

The Commission has recognized this prohibition in prior decisions.²⁰⁵ In the *800 MHz Memorandum Opinion and Order*, for example, the Commission stated that “Section 309(j)(7) prohibits [it] from basing a decision to auction spectrum solely on the expectation of auction revenues.”²⁰⁶ In the *800 MHz Re-banding Order*, the Commission explained that “[its] most basic spectrum-management power is to assign spectrum to achieve public interest benefits *other than monetary recovery*.”²⁰⁷ The Commission noted further that, before Congress enacted Section 309(j) in 1993, the Commission “never obtained cash payments for spectrum.”²⁰⁸ Instead, it achieved its public interest goals through spectrum allocation and license assignments.²⁰⁹ When Congress provided the Commission with auction authority, it simultaneously prohibited the Commission from choosing whether to auction spectrum based on a “desire for federal revenue.”²¹⁰ Thus, “[a]lthough the recovery of auction revenue and promoting competition are important purposes of the auction statute, Congress recognized that there may be more important uses for spectrum than generating revenues for the Treasury.”²¹¹

Chairman Martin recently cautioned against basing the Commission’s spectrum management decisions on the level of expected revenues. In the Chairman’s words:

The Commission needs to be careful about ever designing spectrum auctions to artificially raise a lot of money We auction spectrum because it’s an efficient means of getting the spectrum out into the hands of people quickly. . . . It’s an asset that, when it doesn’t get utilized today, that value can’t get recaptured.

²⁰⁵ See, e.g., *800 MHz Re-banding Order*, ¶ 81; see also *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶ 72 (2005) (“*800 MHz Memorandum Opinion and Order*”).

²⁰⁶ *800 MHz Memorandum Opinion and Order*, ¶ 72.

²⁰⁷ *800 MHz Re-banding Order*, ¶ 81 (emphasis added).

²⁰⁸ *Id.*

²⁰⁹ See *id.*

²¹⁰ *Id.*; see also H.R. Rep. No. 103-111, at 258 (1993) (recommending that “[t]he licensing process, like the allocation process, should not be influenced by the expectation of federal revenues”).

²¹¹ *800 MHz Memorandum Opinion and Order*, ¶ 72.

From the Commission's standpoint getting it into the marketplace is a success The most important thing is that as spectrum managers we make sure the spectrum is being utilized to deliver services to people.²¹²

As noted by Chairman Martin, the public interest is best served not by maximizing auction revenue, but by "getting the spectrum into the hands" of those that will "deliver services to people." M2Z's proposal would accomplish that goal.

2. Petitioners Err by Ignoring Important Caveats Relating to the 2155-2175 MHz Band Valuation Contained in M2Z's Economic Analysis

Although the Commission may not consider potential auction revenues in its public interest determination regarding M2Z's Application, certain Petitioners have attempted to predict the value of the 2155-2175 MHz band with wildly speculative estimates or inapt comparisons to other auctions.²¹³ In addition, a few seek to justify their speculations based on the economic analysis that accompanied M2Z's application.²¹⁴ CTIA in particular attempts to characterize that economic analysis improperly and fails to report or account for either the numerous assumptions upon which the M2Z economic analysis was based or the purposes for which it was advanced.

The economic analysis attached to the M2Z Application compares the potential USF savings from the M2Z plan against the opportunity cost of auctioning the unpaired 2155-2175 MHz band.²¹⁵ Although CTIA and others have pinned their estimates of the auction value of the 2155-2175 MHz band to the approximate gross auction value of \$5 billion used in the economic analysis,²¹⁶ these Petitioners overlook the conditions and caveats placed on that figure. First, the

²¹² See *Martin Expects Consensus on Video Franchise Rules*, Communications Daily, June 7, 2006.

²¹³ See CTIA Petition to Deny at 5; Verizon Wireless Petition to Deny at 5-6; AT&T Petition to Deny at 8-9; NextWave Petition to Deny at 17.

²¹⁴ See Application, Appendix 5, at 23-24, cited in CTIA Petition to Deny at 5.

²¹⁵ See *id.*

²¹⁶ See CTIA Petition to Deny at 5; Verizon Wireless Petition to Deny at 5-6; AT&T Petition to Deny at 8-9; NextWave Petition to Deny at 17.

economic analysis makes clear that “[f]or any auction, the net proceeds to the government are substantially less than the face value of the net bid since companies can be expected to deduct the license costs from their taxable income.”²¹⁷ Second, the analysis explicitly ignores the “potential discounts” for unpaired spectrum.²¹⁸ Third, the analysis ignores the potential discounts caused by the band’s status as “a new spectrum band with limited operational and manufacturing scale.”²¹⁹ Therefore, the figure quoted by CTIA represented a hypothetical, best-case value of the spectrum – a best case that CTIA well knows does not exist. CTIA thus makes a blatantly inaccurate claim, the flaws of which would be apparent to anyone reading the text that CTIA cites, and in the process essentially asks the Commission to ignore the mandate of Section 309(j)(7)(A).²²⁰

Furthermore, this particular piece of analysis in the Application expressly disregards certain commitments made in the Application – and, unfortunately, the Petitioners who seized upon it and distorted it for their own purposes ignore these facts as well. M2Z made a binding commitment in its Application to pay to the U.S. Treasury a usage fee amounting to five percent of M2Z’s annual gross revenues from premium subscription services. For any of the Petitioners to pretend that a single yearly payment must be equal to or close to the one-time only receipts from a potential auction is disingenuous, as M2Z promises payments for years to come while it develops and expands its nationwide service.

In addition to the conditions and caveats placed on the band valuation, the economic analysis is based on a comparison to Auction 58, which only offered paired spectrum licenses.

²¹⁷ *Id.* at 24 n.26.

²¹⁸ *Id.* at 24. M2Z believes there would *likely* be a significant discount for unpaired spectrum, as discussed in the next paragraph.

²¹⁹ *Id.* The analysis also ignores any potential premium for a nationwide license.

²²⁰ *See* 47 U.S.C. § 309(j)(7)(A).

