

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

In re:)
)
M2Z NETWORKS, INC.) WT Docket No. 07-16
)
Application for License and Authority to)
Provide National Broadband Radio Service in)
the 2155-2175 MHz Band)
_____)

**PETITION TO DENY OF
VERIZON WIRELESS**

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EXECUTIVE SUMMARY

Verizon Wireless hereby petitions to deny M2Z Networks, Inc.'s Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band. M2Z seeks an exclusive license to construct and operate a nationwide broadband wireless network through which it will offer both free and for-profit services to the public. The Application also requests that the Commission circumvent the standard competitive bidding process for initial licenses and issue this license directly to M2Z for free. As detailed herein, the Application is fatally defective and should be promptly denied.

As an initial matter, the spectrum sought by M2Z must be auctioned and cannot simply be licensed to one entity for free. The Communications Act generally mandates the use of competitive bidding to select from among mutually exclusive applications for any initial license. While there are limited and narrow exceptions to this mandate, M2Z's proposed service plainly does not fall within any of them. Further, the Commission has already recognized that there is considerable interest in this band from many parties. The auction of CMRS spectrum has historically drawn heavy participation and the Commission has already recognized the potential interest of multiple parties in this particular band. Moreover, the precedent M2Z points to in an attempt to circumvent an auction is clearly inapposite and ignores relevant case law.

The Application is also defective in that M2Z has failed to demonstrate the requisite financial data and qualifications to be granted an authorization. Particularly where, as here, an applicant proposing a large-scale, cost intensive network seeks licensing outside of the financial checks inherent in the auction process, analysis of its financial qualifications is essential to protecting the public interest. To be financially qualified, an applicant must, at a minimum, have the intent and ready ability to pay for its licenses, build out its systems, and provide service in

accordance with Commission rules. M2Z clearly has not met this burden. Indeed, the \$400 million in financial commitments M2Z asserts are obviously not sufficient to construct and operate the proposed nationwide network. M2Z has also provided no information about its business case to demonstrate how its free service would be economically feasible and how customer equipment would be available at reasonable price points.

M2Z has additionally failed to demonstrate the requisite technical data and qualifications to be granted an authorization. In its Application, M2Z recognizes that the activation of its proposed system could generate harmful interference to co-channel incumbents during their transition out of the band, yet it completely fails to explain the mitigation techniques that it will use to protect such entities. The out-of-band emission limits M2Z points to for this purpose will not work – such limits protect *adjacent channel* operations from interference, not *co-channel* operations. Further, the Application fails to demonstrate how M2Z will relocate incumbent systems – something for which the Commission has already determined that any new licensee in the 2155-2175 MHz band would be responsible.

M2Z's assertions as to how it will protect adjacent channel licensees are also inadequate. Frequency Division Duplex systems, such as adjacent AWS licenses are expected to deploy, are very susceptible to interference from M2Z's proposed Time Division Duplex technology. In order to ensure adjacent channel operations are properly protected, the Commission and interested parties must have more information about the technical specifications of M2Z's system and the specific interference mitigation techniques it proposes. Such information is also essential to the establishment of guard bands, which will likely be necessary in addition to interference mitigation techniques. Yet, M2Z's Application wholly lacks this information. It is also largely devoid of technical data to permit evaluation of the proposed system or to identify

technical personnel who will deploy and operate the system.

Finally, M2Z's Application is also fatally flawed in that its grant would require actions by the FCC that are simply unlawful under the Anti-Deficiency Act and the Miscellaneous Receipts Act. Both of these statutes limit the ability of governmental entities to dispense valuable assets (like spectrum) and to receive monies outside of Congressionally-directed processes. Granting the Application as M2Z requests without conducting a spectrum auction, and imposing the proffered usage fee, would cause the agency to run afoul of both of these statutory requirements for sound fiscal management.

For these reasons, M2Z's Application is seriously defective and would have the Commission abrogate the law and sound spectrum policy. The Commission must therefore deny the Application and continue on the proper, lawful course – conducting the necessary rulemaking to set technical and service rules for the 2155-2175 MHz spectrum and opening the spectrum up for competitive bidding.

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**PETITION TO DENY OF
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Pursuant to Section 1.939 of the Commission’s Rules,¹ Verizon Wireless² hereby petitions to deny M2Z Networks, Inc.’s (“M2Z’s”) Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band (“Application”).³ As detailed herein, the Application suffers from numerous and serious flaws. It seeks free access to spectrum that Congress requires be licensed through competitive bidding. It requests a license grant free from competing applicants, which the Communications Act and FCC precedent do not permit. It fails to demonstrate that M2Z has the requisite financial and technical qualifications to be eligible for an authorization. And it would require the FCC to violate the Anti-Deficiency Act

¹ 47 C.F.R. § 1.939.

² Verizon Wireless is a national provider of commercial voice and data wireless services. Verizon Wireless and other commercial wireless providers are potential bidders for the spectrum sought by M2Z. Moreover, as demonstrated in Section III below, grant of M2Z’s Application would risk harmful radiofrequency interference to the future operations of Verizon Wireless and other licensees of adjacent Advance Wireless Services (“AWS”) spectrum. For each of these reasons, Verizon Wireless has standing to file this petition.

³ M2Z Networks, Inc., Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed May 4, 2006) (“M2Z Application”).

and Miscellaneous Receipts Act in order to grant the Application. For these reasons, the FCC should move promptly to deny M2Z's Application.⁴

I. THE SPECTRUM SOUGHT BY M2Z MUST BE AUCTIONED AND CANNOT SIMPLY BE LICENSED TO ONE ENTITY FOR FREE.

In its Application, M2Z seeks an exclusive license to construct and operate a nationwide broadband wireless network through which it will offer both free and for-profit services to the public. The Application also requests that the Commission circumvent the standard competitive bidding process for initial licenses and issue this license directly to M2Z for free. This proposed method of licensing is patently unlawful and demands that the Application be promptly denied. It is clear that M2Z's proposal does not fall within any of the exceptions to Congress' mandate that initial spectrum licenses be auctioned. Further, especially given the prime spectrum M2Z targets, one can safely assume that other entities would be interested in this band and that mutual exclusivity would result. As such, Congress and past FCC precedent requires that this spectrum be licensed through competitive bidding.

A. M2Z's Proposed Service Does Not Fall Within Any of the Limited Exceptions to the Competitive Bidding Mandate.

The Communications Act generally mandates the use of competitive bidding to select from among mutually exclusive applications for any initial license.⁵ The only exceptions to this auction requirement are if the service to be provided is (1) a public safety radio service, (2) a digital television service that will be provided by an existing terrestrial broadcast licensee, or (3)

⁴ Verizon Wireless notes that the Application is procedurally defective as well. The Application is clearly untimely as there is currently no open filing window for the 2155-2175 MHz band and no service rules for the spectrum have yet been adopted.

⁵ 47 U.S.C. § 309(j)(1) ("If...mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.").

a noncommercial educational broadcast service.⁶ Clearly, none of the exceptions to the competitive bidding mandate apply to M2Z's proposed wireless broadband service.

