

4. M2Z's Public Interest Showing Meets or Exceeds the Section 309(j)(6)(E) Standard As Applied By the Commission in Prior Cases

The public interest benefits of M2Z's proposed service far exceed the public interest benefits of other commercial services that the Commission has previously seen fit to authorize without the use of competitive bidding or any commitment by the licensee to make direct payments to the U.S. Treasury.¹²⁶ As required in Section 309(j)(3), grant of the Application, which includes M2Z's commitment to an unprecedented and aggressive network buildout schedule, would promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without undue delays. Consistent with the second prong of Section 309(j)(3), grant of the Application also would promote economic opportunity, avoid excessive concentration of licenses used to provide broadband services, and facilitate true intermodal broadband competition between wireline and wireless providers. Grant of the Application would also allow the public to recover through annual spectrum usage fee payments a portion of the value of the public spectrum resource used to provide M2Z's service, thus satisfying the third prong of Section 309(j)(3). Finally, M2Z's use of TDD technology provides a significant breakthrough that would allow for the most efficient use of the unpaired spectrum, thereby satisfying the fourth prong of Section 309(j)(3).¹²⁷

CTIA and other Petitioners have challenged the Commission's authority to fulfill its obligations under Section 309(j)(6)(E) in other proceedings before the Commission, and those

¹²⁶ See *infra* Part II.B for a discussion of the Commission's history of assigning spectrum licenses and expanding spectrum usage rights without the use of competitive bidding mechanisms, both before and after the enactment of the competitive bidding provisions in Section 309(j).

¹²⁷ See 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").

challenges have been unsuccessful.¹²⁸ The issue of the Commission's discretion and authority to act in the public interest when assigning spectrum licenses is settled law, and CTIA's re-hashing of its arguments against this well settled proposition should be given no weight here.¹²⁹ While there are distinctions to be made between the facts underlying the Commission's decisions in prior proceedings and the facts supporting grant of M2Z's Application, the Petitioners overstate the differences and fail to offer any *meaningful* distinctions between the present proposal and those earlier examples.¹³⁰ For instance, the Commission based its decision in the *800 MHz Re-banding Order*¹³¹ to modify existing licenses held by Nextel for public safety purposes on facts and policy considerations similar to those presented by the M2Z Application. The justifications that the Commission offered for its actions in the 800 MHz Re-banding proceeding are equally applicable to the instant Application, and thus justify grant of M2Z's request, as do the public interest and consumer welfare benefits outlined in Part I above. M2Z's Application will similarly help resolve public safety concerns, and also will help address a myriad of important policy goals, including the rapid deployment of competitive, affordable, and family-friendly broadband service in unserved and under-served areas, alleviating pressure on the USF,

¹²⁸ See *800 MHz Re-banding Order*, ¶¶ 70–72 (rejecting CTIA and Verizon Wireless claims that grant of an initial license must be subject to competitive bidding simply because other carriers intend to participate in any auction that may be held but the Commission instead determines “that it is not in the public interest to open the spectrum for competitive applications”).

¹²⁹ See CTIA Petition to Deny at 4.

¹³⁰ See, e.g., NextWave Petition to Deny at 22; Verizon Wireless Petition to Deny at 8–9. Meanwhile, AT&T attempts to distinguish the two situations in terms of the financing and guarantees in place, of all things, contrasting M2Z's proposal with Nextel's situation on the grounds that the Commission required Nextel to establish an irrevocable letter of credit for the 800 MHz reconfiguration. See AT&T Petition to Deny at 6–7. AT&T misreads Nextel's obligations in that proceeding. Nextel did not establish an irrevocable letter of credit to *fund* the 800 MHz reconfiguration, but obtained it to ensure that it would complete the transition, regardless of any future financial downturn, in a manner that would ensure no harm to other licensees public safety operation. This is not analogous to M2Z's situation. There are no public safety operations to protect in the 2155-2175 MHz band, and M2Z has already tied its build out obligations to its license terms, meaning that if M2Z were to fail in its project it would be the sole Commission licensee harmed by an incomplete buildout.

¹³¹ See *800 MHz Re-banding Order*, *supra*, note 125.

enhancing the level of broadband competition, and protecting children from indecent online content.¹³²

M2Z's promise of free secondary service to public safety officials on a nationwide wireless broadband platform will help ameliorate the critical public safety interoperability issues highlighted by the tragedies of September 11th and Hurricane Katrina.¹³³ In this way, M2Z will contribute to the "system of systems" concept as outlined in SAFECOM's efforts to advance emergency response wireless interoperability.¹³⁴ No less critical than addressing grave interference issues in the 800 MHz band are the interoperability issues that the Commission has undertaken to resolve now.¹³⁵ Grant of the license requested in M2Z's Application would enable "higher public uses for spectrum," and Commission action to allow for such higher uses of spectrum are not precluded by the "auction requirements" that are applicable under Section

¹³² See discussion *supra* Part I.B.

¹³³ AT&T callously and unavailingly attempts to minimize the public safety benefits that would be realized from improved interoperability owing to use of the NBRs. It is difficult to understand AT&T's contention that prolonged national traumas and natural disasters do not implicate "imminent safety of life issues," or its argument that such imminent and vital safety concerns would not be addressed by improving interoperability. See AT&T Petition to Deny at 9.