After reviewing prior auctions for unpaired spectrum, M2Z believes the 2155-2175 MHz band would be significantly discounted in an auction because of its unpaired nature. As the economic analysis makes clear, a 5 MHz nationwide unpaired license in the 1670-1675 MHz band sold for only \$12.6 million in 2003 (\$0.006 per MHz-POP).²²¹ Based on that price, a 20 MHz block such as the 2155-2175 MHz block would sell at auction for approximately \$50 million.²²² In addition, in Auction 49 (Lower 700 MHz), five of the six unpaired Economic Area Grouping licenses sold to a single bidder using bidding credits for approximately \$38 million (\$0.027 per MHz-POP).²²³ Finally, a nationwide unpaired narrowband PCS license sold in Auction 41 for \$505,000, once again with bidding credits in play (\$0.020 per MHz-POP).²²⁴ This information suggests that the public would receive far more value if the Commission assigned 2155-2175 MHz band spectrum use rights to M2Z without an auction, as opposed to holding an auction and holding out hope for a \$5 billion payday all too likely to prove illusory.²²⁵

D. M2Z's Application Does Not Seek to Revive the Pioneer's Preference Program, an Initiative Long Ago Discontinued By Statute and Not Relevant to M2Z's Proposal

Under the Commission's former pioneer's preference program, the Commission used to grant spectrum licenses to entities that had demonstrated they were bringing new and innovative technologies to market.²²⁶ Despite several Petitioners' intimations to the contrary, the

²²¹ Application, Appendix 5, at 24 n.28; see also *1670-1675 MHz Band Auction Closes, Winning Bidders Announced*, Public Notice, DA 03-1472 (rel. May 2, 2003).

²²² See Application, Appendix 5, at 24 n.28.

²²³ See *Lower 700 MHz Band Auction Closes, Winning Bidders Announced*, Public Notice, DA 03-1978 (rel. Jun. 18, 2003).

²²⁴ See *Narrowband PCS Auction Closes, Winning Bidders Announced*, Public Notice, DA 01-2429 (rel. Oct. 18, 2001).

²²⁵ See *Wilkie II* at 48.

²²⁶ See, e.g., *Review of the Pioneer's Preference Rules*, Second Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 4523, ¶ 2 (1995) ("*Review of the Pioneer's Preference Rules*").

Application does not call for a return of that program.²²⁷ M2Z does not seek preferential treatment for its service, but fair consideration of the public interest benefits of the proposal outlined in the Application. Deploying free broadband service to 95% of the nation within ten years after M2Z commences service is a revolutionary concept for the underperforming wireless broadband sector, and will have a profound impact on the overall market for broadband Internet access services. M2Z's proposal is *pioneering* in economic terms, but the Application seeks no preferential treatment on the basis of the technology that M2Z proposes to deploy. Instead, M2Z seeks grant of the Application based on the Commission's discretion to issue a license to a particular licensee or class of licensees promising public interest benefits that the Commission desires to promote.²²⁸

Congress terminated the pioneer's preference program when it enacted the Balanced Budget Act of 1997.²²⁹ Verizon Wireless and other parties opposing the Application suggest

²²⁷ See CTIA Petition to Deny at 9–10; T-Mobile Petition to Deny at 11; Verizon Wireless Petition to Deny at 6–7; Motorola Petition to Deny at 2 (“Granting the license to M2Z simply because it filed its application first . . . when the FCC was not soliciting applications but was instead contemplating the adoption of technical and licensing rules . . . would appear to be reminiscent of the old “Pioneer’s Preference” program that was disbanded by Congressional action.”).

²²⁸ See, e.g., *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989) (upholding a licensing preference that the Commission had established for local applicants). Indeed, all that the Communications Act requires to grant a license is a public interest determination. 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).

²²⁹ See 47 U.S.C. § 309(j)(13)(A) (“[T]he Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology”); id. § 309(j)(13)(F) (“The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on the date of enactment of the Balanced Budget Act of 1997.”); see also *Dismissal of All Pending Pioneer’s Preference Requests; Review of the Pioneer’s Preference Rules*, Memorandum Opinion and Order, 13 FCC Rcd 11485, ¶ 3 (1997).

that M2Z impermissibly seeks to revive the program, implying that the present Application is largely indistinguishable from Northpoint's initial requests for MVDDS licenses.²³⁰ M2Z does not base the Application on such grounds, however, and did not seek to justify its request for a license merely by reference to the nature of the technological innovations that M2Z proposes. The pioneer's preference program prohibited the acceptance of mutually exclusive applications.²³¹ M2Z does not contend that the Commission has no authority to accept, or that it should automatically reject, any mutually exclusive applications for the 2155-2175 MHz band. M2Z has shown, instead, that the Commission does have the authority and discretion to avoid mutual exclusivity, pursuant to Section 309(j)(6)(E) of the Act, when doing so would serve the public interest. When Congress acted to eliminate the pioneer's preference program but preserved Section 309(j)(6)(E), Congress preserved the Commission's discretion to avoid mutual exclusivity upon the basis of reasoned consideration of the merits of particular applications rather than by fiat. When Congress eliminated the pioneer's preference program, it also left undisturbed the Commission's mandate in Section 7 to encourage the provision of new technologies and services, as well as the presumption in Section 7 that such new services are in the public interest.²³²

Thus, unlike applicants applying under the terminated pioneer's preference program, M2Z seeks a license on the basis of the broad range of public interest and consumer welfare benefits that M2Z's proposed service would provide, rather than on the basis of technological innovations alone. This broad range of benefits promised by the Application would justify the

²³⁰ Verizon Wireless Petition to Deny at 7. The Commission's characterization of Northpoint's request as inconsistent with Congress's intent in abolishing the pioneer's preference program occurs in the *Northpoint Order*, ¶ 241.

²³¹ *Review of the Pioneer's Preference Rules*, ¶ 2 ("A pioneer's preference recipient's license application will not be subject to mutually exclusive applications.").

²³² See 47 U.S.C. § 157.

Commission's decision to grant a license to M2Z while avoiding mutual exclusivity and the lengthy rulemaking and competitive bidding proceedings that might follow a decision to invite or facilitate mutual exclusivity for licenses in the 2155-2175 MHz band.

E. The Commission's Installment Payment Program Bears No Factual or Legal Resemblance to M2Z's Proposed Revenue-Based Spectrum Usage Fee

CTIA and other Petitioners also claim that M2Z's commitment to compensate the American public for use of 2155-2175 MHz, by voluntarily paying a usage fee equal to five percent of the gross revenues M2Z derives from its premium service, is a request to "resurrect" the Commission's "troubling installment payment policies."²³³ This claim is incorrect. The installment program was eliminated by the Commission after many of the program's beneficiaries defaulted on their payments. As certain Petitioners opposing the Application must know especially well, the *NextWave* proceedings proved to be the most drawn out and difficult of the cases, resulting in protracted litigation and ultimately settlement.²³⁴

Petitioners fail to identify any rational link between the former installment payment program and the spectrum usage fee proposed in the Application. The Application does not seek reinstatement of the installment payment program or treatment comparable to what the Commission provided certain licensees under that program. M2Z has not asked the Commission to award licenses at auction, identify a certain class of small business bidders not required to pay the entire amount of winning bids at the close of the auction, and establish a payment plan that provides government financing of auction payments for such bidders. Rather, the Application

²³³ See, e.g., CTIA Petition to Deny at 7; T-Mobile Petition to Deny at 11.