M2Z's proposed service is obviously not a broadcast service as contemplated by the second and third exemptions. M2Z will also not be providing a public safety radio service, even though it proposes to offer its service to the public safety community, among others. For purposes of this exemption, "public safety radio services" are defined as those that are used to protect the safety of life, health, or property and that are not made commercially available to the public.⁷ M2Z's proposed service plainly does not fall within this definition.⁸

First, the spectrum targeted by M2Z, the 2155-2175 MHz band, has not been allocated for a public safety radio service. In order for the public safety exception to apply, the spectrum must be specifically allocated for such services.⁹ In contrast, the FCC has allocated the 2155-2175 MHz band for Fixed and Mobile services and designated it for Advanced Wireless Service ("AWS") use, finding that additional spectrum is needed for AWS and that the characteristics of

⁶ The ORBIT Act also prohibits the use of competitive bidding to assign spectrum used for the provision of "international or global satellite communications services." ORBIT Act, Pub. L. No. 106-180, § 647, 114 Stat. 48, 57 (2000). However, this limitation is clearly inapplicable here.

⁷ 47 U.S.C. § 309(j)(2) ("The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission – (A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that – (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public[.]").

⁸ The Commission has indicated that the public safety radio service definition applies to a variety of services besides traditional public safety services. *See, e.g., Implementation of Sections 309(j) & 337 of the Commc'ns Act of 1934*, Report & Order & Further Notice of Proposed Rulemaking, 15 FCC Rcd 22,709, 22,740-41 (¶ 64) (2000) ("2000 Competitive Bidding R&O") ("[T]he statutory exemption for public safety services applies not only to traditional public safety services such as police, fire, and emergency medical services, but also to services designated for non-commercial use by entities such as utilities, railroads, transit systems, and others that provide essential services to the public at large and that need reliable internal communications in order to prevent or respond to disasters or crises affecting their service to the public."). Nevertheless, even this expanded definition does not encompass M2Z's proposed service.

⁹ *Id.* at 22,741 (¶ 66) ("[T]he exemption can apply only to spectrum that the Commission specifically allocates for the particular uses that Congress intended to benefit.").

this band make it well suited for such use.¹⁰ In doing so, the FCC indicated that this designation was consistent with its decision to allocate additional spectrum for AWS on a primary basis to support the types of high powered mobile applications associated with AWS and Broadband Personal Communications Service (“PCS”) expansion.¹¹ Accordingly, absent a rulemaking to reallocate this band for public safety, the public safety exception to competitive bidding cannot apply.

Second, in contrast to the express terms of the public safety exception, M2Z’s service will be made commercially available to the public. In its Application, M2Z indicates that it will make its high speed broadband access service available “to nearly every consumer, business and non-profit” in the United States, as well as to “public safety entit[ies].”¹² In addition, M2Z proposes that, although it will provide certain services to the public for free, it is a “for-profit entity”¹³ and will provide enhanced services, such as faster data rates and access to additional content, for a fee.¹⁴ Under Section 309(j)(2) of the Communications Act, if a service is made commercially available to the public, it is not a public safety radio service that is exempt from the competitive bidding requirement.¹⁵ In interpreting this provision, the FCC has found that “not made commercially available to the public” means that the service is not provided with the intent of receiving compensation and is not available to a substantial portion of the public.¹⁶

¹⁰ *Amendment of Part 2 of the Comm’n’s Rules to Allocate Spectrum Below 3 GHz for Mobile & Fixed Servs. to Support the Intro. of New Advanced Wireless Servs., Including Third Generation Wireless Sys.*, Eighth Report & Order, Fifth Notice of Proposed Rulemaking & Order, 20 FCC Rcd 15,866, 15,872 (¶ 9) (2005) (“*AWS Eighth R&O*”).

¹¹ *Id.*

¹² M2Z Application at 1.

¹³ *Id.* at 8.

¹⁴ *Id.* at 26.

¹⁵ 47 U.S.C. § 309(j)(2)(A)(ii).

¹⁶ *2000 Competitive Bidding R&O*, 15 FCC Rcd at 22,749-50 (¶ 82).

More specifically, the FCC found that commercial service providers intending to provide telecommunications services to public safety entities would not fall within this exemption because doing so would enlarge the exemption “beyond all limits of reasonableness.”¹⁷

As such, it is abundantly clear that neither the public safety exception, nor the other two limited exceptions, to Congress’ competitive bidding requirement applies to M2Z’s proposed service.

B. The Spectrum Will Be Subject to Mutually Exclusive Applications When Opened for Licensing.

Competitive bidding is also required here because M2Z’s interest in the 2155-2175 MHz band is not likely to be unique. The Commission has already allocated this band for AWS, a Commercial Mobile Radio Service (“CMRS”). Historically, CMRS auctions have been highly competitive. For example, Auction 58, in which 218 Broadband PCS licenses were available, concluded only after 91 rounds of bidding by 35 qualified bidders and ultimately netted over \$2 billion.¹⁸ Similarly, Auction 34, in which 1,030 800 MHz SMR licenses were available, concluded after 76 rounds of bidding by 26 qualified bidders, ultimately netting over \$319 million.¹⁹ Most recently, Auction 66, in which 2022 AWS licenses were available, concluded after 161 rounds of bidding by 168 qualified bidders, ultimately netting over \$13.7 billion.²⁰

This significant level of participation indicates a strong interest in CMRS spectrum by a wide variety of entities. There is no reason to believe that the same would not hold true for the 2155-2175 MHz band. Indeed, the FCC has already recognized the potential interest in this band

¹⁷ *Id.* at 22,750 (¶ 83).

¹⁸ *See* Auction 58 Broadband PCS Summary, FCC at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=58.

¹⁹ *See* Auction 34 800 MHz SMR General Category Service Summary, FCC at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=34.

²⁰ *See* Auction 66 Advanced Wireless Services (AWS-1) Summary, FCC at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66.

from numerous parties. As the FCC indicated in establishing AWS service rules, “[o]ur proposal to designate the 2155-2175 MHz band for new and advanced services, including AWS, has generated considerable support, as commenters indicate that this band could be best used to promote new technologies, such as AWS in paired or unpaired configurations.”²¹ Thus, the FCC can safely assume that, given the opportunity, multiple mutually exclusive applications would be filed to utilize this band. Further, because the Commission has previously found sufficient interest in this band to move forward in making it available, there is absolutely no basis for withdrawing it from being auctioned at this point. Accordingly, the FCC must license this band pursuant to competitive bidding.²²

C. Granting M2Z’s Application Would Be the Equivalent of Providing a Pioneer’s Preference, a Policy Congress Directed the FCC to Abandon.

In addition to violating the Communications Act’s competitive bidding mandate, the Application’s licensing request would also conflict directly with past action by Congress limiting the agency’s licensing authority. Were the FCC to grant the Application’s request for a license without competitive bidding, such action would be strikingly similar to a “pioneer’s preference” – a policy that Congress has previously and expressly eliminated.

Under the FCC’s pioneer’s preference program, the FCC provided preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) to “parties

²¹ *AWS Eighth R&O*, 20 FCC Rcd at 15,871 (¶ 8) (2005).

