

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)	
)	
M2Z Networks, Inc.)	WT Docket No. 07-30
)	
Petition for Forbearance Under)	
47 U.S.C. § 160(c) to Permit Acceptance and)	
Grant of its Application for a License to)	
Provide Radio Service in the 2155-2175 MHz)	
Band)	

OPPOSITION TO PETITION FOR FORBEARANCE

The Wireless Communications Association International, Inc. (“WCA”), pursuant to the Commission’s *Public Notice* released February 16, 2007,¹ hereby opposes the above-captioned Petition for Forbearance (“Petition”) submitted by M2Z Networks, Inc. (“M2Z”).² In the Petition, M2Z asks the Commission to forbear from enforcing fundamental procedural safeguards that would assure a thorough public interest review of M2Z’s extraordinary request for an exclusive nationwide license in the 2155-2175 MHz band (“Application”)³ without an auction, a rulemaking or any other process through which the Commission could evaluate whether M2Z’s proposal represents the highest and best use of the spectrum. The Commission, however, has already rendered M2Z’s Petition partially moot by accepting the Application for

¹ See *Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) to Permit Acceptance and Grant of its Application for a License to Provide Radio Service in the 2155-2175 MHz Band*, Public Notice, DA 07-736 (rel. Feb. 16, 2007) [“Feb. 16 Public Notice”].

² See Petition of M2Z Networks, Inc. for Forbearance, WT Docket No. 07-30 (filed Sept. 1, 2006) [“Petition”].

³ See Application of M2Z Networks for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, FCC File No. _____ (filed May 5, 2006); *id.* (amended Sept. 1, 2006) [“Application”].

filing,⁴ and what remains of M2Z's Petition falls well short of satisfying the forbearance criteria in Section 10 of the Communications Act of 1934, as amended (the "Act").⁵

M2Z's tactics here are transparent. As noted above, M2Z initially filed its Application on May 5, 2006. In that submission, M2Z asked the Commission to grant its Application immediately without an auction or consideration of competing proposals.⁶ Apparently dissatisfied that the Commission did not take immediate action on its Application, M2Z filed its Petition four months later, repeating its earlier request for expedited treatment of its Application and relying on essentially the same legal and policy arguments it had already raised in that filing.⁷ By recasting its Application as a petition for forbearance, M2Z plainly is trying to take advantage of the requirement in Section 10 that the Commission act on such petitions within one year.⁸ M2Z thus hopes to either strongarm the Commission into an early decision on its

⁴ See Feb. 16 Public Notice at 2 ("M2Z's Application was found, upon initial review, acceptable for filing, pursuant to the Commission's general statutory authority under Section 309 of the Communications Act of 1934, as amended. A Public Notice announcing that M2Z's Application was accepted for filing was released on January 31, 2007. Given the issuance of that Public Notice, to the extent that M2Z asks for forbearance to accept the Application for filing, that portion of the Forbearance Petition is moot.") (citations omitted); Petition at iii ("M2Z is herein petitioning the Commission to forbear, to the extent applicable from Sections 1.945(b) and (c) of its rules, and from any other administrative rule, statutory provision, or Commission policy which may otherwise impair, impede, or prevent the *acceptance* and grant of M2Z's Application.") (emphasis added).

⁵ WCA is the trade association of the wireless broadband industry and, *inter alia*, is the primary advocate for Broadband Radio Service ("BRS") licensees that use the 2150-2162 MHz band to deliver wireless broadband service and, in some cases, multichannel video service to consumers. As discussed *infra* and in WCA's March 2, 2007 Petition to Deny the Application, WCA's interest in this matter stems from the fact M2Z's proposed nationwide wireless broadband system at 2155-2175 MHz poses a substantial threat of harmful interference to BRS operations at 2150-2162 MHz. See Petition of Wireless Communications Ass'n Int'l, Inc. to Deny, WT Docket No. 07-16, at 1-2 (filed Mar. 2, 2007) ["WCA Petition to Deny"].

⁶ See Application at 37-38 ("[T]he Commission may significantly advance the public interest by granting M2Z's Application pursuant to Section 1.945 of the Commission's Rules, without opening the spectrum to competing applications and competitive bidding.").

