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September 1, 2006

**VIA HAND DELIVERY**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

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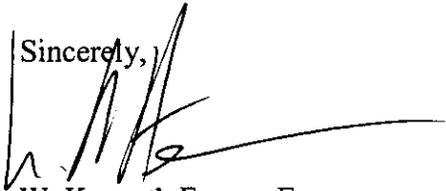
Federal Communications Commission  
Office of Secretary

Re: M2Z Networks, Inc.  
Petition for Forbearance Under 47 U.S.C. § 160(c)  
Concerning Application of Sections 1.945(b) and (c)  
Of the Commission's Rules

Dear Ms. Dortch:

M2Z Networks, Inc. ("M2Z"), by its attorneys and pursuant to Section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), and Section 1.53 of the Commission's rules, 47 C.F.R. § 1.53, hereby submits an original and four copies of a Petition for Forbearance (the "Petition"). The Petition requests 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 pending Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (the "Application"),<sup>1</sup> to the extent such rules, statutory provisions, or policies impede the acceptance and grant of the Application.

Please direct any questions concerning this matter to the undersigned.

Sincerely,  
  
W. Kenneth Ferree, Esq.

Enclosure

<sup>1</sup> See Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (filed May 5, 2006) ("Application"). Because the attached Petition and the Application are interrelated, concurrently with the filing of the Petition, M2Z has amended its Application under separate cover to incorporate the Petition by reference.

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Federal Communications Commission  
Office of Secretary

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

In the Matter of )  
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Concerning Application of Sections 1.945(b) )  
And (c) of the Commission's Rules and )  
Other Regulatory and Statutory Provisions )  
)

WT Docket No. \_\_\_\_\_

To: The Commission

**PETITION OF M2Z NETWORKS, INC.  
FOR FORBEARANCE**

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September 1, 2006

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## **EXECUTIVE SUMMARY**

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

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

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

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

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

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

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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To: The Commission

**PETITION OF M2Z NETWORKS, INC.  
FOR FORBEARANCE**

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

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<sup>1</sup> See Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (filed May 5, 2006) (“*Application*”).

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

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

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

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

<sup>4</sup> See *Application* at 22-32.

<sup>5</sup> See *id.* at 15-19.

<sup>6</sup> See *id.* at 22-26.

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

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

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

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

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<sup>7</sup> 47 U.S.C. § 151.

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

<sup>9</sup> Federal Communications Commission, Strategic Plan 2006-2011 at 6 (2006) (“*FCC 2006 Strategic Plan*”).

a strategic goal, stating that “[a]ll Americans should have affordable access to robust and reliable broadband products and services.”<sup>10</sup>

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

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<sup>10</sup> See *id.* at 5.

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

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

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

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

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

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

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

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

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

communications.<sup>14</sup> Many of these bills are aimed at establishing regulatory relief to encourage new entry into various communications sectors.

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

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

<sup>15</sup> See President George W. Bush, “A New Generation of American Innovation,” April 2004, available at [http://www.whitehouse.gov/infocus/technology/economic\\_policy200404/chap4.html](http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html).

<sup>16</sup> *Id.*

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

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

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

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

<sup>18</sup> *See FCC 2006 Strategic Plan* at 5.

<sup>19</sup> *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.

<sup>20</sup> *Id.* at 5-6.

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

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

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

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<sup>22</sup> See *Martin Tells Reporters He Sees Progress on Broadband, Video, '911'*, TR DAILY (Mar. 17, 2006).

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

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

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

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

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

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

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

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

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<sup>27</sup> *FCC 2006 Strategic Plan* at 3.

<sup>28</sup> The spectrum at 1710-1755 MHz and 2110-2155 MHz, which was the first spectrum designated for advanced wireless services or “AWS,” is sometimes referred to as “AWS1” spectrum.

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

<sup>30</sup> *See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 19 FCC Rcd 20720, ¶ 3 (2004).

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

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

<sup>32</sup> In many markets, portions of the band are completely unoccupied, and have been for several years. Consideration of a more efficient use of this spectrum has been in progress since 1992. *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Communications Technologies*, 7 FCC Rcd 1542 (1992) (proposing use of 2160-2200 MHz band for emerging technologies); ITU RR S5.388 (1992) (the World Administrative Radio Conference of 1992 identified spectrum at 2150-2160 MHz for potential use for advanced wireless services). Although it took several years for the Commission to order relocation of existing licensees, it has now been over two years since incumbent Broadband Radio Service ("BRS") licensees were directed to vacate the band, and nearly a year since Fixed Services ("FS") licensees were ordered to relocate. *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 46 (2003); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (2004) (subsequent history omitted) (ordering relocation of BRS licensees in the 2150-2156 and 2156-2160 MHz bands to the 2496-2502 and 2618-2624 MHz bands); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 20 FCC Rcd 15866 (2005) (ordering relocation of users in the 2155-2160 MHz band).

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

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

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

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

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<sup>33</sup> The Application was filed nearly four months ago, but has not yet been placed on Public Notice.

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

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

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

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

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

<sup>37</sup> *Hush-A-Phone Corp. v. U.S.*, 238 F.2d 266, 269 n.9. (1956).

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

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

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

<sup>40</sup> *Id.*

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

<sup>42</sup> See *Cellular Systems Order*, 86 F.C.C.2d 469 (1981).

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

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

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

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

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

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

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

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

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

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<sup>46</sup> 47 U.S.C. § 160.

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

<sup>48</sup> Report to Accompany H.R. 1555, House Rep. No. 104-204, 104th Cong., 1st Sess. (1995).

<sup>49</sup> *Id.*

<sup>50</sup> Report to Accompany S. 652, S. Rep. No. 104-23, 104th Cong., 1st Sess. (1995).

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

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

With similar goals, Section 7 of the Act, 47 U.S.C. § 157, provides that the Commission “shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.”<sup>55</sup> This statutory provision was enacted to: (1) “encourage the availability of new technology and services to the public”; (2) prevent the Commission from “hamper[ing] the development of new services”; and

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

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

<sup>53</sup> 47 U.S.C. § 160(a).

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

<sup>55</sup> 47 U.S.C. § 157(b). Over the years, the Commission repeatedly 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.” *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, ¶ 57 (2003); see also *Application of Hye Crest Management, Inc. for License Authorization in the Point-to-Point Microwave Radio Service in the 27.5 to 29.5 GHz Band and Request for Waiver of the Rules*, Memorandum Opinion and Order, 6 FCC Rcd 332, ¶ 28 (1991) (granting an exclusive license for 1,000 MHz of underutilized spectrum in the 28 GHz band for an innovative video distribution service comprised of multiple low power transmitters because the proposed service was “imaginative, technically feasible, and consistent with the statutory mandate of Section 7 of the Communications Act, which charges the Commission to encourage the provision of new technologies and service to the public.”).

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

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

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

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

<sup>58</sup> *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).

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

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

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

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

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<sup>60</sup> See *Application* at 13-15.

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

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

- (1) Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) Enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) Forbearance from applying such provision or regulation is consistent with the public interest.<sup>63</sup>

Section 10(b) of the Act specifies that, in making the public interest determination under the third prong of the three-part forbearance standard, “the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>64</sup> Section 10(b) further specifies that, “[i]f the Commission determines that such forbearance will promote competition among providers of

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<sup>61</sup> 47 U.S.C. § 309(a).

<sup>62</sup> See 47 U.S.C. § 160(a)(3).

<sup>63</sup> 47 U.S.C. § 160(a).

<sup>64</sup> 47 U.S.C. § 160(b).