

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

In the Matter of)	
)	
M2Z NETWORKS, INC.)	
)	
Application for License and Authority to)	WT Docket No. 07-16
Provide National Broadband Radio Service)	
In the 2155-2175 MHz Band)	
)	
Petition for Forbearance Under)	WT Docket No. 07-30
47 U.S.C. § 160(c) Concerning Application of)	
Sections 1.945(b) and (c))	
Of the Commission's Rules and Other)	
Regulatory and Statutory Provisions)	

To: Chief, Wireless Telecommunications Bureau

**CONSOLIDATED OPPOSITION OF M2Z NETWORKS, INC.
TO PETITIONS TO DENY**

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EXECUTIVE SUMMARY

Last Spring, M2Z Networks, Inc. (“M2Z”) filed an Application requesting an exclusive fifteen-year, renewable license to operate a nationwide wireless broadband network in the 2155-2175 MHz band (the “Application”). In the Application, M2Z proposed a set of voluntary license conditions that would, provided that the license is granted, allow the public to reap extraordinary benefits – both economic and social. In the Fall, pursuant to Section 10 of the Act, M2Z filed a Petition for Forbearance that reiterated the significant public interest benefits to be achieved by grant of its Application and sought Commission forbearance from any rule, provision of the Act, or Commission policy that could be construed as impeding acceptance or Commission grant of the Application. The Commission recently put both the Application and the Petition on official Public Notice.

To no one’s surprise, most of the large, incumbent wireless operators, along with the trade association that represents their interests, petitioned to deny M2Z’s Application, as did a handful of spectrum prospectors that filed alternative proposals for the 2155-2175 MHz band – all of which were far less complete and compelling than M2Z’s Application. The parties opposing the Application (collectively, the “Petitioners”) are not motivated by a desire to bring the highest and best services to American consumers. To the contrary, the Petitioners are motivated by a desire to protect their private economic interests, which would be threatened by the entry into the market of a true new national provider of wireless broadband services. Their meritless arguments against grant of the Application are another attempt to guard access to spectrum that the Petitioners typically regard as their own to use rather than as a public resource.

Wireless and broadband communications are not, however, the private domain of a few entrenched incumbents, and the legal and policy arguments offered by the Petitioners cannot

fence it off as such. Hundreds of parties have filed in support of M2Z's Application, all in recognition of the unprecedented public interest and consumer welfare benefits that will flow from M2Z's service. Nothing in the Communications Act or the Commission's rules and policies stands as a bar to the realization of those benefits. The time has come, therefore, for the Commission to act decisively in furtherance of solutions rather than to delay again the productive use of the 2155-2175 MHz spectrum band. By granting the Application, the Commission can stand with those seeking to compete, rather than with those looking for protection from competition, and can promote the public interest when others invoke it only in support of arguments for self-serving regulatory gridlock.

As explained in detail in this Opposition, the Commission can and should grant the Application and assign a license to M2Z on the terms proposed therein. The Commission's first responsibility in this regard is to determine the highest and best use of the 2155-2175 MHz band currently allocated for Advanced Wireless Services. M2Z's detailed proposal in the Application, now bolstered by the Petition for Forbearance and the hundreds of supportive analyses and comments in this docket, has shown the Commission the best way forward for this spectrum band. Creation of the National Broadband Radio Service ("NBRS") proposed in the Application will result in dramatic public interest and consumer welfare benefits, as well as important public safety benefits, while promoting the rapid and widespread deployment of free broadband service in under-served and high-cost areas throughout the nation. M2Z's Application conclusively demonstrates that it is the only entity ready and willing to provide the NBRS, and thereby facilitate the creation of a family-friendly broadband competitor to entrenched wireline incumbents while simultaneously creating billions of dollars in savings for consumers of broadband services and for the Universal Service Fund as well.

Contrary to the assertions of the Petitioners, the Commission does have the authority under the competitive bidding provisions in Section 309(j) of the Act to grant M2Z a license without auction. In fact, the Commission must avoid mutual exclusivity in the licensing process when doing so is in the public interest. M2Z's concrete proposal to provide a long overdue and ubiquitous third broadband platform will serve the public interest and fulfill the Commission's broadband deployment mandates far more readily than auctioning off additional licenses to incumbents looking to add to their already massive collections of warehoused spectrum. The Commission has a long and continuing history of assigning spectrum licenses in the public interest without using auctions, and it should continue that practice here.

Furthermore, although the Act forbids the Commission from taking potential auction revenues into account in its public interest determination, the unprecedented level of public interest and consumer welfare benefits promised by the NBRS – along with M2Z's voluntary commitment to pay an annual spectrum usage fee to the U.S. Treasury – ensure that the public will be compensated generously for M2Z's use of this public spectrum resource. The Petitioners lodge an array of meritless complaints against the Application, but contrary to the parade of horrors evoked in their pleadings, M2Z does not attempt to resurrect discarded Commission licensing policies of the past. Instead, M2Z merely asks the Commission to comply with the law and fulfill its most basic responsibility to promote new services and new technologies while managing spectrum in the public interest.

The Application provided adequate assurances regarding M2Z's proposals to avoid harmful interference to soon-to-be relocated incumbents within the 2155-2175 MHz band, as well as to licensees in neighboring bands, but those assurances are re-stated and amplified in this Opposition. As a result, the Commission should not take up the Petitioners' suggestion to

initiate further proceedings or to delay productive use of the band until such time as incumbent wireless carriers and spectrum speculators are good and ready to get around to deploying competitive services. The fulsome record in this proceeding has provided the Commission with all of the information it needs to determine the highest and best use of the 2155-2175 MHz band and to grant M2Z's Application

In addition to phantom interference concerns and flawed interpretations of the Commission's authority to establish service rules in this proceeding, some Petitioners resort to raising previously discredited arguments about the propriety of the Commission's various license assignment mechanisms or M2Z's proposed license conditions and voluntary spectrum usage fees. As with their arguments regarding the Commission's auction authority, the Petitioners' arguments on these counts do nothing to refute M2Z's sound legal reasoning and public interest showing in the Application. In the end, therefore, the Commission can and should grant the Application and deny the Petitions to Deny, as each petition fails to refute the public interest benefits of M2Z's proposal. The petitions to deny also fail to rebut the Act's presumption in favor of proposals for the provision of innovative new technologies and new services such as M2Z's proposed NBRS. Therefore, M2Z respectfully submits that the Commission should establish the NBRS and grant the license requested in the Application, exercising its forbearance authority in the event that any barriers in the Commission's rules and policies remain before such a grant can issue.

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To: Chief, Wireless Telecommunications Bureau

**CONSOLIDATED OPPOSITION OF M2Z NETWORKS, INC.
TO PETITIONS TO DENY**

M2Z Networks, Inc. (“M2Z”), by counsel, and pursuant to Section 309(d)(1) of the Communications Act (the “Act”), 47 U.S.C. § 309(d)(1), hereby submits this Consolidated Opposition to Petitions to Deny (the “Opposition”) filed in the above-captioned docket. The petitions to deny to which M2Z responds, as well as other submissions in this docket also referenced in this Opposition, pertain to M2Z’s Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band (the “Application”).¹ As demonstrated herein, the petitions to deny the Application do not refute the showing made by M2Z in favor of its request. Moreover, as demonstrated in M2Z’s Consolidated Motion to

¹ See M2Z Networks, Inc., Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16, at 2–3 (filed May 5, 2006, and amended Sept. 1, 2006).

Dismiss Alternative Proposals,² also filed in this docket, alternative 2155-2175 MHz proposals that were submitted after acceptance for filing of the M2Z Application to the Federal Communications Commission (the “Commission”) should be promptly dismissed as defective and insufficient, and not accepted for filing. Therefore, M2Z respectfully submits that the Commission should grant the Application and dismiss or deny all petitions to deny.

INTRODUCTION

On May 5, 2006, M2Z filed with the Commission an Application requesting an exclusive fifteen-year, renewable license to operate a nationwide wireless broadband network on spectrum in the 2155-2175 MHz band. In the Application, M2Z proposed a set of voluntary conditions for M2Z’s license that the Commission subsequently could enforce pursuant to its authority under the Act. Among those conditions were M2Z’s obligations to: (1) make available to the public, without any recurring airtime fees, a new broadband Internet access service to be known as the National Broadband Radio Service (or “NBRS”), with downlink speeds of at least 384 kilobits per second (“kbps”) and uplink speeds of at least 128 kbps, and accessible to every consumer equipped with low-cost customer devices capable of receiving M2Z’s free service; (2) make the NBRS available to every federal, state, county, and municipal public safety organization in the United States, with no limitation on the number of devices that any particular public safety agency could attach to the M2Z network; (3) make family-friendly content filtering technology available to all users of the NBRS, so that parents would have the ability to protect their children from potentially harmful content; and (4) make an annual payment to the U.S. Treasury in the

² See Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals, WT Docket Nos. 07-16 & 07-30 (filed Mar. 26, 2007) (“M2Z Consolidated Motion to Dismiss”). Similarly, M2Z’s Consolidated Motion to Dismiss and Strike Petitions to Deny and Alternative Proposals demonstrates that each of the petitions to deny, regardless of caption, are procedurally defective and subject to dismissal. See Consolidated Motion of M2Z Networks, Inc. to Dismiss and Strike Petitions to Deny and Alternative Proposals, WT Docket Nos. 07-16 & 07-30 (filed Mar. 26, 2007).

form of a spectrum usage fee equal to five percent of the revenues derived from a premium, subscription-based service that M2Z also would offer over the 2155-2175 MHz band.³ Citing statistics regarding the then-current state of broadband deployment in the United States, M2Z committed to use its license to deploy a third national platform for delivering broadband services throughout the United States.⁴

On September 1, 2006, M2Z filed a Petition for Forbearance⁵ with the Commission, pursuant to Section 10 of the Act, 47 U.S.C. § 160. In its Petition for Forbearance, M2Z reiterated the significant public interest benefits to be achieved by grant of its Application and sought Commission forbearance from any rule, provision of the Act, or Commission policy that could be construed as impeding acceptance or Commission grant of the Application.

On January 31, 2007, the Commission issued a Public Notice (the “Public Notice”) accepting the Application for filing, seeking comment on the Application, and inviting alternative proposals to operate in the 2155-2175 MHz band.⁶ Hundreds of parties thereafter filed supportive comments and other submissions urging the Commission to grant M2Z’s Application, as well as submissions urging the Commission to consider the merits of M2Z’s unprecedented proposal in a timely fashion. These commenters noted and lauded the wide-ranging public interest benefits that grant of the Application would generate, including

³ See Application at 12.

⁴ See *id.* at 10.

⁵ See Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(a) and (c) of the Commission’s Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-30, at 2 (filed Sept. 1, 2006) (the “Petition for Forbearance”). The Commission subsequently solicited comment on the Petition for Forbearance and established a pleading cycle for such comments in a separate docket. See *Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of Its Application for a License to Provide Radio Service in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-30, DA 07-736, (Wireless Telecom. Bur. rel. Feb. 16, 2007) (the “Forbearance Public Notice”).

⁶ *Wireless Telecommunication Bureau Announces that M2Z Networks, Inc.’s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing*, Public Notice, WT Docket No. 07-16, DA 07-492 (Wireless Telecom. Bur. rel. Jan. 31, 2007) (the “Public Notice”).

(1) bolstering the competitiveness of small and independent businesses;⁷ (2) creating a more competitive broadband marketplace,⁸ (3) increasing diversity in the management and ownership of communications outlets,⁹ (4) enhancing educational opportunities,¹⁰ (5) bridging the digital divide,¹¹ (6) supplementing and enhancing public safety communications,¹² (7) promoting

⁷ See, e.g., Comments of the California Association for Local Economic Development, WT Docket No. 07-16, at 2–3 (submitted Feb. 14, 2007) (noting that widespread governmental interest in deploying broadband stems from recognition that broadband access fosters economic development and that M2Z’s innovative proposal will help government expand broadband access using private funds); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket No. 07-16, at 10–11 (submitted Mar. 2, 2007) (“MMTC Comments”) (noting that the Internet is crucial to the success of all small and independent businesses, which account for over 99% of all companies, and asserting that “a free, nationwide broadband Internet access service would extend the potential of e-commerce to all businesses.”); Comments of The Electronic Retailing Association, WT Docket Nos. 07-16 and 07-30, at 1–2 (submitted Feb. 26, 2007) (“ERA Comments”) (noting that connection to the Internet makes available to online entrepreneurs the ability to market directly to the end-consumer in an affordable and direct way through e-mail, websites and advertising); Comments of MAN-n-BAG, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 16, 2007) (highlighting the importance of online distribution channels for small business operators).

⁸ See, e.g., Comments of The Center for Digital Future, WT Docket No. 07-16, at 2 (submitted Feb. 27, 2007) (explaining the importance of market competition by highlighting the price drop for DSL service and an associated increase in broadband adoption); Comments of FiberTower Corporation, WT Docket 07-16, at 2 (submitted Mar. 2, 2007) (“Consumers win because they ultimately enjoy all the benefits of enhanced competition including greater choice and lower prices.”); ERA Comments at 2 (submitted Feb. 6, 2007) (noting that only 35% of small businesses currently have websites and only 57% use the Internet for business related activities, which “further exemplifies the need for affordable, reliable solutions to the significant, and often times, insurmountable, cost of broadband connectivity”); MMTC Comments at 10–11 (asserting that readily available broadband access is essential for small and independent businesses to remain successful in an increasingly electronic world); Comments of The Latino Coalition, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 22, 2007) (“Latino Coalition Comments”) (explaining that most Americans only have two choices for broadband: cable and DSL, which are still cost prohibitive to many Americans).

⁹ See, e.g., MMTC Comments at 2, 4 (noting that (“[w]ith one of the most diverse ownership and management teams of any communications business,” M2Z is “a model of diversity for other communications businesses to follow”).

¹⁰ See, e.g., Comments of Educause, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) (“Ubiquitous broadband Internet access would empower teachers and promote student success by taking the educational experience beyond the walls of the classroom.”); Comments of the National PTA, WT Docket No. 07-16, at 2 (submitted Mar. 1, 2007) (asserting that M2Z’s proposal is as an “innovative and equitable way to ensure that broadband is an educational resource available to all Americans – parents, children and educators”); Comments of the Higher Education Wireless Access Consortium, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) (supporting M2Z’s proposal because M2Z will help bridge the gap of wireless connectivity in the classrooms of those schools with fewer resources); Comments of the League for Innovation in the Community College, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) (reporting that while computer and Internet access has increased, there still remains a substantial information divide with “communities that do not have adequate access to the Internet and technology-based training, resources, and services”); Comments of the College Parents of America, WT Docket No. 07-16, at 1 (submitted Feb. 28, 2007) (indicating that with the cost of college rising, free broadband service would provide great financial relief to struggling parents and would allow more students to participate in distance learning programs).

¹¹ See, e.g., Comments of the Association of Community Organizations for Reform Now, WT Docket 07-16, at 1–2 (submitted Feb. 2, 2007) (stating that current Internet providers are more interested in the bottom line through service to wealthier Americans with high monthly subscription rates, while M2Z will solve the problems of broadband availability *and* affordability); Comments of One Economy Corporation, WT Docket No. 07-16, at 2

spectral efficiency,¹³ and (8) protecting children from objectionable online materials,¹⁴ among many others.

On March 2, 2007, various parties filed a total of ten petitions to deny or other submissions opposing grant of the Application, with most of these coming from incumbent wireless carriers and their representatives, or from parties filing alternative proposals or suggesting other uses of the band.¹⁵ Five such alternative proposals were filed on that same day.¹⁶

(submitted Mar. 1, 2007) (“[T]his type of market innovation will further One Economy’s mission, benefit an underserved portion of our country, and serve the public interest.”); Latino Coalition Comments at 2 (submitted Mar. 22, 2007) (citing National Center for Education Statistics showing that only 44% of Hispanic children use the Internet at school, compared to 59% of all students, and arguing that “M2Z Networks offers a legitimate opportunity to shrink the digital divide and provide real opportunities for the Latino community to take advantage of the incredible educational and economic development opportunities available on the Internet and to develop skills and compete for jobs in the information economy”).

¹² See, e.g., Comments of the National Troopers Coalition, WT Docket 07-16, at 1 (submitted Feb. 6, 2007) (“M2Z’s proposed network will provide another layer of redundancy to bolster existing and planned public safety-operated networks and help law enforcement stay operational in disasters.”).

¹³ Comments of Alion Science & Technology, WT Docket Nos. 07-16 and 07-30, at 2 (submitted Mar. 2, 2007) (“Alion Science & Technology Comments”) (concluding, after review of M2Z’s proposal, that “M2Z’s proposed network will use the most spectrally efficient technologies that are currently available for commercial radio systems”).

¹⁴ See, e.g., Comments of Most Reverend Paul S. Loverde, WT Docket No. 07-16, at 2 (submitted Mar. 2, 2007) (emphasizing the importance of advancements like M2Z’s network level filter to protect families from Internet pornography); Comments of United Families International, WT Docket Nos. 07-16 and 07-30, at 1–2 (submitted Mar. 16, 2007) (supporting access to “clean” wireless broadband for American families); Comments of Internet Keep Safe Coalition, WT Docket No. 07-16, at 2 (submitted Mar. 1, 2007) (expressing approval of M2Z’s network-level filtering of indecent and pornographic material); Comments of Enough is Enough, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 13, 2007) (“By making a commitment to use highly effective network based filtering, M2Z has found an innovative balance between spurring the rapid adoption of high speed internet service and protecting children and families from on line pornography and sexual predators.”).

¹⁵ On March 2, 2007, the Commission received in this docket a total of seven pleadings formally styled as petitions to deny the Application, as well as two submissions styled as Comments and one pleading captioned as an Opposition. See AT&T Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“AT&T Petition to Deny”); CTIA – The Wireless Association, Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“CTIA Petition to Deny”); Petition to Deny of Motorola, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007) (“Motorola Petition to Deny”); NextWave Broadband Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“NextWave Petition to Deny”); Petition to Deny of T-Mobile USA, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007) (“T-Mobile Petition to Deny”); Petition to Deny of Verizon Wireless, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“Verizon Wireless Petition to Deny”); Wireless Communications Association International, Inc., Petition to Deny, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“WCA Petition to Deny”); Comments of the Consumer Electronics Association, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“CEA Comments”); Comments of Leap Wireless International, Inc., WT Docket No. 07-16 (submitted Mar. 2, 2007)

On March 9, 2007, the Commission issued a Public Notice (the “March Public Notice”) establishing a pleading cycle that extended¹⁷ the deadline for petitions to deny and other filings pertaining to the Application.¹⁸ Three additional petitions to deny or comments opposing grant of the Application were filed prior to the March 16 deadline established in the March Public Notice,¹⁹ along with one additional alternative proposal submitted by a party that also filed a petition to deny.²⁰ Pursuant to the pleading cycle established in the March Public Notice, M2Z timely submits this Opposition, which also includes M2Z’s response to various other submissions filed in this docket.

This Opposition reiterates the many reasons supporting a swift Commission grant of the Application. The Opposition highlights the significant public interest and consumer welfare benefits of the proposal described in the Application and also discusses the Commission’s

(“Leap Wireless Comments”); Opposition of EchoStar Satellite L.L.C., WT Docket No. 07-16 (submitted Mar. 2, 2007) (“EchoStar Opposition”).

¹⁶ See Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“Open Range Proposal”); Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“NextWave Proposal”); Application of Commnet Wireless, LLC for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“Commnet Proposal”); Application of NetfreeUS, LLC for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“NetfreeUS Proposal”); Application of McElroy Electronics Corporation for a Nationwide 2155-2175 MHz Band Authorization, WT Docket No. 07-16 (submitted Mar. 2, 2007) (“McElroy Proposal”).

¹⁷ The Commission’s rules provide that petitions to deny an application subject to Section 309(d) of the Act must be filed no later than thirty days after the date of the public notice listing the application as accepted for filing. See 47 C.F.R. § 1.939(a)(2).

¹⁸ *Wireless Telecommunication Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band*, Public Notice, WT Docket No. 07-16, DA 07-987 (Wireless Telecom. Bur. rel. Mar. 9, 2007) (the “March Public Notice”).

¹⁹ See Consolidated Petition to Deny and Comments of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 15, 2007) (“TowerStream Petition to Deny”); Consolidated Petition to Deny and Comments of the Rural Broadband Group, WT Docket No. 07-16 (submitted Mar. 16, 2007) (“Rural Broadband Group Petition to Deny”); Comments of the Information Technology Industry Council, WT Docket No. 07-16 (submitted Mar. 16, 2007) (“ITI Comments”).

²⁰ Proposal of TowerStream Corporation, WT Docket No. 07-16 (submitted Mar. 16, 2007) (“TowerStream Proposal”).

statutory obligations under Sections 7 and 10 of the Communications Act, and Section 706 of the Telecommunications Act of 1996 (the “Telecommunications Act”), to resolve M2Z’s Application and grant its requested license in a timely manner. Furthermore, the Opposition demonstrates that the spectrum use the Application proposes for the 2155-2175 MHz band, pursuant to the conditions and rules to which M2Z’s services would be subject under the terms of the Application, would constitute the highest and best use of that heretofore under-utilized band.

Parties filing petitions to deny and comments opposed to M2Z’s request (collectively, the “Petitioners”), as well as those submitting alternative proposals in response to the Public Notice, fail to rebut the overwhelming evidence in the record that M2Z’s proposed new service would promote the public interest.²¹ The Application, along with the overwhelming majority of submissions filed in response to the Public Notice, attests to the many public interest and consumer welfare benefits of the proposed NBRS. Neither the alternative proposals for use of the 2155-2175 MHz band, nor any potential proposals that can be imagined by parties filing petitions to deny, commit to producing public interest and consumer welfare benefits remotely approaching the benefits that M2Z’s service would provide. In view of this fact, the Commission has an obligation to declare the proposed NBRS as the highest and best use of the 2155-2175 MHz band, and thereafter to grant the Application as consistent with the public interest.²²

²¹ See, e.g., M2Z Consolidated Motion to Dismiss at 17-50 (describing the public interest benefits to be created by M2Z’s proposed service and demonstrating that the alternative proposals are mere shadows of the concrete and comprehensive proposal described in M2Z’s Application and in other filings in this docket).

²² The act of granting a license is not discretionary under Sections 307 and 309 of the Act once the public interest is met. See 47 U.S.C. § 307 (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, *shall* grant to any applicant therefor a station license provided for by this Act.”) (emphasis added); 47 U.S.C. § 309 (“[T]he Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it *shall* grant such application.”) (emphasis added).

Moreover, Sections 7 and 10 of the Act, and Section 706 of the Telecommunications Act, compel the Commission to make such a determination and grant the Application in the near term. Because M2Z's NBRIS is a new service which uses new technology, Section 7 establishes a presumption in favor of the Application and a one-year timeframe within which the Commission must render its decision.²³ It is up to those opposing M2Z to rebut that presumption²⁴ – a task that, based on the weight of the evidence in the robust record compiled in this proceeding, the Petitioners have failed to accomplish. Section 10 of the Act and Section 706 of the Telecommunications Act have long been used by the Commission to remove regulatory barriers to the deployment of broadband services, and should likewise be used here.

Although the Petitioners put forward a number of legal and policy arguments as to why the Application should be dismissed, all of their arguments fail. As discussed in further detail below, Section 309(j)(6)(E) of the Act provides the Commission with the authority to grant M2Z's license request without accepting alternative license requests for filing or conducting an auction. The Commission must avoid mutual exclusivity and grant the Application if it determines that such action is in the public interest. When evaluated against the public interest goals set forth in Section 309(j)(3) of the Act, the service proposed in the Application clearly promotes the objectives that the Commission seeks to foster in the assignment of spectrum licenses. Try as they might, Petitioners cannot avoid the fact that M2Z's proposal would generate the very type of public interest benefits that require the Commission to exercise its authority under Section 309(j)(6)(E) to avoid the mutual exclusivity in license applications that triggers the Act's auction requirement.

²³ See 47 U.S.C. § 157(a)–(b).

²⁴ See *id.* § 157(a).