²² The FCC typically initiates auction proceedings even when it expects most applications will not be mutually exclusive. For example, in the broadcast context, the FCC will schedule an auction even if only a limited number of entities are permitted and/or expected to apply. Once these short-form applications are received, the FCC will determine whether mutually exclusive applications have been filed. If applications for particular channels are not mutually exclusive, the FCC will allow applicants to file applications for construction permits for facilities operating on those channels. If mutually exclusive applications are filed for such channels, mutually exclusive applicants must either resolve their conflicts or proceed to auction. *See, e.g., LPTV & TV Translator Digital Companion Channel Applications Filing Window for Auction No. 85: Auction Filing Window Rescheduled; Filing Requirements Regarding June 19-30, 2006 Window for LPTV & TV Translator Digital Companion Channel Applications*, Public Notice, 21 FCC Rcd 4100 (2006) (announcing revised auction procedures for the auction for Low Power Television (LPTV) and TV Translator digital companion channels in which only current LPTV, television translator, and Class A television licensees and permittees may apply).

that made significant contributions to the development of a new spectrum-using service or a new technology that substantially enhanced an existing spectrum-using service.”²³ In essence, this policy ““effectively...guarantee[d]” a license to an innovating party ““by permitting the recipient of a pioneer’s preference to file a license application without being subject to competing applications.””²⁴ Congress, however, specifically and unambiguously repealed the FCC’s authority to award a pioneer’s preference in 1997.²⁵ The FCC has subsequently noted this elimination of authority in refusing to act on licensing requests, like M2Z’s, that have attempted to circumvent the auction process. For example, several years ago, Northpoint Technology and its affiliates sought to be licensed without being subject to competing applications. In denying this request, the FCC noted that a grant would have been “inconsistent with Congress’s intent in abolishing the Pioneer’s Preference program.”²⁶ As in the Northpoint case, M2Z’s licensing request should similarly be denied.²⁷

²³ *Dismissal of All Pending Pioneer’s Preference Requests; Review of the Pioneer’s Preference Rules*, Order, 12 FCC Rcd 14,006, 14,006-07 (¶ 2) (1997).

²⁴ *Freeman Eng’g Assocs., Inc. v. FCC*, 103 F.3d 169, 174 (D.C. Cir. 1997) (quoting *Establishment of Procedures to Provide a Preference of Applicants Proposing an Allocation for New Servs.*, Report & Order, 6 FCC Rcd 3488, 3492 (¶ 32) (1991)). This policy was designed to ensure the award of a license to an otherwise-qualified pioneer’s preference recipient during a licensing regime in which licenses were awarded via lottery, not to give the preference recipient a competitive edge over other licensees. *Application of Nationwide Wireless Network Corp., for a Nationwide Authorization in the Narrowband Personal Commc’ns Serv.*, Mem. Op. & Order, 9 FCC Rcd 3635, 3636 (¶ 16) (1994).

²⁵ Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997) (moving up the expiration date of the pioneer’s preference from September 30, 1998 to August 5, 1997).

²⁶ *Amendment of Parts 2 & 25 of the Comm’n’s Rules to Permit Operation of NGSO FSS Sys. Co-Frequency with GSO & Terrestrial Sys. in the Ku-Band Frequency Range; Amendment of the Comm’n’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broad. Satellite Licensees & Their Affiliates; & Applications of Broadwave USA, PDC Broadband Corp., & Satellite Receivers, Ltd. to Provide Fixed Serv. in the 12.2-12.7 GHz Band*, Mem. Op. & Order & Second Report & Order, 17 FCC Rcd 9614, 9706 (¶ 241) (2002) (“*Northpoint Order*”), *aff’d*, *Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61 (D.C. Cir. 2005).

²⁷ Even were the pioneer’s preference policy still in effect, M2Z would not qualify. There is nothing pioneering or innovative about M2Z’s proposal. M2Z’s proposal certainly does not meet the prior standard for a preference – “significant contribution to the development of a new spectrum-using service or a new technology.” M2Z has simply been the first to file to use this band – and only because a filing window has not yet opened and its application is premature.

D. The Precedent Cited by M2Z Does Not Support Grant of its Application.

In its Application, M2Z attempts to argue that the FCC may grant the requested license without holding an auction, pointing to Section 309(j)(6)(E) of the Communications Act and the FCC's decisions in the 800 MHz Rebanding and Ancillary Terrestrial Component ("ATC") service proceedings.²⁸ However, such citations are clearly inapposite here and do not in any way justify the circumvention of the competitive bidding requirement.

As an initial matter, M2Z argues that the FCC has broad authority "to use different licensing schemes and threshold qualifications to avoid mutual exclusivity."²⁹ M2Z also highlights Section 309(j)(6)(E) as requiring the agency "to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."³⁰ However, in no way can this provision be read to completely gut Congress' clear directive to use auctions where the three limited exceptions do not apply. M2Z's interpretation of this section is not that the FCC should adopt reasonable service rules or eligibility criteria for this spectrum – what the plain language of the provision states – but rather that the agency should bar all other entities from applying for a license. Such a tortured and unsupported interpretation cannot stand.

M2Z also relies on two FCC cases it deems "similar", where the agency granted applications without subjecting them to competitive bidding. The first is the 800 MHz Rebanding proceeding, in which the FCC permitted Nextel to relocate to the 1.9 GHz band without being subject to competing applications.³¹ M2Z highlights the FCC's dicta in that

²⁸ M2Z Application at 35-40.

²⁹ *Id.* at 36 (emphasis omitted).

³⁰ *Id.* at 36-37 (emphasis omitted) (*quoting* 47 U.S.C. § 309(j)(6)(E)).

³¹ *Improving Pub. Safety Commc'ns in the 800 MHz Band, Consolidating the 800 & 900 MHz Industrial/Land Transp. & Bus. Pool Channels; Amendment of Part 2 of the Comm'n's Rules to Allocate Spectrum Below 3 GHz for*

order, where the agency states that it “‘could have exercised [its] authority to grant rights to the ten megahertz of spectrum to Nextel as an initial license, without subjecting the spectrum to competitive bidding measures.’”³² The second is the FCC’s decision to allow Mobile Satellite Service (“MSS”) licensees to provide ATC services without an initial licensing auction.³³ Both of these situations, however, involved modifications of existing licenses, not initial license applications as is the case here. As such, these cases are simply inapposite.

The case that is on point is the Northpoint order mentioned above. There, the FCC found that applications for *initial* Multichannel Video Distribution and Data Service licenses must be resolved through competitive bidding because mutual exclusivity was possible.³⁴ In that case, the FCC rejected the arguments that are being made by M2Z here, concluding that its obligation to avoid mutual exclusivity does not preclude it from adopting licensing processes that result in the filing of mutually exclusive applications where it determines that such an approach would serve the public interest.³⁵ Similarly, in the Air-to-Ground context, Verizon Airfone sought a modification to its license to allow it to provide broadband. The Commission, however, denied

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Mobile & Fixed Servs. to Support the Intro. of New Advanced Wireless Servs., Including Third Gen. Wireless Sys.; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Commc’ns Serv.; Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Commc’ns Serv.; Amendment of Section 2.106 of the Comm’n’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Serv., Report & Order, Fifth Report & Order, Fourth Mem. Op. & Order, & Order, 19 FCC Rcd 14,969 (2004) (“800 MHz Rebanding Order”).

³² M2Z Application at 38 (quoting *800 MHz Rebanding Order*, 19 FCC Rcd at 15,016 (¶ 74)).

³³ *Flexibility for Delivery of Commc’ns by Mobile Satellite Serv. Providers in the 2 GHz Band, the L-Band, & the 1.6/2.4 GHz Bands; Review of Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Serv. Sys. in the 1.6/2.4 GHz Bands*, Report & Order & Notice of Proposed Rulemaking, 18 FCC Rcd 1962 (2003).

³⁴ *Northpoint Order*, 17 FCC Rcd at 9705 (¶ 238).

³⁵ *Id.* at 9705-06 (¶ 240).

this enhancement request finding that the new capabilities rendered it a new license and therefore required an auction.³⁶

Here, M2Z is plainly seeking an entirely new license for an entirely new service, rather than a modification of an existing license. Accordingly, the applicable precedent is the FCC's decisions in the Northpoint and Air-to-Ground proceedings, not the orders M2Z cites. As required in the Northpoint and Air-to-Ground decisions, the initial license M2Z seeks must be subject to competitive bidding. Congress' directive on this point is clear and the limited exceptions to the auction requirement do not apply. Because M2Z's Application seeks to circumvent this mandated auction process, it must promptly be denied as unlawful.