⁷ See Petition at 34 n.109 ("[I]n its Application, M2Z sought waiver of the specific procedural rules discussed herein. For many of the same reasons that M2Z offered in support of its waiver request, forbearance from application of these rules also is appropriate.") (internal citation omitted).

⁸ See 47 U.S.C. § 160(c) (a petition for forbearance is deemed granted "if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a)").

Application or obtain a grant of its Petition by default if the Commission does not deny it by the one-year deadline or any permitted extension thereof.⁹ As shown below, the Commission need not and should not capitulate to M2Z's procedural gamesmanship.¹⁰

At the outset, M2Z distorts the facts when it suggests that it is the only entity ready, willing and able to deploy new service in the 2155-2175 MHz band, and that other parties would only be interested in warehousing the spectrum.¹¹ To the contrary, at least five other parties have filed competing applications for licenses in the 2155-2175 MHz band, and more may be filed in the future.¹² Moreover, the Commission has already designated the spectrum for Advanced Wireless Service ("AWS"), has announced that it will hold a rulemaking to adopt licensing and service rules for the spectrum, and has already received substantial expressions of interest from

⁹ *Id.*; *see also* Petition at 35-38.

¹⁰ The petitions to deny and opposing comments filed thus far in WT Docket No. 07-16 already confirm that M2Z's Application raises substantial questions of law and fact that require further Commission inquiry. *See* Petition of AT&T Inc. to Deny, WT Docket No. 07-16 (filed Mar. 2, 2007); Petition of Motorola, Inc. to Deny, WT Docket No. 07-16 (filed Mar. 2, 2007); Petition of CTIA to Deny, WT Docket No. 07-16 (filed Mar. 2, 2007); Petition of Verizon Wireless to Deny, WT Docket No. 07-16 (filed Mar. 2, 2007); Petition of NextWave Broadband Inc. to Deny, WT Docket No. 07-16 (filed Mar. 2, 2007); Opposition of EchoStar Satellite L.L.C., WT Docket No. 07-16 (filed Mar. 2, 2007); WCA Petition to Deny; Petition of T-Mobile USA, Inc. to Deny, WT Docket No. 07-16 (filed Mar. 2, 2007); Comments of Leap Wireless International, Inc., WT Docket No. 07-16 (filed Mar. 2, 2007); Comments of the Consumer Electronics Association, WT Docket No. 07-16 (filed Mar. 2, 2007).

¹¹ *See* Petition at 9-10 ("By forbearing from Sections 1.945(b) and (c), the Commission will open the door to a new entrant capable of deploying a nationwide broadband network using TDD technology. . . . On the other hand, if the Commission applies all of the administrative steps under these sections, it will likely lead to a long, overly drawn-out regulatory process where potential competitors would seek to deny consumers the benefit of the proposed service by arguing for delay in the assignment of the spectrum or for assignment processes that favor incumbent businesses and technologies.") (citation omitted).

¹² *See* Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, FCC File No. _____ (filed Mar. 2, 2007); Application of NetfreeUS, LLC, for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band, FCC File No. _____ (filed Mar. 2, 2007); Application of McElroy Electronics Corporation for a Nationwide 2155-2175 MHz Band Authorization, FCC File No. _____ (filed Mar. 2, 2007); Application of Commnet Wireless, LLC, FCC File No. _____ (filed Mar. 2, 2007); Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band, FCC File No. _____ (filed Mar. 1, 2007).

parties interested in using the 2155-2175 MHz band for AWS once rules are adopted and an auction is held.¹³

Nonetheless, M2Z asks the Commission to ignore all of the above and “forbear from applying any procedural or substantive rule, provision of the Act, or policy that would prevent, prohibit or impede . . . grant of M2Z’s Application.”¹⁴ At a minimum, this would require the Commission to: (1) dismiss all competing applications already filed against the Application; (2) ignore all petitions to deny filed against the Application; (3) announce that it will no longer accept any such petitions or applications in the future; (4) forego a rulemaking proceeding in which it could consider, among other things, the possibility that other potential users of the band might have a better proposal or, alternatively, that others might be willing to pay the Treasury more for the right to do what M2Z is proposing to do; (5) ignore whether the Application satisfies the criteria for grant of non-hearing applications under Section 1.945(c) of the Rules;¹⁵ and (6) deny other interested parties an opportunity to acquire the spectrum at auction in accordance with the requirements of Section 309(j) of the Act.