Petitioners' other arguments against the Application are similarly unpersuasive. The Commission has already considered and rejected some of these assertions in similar contexts, such as the invalid theory that grant of the Application violates the Anti-Deficiency Act (the "ADA") and the Miscellaneous Receipts Act (the "MRA"). Other arguments, such as the assertion that the Commission has no authority to accept M2Z's proposal to make an annual spectrum usage fee payment, have no basis in law. Some arguments put forward by the Petitioners, such as the argument that the Application seeks to resurrect the Commission's former pioneer's preference program, misread the Application and ignore the reasons supporting a grant suggested therein. Finally, Petitioners' claims that the Commission must complete a lengthy and unnecessary service rules proceeding, and do so before issuing a 2155-2175 MHz license, have no basis in the Commission's decisions or rules in light of the fact that the Application has already undergone considerable scrutiny and been subject to a fair and open hearing in this docket.

The benefits of M2Z's proposed NBRS are substantial. Grant of the Application would promote significant Commission policy objectives while furthering important social goals and creating tangible economic benefits. The record is replete with information regarding the potential positive impact of the service. It is now time for the Commission to truly act aggressively to spur the provision of broadband services by making the 2155-2175 MHz band available for the NBRS, granting the Application, and allowing M2Z to move forward with its plans to deploy a third nationwide broadband platform throughout the United States.

I. THE COMMISSION HAS AN OBLIGATION TO ESTABLISH THE NBRS AS THE HIGHEST AND BEST USE OF THE 2155-2175 MHZ BAND

A. The Commission Has a Responsibility, Prior to Making a License Assignment in the 2155-2175 MHz Band, to Determine the Use of the Band That Best Promotes the Public Interest

Spectrum management is one of the Commission’s core responsibilities under the Act.²⁵

Although proper spectrum management certainly involves the evaluation and selection of prospective spectrum licensees, another important aspect of spectrum management – which must always occur prior to the license assignment phase – involves determining how a particular spectrum band should be used. In this case, before the Commission actually assigns a license to operate in the 2155-2175 MHz band, it must first identify and prescribe those uses of the band that would best promote the public interest. In making that determination, it must compare the public interest and consumer welfare benefits that would be generated by M2Z’s proposal to provide the NBRS and other services²⁶ against the public interest and consumer welfare benefits that would be generated by alternative uses.

Moreover, contrary to the suggestions of CTIA²⁷ and certain incumbent wireless providers,²⁸ the Commission will be able in this proceeding (and the related forbearance proceeding) to gather all of the information it needs to specify the most appropriate use of the 2155-2175 MHz band, and should have no need for any additional proceedings. The Commission reallocated the 2155-2175 MHz band for the Advanced Wireless Service (“AWS”)

²⁵ See, e.g., 47 U.S.C. § 151 (identifying as one of the Commission’s responsibilities the regulation of communication by radio in order to make available a nationwide radio communication service); see also *id.* § 157(a) (establishing the policy of the United States “to encourage the provision of new technologies and services to the public”); *id.* § 303(g) (ordering the Commission to “[s]tudy new uses for radio . . . and generally encourage the larger and more effective use of radio in the public interest”).

²⁶ See generally Application at 2–6 (summarizing services proposed to be offered pursuant to the license requested in the Application, as well as the conditions to be imposed on that license).

²⁷ See CTIA Petition to Deny at 6.

²⁸ See, e.g., AT&T Petition to Deny at 25–26; T-Mobile Petition to Deny at 2.

in 2002.²⁹ Yet, since that time the Commission has taken no significant, additional steps to get that reallocated spectrum into the market. M2Z has moved into the void by proposing a use of the band, and related service and technical rules, that would deliver a valuable package of public interest and consumer welfare benefits, including: broadband access free of airtime or service charges and available to 95 percent of the U.S. population; free access to the network for public safety agencies; family-friendly filtering technology that would allow parents to better protect their children from harmful material; and potentially huge savings in the subsidies that would be required to bring broadband access to high-cost areas. Although this use is unquestionably in the public interest, in order to test that contention the Commission has subjected M2Z's proposal to a public comment and evaluation process and invited alternative proposals. Despite the fact that the public has now had ample opportunity to develop proposals for superior uses of the 2155-2175 MHz band, none of the alternative proposals submitted come anywhere close to providing the public interest and consumer benefits generated by M2Z's proposal.³⁰

Although some Petitioners urge the Commission to further delay making the 2155-2175 MHz band useful and productive for consumers by initiating yet another proceeding,³¹ the reality is that M2Z's proposal stands as the highest and best use of the band. Therefore, instead of devoting valuable time and resources to a lengthy service rules proceeding, the Commission should move quickly to issue a decision concluding that the NBRS is the highest and best use of

²⁹ 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*, Second Report and Order, 17 FCC Rcd 23193 (2002) ("AWS Allocation Order").

³⁰ See, e.g., M2Z Consolidated Motion to Dismiss at 17-50 (describing flaws in each of the alternative proposals submitted by other parties).

³¹ See petitions to deny cited *supra*, nn. 27–28; see also CEA Comments at 2; WCA Petition to Deny at 3.

the band.³² As M2Z’s Application represents the best and most comprehensive proposal – and indeed, the only legitimate proposal – for using the 2155-2175 MHz band to rapidly expand broadband access in the public interest, the Commission should thereafter grant the Application and issue the requested license to M2Z.

As discussed in greater detail in Part III.A below, the Commission has ample authority and discretion to facilitate the licensing of the 2155-2175 MHz band through an open adjudicative proceeding such as the one initiated in this docket, rather than through a rulemaking. It is not true, as Petitioners suggest, that the Commission must conduct a service rules rulemaking before assigning spectrum licenses. Commission action upon M2Z’s Application without opening a formal rulemaking is consistent with the Administrative Procedure Act (the “APA”) and the concept of fundamental fairness that governs the Commission’s administrative processes. The APA requires that the Commission provide interested parties with notice and a reasonable opportunity to comment on the Application.³³ The Bureau’s placement of the Application on Public Notice,³⁴ and the full record developed in response to that Public Notice, demonstrate that the Commission’s actions thus far fully satisfy the requirement for a fair deliberation regarding the highest and best use for this historically under-utilized spectrum band.

³² As explained in greater detail in Part III below, the Commission has been seeking the highest and best use of this spectrum for more than fifteen years, and within the context of the AWS proceeding explicitly sought comment several years ago on the best use for spectrum resources in and near the 2155-2175 MHz band. *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*, Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, ¶¶ 62, 70 (2003). This Third Report and Order asked for industry assistance in the Commission’s effort to determine the highest and best use for the band, but the band continued to be underutilized for several more years and the Commission’s questions remained unanswered until M2Z submitted the Application.

³³ *See, e.g., Nat’l Elec. Mfrs. Ass’n v. EPA*, 99 F.3d 1170, 1174 (D.C. Cir. 1996); *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir.1995). In these and other cases ruling on the propriety of agency action under the APA’s notice and comment rulemaking provisions, courts note that the requirements of notice and an opportunity to comment are designed only to facilitate public participation and fairness in agency decisionmaking and to assure interested parties that the agency will have before it the facts and information necessary to render a decision. *See MCI Telecommunications Corp.*, 57 F.3d at 1141.

³⁴ *See* Public Notice, cited *supra* note 6.

Moreover, unlike other bands where the Commission has declined to use its powers of adjudication to assign licenses, the 2155-2175 MHz band is lightly used and devoid of mature, consumer-based services.³⁵ This proceeding, initiated by acceptance of the Application for filing, has seen vigorous participation by other parties filing in support of and in opposition to the Application.³⁶ These parties have all had a full and fair opportunity to air their views, generating a record that will assist the Commission in addressing all policy concerns regarding use of the band. Additional process would serve no purpose other than the illegitimate purpose of delaying use of the band to provide an important third national platform for the provision of broadband services.

B. Grant of the Application Would Provide Concrete and Guaranteed Public Interest Benefits, Consumer Benefits, and Public Safety Benefits, as well as Savings for and Direct Payments to the U.S. Treasury

1. The Public Interest Benefits of M2Z's Proposal are Spelled Out in the Application

M2Z's proposed service would engender numerous public interest and public safety benefits. As discussed in more detail below, these public interest benefits are more than sufficient to grant the Application pursuant to the statutory tests set forth in Section 7³⁷ and

³⁵ See, e.g., *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶ 218 (2002) ("Northpoint Order"). As discussed in further detail in Part III.A.1 herein, the Northpoint Order authorized the Multichannel Video Distribution and Data Service (or "MVDDS") in a spectrum band with numerous incumbent users, including Direct Broadcast Satellite and Non-Geostationary Orbit Fixed Satellite Service licensees. While the creation of the MVDDS in this band required implementation of spectrum sharing arrangements necessary to avoid harmful interference to incumbents, the 2155-2175 MHz band the M2Z proposes to use for its service is not used by any providers offering currently viable consumer-based services.

³⁶ Parties had ample time to review and comment on the Application after the issuance of the initial Public Notice on January 31, 2007, as well as the additional time granted by the March Public Notice. Moreover, prior to the release of either of these Wireless Telecommunications Bureau notices, the Application had been on file for nearly nine months, available in the Commission's reference room and on M2Z's website, and written about extensively in the trade and popular press. The result was a well developed record in a docket containing more than 440 submissions prior to March 26, 2007.

³⁷ 47 U.S.C. § 157; see also discussion *infra* Part I.C, discussing the Commission's obligations under Section 7.

Section 309(j)(3)³⁸ of the Act. The benefits arising from M2Z’s proposed service also meet or exceed those provided by other spectrum-based services in which the Commission has assigned licenses or granted additional spectrum rights previously without the use of competitive bidding. Based on the comprehensive nature of M2Z’s Application, the quantity and quality of the public interest and consumer welfare benefits it offers, the comprehensive solution to service rules for the 2155-2175 MHz band that it provides, and the promise of regular, voluntary payments to the U.S. Treasury in order to compensate the public for use of this spectrum resource, M2Z’s Application should be considered the benchmark against which the Commission makes public interest determinations and measures all other proposed uses and proposed rules for the band.

M2Z’s Application and subsequent filings in this docket have highlighted the numerous public interest and consumer welfare benefits that would result from use of the band for the NBRS and the Commission’s grant of M2Z’s license request.³⁹ M2Z will provide all of these benefits while also ensuring that its network operates in a manner that protects existing and

³⁸ 47 U.S.C. § 309(j)(3); *see also* discussion *infra* Part II, discussing the Commission’s authority to assign licenses in the public interest.

³⁹ M2Z has undertaken voluntary but enforceable public interest commitments to (1) make available a robust level of broadband service throughout the United States, free of airtime or service charges, via the NBRS; (2) commence service within 24 months of grant of Commission authorization, reaching certain specified population coverage benchmarks within a set number of years after commencement of service and providing service to 95% of the nation within ten years after commencement of service; (3) utilize state of the art network filtering technology in order to provide a family-friendly service; (4) serve any federal, state, or municipal public safety agency willing to utilize the NBRS, without limit to the number of such agency’s devices that may be attached to the network; (5) accelerate the deployment of broadband services in unserved and under-served high-cost areas without relying on Universal Service Fund (“USF”) support; and (6) offer faster data rates and additional services on a subscription basis, with voluntary payments to the U.S. Treasury of a “usage fee” in an amount equal to five percent of the gross revenues derived from such premium service. *See* Application at 12. NextWave attacks M2Z’s public interest showing on the grounds that the Application does not promise rapid deployment of widespread and affordable broadband service. *See* NextWave Petition to Deny at 8. Providing little support for its statement, NextWave assures the Commission that “[p]rogress towards this goal is already occurring in the marketplace. *Id.* (emphasis in original). Apparently the progress toward this goal in the marketplace has been so steady and self-evident that NextWave felt no need to substantiate its claims regarding the deployment of an affordable and ubiquitous wireless broadband service that would be substitutable for cable and DSL wireline broadband offerings. Despite NextWave’s statements to the contrary, M2Z’s proposal will go a long way toward increasing the availability of broadband to *all* Americans, without regard to the “geographic and demographic” factors that have slowed progress in deploying affordable broadband service in many low-income and under-served areas of the nation. *See id.* at 9.

anticipated future licensees from harmful interference and strictly complies with the Commission's existing policies for the relocation of Fixed Service and Broadband Radio Service operations currently located within the 2155-2175 MHz band.⁴⁰ In view of its public interest and consumer welfare benefits, and the fact that provision of M2Z's service will assist the Commission in fulfilling its obligations to promote the deployment of advanced services under Section 706 of the Telecommunications Act,⁴¹ the Commission should swiftly review the pleadings filed in this and the related Petition for Forbearance docket and grant the Application.

2. The Consumer Welfare Benefits To Be Generated by M2Z's Entry Into the Broadband Marketplace Have Been Thoroughly Documented in the Record

As explained in papers submitted in this docket by the Commission's former Chief Economist, Dr. Simon Wilkie, on March 1, 2007, and by Dr. Kostas Liopiros on March 19, 2007, M2Z's entry into the marketplace for broadband and telecommunications services will by conservative estimates generate for U.S. consumers a net present value ranging from more than \$18 billion to more than \$32.4 billion.⁴² The low end of this range is a cautious estimate because Dr. Wilkie focused his analysis on only three first-order effects of M2Z's entry: the benefits of

⁴⁰ See *id.* at 13; see also discussion *infra* Part III.D.1.

⁴¹ See Telecommunications Act of 1996, sec. 706, Pub. L. No. 104-104, 110 Stat. 153 (1996), 47 U.S.C. § 157 note.

⁴² See Simon Wilkie, "The Consumer Welfare Impact of M2Z Networks Inc.'s Wireless Broadband Proposal," WT Docket No. 07-16, at 3, 8 (submitted Mar. 2, 2007) (Wilkie, "Consumer Welfare Impact"); Kostas Liopiros, "The Value of Public Interest Commitments and the Cost of Delay to American Consumers," WT Docket No. 07-16, at i-ii (submitted Mar. 19, 2007) ("Liopiros"). Dr. Liopiros takes a similarly cautious approach, but estimates the total benefit at an even higher level due in part to inclusion of public safety agency benefits.

In this study we estimate the benefits generated by M2Z's entry in the broadband market focusing on four major effects: competitive impact of M2Z's entry, benefits accruing to subscribers of M2Z's Free Service, benefits accruing to the public from public safety agencies access to M2Z's Free Service and, finally, benefits accruing to the public from payments of a spectrum usage fee to the U.S. Treasury. Assuming M2Z is permitted to enter the market in 2008, according to these calculations, American consumers and the public will experience average annual benefits of \$3.8 billion, and aggregate consumer benefits over the 15-year term of the license would amount to \$32.4 billion

Id.

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

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

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

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

⁴⁴ See *id.* at 21.

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

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

⁴⁷ *Id.* at 25.

⁴⁸ *Id.*, Appendix 4, at 4.

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

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

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

⁴⁹ *Id.*

⁵⁰ Liopiros at 2–3.

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

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

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

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

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

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

⁵³ Application, Appendix 2, at 2.

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

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

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

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

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

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

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

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

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

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

⁶⁰ See Application, Appendix 5, at 24.

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

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

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

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

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

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

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

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

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

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

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

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

Section 7(b) of the Act, 47 U.S.C. § 157, provides that the Commission “shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.”⁶⁸ This provision was enacted specifically to: (1) “encourage the availability of new technology and services to the public”; (2) prevent the Commission from “hamper[ing] the development of new services”; and (3) allow “the forces of competition and technological growth [to] bring many new services to consumers.”⁶⁹ Moreover, because Congress found these objectives to be of such paramount importance, Section 7(a) places the burden on those who oppose a proposal for new technology or services to demonstrate that the proposal is inconsistent with the public interest.⁷⁰ This burden-shifting procedure “is intended to shift the balance of the process in favor of new services”⁷¹ and creates “a presumption that new services are in the public interest.”⁷²

⁶⁸ 47 U.S.C. § 157(b).

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

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

⁷¹ See Dingell Remarks, at E74. In addition, Section 7(a) is intended to “preclude the Commission [from] considering the claim of adverse economic effect on an existing licensee when such claim is raised” against a petition or application proposing a new service or technology. *Id.*

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

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

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

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

⁷³ See, e.g., *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, ¶ 57 (2003) (subsequent history omitted); see also *1998 Biennial Regulatory Review—Testing New Technology*, Policy Statement, 14 FCC Rcd 6065 (1999); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 18 n.67 (2004); *Revision of Part 15 of the Commission’s Rules Regarding Ultra-Wideband Transmission Systems*, Notice of Proposed Rulemaking, 15 FCC Rcd 12086, ¶ 8 (2000); *Amendment of Parts 2 and 15 of the Commission’s Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, Notice of Proposed Rulemaking, 9 FCC Rcd 7078, ¶ 10 (1995); *Amendment of Parts 1 and 21 of the Commission’s Rules to Redesignate the 27.5 to 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service*, Second Notice of Proposed Rulemaking, 9 FCC Rcd 1394, ¶ 27 (1994).

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

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

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

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

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

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

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

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

A Commission decision to adopt M2Z’s proposed NBRS and grant the Application would be consistent with previous actions taken pursuant to Section 706 to eliminate unnecessary regulatory barriers to the rapid deployment and adoption of broadband service. Yet, such a decision would have a far greater positive impact on the deployment of broadband

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

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

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

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

⁸² *Id.*

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

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

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

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

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

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

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

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

⁸⁴ *See supra* note 5.

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

⁸⁶ *See* Petition for Forbearance at 2.

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

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

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

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

⁸⁸ See *id.*, ¶¶ 5, 6, 14.

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

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

⁹¹ *AT&T Inc.*, 452 F.3d at 835.

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

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

⁹² *Id.*

⁹³ Section 10 provides, in pertinent part, that “the Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.” 47 U.S.C. § 160(c)(emphasis added). This has been interpreted by the courts to require the Commission to “fully consider” a petition for forbearance within the statutory one-year period and provide a “fully considered analysis” of the petition. *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (“[U]nder the Commission’s view, nothing would stop it from finding that the statutory deadline permits ‘fully considered analysis’ of only narrow petitions, and thus adopting a rule that any petition seeking forbearance from more than one regulation is contrary to the public interest. This cannot be correct. Nothing in section 10(a)(3) allows the Commission to avoid ruling on the merits of a forbearance petition whenever it finds the statutory deadline inconvenient. Quite to the contrary, section 10(a)(3)’s very purpose is to force the Commission to act within the statutory deadline.”); see also *In re Core Communs.*, 455 F.3d 267 (D.C. Cir. 2006) (“Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue the explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation.”).

⁹⁴ Petition for Forbearance at 1.

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

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

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

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

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

⁹⁷ March Public Notice at 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In other words, the Commission must avoid mutual exclusivity after determining the highest and best use for a particular spectrum band if another method for assigning spectrum licenses within that band would better serve the public interest. Section 309(j)(6)(E) concludes by specifying that the Commission must “continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity” in the spectrum licensing process, if it determines that such an approach would better serve its public interest mandate.¹⁰⁷

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

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

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

¹⁰⁷ *Id.* § 309(j)(6)(E).

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁴ See AT&T Petition to Deny at 9.

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

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

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

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

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

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

¹¹⁸ *Id.*

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

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

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

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

¹²⁰ *See id.*, ¶ 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

4. M2Z's Public Interest Showing Meets or Exceeds the Section 309(j)(6)(E) Standard As Applied By the Commission in Prior Cases

The public interest benefits of M2Z's proposed service far exceed the public interest benefits of other commercial services that the Commission has previously seen fit to authorize without the use of competitive bidding or any commitment by the licensee to make direct payments to the U.S. Treasury.¹²⁶ As required in Section 309(j)(3), grant of the Application, which includes M2Z's commitment to an unprecedented and aggressive network buildout schedule, would promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without undue delays. Consistent with the second prong of Section 309(j)(3), grant of the Application also would promote economic opportunity, avoid excessive concentration of licenses used to provide broadband services, and facilitate true intermodal broadband competition between wireline and wireless providers. Grant of the Application would also allow the public to recover through annual spectrum usage fee payments a portion of the value of the public spectrum resource used to provide M2Z's service, thus satisfying the third prong of Section 309(j)(3). Finally, M2Z's use of TDD technology provides a significant breakthrough that would allow for the most efficient use of the unpaired spectrum, thereby satisfying the fourth prong of Section 309(j)(3).¹²⁷

CTIA and other Petitioners have challenged the Commission's authority to fulfill its obligations under Section 309(j)(6)(E) in other proceedings before the Commission, and those

¹²⁶ See *infra* Part II.B for a discussion of the Commission's history of assigning spectrum licenses and expanding spectrum usage rights without the use of competitive bidding mechanisms, both before and after the enactment of the competitive bidding provisions in Section 309(j).

¹²⁷ See Alion Science & Technology Comments (concluding, after review of M2Z's proposal, that "M2Z's proposed network will use the most spectrally efficient technologies that are currently available for commercial radio systems").

challenges have been unsuccessful.¹²⁸ The issue of the Commission’s discretion and authority to act in the public interest when assigning spectrum licenses is settled law, and CTIA’s re-hashing of its arguments against this well settled proposition should be given no weight here.¹²⁹ While there are distinctions to be made between the facts underlying the Commission’s decisions in prior proceedings and the facts supporting grant of M2Z’s Application, the Petitioners overstate the differences and fail to offer any *meaningful* distinctions between the present proposal and those earlier examples.¹³⁰ For instance, the Commission based its decision in the *800 MHz Re-banding Order*¹³¹ to modify existing licenses held by Nextel for public safety purposes on facts and policy considerations similar to those presented by the M2Z Application. The justifications that the Commission offered for its actions in the 800 MHz Re-banding proceeding are equally applicable to the instant Application, and thus justify grant of M2Z’s request, as do the public interest and consumer welfare benefits outlined in Part I above. M2Z’s Application will similarly help resolve public safety concerns, and also will help address a myriad of important policy goals, including the rapid deployment of competitive, affordable, and family-friendly broadband service in unserved and under-served areas, alleviating pressure on the USF,

¹²⁸ See *800 MHz Re-banding Order*, ¶¶ 70–72 (rejecting CTIA and Verizon Wireless claims that grant of an initial license must be subject to competitive bidding simply because other carriers intend to participate in any auction that may be held but the Commission instead determines “that it is not in the public interest to open the spectrum for competitive applications”).

¹²⁹ See CTIA Petition to Deny at 4.

¹³⁰ See, e.g., NextWave Petition to Deny at 22; Verizon Wireless Petition to Deny at 8–9. Meanwhile, AT&T attempts to distinguish the two situations in terms of the financing and guarantees in place, of all things, contrasting M2Z’s proposal with Nextel’s situation on the grounds that the Commission required Nextel to establish an irrevocable letter of credit for the 800 MHz reconfiguration. See AT&T Petition to Deny at 6–7. AT&T misreads Nextel’s obligations in that proceeding. Nextel did not establish an irrevocable letter of credit to *fund* the 800 MHz reconfiguration, but obtained it to ensure that it would complete the transition, regardless of any future financial downturn, in a manner that would ensure no harm to other licensees public safety operation. This is not analogous to M2Z’s situation. There are no public safety operations to protect in the 2155-2175 MHz band, and M2Z has already tied its build out obligations to its license terms, meaning that if M2Z were to fail in its project it would be the sole Commission licensee harmed by an incomplete buildout.

¹³¹ See *800 MHz Re-banding Order*, *supra*, note 125.

enhancing the level of broadband competition, and protecting children from indecent online content.¹³²

M2Z's promise of free secondary service to public safety officials on a nationwide wireless broadband platform will help ameliorate the critical public safety interoperability issues highlighted by the tragedies of September 11th and Hurricane Katrina.¹³³ In this way, M2Z will contribute to the "system of systems" concept as outlined in SAFECOM's efforts to advance emergency response wireless interoperability.¹³⁴ No less critical than addressing grave interference issues in the 800 MHz band are the interoperability issues that the Commission has undertaken to resolve now.¹³⁵ Grant of the license requested in M2Z's Application would enable "higher public uses for spectrum," and Commission action to allow for such higher uses of spectrum are not precluded by the "auction requirements" that are applicable under Section

¹³² See discussion *supra* Part I.B.

¹³³ AT&T callously and unavailingly attempts to minimize the public safety benefits that would be realized from improved interoperability owing to use of the NBRIS. It is difficult to understand AT&T's contention that prolonged national traumas and natural disasters do not implicate "imminent safety of life issues," or its argument that such imminent and vital safety concerns would not be addressed by improving interoperability. See AT&T Petition to Deny at 9.