II. M2Z HAS FAILED TO DEMONSTRATE THE REQUISITE FINANCIAL DATA AND QUALIFICATIONS TO BE GRANTED AN AUTHORIZATION.

Section 1.903(b) of the Commission's rules stipulates that authorizations to provide Wireless Radio Services may be granted only upon a finding that the applicant is financially qualified to hold such a license.³⁷ To be financially qualified, an applicant must, at a minimum, have the intent and ready ability to pay for its licenses, build out its systems, and provide service in accordance with Commission rules.³⁸ M2Z clearly has not met this burden.

³⁶ *Amendment of Part 22 of the Comm'n's Rules to Benefit the Consumers of Air-Ground Telecomms. Servs., Biennial Regulatory Review — Amendment of Parts 1, 22, & 90 of the Comm'n's Rules, Amendment of Parts 1 & 22 of the Comm'n's Rules to Adopt Competitive Bidding Rules for Commercial & General Aviation Air-Ground Radiotelephone Serv.*, Report & Order & Notice of Proposed Rulemaking, 20 FCC Rcd 4403 (2005).

³⁷ 47 C.F.R. § 1.903(b) ("Authorizations may be granted upon proper application, provided that the Commission finds that the applicant is qualified in regard to . . . financial . . . criteria. . . ."). *See also* 47 C.F.R. § 1.945(c) ("In the case of both auctionable license applications and non-mutually exclusive non-auctionable license applications, the Commission will grant the application . . . if the Commission finds . . . that . . . [t]he applicant is legally, technically, financially, and otherwise qualified[.]").

³⁸ *See, e.g., BDPCS, Inc.*, Mem. Op. & Order, 15 FCC Rcd 17,590, 17,599 (¶16) (2000) (explaining that "the default payment provisions are critical for maintaining the integrity of the auction process by discouraging insincere bidding and ensuring that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service"); *Amendment of Part 1 of the Comm'n's Rules — Competitive Bidding Procedures*, Third Report & Order & Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 433-34 (¶ 101) (1997); *Implementation of Section 309(j) of the Commc'ns Act — Competitive Bidding*, Second Report & Order, 9 FCC Rcd 2348, 2381 (¶ 190), 2382-83 (¶¶ 197-98) (1994)

In the competitive bidding context, the FCC has relaxed the financial showing because a potential licensee's ability to pay at auction typically demonstrates financial seriousness and wherewithal.³⁹ However, here M2Z is seeking a license for free, with no such upfront down payment demonstration. In this case, the appropriate standard for the financial showing is the one previously used by the Commission when licensees obtained their licenses through non-auctioned means. In such cases, a potential licensee was required to submit a substantive showing demonstrating that it was financially qualified to hold a wireless license.⁴⁰

For example, in the pre-auction cellular context, applicants were required to demonstrate that they were financially qualified to construct their proposed facility and to operate it for a reasonable period of time. This demonstration was required, in part, because of the large capital investment required to finance the "highly sophisticated technology associated with cellular operations, and because cellular service is in an early stage of development and must be viewed as a relatively high-cost business venture."⁴¹ The FCC further noted that the financial

(Continued . . .)

(discussing the value of down payments and default payments in ensuring that all licensees have the financial capability to rapidly deploy their systems and operate them in an efficient manner).

³⁹ See, e.g., *Implementation of Section 309(j) of the Commc'ns Act – Competitive Bidding for Commercial Broad. & Instructional TV Fixed Serv. Licenses*, First Report & Order, 13 FCC Rcd 15,920, 15,956 (¶ 99), 15,975-76 (¶ 144) (1998) (finding that requiring bidders to certify that they are financially qualified was no longer necessary because competitive bidding procedures would provide adequate assurance that applicants are financially qualified); *Implementation of Section 309(j) of the Commc'ns Act – Competitive Bidding*, Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7645 (¶ 68) (1993) (noting that requiring a post-auction full lump payment eliminates the need for the FCC to conduct "detailed checks of financial qualifications").

⁴⁰ See, e.g., *Amendment of the Comm'n's Rules for Rural Cellular Serv.*, Fourth Report & Order, 4 FCC Rcd 2542, 2542 (¶ 3), 2545 (¶¶ 16-17) (1988) (requiring non-wireline rural service area cellular applicants to demonstrate that they have the funds available or that they have received a firm financial commitment from a lender to cover the costs of construction, operation, and other initial expenses for one year). See also *Amendment of Part 74 of the Comm'n's Rules With Regard to the Instructional TV Fixed Serv.*, Report & Order, 10 FCC Rcd 2907, 2912 (¶ 29) (1995) (requiring Instructional Television Fixed Service applicants to demonstrate that they had sufficient net liquid assets on hand or available from committed sources to construct and operate the station for three months without additional funds).

⁴¹ *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Commc'ns Sys.; and Amendment of Parts 2 & 22 of the Comm'n's Rules Relative to Cellular Commc'ns Sys.*, Report & Order, 86 F.C.C.2d 469, 501 (¶ 72) (1981) ("1981 Cellular Order").

qualification demonstration is critical because only two cellular systems could operate in the same geographic area and the inability of any cellular licensee to provide service would significantly inconvenience the public and would cause a huge amount of spectrum to be unused.⁴² Applicants would make this showing by providing detailed documentation on (1) the projected cost of construction and other initial expenses of the proposed system and (2) how the applicant intended to meet those expenses and the costs of operation for the first year.⁴³

Similarly, in the private land mobile context, when the FCC made four 5-channel blocks available for nationwide commercial use to non-Government applicants in the 220-222 MHz band,⁴⁴ applicants were required to prove they had sufficient financial resources to construct 40 percent of the system and to operate the proposed land mobile system for the first four years of the license term, either by demonstrating net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs.⁴⁵

In this case, M2Z requests to be the *sole* recipient of a *free* nationwide 20 MHz license within which it can deploy a single nationwide broadband network – a task which as demonstrated below is a high-cost business venture. As in prior cases where significant spectrum licenses are awarded outside of the auction process, M2Z should have to demonstrate that it has obtained the requisite funding to deploy a nationwide broadband network within its proposed construction period. M2Z's Application utterly fails to do so.

What M2Z has provided by way of financial information is clearly not sufficient to show its financial ability to carry through its proposal. In its Application, M2Z states that it has

⁴² *Id.* at 502 (¶ 72).

⁴³ *See* 47 C.F.R. § 22.953(a)(9) (detailing what must be included in Exhibit IX to an application for authority to operate a cellular system in an unserved area).

⁴⁴ *Id.* § 90.717(b).

⁴⁵ *Id.* § 90.713(b)(5).

financial commitments of \$400 million.⁴⁶ Yet, it provides absolutely no evidence of this level of commitment. Further, even if such commitments were substantiated, they would not be sufficient to demonstrate financial ability to construct and operate the proposed network. M2Z suggests that the costs of building an analogous nationwide broadband network would be as much as \$18 billion⁴⁷ -- a sum exponentially more than its \$400 million in unsupported commitments. In addition, operating and upgrade costs for the system could well total several billion dollars in any given year.⁴⁸ M2Z's alleged financial commitments of \$400 million thus do not even come close to covering the maintenance costs of an already existing network, much less the costs of deploying a new nationwide network.⁴⁹

Moreover, in order for M2Z to demonstrate that it has the financial qualifications to deploy and maintain a financially viable service to the public, a realistic business case must be presented to the Commission. Yet, M2Z has not provided sufficient detail about its proposal for the FCC to ensure that an advertiser-based free service would be economically feasible. In addition, M2Z describes as a key element of its plan that customer equipment would be available at reasonable price points.⁵⁰ However, given that no broadband equipment has yet been developed for the 2155-2175 MHz band and that M2Z as the sole licensee would be the only

⁴⁶ M2Z Application at 8.