As a practical matter, there is no sensible reason for the Commission to do any of this now that it has formally accepted M2Z’s Application for filing and invited petitions to deny and

¹³ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Eighth Report and Order, Fifth Notice of Proposed Rulemaking and Order, 20 FCC Rcd 15866, 15871-2 (2005) (noting, *inter alia*, that the Commission’s proposal to designate the 2155-2175 MHz band for AWS “generate[d] considerable support, as commenters indicate[d] that this band could be best used to promote new technologies, such as AWS in paired or unpaired configurations”) (citation omitted).

¹⁴ Petition at 33.

¹⁵ Under Section 1.945(c), the Commission must find, *inter alia*, that “[t]here are no substantial and material questions of fact” and that “[a] grant of the application would not preclude the grant of any mutually exclusive application.” Given the petitions to deny and competing applications noted above, neither finding is possible unless the Commission ignores the rule.

competing applications.¹⁶ Clearly, the Commission has already concluded that the public interest is better served by encouraging public participation and developing a complete record on M2Z's proposal.¹⁷ Conversely, a grant of M2Z's Petition would defeat that objective for M2Z's benefit only. It therefore was entirely appropriate and, indeed, necessary for the Commission to reject M2Z's position and adhere to its standard Section 309(d) procedures in this case. The same public interest principles warrant rejection of any remaining requests for forbearance in M2Z's Petition.

In any case, assuming that M2Z would even be eligible for relief under Section 10,¹⁸ its Petition does not satisfy the statute's criteria for forbearance. The Commission cannot grant M2Z's Petition unless it finds, *inter alia*, that enforcement of the regulations or provisions at issue is "not necessary" for the protection of consumers,¹⁹ and that "forbearance from applying such provision[s] or regulation[s] is consistent with the public interest."²⁰ As to the latter, the Commission must consider "whether forbearance . . . will promote competitive market

¹⁶ See *Wireless Telecommunications Bureau Announces that M2Z Networks Application for License[] and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band is Accepted for Filing*, Public Notice, DA 07-492, at 1-2 (rel. Jan. 31, 2007) (noting that petitions to deny the Application could be filed pursuant to Section 309(d) of the Act, and that "additional applications for spectrum in [the 2155-2175 MHz] band may be filed while the M2Z application is pending") ["January 31 Public Notice"]. Although the January 31 Public Notice announced that the Application had been accepted for filing and that interested parties could submit petitions to deny, it did not establish date-specific filing deadlines for those petitions. On March 9, 2007, in response to a request from M2Z, the Commission issued a supplemental Public Notice announcing that petitions to deny the Application would be due on March 16, 2007, that oppositions thereto would be due on March 26, 2007 and that replies to such oppositions would be due on April 3, 2007. See *Wireless Telecommunications Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band*, Public Notice, DA 07-987 (rel. Mar. 9, 2007).

¹⁷ See, e.g., January 31 Public Notice at 2 ("While the Application is currently not opposed or subject to competing applications, given the fact that it implicates broadly applicable policy issues, we do not believe it would serve the public interest either to allow presentations to be made off the record or to proscribe *ex parte* presentations altogether. Accordingly...we find that this proceeding should be treated for purposes of the *ex parte* rules as a permit-but-disclose proceeding.") (citation omitted).

¹⁸ Section 10 limits forbearance relief to telecommunications carriers, telecommunications services, or classes of either. See 47 U.S.C. § 160(a).

¹⁹ *Id.* § 160(a)(2).

²⁰ *Id.* § 160(a)(3).

conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”²¹ Certainly, M2Z’s demand that the Commission prohibit any other party from accessing the 2155-2175 MHz band anywhere in the country is hard to square with the principles of competition, consumer protection or the public interest. Indeed, the Commission has long believed that the concept of “highest and best use” normally requires an *inclusive* licensing process that promotes flexible use of spectrum (as opposed to issuing only one license to a single applicant whose use of the spectrum is predefined).²² This idea was refined in Section 309(j), which reflects Congress’s belief that competitive bidding is the most effective way of channeling spectrum licenses to their most productive uses.²³ “An auction is likely to promote the rapid development of service because those parties that are in the best position to deploy technologies and services are also likely to be the highest bidders.”²⁴

Furthermore, while M2Z broadly claims that an unimpeded grant of its Application will yield a litany of public interest benefits, there is actually less to M2Z’s proposal than meets the

²¹ *Id.* § 160(b).