¹³⁴ See Department of Homeland Security, the SAFECOM Program, "Public Safety Statement of Requirements for Communications & Interoperability," Volumes 1 and 2, Version 1.2, October 2006, *available at* http://www.safecomprogram.gov/SAFECOM/library/technology/1258_statementof.htm ("SAFECOM Program"); see also *id.* Section 5; Comments of PacketHop, WT Docket No. 07-16, at 4 (submitted Mar. 1, 2007) ("M2Z is responding to the Commission's recognition that having more networks available to public safety is important enough that 'there may now be a place for commercial providers to assist public safety in securing and protecting the homeland'" (quoting Federal Communications Commission, Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State and Local Emergency Response Providers, 14 FCC Rcd 7772, ¶ 25 (2005) ("Report to Congress"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262865A1.pdf).

¹³⁵ See, e.g., *Report to Congress*, ¶ 2. In its report, the Commission succinctly described the need for a service such as the NBRIS proposed by M2Z.

In light of the information in the record and from practical experience wrought from the aftermath of hurricanes Katrina and Rita, this report examines the spectrum needs of traditional public safety entities and other critical first responders. This report also considers *proposals to enhance public safety interoperability, particularly broadband interoperability, ranging from the deployment of a nationwide, interoperable network to more easily achievable solutions that employ widely available commercial technologies.*

Id. (emphasis added).

309(j) only after the Commission determines to accept mutually exclusive applications.¹³⁶

Within the framework established by the *800 MHz Re-banding Order*, the public safety communications applications made possible as a result of M2Z’s requested license would result in the “furtherance of the public interest by . . . avoid[ing] mutual exclusivity [and instead] promot[ing] public safety.”¹³⁷

The Application does not request “free spectrum”¹³⁸ or the use of valuable spectrum resources in return for nothing. As explained herein, and in the Application and numerous other filings in this docket in support of the Application, M2Z has made enforceable promises to provide public interest benefits in the form of free nationwide wireless broadband service, public safety spectrum use, and annual contributions to the U.S. Treasury representing five percent of M2Z’s gross revenues attributable to its premium service. Parties opposing the Application attempt to dismiss M2Z’s investment in widespread deployment of broadband infrastructure, and M2Z’s promise of ubiquitous free broadband service, as overly optimistic or unpromising when compared to existing offerings in the market for wireless broadband.¹³⁹ However, considering all of these public interest and public safety benefits, including the reduction in strain on universal service funds needed for deployment of broadband and the family-friendly service benefits promised by the Application, it is clear that M2Z’s Application represents a value-for-value proposition. The Commission therefore can satisfy the mandate in Section 309(j)(3)(C) of the Act to recoup “for the public” – and for the U.S. Treasury as well, but more importantly for

¹³⁶ See *800 MHz Re-banding Order*, ¶ 73.

¹³⁷ *Id.*

¹³⁸ See CTIA Petition to Deny at 3; T-Mobile Petition to Deny at 1.

¹³⁹ See, e.g., AT&T Petition to Deny at 16–17; T-Mobile Petition to Deny at 8; WCA Petition to Deny at 6; Rural Broadband Group Petition to Deny at 3.

the public as a whole – “a *portion* of the value of the public spectrum resource made available for commercial use.”¹⁴⁰

Thus, it is not the case that M2Z asks the Commission to read Section 309(j)(6)(E) in such a manner as to defeat Section 309(j)(1) itself, or to interpret this subsection outside the context of Section 309(j) as a whole.¹⁴¹ Section 309(j)(1) mandates competitive bidding only “[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are *accepted*.”¹⁴² Additional applications have not been accepted, and as explained herein and in M2Z’s Consolidated Motion to Dismiss, consistent with 309(j)(6)(E), those filings should not be accepted. Moreover, as noted above, the Commission’s *1997 Balanced Budget Act Order* discussed the nature of the public interest determination to be made pursuant to the mandates of Section 309(j)(6)(E) and stipulated the use for these purposes of the public interest goals enumerated in Section 309(j)(3). The Commission has ample authority under Section 309(j) to consider M2Z’s Application on the merits and determine whether M2Z’s request for a license in the 2155-2175 MHz band would serve these public interest goals, as Section 309(j)(6)(E) requires.

Various Petitioners also contend that the Commission did not rely on Section 309(j)(6)(E) – either in the 800 MHz Re-banding proceeding or in the proceeding to grant Ancillary Terrestrial Component (“ATC”) authority to Mobile Satellite Service (“MSS”) providers – to

¹⁴⁰ 47 U.S.C. § 309(j)(3)(C) (emphasis added). The Application also meets the Section 309(j)(3)(D) objective calling upon the Commission to promote “efficient and intensive use of the electromagnetic spectrum.” *See* 47 U.S.C. § 309(j)(3)(D). A TDD system such as the one that M2Z’s proposed in the Application significantly raises the bar for “efficient and intensive use” of spectrum by allowing two-way communications services to be provided over a single, unpaired spectrum band.

¹⁴¹ *See, e.g.*, Verizon Wireless Petition to Deny at 8 (suggesting that M2Z’s reading of the plain text in Section 309(j)(6)(E) “completely gut” the competitive bidding mandate of Section 309(j)(1)).

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

grant initial licenses to affected parties.¹⁴³ This contention misreads the Commission’s pronouncements on its discretion in such contexts. In the *800 MHz Re-banding Order*, the Commission explained that “Section 309(j) supports our conclusion that we have authority to avoid mutual exclusivity in this context when it is in the public interest to do so. Although 309(j) requires auctions whenever mutually exclusive applications for initial license are filed, Section 309(j)(6)(E) provides that “[nothing in this subsection shall] be construed to relieve the Commission of the *obligation in the public interest* to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity *in application and licensing proceedings*.”¹⁴⁴ Thus, the fact that these cases involved license modifications rather than initial license grants has no bearing whatsoever on the applicability of Section 309(j)(6)(E) to the issue at hand.¹⁴⁵

In reality, Section 309(j)(6)(E) allows the Commission to do precisely what NextWave and other Petitioners contend that the Commission cannot do: make a spectrum assignment decision based on its reasoned and considered view regarding the use of the spectrum and the applicant that would best promote the public interest in its use of the license. If this were not the case, then Section 309(j)(6)(E)’s language reserving the Commission’s authority to use threshold qualifications and service rules to avoid mutual exclusivity would have no meaning.¹⁴⁶ The Commission clarified this point in the *800 MHz Re-banding Order* when it stated that “we could have exercised our authority to grant rights to the ten megahertz of spectrum to Nextel as an

¹⁴³ See, e.g., NextWave Petition to Deny at 6, 21; EchoStar Opposition at 2.

¹⁴⁴ *800 MHz Re-banding Order*, ¶ 73 (alterations and emphases in original).

¹⁴⁵ See Verizon Wireless Petition to Deny at 9.

¹⁴⁶ See N. Singer, *Statutes and Statutory Construction* § 46.06, pp 181-186 (rev. 6th ed. 2000) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”) (footnotes omitted).

initial license, without subjecting the spectrum to competitive bidding procedures. The auction requirement of Section 309(j)(1) applies only when the Commission has accepted mutually exclusive applications for a new license.”¹⁴⁷

When expanding the rights initially granted to MSS licensees, the Commission also rejected calls for competitive bidding and segmentation of the affected bands and decided that such segmentation “would not be an ‘efficient and intensive use of the electromagnetic spectrum’” or satisfy other factors enumerated in Section 309(j)(3) of the Act.¹⁴⁸ In rejecting these calls for an auction of the additional spectrum use rights, the Commission indicated that it “must consider and balance all of the objectives of Section 309(j)(3) in identifying classes of licenses to be auctioned, including ‘the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas’” and the efficient and intensive use considerations cited above.¹⁴⁹

5. Grant of the Application Would Be More Certain than a Spectrum Auction to Provide the Public Interest Benefits of the NBRS

As demonstrated herein and in the record in this docket, M2Z’s proposal satisfies the same Section 309(j)(3) objectives that the Commission cited in the ATC proceeding and elsewhere. For these reasons, the Commission should not heed calls from incumbent wireless carriers for an auction of the 2155-2175 MHz band when M2Z’s Application already provides for the development and rapid deployment of new services for the benefit of the public. It is entirely unsurprising that several of the Petitioners would call for auction of this spectrum, or

¹⁴⁷ 800 MHz Re-banding Order, ¶ 74.

¹⁴⁸ See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers*, Memorandum Opinion and Order and Second Order on Reconsideration, 20 FCC Rcd 4616, ¶ 79 (2005) (“*ATC Memorandum Opinion and Order*”) (citing 47 U.S.C. § 309(j)(3)(A)).

¹⁴⁹ *Id.*, ¶ 81 (citing 47 U.S.C. § 309(j)(3)(D)); see also 47 U.S.C. § 157 (noting that, independent of the auction context, it is the policy of the United States and the Commission to “encourage the provision of new technologies and services to the public”).

that they would justify their request with claims that an auction is the surer route for satisfying Section 309(j)(3)(A) objectives such as rapid deployment of new services for the benefit of the public, including those residing in rural areas.¹⁵⁰ Surprising or not, the Commission should give no weight to the transparently self-serving argument that 2155-2175 MHz spectrum must be made available to incumbents in order to promote innovation and foster the delivery of new services.

As the Commission's records demonstrate, spectrum auctions do not always result in timely assignment of licenses, let alone rapid deployment of service.¹⁵¹ Furthermore, auctioning off the 2155-2175 MHz band to an incumbent wireless carrier would not satisfy the mandate in Section 309(j)(3)(B) to avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants.¹⁵² Opening an auction for this spectrum to incumbents also would ignore the poor track record that incumbent wireless carriers have in terms of deploying fixed and portable wireless broadband services that serve as substitutes for – rather than mere mobile complements to – existing offerings of duopolistic wireline broadband service.¹⁵³

Furthermore, the contention that auctions always lead to rapid deployment of new technologies, products, and services in under-served areas ignores the very real economic incentives for entrenched incumbents and spectrum speculators to influence the outcome of auctions, and even to acquire and warehouse spectrum they do not intend to use, in order to limit,

¹⁵⁰ See, e.g., CTIA Petition to Deny at 4-5 (asserting that “the auction process ensures that scarce spectrum resources are put to their highest and best use”).

¹⁵¹ See, e.g., Wireless Telecommunications Bureau Grants 36 VHF Public Coast and Location and Monitoring Service Licenses, Report No. AUC-39, DA 07-1097 (Wireless Telecom. Bur. rel. Mar. 13, 2007) (announcing grant of licenses in mid-March 2007 to a bidder that won those licenses at auction six years ago, in June 2001).

¹⁵² See 47 U.S.C. § 309(j)(3)(B).

¹⁵³ See Wilkie, “Consumer Welfare Impact,” at 9–10.

delay, or prevent entry by new competitors.¹⁵⁴ As explained by Dr. Wilkie in a separate economic analysis also submitted in this docket, incumbent wireless carriers – including certain Petitioners and their corporate affiliates or parents – have a troubling track record relating to the warehousing of spectrum.¹⁵⁵ While acquiring spectrum without any intent to put it to good use might seem like an irrational economic choice, Dr. Wilkie explains that incumbent carriers may in fact have the incentive and ability to deter entry by new service providers, using methods designed to raise potential competitors’ costs.¹⁵⁶ Meanwhile, speculators may be able to increase the scarcity of spectrum – and therefore the value of their own spectrum holdings – by erecting barriers to entry or increasing the costs associated with acquiring spectrum rights.¹⁵⁷

Incumbents and speculators have the power and means to inflict such costs on their potential rivals. Due to the scarcity of spectrum and the limited opportunities for new entrants to acquire access to this essential resource, existing licensees or their affiliates have ready access to methods for controlling access to spectrum and preventing competition. Dr. Wilkie notes that the telecommunications sector today contains discrete and significant hurdles to entry in the form of spectrum licenses. While only the Commission has the authority to assign licenses, an auction process that does not limit participation by incumbents and potential speculators can be used to prevent potential entrants from acquiring spectrum resources.¹⁵⁸ With a viable mechanism in place to undertake such anticompetitive endeavors, incumbents seeking to block entry by

¹⁵⁴ See Simon Wilkie, PhD., “*Spectrum Auctions Are Not a Panacea: Theory And Evidence Of Anti-Competitive and Rentseeking Behavior in FCC Rulemakings and Auction Designs*,” WT Docket Nos. 07-16 & 07-30, at 13 – 19, 39 (filed Mar. 26, 2007) (“*Wilkie II*”).

¹⁵⁵ See *id.* at 19 (citing *Promoting Efficient use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Comments of 37 Concerned Economists, WT Docket No. 00-230, at 6 (submitted Feb. 7, 2001)).

¹⁵⁶ See *id.* at 15–18.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

potential competitors would find it profitable to do so if the price paid for spectrum rights at auction is less than the amount of lost profit incumbents might experience due to increased competition in the market for their services.¹⁵⁹

Real world examples of such behavior and of apparent spectrum warehousing are numerous. For instance, licensees in the 2.3 GHz Wireless Communications Service (“WCS”) including AT&T, BellSouth, NextWave, Verizon, and others, have consistently failed to construct their networks and meet applicable buildout requirements for licenses they acquired at auction a decade ago in 1997.¹⁶⁰ The WCS band can be used to offer wireless broadband services, including services provided using WiMax technology, that would compete directly against cable modem and DSL services offered by incumbent local exchange carriers and cable operators that hold these licenses.¹⁶¹ Perhaps not surprisingly, the wireline incumbents and wireline affiliates that control many of the extant WCS licenses spent money to acquire these licenses at auction and in the secondary markets, but have done nothing to develop a service that might compete against their wireline broadband offerings. Instead, after more than nine years of delay and finger pointing, these companies recently sought and received a three-year extension of their build out obligations.¹⁶²

Another service in which licenses were acquired at auction before the turn of the century but remain unused today is the Local Multipoint Distribution System service (“LMDS”). In 1998, the Commission auctioned two blocks amounting to 1300 MHz of spectrum for private

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 20–21 (citing *In the Matter of Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, ¶ 13 (2006)).

¹⁶¹ *See id.* at 21.

¹⁶² *See In the Matter of Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, ¶ 13 (2006).

commercial use in this service in the 28, 29 and 31 GHz bands.¹⁶³ The Commission expected licensees to provide two-way, fixed location broadband services that would compete directly against DSL, cable modem and other fixed broadband access technologies. Incumbent LECs acquired licenses in this service, yet to date have done little with this spectrum.¹⁶⁴

Spectrum warehousing also seems to be in play in the Multichannel Video Distribution and Data Service (“MVDDS”). One of the Petitioners in this proceeding, EchoStar, owns 49.9 percent of South.com, a company that acquired 37 spectrum licenses in the 12.2-12.7 GHz band in auctions held in 2004 and 2005, but that has yet to construct facilities or offer services using those authorizations.¹⁶⁵ Finally, in the 2.1 GHz and 2.5 GHz bands currently allocated to the Educational Broadband Service (“EBS”) and Broadband Radio Service (“BRS”), AT&T and BellSouth voluntarily agreed as one of their merger commitments to divest all of the spectrum that BellSouth controlled, but put to little use, in the 2.5 GHz band.¹⁶⁶

In light of the history of apparent spectrum warehousing by incumbents, Dr. Wilkie reports that spectrum policy experts have for years called upon the Commission to streamline processes available to new entrants in need of spectrum and transmission rights.¹⁶⁷ Grant of the Application would provide spectrum resources to a new entrant committed to providing a service that will compete aggressively against entrenched incumbents that have a history of acquiring valuable spectrum without putting it to use. If the Commission were to auction the 2155-2175 MHz band instead, in an auction open to all incumbents and all other putatively qualified parties, there is a significant chance that large incumbent wireless and broadband providers would try to

¹⁶³ See *Wilkie II* at 29.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 27–28.

¹⁶⁶ See *id.* at 22-27.

¹⁶⁷ See *id.* at 31–32.

obtain the license primarily to keep new entrants out of the market. Incumbents could easily find such warehousing tactics profitable even at high bid values, and they have a history of engaging in such tactics.

The wireless industry has seen significant consolidation and aggregation since the Commission removed the spectrum cap for Commercial Mobile Radio Services (“CMRS”).¹⁶⁸ As incumbent wireless carriers continue to grow, and their incentives and abilities to warehouse spectrum and prevent competition increase, it becomes ever more important for the Commission to prevent such anticompetitive behavior – particularly when the incumbents have already manipulated the Commission’s rules to consolidate their power. Although the Commission’s Designated Entity (“DE”) program was designed to avoid the excessive concentration of licenses and disseminate licenses among a wide variety of applicants,¹⁶⁹ large incumbent wireless carriers have increasingly used the program to extend their holdings. As noted by several commenters in 2006, DEs that had ties to large incumbents have won an increasing share of spectrum licenses over the last several years.¹⁷⁰ In effect, large carriers are using the DE program simultaneously

¹⁶⁸ See 2000 Biennial Regulatory Review *Spectrum Aggregation Limits For Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668 (2001) (“2000 Biennial Review”); *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, Report No. 2086 (Wireless Telecom. Bur. rel. Mar. 2, 2005) (granting license transfer application of NextWave Telecom Inc. and Celco 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 Celco Partnership d/b/a Verizon Wireless For Consent to Assignment of Licenses*, Memorandum Opinion and Order, 18 FCC Rcd 6490 (2003).

¹⁶⁹ See 47 U.S.C. § 309(j)(3)(B).

¹⁷⁰ See, e.g., *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Comments of Council Tree Communications, Inc., WT Docket No. 05-211, at 3, 21–24 (submitted Feb. 24, 2006) (showing that DEs with national carrier investment won 51% of the total licenses available in Auction 58); *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Comments of Leap Wireless International, Inc.,

to obtain spectrum at a discount and prevent independent small businesses and new market entrants from competing in the market for wireless services. In an attempt to prevent such activities, the Commission recently strengthened its rules and policies governing relationships between DEs and non-DEs.¹⁷¹ The Commission should take the additional step of preventing spectrum warehousing and facilitating market entry by granting the Application .

The 2155-2175 MHz band presents an excellent opportunity for the Commission to further its goals under Section 309(j) by encouraging a new entrant to compete in the market for wireless services. As described above, however, in the absence of carefully structured rules and qualifications to protect against spectrum warehousing by incumbent operators, an auction would yield suboptimal results.¹⁷² When the Commission removed the spectrum cap in favor of a case-by-case analysis, it noted that it could still “shape the initial distribution of licenses” through specific rules.¹⁷³ Such rules are necessary in the 2155-2175 MHz band. As illustrated in Part II.B below, the Commission has on many occasions awarded licenses for new services without auction. Parties making statements to the contrary ignore the fact that the Commission has throughout its history devised processes that do not rely on competitive bidding in assigning spectrum licenses. The Commission has historically awarded and continues today to award initial licenses for new services and other spectrum usage rights without auction when the public interest is better served by a different approach.

WT Docket No. 05-211, at 3–4 (submitted Feb. 24, 2006) (citing a January 2006 Council Tree filing reporting that the top five largest carriers used DE structures to gain access to 71% of the spectrum they obtained in Auction 58).

¹⁷¹ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, ¶ 25 (2006).

¹⁷² As illustrated above, the Commission’s construction and build-out requirements do not negate the potential for spectrum warehousing. Large incumbents, fueled by revenue streams from various business lines, may still find it profitable to meet the bare minimum construction and buildout requirements if such action will prevent new competition. As the incumbents become larger, the potential for such actions to be profitable increases. See discussion *supra* nn. 154–167 and accompanying text.

¹⁷³ See *2000 Biennial Review*, ¶ 52.

B. The Commission Has Consistently Granted Spectrum Licenses and Spectrum Use Rights Without Requiring Competitive Bidding When Doing So Promotes Goals Specified in Section 151 and Elsewhere in the Act

Since the 1993 enactment of the competitive bidding provisions contained in Section 309(j) of the Act, the Commission has continued to grant a wide range of spectrum licenses and spectrum use rights without requiring competitive bidding in order to promote the goals specified in Section 151 and elsewhere in the Act. The Commission's ongoing obligations to promote competition, new services, and other public interest goals, provide support for a Commission decision to grant M2Z's Application without accepting any mutually exclusive applications in this instance.

Throughout the history of the Act's implementation, including the period following passage of the Act's competitive bidding amendments, a large number of spectrum licenses and spectrum usage rights have been awarded to commercial service providers without the use of auctions. The Commission continues to authorize without auctions the assignment of initial spectrum licenses – as well as additional rights relating to the use of previously licensed spectrum – when doing so would promote competition, facilitate the introduction of new services, and serve the public interest. There are abundant examples of post-Section 309(j) license grants made without auctions, based on the Commission's spectrum management powers and spectrum policy initiatives, including several instances in which the Commission sought to foster more intensive and efficient use of spectrum while simultaneously promoting new services.

The fact that there are commercial aspects to the services offered by entities receiving either initial licenses or additional spectrum usage rights conferred without an auction has had no impact on Commission decisions granting such initial authorizations or providing additional

flexibility to existing licensees. Like many of the services that were not subject to auction, M2Z's proposed service will lead to the development and rapid deployment of new technology, promote economic opportunity and competition, and ensure that innovative new services are made widely available to the American people. Yet, as discussed more fully in Part I.B above, M2Z's service will provide public interest benefits equal to, or far surpassing those provided by, such other services, and M2Z's voluntary payment of usage fees will also ensure recovery by the U.S. Treasury of a portion of the value of the public resource used to provide the NBRS throughout the United States.

1. There are Many Services in Which the Commission Has, Since 1993, Granted Initial Spectrum Authorizations and Additional Spectrum Usage Rights Without Use of Competitive Bidding

a. 800 MHz Re-banding Proceeding

In specific commercial wireless services decisions, such as the *800 MHz Re-banding Order* (also discussed in Part II.A.4 above), the Commission has awarded additional spectrum or spectrum usage rights to a particular licensee or class of licensees without the use of auctions. The Commission issued its decision in the *800 MHz Re-banding Order* in 2004, more than a decade after the enactment of Section 309(j)'s competitive bidding provisions, and in that order granted Nextel Communications, Inc. ("Nextel") use of a 10 MHz block of spectrum in the 1.9 GHz band without any competitive bidding. The Commission concluded that the benefits of reducing the "growing problem of interference to public safety communications" in the 800 MHz band justified modifying Nextel licenses for surrendered 800 MHz spectrum to allow Nextel use of spectrum at 1.9 GHz.¹⁷⁴

¹⁷⁴ *800 MHz Re-banding Order*, ¶¶ 1–5.

The order acknowledged the effect of the Act’s intertwined public safety and public interest mandates on the Commission’s spectrum management responsibilities, noting that in Section 309(j) “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 (which include license modifications), *not just initial licensing matters.*”¹⁷⁵ Obviously, the mention of initial licensing matters here indicates that the Commission does not hold the position espoused by various Petitioners that Section 309(j)(6)(E) should only apply to license modification proceedings.¹⁷⁶

The *800 MHz Re-banding Order* also noted that “[S]ection 309(j)(6)(E) gives the Commission broad authority to create or avoid mutual exclusivity in licensing, based on the Commission’s assessment of the public interest.”¹⁷⁷ The Commission thus concluded that the Act allowed relocation of Nextel’s operations and modification of the company’s licenses in order to realize public interest benefits from a reduction in interference to public safety operations in the 800 MHz band.¹⁷⁸ The Commission concluded in the *800 MHz Re-banding Order* that “[r]adio spectrum is a public resource of the United States that Congress has authorized and directed the Commission to manage in the public interest,” noting that “the Commission’s most basic spectrum-management power is to assign spectrum to achieve public interest benefits *other than* monetary recovery.”¹⁷⁹ Grant of the Application would thus represent nothing more than an exercise of what the Commission itself describes as its most basic spectrum-management prerogative, and would achieve a wide range of public interest and

¹⁷⁵ *Id.*, ¶ 73 (emphasis added; internal quotation omitted).

¹⁷⁶ See *supra* nn. 143–145 and accompanying text.

¹⁷⁷ *800 MHz Re-banding Order*, ¶ 85.

¹⁷⁸ See *id.*, ¶ 86.

