safety entities would be granted free access to the network for an unlimited number of connecting devices.

A broad range of economic benefits will flow from this new offering: reduced universal service spending, reduced spending on network services by public safety entities, more competitive markets for broadband services, and, as millions more broadband users come online, billions of dollars in improvements to the U.S. economy. In addition to all of the economic benefits that will result from the initiation of this new service, M2Z also has proposed that the Commission condition grant of its license on M2Z's payment of five percent of the annual gross revenues derived from the provision of a premium service that will be offered as an option for those who want even faster speeds than free NBRS.

There is virtually unanimous agreement that universal broadband is critical to our nation's ability to educate, inform, communicate, and compete in the global marketplace. No other strategic goal is more central to the Commission's core purpose found in Section 1 of the Act. The Commission should, therefore, use the full range of tools available to establish universally available broadband service at reasonable rates. The instant Petition proposes another such tool Congress has provided to the Commission.

B. Forbearance and Grant of the Application Are Consistent with Current Congressional, White House, and Commission Policy.

1. Forbearance and grant of the Application heed the resounding call for nationwide broadband service and a competitive broadband market.

Increasing the availability and adoption of broadband Internet access is among the top priorities of members of Congress on both sides of the political aisle. As discussed in the Application, more than a dozen bills introduced during the 109th Congress are aimed at expanding broadband deployment, spurring facilities investment, or strengthening public safety

communications.[14] Many of these bills are aimed at establishing regulatory relief to encourage new entry into various communications sectors.

President Bush established the "spread of broadband technology" as the centerpiece of his national technology policy when he stated that Americans should have "universal, affordable access for broadband technology by the year 2007."[15] The President envisions a day when broadband is not only universal, but is available from multiple providers, stating that his goal is to ensure that "consumers have plenty of choices when it comes to [their] broadband carrier."[16] The President's longstanding view of the government's role in advancing technological developments is to "create an environment in which the entrepreneur can flourish, in which minds can expand, in which technologies can reach new frontiers."[17] Promoting broadband

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[14] *See Application* at 9-10 (citing American Broadband for Communities Act, H.R. 5085, 109th Cong. 2nd Sess. (2006); Right TRACK Act, S.2357, 109th Cong. 2nd Sess. (2006) (requiring, *inter alia*, establishment of a national broadband policy); American Broadband for Communities Act, S.2332, 109th Cong. 2nd Sess. (2006); Internet and Universal Service Act of 2006, S.2256, 109th Cong. 2nd Sess. (2006); Re-Channelization of Public Safety Spectrum Act, H.R. 4626, 109th Cong. 1st Sess. (2005) (proposing to require an FCC rulemaking to re-channelize the 700 MHz public safety spectrum to accommodate commercial broadband technologies); Universal Service for the 21st Century Act S.1583, 109th Cong. 1st Sess. (2005); Broadband Investment and Consumer Choice Act, S.1504, 109th Cong. 1st Sess. (2005); Community Broadband Act of 2005, S.1294 109th Cong. 1st Sess. (2005); S.1147, 109th Cong. 1st Sess. (2005) (proposing amendments to the Internal Revenue Code to allow deduction of certain broadband expenses); Rural Access to Broadband Service Act, H.R. 1479, 109th Cong. 1st Sess. (2005) (similar to S.497); Broadband Rural Revitalization Act of 2005, S.497 109th Cong. 1st Sess. (2005) (similar to H.R. 1479); H.R. 146, 109th Cong. 1st Sess. (2005) (proposing to amend the Public Works and Economic Development Act of 1965 to provide for grants to advance high-speed telecommunications in areas with under 1 million in population, introduced January 4, 2005); Rural America Digital Accessibility Act, H.R. 144, 109th Cong. 1st Sess. (2005)). See also, Communications Opportunity Promotion and Enhancement Act of 2006, H.R. 5252, 109th Cong. 2nd Sess. (2006); Communications, Consumer's Choice, and Broadband Deployment Act of 2006, S.2686, 109th Cong. 2nd Sess. (2006).

[15] *See* President George W. Bush, "A New Generation of American Innovation," April 2004, available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html.

[16] *Id.*

[17] *See* President George W. Bush, "Technology Agenda," November 2002, available at: www.whitehouse.gov/infocus/technology/tech1.html. In keeping with this view, the President has taken steps to remove barriers to broadband deployment, including his creation of a Federal Rights-of-Way Working Group. Recognizing the difficulties faced by broadband providers in deploying service because of federal rights of way, the President signed an executive order to streamline the process of securing

deployment through grant of the Application would help effectuate the President's technology policy goals, and grant of the regulatory forbearance requested herein is consistent with the means the President has chosen to achieve those goals.

Recognizing that retail prices affect broadband deployment, the Commission has established a strategic goal to ensure that every American has "affordable access to robust and reliable broadband products and services."[18] The Commission has identified several specific steps necessary to achieve this goal.[19] Among other things, the Commission has stated that it will "encourage and facilitate an environment that stimulates investment and innovation in broadband technologies and services."[20] Individual actions, statements and speeches by the Chairman and each Commissioner demonstrate a commitment to this strategic goal and the intended means to achieve it. Chairman Martin recently stated that "[t]he continued deployment of broadband at affordable prices for consumers remains my top priority as Chairman."[21] The Chairman also has emphasized the importance of wireless offerings to the rapid deployment of broadband service, and has stated that grant of regulatory relief to new investors in this sector

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access to federal lands. *Improving Rights-of-Way Management Across Federal Lands to Spur Greater Broadband Deployment*, Memorandum from President George W. Bush to Heads of Executive Departments and Agencies (dated Apr. 26, 2004). *See also* Remarks of President George W. Bush Before the U.S. Department of Commerce, June 24, 2004, available at: http://www.whitehouse.gov/news/releases/2004/06/20040624-7.html ("[B]roadband providers have trouble getting across federal lands…that's why I signed an order to reduce the regulatory red tape for laying fiberoptic cables and putting up transmission towers on federal lands.")

[18] *See FCC 2006 Strategic Plan* at 5.

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

[20] *Id.* at 5-6.

[21] *Statement of FCC Chairman Kevin Martin on Verizon And BellSouth Eliminating Recently Imposed DSL Fees* (rel. Aug. 30, 2006).

would spur further deployment.[22] Elsewhere, the Chairman and Commissioner Tate have acknowledged that forbearance is among the available means by which the Commission can "establish a policy environment that facilitates and encourages broadband investment, allowing market forces to deliver the benefits of broadband to consumers."[23] Having long advocated competitive entry into the broadband marketplace, Commissioner Copps has indicated that wireless technology holds promise as a potential entrant.[24] Likewise, Commissioner McDowell has lauded not only the benefits of broadband, but the public interest benefits of new competition in the broadband marketplace.[25] Having concluded that "the public interest means securing access to communications for everyone," Commissioner Adelstein "look[s] for opportunities for new entrants . . . who are seeking to compete in spectrum-based services."[26]

Congress, the President, and the Commission are all taking steps to promote universal broadband Internet access and competitive entry into the broadband marketplace using policy initiatives, legislative changes, and revised rules. Grant of this Petition is consistent with these goals. The use of forbearance as a tool to facilitate M2Z's entry into the market reflects the

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[22] *See Martin Tells Reporters He Sees Progress on Broadband, Video, '911'*, TR DAILY (Mar. 17, 2006).

[23] *See Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services,* Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Docket 04-440 (rel. Mar. 20, 2006).

[24] *See Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Power Line Systems, Carrier Current Systems, Including Broadband over Power Line Systems*, Statement of Commissioner Michael J. Copps, FCC 06-113 (rel. Aug. 7, 2006) ("Along with *wireless technologies*, Broadband over Power Line is a credible candidate for a 'third pipe' that could bring meaningful competition to this market" (emphasis added)).

[25] *See Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Power Line Systems, Carrier Current Systems, Including Broadband over Power Line Systems*, Statement of Commissioner Robert M. McDowell, FCC 06-113 (rel. Aug. 7, 2006) (expressing optimism about broadband over power lines because new entry into broadband market would "help drive down consumer prices and foster innovative technologies").

[26] Remarks of Commissioner Jonathan S. Adelstein, "Accessing the Public Interest: Keeping America Well-Connected," 21st Annual Institute on Telecommunications Policy & Regulation, Washington, DC, December 4, 2003, at 1, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241881A1.doc.

principles of new and existing policy initiatives as it will speed innovation and competition in the broadband marketplace.

2. Forbearance and grant of the Application are consistent with Commission policies that favor technological neutrality.

Grant of the Petition also will promote technological neutrality and innovation. The Commission has stated that in order to ensure adequate incentives for providers to develop and deploy broadband products and services, regulatory policies adopted in this area must promote technological neutrality and innovation.[27] In adopting service rules and a band plan for the AWS1 band,[28] the Commission stated that although it was not including unpaired spectrum in its AWS1 band plan, it was committed to the development of new and innovative technologies such as time division duplexing ("TDD"). The Commission further stated that it would "make every effort to provide spectrum opportunities for TDD systems in future allocation and spectrum proceedings," including proceedings allocating spectrum for AWS.[29] Soon after that, the Commission adopted an order establishing a band plan for the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz, and 2175-2180 MHz bands (often referred to as "AWS2" spectrum), which also are paired and therefore inappropriate for TDD use.[30] The only other spectrum designated for AWS use at this time is the 2155-2175 MHz band.

By forbearing from Sections 1.945 (b) and (c), the Commission will open the door to a new entrant capable of deploying a nationwide broadband network using TDD technology in a

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[27] *FCC 2006 Strategic Plan* at 3.

[28] The spectrum at 1710-1755 MHz and 2110-2155 MHz, which was the first spectrum designated for advanced wireless services or "AWS," is sometimes referred to as "AWS1" spectrum.

[29] *Service Rules for the Advanced Wireless Services in the 1.7 and 2.1 GHz Bands,* 18 FCC Rcd 25162, ¶ 46 (2003).

[30] *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*, 19 FCC Rcd 20720, ¶ 3 (2004).

manner that complies with the same service rules that apply to other AWS operations. On the other hand, if the Commission applies all of the administrative steps under these sections, it will likely lead to a long, overly drawn-out regulatory process where potential competitors would seek to deny consumers the benefit of the proposed service by arguing for delay in the assignment of the spectrum or for assignment processes that favor incumbent businesses and technologies.[31] M2Z has identified a technologically innovative and spectrally efficient means of providing service to the public without interfering with co-channel and adjacent channel licensees. It has invested substantial resources in identifying an innovative use for the spectrum. Forbearance will permit the Commission to *immediately* unlock the value of the 2155-2175 MHz band and allow consumers to reap the rewards of M2Z's innovative methodologies. Rather than allowing this spectrum to continue to be underutilized,[32] or to engage in processes that present a risk of the spectrum being warehoused by carriers that have not yet developed plans that are

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[31] It is not inconceivable that incumbents might apply for a license for the sole purpose of preventing the entry of a new broadband competitor, even if they have no business or technical plan that can be executed using unpaired spectrum. *See, e.g.*, Tiernan Ray, *Comcast Sending Strong Buy-Cell Signals*, BARRON'S, Aug. 29, 2006 (observing that Comcast is not likely to construct a wireless network quickly enough to compete with its own network).

