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MAR 29 2007

**Federal Communications Commission
Office of the Secretary**

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

**PLEASE STAMP
AND RETURN**

In the Matter of)
)
 M2Z NETWORKS, INC.)
)
 Application for License and Authority to)
 Provide National Broadband Radio Service)
 In the 2155-2175 MHz Band)
)
 Petition for Forbearance Under)
 47 U.S.C. § 160(c) Concerning Application of)
 Sections 1.945(b) and (c))
 Of the Commission's Rules and Other)
 Regulatory and Statutory Provisions)

WT Docket No. 07-16

WT Docket No. 07-30

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MAR 26 2007

Federal Communications Commission
Bureau / Office

To: Chief, Wireless Telecommunications Bureau

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

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EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

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

**Before the
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Of the Commission's Rules and Other)	
Regulatory and Statutory Provisions)	

To: Chief, Wireless Telecommunications Bureau

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

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

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

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

INTRODUCTION

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

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

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

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

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

³ See Application at 12.

⁴ See *id.* at 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ See 47 U.S.C. § 157(a)–(b).

²⁴ See *id.* § 157(a).

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

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

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

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

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

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

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

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

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

²⁷ See CTIA Petition to Deny at 6.

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

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

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

²⁹ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd 23193 (2002) ("AWS Allocation Order").

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

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

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

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

³² As explained in greater detail in Part III below, the Commission has been seeking the highest and best use of this spectrum for more than fifteen years, and within the context of the AWS proceeding explicitly sought comment several years ago on the best use for spectrum resources in and near the 2155-2175 MHz band. *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, ¶¶ 62, 70 (2003). This Third Report and Order asked for industry assistance in the Commission's effort to determine the highest and best use for the band, but the band continued to be underutilized for several more years and the Commission's questions remained unanswered until M2Z submitted the Application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.