¹⁷⁹ *Id.*, ¶ 81 (emphasis in original).

consumer welfare benefits while at the same time providing for a potentially significant monetary recovery in the form of the usage fees promised by the Application.

b. Instructional Television Fixed Service/Educational Broadband Service

The Commission has a long history of attempting to stimulate delivery of new services in the 2.1 GHz and 2.5 GHz bands by expanding the opportunities available to licensees in the present-day EBS and BRS. EBS licensees are educational institutions and other non-profit educational institutions authorized to operate stations in what was initially established as a fixed service (the “Instructional Television Fixed Service,” or “ITFS”) in 1963, when the Commission “envision[ed] that [this service] would be used for transmission of instructional material to accredited public and private schools, colleges, and universities for the formal education of students.”¹⁸⁰ During the years that followed, the Commission regularly relaxed the use restrictions applicable to licensees in this service “in an effort to encourage more intensive use of the spectrum and to help [ITFS licensees] generate needed revenue.”¹⁸¹ The relaxations included allowing licensees in the band to provide mobile, as well as, fixed services.¹⁸²

The Commission long ago granted ITFS and now EBS licensees the right to lease “excess capacity” amounting to as much of 95% of their spectrum for commercial purposes, and culminated its attempts to encourage more intensive uses of the band in 2004 and 2006 with a series of orders that adopted a new EBS/BRS band plan that “provide[s] incentives for the

¹⁸⁰ *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*, Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, ¶ 9 (2006) (“*EBS/BRS Third MO&O and Second R&O*”).

¹⁸¹ *Id.*, ¶¶ 10–11.

¹⁸² *See 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*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, ¶ 111 (2004) (“*EBS/BRS Report and Order*”).

development of low-power cellularized broadband use.”¹⁸³ No competitive bidding was ever required for the additional usage rights afforded licensees in the bands – a fact which calls into question the weight that should be given to WCA’s repeated calls in its Petition to Deny to auction the 2155-2175 MHz band, when WCA members have for so long benefited from the Commission’s policies towards EBS and BRS licensees.

c. Mobile Satellite Service

In the MSS context, the Commission decided not to use competitive bidding in determining whether existing MSS licensees should be allowed to provide ancillary terrestrial services over spectrum that they had originally received to provide mobile satellite services. The Commission typically has granted MSS licenses without the use of competitive bidding by designing spectrum sharing arrangements intended to avoid mutual exclusivity among applicants.¹⁸⁴ The Commission concluded in its decision to expand the rights initially granted to MSS licensees that such a result would not unjustly enrich MSS operators or treat other carriers unfairly.¹⁸⁵

d. Direct Broadcast Satellite

The Direct Broadcast Satellite (“DBS”) service provides yet another example of the Commission fulfilling its spectrum management responsibilities and granting initial spectrum rights without an auction. Prior to the end of 1995, but after the 1993 enactment of the competitive bidding provisions in Section 309(j) of the Act, the Commission awarded licenses and construction permits to DBS providers without the use of auctions or the recovery of any

¹⁸³ *EBS/BRS Third MO&O and Second R&O*, ¶ 13.

¹⁸⁴ See, e.g., *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, Report and Order, 13 FCC Rcd 9111, ¶ 122 (1997).

¹⁸⁵ See *ATC Memorandum Opinion and Order*, ¶ 75. The ATC proceeding is also discussed in greater detail in Part II.A.4 above.

usage fees.¹⁸⁶ Discussing the early evolution of DBS service in a 1995 order, the Commission explained that when it granted the first DBS authorizations in 1982 its “primary goals in initiating this new service were to provide additional competition to existing program providers such as cable television, to provide improved service to remote areas of the country, and to encourage innovative new programming and services.”¹⁸⁷ Grant of the Application would likewise engender additional competition to existing providers of broadband service, provide improved broadband service to remote areas of the country, and encourage innovative new services. Therefore, grant of the license requested by M2Z to allow construction and operation of the NBRS would serve exactly the same type of spectrum management goals that the Commission sought to achieve when it granted initial licenses to DBS providers.

In its brief comments filed in opposition to the Application, EchoStar joins M2Z in the conclusion “that a new nationwide wireless broadband entrant should be a pressing objective” for the Commission, but calls upon the Commission to auction the 2155-2175 MHz band as a single nationwide license on an expedited basis.¹⁸⁸ Absent from EchoStar’s comments is an explanation as to why the Commission’s policy objectives when it first authorized DBS do not apply today with equal force to the NBRS, which would promote additional competition to existing wireline providers, improved service to remote areas of the country, and innovative new programming and services.

¹⁸⁶ See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712 (1995).

¹⁸⁷ *Advanced Communications Corporation Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System*, Memorandum Opinion and Order, 11 FCC Rcd 3399, ¶ 5 (1995).

¹⁸⁸ EchoStar Opposition at 1–2.

e. Additional Services

Since 1993, the Commission has provided for the assignment of initial or additional spectrum use rights without an auction in several different spectrum bands in order to promote the development and rapid deployment of new technologies and services. It has done so when setting aside spectrum for the Wireless Medical Telemetry Service,¹⁸⁹ and when adopting licensing and service rules for the Dedicated Short Range Communications Service (“DSRCS”) in the 5.9 GHz band.¹⁹⁰ It has also done so when making spectrum available in the 3650-3700 MHz band for the provision of wireless broadband services,¹⁹¹ and in the 70-80-90 GHz band for similar reasons.¹⁹² These examples demonstrate that the Commission has wide discretion to award spectrum licenses without competitive bidding pursuant to its general spectrum management authority, in the public interest.¹⁹³

¹⁸⁹ *Amendment of Parts 2 and 95 of the Commission’s Rules to Create a Wireless Medical Telemetry Service*, Report and Order, 15 FCC Rcd 11206 (2000).

¹⁹⁰ *Amendment of the Commission’s Rules Regarding Dedicated Short-Range Communication Services in the 5.850-5.925 GHz Band*, Report and Order, 19 FCC Rcd 2458 (2004).

¹⁹¹ *Wireless Operations in the 3650-3700 MHz Band*, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502, ¶¶ 44–45 (2005).

¹⁹² *Allocations and Service Rules for the 71-76 GHz, 81-86 GHz and 92-95 GHz Bands*, Report and Order, 18 FCC Rcd 23318 (2003).

¹⁹³ Of course, the Commission also had a long history of assigning spectrum rights to commercial providers without auction and without receipt of direct payments from licensees prior to the enactment of Section 309(j). The Commission traditionally granted broadcasters authorization to use the public airwaves in exchange for the broadcasters’ commitment to serve the public interest. *See, e.g.*, 47 U.S.C. § 336(d) (noting, in the context of the statutory authorization for the grant of digital television licenses to existing analog television licensees, that “[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity”). Although most applications for new commercial broadcast licenses are today subject to competitive bidding, *see* 47 C.F.R. § 73.5000, the Act nonetheless perpetuates the policy of providing unauctioned spectrum to incumbent commercial television broadcast licensees by exempting from competitive bidding requirements all “initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses.” 47 U.S.C. § 309(j)(2)(B). Furthermore, the Commission has expanded broadcasters spectrum usage rights – without requiring any competitive bidding for licensees to obtain these new usage rights – by allowing them to realize new revenue streams from ancillary services and multicasting provided over digital television spectrum that the Act grants to incumbent broadcast television licensees without auctions. *See, e.g.*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, 21 FCC Rcd 2503, ¶ 95 (2006); *see also* 47 C.F.R. § 73.624(g). Other long-time beneficiaries of past Commission decisions to grant spectrum licenses and use rights without competitive bidding are carriers in the commercial mobile radio service

2. Petitioners Fail to Explain How the Public Interest Is Served When Incumbent Licensees Do Not Make Direct Payments to the U.S. Treasury at the Time of License Renewal

As the discussion above makes clear, there is extensive precedent for the assignment of a nationwide 2155-2175 MHz license to M2Z without an auction. For these reasons, grant of M2Z's Application would represent an extension of, rather than a departure from, Commission precedent and policy to manage the spectrum resources of the United States in the public interest. Yet, unlike some other spectrum users that have been assigned licenses or spectrum use rights without use of competitive bidding, M2Z also has committed to make regular usage fee payments to the U.S. Treasury in return for the spectrum usage rights the Application requests. M2Z recognizes that there is no private ownership of spectrum assets in the United States.¹⁹⁴ M2Z proposed the contribution of the usage fee described in the Application in return for the right to use the 2155-2175 MHz band, and as a mechanism – along with the numerous public safety and consumer benefits that grant of the Application would provide – to provide for “recovery for the public of a portion of the value of the public spectrum resource made available

(“CMRS”) industry – including carriers represented by CTIA and many of the incumbent wireless carriers that submitted Petitions to Deny the Application. When the Commission initially created the cellular radio service in 1981, it awarded two 25 MHz licenses in each market, with one of the licenses automatically set aside for the incumbent wireline provider. *See, e.g., Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, ¶ 6 (1997) (citing *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order, 86 FCC 2d 469 (1981) (“*Cellular Order*”). The Commission based its cellular license assignment decision in part on the need to give licensees in the new service the spectrum resources necessary to make them efficient and viable new service providers. *Id.*, ¶¶ 16–19. The same considerations that motivated the Commission's licensing decisions regarding the development of the new cellular service in 1981 should apply equally to M2Z's nascent wireless broadband service today.

¹⁹⁴ *See* 47 U.S.C. § 301 (“It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, *but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”) (emphasis added); *see also id.* § 304 (“No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.”).

for commercial use.”¹⁹⁵ Nevertheless, and no matter what CTIA may argue, it cannot be said that licensees “have purchased spectrum licenses” when they obtain rights to such licenses via auction.¹⁹⁶ Auctions are but one of many license assignment mechanisms, and the Commission has the authority to assign and then renew licenses without the use of competitive bidding procedures in a wide range of different services and contexts. Thus, while the Commission has ample authority to assign spectrum licenses without the use of competitive bidding (either to M2Z or to the licensees in the many services discussed above), such Commission grants of spectrum rights do not confer upon the licensees any ownership rights or entitlements to use the spectrum outside of the license term.

M2Z proposed in the Application to make continuing annual contributions to the U.S. Treasury during the term of its license. This voluntary commitment to make direct payments to the U.S. Treasury stands in stark contrast to the position adopted by licensees that make no such contributions during the terms of their respective licenses, and that invariably conceive of and treat their licenses as entitlements rather than time-limited grants of authority to provide service in the public interest. There is no convincing policy justification or rationale for such other licensees to enjoy continued use of spectrum use rights granted to them in the absence of auctions while these licensees provide fewer public service benefits than M2Z’s proposal does, and while such other licensees also do not make direct payments for their spectrum use rights even at the time their licenses are renewed.

In addition to not making direct payments to the U.S. Treasury for their initial licenses, licensees that received initial spectrum grants prior to the enactment of the competitive bidding requirements in Section 309(j) are not required to participate in auctions at license renewal,

¹⁹⁵ 47 U.S.C. § 309(j)(3)(C).

¹⁹⁶ CTIA Petition to Deny at 6.

despite the fact that these incumbents would have the greatest incentive to place a winning bid in order to renew their licenses. Such licensees therefore continue to reap substantial rewards from their initial grant of spectrum rights while contributing no revenue to the U.S. Treasury in the form of direct payments or auction proceeds that would be available if renewals were handled differently. Petitioners that criticize M2Z for seeking “subsidized spectrum”¹⁹⁷ fail to take account of the public interest benefits and promised remuneration in the form of usage fees proposed by M2Z, and also fail to interpret and apply the plain language of Section 309(j)(6)(E) of the Act in their analyses of the Commission’s auction authority. They also fail to explain why, based on their logic, the continued use of CMRS licenses initially granted to incumbent wireless carriers without any auction or direct payment for such spectrum use rights does not constitute the provision of a subsidy or of “free spectrum”¹⁹⁸ to such carriers.

Direct payments for spectrum rights are just one method of recovering a portion of the value of such public spectrum resource. As emphasized throughout this Opposition, the public interest benefits created by any widely available radio service must also be taken into account in calculating that recovery. A comparison of the public interest benefits promised by the proposed NBRS and the benefits engendered by other services licensed without competitive bidding is instructive.¹⁹⁹ While few would deny the societal and public interest benefits achieved through

¹⁹⁷ CTIA Petition to Deny at 3.

¹⁹⁸ T-Mobile Petition to Deny at 1 (emphasis in original); *see also* Verizon Wireless Petition to Deny at 1 (“[T]he spectrum sought by M2Z must be auctioned and cannot simply be licensed to one entity for free.”).

¹⁹⁹ The similarities between the commercial broadcast service and M2Z’s proposed NBRS are especially noteworthy. First, much like the initial grants of commercial broadcasting licenses under the Act, grant of M2Z’s Application would facilitate the development of a free, advertising-supported wide-area communications service that would generate significant public and societal value. *See* Wilkie, “Consumer Welfare Impact,” at 1–8. Just as the licensing of commercial broadcasting has contributed significantly to the wider dissemination of public affairs and news programming, resulting in a much better informed citizenry, so too would the licensing of M2Z’s NBRS by making it easier for the vast majority of Americans to gain access to a wider amount of such information via affordable broadband connections. *See, e.g., Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, ¶ 14 (2005) (discussing the benefits of “preserving the benefits of free, over-the-air local broadcast television for

the Commission's licensing of such commercial services, grant of M2Z's Application would engender far greater public interest benefits. Moreover, when it comes to direct payments made as partial compensation for continued spectrum use, there simply is no comparison between M2Z's proposal to pay such usage fees and the practice of commercial licensees that have never made such payments.

C. The Commission May Not Take Potential Revenues Into Account, and Especially Should Not Be Swayed by Petitioners' Attempts to Distort Estimates of Potential 2155-2175 MHz Auction Revenues, in Assessing M2Z's Application

M2Z concurs with then-Commissioner Martin's statement summarizing his conclusions in the *Northpoint Order*: "As a general policy matter . . . competitive bidding can be a useful mechanism for distributing licenses, but auctions are not a goal in and of themselves."²⁰⁰ Several Petitioners, however, make the fundamental mistake of assuming that auctions – and, more particularly, auction revenues – are in and of themselves a legitimate goal during the spectrum license assignment process. As a result, these Petitioners speculate that the Commission could

viewers[] and [thereby] promoting the widespread dissemination of information from a multiplicity of sources"). Just as the licensing of commercial broadcasting allowed Americans of all kinds to disseminate, receive, and exchange ideas as never before, so too would the licensing of M2Z's NBRS by facilitating the deployment of affordable broadband services in areas where broadband service is either too expensive (due to lack of effective competition) or not available at all. Just as the licensing of commercial broadcasting spurred the development of a wide variety of ancillary businesses and economic activities that have contributed greatly to the prosperity of the United States economy, so too would the licensing of M2Z's NBRS by making the transformative powers of broadband available to talented individuals and innovative businesses that, because of either location or lack of resources, currently cannot take advantage of such powers. Unlike the early commercial broadcasters, however, M2Z has committed to providing several concrete and enforceable public interest benefits and voluntary payments to the U.S. Treasury. Whatever the public interest benefits of commercial broadcasting may be, officials within the current Administration have questioned the rationale for perpetuating the use of spectrum without any direct payments to the U.S. Treasury by this particular class of Commission licensees. *See Bush administration proposes user fees on unauctioned spectrum*, BROADCAST ENGINEERING, Feb. 13, 2006, available at <http://broadcastengineering.com/news/bush-spectrum-fee-20060213> (last visited Feb. 16, 2007). Yet, the questions now being raised regarding the use of the public airwaves by the commercial broadcasting industry would not apply to M2Z because the Application commits M2Z to making direct payments to the U.S. Treasury while also generating public interest and consumer welfare benefits similar to or greater than those provided by commercial broadcasters. *See* Wilkie, "Consumer Welfare Impact," at 1–3.

²⁰⁰ Separate Statement of Commissioner Kevin J. Martin, *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614 (2002) ("*Northpoint Order*").

generate more revenue from the 2155-2175 MHz band by auctioning a license than by granting M2Z's Application.²⁰¹ Without explaining the basis for their estimate, or by using out-of-context citations to the source for their supposed valuations, they suggest that a nationwide license would have a potential auction value of \$5 billion.²⁰² These Petitioners conveniently omit the fact, however, that Congress has prohibited the Commission from considering potential auction revenues when assigning spectrum rights. In addition, even if the Commission were to hypothesize about auction revenues, the \$5 billion valuation that the Petitioners attribute to the 2155-2175 MHz band stems from an academic exercise never meant to be used as a conjecture regarding the value of the 2155-2175 MHz spectrum at auction.

1. Potential Auction Revenues Are Irrelevant to the Commission's Review of M2Z's Application

Section 309(j)(7)(A) of the Act flatly prohibits the Commission from making a spectrum use decision based on potential auction revenues.²⁰³ The statute reads:

In making a decision . . . to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to [Section 309(j)], and in prescribing regulations [for such proposed use], the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.²⁰⁴

²⁰¹ See CTIA Petition to Deny at 5 (“In addition to assigning commercial spectrum to its highest and best use, spectrum auctions provide the Treasury with billions of dollars that the government can use to fund communications-related programs.”); Verizon Wireless Petition to Deny at 5–6 (arguing that past results in other CMRS spectrum auctions indicate that there would be a “strong interest in [the 2155-2175 MHz band] by a wide variety of entities” and citing total net revenues revenue totals for past PCS, SMR, and AWS spectrum auctions).

²⁰² See CTIA Petition to Deny at 5 (citing the M2Z Application, Appendix 5, at 24). As illustrated below, CTIA plucks this \$5 billion figure out of the Application and ignores all of the qualifying language surrounding the raw number suggested in Appendix 5 to the Application, in the analysis prepared on M2Z's behalf by Drs. Rosston and Wallsten. AT&T takes a different tack by acknowledging some of the careful qualifying language used in this economic analysis, but then faulting M2Z for failure “to adequately determine the present value of the requested license, which could be substantial.” AT&T Petition to Deny at 8–9. AT&T thus takes a different route to arrive at the same wrong conclusion: namely, that the potential value of the spectrum compels the Commission to raise revenues by auctioning the spectrum.

²⁰³ See 47 U.S.C. § 309(j)(7)(A).

²⁰⁴ *Id.*

The Commission has recognized this prohibition in prior decisions.²⁰⁵ In the *800 MHz Memorandum Opinion and Order*, for example, the Commission stated that “Section 309(j)(7) prohibits [it] from basing a decision to auction spectrum solely on the expectation of auction revenues.”²⁰⁶ In the *800 MHz Re-banding Order*, the Commission explained that “[its] most basic spectrum-management power is to assign spectrum to achieve public interest benefits *other than monetary recovery*.”²⁰⁷ The Commission noted further that, before Congress enacted Section 309(j) in 1993, the Commission “never obtained cash payments for spectrum.”²⁰⁸ Instead, it achieved its public interest goals through spectrum allocation and license assignments.²⁰⁹ When Congress provided the Commission with auction authority, it simultaneously prohibited the Commission from choosing whether to auction spectrum based on a “desire for federal revenue.”²¹⁰ Thus, “[a]lthough the recovery of auction revenue and promoting competition are important purposes of the auction statute, Congress recognized that there may be more important uses for spectrum than generating revenues for the Treasury.”²¹¹

Chairman Martin recently cautioned against basing the Commission’s spectrum management decisions on the level of expected revenues. In the Chairman’s words:

The Commission needs to be careful about ever designing spectrum auctions to artificially raise a lot of money We auction spectrum because it’s an efficient means of getting the spectrum out into the hands of people quickly. . . . It’s an asset that, when it doesn’t get utilized today, that value can’t get recaptured.

²⁰⁵ See, e.g., *800 MHz Re-banding Order*, ¶ 81; see also *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶ 72 (2005) (“*800 MHz Memorandum Opinion and Order*”).

²⁰⁶ *800 MHz Memorandum Opinion and Order*, ¶ 72.

²⁰⁷ *800 MHz Re-banding Order*, ¶ 81 (emphasis added).

²⁰⁸ *Id.*

²⁰⁹ See *id.*

²¹⁰ *Id.*; see also H.R. Rep. No. 103-111, at 258 (1993) (recommending that “[t]he licensing process, like the allocation process, should not be influenced by the expectation of federal revenues”).

²¹¹ *800 MHz Memorandum Opinion and Order*, ¶ 72.

From the Commission’s standpoint getting it into the marketplace is a success The most important thing is that as spectrum managers we make sure the spectrum is being utilized to deliver services to people.²¹²

As noted by Chairman Martin, the public interest is best served not by maximizing auction revenue, but by “getting the spectrum into the hands” of those that will “deliver services to people.” M2Z’s proposal would accomplish that goal.

2. Petitioners Err by Ignoring Important Caveats Relating to the 2155-2175 MHz Band Valuation Contained in M2Z’s Economic Analysis

Although the Commission may not consider potential auction revenues in its public interest determination regarding M2Z’s Application, certain Petitioners have attempted to predict the value of the 2155-2175 MHz band with wildly speculative estimates or inapt comparisons to other auctions.²¹³ In addition, a few seek to justify their speculations based on the economic analysis that accompanied M2Z’s application.²¹⁴ CTIA in particular attempts to characterize that economic analysis improperly and fails to report or account for either the numerous assumptions upon which the M2Z economic analysis was based or the purposes for which it was advanced.

The economic analysis attached to the M2Z Application compares the potential USF savings from the M2Z plan against the opportunity cost of auctioning the unpaired 2155-2175 MHz band.²¹⁵ Although CTIA and others have pinned their estimates of the auction value of the 2155-2175 MHz band to the approximate gross auction value of \$5 billion used in the economic analysis,²¹⁶ these Petitioners overlook the conditions and caveats placed on that figure. First, the

²¹² See *Martin Expects Consensus on Video Franchise Rules*, Communications Daily, June 7, 2006.

²¹³ See CTIA Petition to Deny at 5; Verizon Wireless Petition to Deny at 5–6; AT&T Petition to Deny at 8–9; NextWave Petition to Deny at 17.

²¹⁴ See Application, Appendix 5, at 23-24, *cited in* CTIA Petition to Deny at 5.

²¹⁵ See *id.*

²¹⁶ See CTIA Petition to Deny at 5; Verizon Wireless Petition to Deny at 5–6; AT&T Petition to Deny at 8–9; NextWave Petition to Deny at 17.

economic analysis makes clear that “[f]or any auction, the net proceeds to the government are substantially less than the face value of the net bid since companies can be expected to deduct the license costs from their taxable income.”²¹⁷ Second, the analysis explicitly ignores the “potential discounts” for unpaired spectrum.²¹⁸ Third, the analysis ignores the potential discounts caused by the band’s status as “a new spectrum band with limited operational and manufacturing scale.”²¹⁹ Therefore, the figure quoted by CTIA represented a hypothetical, best-case value of the spectrum – a best case that CTIA well knows does not exist. CTIA thus makes a blatantly inaccurate claim, the flaws of which would be apparent to anyone reading the text that CTIA cites, and in the process essentially asks the Commission to ignore the mandate of Section 309(j)(7)(A).²²⁰

Furthermore, this particular piece of analysis in the Application expressly disregards certain commitments made in the Application – and, unfortunately, the Petitioners who seized upon it and distorted it for their own purposes ignore these facts as well. M2Z made a binding commitment in its Application to pay to the U.S. Treasury a usage fee amounting to five percent of M2Z’s annual gross revenues from premium subscription services. For any of the Petitioners to pretend that a single yearly payment must be equal to or close to the one-time only receipts from a potential auction is disingenuous, as M2Z promises payments for years to come while it develops and expands its nationwide service.

In addition to the conditions and caveats placed on the band valuation, the economic analysis is based on a comparison to Auction 58, which only offered paired spectrum licenses.

²¹⁷ *Id.* at 24 n.26.

²¹⁸ *Id.* at 24. M2Z believes there would *likely* be a significant discount for unpaired spectrum, as discussed in the next paragraph.

²¹⁹ *Id.* The analysis also ignores any potential premium for a nationwide license.

²²⁰ *See* 47 U.S.C. § 309(j)(7)(A).