¹³⁴ See Department of Homeland Security, the SAFECOM Program, "Public Safety Statement of Requirements for Communications & Interoperability," Volumes 1 and 2, Version 1.2, October 2006, available at http://www.safecomprogram.gov/SAFECOM/library/technology/1258_statementof.htm ("SAFECOM Program"); see also *id.* Section 5; Comments of PacketHop, WT Docket No. 07-16, at 4 (submitted Mar. 1, 2007) ("M2Z is responding to the Commission's recognition that having more networks available to public safety is important enough that 'there may now be a place for commercial providers to assist public safety in securing and protecting the homeland'" (quoting Federal Communications Commission, Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State and Local Emergency Response Providers, 14 FCC Rcd 7772, ¶ 25 (2005) ("Report to Congress"), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262865A1.pdf).

¹³⁵ See, e.g., *Report to Congress*, ¶ 2. In its report, the Commission succinctly described the need for a service such as the NBRs proposed by M2Z.

In light of the information in the record and from practical experience wrought from the aftermath of hurricanes Katrina and Rita, this report examines the spectrum needs of traditional public safety entities and other critical first responders. This report also considers *proposals to enhance public safety interoperability, particularly broadband interoperability, ranging from the deployment of a nationwide, interoperable network* to more easily achievable solutions that employ widely available commercial technologies.

Id. (emphasis added).

309(j) only after the Commission determines to accept mutually exclusive applications.¹³⁶

Within the framework established by the *800 MHz Re-banding Order*, the public safety communications applications made possible as a result of M2Z's requested license would result in the "furtherance of the public interest by . . . avoid[ing] mutual exclusivity [and instead] promot[ing] public safety."¹³⁷

The Application does not request "free spectrum"¹³⁸ or the use of valuable spectrum resources in return for nothing. As explained herein, and in the Application and numerous other filings in this docket in support of the Application, M2Z has made enforceable promises to provide public interest benefits in the form of free nationwide wireless broadband service, public safety spectrum use, and annual contributions to the U.S. Treasury representing five percent of M2Z's gross revenues attributable to its premium service. Parties opposing the Application attempt to dismiss M2Z's investment in widespread deployment of broadband infrastructure, and M2Z's promise of ubiquitous free broadband service, as overly optimistic or unpromising when compared to existing offerings in the market for wireless broadband.¹³⁹ However, considering all of these public interest and public safety benefits, including the reduction in strain on universal service funds needed for deployment of broadband and the family-friendly service benefits promised by the Application, it is clear that M2Z's Application represents a value-for-value proposition. The Commission therefore can satisfy the mandate in Section 309(j)(3)(C) of the Act to recoup "for the public" – and for the U.S. Treasury as well, but more importantly for

¹³⁶ See *800 MHz Re-banding Order*, ¶ 73.

¹³⁷ *Id.*

¹³⁸ See CTIA Petition to Deny at 3; T-Mobile Petition to Deny at 1.

¹³⁹ See, e.g., AT&T Petition to Deny at 16–17; T-Mobile Petition to Deny at 8; WCA Petition to Deny at 6; Rural Broadband Group Petition to Deny at 3.

the public as a whole – “a *portion* of the value of the public spectrum resource made available for commercial use.”¹⁴⁰

Thus, it is not the case that M2Z asks the Commission to read Section 309(j)(6)(E) in such a manner as to defeat Section 309(j)(1) itself, or to interpret this subsection outside the context of Section 309(j) as a whole.¹⁴¹ Section 309(j)(1) mandates competitive bidding only “[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are *accepted*.”¹⁴² Additional applications have not been accepted, and as explained herein and in M2Z’s Consolidated Motion to Dismiss, consistent with 309(j)(6)(E), those filings should not be accepted. Moreover, as noted above, the Commission’s *1997 Balanced Budget Act Order* discussed the nature of the public interest determination to be made pursuant to the mandates of Section 309(j)(6)(E) and stipulated the use for these purposes of the public interest goals enumerated in Section 309(j)(3). The Commission has ample authority under Section 309(j) to consider M2Z’s Application on the merits and determine whether M2Z’s request for a license in the 2155-2175 MHz band would serve these public interest goals, as Section 309(j)(6)(E) requires.

Various Petitioners also contend that the Commission did not rely on Section 309(j)(6)(E) – either in the 800 MHz Re-banding proceeding or in the proceeding to grant Ancillary Terrestrial Component (“ATC”) authority to Mobile Satellite Service (“MSS”) providers – to

¹⁴⁰ 47 U.S.C. § 309(j)(3)(C) (emphasis added). The Application also meets the Section 309(j)(3)(D) objective calling upon the Commission to promote “efficient and intensive use of the electromagnetic spectrum.” See 47 U.S.C. § 309(j)(3)(D). A TDD system such as the one that M2Z’s proposed in the Application significantly raises the bar for “efficient and intensive use” of spectrum by allowing two-way communications services to be provided over a single, unpaired spectrum band.

¹⁴¹ See, e.g., Verizon Wireless Petition to Deny at 8 (suggesting that M2Z’s reading of the plain text in Section 309(j)(6)(E) “completely gut” the competitive bidding mandate of Section 309(j)(1)).