²³⁴ See *Federal Communications Commission v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) (briefly describing the history of the *NextWave* proceeding at the Commission from the 1993 enactment of the competitive bidding provisions through this 2003 Supreme Court decision).

requests the Commission to make a determination that the assignment of a license to M2Z is warranted by the myriad public interest benefits of the Application.

NextWave involved a default on a government loan. M2Z, by contrast, does not seek to enter into a debtor-creditor relationship with the government. It aims, instead, to offer a service that will yield wide-ranging public interest benefits with a conservatively estimated up-front value of at least \$18 billion to \$25 billion.²³⁵ Under M2Z's proposal, the Commission bears *none of the risk* associated with the installment payment plan.²³⁶ Because of the license conditions that M2Z has proposed, M2Z either must deliver on the public interest benefits promised in its Application, including the spectrum usage fee, or lose its license.²³⁷

The license condition model provides the Commission with a safety mechanism if it determines that M2Z's provision of service is not fulfilling the public interest conditions set out in the Application. Under this model, there is no risk – and indeed, no potential at all – that M2Z could or would “default” on any payment obligations, as it has no obligations beyond its commitment to make voluntary payments of a usage fee based on a percentage of the gross revenues derived from M2Z's premium, subscription-based service. There is also no potential for a windfall or unjust enrichment of M2Z, despite Petitioners' claims to the contrary.²³⁸ The

²³⁵ See Wilkie, “Consumer Welfare Impact,” at 3, 8.

²³⁶ M2Z's notes that its revenue-based payments will be self-effectuating, and in that way similar to the ancillary and supplementary DTV services fees broadcasters pay each year for revenues they receive from such services. See 47 C.F.R. § 73.624(g) (“Commercial and noncommercial DTV licensees must annually remit a fee of five percent of the gross revenues derived from all ancillary or supplementary services, as defined by paragraph (b) of this section, which are feeable, as defined in paragraphs (g)(2)(i) through (ii) of this section.”).

²³⁷ See Application at 5, 12.

²³⁸ See AT&T Petition to Deny at 8–9, 14–15; Leap Wireless Comments at 2; Motorola Petition to Deny at 2–3; NextWave Petition to Deny at 17; WCA Petition to Deny at 6. One might have thought that NextWave and AT&T would lack the temerity to complain about unjust enrichment and potential windfalls, yet these entities level such baseless charges at M2Z without any apparent regard for their own history. While NextWave is undoubtedly uniquely qualified to speak on the topic, it is the wrong party to suggest that M2Z would be unjustly enriched by an exclusive license to operate in the 2155-2175 MHz band. NextWave was able to maintain and sell many of its licenses after failing to comply with the FCC's installment payment plan requirements, despite the fact that it never

spectrum usage fee payments will continue throughout the license term, with the potential to yield many times more than what might be paid at a one-time auction or in any installment payments intended to pay over time an amount owed to the U.S. Treasury based on a one-time auction bid. Moreover, M2Z's license also would be conditioned upon its continued value-for-value provision of the many public interest benefits that would be realized by the establishment of the NBRS and the licensing of M2Z. Therefore, contrary to AT&T's suggestion in its Petition to Deny, no unjust enrichment will occur²³⁹ if the Commission grants the Application because M2Z's public interest commitments ensure that the public as a whole will benefit from the proposed service, and the five percent annual spectrum usage fee proposed by M2Z will ensure that the public recovers a fair portion of the value of public spectrum resource.

provided service using those licenses. *See Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc. Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in Possession, to subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, 19 FCC Rcd 2570, ¶¶ 1-2 (2004) (noting that NextWave received in 2003 an extension of nearly two years on its original five-year construction deadlines for PCS licenses and thereafter transferred the PCS licenses in question to Cingular in early 2004). Unlike NextWave, M2Z will have no ability to claim that the fair market value of the licenses had decreased from what it paid at auction, and that its payments should be adjusted accordingly. *See NextWave Personal Communications, Inc.*, 537 U.S. at 298. Meanwhile, AT&T's windfall comments are also rather ironic, to describe them charitably, in light of the fact that AT&T currently operates on 25 MHz blocks of valuable 800 MHz spectrum that the Commission assigned to its predecessors without auction. *See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Sixth Report and Order and Order on Reconsideration, 15 FCC Rcd 16266, ¶ 60 and n.174 (2000) (noting denial of CMRS spectrum cap waiver requests filed by AT&T Wireless and BellSouth). If grant of M2Z's Application would constitute a "windfall," then certainly AT&T and its predecessors received a windfall from grant of CMRS licenses as well, but there is no windfall in any case when the Commission determines the highest and best use of spectrum and assigns licenses in fulfillment of its public interest duties.

²³⁹ See AT&T Petition to Deny at 8-9.

III. THE COMMISSION CURRENTLY HAS THE AUTHORITY TO TAKE ALL STEPS NECESSARY TO LICENSE SERVICES IN THE BAND IN RESPONSE TO THE APPLICATION, AND SHOULD NOT FURTHER DELAY THE INTRODUCTION OF SERVICES IN THIS UNDER-UTILIZED BAND

The Commission processes more than 600,000 applications for wireless service per year by accepting the applications for filing, providing public notice of such acceptance, and making a public interest determination to grant or deny.²⁴⁰ Despite the various – and largely meritless – claims made by the Petitioners, there is no legal or policy reason why the Commission should not move forward to grant the Application now, using the same process to make a public interest determination on the merits of M2Z’s proposal.

A. The Commission Can Grant the Application on the Basis of the Record in this Proceeding Because the Commission Has No Obligation To Conduct a Formal Rulemaking to Develop General Service Rules for New Operations in the 2155-2175 MHz Band

As discussed below, the Commission simply does not conduct a service rules proceeding in every instance before assigning wireless licenses. There is no universally applicable requirement that the Commission first conduct a time-consuming rulemaking inquiry, replicating steps it has previously taken and reaffirming past conclusions, in order to consider the Application and grant M2Z the requested license to operate in the 2155-2175 MHz band. Moreover, even were such a requirement to exist, it would be subject to M2Z’s Forbearance Petition.²⁴¹

First and foremost, the Commission has substantial discretion in determining whether to facilitate the licensing of the 2155-2175 MHz band by rulemaking or adjudication. As the Supreme Court held in *Securities and Exchange Commission v. Chenery Corp.*, “the choice made

²⁴⁰ See 2006 Wireless Telecommunications Bureau Presentation at January 20, 2006, Open Commission Meeting, at page 5, available at <http://www.fcc.gov/realaudio/presentations/2006/012006/wtb.pdf>. As the Bureau’s Presentation notes, more than 220,000 of these applications were for new licenses, renewals or special temporary authority.