After reviewing prior auctions for unpaired spectrum, M2Z believes the 2155-2175 MHz band would be significantly discounted in an auction because of its unpaired nature. As the economic analysis makes clear, a 5 MHz nationwide unpaired license in the 1670-1675 MHz band sold for only \$12.6 million in 2003 (\$0.006 per MHz-POP).²²¹ Based on that price, a 20 MHz block such as the 2155-2175 MHz block would sell at auction for approximately \$50 million.²²² In addition, in Auction 49 (Lower 700 MHz), five of the six unpaired Economic Area Grouping licenses sold to a single bidder using bidding credits for approximately \$38 million (\$0.027 per MHz-POP).²²³ Finally, a nationwide unpaired narrowband PCS license sold in Auction 41 for \$505,000, once again with bidding credits in play (\$0.020 per MHz-POP).²²⁴ This information suggests that the public would receive far more value if the Commission assigned 2155-2175 MHz band spectrum use rights to M2Z without an auction, as opposed to holding an auction and holding out hope for a \$5 billion payday all too likely to prove illusory.²²⁵

D. M2Z's Application Does Not Seek to Revive the Pioneer's Preference Program, an Initiative Long Ago Discontinued By Statute and Not Relevant to M2Z's Proposal

Under the Commission's former pioneer's preference program, the Commission used to grant spectrum licenses to entities that had demonstrated they were bringing new and innovative technologies to market.²²⁶ Despite several Petitioners' intimations to the contrary, the

²²¹ Application, Appendix 5, at 24 n.28; *see also* 1670-1675 MHz Band Auction Closes, Winning Bidders Announced, Public Notice, DA 03-1472 (rel. May 2, 2003).

²²² *See* Application, Appendix 5, at 24 n.28.

²²³ *See* Lower 700 MHz Band Auction Closes, Winning Bidders Announced, Public Notice, DA 03-1978 (rel. Jun. 18, 2003).

²²⁴ *See* Narrowband PCS Auction Closes, Winning Bidders Announced, Public Notice, DA 01-2429 (rel. Oct. 18, 2001).

²²⁵ *See* *Wilkie II* at 48.

²²⁶ *See, e.g.,* *Review of the Pioneer's Preference Rules*, Second Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 4523, ¶ 2 (1995) ("*Review of the Pioneer's Preference Rules*").

Application does not call for a return of that program.²²⁷ M2Z does not seek preferential treatment for its service, but fair consideration of the public interest benefits of the proposal outlined in the Application. Deploying free broadband service to 95% of the nation within ten years after M2Z commences service is a revolutionary concept for the underperforming wireless broadband sector, and will have a profound impact on the overall market for broadband Internet access services. M2Z's proposal is *pioneering* in economic terms, but the Application seeks no preferential treatment on the basis of the technology that M2Z proposes to deploy. Instead, M2Z seeks grant of the Application based on the Commission's discretion to issue a license to a particular licensee or class of licensees promising public interest benefits that the Commission desires to promote.²²⁸

Congress terminated the pioneer's preference program when it enacted the Balanced Budget Act of 1997.²²⁹ Verizon Wireless and other parties opposing the Application suggest

²²⁷ See CTIA Petition to Deny at 9–10; T-Mobile Petition to Deny at 11; Verizon Wireless Petition to Deny at 6–7; Motorola Petition to Deny at 2 (“Granting the license to M2Z simply because it filed its application first . . . when the FCC was not soliciting applications but was instead contemplating the adoption of technical and licensing rules . . . would appear to be reminiscent of the old “Pioneer’s Preference” program that was disbanded by Congressional action.”).

²²⁸ See, e.g., *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989) (upholding a licensing preference that the Commission had established for local applicants). Indeed, all that the Communications Act requires to grant a license is a public interest determination. See 47 U.S.C. § 307 (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.”) (emphasis added); 47 U.S.C. § 309 (“[T]he Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.”) (emphasis added).

²²⁹ See 47 U.S.C. § 309(j)(13)(A) (“[T]he Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology”); id. § 309(j)(13)(F) (“The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on the date of enactment of the Balanced Budget Act of 1997.”); see also *Dismissal of All Pending Pioneer’s Preference Requests; Review of the Pioneer’s Preference Rules*, Memorandum Opinion and Order, 13 FCC Rcd 11485, ¶ 3 (1997).

that M2Z impermissibly seeks to revive the program, implying that the present Application is largely indistinguishable from Northpoint's initial requests for MVDDS licenses.²³⁰ M2Z does not base the Application on such grounds, however, and did not seek to justify its request for a license merely by reference to the nature of the technological innovations that M2Z proposes. The pioneer's preference program prohibited the acceptance of mutually exclusive applications.²³¹ M2Z does not contend that the Commission has no authority to accept, or that it should automatically reject, any mutually exclusive applications for the 2155-2175 MHz band. M2Z has shown, instead, that the Commission does have the authority and discretion to avoid mutual exclusivity, pursuant to Section 309(j)(6)(E) of the Act, when doing so would serve the public interest. When Congress acted to eliminate the pioneer's preference program but preserved Section 309(j)(6)(E), Congress preserved the Commission's discretion to avoid mutual exclusivity upon the basis of reasoned consideration of the merits of particular applications rather than by fiat. When Congress eliminated the pioneer's preference program, it also left undisturbed the Commission's mandate in Section 7 to encourage the provision of new technologies and services, as well as the presumption in Section 7 that such new services are in the public interest.²³²

Thus, unlike applicants applying under the terminated pioneer's preference program, M2Z seeks a license on the basis of the broad range of public interest and consumer welfare benefits that M2Z's proposed service would provide, rather than on the basis of technological innovations alone. This broad range of benefits promised by the Application would justify the

²³⁰ Verizon Wireless Petition to Deny at 7. The Commission's characterization of Northpoint's request as inconsistent with Congress's intent in abolishing the pioneer's preference program occurs in the *Northpoint Order*, ¶ 241.

²³¹ *Review of the Pioneer's Preference Rules*, ¶ 2 ("A pioneer's preference recipient's license application will not be subject to mutually exclusive applications.").

²³² See 47 U.S.C. § 157.

Commission's decision to grant a license to M2Z while avoiding mutual exclusivity and the lengthy rulemaking and competitive bidding proceedings that might follow a decision to invite or facilitate mutual exclusivity for licenses in the 2155-2175 MHz band.

E. The Commission's Installment Payment Program Bears No Factual or Legal Resemblance to M2Z's Proposed Revenue-Based Spectrum Usage Fee

CTIA and other Petitioners also claim that M2Z's commitment to compensate the American public for use of 2155-2175 MHz, by voluntarily paying a usage fee equal to five percent of the gross revenues M2Z derives from its premium service, is a request to "resurrect" the Commission's "troubling installment payment policies."²³³ This claim is incorrect. The installment program was eliminated by the Commission after many of the program's beneficiaries defaulted on their payments. As certain Petitioners opposing the Application must know especially well, the *NextWave* proceedings proved to be the most drawn out and difficult of the cases, resulting in protracted litigation and ultimately settlement.²³⁴

Petitioners fail to identify any rational link between the former installment payment program and the spectrum usage fee proposed in the Application. The Application does not seek reinstatement of the installment payment program or treatment comparable to what the Commission provided certain licensees under that program. M2Z has not asked the Commission to award licenses at auction, identify a certain class of small business bidders not required to pay the entire amount of winning bids at the close of the auction, and establish a payment plan that provides government financing of auction payments for such bidders. Rather, the Application

²³³ See, e.g., CTIA Petition to Deny at 7; T-Mobile Petition to Deny at 11.

²³⁴ See *Federal Communications Commission v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) (briefly describing the history of the *NextWave* proceeding at the Commission from the 1993 enactment of the competitive bidding provisions through this 2003 Supreme Court decision).

requests the Commission to make a determination that the assignment of a license to M2Z is warranted by the myriad public interest benefits of the Application.

NextWave involved a default on a government loan. M2Z, by contrast, does not seek to enter into a debtor-creditor relationship with the government. It aims, instead, to offer a service that will yield wide-ranging public interest benefits with a conservatively estimated up-front value of at least \$18 billion to \$25 billion.²³⁵ Under M2Z’s proposal, the Commission bears *none of the risk* associated with the installment payment plan.²³⁶ Because of the license conditions that M2Z has proposed, M2Z either must deliver on the public interest benefits promised in its Application, including the spectrum usage fee, or lose its license.²³⁷

The license condition model provides the Commission with a safety mechanism if it determines that M2Z’s provision of service is not fulfilling the public interest conditions set out in the Application. Under this model, there is no risk – and indeed, no potential at all – that M2Z could or would “default” on any payment obligations, as it has no obligations beyond its commitment to make voluntary payments of a usage fee based on a percentage of the gross revenues derived from M2Z’s premium, subscription-based service. There is also no potential for a windfall or unjust enrichment of M2Z, despite Petitioners’ claims to the contrary.²³⁸ The

²³⁵ See Wilkie, “Consumer Welfare Impact,” at 3, 8.

²³⁶ M2Z’s notes that its revenue-based payments will be self-effectuating, and in that way similar to the ancillary and supplementary DTV services fees broadcasters pay each year for revenues they receive from such services. See 47 C.F.R. § 73.624(g) (“Commercial and noncommercial DTV licensees must annually remit a fee of five percent of the gross revenues derived from all ancillary or supplementary services, as defined by paragraph (b) of this section, which are feeable, as defined in paragraphs (g)(2)(i) through (ii) of this section.”).

²³⁷ See Application at 5, 12.

²³⁸ See AT&T Petition to Deny at 8–9, 14–15; Leap Wireless Comments at 2; Motorola Petition to Deny at 2–3; NextWave Petition to Deny at 17; WCA Petition to Deny at 6. One might have thought that NextWave and AT&T would lack the temerity to complain about unjust enrichment and potential windfalls, yet these entities level such baseless charges at M2Z without any apparent regard for their own history. While NextWave is undoubtedly uniquely qualified to speak on the topic, it is the wrong party to suggest that M2Z would be unjustly enriched by an exclusive license to operate in the 2155-2175 MHz band. NextWave was able to maintain and sell many of its licenses after failing to comply with the FCC’s installment payment plan requirements, despite the fact that it never

spectrum usage fee payments will continue throughout the license term, with the potential to yield many times more than what might be paid at a one-time auction or in any installment payments intended to pay over time an amount owed to the U.S. Treasury based on a one-time auction bid. Moreover, M2Z's license also would be conditioned upon its continued value-for-value provision of the many public interest benefits that would be realized by the establishment of the NBRS and the licensing of M2Z. Therefore, contrary to AT&T's suggestion in its Petition to Deny, no unjust enrichment will occur²³⁹ if the Commission grants the Application because M2Z's public interest commitments ensure that the public as a whole will benefit from the proposed service, and the five percent annual spectrum usage fee proposed by M2Z will ensure that the public recovers a fair portion of the value of public spectrum resource.

provided service using those licenses. *See Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc. Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in Possession, to subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, 19 FCC Rcd 2570, ¶¶ 1–2 (2004) (noting that NextWave received in 2003 an extension of nearly two years on its original five-year construction deadlines for PCS licenses and thereafter transferred the PCS licenses in question to Cingular in early 2004). Unlike NextWave, M2Z will have no ability to claim that the fair market value of the licenses had decreased from what it paid at auction, and that its payments should be adjusted accordingly. *See NextWave Personal Communications, Inc.*, 537 U.S. at 298. Meanwhile, AT&T's windfall comments are also rather ironic, to describe them charitably, in light of the fact that AT&T currently operates on 25 MHz blocks of valuable 800 MHz spectrum that the Commission assigned to its predecessors without auction. *See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Sixth Report and Order and Order on Reconsideration, 15 FCC Rcd 16266, ¶ 60 and n.174 (2000) (noting denial of CMRS spectrum cap waiver requests filed by AT&T Wireless and BellSouth). If grant of M2Z's Application would constitute a "windfall," then certainly AT&T and its predecessors received a windfall from grant of CMRS licenses as well, but there is no windfall in any case when the Commission determines the highest and best use of spectrum and assigns licenses in fulfillment of its public interest duties.

²³⁹ *See* AT&T Petition to Deny at 8-9.

III. THE COMMISSION CURRENTLY HAS THE AUTHORITY TO TAKE ALL STEPS NECESSARY TO LICENSE SERVICES IN THE BAND IN RESPONSE TO THE APPLICATION, AND SHOULD NOT FURTHER DELAY THE INTRODUCTION OF SERVICES IN THIS UNDER-UTILIZED BAND

The Commission processes more than 600,000 applications for wireless service per year by accepting the applications for filing, providing public notice of such acceptance, and making a public interest determination to grant or deny.²⁴⁰ Despite the various – and largely meritless – claims made by the Petitioners, there is no legal or policy reason why the Commission should not move forward to grant the Application now, using the same process to make a public interest determination on the merits of M2Z’s proposal.

A. The Commission Can Grant the Application on the Basis of the Record in this Proceeding Because the Commission Has No Obligation To Conduct a Formal Rulemaking to Develop General Service Rules for New Operations in the 2155-2175 MHz Band

As discussed below, the Commission simply does not conduct a service rules proceeding in every instance before assigning wireless licenses. There is no universally applicable requirement that the Commission first conduct a time-consuming rulemaking inquiry, replicating steps it has previously taken and reaffirming past conclusions, in order to consider the Application and grant M2Z the requested license to operate in the 2155-2175 MHz band. Moreover, even were such a requirement to exist, it would be subject to M2Z’s Forbearance Petition.²⁴¹

First and foremost, the Commission has substantial discretion in determining whether to facilitate the licensing of the 2155-2175 MHz band by rulemaking or adjudication. As the Supreme Court held in *Securities and Exchange Commission v. Chenery Corp.*, “the choice made

²⁴⁰ See 2006 Wireless Telecommunications Bureau Presentation at January 20, 2006, Open Commission Meeting, at page 5, available at <http://www.fcc.gov/realaudio/presentations/2006/012006/wtb.pdf>. As the Bureau’s Presentation notes, more than 220,000 of these applications were for new licenses, renewals or special temporary authority.

²⁴¹ See *supra* note 5.

between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”²⁴² The Court later relied on *Chenery* to hold that “[t]he Commission has substantial discretion as to whether to proceed by rulemaking or adjudication.”²⁴³ As a general principle then, the Commission may exercise its informed discretion in determining whether to grant a license in the 2155-2175 MHz band by way of a rulemaking proceeding or by use of an open, adjudicative proceeding such as the one initiated in this docket to consider M2Z’s Application.

It is not the case, therefore, that the Commission must conduct a rulemaking before determining to grant licenses, regardless of usual Commission practice and process in such instances.²⁴⁴ The Commission would not deviate from its past course with regard to the 2155-2175 MHz band by authorizing the NBRS in a spectrum band set aside for AWS and then granting the license requested in the Application.²⁴⁵ Nevertheless, the Commission may deviate from its general policies for good cause shown,²⁴⁶ and cannot be constrained to reach the same

²⁴² 332 U.S. 194, 203 (1947).

²⁴³ *FCC v. National Citizen Comm. for Broadcasting*, 436 U.S. 775, at 808 n.29 (1978).

²⁴⁴ *See, e.g.*, Verizon Wireless Petition to Deny at 3 (“The Commission must therefore deny the Application and continue on the proper, lawful course – conducting the necessary rulemaking to set technical and service rules for the 2155-2175 MHz spectrum.”); T-Mobile Petition to Deny at 2 (arguing that bypassing a rulemaking in this instance would constitute a “wholly unnecessary departure from Commission Practice”); AT&T Petition to Deny at 25–26; CEA Comments at 2; Motorola Petition to Deny at 1 (arguing that “[s]tandards to ensure non-interference operation are best established through notice and comment rule making proceedings.”).

²⁴⁵ AT&T and other Petitioners suggest that the Commission cannot grant the Application because such a decision would change the course set when the Commission established the 2155-2175 MHz band as AWS spectrum. *See* AT&T Petition to Deny at 15–16; *see also* Verizon Wireless Petition to Deny at 4; WCA Petition to Deny at 4 (referencing the Commission’s “prior assignment of the band to AWS”). These Petitioners confuse the Commission’s authority to allocate spectrum, establish service rules for its use, and thereafter assign licenses within a service – each of which is a separate regulatory task. M2Z’s Application does not suggest that the Commission should reallocate this spectrum away from AWS. Rather, the Application requests action by the Commission to authorize in this adjudicatory proceeding M2Z’s proposed use of the band for nationwide broadband service, to promulgate service rules for the NBRS in this portion of the AWS spectrum, and thereafter to assign a license to M2Z authorizing construction and operation of the NBRS.

²⁴⁶ *See Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (“[R]easoned decision-making remains a requirement of our law. . . . An agency’s view of what is in the public interest may change. . . . [b]ut an agency changing its course must supply a reasoned analysis indicating that

conclusions that it has reached previously upon being presented with new facts, changed circumstances, and new methods for achieving longstanding policy goals.²⁴⁷

Commission action upon M2Z's Application without opening a formal notice and comment rulemaking would neither violate the APA nor disregard considerations of fundamental fairness and participation in the administrative process. The APA requires simply that the Commission provide interested parties with notice and a reasonable opportunity to comment on the Application.²⁴⁸ The Bureau's placement of the Application on Public Notice,²⁴⁹ and the full record developed in response to that Public Notice, demonstrate that the Commission's actions

prior policies and standards are being deliberately changed . . ."). AT&T contends that M2Z "does not address . . . prior public interest findings" made by the Commission regarding AWS, "and, therefore, offers no reasoned basis for the FCC to change course now and find that M2Z's proposed use represents the highest and best use of the spectrum." AT&T Petition to Deny at 16. As explained above, M2Z does not suggest that the Commission should remove the 2155-2175 MHz band from AWS. Nevertheless, M2Z has offered reasoned bases and compelling arguments as to why the Commission should readily conclude that the NBRS is the highest and best use of the band and that M2Z is the only party ready to provide the NBRS. For example, by granting the Application the Commission would be acting to increase facilities-based broadband competition and improve the quality and quantity of broadband services that are available to consumers. *See* Application, Appendix 5, at 13. The Commission has several reasoned bases for concluding that the NBRS is the highest and best use of this AWS spectrum and that M2Z will provide the greatest amount of public interest and consumer welfare benefits by offering the service described in the Application.

²⁴⁷ Indeed, numerous examples exist where the Commission initiated a proceeding to license services even before having issued its spectrum allocation decision. As in the Northpoint proceeding, the Commission initially accepted and placed on public notice MSS applications submitted by Motorola Satellite Communications, Inc. and Ellipsat Corporation (later Mobile Communications Holdings, Inc.). *See Satellite Applications Acceptable for Filing*, Public Notice, 6 FCC Rcd 2083 (1991). At the time these applications were filed and placed on public notice, there was no domestic or international allocation for MSS in the frequency bands that the applicants requested. Similarly, the Commission initially placed license applications filed in the Northpoint proceeding on public notice despite the fact that there was no specific frequency established for this service at the time. *See Wireless Telecommunications Bureau Seeks Comment on Broadwave Albany, L.L.C., et al. Requests for Waiver of Part 101 Rules*, Public Notice, 14 FCC Rcd 3937 (1999). The Commission also granted the Boeing Company's applications to provide aeronautical mobile satellite service in frequency bands that were allocated on a primary basis to the Fixed Satellite Service, with a secondary allocation for terrestrial mobile services except aeronautical mobile. *See, e.g., Boeing Company; Application for Blanket Authority to Operate up to Eight Hundred Technically Identical Receive-Only Mobile Earth Stations Abroad Aircraft in the 11.7-12.2 GHz Frequency Band*, Order and Authorization, 16 FCC Rcd 5864 (International Bur. and O.E.T. 2001). In all of these cases the Commission had not proposed, let alone promulgated, service or licensing rules before evaluating the applications filed and subsequently place on public notice.

²⁴⁸ *See* discussion and cases cited *supra* note 33.

²⁴⁹ *Wireless Telecommunication Bureau Announces that M2Z Networks, Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing*, Public Notice, DA 07-492 (Wireless Telecom. Bur. rel. Jan. 31, 2007) (the "Public Notice").

thus far fully satisfy this requirement. The APA also requires simply that Commission action not be arbitrary or capricious.²⁵⁰ The Commission obviously can satisfy the requirement of reasoned decisionmaking on the basis of the well-developed record created by the Application and the many comments and submissions filed in support of and against the Application.

T-Mobile mistakenly argues that the Commission’s decision in the *Northpoint Order* suggests that the Commission should dismiss the Application, establish service rules, and schedule an auction for the 2155-2175 MHz spectrum.²⁵¹ The *Northpoint Order* does not, however, stand for the proposition that rulemaking is generally preferable to adjudication in licensing proceedings. In fact, the *Northpoint Order* confirms that “[t]he Commission has broad discretion in deciding to proceed by rulemaking or adjudication.”²⁵² In the *Northpoint Order*, the Commission decided to proceed by rulemaking to create the MVDDS in the context of a spectrum band that required implementation of a complex array of spectrum sharing arrangements necessary to avoid harmful interference to a host of incumbent users, including Direct Broadcast Satellite (a mature, consumer-based service) and Non-Geostationary Orbit Fixed Satellite Service licensees.²⁵³

²⁵⁰ See, e.g., *Com. of Mass. v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (“The standard of review applicable to both original agency action and agency rescission or modification of a prior standard requires the agency action to be ‘rational [and] based on consideration of the relevant factors’”) (internal citations omitted); *People of State of California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (“A reviewing court . . . may require the agency to provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”).

²⁵¹ See T-Mobile Petition to Deny at 4.

²⁵² *Northpoint Order*, ¶ 218.

²⁵³ *Id.*, ¶ 3.

As noted below, the 2155-2175 MHz band, by contrast, is lightly used, with incumbents that the Commission has already decided to relocate from the band.²⁵⁴ It is therefore a spectrum band that M2Z could put to use within no more than two years of being assigned the license sought in the Application. As discussed in greater detail below, before granting the license the Commission may need to address some interference and other service-specific issues along the lines already discussed in detail in the Application, but none of these issues would be markedly different from those addressed in other Part 27 service proceedings for spectrum bands with few incumbent users. Therefore, it is clear from several previous service rules proceedings for wireless services that the Commission has already developed a comprehensive set of default service rules that could be used to regulate M2Z's provision of its NBRs. The Commission routinely imposes such rules on wireless services and could likewise impose them on M2Z, based on information presented and developed in the Application, this Opposition, and in the remainder of the robust record created in response to the Public Notice. The worst and most unfortunate thing that the Commission could do at this point would be to hold the prospect of real competition in the provision of broadband service in limbo, subject to the completion of a service rules proceeding, the likely result of which would be service rules mirroring those proposed in the Application.

Another stark contrast between the situation in the 2155-2175 MHz band and the situation that the Commission faced in the *Northpoint Order* is that grant of a nationwide license to M2Z would eliminate the need for consideration of geographic licensing area sizes and other similar issues that arise when new services are permitted to operate in a band that is already

²⁵⁴ See discussion *infra* at Part III.D.1 regarding relocation of incumbents in the 2155-2175 MHz band and the services that the Commission could adopt for this band by looking to the proposal in the Application and to the service rules and procedures established for other spectrum bands governed by Part 27 of the Commission's rules.

home to mature, consumer-based services. CTIA and other Petitioners complain that a general service rules proceeding is necessary to consider interference issues, establish a band plan, and consider appropriate geographic area license sizes in the 2155-2175 MHz band.²⁵⁵ CTIA essentially asks the Commission to ignore the fact that the M2Z's Application seeking a nationwide license in this band already has presented all of these issues for discussion, that the Public Notice inviting comment on the Application already has given the public an opportunity to comment, and that CTIA itself has had an opportunity to comment (and did comment) on this very issue.

Finally, accepting mutually exclusive applications and holding an auction does not always result in competition within the auctioned spectrum band. If a single nationwide license is awarded by auction, there is obviously no competition within that particular service band.²⁵⁶ Moreover, even if licenses are awarded for smaller geographic areas, a single entity could nonetheless place the highest bid and win all such licenses at auction, or at least win all such licenses within a single region or single geographic market, unless an auction-based license cap is imposed. Thus, if the Commission were inclined to ensure competition within a single service or within a narrowly defined market, an auction would provide no guarantee of yielding multiple viable competitors in that narrowly defined market.

B. The Commission Should Not Conduct a Further Proceeding to Consider M2Z's Proposed Service Because Additional Proceedings Are Unnecessary and Would Only Result in Further Delay

A rulemaking and subsequent auction would by no means ensure rapid deployment of services in the 2155-2175 MHz band. When it established the MVDDS, for example, the

²⁵⁵ See CTIA Petition to Deny at 6.

²⁵⁶ See, e.g., EchoStar Petition to Deny at 1 (agreeing with M2Z's contention that a licensing a single nationwide broadband provider in the 2155-2175 MHz band would promote service and that fostering "a new nationwide wireless broadband entrant should be a pressing objective" for the Commission).