[32] In many markets, portions of the band are completely unoccupied, and have been for several years. Consideration of a more efficient use of this spectrum has been in progress since 1992. *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Communications Technologies,* 7 FCC Rcd 1542 (1992) (proposing use of 2160-2200 MHz band for emerging technologies); ITU RR S5.388 (1992) (the World Administrative Radio Conference of 1992 identified spectrum at 2150-2160 MHz for potential use for advanced wireless services). Although it took several years for the Commission to order relocation of existing licensees, it has now been over two years since incumbent Broadband Radio Service ("BRS") licensees were directed to vacate the band, and nearly a year since Fixed Services ("FS") licensees were ordered to relocate. *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 46 (2003); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (2004) (subsequent history omitted) (ordering relocation of BRS licensees in the 2150-2156 and 2156-2160 MHz bands to the 2496-2502 and 2618-2624 MHz bands); *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*, 20 FCC Rcd 15866 (2005) (ordering relocation of users in the 2155-2160 MHz band).

consistent with unpaired use, the Commission should forbear from applying Sections 1.945 (b) and (c).

C. Prompt Action on this Petition Will Ensure that the Public Enjoys the Benefits of NBRS as Soon as Practicable.

When the Commission's administrative wheels turn slowly or grind to a halt, the public is deprived of the benefits of new competition and new means of communicating, learning, and becoming informed. History is rife with examples of how torpid bureaucracies may delay initiation of new services to the detriment of the public. The current Commission should not allow the public to suffer the perils of over-deliberation on the Petition or the Application.[33]

Two of the most conspicuous examples of how past Commission inaction has harmed the public interest come from a review of the Commission's reaction to the introduction of competitive telephone customer premises equipment ("CPE")[34] and cellular telephony into the market. Had the Commission responded more quickly and favorably to these developments, the public interest benefits of these services and related products and applications would have been available to consumers much sooner.[35]

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[33] The Application was filed nearly four months ago, but has not yet been placed on Public Notice.

[34] Early CPE included the Hush-A-Phone, invented in 1921, and the Carterfone, invented in 1959. *See Hush-A-Phone Corporation and Harry C. Tuttle (Complainants), American Telephone and Telegraph Company, et al (Defendants)*, 20 FCC 391 (1955) (the Hush-A-Phone was a cup-like device placed over a telephone receiver to make conversations more private); *See Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968) ("*Carterfone Order*") (the Carterfone permitted users of mobile radio systems to interconnect their telephones with the radio system to permit mobile and fixed users to communicate with each other).

[35] Early CPE manufacturers had to complain and litigate their way to market. Hush-A-Phone endured nearly *ten years* of Commission proceedings and litigation over whether telephone companies could use tariffs to keep consumers from attaching the device to their telephones. *See Hush-A-Phone Corporation and Harry C. Tuttle (Complainants), American Telephone and Telegraph Company, et al (Defendants)*, 20 FCC 391, 413-14 (1955) (upholding a 1951 dismissal of a complaint filed in 1948 on grounds that the device interfered with the quality of telephone service and was appropriately barred by telephone company tariffs).

Faced with years of Commission indecision on whether to allow competitive entry into CPE markets, courts have lamented the Commission's lack of alacrity in responding to new entrants providing competition to incumbents.[36] In one memorable case, the D.C. Circuit found that "the unfairness [from the bias towards incumbents] is enhanced from time to time *when the Commission's adjudicatory process bogs down*."[37] Ultimately, Commission decisions introducing CPE competition allowed for the creation of a vibrant consumer-driven market leading to such innovations as answering machines, fax machines, and eventually the modem, which was critical to the growth and development of the Internet.[38]

Initiation of Cellular Service. Although today's widespread availability of wireless telephony generally is considered a Commission success, a different picture can be seen through the lens of history. In fact, the Commission's reaction to the invention of cellular technology was marked by administrative inaction that likely delayed the availability of wireless telephony for three decades. Before 1949, the Commission made spectrum available to wireline carriers for

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[36] After seven years of Commission proceedings, the manufacturer of the Hush-A-Phone sought appellate relief, and the D.C. Circuit reversed. *Hush-A-Phone Corp. v. U.S.,* 238 F.2d 266 (1956). On remand, the Commission finally prohibited tariffs that would prevent customers from using the Hush-A-Phone or "any other device which does not . . . impair the operation of the telephone system." *Hush-A-Phone Corp. v. AT&T,* 22 FCC 112 (1957).

[37] *Hush-A-Phone Corp. v. U.S.,* 238 F.2d 266, 269 n.9. (1956).

[38] Commission enforcement of *Hush-A-Phone* left much to be desired. The decision ostensibly prohibited tariffs that prevented use of non-Bell CPE, but AT&T warned customers that its tariff prohibited the use of the Carterfone. The manufacturer filed an antitrust suit against AT&T in November 1965, and the matter was referred by the court to the Commission in 1966. *See Carter v. American Telephone & Telegraph Company*, 250 F. Supp. 188 (N.D. Texas 1966), *aff'd*, 365 F.2d 486, 488 (5th Cir. 1966). The issue of whether AT&T's tariff and warnings violated *Hush-A-Phone*—decided in 1957—remained pending before the Commission until 1968, when AT&T finally directed AT&T to strike the restrictive tariff provisions, holding that a customer wishing to improve the functionality of the telephone network by interconnecting a piece of equipment not manufactured by the phone company would be permitted to do so, so long as that equipment does not harm the network. *See Carterfone Order*. Several years later, the Commission adopted rules codifying this principle. *See* 47 C.F.R. § 68.1 et seq.

experimentation and testing of mobile radio services.[39] In 1949, the Commission completed a proceeding to allocate spectrum to various service classifications.[40] Nearly twenty years later, in 1968, the Commission began a proceeding to allocate spectrum for land mobile communications.[41] The Commission's order establishing rules for operations in the band was finally released in 1981,[42] and the first cellular licenses were awarded in 1983.[43] Some economists have estimated that the Commission's delay in authorizing cellular telephony caused a consumer welfare loss of more than $85 billion.[44] Delay remains endemic to licensing of wireless services. One study of 13 allocations found that the median length of time from commencement of spectrum allocation proceedings to completion of auction was 6.7 years.[45]

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[39] *Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 F.C.C.2d 469, ¶ 2 (1981) ("*Cellular Systems Order* ").

[40] *Id.*

[41] *Id.* ¶ 3 (citing *Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 18262*, 14 F.C.C.2d 311 (1968)). This proceeding was pending for eight years before further action was taken. In 1974, 30 MHz was allocated for private services and 40 MHz for common carrier services. *Cellular Systems Order* ¶ 4 (citing *Second Report and Order in Docket No. 18262*, 46 F.C.C.2d 756 (1974)). During the pendency of this proceeding, the Commission authorized two developmental systems, one in Chicago metropolitan area, and one in the Washington, D.C. metropolitan area. *Illinois Bell Telephone Co.,* 63 F.C.C.2d 655 (1977), *aff'd sub nom, Rogers Radio Communications Services, Inc. v. FCC,* 593 F. 2d 1225 (2nd Cir. 1978); *American Radio Telephone Service, Inc.*, 66 F.C.C.2d 481 (1971). The reports provided by these systems informed the Commission's 1980 Notice of Proposed Rulemaking considering or re-considering such issues as allocation, ownership qualifications and limits (at one point in time, these qualifications would have prohibited any entity other than an incumbent wireline carrier from offering cellular service), and interconnection. *Cellular Systems Order* at ¶¶ 7, 27-57.

[42] *See Cellular Systems Order*, 86 F.C.C.2d 469 (1981).

[43] The Commission granted its first application for a license to cover a cellular construction permit in October, 1983. *See Chicago SMSA Limited Partnership: For license to cover construction permit (in part) to operate on frequency Block B in the Domestic Cellular Radio Telecommunications Service to serve the Chicago, Illinois, Standard Metropolitan Statistical Area*, 95 F.C.C.2d 538 (1983).

[44] *See* G. Keyworth, J. Eisenach, T. Lenard and D. Colton, *The Telecom Revolution: An American Opportunity* 9 (1995).

[45] *See* Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punch Line to Ronald Coase's Big Joke: An Essay on Airwave Allocation Policy*, 14 HARVARD L.J. 335, 481, Table 8 (2001).

So many products and services that have dramatically improved consumer welfare and the U.S. economy came to market more slowly than they perhaps should have because of unnecessary Commission delays. It is impossible to determine how many other potentially lifesaving or welfare-enhancing products, applications, or services never made it into the marketplace because of past Commission inaction or failure to take timely action. Such inaction is exactly what Congress sought to prevent by granting the Commission forbearance authority. Today, this Commission has the opportunity to take action that will give all Americans, for the first time, a free broadband Internet access service—a service that will empower parents, support the efforts of our nation's first responders, reduce the burdens on the universal service fund, and dramatically impact the U.S. economy in a positive way.

This Commission has the opportunity to avoid a legacy of inaction that has plagued earlier Commissions and usher in an era in which expedited Commission action can advance the public interest. To that end, it should use all of the means and tools available to introduce competition and innovation into the marketplace.

II. CONGRESS REQUIRES PROMPT ACTION ON SECTION 10 FORBEARANCE PETITIONS AND ON APPLICATIONS FOR NEW SERVICES AND TECHNOLOGIES SUCH AS THOSE PROPOSED BY M2Z.

Congress has empowered the Commission to approve the deployment of new telecommunications services and technologies, such as those proposed by M2Z, within a very short time frame. Section 10 of the Act requires the Commission to forbear from applying its regulations or any provision of the Act upon a showing that enforcement of such rules or statutory provisions is not necessary to protect consumers or to ensure that rates are just, reasonable, and non-discriminatory, and that forbearance otherwise is consistent with the public

interest.[46] Section 10 was enacted in the Telecommunications Act of 1996 ("1996 Act"), and was intended by Congress to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[47]

Consistent with a primary purpose of the 1996 Act "to shift monopoly markets to competition as quickly as possible,"[48] Congress anticipated that the Commission's forbearance authority would "be a useful tool in ending unnecessary regulation"[49] and "reduc[ing] the regulatory burdens on new entrants."[50] Indeed, the forbearance standard itself states that a determination by the Commission that "forbearance will promote competition among providers of telecommunications services . . . may be the basis for a Commission finding that forbearance is in the public interest."[51] As part of this "pro-competitive, deregulatory policy framework,"[52]

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[46] 47 U.S.C. § 160.