⁴⁷ *Id.* at 24. This estimate likely grossly underestimates the costs of building such a system.

⁴⁸ For example, Sprint Nextel has indicated that it is beginning to develop plans to roll out its 4G wireless broadband network and is deciding on whether to spend between \$2 and \$4 billion to do so. Kevin Maney, *CEO Roundtable: Top Tech Players Sound Off About Evolving Industry*, USA Today, May 18, 2006, at 6B-7B, available at http://www.usatoday.com/tech/news/2006-05-17-tech-ceo-roundtable_x.htm. Similarly, Cingular indicated its intention to invest nearly \$6.5 billion in its network in 2006. News Release, Cingular Invests Nearly \$105 Million in Its Arizona Network in 2006: New Cell Sites, Enhanced Voice/Data Quality and Capacity, Expanded Retail Outlets (Apr. 13, 2006), available at http://cingular.mediaroom.com/index.php?s=press_releases&item=1501.

⁴⁹ Significantly, M2Z's conservative cost estimate for deploying the system substantially exceeds the assets of all of its financial backers identified in its application.

⁵⁰ "We anticipate that the equipment, even initially, will cost less than \$250.00, and that the cost will decline with increasing consumer adoption and manufacturing scale." M2Z Application at 3 n.6.

buyer of such equipment (once developed), M2Z's claims of reasonable price points seems suspect. At a bare minimum, M2Z must provide detailed information as to how it expects to procure unique wireless equipment to operate in the 2155-2175 MHz that will be available to the public at a reasonable price point, as well as which vendor would be supplying such product.⁵¹

For these reasons, M2Z has failed to demonstrate the requisite financial data and qualifications to be granted an authorization. Accordingly, its Application should be promptly denied.

III. M2Z HAS ALSO FAILED TO DEMONSTRATE THE REQUISITE TECHNICAL DATA AND QUALIFICATIONS TO BE GRANTED AN AUTHORIZATION.

In addition to demonstrating its financial qualifications to deploy and operate the proposed service, the Commission's rules also require that M2Z demonstrate the technical qualifications to be awarded the license it seeks.⁵² In particular, M2Z must demonstrate in detail how it will protect co-channel and adjacent channel incumbent licenses from interference from its proposed system. M2Z must be required to commit to the relocation of affected incumbent license holders. Finally, M2Z must provide technical details to permit evaluation of the proposed system as well as identify the technical personnel who will be responsible for deploying and maintaining the wireless network infrastructure. M2Z's Application fails to address any of these issues.

⁵¹ This showing should be supported by an affidavit or signed statement from the vendor detailing specifics about the equipment and the costs expected for the product.

⁵² See 47 C.F.R. § 1.945(c)(2).

A. The Application Fails to Demonstrate How M2Z Will Protect Co-Channel Incumbents.

In its Application, M2Z recognizes that harmful co-channel interference can occur in the 2155-2175 MHz band during the transition of incumbent operations out of the band.⁵³ M2Z argues that it will address potential co-channel interference through “judicious selection of spectral subbands of operation and [advanced antenna system (“AAS”)] technology.”⁵⁴ M2Z asserts that this process will provide the same level of protection afforded by the current Broadband Radio Service/Educational Broadband Service (“BRS/EBS”) emission rules of the $43 + 10 \log(P)$ out-of-band emission standard.⁵⁵

M2Z has accurately described the risk for co-channel harmful interference in the 2155-2175 MHz band. However, M2Z has completely failed to explain the mitigation techniques that it will use to protect co-channel incumbents. Fixed microwave service licenses are licensed in this band on an exclusive, non-interference basis and have structured, rigorous protection standards established by standards bodies such as the Telecommunications Industry Association (“TIA”). For example, TIA Bulletin 10-F provides a variety of technical calculations and parameters designed to ensure new operations will not cause harmful interference to previously established systems.⁵⁶ BRS/EBS systems also have extensive line of sight protection criteria just recently adopted by the Commission that protect them from co-channel interference.⁵⁷

⁵³ See M2Z Application at 20.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Telecommunications Industry Ass’n, TIA/EIA Telecommunications Systems Bulletin 10-F, *Interference Criteria for Microwave Systems* (June 1994). See also 47 C.F.R. § 24.237.

⁵⁷ See *Amendment of Part 2 of the Comm’n’s Rules to Allocate Spectrum Below 3 GHz for Mobile & Fixed Servs. to Support the Intro. of New Advanced Wireless Servs., Including Third Generation Wireless Sys.; Serv. Rules for Advanced Wireless Servs. in the 1.7 & 2.1 GHz Bands*, Ninth Report & Order, 21 FCC Rcd 4473, 4501-02 (¶ 52) (2006).

For this reason, in establishing the technical service rules for AWS systems in the 1.7 and 2.1 GHz bands, the Commission sought and received extensive comments regarding the protection of incumbent BRS/EBS and fixed microwave license holders. Given the many differences between M2Z's proposed network and the AWS systems, the Commission must conduct a similar process before even considering granting M2Z's Application. M2Z cannot purport to fully understand all the technical operations of these incumbent license holders, nor the protections required to ensure their continued interference-free operations, without the Commission specifically seeking comment and developing adequate requirements for these protections.

M2Z's meager attempts to demonstrate how it will protect these incumbents are insufficient and inexplicable. Out-of-band emission limits, which M2Z apparently relies upon for *co-channel* protection, are designed to protect *adjacent channel* operations from interference.⁵⁸ By stating that the protections that M2Z will provide to co-channel incumbents will meet out-of-band emission limits, M2Z demonstrates a lack of technical knowledge of interference protections for wireless systems and plainly calls into question its technical qualifications to be a licensee. M2Z must demonstrate, through an acceptable engineering analysis, how its operations would protect co-channel incumbents to meet minimal technical qualifications to be a Commission licensee. Absent such demonstration, the Application must be promptly denied.

⁵⁸ See, e.g., Spectrum Policy Task Force Report, ET Docket No. 02-135, at 64 (Nov. 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.doc ("Spectrum Policy Task Force Report").

B. The Application Fails to Demonstrate How M2Z Will Protect Adjacent Channel Incumbents.

M2Z notes that future AWS operations in the 2110-2155 MHz and 2175-2180 MHz bands pose the highest potential for out-of-band harmful interference.⁵⁹ M2Z claims that “the use of cutting edge technology will ensure that M2Z is a good neighbor.”⁶⁰ M2Z argues that use of filtering, Orthogonal Frequency Division Multiple Access waveforms and AAS technology, along with restricting out-of-band emissions to $43 + 10 \log(P)$, will ensure protection of adjacent channel systems.⁶¹ Finally, M2Z asserts that the Commission has already approved operation of Time Division Duplex (“TDD”) and Frequency Division Duplex (“FDD”) systems in close spectral proximity in the 2495-2690 MHz band.⁶²

As with co-channel protections, determination of appropriate values for out-of-band emission levels is a complicated process that requires the input of all affected parties to ensure that previously licensed systems continue to be protected from harmful interference. Of greater import in this instance, the adjacent spectrum bands (2110-2155 MHz and 2175-2180 MHz) are allocated for AWS licensing and, in the case of the 2110-2155 MHz band, were recently auctioned. Such systems are expected to deploy FDD technology, which is fundamentally different from M2Z’s proposed TDD technology. Yet, M2Z has failed to provide any technical details about how it would protect these adjacent band AWS systems.