¹⁴² 47 U.S.C. § 309(j)(1) (emphasis added).

grant initial licenses to affected parties.¹⁴³ This contention misreads the Commission's pronouncements on its discretion in such contexts. In the *800 MHz Re-banding Order*, the Commission explained that "Section 309(j) supports our conclusion that we have authority to avoid mutual exclusivity in this context when it is in the public interest to do so. Although 309(j) requires auctions whenever mutually exclusive applications for initial license are filed, Section 309(j)(6)(E) provides that '[nothing in this subsection shall] be construed to relieve the Commission of the *obligation in the public interest* to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity *in application and licensing proceedings*.'"¹⁴⁴ Thus, the fact that these cases involved license modifications rather than initial license grants has no bearing whatsoever on the applicability of Section 309(j)(6)(E) to the issue at hand.¹⁴⁵

In reality, Section 309(j)(6)(E) allows the Commission to do precisely what NextWave and other Petitioners contend that the Commission cannot do: make a spectrum assignment decision based on its reasoned and considered view regarding the use of the spectrum and the applicant that would best promote the public interest in its use of the license. If this were not the case, then Section 309(j)(6)(E)'s language reserving the Commission's authority to use threshold qualifications and service rules to avoid mutual exclusivity would have no meaning.¹⁴⁶ The Commission clarified this point in the *800 MHz Re-banding Order* when it stated that "we could have exercised our authority to grant rights to the ten megahertz of spectrum to Nextel as an

¹⁴³ See, e.g., NextWave Petition to Deny at 6, 21; EchoStar Opposition at 2.

¹⁴⁴ *800 MHz Re-banding Order*, ¶ 73 (alterations and emphases in original).

¹⁴⁵ See Verizon Wireless Petition to Deny at 9.

¹⁴⁶ See N. Singer, *Statutes and Statutory Construction* § 46.06, pp 181-186 (rev. 6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .") (footnotes omitted).

initial license, without subjecting the spectrum to competitive bidding procedures. The auction requirement of Section 309(j)(1) applies only when the Commission has accepted mutually exclusive applications for a new license.”¹⁴⁷

When expanding the rights initially granted to MSS licensees, the Commission also rejected calls for competitive bidding and segmentation of the affected bands and decided that such segmentation “would not be an ‘efficient and intensive use of the electromagnetic spectrum’” or satisfy other factors enumerated in Section 309(j)(3) of the Act.¹⁴⁸ In rejecting these calls for an auction of the additional spectrum use rights, the Commission indicated that it “must consider and balance all of the objectives of Section 309(j)(3) in identifying classes of licenses to be auctioned, including ‘the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas’” and the efficient and intensive use considerations cited above.¹⁴⁹

5. Grant of the Application Would Be More Certain than a Spectrum Auction to Provide the Public Interest Benefits of the NBRS

As demonstrated herein and in the record in this docket, M2Z’s proposal satisfies the same Section 309(j)(3) objectives that the Commission cited in the ATC proceeding and elsewhere. For these reasons, the Commission should not heed calls from incumbent wireless carriers for an auction of the 2155-2175 MHz band when M2Z’s Application already provides for the development and rapid deployment of new services for the benefit of the public. It is entirely unsurprising that several of the Petitioners would call for auction of this spectrum, or

¹⁴⁷ 800 MHz Re-banding Order, ¶ 74.

¹⁴⁸ See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers*, Memorandum Opinion and Order and Second Order on Reconsideration, 20 FCC Rcd 4616, ¶ 79 (2005) (“*ATC Memorandum Opinion and Order*”) (citing 47 U.S.C. § 309(j)(3)(A)).

¹⁴⁹ *Id.*, ¶ 81 (citing 47 U.S.C. § 309(j)(3)(D)); see also 47 U.S.C. § 157 (noting that, independent of the auction context, it is the policy of the United States and the Commission to “encourage the provision of new technologies and services to the public”).

that they would justify their request with claims that an auction is the surer route for satisfying Section 309(j)(3)(A) objectives such as rapid deployment of new services for the benefit of the public, including those residing in rural areas.¹⁵⁰ Surprising or not, the Commission should give no weight to the transparently self-serving argument that 2155-2175 MHz spectrum must be made available to incumbents in order to promote innovation and foster the delivery of new services.

As the Commission's records demonstrate, spectrum auctions do not always result in timely assignment of licenses, let alone rapid deployment of service.¹⁵¹ Furthermore, auctioning off the 2155-2175 MHz band to an incumbent wireless carrier would not satisfy the mandate in Section 309(j)(3)(B) to avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants.¹⁵² Opening an auction for this spectrum to incumbents also would ignore the poor track record that incumbent wireless carriers have in terms of deploying fixed and portable wireless broadband services that serve as substitutes for – rather than mere mobile complements to – existing offerings of duopolistic wireline broadband service.¹⁵³

Furthermore, the contention that auctions always lead to rapid deployment of new technologies, products, and services in under-served areas ignores the very real economic incentives for entrenched incumbents and spectrum speculators to influence the outcome of auctions, and even to acquire and warehouse spectrum they do not intend to use, in order to limit,

¹⁵⁰ See, e.g., CTIA Petition to Deny at 4-5 (asserting that “the auction process ensures that scarce spectrum resources are put to their highest and best use”).

¹⁵¹ See, e.g., Wireless Telecommunications Bureau Grants 36 VHF Public Coast and Location and Monitoring Service Licenses, Report No. AUC-39, DA 07-1097 (Wireless Telecom. Bur. rel. Mar. 13, 2007) (announcing grant of licenses in mid-March 2007 to a bidder that won those licenses at auction six years ago, in June 2001).

¹⁵² See 47 U.S.C. § 309(j)(3)(B).