Commission expressed hopes that creating space for a fourth competitive provider in the multichannel video programming distribution (“MVPD”) marketplace would provide significant public interest benefits through lower prices, improved service quality, increased innovation, and increased service to unserved or under-served rural areas.²⁵⁷ As noted below, however, the Commission’s hopes have not yet been realized, and as of the third quarter 2006, MVDDS equipment was “still under development.”²⁵⁸ It has been eight years since Northpoint applied to offer MVDDS and five years since the Commission decided to award MVDDS licenses at auction, but the MVPD competition the Commission sought to promote through its actions has yet to develop. Notwithstanding WCA’s claim that the “crucible of a rulemaking proceeding” and a subsequent auction generally permits flexible spectrum use, entrepreneurial efforts, and more rapid deployment of services, it is clear from the Northpoint proceeding that a rulemaking proceeding and auction do nothing to guarantee rapid realization of the goal that spectrum be put to its highest and best use.²⁵⁹

M2Z’s contention that the public interest would not be served by an additional proceeding is supported by the Commission’s actions in its Space Station Licensing Reform (“SSLR”) proceeding. Prior to its decision in the SSLR proceeding, the Commission licensed geostationary (“GSO”) satellite services through the use of lengthy satellite license application processing rounds, which contained many of the negative attributes of wireless service rule proceedings. Unfortunately, like wireless service rules proceedings, GSO processing rounds

²⁵⁷ See *Northpoint Order*, ¶ 164.

²⁵⁸ See *2006 Biennial Regulatory Review*, Wireless Telecommunications Bureau Staff Report, DA 07-674 (Wireless Telecom. Bur. Feb. 14, 2007). The Commission held two auctions for MVDDS licenses. On January 27, 2004, the Commission completed the auction of the 214 MVDDS licenses (“Auction No. 53”), raising (in net bids) a total of \$118,721,835. In this auction, ten winning bidders won a total of 192 MVDDS licenses, which the Commission issued later in 2004. On December 7, 2005, the Commission completed an auction (auction No. 63) in which bidders won the 22 remaining MVDDS licenses.

²⁵⁹ See WCA Petition to Deny at 3.

could take a long time, in some cases as long as four years from initiation to completion. In the SSLR proceeding, however, the Commission rejected as too time-consuming and counterproductive the license processing round approach, and opted instead to license GSO applications on a first-come, first-served (or “FCFS”) basis when doing so would serve the public interest. In changing the rules, the Commission found that the new procedure “will enable [action] on satellite applications dramatically more quickly and efficiently than under the current processing round procedure. *Thus, consumers will benefit because they will receive service faster.* In addition, [it] will lead to more efficient spectrum usage because it will reduce the amount of time spectrum lies fallow. . . .”²⁶⁰

As discussed in greater detail below, the Commission’s deliberations over the 2155-2175 MHz band have been lengthy, and its policy-making for this band is a mature and well-developed process. Yet, even if that were not the case, grant of M2Z’s Application would not be unprecedented because the Commission now accepts and grants a number of license applications on a FCFS basis. As Part II of this Opposition makes clear, M2Z seeks no preferential treatment because it filed the first application for use of the 2155-2175 MHz band. Instead, it merely requests that the Commission grant the Application because M2Z’s proposal would provide the most public interest and consumer welfare benefits of any proposal for this band, and thus constitutes the highest and best use of the band.

²⁶⁰ *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, ¶ 74 (2003) (“*SSLR Proceeding*”). The Commission further noted that “[it has] considered and rejected arguments that *Ashbacker* or the Communications Act requires the Commission to give parties an opportunity to file mutually exclusive applications.” *Id.*, ¶ 103 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)); *see also id.* (citing *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission’s Rules Governing the Use of Frequencies in the 2.1 and 2.5 GHz Bands*, Order on Reconsideration, 6 FCC Rcd 6764, ¶¶ 61–62 (1991)). Experience with the FCFS system proved the Commission’s expectations to be correct, and processing time for satellite applications dropped significantly. Moreover, the Commission chose to adopt standard or “default service rules” in the *SSLR Proceeding* to permit initiation of service once spectrum had been allocated domestically but prior to the adoption of spectrum-specific service rules.

The proceeding initiated by acceptance of the Application for filing and issuance of the Public Notice is not an isolated adjudicatory proceeding, as demonstrated by the vigorous participation of other parties filing in support of and in opposition to the Application. At the conclusion of the Application proceeding, all interested parties will have had a full and fair opportunity to air their views in response to the Public Notice.²⁶¹ The public interest obligations and comprehensive operational standards proposed in the Application were more than sufficient to provide a basis for full and fair comment from interested parties – although Petitioners did tend to spend more time and energy complaining about the lack of a chance to comment than they did in contributing substantive comments on M2Z’s detailed proposal – and the record developed in response to the Public Notice will assist the Commission in addressing any policy concerns that could be dealt with in a rulemaking.

The Commission might very well after a rulemaking proceeding adopt a collection of service rules quite similar to rules adopted already for other Part 27 services – and quite similar to the careful service guideline proposals that M2Z advanced in the Application.²⁶² Arguments that the Commission should or must initiate a rulemaking amount to nothing more than requests for the Commission to delay productive use of this spectrum by commencing a proceeding – one that easily could take several years to complete – simply in order to achieve a result very similar to one that the Commission already could reach by granting the Application. The initiation of a general service rules proceeding thus would be a waste of Commission resources and a

²⁶¹ AT&T claims in its Petition to Deny that “[u]nlike a rulemaking which is open to all parties,” the proceeding initiated by the Commission in this docket to consider M2Z’s Application under Section 309(d) is open only to parties in interest. *See* AT&T Petition to Deny at 27–28. While AT&T complains that this restriction might “artificially reduce” participation in this proceeding based on potential commenters’ standing concerns, the Petition to Deny provides no examples of such entities that might have standing to comment in a rulemaking proceeding but could not demonstrate their interest in either supporting or opposing the Application. The number of submissions into large and robust record developed in response to the Public Notice suggests that few if any parties “artificially” restrained themselves from filing comments with the Commission.

²⁶² *See* Application at 13–21.

tremendous waste of time in the face of the Commission’s pressing and overriding goal to promote broadband deployment and intermodal competition among broadband providers.

C. Grant of the Application Would Promote Deployment of Services in the Under-Utilized 2155-2175 MHz Band, Which Contains No Long-term Licensees and Holds No Promise for Vigorous Use in the Immediate Future

Petitioners also argue that a rulemaking is necessary to protect incumbents in the 2155-2175 MHz band or to resolve issues regarding prior uses or planned uses for this spectrum. M2Z’s Application to use the 2155-2175 MHz band, however, will not disturb established uses in a congested band, or even result in the displacement of incumbents that have not already been ordered to vacate this spectrum. The 2155-2175 MHz band is devoid of significant permanent occupants, and lacks a plan for future occupants. All incumbents have been ordered by the Commission to relocate to other bands as soon as practicable.²⁶³ CTIA and other Petitioners contend that this spectrum is not “fallow” as M2Z suggests.²⁶⁴ These arguments do nothing, however, to refute M2Z’s showing that the band is under-utilized and not home to permanent, mature, consumer-based services.

Grant of M2Z’s Application would resolve a lengthy search for a beneficial use of the 2155-2175 MHz band. In fact, the Commission first identified a segment of the spectrum in question in this Application as a candidate for reallocation during the Commission’s 1992

²⁶³ Two primary types of services occupy the 2155-2175 MHz band – Broadband Radio Service (“BRS”) and Fixed Microwave Service (“FS”). See *EBS/BRS Report and Order*, ¶¶ 37–38 (ordering the relocation of users from the 2150-2156 MHz and 2156-2160 MHz bands to 2496-2502 MHz and 2618-2624 MHz respectively); *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*, Eighth Report and Order, Fifth Notice of Proposed Rule Making and Order, 20 FCC Rcd 15866, ¶¶ 6, 9 (2005) (ordering the relocation of users of the Fixed and Mobile Service allocations in the 2155-2160 MHz band and making the 2155-2175 MHz band available for AWS use). For the number of incumbent licensees in the band, see Federal Communications Commission, Universal Licensing System database, available at: <http://www.fcc.gov/uls> (last accessed Mar. 18, 2007). The FCC’s database displayed the following incumbent licensees in 2155 to 2175 MHz: AWS (9 licenses), BRS (635 licenses) CD, paging and radio telephone (22 licenses) CF, common carrier, point-to-point (1356 licenses) CT, local television transmissions (10 licenses), MW, microwave public safety pool (5 licenses).

²⁶⁴ See, e.g., CTIA Petition to Deny at 12–13; WCA Petition to Deny at 5.

Emerging Technologies proceeding.²⁶⁵ The Commission at that point considered potential use of spectrum for the introduction of third generation wireless technologies, and many factions within the wireless industry supported this proposal. One incumbent licensee present in the band in 1992, Utilities Telecommunications Council (“UTC”), petitioned to defer consideration of advanced technologies in the 2 GHz band, citing the need for further study accommodating relocating licensees.²⁶⁶ However, several mobile wireless providers and manufacturers opposed UTC’s petition on the ground that delay could stall the implementation of what were then important new services, such as PCS.²⁶⁷

In 1992, the Commission ruled against UTC and reallocated spectrum to PCS from fixed microwave services.²⁶⁸ This reallocation of some spectrum to PCS services, however, did not end the clamor for additional spectrum to be made available for wireless services at 2155-2175 MHz and in other bands. Incumbent wireless carriers and others renewed their calls for additional spectrum resources and resumed this discussion in the years surrounding the 2000 World Radiocommunication Conference. Following that conference, the Commission issued a

²⁶⁵ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd 1542 (1992); see also *Wilkie II* at 33–35 (detailing longstanding and ongoing delays in putting AWS spectrum to efficient use).

²⁶⁶ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd 6100, ¶¶ 7–8 (1992).

²⁶⁷ *Id.*, ¶ 34. The parties opposing UTC included AT&T, Motorola, SCS Mobilecom, and Spatial Communications, Inc. In its Petition to Deny the Application, Motorola neatly proves the point that the 2155-2175 MHz band has long been targeted for use by the Commission and various industry participants – but with little or no success in deploying services in this spectrum band – by noting that “Motorola previously proposed a course of action for use of the 2155-2180 MHz band [i]n comments file[d] as part of ET Docket 00-258” almost four years ago. See Motorola Petition to Deny at 2.

²⁶⁸ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992) (indicating that the Commission reallocated the 1850-1910/1930-1990 MHz bands to PCS from fixed microwave services.).

notice of proposed rulemaking inquiring about bands that would be suitable for the deployment of third generation wireless services, including 2110-2170 MHz.²⁶⁹

Many wireless industry participants in that proceeding expressed their eagerness for access to new spectrum that they might use to deploy advanced wireless services. Notably, CTIA, AT&T, Qualcomm, and Verizon Wireless were all staunch supporters of a speedy reallocation of the 2110-2170 MHz band and a relocation of any incumbents in that band.²⁷⁰ At that time, and in the context of the international WRC-2000 conference, the debate in the United States centered on deciding which segments of the band were suitable for the global harmonization of spectrum resources. Some commenters were unsure if 2110-2170 MHz would be a feasible band to use in pursuit of these goals. Nonetheless, CTIA indicated that if the 2110-2170 MHz band represented the only available spectrum for the deployment of advanced wireless services, the Commission should not hesitate to reallocate it for such use.²⁷¹

²⁶⁹ *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000*, Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596, ¶¶ 50–57 (2001) (“*Implementation of WRC-2000 Order*”).

²⁷⁰ See Petition for Rule Making of the Cellular Telecommunications Industry Ass’n Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000, File Nos. RM-9911 and RM-9920 (submitted July 12, 2000) (“CTIA July 2000 Petition for Rule Making”); Petition for Rule Making of the Cellular Telecommunications Industry Ass’n Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT -2000, Comments of Qualcomm Inc., File No. RM-9920 (submitted Aug. 25, 2000) (“U.S. industry and consumers cannot afford for the U.S. Government to delay in developing policies regarding spectrum for 3G services.”); Review of Spectrum and Regulatory Requirements for IMT -2000, Comments of AT&T Wireless Services, Inc., File No. RM-9920 (submitted Aug. 28, 2000) (“AT&T . . . urges the Commission to take all necessary steps to make such spectrum available at the earliest possible date.”); Review of Spectrum and Regulatory Requirements for IMT-2000, Comments of Verizon Wireless, File No. RM-9920 (submitted Feb. 22, 2000) (“There can also be no question that current spectrum resources are inadequate, and that the United States is far behind many other countries in making these resources available. . . . It is critical that the Commission fulfill its responsibility by ensuring there will be sufficient spectrum for the next generation of mobile services to serve the public.”).

²⁷¹ See CTIA July 2000 Petition for Rule Making at 8–9 (indicating that 2110-2170 MHz may inevitably be the only viable option).

As the petitions to deny the Application demonstrate, some six short years after filing their comments in the WRC-2000 proceeding, many of the Petitioners have developed a notable change in position. CTIA's own previous statements regarding the spectrum, including the 2155-2175 MHz band at issue in the Application, belie the statements CTIA makes in the instant proceeding regarding incumbent use of the 2155-2175 MHz band.²⁷² Although CTIA now suggests that the band is too encumbered to justify a timely grant of M2Z's license, in the past CTIA has argued that the band was underutilized and that the Commission should move quickly to facilitate its use. Incumbent wireless providers cannot have it both ways: either they are supportive of the expedient technical deployment of this spectrum or they are not.

D. M2Z's System Will Not Cause Harmful Interference to Existing 2155-2175 MHz Licensees or AWS Licensees Operating in Nearby Bands

Some of the Petitioners also assert that a rulemaking is necessary by arguing that, absent such a proceeding, M2Z's national broadband network might cause harmful interference to grandfathered incumbent licensees in the 2155-2175 MHz band.²⁷³ BRS operations currently exist in the 2150-2160/62 MHz band and FS operations currently exist in the 2110-2150 MHz and 2160-2200 MHz bands. As set forth in the Application, M2Z will take all precautions necessary to avoid causing harmful interference to these incumbents.²⁷⁴ M2Z takes its

²⁷² See CTIA Petition to Deny at 12.

²⁷³ To the extent that incumbent licensees operate in this band, M2Z is committed to protecting them from harmful interference. In their respective Petitions to Deny, WCA and Verizon Wireless expressed doubt regarding M2Z's ability to protect 2155-2175 MHz band incumbents. See WCA Petition to Deny at 7 ("WCA's constituency is uniquely affected by M2Z's failure to propose conditions upon its license that would guarantee that M2Z will avoid destructive interference to those BRS licensees that currently occupy the 2150-2162 MHz band."); Verizon Wireless Petition to Deny at 14 ("M2Z must demonstrate in detail how it will protect co-channel and adjacent channel incumbent licensees from interference from its proposed system.").

²⁷⁴ See Application, Appendix 2, at 3-4; In the Application and appendices thereto, M2Z stated plainly that it would relocate incumbent FS and BRS licensees pursuant to the FCC's relocation requirements developed in the AWS proceeding. See *id.* Moreover, M2Z's Application is conditioned on its compliance with the current standards for band emissions, $(43 + 10 \log(P))$ and $(67 + 10 \log(P))$. See 47 C.F.R. § 27.53(1)-(2). M2Z understands that the standards do not provide complete interference protection to the noise floor. To alleviate interference from lower

interference obligations seriously and will accept fulfillment of these obligations as a condition of its license.

1. M2Z Will Avoid Causing Harmful Interference to Existing 2155-2175 MHz Licensees

In order to avoid harmful interference, M2Z will work diligently, both during the construction phase and the operational phase of its network, to prevent harmful co-channel interference to BRS and FS incumbents currently operating in the 2155-2175 MHz band. BRS and FS systems operate in fixed frequency bands at fixed geographic locations, and several proven successful engineering techniques can be used to avoid interference.

In the Application, M2Z proposed to address potential co-channel interference through “judicious selection” of base station locations and spectral sub-bands of operation, and with the use of smart antenna technology.²⁷⁵ Taking such steps would provide the same level of protection afforded by the current BRS/EBS emission rules utilizing the applicable out-of-band emission (“OOBE”) standard.²⁷⁶ These actions would also protect FS licensees based on the interference criteria contained in Parts 24 and 101 of the Commission’s rules, and the general operational guidelines for 99.99% microwave communication reliability.²⁷⁷ Therefore, Petitioners’ allegations regarding the potential for M2Z’s service to cause harmful interference to

noise levels, license holders are required to coordinate, cooperate and sometimes co-locate. This is a common practice in the industry to fully utilize spectrum resources.

²⁷⁵ For example, BRS licensees only occupy 4, 6, or up to 10 MHz spectral bands (BRS Channels 1, 2, and/or 2A) and FS licensees are limited in the 2160-2180 MHz band to use of 3.5 MHz. Thus, M2Z could appropriately select from the vacant spectrum in the limited locations where BRS or FS licensees exist. FS systems in 2160-2180 MHz must deploy using beamwidths of less than 5 degrees (8 degrees in Standard B regions) which enables interference avoidance using smart antenna technology. See Application at 20; see also BRS Towers Map attached hereto as Attachment A (illustrating the existing BRS licensees subject to potential relocation); FS Towers Map attached hereto as Attachment B (illustrating existing FS licensees subject to potential relocation).

²⁷⁶ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 92 (2003) (“AWS 1st Report and Order”).

²⁷⁷ See 47 C.F.R. §§ 24.237, 101.105, 101.107; see also Telecommunications Industry Ass’n TIA/EIA Telecommunications Systems Bulletin 10-F, *Interference Criteria for Microwave Systems* (June 1994).

incumbent BRS and FS operations have already been addressed.²⁷⁸ M2Z’s meticulously planned construction buildout schedule and carefully coordinated interference planning will prevent any such interference from occurring. To the extent that some Petitioners have requested greater protections,²⁷⁹ M2Z’s status as an AWS band occupant (M2Z has proposed that its NBRS be provided over spectrum allocated to AWS) will ensure that the protections and relocation procedures already established for FS and BRS incumbents also apply to M2Z.

M2Z commits to operating in conformity with the Commission’s pronouncements in the *AWS Ninth Report and Order*, which requires users of the 2155-2175 MHz band to relocate line-of-sight incumbent BRS systems and incompatible FS operations according to definite timetables.²⁸⁰ Deployment of M2Z’s proposed NBRS will depend, in part, on the speedy relocation of FS and BRS operations, giving M2Z every incentive to ensure that these transitions take place quickly and smoothly. M2Z is committed to a successful and fully-funded relocation of FS and BRS incumbents – and as indicated above, will accept fulfillment of this commitment as a condition of its license.

The Commission has determined that FS and BRS licensees must relocate by negotiating with AWS licensees for comparable facilities. Licensees in both services must enter into a mandatory negotiation period followed by an involuntary relocation procedure if they do not

²⁷⁸ See, e.g., Verizon Wireless Petition to Deny at 15 (alleging that M2Z had no proposal for the interference protection of FS licensees); WCA Petition to Deny (alleging that M2Z has no remedy to resolve BRS co-channel interference).

²⁷⁹ See, e.g., WCA Petition to Deny at 9–10 (“If M2Z is going to sub-channelize the 2155-2175 MHz band to avoid operations co-channel to BRS, any resulting adjacent channel operations should be subject to compliance with Section 27.53(1)(2) as if M2Z were operating a BRS station.”). WCA provides no legal or engineering basis for its assertion that BRS operators operating in spectral proximity to M2Z deserve greater interference protection than the Commission would mandate for adjacent channel AWS-1 licensees.

²⁸⁰ 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*, Ninth Report and Order, 21 FCC Rcd 4473, ¶¶ 16–54 (2006) (“*AWS 9th R&O*”) (BRS interference and relocation standards); *Id.*, ¶¶ 55–63 (FS relocation rules).

timely agree on a relocation procedure.²⁸¹ As an impetus for speeding the relocation process, the Commission adopted a ten-year sunset period for FS operations in the 2160-2175 MHz band, triggered when the first AWS license was issued in the band.²⁸² If FS operators do not exit the band within the sunset period, then they could lose their rights to have their relocation expense covered by AWS licensees entering the band.

WCA asserts that “M2Z appears to underestimate how far into the future BRS licensees may continue to occupy the 2150-2162 MHz band.”²⁸³ To the contrary, M2Z has a firm grasp on the time period that BRS incumbents may remain in the band. Like FS licensees, BRS licensees face the requirement of mandatory negotiation followed by an involuntary relocation procedure if the parties fail to reach an agreement.²⁸⁴ Despite the fact that BRS incumbents have the right to remain in the 2155-2175 MHz band for up to fifteen years,²⁸⁵ they, like FS licensees, also have every incentive to relocate quickly once an AWS licensee triggers the relocation process. As with FS licensees, the Commission has adopted a sunset period²⁸⁶ after which an AWS licensee

²⁸¹ See 47 C.F.R. § 101.69. The FS incumbents will have either a two or three-year mandatory negotiation period. *Id.* § 101.69(d)(1)–(2) (stating that non-public safety incumbents will have a two-year mandatory negotiation period and public safety incumbents will have a three-year mandatory negotiation period.). The mandatory negotiation period will commence on a “rolling” basis, once an AWS licensee provides written notice of its desire to negotiate for relocation. *AWS 9th R&O*, ¶ 59. The result of these “rolling” negotiations will be a series of independent negotiation periods, each specific to the individual relocating FS system.

²⁸² *AWS 9th R&O*, ¶ 58. According to the FCC’s Universal Licensing System, the first AWS license was granted on November 29, 2006. Thus, the FS sunset deadline is November 29, 2016.

²⁸³ WCA Petition to Deny at 8.

²⁸⁴ See 47 C.F.R. § 27.1251. M2Z notes, however, that in mandatory negotiations, BRS incumbents and new AWS licensees may agree to either: (1) relocate the BRS incumbent to a new band or (2) accept a sharing arrangement that may result in otherwise impermissible interference levels to the BRS operations. *Id.* § 27.1251(a). The mandatory negotiation period is three-years in duration and the BRS licensee may suspend this period briefly. *Id.* § 27.1250(c) (granting BRS licensee permission to suspend the mandatory negotiation period for up to one year if the BRS licensee cannot be relocated to comparable facilities at the time the AWS licensee seeks band entry); see also *id.* § 27.1251(c) (stating that mandatory negotiations will commence for each BRS licensee when the AWS licensee informs the BRS licensee in writing of its desire to negotiate).

²⁸⁵ See WCA Petition to Deny at 8.

²⁸⁶ *Id.* § 27.1253(a) (noting that the sunset deadline is fifteen years from the date on which the first AWS license is issued in the band). Thus, the BRS sunset deadline is November 29, 2021.

may require the BRS incumbent to cease operations and may opt not to pay the BRS incumbent's relocation costs.²⁸⁷

2. AWS Band Relocations Will Likely Be at Least as Carefully Orchestrated as the Successful PCS Relocation

In the late 1990s, the FCC required microwave facilities operating in the 1850-1990 MHz band (“the 1.9 GHz band”) to vacate the band for entering PCS licensees.²⁸⁸ Prior to the microwave relocation, there were 8,846 private microwave licenses in the 1.9 GHz band established for PCS use.²⁸⁹ Most licensees had multiple base stations on their network, impacting more than one PCS new entrant. Thus, extensive cost reimbursement coordination was required for over 510,000 base stations.²⁹⁰ Despite these cost reimbursement complexities, the Commission's microwave relocation process was hugely successful.²⁹¹ Most incumbents were relocated on-time and on-budget. The Commission's then-Wireless Bureau Chief, Daniel Phythyon, hailed the 1.9 GHz relocation as a success-story for the Bureau, “further[ing] the rapid clearing of spectrum and the build out of PCS networks.”²⁹²

By contrast, relocation in the 2155-2175 MHz band at issue in this proceeding will require far fewer relocations. Only 565 active BRS licenses exist in the 2150-2160/62 MHz

²⁸⁷ *Id.*

²⁸⁸ *See Amendment To The Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Third Notice of Proposed Rule Making, 11 FCC Rcd 8825, ¶ 3–7 (1996).

²⁸⁹ *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, Notice of Proposed Rule Making, 11 FCC Rcd 1923, ¶ 12 (1995).