FDD systems are very susceptible to harmful interference from TDD systems unless significant safeguards are put into place.⁶³ M2Z blithely asserts that a recent ITU technical paper

⁵⁹ See M2Z Application at 20.

⁶⁰ *Id.* at 21-22

⁶¹ *Id.* at 22.

⁶² *Id.*

⁶³ See, e.g., Spectrum Policy Task Force Report at 64 (“Group future allocations based on mutually-compatible technical characteristics (power flux density and sensitivity to interference), and improve the out-of-band

establishes that TDD and FDD systems may be deployed in adjacent spectrum bands without difficulty.⁶⁴ However, this technical paper in fact describes the problems that arise when these systems are deployed adjacent to one another, especially due to base station-to-base station and mobile station-to-mobile station interference scenarios.⁶⁵ While the paper notes that the application of mitigation techniques *may* reduce the size of, and *may* in some cases eliminate, the guard band and/or isolation distances that might otherwise be required,⁶⁶ in many cases a buffer of some kind will still be necessary. The paper also suggests that the use of several interference mitigation techniques should be considered in determining if there are guard band requirements between two adjacent band systems.⁶⁷

Consequently, even with the use of interference mitigation techniques suggested in the ITU technical paper, guard bands will likely still be necessary between FDD and TDD systems, especially to protect sensitive mobile receivers in the 2110 to 2155 MHz band from operations in the 2155 to 2175 MHz band proposed by M2Z. Indeed, when the Commission first proposed allocating the 2155 to 2175 MHz band for AWS, Motorola specifically determined that if TDD operations were permitted in the 2155 to 2175 MHz band, “a guard band of at least 5 MHz would be required between FDD and TDD systems, and even then additional filtering and coordination measures would be needed to prevent harmful interference from occurring.”⁶⁸

(Continued . . .)

interference performance of transmitters and receivers over time so as to reduce the need for this kind of grouping.”).

⁶⁴ See M2Z Application at 14.

⁶⁵ See Report ITU-R M.2045, *Mitigating Techniques to Address Coexistence Between IMT-2000 Time Division Duplex and Frequency Division Duplex Radio Interface Technologies Within the Frequency Range 2500-2690 MHz Operating in Adjacent Bands and in the Same Geographical Area*, at 1 (2004).

⁶⁶ See *id.* at 14 (emphasis added).

⁶⁷ *Id.*

⁶⁸ See Comments of Motorola, Inc., ET Docket No. 00-258, at 16 (filed Apr. 14, 2003).

WCA found similar issues, when examining the 2155 to 2175 MHz band for TDD operations noting that there would need to be at least 10 MHz of guard band between TDD operations and the AWS operations in the 2110 to 2155 MHz band.⁶⁹ However, according to M2Z, absolutely no guard band is necessary between its proposed operations and those of AWS. Inconceivably, M2Z has failed to consider, let alone address, the comments in the AWS proceedings for the 2155 to 2175 MHz band that raised significant adjacent channel interference concerns.

The Commission, in light of the past record raising significant interference concerns, cannot act upon the M2Z Application without first seeking comment on the effects of locating M2Z's proposed TDD system in spectrum adjacent to AWS FDD systems. Further, in order to establish adequate adjacent channel protection criteria, the mitigation techniques need to be fully described and discussed based upon the technical specifications of the M2Z system. Finally, such technical specifications are also necessary to assess the appropriate guard band needed between TDD and FDD operations. Absent the submission of relevant technical data to assess and resolve these issues, the Application must be denied.

C. The Application Fails to Demonstrate How M2Z Will Relocate Incumbent Systems.

As discussed previously herein, the spectrum to which M2Z seeks access is encumbered with numerous fixed microwave and BRS/EBS incumbent license holders. In the recently adopted *BRS Relocation Order*, the Commission determined that co-channel licensees in the 2155-2175 MHz band would be responsible for relocating any of the incumbent license holders. BRS/EBS license holders that are within line of sight of co-channel operations in the 2155-2175

⁶⁹ See Comments of WCA, ET Docket No. 00-258, at 27 (filed Apr. 14, 2003).

MHz band would be relocated by the new entrant.⁷⁰ Fixed microwave service incumbents are to be relocated if their systems would be expected to receive interference from a new entrant in the 2155-2175 MHz band.⁷¹

In spite of these unambiguous requirements, nowhere in the Application does M2Z commit to the relocation of displaced incumbents. Moreover, M2Z does not provide any financial or technical data on the cost or complexity of such relocations. Without an affirmative showing of its commitment to relocate affected incumbents, and a financial showing of how such relocations will be paid for, M2Z's Application is incomplete and must be denied.

D. The Application Fails to Provide Technical Data for Evaluation of the Proposed System or to Identify the Technical Personnel Who Will Deploy and Operate the Network.

Finally, the Application is largely devoid of technical information that would permit the Commission to undertake the requisite evaluation of the technology and build-out plans for M2Z's proposed system and of the capabilities of the personnel who will be carrying them out. Where, as here, an applicant is seeking access to spectrum outside of the competitive bidding process, more extensive review of the entity's technical qualifications is warranted. In the competitive bidding context, an applicant's business plan, technical expertise, and proposed network specifications will be thoroughly reviewed by the financial community in the process of obtaining funding to participate and be successful in the auction. In such cases, the Commission can rely on this review as substantiating the technical qualifications of the applicant. Yet, here M2Z seeks to avoid the auction process. It is thus essential that the FCC itself undertake a

⁷⁰ See *Amendment of Part 2 of the Comm'n's Rules to Allocate Spectrum Below 3 GHz for Mobile & Fixed Servs. to Support the Intro. of New Advanced Wireless Servs., Including Third Generation Wireless Sys.*, Ninth Report & Order, 21 FCC Rcd 4473, 4481-82 (¶15) (2005).

⁷¹ See 47 C.F.R. §§ 101.69-101.83.

thorough review of the technical aspects of M2Z's proposal and ensure the spectrum will be used in the public interest.

Prior to the advent of auctions, the Commission required the submission of extensive technical data about the network and the applicant's proposed build-out plans prior to the grant of any application. For example, in the pre-auction cellular context, the Commission required the submission of multiple exhibits including proposed coverage maps, engineering data and calculations to substantiate coverage predictions, demonstration of compliance with cellular design concepts, plans for build-out, strategies for relieving network congestion, proposed frequency plans, and plans for addressing the needs of local subscribers including how it will handle customer complaints.⁷² M2Z's Application is totally devoid of this type of information and thus does not permit the Commission to make any meaningful evaluation as to whether the proposal will serve the public interest.

When making a determination about the technical qualifications of an applicant, the Commission must also look at the technical personnel and expertise offered in a filing. In this case, M2Z proffers Milo Medin as its Chief Technology Officer, with no indications of other qualified technical personnel. Mr. Medin's qualifications appear to be an engineering degree, past employment at the National Aeronautical and Space Administration, and experience as a founder of @Home.⁷³ Nowhere does Mr. Medin appear to have had any past experience in planning, deploying or maintaining a complex commercial wireless network. An application so glaringly bereft of any experienced commercial wireless technical staff necessarily cannot meet the technical qualifications for Commission licensing. M2Z needs to provide the Commission with a full accounting of the experienced technical employees that that will be deploying the

⁷² *1981 Cellular Order*, 86 FCC 2d at 502-03 (¶¶ 74-78) & App. C.

⁷³ *See* M2Z Application at 6.

proposed commercial wireless network. Otherwise, the Application is incomplete and must be denied.