[47] Telecommunications Act of 1996, Pub. L. No. 104-104, pmbl., 110 Stat. 56 (1996); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶ 1 (1998) (subsequent history omitted) ("One of the fundamental goals of the Telecommunications Act of 1996 (1996 Act) is to promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, in order to stimulate competition for all services, including advanced services. Congress provided the blueprint in the 1996 Act for ensuring that all markets are open to competition, while encouraging the rapid deployment of new telecommunications technologies.").

[48] Report to Accompany H.R. 1555, House Rep. No. 104-204, 104th Cong., 1st Sess. (1995).

[49] *Id*.

[50] Report to Accompany S. 652, S. Rep. No. 104-23, 104th Cong., 1st Sess. (1995).

[51] 47 U.S.C. § 160(b); *see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 46 (2005) ("In making this determination [whether forbearance is in the public interest], the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers telecommunications services."); *Regionet Wireless License, LLC, Petition for Forbearance From Enforcement of Section 80.102 of the Commission's Rules*, 15 FCC Rcd 16119, ¶ 8 (2000). ("[I]n determining whether forbearing from a regulation is in the public interest, we must consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If we determine that forbearance will promote competition among providers of telecommunications services, that determination may be the basis of a finding that the forbearance is in the public interest."); *Personal Communications Industry Association's*

the Commission *must* forbear from applying its regulations or any provision of the Act if it determines that the forbearance standard is met.[53] Moreover, Congress' belief that forbearance serves an important and effective deregulatory function in promoting competition and new service deployment was so strong that it made forbearance self-effectuating: If the Commission fails to act by written order on a Section 10 petition within one year, the forbearance petition is deemed granted by operation of law.[54]

With similar goals, 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."[55] This statutory provision was enacted to: (1) "encourage the availability of new technology and services to the public"; (2) prevent the Commission from "hamper[ing] the development of new services"; and

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Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 27 (1998) ("In evaluating whether forbearance is consistent with the public interest, we must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers.").

[52] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[53] 47 U.S.C. § 160(a).

[54] *See* 47 U.S.C. § 160(c); *see also* FCC, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006).

[55] 47 U.S.C. § 157(b). Over the years, 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." *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); *see also Application of Hye Crest Management, Inc. for License Authorization in the Point-to-Point Microwave Radio Service in the 27.5 to 29.5 GHz Band and Request for Waiver of the Rules*, Memorandum Opinion and Order, 6 FCC Rcd 332, ¶ 28 (1991) (granting an exclusive license for 1,000 MHz 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.").

(3) allow "the forces of competition and technological growth [to] bring many new services to consumers."[56] Indeed, Congress found the rapid deployment of new services and technologies to the public to be of such paramount importance that it incorporated a burden-shifting mechanism into Section 7: Any party who opposes a new technology or service "shall have the burden to demonstrate that such proposal is inconsistent with the public interest."[57] In other words, Section 7 creates "a presumption that new services are in the public interest."[58]

Section 10 forbearance authority provides the Commission with a tool to ensure positive action on M2Z's Application consistent with Section 7's goal of bringing new services and technologies to the public on an expedited basis.[59] As set forth in the Application, M2Z proposes to bring an innovative service to the public, using new technologies in 20 MHz of underutilized and unpaired spectrum. Currently, there exists no service comparable to M2Z's

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[56] Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984); *see also* House Floor Debate on H.R. 2755, 129 Cong. Rec. 33347 (Nov. 17, 1983) (discussing a backlog of more than 10,000 applications for low power television service which were being processed at a rate of only 20 per month).

[57] 47 U.S.C. § 157(a). This burden-shifting mechanism "is intended to shift the balance of the process in favor of new services" and "allow the FCC, on an expedited time frame, to review [an] application" proposing a new service or technology. Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984). As Congress recognized when it enacted the statutory provision, delays in authorizing new services often result from opposition by incumbents seeking to limit competition. *See id.*

[58] *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, Memorandum Opinion and Order, 98 F.C.C.2d 792 ¶ 24 (1984).

[59] Indeed, the note to Section 7, commonly referred to as Section 706 and enacted in 1996 contemporaneously with Section 10, instructs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, *regulatory forbearance*, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 note (emphasis added). That is, Section 706 "directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services" and to "further Congress' objective of opening all telecommunications markets to competition." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, ¶¶ 69 & 76 (1998).

that offers consumers and public safety nationwide broadband service free of recurring charges and with network level filtering of obscene and indecent material to prevent harm to children. Likewise, M2Z's creative use of TDD, advanced antenna systems, and Orthogonal Frequency Division Multiple Access ("OFDMA") technology in unpaired spectrum constitutes an innovative way to provide this service.[60] Thus, M2Z's Application provides a prototypical case for the Commission to exercise its forbearance authority under Section 10 in furtherance of Congress' clearly expressed goals of promoting competition, innovation, and the rapid deployment new services and technologies. Moreover, because this Petition and M2Z's underlying Application are inextricably connected, the Commission should address the merits of both filings together in a single decisional order.

III. THE COMMISSION SHOULD FORBEAR FROM ANY PROVISION OF SECTIONS 1.945(b) AND (c) TO THE EXTENT THAT ENFORCEMENT OF SUCH PROVISIONS WOULD DELAY OR PREVENT POSITIVE ACTION ON M2Z'S APPLICATION.

Pursuant to Section 10(c) of the Act, 47 U.S.C. § 160(c), M2Z requests that the Commission forbear from applying Sections 1.945(b) and (c) of its rules to M2Z's Application, to the extent that enforcement of any provision of these rules prevents the acceptance and grant of the Application. To be clear, M2Z seeks forbearance from Sections 1.945(b) and (c) only to the extent that the Commission believes that any element of these rules would preclude the Commission from accepting and granting M2Z's Application. As discussed herein and also explained in the Application, M2Z has demonstrated that it satisfies each of Section 1.945(c)'s criteria for the grant of its Application, and therefore nothing should stand in the way of the Commission accepting the Application for filing under Section 1.945(b). Moreover, in seeking forbearance from these rules, M2Z is not asking the Commission to abdicate one of its primary

[60] *See Application* at 13-15.

responsibilities to determine whether "the public interest, convenience, and necessity will be served" by accepting and granting M2Z's Application.[61] Rather, the forbearance process itself provides a specific public interest standard of review for this Petition and, by reference, M2Z's Application.[62] This Petition provides the means to undertake that review and to encourage public debate on M2Z's proposal on a timely basis as Congress intended.

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
>
> (3) Forbearance from applying such provision or regulation is consistent with the public interest.[63]

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."[64] Section 10(b) further specifies that, "[i]f the Commission determines that such forbearance will promote competition among providers of

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[61] 47 U.S.C. § 309(a).

[62] *See* 47 U.S.C. § 160(a)(3).

[63] 47 U.S.C. § 160(a).

[64] 47 U.S.C. § 160(b).

telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[65]

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."[66] Section 1.945(c) sets forth the standard for granting wireless license applications such as M2Z's and provides in full 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.[67]

As discussed below, 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.

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[65] *Id.*; *see also supra* n.51.

[66] 47 C.F.R. § 1.945(b).

[67] *See* 47 C.F.R. § 1.945(c).

Moreover, forbearance from Sections 1.945(b) and (c) in this instance satisfies Section 10's public interest test 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. Accordingly, as demonstrated in greater detail below, the forbearance standard is met, and 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.

A. Enforcement of Sections 1.945(b) and (c) Is Not Necessary to Ensure that M2Z's Charges, Practices, Classifications, and Regulations Are Just and Reasonable and Are Not Unjustly or Unreasonably Discriminatory.

The first prong of the forbearance standard requires the Commission to forbear from applying any regulation or provision of the Act if enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with a telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.[68] The Commission previously has held in the context of applying this prong of the forbearance test that "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[69]

Forbearance in this instance will allow new competitive entry by M2Z into the market for broadband commercial radio services, which will create additional competition in a market currently dominated by only two types of wire-based broadband service providers. As a new entrant, M2Z will lack market power to charge unjust or unreasonable rates or engage in discriminatory conduct, and it will act as a check on the market power of the incumbent

[68] *See* 47 U.S.C. § 160(a)(1).

[69] *Petition of U S WEST Communications, Inc. for Forbearance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶ 31 (1999).

providers.[70] Moreover, as explained in the Application, M2Z's service will be a class of CMRS.[71] As a CMRS operator, M2Z will be subject to a host of substantive regulatory and statutory protections intended to ensure that its charges, practices, classifications, and regulations are just and reasonable and are not unjustly or unreasonably discriminatory.[72] Accordingly, because enforcement of Sections 1.945(b) and (c) is not necessary to ensure M2Z's charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, the Commission must forbear from applying the rules.

B. Enforcement of Sections 1.945(b) and (c) Is Not Necessary for the Protection of Consumers.

The second prong of the forbearance standard requires the Commission to forbear from applying any regulation or provision of the Act if enforcement of such regulation or provision is not necessary for the protection of consumers.[73] Rules are regarded as being necessary for the protection of consumers only if they were adopted specifically for some consumer protection purpose or there is a strong connection between the rule and an identifiable consumer protection

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[70] *See Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, Memorandum Opinion and Order, 14 FCC Rcd 21484, ¶ 14 (1999). As explained in the Application, M2Z's basic service will be free to anyone who wishes to use it. *See Application* at 22-23. Thus, with respect to M2Z's free service offering, there exists no danger that forbearance from Sections 1.945(b) and (c) would result in unjust or unreasonable charges or discriminatory practices or classifications. *See, e.g., Regionet Wireless License, LLC, Petition for Forbearance From Enforcement of Section 80.102 of the Commission's Rules*, 15 FCC Rcd 16119, ¶ 5 (2000). M2Z also will offer a premium service on a subscription basis. *See Application* at 12 & 24. However, any charges imposed for that service will be subject to significant competitive pressures from the incumbent broadband service providers.

[71] *See Application* at Appendix 2, p. 5.

[72] *See* 47 C.F.R. § 20.15 (requiring CMRS providers to comply with, among others, Sections 201 and 202 of the Act). Sections 201 and 202 of the Act, in turn, require that all charges, practices, classifications, and regulations be just and reasonable and prohibit unjust and unreasonable discrimination. *See* 47 U.S.C. §§ 201 & 202. In this regard, enforcement of Section 1.945(b) is inapposite because whether or not the Commission places M2Z's Application on public notice prior to grant has no bearing whatsoever on any charges, practices, classifications, and regulations M2Z could impose as a CMRS operator.