²² See, e.g., *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, Notice of Proposed Rulemaking, 11 FCC Rcd 21713, 21726 (1996) (“We believe that opening the WCS market to a wide range of applicants will permit and encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure the highest and best use of this spectrum.”); *Service Rules for Advanced Wireless Services in the 1.7 and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, 25167-8 (2003) (“Flexibility . . . allows spectrum to move to its highest valued use without regulatory lag, an economically efficient result.”) (citation omitted).

²³ See, e.g., *BDPCS, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 17590, 17598 (2000); *NextWave Personal Communications, Inc.*, Order on Reconsideration, 15 FCC Rcd 17500, 17513 (2000) (“Section 309(j) embodies a presumption that licenses should be allocated as a result of an auction to those who place the highest value on the use of the spectrum,” since those parties “are presumed to be those best able to put the licenses to their most effective use.”) (subsequent history omitted).

²⁴ *DirecTV, Inc. v. FCC*, 110 F.3d 816, 827 (D.C. Cir. 1997) (citation omitted); see also *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*, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5738 (2006) (“[a]n auction is most likely to assign the license to the qualified licensee that most highly values it if the auction is open to all potentially qualified licensees”).

eye. To cite just a few examples already discussed in greater detail in the petitions to deny filed by WCA and others:

- Even at its most basic level (384 kbps downstream, 128 kbps upstream) M2Z’s proposed service is not, as M2Z misleadingly suggests, “free.” In truth, consumers would be required to pay for an M2Z-certified reception device that M2Z “anticipates ... will cost less than \$250.00.”²⁵ Thus, even if M2Z’s cost estimate is accurate, it is still substantially more than, for instance, what consumers now typically pay for Wi-Fi access via their laptop computers in many areas of the country.
- It appears that M2Z’s proposed construction benchmarks are triggered at the earliest by M2Z’s commencement of operations.²⁶ However, M2Z would not have to commence operations until two years after it receives its license, and even then would only be obligated to put a single base station in one Statistical Metropolitan Statistical Area in the United States.²⁷ M2Z also would not be obligated to offer service to even a third of the nation’s population until three years after commencement of service (*i.e.*, five years after its license grant), and may offer service to considerably less than that in the interim.²⁸ While M2Z suggests that the Commission would have the authority to revoke M2Z’s license if M2Z fails to reach its proposed benchmarks, the Commission is unlikely to do so if M2Z has already commenced operations and consumers have paid up to \$250 each for the proprietary equipment needed to access M2Z’s proposed network.
- It does not appear that public safety organizations would be assured of uninterrupted service on M2Z’s network.²⁹ And, since M2Z would not be obligated to cover even half the nation’s population until five years after commencing service (*i.e.*, seven years after receiving its license), the lion’s share of the public safety community may receive little to no benefit from M2Z’s proposal for the foreseeable future.³⁰
- M2Z is proposing to keep 95% of the gross revenue it receives for its “premium” services and contribute the remaining 5% to the Treasury as something akin to a

²⁵ Application at 3 n.6. Moreover, consumers who want access to M2Z’s network at speeds comparable to those usually offered by other broadband service providers must subscribe to one of M2Z’s “premium” services which, again, are not “free.” *Id.* at 12.

²⁶ *Id.* at 34 and Appendix 2 at 2.

²⁷ *Id.*, Appendix 2 at 2.

²⁸ *Id.* And, since M2Z’s coverage benchmarks are measured in terms of population rather than geographic area, there is no assurance that M2Z’s networks will be constructed in rural or otherwise less densely populated areas in a timely manner.

²⁹ *Id.*, Appendix 4 at 7 (“[T]o the extent public safety entities require uninterrupted service, M2Z will work with them to achieve that goal.”).