IV. THE REQUESTED GRANT OF THE APPLICATION WOULD VIOLATE THE ANTI-DEFICIENCY ACT AND MISCELLANEOUS RECEIPTS ACT.

M2Z's Application is also fatally flawed in that its grant would require actions by the FCC that are simply unlawful under not just the Communications Act but other important provisions of federal statutory law. The Anti-Deficiency Act ("ADA")⁷⁴ and the Miscellaneous Receipts Act ("MRA")⁷⁵ limit the ability of governmental entities to dispense valuable assets (like spectrum) and to receive monies outside of Congressionally-directed processes. Granting the Application as M2Z requests without conducting a spectrum auction, and imposing the proffered usage fee, would cause the agency to run afoul of both of these statutory requirements for sound fiscal management. As such, the Application must be denied.

A. The M2Z Application Violates the Anti-Deficiency Act.

Granting the M2Z application would flatly violate the Anti-Deficiency Act by involving the government in a contract for monetary value without express Congressional authorization. The ADA protects Congress' power to appropriate funds⁷⁶ from the United States Treasury by forbidding an officer or employee of the United States from involving the "government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."⁷⁷ The ADA sets a high standard: numerous courts⁷⁸ and expert agencies⁷⁹

⁷⁴ 31 U.S.C. § 1341.

⁷⁵ 31 U.S.C. § 3302(b).

⁷⁶ U.S. Const. art. 1, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"); *see also Nev. v. DOE*, 400 F.3d 9, 13 (D.C. Cir. 2005) (stating that "the Appropriations Clause of the U.S. Constitution vests Congress with exclusive power over the federal purse" (internal quotations and citation omitted)).

⁷⁷ 31 U.S.C. § 1341(a)(1)(B). The statute also prevents government officers from incurring obligations beyond amounts that Congress has already appropriated. *Id.* § 1341(a)(1)(A).

have held that Congress must *explicitly* authorize an agency or officer to enter into an agreement on behalf of the United States.⁸⁰ This limitation on contractual authority extends beyond pure monetary obligations and encompasses agreements where the government transfers items of value or credits.⁸¹ In effect, Congress must authorize and appropriate funds *before* a governmental officer or agency may obligate the United States in a financially-related transaction or enter into a contract.⁸² M2Z's Application would require the government to enter into such a transaction without separate Congressional authorization and would violate the ADA.

In the instant case, Congress has already expressly instructed the Commission as to how to issue licenses for use of the spectrum, how to collect compensation for such licenses, and how to process the collected compensation. *First*, Congress has required the Commission to use competitive bidding to decide how to award spectrum licenses for bands, such as the ones at

(Continued . . .)

⁷⁸ See, e.g., *Royal Indem. Co. v. United States*, 313 U.S. 289, 294-95 (1941) ("There is no statute *in terms authorizing them* to remit taxes, to pass upon the claims for abatement of taxes, or to release any obligation for their payment. . . . There is thus no basis in the statutes of the United States for implying an authority in a collector to release a bond for the payment of the tax . . ."); *Greene County Planning Bd. v. FPC*, 559 F.2d 1227, 1240 (2d Cir. 1977) (en banc) (explaining that "a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action").

⁷⁹ See, e.g., *FAA – FBI – Air Transp. Sec. – Mgmt. of Aircraft Hijacking*, 2 Op. Off. Legal Counsel 219, 223 (1978) ("The Comptroller General has ruled that indemnity agreements of this type are void unless authorized by an express statute. We have been unable to find any statute that would specifically authorize the FBI or FAA to enter into an open-ended indemnity agreement.").

⁸⁰ In an opinion letter, the Comptroller General illustrated the strength of the ADA's limitations on an agency's independent authority to obligate the United States. *Matter of: Appropriations Accounting for Imprest Fund Advances Issued to Cashiers*, 70 Comp. Gen. 481, 484 (1991) ("For example, an agency with a \$1,000 appropriation and a \$100 Imprest Fund advanced to a cashier might fully obligate its \$1,000 appropriation while the Fund is still outstanding. If the cashier subsequently makes \$50 of authorized cash payments and seeks reimbursement, an additional \$50 obligation would have to be recorded. The total obligations of \$1,050 would then exceed the amount of the \$1,000 appropriation, and the agency would have violated the Anti-Deficiency Act.").

⁸¹ See, e.g., *To the Sec'y, Smithsonian Inst.*, 42 Comp. Gen. 650, 653, *abrogated on other grounds* by 51 Comp. Gen. 650 (1963) ("We have for many years consistently held that any grant of a right to use Government-owned property or facilities in a manner not permitted to the public at large creates a valuable privilege for which the Government should be compensated, and should be subject to statutory provisions governing public contracts.").

⁸² *Cf. Auth. of the U.S. To Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 1999 OLC LEXIS 10, at *84 (Op. Off. Legal Counsel June 15, 1999) ("In light of the express terms of the Anti-Deficiency Act, . . . there must be an identifiable source of statutory authority to incur an obligation in advance of an appropriation before a settlement may be entered that would incur one.").

issue here.⁸³ *Second*, although Congress has allowed the Commission to consider alternative payment schedules, it has not suggested that the Commission may accept non-monetary compensation or other consideration.⁸⁴ *Third*, the Commission may not make independent use of the proceeds received from a spectrum auction but instead must deposit those proceeds in the United States Treasury.⁸⁵ Thus, Congress has crafted specific and detailed procedures to determine how to award licenses for spectrum such as the one requested by M2Z.

The M2Z Application would require the Commission, in the absence of Congressional authorization and in the face of this careful auction regime, to commit portions of valuable spectrum in exchange for certain promises on the part of M2Z.⁸⁶ M2Z obviously believes that the spectrum has value, as shown in its desire to charge a subscription fee for access to its premium service.⁸⁷ The value is even more apparent when one considers that M2Z anticipates that this fee will generate a profit⁸⁸ even *after* covering costs associated with building the infrastructure, filtering content, assisting public safety providers, and paying a “voluntary” 5% of the fee to the United States Treasury.⁸⁹ Thus, M2Z seeks to obtain a license to use an extremely

⁸³ 47 U.S.C. § 309(j)(1) (stating that, when “mutually exclusive applications are accepted for any initial license or construction permit, then . . . the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection”).

⁸⁴ *Id.* § 309(j)(4)(A).

⁸⁵ *Id.* § 309(j)(8)(A).

⁸⁶ *See* M2Z Application at 12-13; *id.* at 12 (“In exchange for the spectrum requested[,] . . . M2Z pledges to utilize the spectrum subject to tangible and groundbreaking public interest commitments.”).

⁸⁷ *Id.* at 4, 12.

⁸⁸ *Id.* at 8 (referring to M2Z as “a for-profit entity”); *id.* at 18 (stating that spreading costs across “both urban and rural markets as well as high and low income areas [would] creat[e] an opportunity for [M2Z] to profitably serve these different markets as well”).

⁸⁹ *Id.* at 4.

valuable resource in exchange for certain voluntary, non-monetary consideration in the form of promises to perform certain acts and services.⁹⁰

Simply stated, Congress has not authorized the Commission to enter into any sort of agreement such as the one proposed by M2Z. Indeed, as discussed previously, Congress has affirmatively ordered the Commission to proceed in a completely different fashion in awarding spectrum licenses. The Commission cannot – in the absence of Congressional authorization – obligate itself to license valuable spectrum to a third party in exchange for certain promises. It certainly cannot make such an obligation in contrast with the express Congressional desire to award licenses based on a competitive bidding regime.