[73] *See* 47 U.S.C. § 160(a)(2).

objective.[74] The rules at issue here have no such consumer protection objective. Section 1.945(b) is a procedural requirement unrelated to the goal of protecting consumers. In fact, enforcement of Section 1.945(b) in this instance will further delay the grant of the Application and the public interest benefits of M2Z's proposed service.[75] Likewise, Section 1.945(c), is a spectrum management tool that the Commission uses to grant wireless licenses to private applicants. The rule dates back decades and was implemented specifically to address "the adequacy of the supply of microwave frequencies and the terms and extent to which radio station authorizations may be made to private users."[76] This licensing scheme is inapposite to the goal of protecting consumers.

Moreover, even if Sections 1.945(b) and (c) were implemented specifically for the protection of consumers, enforcement of the rules in this instance would not be necessary. As further discussed below, M2Z's fundamental commitment to providing free service, its other public interest obligations, and market forces will more than adequately protect against any potential consumer harms.[77] Indeed, new entry by M2Z will increase competition in the market

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[74] *See, e.g., Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179, ¶ 26 (2004) ("[A]pplication of the growth caps and new market rule is not 'necessary for the protection of consumers.' These rules are directly related to intercarrier compensation, and were not implemented specifically for the protection of consumers."); *Cellular Telecommunications & Internet Assoc. v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003) ("[I]t is reasonable to construe 'necessary' as referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation.").

[75] In any event, Section 1.945(b) can be satisfied through the process of Commission action on this Petition. As noted above, this Petition and M2Z's Application are inextricably related and therefore should be considered and debated together in the context of this proceeding.

[76] *See Amendment of the Commission's Rules to Establish a Private Operational-Fixed Microwave Radio Service*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 43 F.C.C.2d 1199, ¶ 2 (1974).

[77] *See, e.g., Petitions for Forbearance Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, n.84 (2004) (market forces mitigate concerns regarding potential consumer harms); *Petitions for Forbearance from Section 272 Requirements in Connection with Directory Assistance Services*, Memorandum Opinion and Order, 19 FCC Rcd 5211, ¶ 20 (2004) (new entry into the market will increase competition and protect against consumer harms).

for the provision of broadband service and thereby enhance customer choice. Accordingly, because Sections 1.945(b) and (c) were not specifically implemented, and are not necessary, for the protection of consumers, the Commission must forbear from applying these rules.

C. Forbearance from Sections 1.945(b) and (c) Will Serve the Public Interest.

The final prong of the forbearance standard requires the Commission to forbear from applying any regulation or provision of the Act if forbearance from applying such provision or regulation is consistent with the public interest.[78] In making this public interest determination, the Commission must consider whether forbearance "will promote competitive market conditions" and "[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."[79]

The public interest benefits that will result from the grant of this Petition far exceed the benefits of forbearance petitions previously granted by the Commission. Grant of this Petition will promote competitive entry and will dramatically expedite delivery of a new broadband alternative to the public. The public interest benefits arising from competitive entry, by themselves, provides an overwhelming public interest basis for grant of this Petition. As explained in the Application, M2Z's NBRS 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. In light of the many benefits that will accrue to the public, this Petition should be granted.

[78] *See* 47 U.S.C. § 160(a)(3).

[79] 47 U.S.C. § 160(b).

1. Forbearance will promote competitive entry into multiple product markets.

In most markets for communications services, consumer choice among many facilities-based providers is burgeoning. Today, 97% of the U.S. population lives in counties with three or more different operators providing mobile voice telephony;[80] almost all consumers have three choices of multichannel video programming distribution ("MVPD") service—with choice expanding rapidly as companies that have traditionally provided telephony and broadband enter the MVPD market.[81] In contrast, the market for broadband Internet access remains relatively entrenched, and most Americans have fewer choices for broadband service than for wireless telephony or video service. Commission reports on the status of broadband Internet access show that incumbent local exchange carriers ("LECs") and cable operators dominate the residential broadband market, with LECs serving 41.3% of the market, and cable operators serving 57.5% of residential broadband subscribers.[82] Only 1.2% of all other residential broadband subscribers use other technologies. Some analysts have posited that these purported "competitors" are no longer perceived as substitutes by consumers, and consumers who want the fastest broadband

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[80] *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*, 20 FCC Rcd 15908, ¶ 41 (2005). Although there is competitive choice among providers of mobile voice service, mobile broadband is not as widely available, and, where it is available, there are limitations. *See* Amol Sharma, *Cell Carriers to Web Customers: Use Us, But Not Too Much*, WALL STREET JOURNAL, May 11, 2006, at B1 (Internet access services available to mobile devices "come with limitations tucked into their policies that are unfamiliar to users of land-line Internet connections," including limits on bandwidth-intensive applications).

[81] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 21 FCC Rcd 2503, ¶ 5 (2006) ("*Twelfth Annual Video Competition Report*").

[82] Of the 50.2 million total high-speed lines, 42.9 million were designed to serve primarily residential end users. Cable modem represented 57.5% of these lines while 40.5% were ADSL, 0.3% were SDSL or traditional wireline connections, 0.5% were fiber to the end user premises, and 1.2% used other technologies. *See* FCC, *High-Speed Services for Internet Access: Status as of December 31, 2005*, at 2, Table 3, Chart 6.

Internet service often do not consider DSL a substitute for cable modem service.[83] Further, not only is DSL service proving to be little or no constraint on cable modem prices, as evidenced by recent events, LECs have little incentive to lower DSL prices.[84] Finally, well over half of all U.S. adults do not enjoy the benefits of broadband at home—they either use dial-up access or have no Internet access at all.[85] As these data demonstrate, the broadband Internet access market would benefit greatly from the entry of a new, nationwide, facilities-based competitor. Many observers have noted that the most likely source of such facilities-based competition to existing cable and LEC broadband offerings will be a wireless broadband service.[86]

To provide true competition, however, the new wireless broadband provider will have to be a new entrant, unaffiliated with an existing cable modem, DSL, or incumbent wireless carrier

[83] Robert Marich, *Cable Modem vs. DSL: Rivals Side-Step Big Price Wars So Far*, Kagan, Cable TV Investor: Deals & Finance, July 6, 2006 (available at: http://www.kagan.com/ContentDetail.aspx?group=5&id=216) ("there's no screaming price war between cable TV and telcos, and Kagan Research doesn't expect one in the foreseeable future… What has emerged in broadband, however, is a two-tier marketplace.").

[84] Two LECs recently announced that they would not reduce the price of DSL service to reflect the Commission's elimination of certain USF contribution fees. Instead of passing the savings from these fees on to consumers, BellSouth and Verizon reported that prices would remain the same. *See, e.g.,* Amy Schatz, *Verizon and BellSouth DSL Users Won't See Lower Bills as Fee Ends,* WALL STREET JOURNAL, Aug. 22, 2006, at A2. Commission reaction to protect consumers was swift; reports of the Commission's commencement of enforcement proceedings were widespread. *See, e.g.,* Amy Schatz, *FCC Questions DSL Customer Fees,* WALL STREET JOURNAL, Aug. 25, 2006, at A4. Within a few days, the carriers eliminated the fees. *See Statement of FCC Chairman Kevin Martin on Verizon And BellSouth Eliminating Recently Imposed DSL Fees* (rel. Aug. 30, 2006) ("Consumers should receive the benefits of the Commission's action last summer to remove regulations imposed on DSL service.").

[85] There are 42.9 million residential broadband lines in the U.S. *See* FCC, *High-Speed Services for Internet Access: Status as of December 31, 2005*. According to the Census Bureau, there were 113 million households in the United States in 2005. *See* U.S. Census Bureau, "Households by Type, 1940 to the Present," May 25, 2006 (available at http://www.census.gov/population/socdemo/hh-fam/hh1.pdf). The percentage of households with broadband access is therefore approximately 38%.

[86] *See, e.g., Martin Tells Reporters He Sees Progress on Broadband, Video, '911'*, TR DAILY (Mar. 17, 2006) (wireless broadband will be an "important component" of high-speed service and regulatory relief should be offered to new investors in the broadband marketplace); Remarks of Commissioner Jonathan Adelstein at the Wireless Communications Association Annual Convention (June 27, 2006) ("If we are going to see real broadband competition, it probably has to come from wireless.").

that has a legacy network to protect.[87] Although AWS1 spectrum could be a vehicle for the emergence of a new broadband entrant, many of the parties that are actively bidding in the AWS1 auction are affiliated with LECs, cable operators, or incumbent wireless carriers.[88] The potential for new entry in AWS1 spectrum was limited, in part, by the Commission's adoption of rules that do not permit TDD operations in the band.[89] Grant of the instant Petition, on the other hand, will allow the Commission to ensure facilities-based, competitive entry into the markets for both broadband Internet access and spectrum-based communications services by an entirely new entrant in a manner consistent with Commission rules and policies.

From the early days of spectrum auctions, the Commission has used a variety of tools to promote competitive entry into the markets for wireless services. At one time, the Commission

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[87] Incumbent broadband providers that offer cable modem or DSL service have little incentive to deploy a broadband wireless service that will compete with their own wireline offerings. *See, e.g.*, Tiernan Ray, *Comcast Sending Strong Buy-Cell Signals*, BARRON'S, Aug. 29, 2006 (observing that Comcast is not likely to construct a wireless network until such service will complement, rather than compete with, its existing network); Karen Brown, *BellSouth Expands Broadband Wireless Plans*, MULTICHANNEL NEWS, July 10, 2006 (BellSouth's director of product development explains that BellSouth will use its wireless communications service (WCS) spectrum to supplement its wireline network, stating that: "Even in metro areas, we have spaces where we don't have DSL coverage. And then when we get out to rural areas where we have DSL, but it goes so far out and the economics don't carry it farther . . . So what you are seeing is our plan using wireless broadband to push broadband farther out."). *See also Consolidated Request for Limited Extension of Deadline for Establishing WCS Compliance with Section 27.14 Substantial Service Requirement*, WT Docket No. 06-102 (filed Mar. 22, 2006) (nine years after they obtained licenses, WCS licensees including AT&T, BellSouth, Comcast, NextWave Broadband, NTELOS, Sprint Nextel, Verizon, and WavTel, still have not constructed networks and are seeking an extension of time to comply with the substantial service requirement).