²⁴¹ See *supra* note 5.

between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”²⁴² The Court later relied on *Chenery* to hold that “[t]he Commission has substantial discretion as to whether to proceed by rulemaking or adjudication.”²⁴³ As a general principle then, the Commission may exercise its informed discretion in determining whether to grant a license in the 2155-2175 MHz band by way of a rulemaking proceeding or by use of an open, adjudicative proceeding such as the one initiated in this docket to consider M2Z’s Application.

It is not the case, therefore, that the Commission must conduct a rulemaking before determining to grant licenses, regardless of usual Commission practice and process in such instances.²⁴⁴ The Commission would not deviate from its past course with regard to the 2155-2175 MHz band by authorizing the NBRS in a spectrum band set aside for AWS and then granting the license requested in the Application.²⁴⁵ Nevertheless, the Commission may deviate from its general policies for good cause shown,²⁴⁶ and cannot be constrained to reach the same

²⁴² 332 U.S. 194, 203 (1947).

²⁴³ *FCC v. National Citizen Comm. for Broadcasting*, 436 U.S. 775, at 808 n.29 (1978).

²⁴⁴ See, e.g., Verizon Wireless Petition to Deny at 3 (“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.”); T-Mobile Petition to Deny at 2 (arguing that bypassing a rulemaking in this instance would constitute a “wholly unnecessary departure from Commission Practice”); AT&T Petition to Deny at 25–26; CEA Comments at 2; Motorola Petition to Deny at 1 (arguing that “[s]tandards to ensure non-interference operation are best established through notice and comment rule making proceedings.”).

²⁴⁵ AT&T and other Petitioners suggest that the Commission cannot grant the Application because such a decision would change the course set when the Commission established the 2155-2175 MHz band as AWS spectrum. See AT&T Petition to Deny at 15–16; see also Verizon Wireless Petition to Deny at 4; WCA Petition to Deny at 4 (referencing the Commission’s “prior assignment of the band to AWS”). These Petitioners confuse the Commission’s authority to allocate spectrum, establish service rules for its use, and thereafter assign licenses within a service – each of which is a separate regulatory task. M2Z’s Application does not suggest that the Commission should reallocate this spectrum away from AWS. Rather, the Application requests action by the Commission to authorize in this adjudicatory proceeding M2Z’s proposed use of the band for nationwide broadband service, to promulgate service rules for the NBRS in this portion of the AWS spectrum, and thereafter to assign a license to M2Z authorizing construction and operation of the NBRS.

²⁴⁶ See *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (“[R]easoned decision-making remains a requirement of our law. . . . An agency’s view of what is in the public interest may change . . . [b]ut an agency changing its course must supply a reasoned analysis indicating that

conclusions that it has reached previously upon being presented with new facts, changed circumstances, and new methods for achieving longstanding policy goals.²⁴⁷

Commission action upon M2Z's Application without opening a formal notice and comment rulemaking would neither violate the APA nor disregard considerations of fundamental fairness and participation in the administrative process. The APA requires simply that the Commission provide interested parties with notice and a reasonable opportunity to comment on the Application.²⁴⁸ The Bureau's placement of the Application on Public Notice,²⁴⁹ and the full record developed in response to that Public Notice, demonstrate that the Commission's actions

prior policies and standards are being deliberately changed . . ."). AT&T contends that M2Z "does not address . . . prior public interest findings" made by the Commission regarding AWS, "and, therefore, offers no reasoned basis for the FCC to change course now and find that M2Z's proposed use represents the highest and best use of the spectrum." AT&T Petition to Deny at 16. As explained above, M2Z does not suggest that the Commission should remove the 2155-2175 MHz band from AWS. Nevertheless, M2Z has offered reasoned bases and compelling arguments as to why the Commission should readily conclude that the NBRIS is the highest and best use of the band and that M2Z is the only party ready to provide the NBRIS. For example, by granting the Application the Commission would be acting to increase facilities-based broadband competition and improve the quality and quantity of broadband services that are available to consumers. *See* Application, Appendix 5, at 13. The Commission has several reasoned bases for concluding that the NBRIS is the highest and best use of this AWS spectrum and that M2Z will provide the greatest amount of public interest and consumer welfare benefits by offering the service described in the Application.

²⁴⁷ Indeed, numerous examples exist where the Commission initiated a proceeding to license services even before having issued its spectrum allocation decision. As in the Northpoint proceeding, the Commission initially accepted and placed on public notice MSS applications submitted by Motorola Satellite Communications, Inc. and Ellipsat Corporation (later Mobile Communications Holdings, Inc.). *See Satellite Applications Acceptable for Filing*, Public Notice, 6 FCC Rcd 2083 (1991). At the time these applications were filed and placed on public notice, there was no domestic or international allocation for MSS in the frequency bands that the applicants requested. Similarly, the Commission initially placed license applications filed in the Northpoint proceeding on public notice despite the fact that there was no specific frequency established for this service at the time. *See Wireless Telecommunications Bureau Seeks Comment on Broadwave Albany, L.L.C., et al. Requests for Waiver of Part 101 Rules*, Public Notice, 14 FCC Rcd 3937 (1999). The Commission also granted the Boeing Company's applications to provide aeronautical mobile satellite service in frequency bands that were allocated on a primary basis to the Fixed Satellite Service, with a secondary allocation for terrestrial mobile services except aeronautical mobile. *See, e.g., Boeing Company; Application for Blanket Authority to Operate up to Eight Hundred Technically Identical Receive-Only Mobile Earth Stations Abroad Aircraft in the 11.7-12.2 GHz Frequency Band*, Order and Authorization, 16 FCC Rcd 5864 (International Bur. and O.E.T. 2001). In all of these cases the Commission had not proposed, let alone promulgated, service or licensing rules before evaluating the applications filed and subsequently place on public notice.

²⁴⁸ *See* discussion and cases cited *supra* note 33.

²⁴⁹ *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, DA 07-492 (Wireless Telecom. Bur. rel. Jan. 31, 2007) (the "Public Notice").

thus far fully satisfy this requirement. The APA also requires simply that Commission action not be arbitrary or capricious.²⁵⁰ The Commission obviously can satisfy the requirement of reasoned decisionmaking on the basis of the well-developed record created by the Application and the many comments and submissions filed in support of and against the Application.