B. The M2Z Application Violates the Miscellaneous Receipts Act

Similarly, the M2Z Application violates the MRA by inducing the Commission to trade the value of the spectrum – value that should be realized for the Treasury via an auction – for promises by M2Z to perform certain acts and services that the Commission will retain the discretion to enforce. The MRA requires government officers or agents “receiving money for the Government from any source [to] deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”⁹¹ The statute applies both to monies *actually* received by a government officer or agent and those *constructively* received – that is, situations where no money actually crosses the palms of a federal officer but the officer makes use of the

⁹⁰ The Comptroller General has rejected just such an arrangement. *See To the Sec’y of Health, Educ., & Welfare*, 41 Comp. Gen. 671 (1962).

⁹¹ 31 U.S.C. § 3302(b). Congress may pass an exception to the MRA in separate legislation. *See, e.g.,* GAO, *Defense Infrastructure: Greater Management Emphasis Needed to Increase the Services’ Use of Expanded Leasing Authority*, Report to the Secretary of Defense, GAO Report No. 02-475, at 4 (2002) available at <http://www.gao.gov/newitems/d02475.pdf> (“Congress also provided limited relief from the Miscellaneous Receipts Act by permitting the services to be reimbursed for the costs of utilities or services provided in connection with a lease.”).

funds indirectly.⁹² The statute thus helps to protect Congress' prerogative to manage and appropriate revenues properly destined for the United States government.⁹³

Pursuant to the Application, M2Z would substitute the additional money it would otherwise have paid to the government as part of an auction with certain services – for example, building a nationwide and publicly-available broadband network and promising to offer it for “free.” M2Z’s application makes this *quid pro quo* bargain quite clear: “*In exchange for the spectrum requested in this Application[,] M2Z pledges to utilize the spectrum subject to tangible and groundbreaking public interest commitments.*”⁹⁴ Federal decisions construing the MRA have rejected this kind of indirect path around the statute’s direct prohibitions: “the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of [the MRA], *if a federal agency could have accepted possession and retains discretion to direct the use of the money.*”⁹⁵ Although M2Z pledges to provide some monies to the United States Treasury,⁹⁶ the

⁹² See, e.g., *SBA’s Imposition of Oversight Review Fees on PLP Lenders*, 2004 U.S. Comp. Gen. LEXIS 13 (Jan. 15, 2004). In the program at issue here, the Small Business Administration did not directly collect and pay for the cost of a review of a lender without giving that money to the United States Treasury. Rather, the SBA required those undergoing the review to pay those costs to the contractors performing the review. In essence, the SBA removed itself from the stream of payment, but still managed and mandated the payment as if it actually held the money.

⁹³ See, e.g., *Matter of: Tenn. Valley Auth. – False Claims Act Recoveries*, 2000 WL 230221 (Comp. Gen.), at *2 (Feb. 14, 2000) (“In the absence of specific statutory authority, an agency must deposit monies received for the use of the United States into the general fund of the Treasury as miscellaneous receipts.”); see also *Effect of 31 U.S.C. § 484 on the Settlement Auth. Of the Attorney Gen.*, 4B Op. Off. Legal Counsel 684, 686 (1980) (“The opinions of the Comptroller General construing [the MRA] tend to emphasize the prerogatives of the Congress and find exceptions to application of [the MRA] only when supported by a clear expression of congressional intent.”).

⁹⁴ M2Z Application at 12 (emphasis added).

⁹⁵ *Effect of 31 U.S.C. § 484*, 4B Op. Off. Legal Counsel at 688 (emphasis added); *id.* ([“W]e believe that money available to the United States and directed to another recipient is constructively ‘received’ for purposes of [the MRA]. . . .”); *To the Sec’y of Health, Educ., & Welfare*, 41 Comp. Gen. at 675 (rejecting Public Health Service proposal to exchange drugs for dental chairs because the “net effect of transferring drugs for dental chairs without replacing the drugs or covering an appropriate amount into the Treasury as miscellaneous receipts is the purchase of chairs for drugs rather than for money”).

⁹⁶ M2Z Application at 4 (stating that M2Z will “submit a voluntary payment to the U.S. Treasury of 5% of gross revenues generated from the subscription services that it will offer”).

plan as a whole allows the Commission, without Congressional authorization,⁹⁷ to manage the *full value* of the spectrum to achieve its own independent goals. In effect, the FCC would exchange large portions of the value of the spectrum for M2Z's promises. Additionally, as M2Z has acknowledged, the Commission would retain the discretion to direct the use of the spectrum via the license conditions that M2Z says are binding and enforceable.⁹⁸ Consequently, the FCC's "purchase" of public interest promises with the value of the spectrum license would constructively violate the MRA.⁹⁹

To be sure, the Commission rejected a related argument under the ADA and MRA in the 800 MHz context.¹⁰⁰ The Commission recognized the novelty and potential significance of these appropriations law questions, but determined to move ahead with rebanding based on the "vital public safety interest served by [the] *Report and Order*" and the need to "address[] the 800 MHz interference problem."¹⁰¹ Neither the interest of public safety nor any interference issues are present here, however. Moreover, the Commission found no MRA problem because it determined that the Communications Act did not require a commercial auction of the 1.9 GHz

⁹⁷ *Vending Machs. – Disposition of Receipts*, 32 Comp. Gen. 124, 125-26 (1952) ("[The funds] are required to be deposited into the Treasury of the United States as miscellaneous receipts, in the absence of express statutory authority to the contrary. No express provision of law to the contrary with respect to the receipts here involved has been found.").

⁹⁸ *See, e.g.*, M2Z Application at 33 ("In the event of M2Z's failure to comply with any of the explicit voluntary conditions, the Commission will have the discretion to find that the license has been rendered null and void of its own terms, without the need to conduct a revocation hearing.").

⁹⁹ *See* Comments of Verizon Communications Inc., Docket No. 02-55, at 17 (filed June 28, 2004) (The FCC's "failure to capture the market value of the spectrum for the benefit of the public *is tantamount to a failure to transfer to Treasury those funds to which the Government would otherwise be entitled.*" (emphasis added)).

¹⁰⁰ *See 800 MHz Rebanding Order*, 19 FCC Rcd at 15,017-22 (¶ 77-87); *Improving Pub. Safety Commc'ns in the 800 MHz Band*, Mem. Op. & Order, 20 FCC Rcd 16,015, 16,049-50 (¶76) (2005).

¹⁰¹ *800 MHz Rebanding Order*, 19 FCC Rcd at 15,021 (¶ 86); *see also id.* at 15,020 (¶ 82) ("Allocating spectrum to establish a long-term solution to the public safety interference problem and support the associated rebanding is a valid use of spectrum in the public interest.").

spectrum at issue there.¹⁰² The spectrum sought by M2Z, however, is plainly set aside for auction, as we have explained.¹⁰³

The Commission could not grant M2Z's Application without violating these two statutes.

V. CONCLUSION.

For the foregoing reasons, M2Z's Application is fatally defective. It seeks free access to spectrum that Congress requires be licensed through competitive bidding. It fails to demonstrate that M2Z has the requisite financial and technical qualifications to be eligible for an authorization. And it would require the FCC to violate the Anti-Deficiency Act and Miscellaneous Receipts Act in order to grant the Application. Accordingly, the FCC should deny M2Z's Application.

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Dated: March 2, 2007

¹⁰² See *id.* at 15,021 (¶ 85).

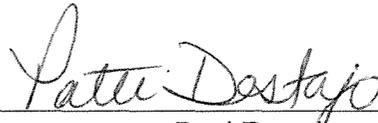
¹⁰³ See *supra* Section I.

CERTIFICATE OF SERVICE

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