[88] Qualified bidders include SpectrumCo, LLC (a joint venture involving cable operators Time Warner Cable, Comcast, Cox Communications and Bright House Networks), T-Mobile USA, Cingular Wireless and Verizon Wireless. *See Auction of Advanced Wireless Services Licenses; 168 Bidders Qualified to Participate in Auction No. 66; Information Disclosure Procedures Announced*, Public Notice, DA No. 06-1525, Attachment A (rel. July 28, 2006). As of Round 66, T-Mobile was the top bidder in terms of total net bids, with 114 provisionally winning bids totaling $4,146,058,000. Verizon Wireless was the second highest bidder, with 4 provisionally winning bids totaling $2,798,738,000. SpectrumCo came in at number three, with 136 provisionally winning bids totaling $2,336,565,000. FCC Advanced Wireless Services Auction 66 Report, available at: http://wireless.fcc.gov/auctions/66/charts/66press_3.pdf. (viewed Aug. 31, 2006).

[89] *Service Rules for the Advanced Wireless Services in the 1.7 and 2.1 GHz Bands,* 18 FCC Rcd 25162, ¶ 46 (2003).

set aside specific blocks of spectrum for use by new entrants and small businesses (*i.e.,* "designated entities" or "DEs").[90] For many years, the Commission also capped the amount of spectrum that any commercial mobile radio services ("CMRS") licensee could hold.[91] In the Broadband PCS spectrum auctions, two-thirds of the spectrum in each geographic market was reserved for new entrants through eligibility restrictions and spectrum caps and ensuring that a number of new competitors entered the market. The Commission eliminated the per se limit on the aggregation of CMRS spectrum in 2003 due to the level of competition in the mobile voice market.[92] Today, the Commission still seeks to promote competitive entry and prevent concentration using such tools as DE bidding credits[93] and case-by-case review of transactions

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[90] *See Implementation of Section 309(j) of The Communications Act—Competitive Bidding,* Fifth Report and Order, 9 FCC Rcd 5532 (1994) (establishing C and F blocks of broadband PCS spectrum as "entrepreneur's blocks"). The Commission limited eligibility for bidding on spectrum in these blocks to small businesses, rural telephone companies and businesses owned by women and minorities, collectively referred to as designated entities, in order to ensure that these entities would have "the opportunity to participate in the provision" of PCS, as Congress directed in Section 309(j)(4)(D). *Id.*

[91] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order,* 9 FCC Rcd 7988, ¶ 238 (1994). To ensure that competition would shape the development of the CMRS market, the Commission took a number of steps, including adoption of a rule to cap at 45 MHz the total amount of combined broadband PCS, cellular, and Specialized Mobile Radio spectrum in which an entity may have an attributable interest in any geographic area. *Id*.

[92] *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668 (2001) (effective Jan. 1, 2003). Since the caps were removed, there has been significant consolidation of mobile carriers and aggregation of PCS spectrum licenses. *See Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967 (2005); *Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Action Notifications,* Public Notice (rel. Mar. 2, 2005) (granting license transfer application of NextWave Telecom Inc. and Cellco Partnership d/b/a Verizon Wireless); *Applications for Consent to the Assignment of Licenses from NextWave Personal Communications, Inc., and NextWave Power Partners, Inc., to Subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, 19 FCC Rcd 2570 (2004); *Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless, Corp., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 21522 (2004); *Applications of Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless For Consent to Assignment of Licenses*, Memorandum Opinion and Order, 18 FCC Rcd 6490 (2003).

[93] 47 C.F.R. § 1.2110.

involving the assignment or transfer of control of wireless licenses.[94] Indeed, to prevent the use of loopholes or other strategies that skirt the spirit, if not the letter, of its pro-competitive rules and policies, the Commission recently strengthened its rules and policies governing relationships between DEs and non-DEs.[95] By these actions, the Commission has recognized the need for competition and new entry in the markets for various wireless services. In an era without spectrum caps, it has become more important than ever before to aggressively enforce existing rules and to engage in thorough case-by-case analysis of transactions involving incumbent carriers. The instant Petition presents the Commission with yet another tool for promoting competitive entry.

Absent forbearance, there is a risk that incumbent carriers will use the administrative processes involved in allocating spectrum, setting service rules, accepting applications, and engaging in auction to thwart potential competition. Forbearance will permit the Commission to avoid wading through a pool of predictable protectionist proposals by incumbent carriers, all urging the adoption of technical standards and service rules that fit their own business plans while creating barriers to truly new potential market entrants.

Clearly, it is in the best interest of entrenched competitors to ensure that licensing schemes and service rules for any particular swath of spectrum minimizes the likelihood of competitive entry into the markets for spectrum-based services. History has shown that, as the Commission diligently completes each procedural and administrative step towards licensing, refuting arguments by incumbents that a new technology offered by a new entrant will upset the

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[94] *See, e.g., Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13967 (2005); *Applications of Western Wireless Corp. and ALLTEL Corp*., 20 FCC Rcd 13053 (2005) (conditioning license transfer approval on spectrum divestitures); *Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless, Corp., Transferee*, 19 FCC Rcd 21522 (2004) (conditioning license transfer approval on spectrum divestitures).

[95] *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd 4753, ¶ 25 (2006).

applecart and undermine investments in existing networks may prove to be time-consuming and politically problematic.

The Commission's paramount concern is benefiting consumers by encouraging competitive entry, the development of new services, differentiated products, and innovation. Forbearance in the instant case will avoid regulatory obstructionism by incumbents that could delay or prevent a broadband offering in the 2155-2175 MHz band. It will promote intermodal, facilities-based competition in the market for broadband Internet access and provide intramodal competition to existing wireless licensees. Because the Application proposes that M2Z fully comply with established relocation procedures for incumbents in the band, along with the same technical standards, power limits, and emission limits that will apply to other AWS spectrum licensees, the Commission has all the information necessary to forbear from Sections 1.945 (b) and (c) to the extent necessary to grant the Application.

2. The introduction of a free service will promote service and price competition.

M2Z's entry into the broadband market presents the potential for tremendous marketplace change. Because it will offer a free service, rather than the subscription fee model employed by all other broadband providers, M2Z's entry can force prices downward or force incumbent broadband providers to compete on points other than price so that consumers enjoy a choice of innovative and differentiated products. M2Z will not simply compete, it will re-invent the broadband business model and force others to adapt and provide more value to their customers.

There are already signs of the kind of change that can be effected by M2Z's entry into the broadband market. Within a few months of M2Z's groundbreaking proposal to establish a nationwide broadband system that filters objectionable content on the network level, an

incumbent wireless carrier responded by announcing a new family-friendly broadband option.[96] Establishing M2Z as a competitive force in the marketplace will ensure the continued development of innovative options by incumbent broadband providers.

3. Forbearance will speed M2Z's delivery of the many public interest benefits of NBRS.

As discussed in the Application, NBRS will generate significant public interest benefits. As the Commission has observed, the cost of broadband service is a significant barrier to consumer adoption of broadband.[97] Unlike any other broadband service currently available, NBRS will be entirely free to subscribers, thereby eliminating one of the most significant hurdles to consumer adoption of broadband.[98] M2Z's NBRS will be more accessible to consumers not only in terms of cost, but in terms of availability. Because M2Z's NBRS will not be encumbered by the technological impediments that are delaying—or preventing—nationwide broadband deployment by incumbent providers, M2Z has proposed an aggressive construction timetable.[99] M2Z's broad reach to 95% of consumers nationwide will undoubtedly reduce the need for the expansion of the Universal Service Fund ("USF") to accommodate broadband services, and, if the USF is modified to support broadband services in high-cost areas, the existence of a free broadband alternative will reduce the expense of any broadband USF program.[100]

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[96] *See* Sprint, *Sprint Family-Friendly Services Give Peace of Mind to Parents as Children Head Back to School*, Press Release (Aug. 10, 2006).

[97] *See FCC 2006 Strategic Plan* at 6-7 (citing the retail price of broadband service as a factor that is impacting consumer decisions to adopt broadband service and affecting the Commission's ability to achieve its objectives for broadband).

[98] Commission reports on high speed Internet access have repeatedly found a strong correlation between household income and adoption of broadband. The most recent report on high-speed access finds high-speed subscribers can be found in 99% of the top tenth of zip codes ranked in terms of median household income. By contrast, high-speed subscribers are reported in 90% of zip codes with the lowest median household income. *See* FCC, *High-Speed Services for Internet Access: Status as of December 31, 2005*, at Table 19. A free service could eliminate the disparity in broadband adoption.

[99] *See Application* at 4-5 and Appendix 2.

[100] *See id*. at 29-31 and Appendix 5, pp. 13-23.

Because broadband is a service that is characterized by direct and indirect network effects,[101] adding consumers to the total broadband subscribership will enhance overall consumer welfare and promote economic growth.[102] As demonstrated in the Application, achieving universal broadband deployment and adoption could yield economic and social welfare benefits estimated in the hundreds of billions of dollars.[103] M2Z also has pledged to provide free access to broadband services for all qualifying public safety entities. Access to the M2Z network will spare these agencies the costs of investing in building their own networks or paying for commercial network access. Further, M2Z's NBRS will provide automatic, default blocking of access to pornographic, obscene, and/or indecent material.[104] Through its default filtering system, M2Z will empower parents to control minors' access to inappropriate content. Accordingly, forbearance from applying Sections 1.945(b) and (c), to the extent that the rules would slow or block the acceptance and grant of M2Z's Application, not only would be consonant with the public interest, but essential to it.

[101] *See id*. at 27. Direct network effects occur when a subscriber to a particular service benefits from direct interaction with another subscriber and is made better off by having more subscribers with whom to interact. Indirect network effects arise from the provision of additional goods and services, such as content, applications, and equipment, that become more prevalent as producers respond to the larger size of a network. *Id.*

[102] *See id*. at 27-28 and Appendix 5, pp. 5-10.

[103] *See id*. at Appendix 5, pp. 5-10 (citing Robert Crandall, *The $500 Billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access*, Criterion Economics, Washington, D.C. (2001) (estimating gross consumer benefits of universal broadband deployment at $300 to $450 billion per year); Litan, Robert E., *Projecting the Economic Impact of the Internet*, 91 AMERICAN ECONOMIC REVIEW 313 (2001) (estimating reduced transaction costs from universal broadband deployment at $125-250 billion per year)).

[104] M2Z can disable the blocking feature for customers who provide M2Z with appropriate proof that they are of the age of majority. *See Application* at Appendix 2.

IV. THE COMMISSION SHOULD FORBEAR FROM ANY AND ALL OTHER PROVISIONS OF THE ACT OR ITS RULES, TO THE EXTENT THEY APPLY, WHICH CONFLICT WITH OR ARE OTHERWISE INCONSISTENT WITH THE IMMEDIATE ACCEPTANCE AND GRANT OF M2Z'S APPLICATION.