²⁹⁰ *Semi-Annual Report of the PCIA Microwave Clearinghouse Regarding Operation of Microwave Relocation Cost Sharing Clearinghouse*, PCIA Microwave Clearinghouse Semi-Annual Report to the Commission (WT Docket No. 95-157) (rec'd Aug. 10, 2004).

²⁹¹ *See id.* (noting as well that representatives from Australia, Canada, France, Taiwan and Japan have studied the US microwave relocation process so that they may establish similar processes in their countries). *See generally* Peter Cramton et. al., *Efficient Relocation of Spectrum Incumbents*, 41 J.L.& ECON. 647 (1998).

²⁹² *Wireless Bureau Chief Daniel Phythyon Hails Success of Market-Based Spectrum Policies*, Press Release (rel. Sept. 11, 1997). Daniel Phythyon was the Chief of the former Wireless Bureau in 1997 and 1998.

band, and the actual number of constructed BRS facilities could be less.²⁹³ Furthermore, only 1356 active FS licenses exist in the 2155-2175 MHz band, with approximately 150 of these authorized by licenses expiring by December 2010 and the remainder authorized licenses, except 30, expiring in February 2011.²⁹⁴ With the cooperation of existing incumbents, that in the aggregate amount in numerical terms to nothing more than a fraction of the number of licensees that were relocated for PCS, M2Z believes that all required relocations will be accomplished in an efficient manner that allows intensive use of the band for M2Z's proposed NBRS.

Finally, because of its aggressive network construction build out commitments, M2Z will also have a strong incentive to facilitate a speedy resolution to the 2155-2175 MHz band relocation process. As noted in the Application, M2Z proposes that its license be conditioned upon its meeting certain very aggressive construction buildout commitments. In view of the foregoing, the Commission should be confident that grant of the Application will result in the intensive use of the 2155-2175 MHz band and a smooth transition for incumbents according to procedures previously established by the Commission for this band.

3. M2Z Must and Will Prevent Harmful Interference to Neighboring AWS Licensees and Will Be Able To Do So Using Currently Available Technology

The spread of Internet Protocol ("IP") technologies and discrete, packetized communications have spurred the development of new, more flexible methods of interference

²⁹³ *AWS 9th R&O*, ¶ 13 n.40. The *AWS 9th R&O* explained that 565 active BRS licensees exist in the ULS database, but noted that only 127 stations submitted responses to a Commission Order seeking BRS station data. Because the data request did not require responses from stations without built-out facilities, the Commission concluded that many licensees may not have constructed operational facilities. *Id.* CTIA cites the Commission's ULS database to report that there are instead 556 BRS licensees in the 2155-2175 MHz Band. *See* CTIA Petition to Deny at 12 n.33. M2Z's review of ULS indicates that fewer than 250 BRS transmission facilities have been constructed.

²⁹⁴ Federal Communication Commission, Universal Licensing System, available at: <http://wireless.fcc.gov/uls/index.htm?job=home> (searching for all "CF" designated-licensees in the 2155-2175 MHz bands) (last visited Mar. 16, 2007). CTIA's estimate again differs slightly, with CTIA asserting that there are 1,446 common carrier fixed microwave service licensees in the band. CTIA Petition to Deny at 12 n.33.

analysis and engineering. M2Z intends to employ such engineering techniques without abrogating its responsibility to avoid harmful interference. Unfortunately, some of the Petitioners challenge the M2Z proposal using dated engineering assumptions. They contend that theoretically possible interference scenarios could negatively impact future AWS operations in the 2110-2155 MHz and 2175-2180 MHz bands.²⁹⁵ Petitioners' engineering analyses might have been appropriate for the wireless telephony services of three, five, or even ten years ago, when such wireless services more closely resembled wireline telephony, but they are not appropriate today.

The Commission has recognized that “many portions of the radio spectrum are not in use for significant periods of time, and that spectrum use of these ‘white spaces’ (both temporal and geographic) can be increased significantly.”²⁹⁶ Many of these white spaces exist because engineering analysis formerly focused on only one potential interference analysis variable – the transmission power of any two license holders involved in the interference analysis. In November 2002, the Commission’s Spectrum Policy Task Force (“SPTF”) made significant advancements in analyzing interference.²⁹⁷ Instead of calculating simple radiating power levels, the SPTF shifted the analysis toward “operations using real-time adaptation based on the actual RF environment through interactions between transmitters and receivers.”²⁹⁸ Modern engineers,

²⁹⁵ The Commission has established these neighboring spectrum bands for AWS operations as well. *See Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006*, Public Notice, 21 FCC Rcd 4562 (2006) (announcing procedures and rules for the “AWS-1” auction of Advanced Wireless Services licenses in the 1710-1755 MHz and 2110-2155 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*, Sixth Report and Order, Third Memorandum Opinion and Order, and Fifth Memorandum Opinion and Order, 19 FCC Rcd 20720, ¶ 1 (2004).

²⁹⁶ *Spectrum Policy Task Force Report*, Federal Communications Commission, Office of Engineering & Technology, ET Docket No. 02-135, at 4, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf (2002) (“SPTF Report”).

²⁹⁷ *Id.*

²⁹⁸ *SPTF Report* at 27.

following this breakthrough, now use four variables to calculate the potential for interference: frequency, power, space and time.²⁹⁹

Some Petitioners in this proceeding have ignored modern engineering methods and instead referenced studies focusing on the “worst case scenario” – using single-variable power analysis. For example, AT&T unsuccessfully attempts to discredit M2Z’s engineering analysis by referencing a study conducted by the United Kingdom’s Office of Communications (“Ofcom”).³⁰⁰ AT&T’s reliance on the Ofcom Report is misplaced at best. It appears that AT&T only reviewed portions of the Executive Summary of this report, and failed to digest it in full. A complete review of this report reveals the following:

- the Ofcom Report is a “worst case scenario” analysis which fails to account for the time and space domains;³⁰¹
- the majority of the Ofcom Report (over 75%) addresses interference scenarios other than the Frequency Division Duplex (“FDD”) mobile to TDD mobile interference potentially at issue in this application; and
- the portions of the Ofcom Report that are relevant actually support M2Z’s statistical analysis, as more fully explained below.³⁰²

The Ofcom Report further supports M2Z’s probability analysis that the potential for interference is slight between FDD and TDD mobiles. When discussing FDD and TDD mobile interference, the Ofcom Report concludes that “[t]he probability of the predicted worst-case scenario interference occurring is low.”³⁰³ Later in the report, Ofcom quantifies this finding by stating that it “performed a high level probabilistic assessment (covered in Appendix A), the results of

²⁹⁹ See the attached Affidavit of Michael J. Marcus, Sc. D., F-IEEE, ¶ 4 (“Marcus Affidavit”), attached hereto as Attachment C.

³⁰⁰ See AT&T Petition to Deny at 11–14 (citing Ofcom, 2500-2690 MHz, 2010-2025 MHz and 2290-2302 Spectrum Awards Engineering Study (Phase 2) (2006) (“Ofcom Report”).

³⁰¹ Ofcom Report at 7 (“The results of the *worst-case analysis* demonstrated that FDD/TDD, and TDD/TDD, co-existence is not feasible at either 10 or 15MHz offset without suitable interference mitigation.”) (emphasis added).

³⁰² *Id.* at 7, 35.

³⁰³ *Id.* at 7.

which suggest that 1.9% of mobile devices in high user density areas might suffer effects of 2.6 GHz MS-MS interference, for 1.4 % of the time.”³⁰⁴ According to Ofcom’s analysis, FDD and TDD mobile units would interfere with each other less than 0.03% of the time *without any mitigation techniques employed*.

Most networks do not transmit communications on a constant basis with little to no interference mitigation. Instead, modern digital networks have cycles of communications silence, and spectrum managers use these silent periods to synchronize communications, thereby avoiding interference. Consistent with this approach, M2Z detailed in the Application its proposal for avoiding harmful interference with proactive system configuration and design using emerging technologies, as described in more detail below.

Some Petitioners argue that the Application does not explain sufficiently the steps that M2Z would take to reduce potential out-of-band, adjacent channel interference that could be caused by M2Z’s proposed TDD system to AWS FDD systems in nearby bands.³⁰⁵ While none of these Petitioners have ever contacted M2Z for further technical details regarding interference, it appears that they have preconceived and decidedly false notions regarding the issue. For example, in its Petition to Deny, Verizon Wireless quoted the TDD/FDD engineering analysis of Motorola in the AWS proceeding.³⁰⁶ Motorola’s comments were filed in 2003, but their substance on this issue comes from an October 2001 Motorola filing³⁰⁷ developed before most carriers performed packet-based digital interference analysis.

³⁰⁴ *Id.* at 35.

³⁰⁵ See AT&T Petition to Deny at 11–14; Verizon Wireless Petition to Deny at 14–20; T-Mobile Petition to Deny at 6–7; CTIA Petition to Deny at 6; Motorola Petition to Deny at 1.

³⁰⁶ See Verizon Wireless Petition to Deny at 3 (citing Comments of Motorola, Inc., ET Docket No. 00-258, at 16 (submitted Apr. 14, 2003)).

³⁰⁷ Comments of Motorola, Inc., ET Docket No. 00-258, at 16 (submitted October 22, 2001). These comments actually base their conclusions on earlier studies by others that are referenced.

Because Petitioners were not very clear in identifying potential interference scenarios, it is important to point out that even if no interference mitigation techniques were employed, M2Z's proposed service could only cause one novel type of potential interference to FDD operations³⁰⁸ in adjacent bands. Namely, the following type of interference potentially could occur, TDD mobile uplink transmissions to FDD mobile base station reception in the adjacent bands [2110-2155 (upper portion) MHz and 2175-2180 MHz AWS bands].³⁰⁹ This single type of interference that M2Z's proposed use of the 2155-2175 MHz band could cause to adjacent channel licensees is a typical variety of "near/far" interference that could occur in virtually any service or with any type of radio receiver when the mobile receiver of the interference victim is located far away geographically from the desired signal transmitter and near geographically to the undesired signal transmitter.³¹⁰

Any two systems operating in adjacent or nearby spectrum bands can cause mutual problems if network managers do not pay careful attention to the coexistence of such networks during the planning and design process. Yet, licensees in other services have successfully overcome the problem of near/far interference.³¹¹ In fact, in contrast to its behavior in this proceeding, Verizon Wireless cooperated with the other carriers involved in a potential AWS-PCS interference scenario to develop a "Joint H Block Proposal," suggesting effective power

³⁰⁸ TDD base stations could cause interference to downlinks of FDD mobiles in adjacent bands, but this interference mechanism is not novel and would exist even if the 2155-2175 MHz band were used for FDD downlinks like both its neighboring bands. This intersystem downlink issue is well understood by the CMRS industry and addressed through intercarrier coordination of base station locations, usually resulting in siting adjacent band base stations near each other.

³⁰⁹ See Marcus Affidavit, ¶¶ 9–11.

³¹⁰ *Id.*, ¶¶ 10, 12.

³¹¹ See *Service Rules for Advanced Wireless Services*, Joint Reply Comments of Sprint Corporation, Verizon Wireless, and Nextel Communications, WT Docket Nos. 04-356, 02-353 (submitted Feb. 8, 2005) ("Joint Reply Comments"). When the Commission developed the AWS-1 service rules, Sprint, Verizon Wireless and Nextel came to the realization that near/far interference would result between 1915-20 MHz and 1995-2000 MHz (AWS "H Block") and PCS operations, and worked together to resolve that issue.

limits and out-of-band emission limits to guard against interference.³¹² In the joint proposal that those carriers filed with the Commission, the parties even recognized that advancements in filtering technology may eliminate the need for the proposed limits.³¹³ This recognition of future advancements in the H-Block proposal is significant – in so doing, all carriers took note of the packet-based digital analysis of Nextel Communications.³¹⁴

With respect to the problem of adjacent TDD/FDD interference, there are long-standing examples of TDD systems that peacefully co-exist alongside FDD operations outside the United States. For instance, Personal Handyphone Systems (“PHS”) are used in several Asian countries including China, and have a worldwide subscriber base today of over 100 million users.³¹⁵ Although these cases do not present the same adjacent band TDD/FDD coexistence scenarios presented by M2Z’s Application, they nonetheless demonstrate that coordination and cooperation can occur.

Finally, the Commission has supported TDD and FDD deployment in close proximity. As the Commission recently stated in the BRS/EBS proceeding, the “current Rules would allow ITFS or MDS operators to safely use either FDD or TDD technology. Providing users with the flexibility to deploy the technologies of their choice is consistent with the Commission’s goal of allowing licensees to operate technology independent.”³¹⁶ Accordingly, in this same decision,

³¹² Joint Reply Comments, Attachment.

³¹³ Joint Reply Comments at 2.

³¹⁴ See *Service Rules for Advanced Wireless Services*, Comments of Nextel Communications, WT Docket Nos. 04-356, 02-353 (submitted Dec. 8, 2004). Nextel Communications used packet-based analysis to determine the actual probability that interference would occur. As illustrated by Nextel’s approach, other methods of analysis do not “take into account the probability of these legacy handsets would actually experience interference. . . . [although] mobile-to-mobile interference is highly probabilistic and depends upon the coincident occurrence of four factors.” *Id.* at 38.

³¹⁵ See Marcus Affidavit, ¶ 20; see also PHS MoU Group Press Release, “PHS MoU Group announced breakthrough of 100,000,000 PHS users worldwide” (Nov. 9, 2006), available at <http://www.phsmou.org/news/en/745.aspx>.

³¹⁶ *EBS/BRS Report and Order*, ¶ 133.

the Commission approved the operation of TDD and FDD in close spectral proximity when it revised the rules for BRS/EBS operation in the 2495-2690 MHz band.³¹⁷ Consistent with the current state of interference mitigation, M2Z will consider utilizing numerous techniques and engineering solutions to avoid interference during the planning, construction, and operation of its proposed NBRS network.³¹⁸ M2Z understands that AWS-1 and AWS-2 licensees are entitled to operate free of harmful interference from the proposed M2Z system, but is convinced that, through careful use of these interference avoidance techniques, M2Z can avoid harmful interference with its neighbors.

4. Further Technical Study for the Development of Service Rules is Unnecessary

In light of the foregoing, and due to the comprehensive nature of the interference mitigation solutions proposed in the Application (as further explained herein), the Commission need not conduct further technical study of the interference issues raised by use of the 2155-2175 MHz band in a separate rulemaking before authorizing M2Z's use of the 2155-2175 MHz band. The Commission has moved increasingly towards streamlining and harmonizing its Part 27 technical requirements, adopting the same or similar rules in proceeding after proceeding, in order to encourage spectrum use flexibility and interchangeability.³¹⁹ By working to standardize

³¹⁷ *Id.*, ¶ 134.

³¹⁸ See Marcus Affidavit, ¶¶ 16–21. Both Verizon Wireless and AT&T recommend that 5 MHz “guard bands” be created between M2Z's frequency of operation and the adjacent bands. See Verizon Wireless Petition to Deny at 18–19; AT&T Petition to Deny at 14–15. Such a proposal would create an artificial, demilitarized zone between M2Z and other AWS licensees and would specify a technical approach to mitigating interference (*i.e.*, the institution of a guard band) instead of allowing licensees to determine the best technical solutions to ensure protection. Mandating guard bands would be contrary to the Commission's policy of technology neutrality, and the Commission should avoid this approach. See, e.g., *Federal-State Joint Board On Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 69 (1997). The Commission should focus on preventing harmful interference, but should not dictate the measures to be used in meeting this goal. M2Z will commit to any reasonable interference control requirement imposed as a condition of its license as long as the requirement is technologically neutral and preserves M2Z's flexibility to respond to the interference issue with the modern interference mitigation techniques discussed above.

³¹⁹ See e.g., *AWS 1st Report and Order*, ¶ 41 (stating the Commission sought to harmonize the technical rules developed for BRS/EBS licensees with the those imposed on PCS and AWS licensees).

rules across wireless services, the Commission has eliminated artificial regulatory barriers that separate similar wireless services that differ from each other in only a few band-specific and service-specific respects. A rulemaking proceeding on technical matters is all the more unnecessary because the Commission allocated the 2155-2175 MHz band in the context of issuing AWS service rules. The Commission's reform efforts have streamlined the market-focused regulatory regime under Part 27, and in the process made the Commission's rules more consistent and standard across wireless services. Another lengthy and time-consuming rulemaking proceeding would only needlessly delay the long-awaited nationwide deployment of wireless broadband infrastructure and the commencement of M2Z's promising new service.

IV. PETITIONERS DO NOT RAISE ANY SUBSTANTIAL AND MATERIAL QUESTIONS REGARDING THE BENEFITS OF M2Z'S PROPOSAL OR THE VALIDITY OF THE PROPOSAL UNDER APPLICABLE LAW

A. M2Z's Provision of a Free, Portable Broadband Internet Access Service Represents A Significant Step Forward in the Deployment of Advanced Services

1. M2Z's Proposed Connection Speed of 384 Kbps Sets a Floor, Not a Ceiling, and Represents a Six-Fold Increase in Speed Over Dial-Up Service

Petitioners criticize M2Z for proposing to offer connection speeds of 384 kbps downstream and 128 kbps upstream, arguing that other wireless providers already offer mobile data rates at or in excess of the base level proposed in the Application.³²⁰ However, the Application establishes these data rates as minimum guarantees and enforceable promises regarding the level of service that M2Z would provide via the NBRS, and all of the specifics of the service that M2Z would eventually deploy are, of course, subject to the Commission's regulatory authority. Furthermore, in order to respond to technological and marketplace

³²⁰ See, e.g., CTIA Petition to Deny at 12; T-Mobile Petition to Deny at 8, 11.

developments, M2Z's service will be scalable and adaptable over time. Finally, the Commission should not turn its back on its principles of competitive and technological neutrality³²¹ by mandating data rates for broadband service providers.

In view of the always changing nature of the broadband marketplace, it would be unwise for the Commission to attempt to determine what optimum broadband speeds will be five, ten, or fifteen years into the future. Moreover, the Commission should take comfort in the fact that no matter what the actual data rates provided may be when M2Z first deploys its service within two years after grant of the license requested in the Application, those data rates will represent a marked increase over the dial-up data rates associated with the Internet access services that are available in many parts of the country. Grant of the Application would add one more competitive option to the broadband marketplace, resulting in a clear net gain for consumers.³²² Any broadband service that comes free of airtime charges would be a welcome alternative for millions of Americans currently locked into receiving high-priced wireline broadband service, receiving dial-up wireline service, or unable to receive any broadband service at all.³²³

³²¹ See, e.g., *Federal-State Joint Board On Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 69 (1997). T-Mobile argues that the Commission should not be in the position of picking “winners and losers” for licensing purposes, but failure to adhere to technological neutrality principles – by favoring FDD over TDD technology, for instance – is far more likely to result in the Commission picking winners and losers than would grant of M2Z's Application to provide nationwide broadband service in competition with incumbent wireline and wireless offerings.

³²² See Wilkie, “Consumer Welfare Impact,” at 3, 8.

³²³ Petitioners also criticize M2Z's proposal to provide service free of airtime charges by noting that consumer equipment necessary to receive the service could initially cost \$250. See, e.g., WCA Petition to Deny at 3 n.7. Furthermore, WCA implies that M2Z will profit directly from the sale of this equipment, but that implication is false, as M2Z does not have a stake in equipment sales. See, e.g., Wireless Communications Association International, Inc., Opposition to Petition for Forbearance, WT Docket No. 07-30, at 7 (submitted Mar. 19, 2007). As with the data rates promised in the Application, this estimate is a conservative one intended to serve as an enforceable condition of the license. As Verizon Wireless notes, the Application makes clear that M2Z anticipates that the equipment initially will cost *less than* \$250, and that the cost will decline over time. See Verizon Wireless Petition to Deny at 13 n.50 (citing Application at 3 n.6). Finally, even a \$250 initial investment amortized over just a single year of service would amount to a charge of little more than \$20/month, with that effective monthly rate declining over time as the term of service increases.

2. M2Z's Proposed Buildout Schedule Exceeds What Has Been Required of or Delivered by Other Licensees

Some Petitioners criticize M2Z's buildout schedule and imply that it will not result in rapid deployment of advanced services.³²⁴ No matter how onerous a buildout schedule the Commission may or may not have imposed on other services, the true test of a deployment schedule is how fast the provider actually brings its offering to the market and begins serving consumers. In other words, even the most rigorous buildout schedule is of little use if the licensees in the service seek waiver after waiver from the Commission or fail for other reasons to make good on their promises.

Unfortunately, many of the wireless services that have been auctioned by the Commission in the past as a possible hope for wireless broadband services have failed to live up to expectations. Numerous services that have been subject to the Commission's relaxed "substantial service" construction buildout standard have proven incapable, thus far, of delivering a viable third national broadband provider that can compete head-to-head against wireline providers of broadband service. For the most part, the Commission has excused the failure of licensees in the wireless broadband spectrum bands to build out their networks, allowing a large swath of valuable spectrum to lay fallow. The latest example of such treatment is the grant of additional time for network buildout provided to 2.3 GHz WCS licensees.³²⁵ In

³²⁴ See, e.g., AT&T Petition to Deny at 18–19; T-Mobile Petition at 8–9; WCA Petition to Deny at 5. While WCA questions whether M2Z's three-year build out milestone is adequate, the organization is on record stating that a three-year extension after nine years of inactivity is "an important step" in bringing services to consumers: "WCA applauds the FCC for granting the request of the WCS Coalition, of which WCA is a member, for an extension of the WCS build-out deadline. This represents an important step in the effort to bring WiMAX and other advanced technologies to U.S. consumers . . ." See WCA, WCA Applauds FCC For Granting WCS Coalition's Request For 2.3 GHz Buildout Deadline Extension, Press Release (rel. Dec. 1, 2006) available at: http://www.wcai.com/pdf/2006/p_wcaDec1.pdf

³²⁵ The Commission recently granted all WCS licensees, including entities such as AT&T, NextWave, and Verizon Wireless, an additional three years until July 2010 to satisfy their applicable construction build out requirements. See Wilkie II at 23 (citing *In the Matter of Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, ¶ 13 (2006)). The WCS waiver order

contrast to the licensees in this failed service, M2Z has made a concrete, realistic, and enforceable proposal to serve as much as 95% of the United States' population within ten years after commencing service. While Petitioners may quibble over the difference between 95% and 100%,³²⁶ M2Z notes that no deployment schedule or buildout requirement previously imposed by the Commission has yielded results as dynamic or beneficial for improving broadband deployment as those promised in the Application.

3. M2Z's Proposal Is Consistent with the Concept of a Marketplace Broadband Solution—It Will Permit New Entry into the Market and Spur Competition

The unfettered marketplace has done a good job of promoting ubiquitous wireless competition in the realm of traditional voice services, but despite the Commission's repeated efforts that marketplace has failed miserably in fostering the deployment of a ubiquitous and robust wireless broadband service that is competitive with wireline broadband offerings. Although spectrum capable of supporting wireless broadband has been auctioned in the WCS, LMDS, 39 GHz, 24 GHz, BRS, and other services,³²⁷ none of that spectrum is currently being used to provide nationwide broadband service in competition against the wireline broadband

limited the breadth of the original request because it lacked certainty and "could act as a disincentive for WCS licensees to expeditiously develop technological solutions for the band and construct systems" and "undermine one of the purposes of the construction requirement – to prevent spectrum warehousing." *Id.*, ¶ 14.

³²⁶ See, e.g., CTIA Petition to Deny at 10 n.25. What CTIA fails to appreciate once again is that M2Z's commitment to serve 95% of the nation's population is a minimum benchmark that M2Z has proposed as a condition of its license, but it is not intended to serve as a maximum service area. See Application at 23.