¹⁵³ See Wilkie, “Consumer Welfare Impact,” at 9–10.

delay, or prevent entry by new competitors.¹⁵⁴ As explained by Dr. Wilkie in a separate economic analysis also submitted in this docket, incumbent wireless carriers – including certain Petitioners and their corporate affiliates or parents – have a troubling track record relating to the warehousing of spectrum.¹⁵⁵ While acquiring spectrum without any intent to put it to good use might seem like an irrational economic choice, Dr. Wilkie explains that incumbent carriers may in fact have the incentive and ability to deter entry by new service providers, using methods designed to raise potential competitors' costs.¹⁵⁶ Meanwhile, speculators may be able to increase the scarcity of spectrum – and therefore the value of their own spectrum holdings – by erecting barriers to entry or increasing the costs associated with acquiring spectrum rights.¹⁵⁷

Incumbents and speculators have the power and means to inflict such costs on their potential rivals. Due to the scarcity of spectrum and the limited opportunities for new entrants to acquire access to this essential resource, existing licensees or their affiliates have ready access to methods for controlling access to spectrum and preventing competition. Dr. Wilkie notes that the telecommunications sector today contains discrete and significant hurdles to entry in the form of spectrum licenses. While only the Commission has the authority to assign licenses, an auction process that does not limit participation by incumbents and potential speculators can be used to prevent potential entrants from acquiring spectrum resources.¹⁵⁸ With a viable mechanism in place to undertake such anticompetitive endeavors, incumbents seeking to block entry by

¹⁵⁴ See Simon Wilkie, PhD., *"Spectrum Auctions Are Not a Panacea: Theory And Evidence Of Anti-Competitive and Rentseeking Behavior in FCC Rulemakings and Auction Designs,"* WT Docket Nos. 07-16 & 07-30, at 13 – 19, 39 (filed Mar. 26, 2007) ("Wilkie II").

¹⁵⁵ See *id.* at 19 (citing *Promoting Efficient use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Comments of 37 Concerned Economists, WT Docket No. 00-230, at 6 (submitted Feb. 7, 2001)).

¹⁵⁶ See *id.* at 15–18.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

potential competitors would find it profitable to do so if the price paid for spectrum rights at auction is less than the amount of lost profit incumbents might experience due to increased competition in the market for their services.¹⁵⁹

Real world examples of such behavior and of apparent spectrum warehousing are numerous. For instance, licensees in the 2.3 GHz Wireless Communications Service (“WCS”) including AT&T, BellSouth, NextWave, Verizon, and others, have consistently failed to construct their networks and meet applicable buildout requirements for licenses they acquired at auction a decade ago in 1997.¹⁶⁰ The WCS band can be used to offer wireless broadband services, including services provided using WiMax technology, that would compete directly against cable modem and DSL services offered by incumbent local exchange carriers and cable operators that hold these licenses.¹⁶¹ Perhaps not surprisingly, the wireline incumbents and wireline affiliates that control many of the extant WCS licenses spent money to acquire these licenses at auction and in the secondary markets, but have done nothing to develop a service that might compete against their wireline broadband offerings. Instead, after more than nine years of delay and finger pointing, these companies recently sought and received a three-year extension of their build out obligations.¹⁶²

Another service in which licenses were acquired at auction before the turn of the century but remain unused today is the Local Multipoint Distribution System service (“LMDS”). In 1998, the Commission auctioned two blocks amounting to 1300 MHz of spectrum for private

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at 20–21 (citing *In the Matter of Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, ¶ 13 (2006)).

¹⁶¹ See *id.* at 21.

¹⁶² See *In the Matter of Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, ¶ 13 (2006).

commercial use in this service in the 28, 29 and 31 GHz bands.¹⁶³ The Commission expected licensees to provide two-way, fixed location broadband services that would compete directly against DSL, cable modem and other fixed broadband access technologies. Incumbent LECs acquired licenses in this service, yet to date have done little with this spectrum.¹⁶⁴

Spectrum warehousing also seems to be in play in the Multichannel Video Distribution and Data Service (“MVDDS”). One of the Petitioners in this proceeding, EchoStar, owns 49.9 percent of South.com, a company that acquired 37 spectrum licenses in the 12.2-12.7 GHz band in auctions held in 2004 and 2005, but that has yet to construct facilities or offer services using those authorizations.¹⁶⁵ Finally, in the 2.1 GHz and 2.5 GHz bands currently allocated to the Educational Broadband Service (“EBS”) and Broadband Radio Service (“BRS”), AT&T and BellSouth voluntarily agreed as one of their merger commitments to divest all of the spectrum that BellSouth controlled, but put to little use, in the 2.5 GHz band.¹⁶⁶

In light of the history of apparent spectrum warehousing by incumbents, Dr. Wilkie reports that spectrum policy experts have for years called upon the Commission to streamline processes available to new entrants in need of spectrum and transmission rights.¹⁶⁷ Grant of the Application would provide spectrum resources to a new entrant committed to providing a service that will compete aggressively against entrenched incumbents that have a history of acquiring valuable spectrum without putting it to use. If the Commission were to auction the 2155-2175 MHz band instead, in an auction open to all incumbents and all other putatively qualified parties, there is a significant chance that large incumbent wireless and broadband providers would try to

¹⁶³ See *Wilkie II* at 29.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 27-28.

¹⁶⁶ See *id.* at 22-27.

¹⁶⁷ See *id.* at 31-32.

obtain the license primarily to keep new entrants out of the market. Incumbents could easily find such warehousing tactics profitable even at high bid values, and they have a history of engaging in such tactics.