M2Z's Application proposes the licensing and deployment of an innovative nationwide wireless broadband system. The public interest benefits of the system, as explained in the Application, are beyond cavil. The only question remaining is whether the Commission's rules, procedures and policies developed in other contexts and for other services will be allowed to work as a barrier to the acceptance and grant of M2Z's Application and the rapid deployment of M2Z's innovative service. It may be that advocates for competing incumbent wireless networks, and others with private economic interests, will attempt to leverage the regulatory process to slow or stop M2Z from realizing its vision of a completely connected America. The Commission, however, should take decisive action to guard against such abuse of its processes and to encourage the development of new technologies and services for America's consumers.[105]

For these reasons, the Commission should, pursuant to Section 10, forbear from applying any procedural or substantive rule, provision of the Act, or policy that would prevent, prohibit, or impede the acceptance and grant of M2Z's Application or the deployment of its nationwide wireless broadband service. In this regard, to the extent necessary, M2Z requests forbearance from any of the statutory provisions that form the bases for Sections 1.945(b) and (c),[106] on the same grounds described above. Likewise, to the extent necessary, M2Z asks for forbearance from Section 309(j)(1) of the Act, which requires the Commission to grant mutually exclusive

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[105] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 2 (1998) (the Commission's role is to ensure that the marketplace is conducive to investment and innovation).

[106] *See, e.g.*, 47 U.S.C. § 309(b) (statutory requirement that certain applications be placed on 30-day public notice); 308(b) (statutory qualifications for license applicants).

applications through a system of competitive bidding.[107] As discussed in detail below,[108] the Commission has the authority to avoid mutual exclusivity and has done so in the past when the public interest so demands. M2Z's proposed service will yield concrete and immediate public interest benefits which merit a similar result.

Moreover, as suggested by the Application itself,[109] there are certain specific procedural requirements for which the forbearance standard is met and, given the unique and uniquely valuable service that M2Z is proposing, forbearance is appropriate for these and any other substantive or procedural rule which might prevent the deployment of that service. For example, to the extent the Commission has not already accepted M2Z's Application for filing, acted on the waiver requests made therein, and begun processing of the Application, it should now forbear from requiring M2Z compliance with Section 1.913(b) and the Form 601 filing requirement. In these unique circumstances, and as explained in the Application, enforcement of these procedural requirements will not ensure just and reasonable charges and practices, protect consumers, or advance any public interest purpose. Indeed, an overly parsimonious application of Section 1.913(b) in this case could, ironically, present a barrier to the introduction of new service to the public rather than facilitate it.

Likewise, to the extent that any other procedural or substantive rule or policy would prevent, prohibit, or impede the acceptance and grant of the M2Z Application or the deployment of its network, the Commission should exercise its forbearance authority under Section 10. M2Z has filed an application for a new radio service that is complete unto itself. Conflicting or

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[107] *See* 47 U.S.C. § 309(j)(1).

[108] *See infra* Section VI.C.

[109] Appropriately, in its Application, M2Z sought waiver of the specific procedural rules discussed herein. *See Application* at 43-47. For many of the same reasons that M2Z offered in support of its waiver request, forbearance from application of these rules also is appropriate.

supplemental rules of more general application are not necessary to ensure that rates are just and reasonable, protect consumers, or promote the public interest. To the contrary, additional rules and requirements that go beyond the terms, conditions, and standards of service set forth in the Application, and which conflict with or are otherwise inconsistent with those terms, conditions, and standards, will serve only to frustrate and confound the introduction of this important new service. Section 10 was added to the Communications Act by Congress to prevent such blind application of rules and policies from defeating the public interest.[110]

V. THE COMMISSION MUST EITHER RULE ON THE MERITS OF THIS PETITION OR PERMIT A LICENSE GRANT TO M2Z BY OPERATION OF LAW.

Section 10(c) of the Act, 47 U.S.C. § 160(c), requires the Commission to rule on the merits of a forbearance petition and to explain its decision in writing within one year after receipt of the petition.[111] The Commission may not refuse to hear the merits of a forbearance petition solely on the ground that the petition is conditional or seeks forbearance from uncertain or hypothetical regulatory obligations.[112] Rather, the Commission must "fully consider" a petition for forbearance within the statutory one-year period irrespective of whether the Commission has yet to determine whether the regulatory obligations from which the petitioner seeks forbearance apply to the petitioner.[113] This Petition, therefore, is ripe for consideration on its merits, even though the Commission has yet to determine the scope of regulation applicable to M2Z, its

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[110] Telecommunications Act of 1996, Pub. L. No. 104-104, pmbl., 110 Stat. 56 (1996); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, ¶ 1 (1998); Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[111] *See* 47 U.S.C. § 160(c).

[112] *See AT&T v. FCC*, No. 05-1186, slip op. at 10-11 (D.C. Cir. June 27, 2006).

[113] *Id*. at 9 (quoting *AT&T v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001)) ("Section 10(a)(3) . . . gives the Commission authority to decide only whether 'forbearance . . . is consistent with the public interest,' not to decide whether *deciding* whether to forbear is in the public interest.") (emphasis in original).

Application, and NBRS. Similarly, where a petition seeks forbearance from a broad assortment of regulatory requirements, the Commission may not deny the petition merely on the ground that it is insufficiently specific, particularly when the Commission has addressed equally broad requests in the past.[114] Thus, because this Petition is no less cognizable, nor more broadly phrased, than others that have been filed and granted before,[115] the Commission is obliged to address this Petition on the merits.

In filing this Petition M2Z seeks first and foremost a substantive decision from the Commission addressing the merits of this Petition and granting forbearance from Sections 1.945(b) and (c) and any other statutory or regulatory provision or policy that may impede the acceptance and grant of M2Z's Application to the extent necessary. As discussed above, such action will satisfy the Commission's obligations under Section 10 of the Act and also will be consistent with Section 7's goal of rapidly deploying new services and technologies to the public. Moreover, substantive Commission action on this Petition will encourage a prompt, robust, and transparent debate on M2Z's proposal.

Although Section 10 generally provides the Commission with a twelve to fifteen month window to act on a forbearance petition,[116] this Petition merits swifter action. In the past, the

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[114] *See AT&T v. FCC*, No. 05-1186, slip op. at 15 (D.C. Cir. June 27, 2006); *see also Idaho Power Co. v. FERC*, 312 F.3d 454, 464 (D.C. Cir. 2002) (vacating agency action because, among other things, the challenged orders were inconsistent with both prior and subsequent agency actions). Along these lines, the forbearance mechanism creates a "viable and independent" means of seeking relief from Commission regulation. *AT&T v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001). Consequently, the Commission has the "responsibility to fully consider petitions under Section 10" regardless of the availability to the petitioner of alternative routes for seeking regulatory relief. *Id*.

[115] *See, e.g., Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (FCC preempted an order of the Minnesota Public Utilities Commission applying its traditional "telephone company" regulations to Vonage's DigitalVoice service).

[116] *See* 47 U.S.C. § 160(c). To satisfy Section 10, the Commission must act on a forbearance petition within the statutory time frame and explain its decision in writing. *See id.* Thus, the Commission must release a written order by Section 10's statutory deadline to avoid the grant of this Petition by operation of law. *See id.*; *see also MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974) (release of the full text of a

Commission repeatedly has demonstrated its ability to conduct complex analyses very quickly, such as its expedited actions on numerous applications by local exchange carriers for approval to offer long distance service pursuant to Section 271 of the Act.[117] The irrefutable public interest benefits derived from M2Z's proposed service warrant similar expedited consideration and positive treatment by the Commission. Thus, without sacrificing the public debate about the Application, the Commission should promptly address the merits of this Petition, including a thorough Section 10 public interest analysis, and forbear to the extent necessary to allow the acceptance and grant of M2Z's Application.

If the Commission fails, however, to rule on the merits of this Petition by Section 10's deadline, the Petition will be deemed granted by operation of law.[118] Moreover, because this Petition requests forbearance from each element of Sections 1.945(b) and (c), to the extent they are inconsistent with the acceptance and grant of M2Z's Application, and any other statutory or regulatory provisions or Commission policy that may impede the acceptance and grant of M2Z's Application, no impediment to the acceptance and grant of M2Z's Application will remain. That

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Commission order constitutes official action); *Adelphia Communications Corp.*, 12 FCC Rcd 10759 (1997) (public notice occurs when a document is "released," that is, when the full text is made available to the press and public in the Commission's Office of Public Affairs, not merely upon a vote to adopt the text).

[117] *See, e.g.*, *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237 (2001) (approving Section 271 application in under three months); *Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000) (approving Section 271 application in under three months); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999) (approving Section 271 application in under three months).

[118] *See* 47 U.S.C. § 160(c).

is, Commission inaction on this Petition will not only result in the grant of this Petition, but also effectively will render M2Z's Application granted by operation of law.

VI. GRANT OF M2Z'S UNDERLYING APPLICATION ACHIEVES THE SAME PUBLIC INTEREST BENEFITS AS FORBEARANCE.

As demonstrated in its Application, M2Z satisfies each of the criteria for granting a wireless license application set forth at Section 1.945(c) of the Commission's rules. Thus, even if the Commission determines that it will not forbear from Section 1.945(c), it still may grant the Application. Moreover, because M2Z is proposing to establish a new service using new technology, the Application qualifies for the presumption under Section 7(a) of the Act that a grant will serve the public interest.[119] Consequently, if the Application is to be denied, the burden of proof is upon those who would oppose the Application. Absent a compelling showing that grant of M2Z's Application would be inconsistent with the public interest, and even assuming that the Commission will not forbear from Section 1.945(c) as requested above, the Commission should grant the Application without further delay.

A. M2Z is Legally, Technically, Financially and Otherwise Qualified to Hold a Title III License.

Section 1.945(c)(2) provides that the Commission will grant a wireless license application without a hearing if the Commission finds that the applicant is legally, technically, financially, and otherwise qualified.[120] As demonstrated in its Application, M2Z is legally, technically, financially, and otherwise qualified to be a Commission licensee.[121] M2Z is a California corporation founded in 2005 by Milo Medin, who serves as the company's Chief Technology officer and Chairman of its Board of Directors, and John Muleta, who serves as the

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[119] *See* 47 U.S.C. § 157(a); *see also Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, Memorandum Opinion and Order, 98 F.C.C.2d 792 ¶ 24 (1984).

[120] *See* 47 C.F.R. § 1.945(c)(2).