³⁰ In fact, much of M2Z’s showing with respect to public safety seems to be little more than a sales pitch for its equipment vendor/partner PacketHop. *Id.*, Appendix 4 at 4-6.

spectrum fee.³¹ There is no guarantee or even likelihood that M2Z's "premium" services will generate anything close to the amount of revenue necessary to adequately compensate the Treasury for the spectrum, particularly after M2Z takes its 95% share before the government receives a nickel.

All said, nothing about M2Z's proposal is unique or compelling enough to justify the extraordinary relief M2Z has requested in its Petition or its Application. Furthermore, even putting all of the above aside, WCA's constituency is uniquely affected by M2Z's failure to propose conditions upon its license that would guarantee that M2Z will avoid destructive interference to those BRS licensees that currently occupy the 2150-2162 MHz band. Although M2Z gives the issue scant attention in both its Petition and its Application,³² the problem is neither new nor insignificant – throughout the seven-year course of ET Docket 00-258 and related proceedings, the Commission has been fully aware that BRS cannot operate cochannel with AWS without suffering destructive interference. Indeed, it is for that very reason that AWS licensees cannot begin operations until they relocate BRS incumbents who might suffer interference.³³

WCA's petition to deny the Application already addresses the interference problem and the flaws in M2Z's limited analysis thereof, and thus WCA will not repeat those arguments *verbatim* here.³⁴ Most important, while WCA takes some solace in M2Z's claim that "it is committed to protect market incumbents until [transitions to the 2.5 GHz band] are complete," the specific interference-related conditions that M2Z proposes to accept do not go far enough to assure protection of BRS incumbents. Therefore, if the Commission is disposed to grant either the Petition or the Application, it should specifically condition any license on M2Z's compliance

³¹ *Id.* at 26.

³² *See* Petition at 30; Application at 19-22.

³³ *See* 47 C.F.R. §§ 27.1132 and 27.1250 *et seq.*

³⁴ *See* WCA Petition to Deny at 7-9.

with the relocation requirements in Section 27.1255 as if M2Z were an AWS licensee.³⁵ Also, due to its misreading of the BRS technical rules, M2Z has significantly understated the amount of adjacent channel protection BRS licensees must afford each other under Section 27.53(1)(2) of the Rules. Hence, if M2Z intends to subchannelize the 2155-2175 MHz band to avoid operations cochannel to BRS, any resulting adjacent channel operations should be subject to full compliance with Section 27.53(1)(2) as if M2Z were operating a BRS station.

* * *

M2Z has failed to demonstrate either in its Petition or its Application why the Commission should throw its rules and policies aside to facilitate an unchallenged grant to M2Z of an exclusive nationwide license for the 2155-2175 MHz band, subject only to the “soft” conditions M2Z offers in its application. Even if M2Z had made a more credible case, the proper forum for consideration of its proposal is a rulemaking proceeding, where all of the relevant issues (including the technical issues unique to BRS) and interested parties can be given a full and fair hearing. M2Z’s Petition and its Application thus should both be denied.

Respectfully submitted,

**THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.**

By: /s/ Andrew Kreig
Andrew Kreig
President

1333 H Street, N.W.
Suite 700 West
Washington, D.C. 20005
(202) 452-7823

March 19, 2007

³⁵ Section 27.1255 of the Commission’s Rules requires an AWS newcomer to relocate any cochannel BRS operations before deploying a base station that will have line of sight to BRS facilities, and imposes on AWS an absolute obligation to cure any interference that it causes BRS. *See* 47 C.F.R. § 27.1255.

CERTIFICATE OF SERVICE

I, Tim Gray, hereby certify that the foregoing Opposition to Petition for Forbearance was served this 19th day of March, 2007 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

W. Kenneth Ferree
Shepard Mullin Richter & Hampton, LLP
1300 I Street, N.W.
11th Floor East
Washington, DC 20005-3314

Milo Medin
Chairman
M2Z Networks, Inc.
2800 Sand Hill Road
Suite 150
Menlo Park, CA 94025

Uzoma C. Onyeije
Vice President Regulatory Affairs
M2Z Networks, Inc.
2000 North 14th Street
Suite 600
Arlington, VA 22201

/s/ Tim Gray

Tim Gray