The wireless industry has seen significant consolidation and aggregation since the Commission removed the spectrum cap for Commercial Mobile Radio Services (“CMRS”).¹⁶⁸ As incumbent wireless carriers continue to grow, and their incentives and abilities to warehouse spectrum and prevent competition increase, it becomes ever more important for the Commission to prevent such anticompetitive behavior – particularly when the incumbents have already manipulated the Commission’s rules to consolidate their power. Although the Commission’s Designated Entity (“DE”) program was designed to avoid the excessive concentration of licenses and disseminate licenses among a wide variety of applicants,¹⁶⁹ large incumbent wireless carriers have increasingly used the program to extend their holdings. As noted by several commenters in 2006, DEs that had ties to large incumbents have won an increasing share of spectrum licenses over the last several years.¹⁷⁰ In effect, large carriers are using the DE program simultaneously

¹⁶⁸ See 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order, 16 FCC Rcd 22668 (2001) (“2000 Biennial Review”); Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 20 FCC Rcd 13967 (2005); Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Action Notifications, Public Notice, Report No. 2086 (Wireless Telecom. Bur. rel. Mar. 2, 2005) (granting license transfer application of NextWave Telecom Inc. and Cellco Partnership d/b/a Verizon Wireless); Applications for Consent to the Assignment of Licenses from NextWave Personal Communications, Inc., and NextWave Power Partners, Inc., to Subsidiaries of Cingular Wireless LLC, Memorandum Opinion and Order, 19 FCC Rcd 2570 (2004); Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless, Corp., Transferee, Memorandum Opinion and Order, 19 FCC Rcd 21522 (2004); Applications of Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless For Consent to Assignment of Licenses, Memorandum Opinion and Order, 18 FCC Rcd 6490 (2003).

¹⁶⁹ See 47 U.S.C. § 309(j)(3)(B).

¹⁷⁰ See, e.g., Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, Comments of Council Tree Communications, Inc., WT Docket No. 05-211, at 3, 21–24 (submitted Feb. 24, 2006) (showing that DEs with national carrier investment won 51% of the total licenses available in Auction 58); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, Comments of Leap Wireless International, Inc.,

to obtain spectrum at a discount and prevent independent small businesses and new market entrants from competing in the market for wireless services. In an attempt to prevent such activities, the Commission recently strengthened its rules and policies governing relationships between DEs and non-DEs.¹⁷¹ The Commission should take the additional step of preventing spectrum warehousing and facilitating market entry by granting the Application .

The 2155-2175 MHz band presents an excellent opportunity for the Commission to further its goals under Section 309(j) by encouraging a new entrant to compete in the market for wireless services. As described above, however, in the absence of carefully structured rules and qualifications to protect against spectrum warehousing by incumbent operators, an auction would yield suboptimal results.¹⁷² When the Commission removed the spectrum cap in favor of a case-by-case analysis, it noted that it could still “shape the initial distribution of licenses” through specific rules.¹⁷³ Such rules are necessary in the 2155-2175 MHz band. As illustrated in Part II.B below, the Commission has on many occasions awarded licenses for new services without auction. Parties making statements to the contrary ignore the fact that the Commission has throughout its history devised processes that do not rely on competitive bidding in assigning spectrum licenses. The Commission has historically awarded and continues today to award initial licenses for new services and other spectrum usage rights without auction when the public interest is better served by a different approach.

WT Docket No. 05-211, at 3-4 (submitted Feb. 24, 2006) (citing a January 2006 Council Tree filing reporting that the top five largest carriers used DE structures to gain access to 71% of the spectrum they obtained in Auction 58).

¹⁷¹ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753, ¶ 25 (2006).

¹⁷² As illustrated above, the Commission's construction and build-out requirements do not negate the potential for spectrum warehousing. Large incumbents, fueled by revenue streams from various business lines, may still find it profitable to meet the bare minimum construction and buildout requirements if such action will prevent new competition. As the incumbents become larger, the potential for such actions to be profitable increases. See discussion *supra* nn. 154-167 and accompanying text.

¹⁷³ See *2000 Biennial Review*, ¶ 52.

B. The Commission Has Consistently Granted Spectrum Licenses and Spectrum Use Rights Without Requiring Competitive Bidding When Doing So Promotes Goals Specified in Section 151 and Elsewhere in the Act

Since the 1993 enactment of the competitive bidding provisions contained in Section 309(j) of the Act, the Commission has continued to grant a wide range of spectrum licenses and spectrum use rights without requiring competitive bidding in order to promote the goals specified in Section 151 and elsewhere in the Act. The Commission's ongoing obligations to promote competition, new services, and other public interest goals, provide support for a Commission decision to grant M2Z's Application without accepting any mutually exclusive applications in this instance.

Throughout the history of the Act's implementation, including the period following passage of the Act's competitive bidding amendments, a large number of spectrum licenses and spectrum usage rights have been awarded to commercial service providers without the use of auctions. The Commission continues to authorize without auctions the assignment of initial spectrum licenses – as well as additional rights relating to the use of previously licensed spectrum – when doing so would promote competition, facilitate the introduction of new services, and serve the public interest. There are abundant examples of post-Section 309(j) license grants made without auctions, based on the Commission's spectrum management powers and spectrum policy initiatives, including several instances in which the Commission sought to foster more intensive and efficient use of spectrum while simultaneously promoting new services.

The fact that there are commercial aspects to the services offered by entities receiving either initial licenses or additional spectrum usage rights conferred without an auction has had no impact on Commission decisions granting such initial authorizations or providing additional

flexibility to existing licensees. Like many of the services that were not subject to auction, M2Z's proposed service will lead to the development and rapid deployment of new technology, promote economic opportunity and competition, and ensure that innovative new services are made widely available to the American people. Yet, as discussed more fully in Part I.B above, M2Z's service will provide public interest benefits equal to, or far surpassing those provided by, such other services, and M2Z's voluntary payment of usage fees will also ensure recovery by the U.S. Treasury of a portion of the value of the public resource used to provide the NBRIS throughout the United States.