[121] *See Application* at 6-8.

company's Chief Executive Officer and a Director. M2Z's owners, officers and directors are all U.S. entities or U.S. citizens.[122] As M2Z previously has certified, it is not directly or indirectly owned or controlled by foreign individuals or entities and is in full compliance with the foreign ownership benchmarks set forth in Section 310(b) of the Act, 47 U.S.C. § 310(b).[123]

Moreover, M2Z enjoys more than its share of technical expertise, as demonstrated in the professional backgrounds of its co-founders. Mr. Medin is a technology pioneer who began his career as an engineer at NASA Ames Research Center in California. After several years of distinguished government service, Mr. Medin left to create @Home Networks in 1995. By establishing technology standards for cable broadband Internet access in conjunction with cable operators, @Home revolutionized the cable broadband platform.[124] Likewise, Mr. Muleta's career has kept him at the forefront of telecommunications policy and technology for more than two decades, having served as a partner and co-Chair of the Communications Practice at Venable LLP, as Chief of the Commission's Wireless Telecommunications Bureau, and as Deputy Chief of the Common Carrier Bureau. At the same time, Mr. Muleta brings to bear his substantial private sector expertise, having served in several entrepreneurial leadership roles, including his position as a senior officer of PSINet, Inc., a leading commercial Internet Services Provider.[125]

M2Z's other owners and directors contribute both financial resources and significant relevant expertise to the company. Kleiner Perkins Caufield & Byers ("KPCB"), Charles River Ventures ("CRV"), and Redpoint Ventures each have an ownership interest in M2Z, and a

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[122] The following entities hold a disclosable ownership interest in M2Z: Charles River Partnership XII, LP (16.10%), John Muleta (25.10%), KPCB Holdings, Inc. (16.32%), Milo Medin (25.10%), Redpoint Ventures II, L.P. (15.95%). *See Application*, Appendix 1 at FCC Form 602, Schedule A. The M2Z Board of Directors comprises five members, all of whom are U.S. citizens: Milo Medin, John Muleta, John Doerr, Bruce Sachs, and Geoff Yang. *Id.* at 6, n.15.

[123] *See Application* at 6, n.14.

[124] *See id*. at 6.

[125] *See id*. at 6-7.

managing partner of each firm also serves on M2Z's Board of Directors. Through their investments in innovative technologies, networks, and applications, these venture capital firms have had leading roles in transforming the American economy and ushering in the digital age. KPCB, for example, has been an early investor in more than 300 information technology and biotech firms, including @Home, Amazon.com, America Online, and Google.[126] CRV, one of the oldest and most successful early-stage venture capital firms, has invested in leading companies in the data communications and software sectors, such as Cascade, Chipcom, CIENA, iBasis, Sonus Networks, SpeechWorks International, Flarion and Vignette.[127] Redpoint Ventures focuses on investing in companies offering services at the intersection of media and broadband, such as Excite, Ask Jeeves, TiVo, Netflix, WebTV, MySpace.com, Juniper Networks, Foundry Networks, MMC Networks, and Bay Networks.[128]

As the Application has made clear, M2Z is legally, technically and financially qualified to be a Commission licensee and to carry out its plans for NBRS. The company's owners, officers, and directors bring substantial technical and business expertise to the enterprise. Moreover, the company has access to capital that will ensure that construction of M2Z's broadband network can begin immediately upon the grant of the Application.[129] Accordingly, M2Z easily satisfies the requirements of Section 1.945(c)(2) of the Commission's rules.

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[126] *Id*. at 7. John Doerr, a managing partner of KPCB, is a founding board member of M2Z. *Id.*

[127] *Id*. Bruce Sachs, the managing partner of CRV, is a founding board member of M2Z. *Id.*

[128] *Id*. at 7-8. Geoff Yang, a managing partner of Redpoint Ventures, is a founding board member of M2Z. *Id.*

[129] In the Application, M2Z certified that it had reasonable assurances from various sources that would allow it access to over $400 million for construction and operation of NBRS. *Application* at 8. As explained in the Application, M2Z has access to funds through both its venture capital owners and through various strategic business relationships. Because many of these relationships are confidential and release of sensitive information concerning them would be inconsistent with M2Z's contractual obligations, M2Z has not disclosed this information in the Application or the instant Petition. Should the Commission wish to review additional financial information about M2Z or its partners, M2Z will provide such additional information, upon request, under a cover of confidentiality.

B. Grant of M2Z's Application Will Not Result in Modification, Revocation, or Non-Renewal of Any Other License.

Section 1.945(c)(3) provides that the Commission will grant a wireless license application without a hearing if the Commission finds that a grant of the application would not involve modification, revocation, or non-renewal of any other existing license.[130] The spectrum M2Z proposes to use has a limited universe of incumbent licensees, all of whom the Commission has reassigned to other spectrum bands.[131] In the interim, until they relocate, M2Z has committed to protecting these incumbent licensees from harmful interference,[132] and to satisfying its obligations under the Commission's relocation procedures.[133] M2Z also has pledged to provide interference protection to AWS licensees on adjacent channels using its proposed out-of-band emission standards.[134] Thus, grant of the Application would not involve the modification, revocation, or non-renewal of any other existing license, and such grant will comply with Section 1.945(c)(3) of the Commission's rules.

C. The Mutual Exclusivity Requirement Should Not Preclude the Grant of M2Z's Application.

Section 1.945(c)(4) provides that the Commission will grant a wireless license application without a hearing if the Commission finds that a grant of the application would not

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[130] *See* 47 C.F.R. § 1.945(c)(3).

[131] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (2004) (ordering relocation of BRS licensees in the 2150-2156 and 2156-2160 MHz bands to the 2496-2502 and 2618-2624 MHz bands); *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*, 20 FCC Rcd 15866 (2005) (ordering relocation of users in the 2155-2160 MHz band).

[132] *See Application* at 19-21.

[133] *See id*. at 19.

[134] *See id*. at 20-21 & Appendix 2.

preclude the grant of any mutually exclusive application.[135] This element of Section 1.945(c) should be deemed satisfied or inapplicable to M2Z's Application. In the past, the Commission has avoided accepting mutually exclusive applications when overriding public interest considerations outweigh the need to conduct a spectrum auction. In light of the compelling public interest benefits of NBRS, the Commission should afford similar treatment to M2Z's Application and expeditiously grant the Application.

1. The Commission has the statutory authority and the obligation to avoid mutual exclusivity when the public interest so demands.

The Commission has the authority to process and grant M2Z's Application without accepting mutually exclusive, competing applications and conducting a spectrum auction. The Commission's auction authority, set forth in Section 309(j) of the Act,[136] is just one, but not the only, spectrum management tool it may use in granting applications consistent with "the public interest, convenience, and necessity."[137] Indeed, nothing in Section 309(j) requires the Commission to accept mutually exclusive applications in the first place. To the contrary, the Commission's statutory authority to accept mutually exclusive applications and to grant licenses pursuant to competitive bidding, as set forth in Section 309(j)(1), is conditioned upon the fulfillment of other higher priority spectrum management duties set forth in Section 309(j)(6)(E).[138]

Specifically, Section 309(j)(6)(E) provides that the acceptance of competing applications and the use of competitive bidding does not "relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications,

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[135] *See* 47 C.F.R. § 1.945(c)(4).

[136] 47 U.S.C. § 309(j).

[137] 47 U.S.C. § 309(a).

[138] *See* 47 U.S.C. § 309(j)(1) (acceptance of mutually exclusive applications must be "consistent with the obligations described in paragraph (6)(E)" of Section 309).

service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[139] As previously interpreted, this section of the Act requires the Commission to avoid mutual exclusivity by using the spectrum management tools prescribed in Section 309(j)(6)(E) when the public interest so demands.[140] Thus, the Commission's auction authority is not absolute, nor is the acceptance of mutually exclusive applications required by Section 309(j) when inconsistent with the public interest.

2. The Commission previously has avoided accepting mutually exclusive applications.

The Commission previously has exercised its authority to elevate the public interest above the auction process. For example, in the 800 MHz re-banding proceeding, the Commission granted to Nextel Communications, Inc. ("Nextel") wholly new, exclusive, and nationwide spectrum rights in the 1.9 GHz band without subjecting Nextel to competing applications or the auction process based on the growing interference to public safety operations

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[139] 47 U.S.C. § 309(j)(6)(E). Congress did not want the Commission to interpret its auction authority in a way that would reduce its Section 309(j)(6)(E) obligation: "[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity." H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997). *See also Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 11962-63 (2000) ("Section 309 (j)(6)(E) has been construed to give the Commission broad authority to create or avoid mutual exclusivity in licensing, based on the Commission's assessment of the public interest," citing *DirectTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997)). *Cf. Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605-06 (D.C. Cir. 2000) (Section 309(j)(6)(E) neither requires the Commission to avoid mutual exclusivity, nor to create it; the touchstone is what best serves the public interest).

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

arising from Nextel's service and other CMRS operations in the 800 MHz band.[141] In that proceeding, the Commission concluded that it has both the statutory authority and the obligation to preclude the filing of mutually exclusive applications when "higher public interest uses of spectrum" are present.[142] Significantly, the Commission also held that it has the "authority to grant rights to the ten megahertz of spectrum to Nextel as an initial license, without subjecting the spectrum to competitive bidding procedures . . . . to address satisfactorily the public interest imperatives" at issue.[143]

Similarly, when the Commission in 2003 authorized Mobile Satellite Service ("MSS") providers to integrate ancillary terrestrial component ("ATC") frequencies into their networks, it did so without reallocating the spectrum, without accepting competing applications, and without conducting an auction.[144] In that proceeding, the Commission concluded that restricting eligibility for ATC frequencies to existing MSS licensees was consistent with the public interest because it would promote, among other benefits, "the development and rapid deployment of new technologies, products, and services for the benefit of the public."[145] Both the 800 MHz re-

[141] *See Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969, ¶¶ 69-74 (2004).

[142] *Id.* ¶ 73; *see also id*. ("Section 309(j) supports our conclusion that we have the authority to avoid mutual exclusivity . . . when it is in the public interest to do so . . . . [I]n Section 309(j)(6)(E), Congress recognized that the Commission can determine that its public interest obligation warrants action that avoids mutual exclusivity, and that this obligation extends to 'application and licensing proceedings' . . . not just initial licensing matters."); *see also id*. at n.236 ("[E]ven if we were to classify the 1.9 GHz authorization as a matter of initial licensing, we have not authorized the filing of mutually exclusive applications; none are, in fact, on file; and . . . we have the authority—and obligation—to impose threshold qualifications that preclude the filing of such mutually exclusive applications if we determine that the public interest requires such an approach.").

[143] *Id.* ¶ 74.

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

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

banding and the MSS-ATC decisions establish that public interest considerations predominate the Section 309(j) calculus and that the Commission may exercise its authority to supersede the auction process when overriding public interest concerns so require.