T-Mobile mistakenly argues that the Commission's decision in the *Northpoint Order* suggests that the Commission should dismiss the Application, establish service rules, and schedule an auction for the 2155-2175 MHz spectrum.²⁵¹ The *Northpoint Order* does not, however, stand for the proposition that rulemaking is generally preferable to adjudication in licensing proceedings. In fact, the *Northpoint Order* confirms that "[t]he Commission has broad discretion in deciding to proceed by rulemaking or adjudication."²⁵² In the *Northpoint Order*, the Commission decided to proceed by rulemaking to create the MVDDS in the context of a spectrum band that required implementation of a complex array of spectrum sharing arrangements necessary to avoid harmful interference to a host of incumbent users, including Direct Broadcast Satellite (a mature, consumer-based service) and Non-Geostationary Orbit Fixed Satellite Service licensees.²⁵³

²⁵⁰ See, e.g., *Com. of Mass. v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) ("The standard of review applicable to both original agency action and agency rescission or modification of a prior standard requires the agency action to be 'rational [and] based on consideration of the relevant factors . . .'" (internal citations omitted); *People of State of California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("A reviewing court . . . may require the agency to provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

²⁵¹ See T-Mobile Petition to Deny at 4.

²⁵² *Northpoint Order*, ¶ 218.

²⁵³ *Id.*, ¶ 3.

As noted below, the 2155-2175 MHz band, by contrast, is lightly used, with incumbents that the Commission has already decided to relocate from the band.²⁵⁴ It is therefore a spectrum band that M2Z could put to use within no more than two years of being assigned the license sought in the Application. As discussed in greater detail below, before granting the license the Commission may need to address some interference and other service-specific issues along the lines already discussed in detail in the Application, but none of these issues would be markedly different from those addressed in other Part 27 service proceedings for spectrum bands with few incumbent users. Therefore, it is clear from several previous service rules proceedings for wireless services that the Commission has already developed a comprehensive set of default service rules that could be used to regulate M2Z's provision of its NBRs. The Commission routinely imposes such rules on wireless services and could likewise impose them on M2Z, based on information presented and developed in the Application, this Opposition, and in the remainder of the robust record created in response to the Public Notice. The worst and most unfortunate thing that the Commission could do at this point would be to hold the prospect of real competition in the provision of broadband service in limbo, subject to the completion of a service rules proceeding, the likely result of which would be service rules mirroring those proposed in the Application.

Another stark contrast between the situation in the 2155-2175 MHz band and the situation that the Commission faced in the *Northpoint Order* is that grant of a nationwide license to M2Z would eliminate the need for consideration of geographic licensing area sizes and other similar issues that arise when new services are permitted to operate in a band that is already

²⁵⁴ See discussion *infra* at Part III.D.1 regarding relocation of incumbents in the 2155-2175 MHz band and the services that the Commission could adopt for this band by looking to the proposal in the Application and to the service rules and procedures established for other spectrum bands governed by Part 27 of the Commission's rules.

home to mature, consumer-based services. CTIA and other Petitioners complain that a general service rules proceeding is necessary to consider interference issues, establish a band plan, and consider appropriate geographic area license sizes in the 2155-2175 MHz band.²⁵⁵ CTIA essentially asks the Commission to ignore the fact that the M2Z's Application seeking a nationwide license in this band already has presented all of these issues for discussion, that the Public Notice inviting comment on the Application already has given the public an opportunity to comment, and that CTIA itself has had an opportunity to comment (and did comment) on this very issue.

Finally, accepting mutually exclusive applications and holding an auction does not always result in competition within the auctioned spectrum band. If a single nationwide license is awarded by auction, there is obviously no competition within that particular service band.²⁵⁶ Moreover, even if licenses are awarded for smaller geographic areas, a single entity could nonetheless place the highest bid and win all such licenses at auction, or at least win all such licenses within a single region or single geographic market, unless an auction-based license cap is imposed. Thus, if the Commission were inclined to ensure competition within a single service or within a narrowly defined market, an auction would provide no guarantee of yielding multiple viable competitors in that narrowly defined market.

B. The Commission Should Not Conduct a Further Proceeding to Consider M2Z's Proposed Service Because Additional Proceedings Are Unnecessary and Would Only Result in Further Delay

A rulemaking and subsequent auction would by no means ensure rapid deployment of services in the 2155-2175 MHz band. When it established the MVDDS, for example, the

²⁵⁵ See CTIA Petition to Deny at 6.

²⁵⁶ See, e.g., EchoStar Petition to Deny at 1 (agreeing with M2Z's contention that a licensing a single nationwide broadband provider in the 2155-2175 MHz band would promote service and that fostering "a new nationwide wireless broadband entrant should be a pressing objective" for the Commission).

Commission expressed hopes that creating space for a fourth competitive provider in the multichannel video programming distribution (“MVPD”) marketplace would provide significant public interest benefits through lower prices, improved service quality, increased innovation, and increased service to unserved or under-served rural areas.²⁵⁷ As noted below, however, the Commission’s hopes have not yet been realized, and as of the third quarter 2006, MVDDS equipment was “still under development.”²⁵⁸ It has been eight years since Northpoint applied to offer MVDDS and five years since the Commission decided to award MVDDS licenses at auction, but the MVPD competition the Commission sought to promote through its actions has yet to develop. Notwithstanding WCA’s claim that the “crucible of a rulemaking proceeding” and a subsequent auction generally permits flexible spectrum use, entrepreneurial efforts, and more rapid deployment of services, it is clear from the Northpoint proceeding that a rulemaking proceeding and auction do nothing to guarantee rapid realization of the goal that spectrum be put to its highest and best use.²⁵⁹

M2Z’s contention that the public interest would not be served by an additional proceeding is supported by the Commission’s actions in its Space Station Licensing Reform (“SSLR”) proceeding. Prior to its decision in the SSLR proceeding, the Commission licensed geostationary (“GSO”) satellite services through the use of lengthy satellite license application processing rounds, which contained many of the negative attributes of wireless service rule proceedings. Unfortunately, like wireless service rules proceedings, GSO processing rounds

²⁵⁷ See *Northpoint Order*, ¶ 164.

²⁵⁸ See *2006 Biennial Regulatory Review*, Wireless Telecommunications Bureau Staff Report, DA 07-674 (Wireless Telecom. Bur. Feb. 14, 2007). The Commission held two auctions for MVDDS licenses. On January 27, 2004, the Commission completed the auction of the 214 MVDDS licenses (“Auction No. 53”), raising (in net bids) a total of \$118,721,835. In this auction, ten winning bidders won a total of 192 MVDDS licenses, which the Commission issued later in 2004. On December 7, 2005, the Commission completed an auction (auction No. 63) in which bidders won the 22 remaining MVDDS licenses.