1. There are Many Services in Which the Commission Has, Since 1993, Granted Initial Spectrum Authorizations and Additional Spectrum Usage Rights Without Use of Competitive Bidding

a. 800 MHz Re-banding Proceeding

In specific commercial wireless services decisions, such as the *800 MHz Re-banding Order* (also discussed in Part II.A.4 above), the Commission has awarded additional spectrum or spectrum usage rights to a particular licensee or class of licensees without the use of auctions. The Commission issued its decision in the *800 MHz Re-banding Order* in 2004, more than a decade after the enactment of Section 309(j)'s competitive bidding provisions, and in that order granted Nextel Communications, Inc. ("Nextel") use of a 10 MHz block of spectrum in the 1.9 GHz band without any competitive bidding. The Commission concluded that the benefits of reducing the "growing problem of interference to public safety communications" in the 800 MHz band justified modifying Nextel licenses for surrendered 800 MHz spectrum to allow Nextel use of spectrum at 1.9 GHz.¹⁷⁴

¹⁷⁴ *800 MHz Re-banding Order*, ¶¶ 1-5.

The order acknowledged the effect of the Act's intertwined public safety and public interest mandates on the Commission's spectrum management responsibilities, noting that in Section 309(j) "Congress recognized that the Commission can determine that its public interest obligation warrants action that avoids mutual exclusivity, and that this obligation extends to application and licensing proceedings (which include license modifications), *not just initial licensing matters.*"¹⁷⁵ Obviously, the mention of initial licensing matters here indicates that the Commission does not hold the position espoused by various Petitioners that Section 309(j)(6)(E) should only apply to license modification proceedings.¹⁷⁶

The *800 MHz Re-banding Order* also noted that "[S]ection 309(j)(6)(E) gives the Commission broad authority to create or avoid mutual exclusivity in licensing, based on the Commission's assessment of the public interest."¹⁷⁷ The Commission thus concluded that the Act allowed relocation of Nextel's operations and modification of the company's licenses in order to realize public interest benefits from a reduction in interference to public safety operations in the 800 MHz band.¹⁷⁸ The Commission concluded in the *800 MHz Re-banding Order* that "[r]adio spectrum is a public resource of the United States that Congress has authorized and directed the Commission to manage in the public interest," noting that "the Commission's most basic spectrum-management power is to assign spectrum to achieve public interest benefits *other than* monetary recovery."¹⁷⁹ Grant of the Application would thus represent nothing more than an exercise of what the Commission itself describes as its most basic spectrum-management prerogative, and would achieve a wide range of public interest and

¹⁷⁵ *Id.*, ¶ 73 (emphasis added; internal quotation omitted).

¹⁷⁶ See *supra* nn. 143–145 and accompanying text.

¹⁷⁷ *800 MHz Re-banding Order*, ¶ 85.

¹⁷⁸ See *id.*, ¶ 86.

¹⁷⁹ *Id.*, ¶ 81 (emphasis in original).

consumer welfare benefits while at the same time providing for a potentially significant monetary recovery in the form of the usage fees promised by the Application.

b. *Instructional Television Fixed Service/Educational Broadband Service*

The Commission has a long history of attempting to stimulate delivery of new services in the 2.1 GHz and 2.5 GHz bands by expanding the opportunities available to licensees in the present-day EBS and BRS. EBS licensees are educational institutions and other non-profit educational institutions authorized to operate stations in what was initially established as a fixed service (the “Instructional Television Fixed Service,” or “ITFS”) in 1963, when the Commission “envisio[n]ed that [this service] would be used for transmission of instructional material to accredited public and private schools, colleges, and universities for the formal education of students.”¹⁸⁰ During the years that followed, the Commission regularly relaxed the use restrictions applicable to licensees in this service “in an effort to encourage more intensive use of the spectrum and to help [ITFS licensees] generate needed revenue.”¹⁸¹ The relaxations included allowing licensees in the band to provide mobile, as well as, fixed services.¹⁸²

The Commission long ago granted ITFS and now EBS licensees the right to lease “excess capacity” amounting to as much of 95% of their spectrum for commercial purposes, and culminated its attempts to encourage more intensive uses of the band in 2004 and 2006 with a series of orders that adopted a new EBS/BRS band plan that “provide[s] incentives for the

¹⁸⁰ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, ¶ 9 (2006) (“EBS/BRS Third MO&O and Second R&O”).*

¹⁸¹ *Id.*, ¶¶ 10–11.

¹⁸² *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, ¶ 111 (2004) (“EBS/BRS Report and Order”).*

development of low-power cellularized broadband use.”¹⁸³ No competitive bidding was ever required for the additional usage rights afforded licensees in the bands – a fact which calls into question the weight that should be given to WCA’s repeated calls in its *Petition to Deny* to auction the 2155-2175 MHz band, when WCA members have for so long benefited from the Commission’s policies towards EBS and BRS licensees.

c. Mobile Satellite Service

In the MSS context, the Commission decided not to use competitive bidding in determining whether existing MSS licensees should be allowed to provide ancillary terrestrial services over spectrum that they had originally received to provide mobile satellite services. The Commission typically has granted MSS licenses without the use of competitive bidding by designing spectrum sharing arrangements intended to avoid mutual exclusivity among applicants.¹⁸⁴ The Commission concluded in its decision to expand the rights initially granted to MSS licensees that such a result would not unjustly enrich MSS operators or treat other carriers unfairly.¹⁸⁵

d. Direct Broadcast Satellite

The Direct Broadcast Satellite (“DBS”) service provides yet another example of the Commission fulfilling its spectrum management responsibilities and granting initial spectrum rights without an auction. Prior to the end of 1995, but after the 1993 enactment of the competitive bidding provisions in Section 309(j) of the Act, the Commission awarded licenses and construction permits to DBS providers without the use of auctions or the recovery of any

¹⁸³ *EBS/BRS Third MO&O and Second R&O*, ¶ 13.