3. The public interest benefits of M2Z's proposed service outweigh the need to accept mutually exclusive applications.

M2Z's Application to bring free nationwide broadband service to the American people merits the same result reached in the 800 MHz re-banding and MSS-ATC proceedings. As demonstrated in its Application, M2Z has the legal, technical, and financial qualifications to build a national wireless broadband network in nearly vacant, unpaired spectrum for which the Commission currently has no long-term plan.[146] Moreover, as explained in detail in the Application,[147] M2Z's proposed service will yield concrete and immediate public interest benefits, including, among others:

(1) Providing free wireless broadband service to the nation;

(2) Increasing competition in the market for the delivery of broadband service;

(3) Rapid deployment of service in accordance with strict construction benchmarks;

(4) Mandatory filtering of obscene and indecent material;

(5) Creating a free interoperable broadband platform for public safety organizations;

(6) Voluntary five percent spectrum usage payments to the U.S. Treasury each year derived from M2Z's premium service offerings.

There can be little doubt that the numerous benefits of M2Z's proposal warrant a decision by the Commission to follow its precedent to avoid mutual exclusivity where doing so furthers the public interest.

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[146] *See Application* at 6-8 & 15-16.

[147] *See id.* at 22-32.

4. **Grant of the Application will establish a generous revenue stream for the U.S. Treasury.**

Today, licenses to use the public airwaves are awarded through a process that provides the U.S. Treasury with a one-time payment that represents a potential licensee's best estimate of the value of that particular license at the time of bidding. If spectrum is undervalued by auction participants, the government has no recourse; a licensee that earns billions using a license that cost a fraction of one year's annual revenue doesn't share that windfall with the public. The price paid for a license at auction is a snap-shot that freezes the value of spectrum in time and does not reflect developments in the marketplace that may occur after the final round of bidding. For example, PCS spectrum garnered a total of $17 billion in winning bids at auction. Today, the industry enjoys an annual revenue of $100 billion. If the PCS industry were paying a five percent share of its revenues to the U.S. Treasury, that would mean $5 billion just for 2006.[148] Whether the government truly "recover[s] for the public a portion of the value of the public spectrum resource" through an auction depends entirely on whether bidders happen to make good estimates.[149] Thus, the amounts collected through spectrum auctions do not necessarily reflect the true value of this public asset.

This is perhaps the reason why auctions are not the only means by which federal, state, and local governments ensure that the public is compensated by businesses that use public resources. Cable operators, for example, typically compensate local governments for access to public rights-of-way and other rights associated with cable franchises by paying a franchise fee equal to five percent of their gross revenues.[150] As Congress considers new legislation to permit

[148] *See id.* at 32, n.98 (comparing total revenues from PCS auctions to a five percent share of the PCS industry's annual gross revenues).

[149] *See* 47 U.S.C. §309(j)(3)(C) (requiring the Commission to ensure that licensees compensate the public for use of valuable spectrum and prevent unjust enrichment by licensees).

[150] *See* 47 U.S.C. 542(b) (establishing franchise fee cap of five percent of gross revenues).

national franchising for video services, both the House and Senate are proposing to cap franchise fees at this same level for new entrants in the video marketplace, such as telecommunications carriers.[151] When the Commission was faced with deciding how to ensure adequate compensation for broadcasters' use of digital television broadcast spectrum for feeable ancillary and supplementary services, it decided that broadcasters should provide five percent of the revenues derived from feeable services deployed on that second channel.[152] There, the Commission held that "a fee of five percent of gross revenues fulfills our statutory obligations to impose a fee which recovers for the public some portion of the value of the spectrum, prevents the unjust enrichment of broadcasters providing feeable ancillary or supplementary services, and approximates, to the extent possible, the revenues that would have been received had the spectrum on which these services are provided been licensed through an auction."[153] The White House also supports Commission use of spectrum usage fees as a way of compensating the public for the use of its airwaves.[154] A "royalty fee" method of compensation for use of public

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[151] *See* Communications Opportunity Promotion and Enhancement Act of 2006, H.R. 5252 § 630 (c)(1) 109th Cong., 2nd Sess. (2006) ("A cable operator authorized under this section to provide cable service in a franchise area shall pay to the franchising authority in such franchise area a franchise fee of up to 5 percent (as determined by the franchising authority) of such cable operator's gross revenues from the provision of cable service under this section in such franchise area."); Communications, Consumer's Choice, and Broadband Deployment Act of 2006, S.2686 § 603(b)(3)(B) 109th Cong., 2nd Sess. (2006) (providing for default grant of any video franchise application not acted upon within 30 days with an automatic cap on franchise fees at five percent of a video provider's gross revenue); *id.* § 331(b)(1) (establishing franchise fee cap of five percent of gross revenues for all other video franchises).

[152] *See* 47 U.S.C. § 336(e); *see also Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 3259 ¶ 20 (1998) ("*Digital Broadcast Fee Order*").

[153] *Digital Broadcast Fee Order* ¶ 20. The Commission believed that this approach would strike an appropriate balance—while it would prevent unjust enrichment and recover a portion of the spectrum's value for the public, it would not "dissuade broadcasters from using their DTV capacity to provide new and innovative services that can greatly benefit consumers." *Id.*

[154] *See Budget of the United States Government, Fiscal Year 2006,* available at: http://www.whitehouse.gov/omb/budget/fy2006/other.html ("To continue to promote efficient spectrum use, the Administration also supports granting the FCC authority to set user fees on unauctioned spectrum licenses based on public-interest and spectrum-management principles."); *Budget of the United States Government, Fiscal Year 2007,* available at: http://www.whitehouse.gov/omb/budget/fy2007/other.html

resources can provide a regular stream of payments that reflect a portion of the actual value of that resource.

As explained in the Application, in addition to providing basic NBRS to the country free of recurring charges, M2Z also will offer a subscription-based service with such premium features as faster data rates and access to additional content and/or applications (the "Premium Service").[155] M2Z has voluntarily committed to pay an annual spectrum usage fee to the U.S. Treasury in the amount of five percent of the gross revenues derived from the Premium Service, and has proposed that this commitment be included among the terms and conditions of its license.[156] Unlike the one-time, snapshot payment that would be derived from an auction, the proposed usage fee would ensure that the public obtains an ongoing benefit through periodic payments to the U.S. Treasury that reflect a percentage of the actual value of the spectrum—not merely its predicted value. As subscribership for the Premium Service increases, the amounts paid to the U.S. Treasury will multiply, ensuring a steady stream of revenue that will far outstrip what could be obtained at a spectrum auction.[157] Consistent with Section 309(j), this revenue stream will ensure "recovery for the public of a portion of the value of the public spectrum resource" and will avoid any unjust enrichment for M2Z.[158]

("To promote efficient spectrum use, the Administration supports granting FCC authority to set user fees on unauctioned spectrum licenses based on public-interest and spectrum-management principles….User fees will help to ensure that spectrum is put to its highest and best use, by internalizing the value of spectrum to license holders.")

[155] *Application* at 26.

[156] *Id*.

[157] M2Z's business model and technological research also will pave the way for other nationwide broadband wireless services. By granting the Application, the Commission will be able to realize value for the American people not only from M2Z's NBRS service, but from similar services that follow. Others may choose to follow the NBRS model using existing licenses or licenses awarded in the future, and the fees generated from these services will provide additional revenue to the U.S. Treasury.

[158] *See* 47 U.S.C. § 309(j)(3)(C).

In short, the Application identifies multiple means by which the public will be compensated for M2Z's use of the airwaves. In addition to free broadband Internet access, unlimited public safety access to a free network, and a reduction in the amounts the public will ultimately pay into the universal service fund, M2Z also will assure a steady stream of revenue into public coffers through its proposed license condition of a five percent spectrum usage fee.

For all of the foregoing reasons, M2Z submits that Section 1.945(c)(4), requiring that the grant of M2Z's Application not preclude the grant of any mutually exclusive application, is satisfied, or should be deemed inapplicable to the Application.

D. Grant of the Application Will Serve the Public Interest, Convenience, and Necessity.

Section 1.945(c)(5) provides that the Commission will grant a wireless license application without a hearing if the Commission finds that a grant of the application would serve the public interest, convenience, and necessity.[159] As M2Z has explained in detail in the Application, as well as in various sections of this Petition, numerous public interest benefits will result from the introduction of NBRS in the marketplace. The public interest benefits that will result from the grant of this Petition are identical to those that would result from the grant of the Application because both actions would introduce a new entrant in the broadband market offering free service to all Americans. Thus, the Commission may achieve the concrete, enforceable public interest benefits of NBRS—free nationwide coverage, competition from a truly new entrant in the broadband market, a network that filters obscene and indecent material, service to our nation's first responders, and a five percent revenue-based spectrum usage fee—through forbearance or grant of the Application.[160]

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[159] *See* 47 C.F.R. § 1.945(c)(5).

[160] *See Application* at 22-32.

E. There Are No Substantial or Material Questions of Fact.

Section 1.945(c)(1) provides that the Commission will grant a wireless license application without a hearing if the Commission finds that there are no substantial and material questions of fact.[161] M2Z's Application sets forth a specific and complete proposal to provide NBRS, including applicable service rules, interference standards, buildout requirements, and licensing conditions.[162] The proposal presents no risk of harmful interference to co-channel or adjacent channel licensees, as M2Z will comply with all of the rules applicable to other AWS licensees. Finally, the public interest obligations to which M2Z has committed itself would be legally enforceable as license conditions. There are, therefore, no "substantial and material questions of fact" concerning the Application.

In any event, however, if unforeseen circumstances give rise to potential regulatory obstacles, the Commission can and should forbear from application of its rules to the extent necessary to bring the enormous benefits of NBRS service to the American public. All of the facts necessary for the Commission to grant to Application have been provided; now the Commission needs to decide only whether it is ready to accomplish its goal of providing affordable access to a robust and reliable broadband service for all Americans. By approving the creation of a free, nationwide broadband Internet access service, this Commission will respond to the resounding call of American consumers and policymakers.

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[161] *See* 47 C.F.R. § 1.945(c)(1).

[162] *See Application* at Appendix 2 (Conditions for Grant of M2Z's License and Operation of Its Network).

VII. CONCLUSION

For the foregoing reasons, M2Z respectfully requests, pursuant to Section 10 of the Act, that the Commission forbear from applying Sections 1.945 (b) and (c), and any and all other provisions of the Act or the Commission's rules or policies, to the extent such provisions or policies would delay or prevent the acceptance and grant of M2Z's Application.

Respectfully submitted,

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September 1, 2006

CERTIFICATE OF SERVICE

I, Erin L. Dozier, an attorney in the law office of Sheppard Mullin Richter & Hampton, LLP, hereby certify that I have on this 1st day of September, 2006 caused a copy of the foregoing Petition of M2Z Networks, Inc. for Forbearance to be delivered by hand to the following:

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