²⁵⁹ See WCA Petition to Deny at 3.

could take a long time, in some cases as long as four years from initiation to completion. In the SSLR proceeding, however, the Commission rejected as too time-consuming and counterproductive the license processing round approach, and opted instead to license GSO applications on a first-come, first-served (or "FCFS") basis when doing so would serve the public interest. In changing the rules, the Commission found that the new procedure "will enable [action] on satellite applications dramatically more quickly and efficiently than under the current processing round procedure. *Thus, consumers will benefit because they will receive service faster.* In addition, [it] will lead to more efficient spectrum usage because it will reduce the amount of time spectrum lies fallow. . . ."²⁶⁰

As discussed in greater detail below, the Commission's deliberations over the 2155-2175 MHz band have been lengthy, and its policy-making for this band is a mature and well-developed process. Yet, even if that were not the case, grant of M2Z's Application would not be unprecedented because the Commission now accepts and grants a number of license applications on a FCFS basis. As Part II of this Opposition makes clear, M2Z seeks no preferential treatment because it filed the first application for use of the 2155-2175 MHz band. Instead, it merely requests that the Commission grant the Application because M2Z's proposal would provide the most public interest and consumer welfare benefits of any proposal for this band, and thus constitutes the highest and best use of the band.

²⁶⁰ *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, ¶ 74 (2003) ("*SSLR Proceeding*"). The Commission further noted that "[it has] considered and rejected arguments that *Ashbacker* or the Communications Act requires the Commission to give parties an opportunity to file mutually exclusive applications." *Id.*, ¶ 103 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)); see also *id.* (citing *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing the Use of Frequencies in the 2.1 and 2.5 GHz Bands*, Order on Reconsideration, 6 FCC Rcd 6764, ¶¶ 61-62 (1991)). Experience with the FCFS system proved the Commission's expectations to be correct, and processing time for satellite applications dropped significantly. Moreover, the Commission chose to adopt standard or "default service rules" in the *SSLR Proceeding* to permit initiation of service once spectrum had been allocated domestically but prior to the adoption of spectrum-specific service rules.

The proceeding initiated by acceptance of the Application for filing and issuance of the Public Notice is not an isolated adjudicatory proceeding, as demonstrated by the vigorous participation of other parties filing in support of and in opposition to the Application. At the conclusion of the Application proceeding, all interested parties will have had a full and fair opportunity to air their views in response to the Public Notice.²⁶¹ The public interest obligations and comprehensive operational standards proposed in the Application were more than sufficient to provide a basis for full and fair comment from interested parties – although Petitioners did tend to spend more time and energy complaining about the lack of a chance to comment than they did in contributing substantive comments on M2Z’s detailed proposal – and the record developed in response to the Public Notice will assist the Commission in addressing any policy concerns that could be dealt with in a rulemaking.

The Commission might very well after a rulemaking proceeding adopt a collection of service rules quite similar to rules adopted already for other Part 27 services – and quite similar to the careful service guideline proposals that M2Z advanced in the Application.²⁶² Arguments that the Commission should or must initiate a rulemaking amount to nothing more than requests for the Commission to delay productive use of this spectrum by commencing a proceeding – one that easily could take several years to complete – simply in order to achieve a result very similar to one that the Commission already could reach by granting the Application. The initiation of a general service rules proceeding thus would be a waste of Commission resources and a

²⁶¹ AT&T claims in its Petition to Deny that “[u]nlike a rulemaking which is open to all parties,” the proceeding initiated by the Commission in this docket to consider M2Z’s Application under Section 309(d) is open only to parties in interest. *See* AT&T Petition to Deny at 27–28. While AT&T complains that this restriction might “artificially reduce” participation in this proceeding based on potential commenters’ standing concerns, the Petition to Deny provides no examples of such entities that might have standing to comment in a rulemaking proceeding but could not demonstrate their interest in either supporting or opposing the Application. The number of submissions into large and robust record developed in response to the Public Notice suggests that few if any parties “artificially” restrained themselves from filing comments with the Commission.

²⁶² *See* Application at 13–21.

tremendous waste of time in the face of the Commission's pressing and overriding goal to promote broadband deployment and intermodal competition among broadband providers.

C. Grant of the Application Would Promote Deployment of Services in the Under-Utilized 2155-2175 MHz Band, Which Contains No Long-term Licensees and Holds No Promise for Vigorous Use in the Immediate Future

Petitioners also argue that a rulemaking is necessary to protect incumbents in the 2155-2175 MHz band or to resolve issues regarding prior uses or planned uses for this spectrum. M2Z's Application to use the 2155-2175 MHz band, however, will not disturb established uses in a congested band, or even result in the displacement of incumbents that have not already been ordered to vacate this spectrum. The 2155-2175 MHz band is devoid of significant permanent occupants, and lacks a plan for future occupants. All incumbents have been ordered by the Commission to relocate to other bands as soon as practicable.²⁶³ CTIA and other Petitioners contend that this spectrum is not "fallow" as M2Z suggests.²⁶⁴ These arguments do nothing, however, to refute M2Z's showing that the band is under-utilized and not home to permanent, mature, consumer-based services.

Grant of M2Z's Application would resolve a lengthy search for a beneficial use of the 2155-2175 MHz band. In fact, the Commission first identified a segment of the spectrum in question in this Application as a candidate for reallocation during the Commission's 1992

²⁶³ Two primary types of services occupy the 2155-2175 MHz band – Broadband Radio Service ("BRS") and Fixed Microwave Service ("FS"). See *EBS/BRS Report and Order*, ¶¶ 37–38 (ordering the relocation of users from the 2150-2156 MHz and 2156-2160 MHz bands to 2496-2502 MHz and 2618-2624 MHz respectively); *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 Rule Making and Order, 20 FCC Rcd 15866, ¶¶ 6, 9 (2005) (ordering the relocation of users of the Fixed and Mobile Service allocations in the 2155-2160 MHz band and making the 2155-2175 MHz band available for AWS use). For the number of incumbent licensees in the band, see Federal Communications Commission, Universal Licensing System database, available at: <http://www.fcc.gov/uls> (last accessed Mar. 18, 2007). The FCC's database displayed the following incumbent licensees in 2155 to 2175 MHz: AWS (9 licenses), BRS (635 licenses) CD, paging and radio telephone (22 licenses) CF, common carrier, point-to-point (1356 licenses) CT, local television transmissions (10 licenses), MW, microwave public safety pool (5 licenses).

²⁶⁴ See, e.g., CTIA Petition to Deny at 12–13; WCA Petition to Deny at 5.

Emerging Technologies proceeding.²⁶⁵ The Commission at that point considered potential use of spectrum for the introduction of third generation wireless technologies, and many factions within the wireless industry supported this proposal. One incumbent licensee present in the band in 1992, Utilities Telecommunications Council (“UTC”), petitioned to defer consideration of advanced technologies in the 2 GHz band, citing the need for further study accommodating relocating licensees.²⁶⁶ However, several mobile wireless providers and manufacturers opposed UTC’s petition on the ground that delay could stall the implementation of what were then important new services, such as PCS.²⁶⁷

In 1992, the Commission ruled against UTC and reallocated spectrum to PCS from fixed microwave services.²⁶⁸ This reallocation of some spectrum to PCS services, however, did not end the clamor for additional spectrum to be made available for wireless services at 2155-2175 MHz and in other bands. Incumbent wireless carriers and others renewed their calls for additional spectrum resources and resumed this discussion in the years surrounding the 2000 World Radiocommunication Conference. Following that conference, the Commission issued a

²⁶⁵ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd 1542 (1992); see also *Wilkie II* at 33–35 (detailing longstanding and ongoing delays in putting AWS spectrum to efficient use).