¹⁸⁴ See, e.g., *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, Report and Order, 13 FCC Rcd 9111, ¶ 122 (1997).

¹⁸⁵ See *ATC Memorandum Opinion and Order*, ¶ 75. The ATC proceeding is also discussed in greater detail in Part II.A.4 above.

usage fees.¹⁸⁶ Discussing the early evolution of DBS service in a 1995 order, the Commission explained that when it granted the first DBS authorizations in 1982 its “primary goals in initiating this new service were to provide additional competition to existing program providers such as cable television, to provide improved service to remote areas of the country, and to encourage innovative new programming and services.”¹⁸⁷ Grant of the Application would likewise engender additional competition to existing providers of broadband service, provide improved broadband service to remote areas of the country, and encourage innovative new services. Therefore, grant of the license requested by M2Z to allow construction and operation of the NBRSS would serve exactly the same type of spectrum management goals that the Commission sought to achieve when it granted initial licenses to DBS providers.

In its brief comments filed in opposition to the Application, EchoStar joins M2Z in the conclusion “that a new nationwide wireless broadband entrant should be a pressing objective” for the Commission, but calls upon the Commission to auction the 2155-2175 MHz band as a single nationwide license on an expedited basis.¹⁸⁸ Absent from EchoStar’s comments is an explanation as to why the Commission’s policy objectives when it first authorized DBS do not apply today with equal force to the NBRSS, which would promote additional competition to existing wireline providers, improved service to remote areas of the country, and innovative new programming and services.

¹⁸⁶ See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712 (1995).

¹⁸⁷ *Advanced Communications Corporation Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System*, Memorandum Opinion and Order, 11 FCC Rcd 3399, ¶ 5 (1995).

¹⁸⁸ EchoStar Opposition at 1-2.

e. *Additional Services*

Since 1993, the Commission has provided for the assignment of initial or additional spectrum use rights without an auction in several different spectrum bands in order to promote the development and rapid deployment of new technologies and services. It has done so when setting aside spectrum for the Wireless Medical Telemetry Service,¹⁸⁹ and when adopting licensing and service rules for the Dedicated Short Range Communications Service (“DSRCS”) in the 5.9 GHz band.¹⁹⁰ It has also done so when making spectrum available in the 3650-3700 MHz band for the provision of wireless broadband services,¹⁹¹ and in the 70-80-90 GHz band for similar reasons.¹⁹² These examples demonstrate that the Commission has wide discretion to award spectrum licenses without competitive bidding pursuant to its general spectrum management authority, in the public interest.¹⁹³

¹⁸⁹ *Amendment of Parts 2 and 95 of the Commission's Rules to Create a Wireless Medical Telemetry Service*, Report and Order, 15 FCC Rcd 11206 (2000).

¹⁹⁰ *Amendment of the Commission's Rules Regarding Dedicated Short-Range Communication Services in the 5.850-5.925 GHz Band*, Report and Order, 19 FCC Rcd 2458 (2004).

¹⁹¹ *Wireless Operations in the 3650-3700 MHz Band*, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502, ¶¶ 44-45 (2005).

¹⁹² *Allocations and Service Rules for the 71-76 GHz, 81-86 GHz and 92-95 GHz Bands*, Report and Order, 18 FCC Rcd 23318 (2003).

¹⁹³ Of course, the Commission also had a long history of assigning spectrum rights to commercial providers without auction and without receipt of direct payments from licensees prior to the enactment of Section 309(j). The Commission traditionally granted broadcasters authorization to use the public airwaves in exchange for the broadcasters' commitment to serve the public interest. *See, e.g.*, 47 U.S.C. § 336(d) (noting, in the context of the statutory authorization for the grant of digital television licenses to existing analog television licensees, that “[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity”). Although most applications for new commercial broadcast licenses are today subject to competitive bidding, *see* 47 C.F.R. § 73.5000, the Act nonetheless perpetuates the policy of providing unauctioned spectrum to incumbent commercial television broadcast licensees by exempting from competitive bidding requirements all “initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses.” 47 U.S.C. § 309(j)(2)(B). Furthermore, the Commission has expanded broadcasters spectrum usage rights – without requiring any competitive bidding for licensees to obtain these new usage rights – by allowing them to realize new revenue streams from ancillary services and multicasting provided over digital television spectrum that the Act grants to incumbent broadcast television licensees without auctions. *See, e.g.*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, 21 FCC Rcd 2503, ¶ 95 (2006); *see also* 47 C.F.R. § 73.624(g). Other long-time beneficiaries of past Commission decisions to grant spectrum licenses and use rights without competitive bidding are carriers in the commercial mobile radio service

2. **Petitioners Fail to Explain How the Public Interest Is Served When Incumbent Licensees Do Not Make Direct Payments to the U.S. Treasury at the Time of License Renewal**

