

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

M2Z seeks forbearance from Sections 1.945(b) and (c) of the Commission’s rules, to the extent that the enforcement of any provision of these rules would block the acceptance and grant of M2Z’s Application. Section 1.945(b) provides that “[n]o application that is not subject to competitive bidding under Section 309(j) of the Communications Act will be granted by the Commission prior to the 31st day following the issuance of a Public Notice of the acceptance for filing of such application or of any substantial amendment thereof, unless the application is not subject to Section 309(b) of the Communications Act.”⁶⁶ Section 1.945(c) sets forth the standard for granting wireless license applications such as M2Z’s and provides in full that the Commission will grant a wireless license application without a hearing if the application is proper on its face and if the Commission finds that the following five criteria are met:

- (1) There are no substantial and material questions of fact;
- (2) The applicant is legally, technically, financially, and otherwise qualified;
- (3) A grant of the application would not involve modification, revocation, or non-renewal of any other existing license;
- (4) A grant of the application would not preclude the grant of any mutually exclusive application; and
- (5) A grant of the application would serve the public interest, convenience, and necessity.⁶⁷

As discussed below, enforcement of these rules in the context of M2Z’s Application is not necessary to protect consumers or to ensure that M2Z’s charges, practices, classifications, and regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

⁶⁵ *Id.*; see also *supra* n.51.

⁶⁶ 47 C.F.R. § 1.945(b).

⁶⁷ See 47 C.F.R. § 1.945(c).

Moreover, forbearance from Sections 1.945(b) and (c) in this instance satisfies Section 10's public interest test because it will increase the level of competition in the broadband and telecommunications market by allowing new entry by M2Z as a Commercial Mobile Radio Service ("CMRS") provider. Accordingly, as demonstrated in greater detail below, the forbearance standard is met, and the Commission must forbear from applying any provision of Sections 1.945(b) and (c) that would block the acceptance and grant of M2Z's Application.

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

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

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

⁶⁸ See 47 U.S.C. § 160(a)(1).

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

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

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

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

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

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

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

⁷³ See 47 U.S.C. § 160(a)(2).

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

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

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

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

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

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

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

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

The final prong of the forbearance standard requires the Commission to forbear from applying any regulation or provision of the Act if forbearance from applying such provision or regulation is consistent with the public interest.⁷⁸ In making this public interest determination, the Commission must consider whether forbearance “will promote competitive market conditions” and “[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”⁷⁹

The public interest benefits that will result from the grant of this Petition far exceed the benefits of forbearance petitions previously granted by the Commission. Grant of this Petition will promote competitive entry and will dramatically expedite delivery of a new broadband alternative to the public. The public interest benefits arising from competitive entry, by themselves, provides an overwhelming public interest basis for grant of this Petition. As explained in the Application, M2Z’s NBRS also will deliver additional public interest benefits by spurring innovation in the consumer electronics market, augmenting universal service, and promoting economic growth through broadband deployment. In light of the many benefits that will accrue to the public, this Petition should be granted.

⁷⁸ See 47 U.S.C. § 160(a)(3).

⁷⁹ 47 U.S.C. § 160(b).

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

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

⁸⁰ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 20 FCC Rcd 15908, ¶ 41 (2005). Although there is competitive choice among providers of mobile voice service, mobile broadband is not as widely available, and, where it is available, there are limitations. See Amol Sharma, *Cell Carriers to Web Customers: Use Us, But Not Too Much*, WALL STREET JOURNAL, May 11, 2006, at B1 (Internet access services available to mobile devices “come with limitations tucked into their policies that are unfamiliar to users of land-line Internet connections,” including limits on bandwidth-intensive applications).

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

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

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

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

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

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

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

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

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

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

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

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

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

set aside specific blocks of spectrum for use by new entrants and small businesses (*i.e.*, “designated entities” or “DEs”).⁹⁰ For many years, the Commission also capped the amount of spectrum that any commercial mobile radio services (“CMRS”) licensee could hold.⁹¹ In the Broadband PCS spectrum auctions, two-thirds of the spectrum in each geographic market was reserved for new entrants through eligibility restrictions and spectrum caps and ensuring that a number of new competitors entered the market. The Commission eliminated the per se limit on the aggregation of CMRS spectrum in 2003 due to the level of competition in the mobile voice market.⁹² Today, the Commission still seeks to promote competitive entry and prevent concentration using such tools as DE bidding credits⁹³ and case-by-case review of transactions

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

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

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

⁹³ 47 C.F.R. § 1.2110.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁷ See 47 U.S.C. § 309(j)(1).

¹⁰⁸ See *infra* Section VI.C.

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

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

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

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

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

¹¹¹ *See* 47 U.S.C. § 160(c).

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁸ See 47 U.S.C. § 160(c).

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

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

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

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

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

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

¹²⁰ See 47 C.F.R. § 1.945(c)(2).

¹²¹ See *Application* at 6-8.

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

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

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

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

¹²³ *See Application* at 6, n.14.

¹²⁴ *See id.* at 6.

¹²⁵ *See id.* at 6-7.

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

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

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

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

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

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

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

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

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

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

¹³⁰ See 47 C.F.R. § 1.945(c)(3).

¹³¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (2004) (ordering relocation of BRS licensees in the 2150-2156 and 2156-2160 MHz bands to the 2496-2502 and 2618-2624 MHz bands); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 20 FCC Rcd 15866 (2005) (ordering relocation of users in the 2155-2160 MHz band).

¹³² See *Application* at 19-21.

¹³³ See *id.* at 19.

¹³⁴ See *id.* at 20-21 & Appendix 2.

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

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

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

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

¹³⁵ See 47 C.F.R. § 1.945(c)(4).

¹³⁶ 47 U.S.C. § 309(j).

¹³⁷ 47 U.S.C. § 309(a).

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

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

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

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

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

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

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

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

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

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

¹⁴³ *Id.* ¶ 74.

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

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