²⁶⁶ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd 6100, ¶¶ 7–8 (1992).

²⁶⁷ *Id.*, ¶ 34. The parties opposing UTC included AT&T, Motorola, SCS Mobilecom, and Spatial Communications, Inc. In its Petition to Deny the Application, Motorola neatly proves the point that the 2155-2175 MHz band has long been targeted for use by the Commission and various industry participants – but with little or no success in deploying services in this spectrum band – by noting that “Motorola previously proposed a course of action for use of the 2155-2180 MHz band [i]n comments file[d] as part of ET Docket 00-258” almost four years ago. See Motorola Petition to Deny at 2.

²⁶⁸ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992) (indicating that the Commission reallocated the 1850-1910/1930-1990 MHz bands to PCS from fixed microwave services.).

notice of proposed rulemaking inquiring about bands that would be suitable for the deployment of third generation wireless services, including 2110-2170 MHz.²⁶⁹

Many wireless industry participants in that proceeding expressed their eagerness for access to new spectrum that they might use to deploy advanced wireless services. Notably, CTIA, AT&T, Qualcomm, and Verizon Wireless were all staunch supporters of a speedy reallocation of the 2110-2170 MHz band and a relocation of any incumbents in that band.²⁷⁰ At that time, and in the context of the international WRC-2000 conference, the debate in the United States centered on deciding which segments of the band were suitable for the global harmonization of spectrum resources. Some commenters were unsure if 2110-2170 MHz would be a feasible band to use in pursuit of these goals. Nonetheless, CTIA indicated that if the 2110-2170 MHz band represented the only available spectrum for the deployment of advanced wireless services, the Commission should not hesitate to reallocate it for such use.²⁷¹

²⁶⁹ *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, Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000*, Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596, ¶¶ 50-57 (2001) ("*Implementation of WRC-2000 Order*").

²⁷⁰ See *Petition for Rule Making of the Cellular Telecommunications Industry Ass'n Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000*, File Nos. RM-9911 and RM-9920 (submitted July 12, 2000) ("*CTIA July 2000 Petition for Rule Making*"); *Petition for Rule Making of the Cellular Telecommunications Industry Ass'n Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000*, Comments of Qualcomm Inc., File No. RM-9920 (submitted Aug. 25, 2000) ("*U.S. industry and consumers cannot afford for the U.S. Government to delay in developing policies regarding spectrum for 3G services.*"); *Review of Spectrum and Regulatory Requirements for IMT-2000*, Comments of AT&T Wireless Services, Inc., File No. RM-9920 (submitted Aug. 28, 2000) ("*AT&T . . . urges the Commission to take all necessary steps to make such spectrum available at the earliest possible date.*"); *Review of Spectrum and Regulatory Requirements for IMT-2000*, Comments of Verizon Wireless, File No. RM-9920 (submitted Feb. 22, 2000) ("*There can also be no question that current spectrum resources are inadequate, and that the United States is far behind many other countries in making these resources available. . . . It is critical that the Commission fulfill its responsibility by ensuring there will be sufficient spectrum for the next generation of mobile services to serve the public.*").

²⁷¹ See *CTIA July 2000 Petition for Rule Making* at 8-9 (indicating that 2110-2170 MHz may inevitably be the only viable option).

As the petitions to deny the Application demonstrate, some six short years after filing their comments in the WRC-2000 proceeding, many of the Petitioners have developed a notable change in position. CTIA's own previous statements regarding the spectrum, including the 2155-2175 MHz band at issue in the Application, belie the statements CTIA makes in the instant proceeding regarding incumbent use of the 2155-2175 MHz band.²⁷² Although CTIA now suggests that the band is too encumbered to justify a timely grant of M2Z's license, in the past CTIA has argued that the band was underutilized and that the Commission should move quickly to facilitate its use. Incumbent wireless providers cannot have it both ways: either they are supportive of the expedient technical deployment of this spectrum or they are not.

D. M2Z's System Will Not Cause Harmful Interference to Existing 2155-2175 MHz Licensees or AWS Licensees Operating in Nearby Bands

Some of the Petitioners also assert that a rulemaking is necessary by arguing that, absent such a proceeding, M2Z's national broadband network might cause harmful interference to grandfathered incumbent licensees in the 2155-2175 MHz band.²⁷³ BRS operations currently exist in the 2150-2160/62 MHz band and FS operations currently exist in the 2110-2150 MHz and 2160-2200 MHz bands. As set forth in the Application, M2Z will take all precautions necessary to avoid causing harmful interference to these incumbents.²⁷⁴ M2Z takes its

²⁷² See CTIA Petition to Deny at 12.

²⁷³ To the extent that incumbent licensees operate in this band, M2Z is committed to protecting them from harmful interference. In their respective Petitions to Deny, WCA and Verizon Wireless expressed doubt regarding M2Z's ability to protect 2155-2175 MHz band incumbents. See WCA Petition to Deny at 7 ("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."); Verizon Wireless Petition to Deny at 14 ("M2Z must demonstrate in detail how it will protect co-channel and adjacent channel incumbent licensees from interference from its proposed system.").

²⁷⁴ See Application, Appendix 2, at 3-4; In the Application and appendices thereto, M2Z stated plainly that it would relocate incumbent FS and BRS licensees pursuant to the FCC's relocation requirements developed in the AWS proceeding. See *id.* Moreover, M2Z's Application is conditioned on its compliance with the current standards for band emissions, $(43 + 10 \log(P))$ and $(67 + 10 \log(P))$. See 47 C.F.R. § 27.53(1)-(2). M2Z understands that the standards do not provide complete interference protection to the noise floor. To alleviate interference from lower

interference obligations seriously and will accept fulfillment of these obligations as a condition of its license.

1. M2Z Will Avoid Causing Harmful Interference to Existing 2155-2175 MHz Licensees

In order to avoid harmful interference, M2Z will work diligently, both during the construction phase and the operational phase of its network, to prevent harmful co-channel interference to BRS and FS incumbents currently operating in the 2155-2175 MHz band. BRS and FS systems operate in fixed frequency bands at fixed geographic locations, and several proven successful engineering techniques can be used to avoid interference.