³²⁷ Amendments to Parts 1, 2, 87 and 101 of the Commission's rules to License Fixed Services at 24 GHz, Report and Order, 15 FCC Rcd 16934 (2000); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0GHz Bands, Report and Order and Second Notice of Proposed Rule Making, 12 FCC Rcd 18600 (1997); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997); Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), Report and Order, 12 FCC Rcd 10785 (1997); Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Report and Order, 10 FCC Rcd 9589 (1995).

providers. However, the fact that no individual or isolated Commission spectrum policy action will guarantee the attainment of ubiquitous wireless broadband service cannot serve as a justification for the Commission refusing to try. M2Z has identified one concrete action – grant of the Application – that the Commission could take to positively impact the state of competition in the broadband marketplace. The Commission has an obligation to consider this fact in its review of the Application. Notwithstanding claims to the contrary made by CTIA and others, the state of broadband deployment throughout the United States today is not acceptable.³²⁸ Grant of the Application would spur widespread deployment of M2Z’s wireless broadband service, which would serve as more than a mere complement to duopoly wireline broadband services.³²⁹

B. M2Z's Proposed Spectrum Usage Fee Provides a Generous Revenue Stream for the U.S. Treasury, and Neither That Voluntary Payment Nor the Commission’s Acceptance of the Proposal Violates The Act or Other Applicable Law

Certain Petitioners lodge unsubstantiated criticisms against the value of M2Z’s proposal to make voluntary, direct payments to the U.S. Treasury of a usage fee equal to five percent of gross revenues from M2Z’s premium service.³³⁰ Economic studies entered into the record in this proceeding since the time that the Application was filed in May, 2006, serve to demonstrate the validity of M2Z’s estimates for the total amount of the annual usage fee contribution.³³¹ Petitioners criticizing M2Z’s estimates in this regard can offer nothing but speculation as they attempt, unsuccessfully, to refute the showing that M2Z made in its Application and the reasoned estimates submitted since that time.

³²⁸ See, e.g., CTIA Petition to Deny at 11–12; NextWave Petition to Deny at 8–9.

³²⁹ See *Wilkie II* at 15-19.

³³⁰ See, e.g., WCA Petition to Deny at 6. These unsubstantiated attacks on M2Z’s projected valuation differ markedly from the substantial supporting evidence offered in support of M2Z’s estimate. See *Wilkie*, “Consumer Welfare Impact,” at 19–20; Liopiros at 32–33.

³³¹ See *Wilkie*, “Consumer Welfare Impact,” at 19–20.

Unsatisfied with simply questioning the amount of M2Z’s voluntary contributions, however, AT&T and Verizon Wireless also challenge the Commission’s authority to accept such voluntary payments on behalf of the U.S. Treasury, and question the validity of M2Z’s entire proposal under certain statutes regulating federal agencies’ financial dealings and contracts with private entities. As shown below, however, these arguments are likewise without merit.

1. The Commission Has the Authority and Discretion to Accept M2Z’s Proposal to Pay a Voluntary Usage Fee for the Spectrum Rights M2Z Seeks in the Application

AT&T erroneously asserts that the Commission lacks authority to collect M2Z’s proposed five percent usage fee. It argues that any payments imposed by the Commission must be “reasonably related to the value of the spectrum resource being received.”³³² In lieu of such a connection, AT&T states, the fee is simply a gross receipts tax.³³³ These arguments are without merit.

First, under M2Z’s proposal, the U.S. Treasury – and not the Commission – would “collect” the payments. Second, M2Z’s payments would be *voluntary* – the Commission has not imposed any fee or tax whatsoever on M2Z’s services. Instead, the payments are designed to recover a “portion” of the value of the public spectrum resource used to provide M2Z’s service, as specified as a goal in Section 309(j)(3)(C) of the Act. Such voluntary payments are accepted by the U.S. Treasury – even from certain Petitioners in this docket – in numerous wireless, licensing, enforcement, and merger review contexts in the form of consent decree settlements.³³⁴

³³² AT&T Petition to Deny at 19.

³³³ *Id.*

³³⁴ See, e.g., *In the Matter of AT&T Inc. Compliance with the Commission’s Rules and Regulations Governing Customer Proprietary Network Information*, Order, File Nos. EB-05-TC-047 and EB-06-TC-059, NAL/Acct. No. 200632170003, FCC 06-100 (rel. Jul. 7, 2006) (adopting a \$550,000 Consent Decree to resolve a CPNI compliance investigation); *In the Matter of T-Mobile USA, Inc. Compliance with the Commission’s Rules and Regulations Governing the National Do-Not-Call Registry*, Order, File No. EB-04-TC-010, NAL/Acct. No. 200532170012, DA 05-3038 (Enforcement. Bur. rel. Nov. 23, 2005) (adopting a \$100,000 Consent Decree); see also *In the Matter of Sprint*

The D.C. Circuit decision that AT&T relies upon, *NCTA v. FCC*,³³⁵ has no bearing on M2Z's Application. In *NCTA*, the Supreme Court reversed and remanded a Commission fee structure that sought to recover the full cost of cable television (or "CATV") oversight through annual per-subscriber fees imposed on CATV system operators.³³⁶ In that case, the issue was whether the Commission could lawfully recover its own costs in full from regulated entities, or whether the value of the Commission's services to the CATV systems was lower. M2Z has voluntarily offered to submit a payment to the U.S. Treasury, and there is no dispute as to whether the Commission is requiring the payment in return for services rendered to M2Z.

Third, AT&T is incorrect that M2Z's payments are not tied to the value of the 2155-2175 MHz spectrum. Once again, AT&T tries to force the Commission into auctioning the spectrum, essentially arguing that no payment could possibly represent the value of the spectrum to M2Z other than the amount that would be received at auction. In truth, M2Z's payments to the U.S. Treasury will grow as its premium service subscriber base increases. In other words, as M2Z derives additional revenue from the license, so will the U.S. Treasury, providing the tie that AT&T believes necessary. Further, the five percent usage fee could appropriately be described as the value that M2Z places on the 2155-2175 MHz band, when understood in context and in conjunction with all of M2Z's additional commitments to provide the public interest and consumer welfare benefits enumerated in Part I to this Opposition. In any event, as discussed in detail in Part II above, the Commission is not required to auction off licenses in the 2155-2175 MHz band, and in lieu of such a requirement it would be utterly inappropriate to assume that a

Communications Company, LP Verification of Orders for Telecommunications Services, Order, File No. EB-03-TC-056, NAL/Acct. No. 200532170004, FCC 05-60 (rel. Mar. 11, 2005) (adopting a \$4 million Consent Decree to resolve a slamming investigation).

³³⁵ 554 F.2d 1094 (D.C. Cir. 1976).

³³⁶ *See id.* at 1096-97.

hypothetical auction value represents the only acceptable license value – particularly where, as here, the Applicant has made public service commitments far beyond those traditionally offered by auction bidders.

2. M2Z’s Proposal Does Not Violate the Anti-Deficiency Act or the Miscellaneous Receipts Act

Verizon Wireless devotes a considerable amount of space in its Petition to Deny to arguments that grant of the Application would violate the Miscellaneous Receipts Act (“MRA”) and the Anti-Deficiency Act (“ADA”).³³⁷ Both of these claims have been considered and rejected by the Commission in other contexts, and also by the Government Accountability Office (“GAO”),³³⁸ and neither statutory argument fares better here.

The MRA does not bar the Commission from granting M2Z its requested license based on the conditions proposed in the Application. Verizon Wireless is the only petitioner to raise this argument, claiming that the Application violates the MRA by “inducing the Commission to trade the value of spectrum – value that should be realized for the Treasury via auction – for promises by M2Z to perform certain acts and services that the Commission will retain the discretion to enforce.”³³⁹ The MRA requires government officers or agents “receiving money for the Government . . . [to] deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”³⁴⁰ Characterizing the public interest commitments made by M2Z as akin to “constructive” payments of monies to the Commission made in lieu of auction

³³⁷ See Verizon Wireless Petition to Deny at 22–28.

³³⁸ See “Whether the Federal Communications Commission’s Order on Improving Public Safety Communications in the 800 MHz Band Violates the Antideficiency Act or the Miscellaneous Receipts Statute,” No. B-303413 (Nov. 8, 2004) (the “GAO Ruling”).

³³⁹ Verizon Wireless Petition to Deny at 25.

³⁴⁰ 31 U.S.C. § 302(b).

payments, Verizon Wireless argues that the Commission is prohibited by the MRA from “purchas[ing] . . . public interest promises with the value of the spectrum license.”³⁴¹

Verizon Wireless’s argument that the MRA prohibits grant of the Application is based on the false premise that the Commission has no discretion to assign the license requested by M2Z without competitive bidding.³⁴² As discussed in detail in Part II, however, Section 309(j)(6)(E) of the Act expressly affords the Commission such discretion by authorizing it to avoid mutual exclusivity in accepting and granting initial spectrum license applications.³⁴³ Therefore, grant of the Application would not violate the MRA because the Commission is not obligated under Section 309(j) or any other provision of the Act to assign licenses only via competitive bidding.

The Commission rejected a similar argument made by Verizon Wireless in the context of the 800 MHz re-banding. In that proceeding, Verizon Wireless argued that the MRA prohibited the Commission from granting Nextel’s proposal that it be assigned a nationwide license to operate on the 1.9 GHz band in exchange for 800 MHz spectrum that it would relinquish in order to eliminate interference to public safety.³⁴⁴ In discussing Verizon Wireless’s argument, the Commission stated that “[t]he MRA does not nullify the discretion that Congress gave to the Commission and preserved in Section 309(j).” The GAO confirmed the Commission’s interpretation of an agency’s responsibility under the MRA, and likewise rejected Verizon Wireless’s arguments.³⁴⁵ The Commission should similarly reject Verizon Wireless’s attempt to resurrect its failed MRA argument here.

³⁴¹ Verizon Wireless Petition to Deny at 27.

³⁴² See *id.* at 28 n.103; see also *id.* at 2–5.

³⁴³ See *800 MHz Re-banding Order*, ¶ 85.

³⁴⁴ See *id.*

³⁴⁵ See GAO Ruling at 22–23 (“[W]e defer to the Commission’s judgment that . . . modification authority is available to the Commission. . . . Accordingly, we do not believe that the Commission has circumvented the

The Commission also must reject Verizon Wireless’s argument that the Commission is barred by the Anti-Deficiency Act (“ADA”) from granting M2Z its requested license. The ADA prohibits an officer or employee of the United States from involving the “government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”³⁴⁶ Verizon Wireless argues that the ADA governs contracts or agreements relating to the transfer of value, as well as agreements relating to the payment of money.³⁴⁷ In essence, Verizon Wireless argues that if the Commission grants M2Z’s license request on the condition that M2Z perform the public interest obligations proposed in the Application, the Commission would be entering into a contract or transaction with M2Z to transfer value in the form of the requested license in exchange for the performance of M2Z’s commitments.³⁴⁸ Verizon Wireless argues that such a contract or transaction is prohibited under the ADA because Congress has not authorized such an agreement and has expressly required that spectrum licenses such as the license sought by M2Z be assigned via auction.³⁴⁹

Verizon Wireless’s claims of an ADA violation fail on at least two counts. First, as the federal government agency with plenary authority over the regulation of spectrum resources, the Commission is authorized to grant spectrum licenses to qualified applicants based on its determination of the public interest.³⁵⁰ Such license grants, which are often subject to conditions, do not constitute contracts or agreements under the ADA, but are instead

requirements of the miscellaneous receipts statute by not auctioning the spectrum in the 1.9 GHz band and obtaining and depositing the proceeds into the Treasury.”).

³⁴⁶ 31 U.S.C. § 1341(a)(1)(B).

³⁴⁷ Verizon Wireless Petition to Deny at 23.

³⁴⁸ *Id.* at 24-25.

³⁴⁹ *Id.* at 25.

³⁵⁰ *See* 47 U.S.C. § 309(d).

authorizations granted by the Commission pursuant to its regulatory powers.³⁵¹ Just as the thousands of conditioned spectrum license grants made by the Commission annually do not constitute contracts or agreements subject to the ADA, neither would the license grant to M2Z. As the Commission stated in the *800 MHz Re-banding Order* when it rejected a similar argument, “[r]adio spectrum is not appropriated by Congress and it cannot be obligated, expended, or deposited in the Treasury . . . [it] is a public resource of the United States that Congress has authorized and directed the Commission to manage in the public interest.”³⁵²

Second, like Verizon Wireless’s flawed MRA argument, its argument that grant of the Application is barred by the ADA is based on the false premise that the Commission has no discretion in how it must assign the license requested by M2Z. As discussed in detail in Section II, Congress has granted the Commission broad authority under Section 309(j)(6)(E) to avoid the mutual exclusivity in spectrum license applications that gives rise to the auction requirement.³⁵³

3. Despite Petitioners’ Fanciful Claims to the Contrary, M2Z’s Proposal Does Not Amount to a Request for Free Spectrum, Subsidies, or the Commission’s Financial Backing

CTIA and other Petitioners unjustifiably criticize the Application for seeking free or subsidized spectrum.³⁵⁴ These Petitioners seem to have conveniently forgotten that members of

³⁵¹ The GAO readily concluded that assignment of a license does not obligate or commit the government to pay any funds in violation of the ADA.

The express language of 31 U.S.C. § 1341(a)(1)(B) prohibits involving the U.S. government in a contract or obligation for the payment of money before an appropriation is made unless Congress by law authorizes such action. *The Report and Order does not obligate the government, by contract or otherwise, to pay any money from government funds that Congress has not appropriated.* Further, even if one were to accept the statements offered by critics of the Report and Order, *clearly this case does not commit the Commission to make, or the Congress to fund, any payments, the very evil that Congress addressed when enacting [the ADA].*

See GAO Ruling at 9–10 (emphases added).

³⁵² See *800 MHz Re-banding Order*, ¶ 81.

³⁵³ See *id.*, ¶ 85.

³⁵⁴ See CTIA Petition to Deny at 3; T-Mobile Petition to Deny at 1; Verizon Wireless Petition to Deny at 1.

the CMRS industry, including many of the providers that now oppose the M2Z Application, secured their initial spectrum authorizations without directly compensating U.S. taxpayers by making auction payments to the U.S. Treasury. It is true that grant of M2Z's Application – like the initial grants of valuable cellular licenses – would assign M2Z a license not subject to competitive bidding. Yet, as explained in Parts I and II above, the Commission has the authority to determine that the NBRB is the highest and best use of the 2155-2175 MHz band and thereafter to assign the requested license to M2Z in the public interest. In doing so, the Commission could be certain of the public interest benefits that would result from granting M2Z's license because of M2Z's voluntary payment of usage fees, its extensive public interest commitments, and the unprecedented level of network buildout proposed in the Application. These commitments far outweigh the commitments that were made by the cellular licensees when they received their initial licenses without auction.

In light of the Commission's history of assigning CMRS licenses to cellular providers at no cost, CTIA's charge that M2Z's proposal seeks the Commission's financial backing³⁵⁵ is disingenuous at best. M2Z has no more asked the Commission to finance its business than did the cellular licensees to which the Commission assigned so many licenses without competitive bidding. As noted above, the Commission grants thousands of spectrum licenses without competitive bidding each year.³⁵⁶ Many of these licenses are used in the provision of

³⁵⁵ See CTIA Petition to Deny at 8. CTIA also contends that the five percent voluntary usage fee to be paid under M2Z's proposal would make the Commission an "equity investor" in M2Z's business, and that the prospects receiving such payments would "pose an obvious conflict for the FCC in its role as a neutral government regulator because the U.S. Treasury's and the FCC's funds would be directly tied to M2Z's success." *Id.*; see also T-Mobile Petition to Deny at 12. Apart from insulting the Commission's decisionmaking processes and impartiality, the novel logic advanced by CTIA also would make the Commission an equity investor in every private company from which the United States collects a revenues-based USF contribution, every commercial and noncommercial broadcaster from which the Commission collects a five percent fee on revenues derived from ancillary services, and every cable operator from which the Commission collects a regulatory fee based on the number of subscribers that a cable system serves. See 47 C.F.R. § 1.1155.

³⁵⁶ See *supra* note 240.

commercial services and most of the recipients of such licenses do not pay an annual usage fee for such licenses. No one could reasonably assert, however, that the Commission has been financing or subsidizing the businesses of such licensees merely because the licensees were not required to secure their licenses through a process of competitive bidding.

C. There Are No Remaining Substantial and Material Questions of Fact Concerning the Application, the Public Interest Benefits of M2Z's Proposed Service, or M2Z's Financial Qualifications

The M2Z Application on its face provides sufficient information regarding the public interest benefits that would result from granting the Application to authorize the NBRS and grant M2Z's requested license, and regarding M2Z's financial qualifications to construct its proposed network. No further proceedings are necessary to confirm this information. In its Petition to Deny, AT&T repeatedly asserts that "substantial and material" questions of fact remain unanswered and that the Commission is without sufficient information to grant the Application, but its conclusory statements fail to raise factual issues.³⁵⁷ Under Section 309(d) of the Act, petitions to deny must set forth "specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest]. Second, the petition must present a 'substantial and material question of fact.'³⁵⁸ AT&T's Petition fails both prongs of this test.

To satisfy the first prong of the test, a petitioning party must set forth allegations, *supported by affidavit*, that constitute "specific evidentiary facts," not conclusory facts or general

³⁵⁷ See, e.g., AT&T Petition to Deny at 6.

³⁵⁸ *Application of GTE and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 434 (2000) ("*GTE Order*"). The *GTE Order* cites 47 U.S.C. § 309(d)(1) – (2) itself for this proposition, as well as the D.C. Circuits decisions in *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) and *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988).

allegations.³⁵⁹ AT&T has included no affidavit whatsoever with its petition. It submitted with its Petition to Deny a Declaration regarding interference issues, but, as shown in Part III of this Opposition, there are no factual issues that remain regarding interference.³⁶⁰ In addition to lacking an affidavit, AT&T's Petition provides no "specific evidentiary facts."

AT&T and the other Petitioners have also failed to present "substantial and material questions of fact." Although its Petition to Deny disputes some of the public interest benefits offered by M2Z's Application, the D.C. Circuit and the Commission have repeatedly stated that such concerns "manifestly do not" raise substantial and material questions of fact.³⁶¹ To be sure, the concerns that AT&T voices relate to questions that the Commission is well-suited to answer.³⁶² Finally, the "voluminous record" developed in this proceeding provides further evidence that no questions of fact remain that would require either a hearing or a denial of M2Z's Application.³⁶³

AT&T and other Petitioners also question the financial wherewithal of M2Z to construct its proposed network, arguing that the Application did not establish M2Z's solubility or capacity to raise the funds necessary to buildout and operate its service.³⁶⁴ As demonstrated in the Application, however, M2Z has the requisite finances in place to commence construction of its

³⁵⁹ See, e.g., *GTE Order*, ¶ 434; *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir.1980) (*en banc*) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Cir. 1974)).

³⁶⁰ AT&T overlooks the fact that M2Z committed to operate under the same Part 27 service rules that apply to other AWS services. In fact, the Declaration itself notes that the declarant's position is based on the "absence of specific service rules" being applied to M2Z. See AT&T Petition, Attachment A at 29. As discussed in more detail in Part III, M2Z offers the same commitment to protect against interference that other users in the band have made.

³⁶¹ See, e.g., *GTE Order*, ¶ 436-37; *SBC Communications, Inc. v. FCC*, 56 F.3d at 1496-97 (D.C. Cir. 1995).

³⁶² Even if AT&T raised substantial and material questions of fact, the appropriate step for the Commission would be to hold a hearing, not to deny the Application. See 47 U.S.C. § 309(d), (e).

³⁶³ See, e.g., *GTE Order*, ¶ 438.

³⁶⁴ See, e.g., AT&T Petition to Deny at 6-7; Verizon Wireless Petition to Deny at 10-14; CTIA Petition to Deny at 8; T-Mobile Petition to Deny at 7-8.

network and commencement of service after the Commission grants the Application.³⁶⁵

Moreover, many of the specific showings that Petitioners demand from M2Z³⁶⁶ are wholly without precedent and inappropriate in view of the already significant showing of financial and technical viability that M2Z has provided.³⁶⁷ Although M2Z's financial viability has been established by M2Z in this proceeding and even acknowledged in CTIA's Petition to Deny,³⁶⁸ in order to further establish M2Z's bona fides, M2Z notes that the financial resources it will be able to marshal to support its network buildout are far greater than the \$400 million mentioned in connection with M2Z's initial buildout phase in the Application.³⁶⁹

While M2Z has been very forthcoming in discussing its financial information and proposed service, it is worth noting that other wireless carriers – including some of the Petitioners – have recently reported financial struggles and losses on top of the vast amounts of money they spent to acquire spectrum licenses in the AWS auction and earlier.³⁷⁰ These facts

³⁶⁵ Application at 8. In fact, M2Z has assurances to receive funding at an amount significantly in excess of \$400 million and has provided the FCC with proof of such assurances under cover of confidentiality. *See* Request for Confidential Treatment of M2Z Networks, Inc., WT Docket Nos. 07-16 & 07-30 (filed Mar. 26, 2007). Moreover, M2Z's backers (Kleiner Perkins Caufield & Byers, Charles River Ventures, and Redpoint Ventures) are undoubtedly capable of seeing the network build out through to completion as they have generated over \$200 billion in value to shareholders, \$40 billion in annual revenues and 80 thousand jobs through just a select number of investments in companies that have been instrumental in the growth and use of the Internet.

³⁶⁶ Verizon Wireless suggests that M2Z should make the type of financial showing that the Commission required from pre-competitive bidding era cellular and private land mobile licensees, and also proclaims that "M2Z must provide detailed information as to how it expects to procure unique wireless equipment to operate in the 2155-2175 MHz" in order to justify estimates in the Application regarding the pricing point for customer equipment. *See* Verizon Wireless Petition to Deny at 11–12, 14. AT&T meanwhile would have M2Z provide further assurances against default akin to the steps required of Nextel in the 800 MHz transition. *See* AT&T Petition to Deny at 6–7. These parties fail to recognize that the burden of proof is on them, not M2Z. *See* Part I.C., *supra*. Claiming that M2Z must provide additional financial data does not meet that burden. Nevertheless, as explained elsewhere in this Opposition, M2Z is more than capable of financing the buildout of its network and will provide the Commission with additional information as requested.

³⁶⁷ *See, e.g.*, Application at 6–8.

³⁶⁸ CTIA notes in its Petition to Deny that M2Z has lined up capital venture backing in support of its proposal. *See* CTIA Petition to Deny at 3 n.6.

³⁶⁹ *See* Application at 8.

³⁷⁰ *See, e.g.*, Spencer Ante, "Verizon's Spin-off Offensive," Business Week Online (Jan. 18, 2007) (describing a series of transactions in which, "[o]ver the last five years, Verizon has spun off or sold a range of businesses worth

should bear on the seriousness with which the Commission treats questions regarding M2Z's financial viability raised by some Petitioners.

Finally, as noted in the Application,³⁷¹ M2Z has assembled a management team with extensive experience building out and operating wireless and IP-based networks. Attached hereto as Attachment C are affidavits that delineate the background and experiences of key members of this management team. This submission should lay to rest any supposed concerns³⁷² regarding M2Z's ability to satisfy its commitments to build out a nationwide wireless broadband network on the aggressive timetable set forth in the Application.

about a combined \$17 billion in cash and assumed debt," and noting that "investors are less sure Verizon will be able to produce a return on its massive fiber-to-the-home investment"); *see also* "Deutsche Telekom on the look-out for acquisition targets," Yahoo News (Mar. 1, 2007) (detailing T-Mobile parent Deutsche Telekom's recent \$1.2 billion fourth quarter loss).

³⁷¹ See Application at 6–8.

³⁷² See Verizon Wireless Petition to Deny at 20.

CONCLUSION

The M2Z Application presents a unique opportunity for the Commission to make significant progress in facilitating real competition to the current national wireline broadband duopoly. Despite some limited attempts by the Commission to foster such service, no serious national wireless provider of broadband services has emerged in the marketplace. The absence of such a provider has, unfortunately, retarded the deployment and take-up of broadband services, and left Americans with few real choices. If the Commission grants M2Z's Application as proposed in a timely manner, that action would unleash a valuable set of public interest and consumer welfare benefits that would have positive repercussions throughout the country. In view of the voluminous record developed in this proceeding, the unquestionable authority held by the Commission to grant M2Z's request, and the tremendous opportunity created by M2Z's proposal, M2Z urges the Commission to act swiftly to grant the Application within the one-year timeframe established by Section 7 of the Act using its forbearance authority, if needed.

Respectfully submitted,

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March 26, 2007

LIST OF ATTACHMENTS

ATTACHMENT A: Map illustrating existing BRS licensees subject to potential relocation

ATTACHMENT B: Map illustrating existing FS licensees subject to potential relocation

ATTACHMENT C: Affidavits from key M2Z personnel concerning qualifications

Attachment A

Attachment B

Attachment C

CERTIFICATE OF SERVICE

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

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