In the Application, M2Z proposed to address potential co-channel interference through “judicious selection” of base station locations and spectral sub-bands of operation, and with the use of smart antenna technology.²⁷⁵ Taking such steps would provide the same level of protection afforded by the current BRS/EBS emission rules utilizing the applicable out-of-band emission (“OOBE”) standard.²⁷⁶ These actions would also protect FS licensees based on the interference criteria contained in Parts 24 and 101 of the Commission’s rules, and the general operational guidelines for 99.99% microwave communication reliability.²⁷⁷ Therefore, Petitioners’ allegations regarding the potential for M2Z’s service to cause harmful interference to

noise levels, license holders are required to coordinate, cooperate and sometimes co-locate. This is a common practice in the industry to fully utilize spectrum resources.

²⁷⁵ For example, BRS licensees only occupy 4, 6, or up to 10 MHz spectral bands (BRS Channels 1, 2, and/or 2A) and FS licensees are limited in the 2160-2180 MHz band to use of 3.5 MHz. Thus, M2Z could appropriately select from the vacant spectrum in the limited locations where BRS or FS licensees exist. FS systems in 2160-2180 MHz must deploy using beamwidths of less than 5 degrees (8 degrees in Standard B regions) which enables interference avoidance using smart antenna technology. See Application at 20; see also BRS Towers Map attached hereto as Attachment A (illustrating the existing BRS licensees subject to potential relocation); FS Towers Map attached hereto as Attachment B (illustrating existing FS licensees subject to potential relocation).

²⁷⁶ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 92 (2003) (“*AWS 1st Report and Order*”).

²⁷⁷ See 47 C.F.R. §§ 24.237, 101.105, 101.107; see also Telecommunications Industry Ass’n TIA/EIA Telecommunications Systems Bulletin 10-F, *Interference Criteria for Microwave Systems* (June 1994).

incumbent BRS and FS operations have already been addressed.²⁷⁸ M2Z's meticulously planned construction buildout schedule and carefully coordinated interference planning will prevent any such interference from occurring. To the extent that some Petitioners have requested greater protections,²⁷⁹ M2Z's status as an AWS band occupant (M2Z has proposed that its NBRs be provided over spectrum allocated to AWS) will ensure that the protections and relocation procedures already established for FS and BRS incumbents also apply to M2Z.

M2Z commits to operating in conformity with the Commission's pronouncements in the *AWS Ninth Report and Order*, which requires users of the 2155-2175 MHz band to relocate line-of-sight incumbent BRS systems and incompatible FS operations according to definite timetables.²⁸⁰ Deployment of M2Z's proposed NBRs will depend, in part, on the speedy relocation of FS and BRS operations, giving M2Z every incentive to ensure that these transitions take place quickly and smoothly. M2Z is committed to a successful and fully-funded relocation of FS and BRS incumbents – and as indicated above, will accept fulfillment of this commitment as a condition of its license.

The Commission has determined that FS and BRS licensees must relocate by negotiating with AWS licensees for comparable facilities. Licensees in both services must enter into a mandatory negotiation period followed by an involuntary relocation procedure if they do not

²⁷⁸ See, e.g., Verizon Wireless Petition to Deny at 15 (alleging that M2Z had no proposal for the interference protection of FS licensees); WCA Petition to Deny (alleging that M2Z has no remedy to resolve BRS co-channel interference).

²⁷⁹ See, e.g., WCA Petition to Deny at 9–10 (“If M2Z is going to sub-channelize the 2155-2175 MHz band to avoid operations co-channel to BRS, any resulting adjacent channel operations should be subject to compliance with Section 27.53(1)(2) as if M2Z were operating a BRS station.”). WCA provides no legal or engineering basis for its assertion that BRS operators operating in spectral proximity to M2Z deserve greater interference protection than the Commission would mandate for adjacent channel AWS-1 licensees.

²⁸⁰ 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*, Ninth Report and Order and Order, 21 FCC Rcd 4473, ¶¶ 16–54 (2006) (“*AWS 9th R&O*”) (BRS interference and relocation standards); *Id.*, ¶¶ 55–63 (FS relocation rules).

timely agree on a relocation procedure.²⁸¹ As an impetus for speeding the relocation process, the Commission adopted a ten-year sunset period for FS operations in the 2160-2175 MHz band, triggered when the first AWS license was issued in the band.²⁸² If FS operators do not exit the band within the sunset period, then they could lose their rights to have their relocation expense covered by AWS licensees entering the band.

WCA asserts that “M2Z appears to underestimate how far into the future BRS licensees may continue to occupy the 2150-2162 MHz band.”²⁸³ To the contrary, M2Z has a firm grasp on the time period that BRS incumbents may remain in the band. Like FS licensees, BRS licensees face the requirement of mandatory negotiation followed by an involuntary relocation procedure if the parties fail to reach an agreement.²⁸⁴ Despite the fact that BRS incumbents have the right to remain in the 2155-2175 MHz band for up to fifteen years,²⁸⁵ they, like FS licensees, also have every incentive to relocate quickly once an AWS licensee triggers the relocation process. As with FS licensees, the Commission has adopted a sunset period²⁸⁶ after which an AWS licensee

²⁸¹ See 47 C.F.R. § 101.69. The FS incumbents will have either a two or three-year mandatory negotiation period. *Id.* § 101.69(d)(1)–(2) (stating that non-public safety incumbents will have a two-year mandatory negotiation period and public safety incumbents will have a three-year mandatory negotiation period.). The mandatory negotiation period will commence on a “rolling” basis, once an AWS licensee provides written notice of its desire to negotiate for relocation. *AWS 9th R&O*, ¶ 59. The result of these “rolling” negotiations will be a series of independent negotiation periods, each specific to the individual relocating FS system.

²⁸² *AWS 9th R&O*, ¶ 58. According to the FCC’s Universal Licensing System, the first AWS license was granted on November 29, 2006. Thus, the FS sunset deadline is November 29, 2016.

²⁸³ WCA Petition to Deny at 8.

²⁸⁴ See 47 C.F.R. § 27.1251. M2Z notes, however, that in mandatory negotiations, BRS incumbents and new AWS licensees may agree to either: (1) relocate the BRS incumbent to a new band or (2) accept a sharing arrangement that may result in otherwise impermissible interference levels to the BRS operations. *Id.* § 27.1251(a). The mandatory negotiation period is three-years in duration and the BRS licensee may suspend this period briefly. *Id.* § 27.1250(c) (granting BRS licensee permission to suspend the mandatory negotiation period for up to one year if the BRS licensee cannot be relocated to comparable facilities at the time the AWS licensee seeks band entry); see also *id.* § 27.1251(c) (stating that mandatory negotiations will commence for each BRS licensee when the AWS licensee informs the BRS licensee in writing of its desire to negotiate).

²⁸⁵ See WCA Petition to Deny at 8.

²⁸⁶ *Id.* § 27.1253(a) (noting that the sunset deadline is fifteen years from the date on which the first AWS license is issued in the band). Thus, the BRS sunset deadline is November 29, 2021.