As the discussion above makes clear, there is extensive precedent for the assignment of a nationwide 2155-2175 MHz license to M2Z without an auction. For these reasons, grant of M2Z's Application would represent an extension of, rather than a departure from, Commission precedent and policy to manage the spectrum resources of the United States in the public interest. Yet, unlike some other spectrum users that have been assigned licenses or spectrum use rights without use of competitive bidding, M2Z also has committed to make regular usage fee payments to the U.S. Treasury in return for the spectrum usage rights the Application requests. M2Z recognizes that there is no private ownership of spectrum assets in the United States.¹⁹⁴ M2Z proposed the contribution of the usage fee described in the Application in return for the right to use the 2155-2175 MHz band, and as a mechanism – along with the numerous public safety and consumer benefits that grant of the Application would provide – to provide for “recovery for the public of a portion of the value of the public spectrum resource made available

(“CMRS”) industry – including carriers represented by CTIA and many of the incumbent wireless carriers that submitted Petitions to Deny the Application. When the Commission initially created the cellular radio service in 1981, it awarded two 25 MHz licenses in each market, with one of the licenses automatically set aside for the incumbent wireline provider. *See, e.g., Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, ¶ 6 (1997) (citing *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order, 86 FCC 2d 469 (1981) (“*Cellular Order*”). The Commission based its cellular license assignment decision in part on the need to give licensees in the new service the spectrum resources necessary to make them efficient and viable new service providers. *Id.*, ¶¶ 16–19. The same considerations that motivated the Commission's licensing decisions regarding the development of the new cellular service in 1981 should apply equally to M2Z's nascent wireless broadband service today.

¹⁹⁴ *See* 47 U.S.C. § 301 (“It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, *but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”) (emphasis added); *see also id.* § 304 (“No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.”).

for commercial use.”¹⁹⁵ Nevertheless, and no matter what CTIA may argue, it cannot be said that licensees “have purchased spectrum licenses” when they obtain rights to such licenses via auction.¹⁹⁶ Auctions are but one of many license assignment mechanisms, and the Commission has the authority to assign and then renew licenses without the use of competitive bidding procedures in a wide range of different services and contexts. Thus, while the Commission has ample authority to assign spectrum licenses without the use of competitive bidding (either to M2Z or to the licensees in the many services discussed above), such Commission grants of spectrum rights do not confer upon the licensees any ownership rights or entitlements to use the spectrum outside of the license term.

M2Z proposed in the Application to make continuing annual contributions to the U.S. Treasury during the term of its license. This voluntary commitment to make direct payments to the U.S. Treasury stands in stark contrast to the position adopted by licensees that make no such contributions during the terms of their respective licenses, and that invariably conceive of and treat their licenses as entitlements rather than time-limited grants of authority to provide service in the public interest. There is no convincing policy justification or rationale for such other licensees to enjoy continued use of spectrum use rights granted to them in the absence of auctions while these licensees provide fewer public service benefits than M2Z’s proposal does, and while such other licensees also do not make direct payments for their spectrum use rights even at the time their licenses are renewed.

In addition to not making direct payments to the U.S. Treasury for their initial licenses, licensees that received initial spectrum grants prior to the enactment of the competitive bidding requirements in Section 309(j) are not required to participate in auctions at license renewal,

¹⁹⁵ 47 U.S.C. § 309(j)(3)(C).

¹⁹⁶ CTIA Petition to Deny at 6.

despite the fact that these incumbents would have the greatest incentive to place a winning bid in order to renew their licenses. Such licensees therefore continue to reap substantial rewards from their initial grant of spectrum rights while contributing no revenue to the U.S. Treasury in the form of direct payments or auction proceeds that would be available if renewals were handled differently. Petitioners that criticize M2Z for seeking “subsidized spectrum”¹⁹⁷ fail to take account of the public interest benefits and promised remuneration in the form of usage fees proposed by M2Z, and also fail to interpret and apply the plain language of Section 309(j)(6)(E) of the Act in their analyses of the Commission’s auction authority. They also fail to explain why, based on their logic, the continued use of CMRS licenses initially granted to incumbent wireless carriers without any auction or direct payment for such spectrum use rights does not constitute the provision of a subsidy or of “free spectrum”¹⁹⁸ to such carriers.

Direct payments for spectrum rights are just one method of recovering a portion of the value of such public spectrum resource. As emphasized throughout this Opposition, the public interest benefits created by any widely available radio service must also be taken into account in calculating that recovery. A comparison of the public interest benefits promised by the proposed NBRS and the benefits engendered by other services licensed without competitive bidding is instructive.¹⁹⁹ While few would deny the societal and public interest benefits achieved through

¹⁹⁷ CTIA Petition to Deny at 3.

¹⁹⁸ T-Mobile Petition to Deny at 1 (emphasis in original); see also Verizon Wireless Petition to Deny at 1 (“[T]he spectrum sought by M2Z must be auctioned and cannot simply be licensed to one entity for free.”).

¹⁹⁹ The similarities between the commercial broadcast service and M2Z’s proposed NBRS are especially noteworthy. First, much like the initial grants of commercial broadcasting licenses under the Act, grant of M2Z’s Application would facilitate the development of a free, advertising-supported wide-area communications service that would generate significant public and societal value. See Wilkie, “Consumer Welfare Impact,” at 1–8. Just as the licensing of commercial broadcasting has contributed significantly to the wider dissemination of public affairs and news programming, resulting in a much better informed citizenry, so too would the licensing of M2Z’s NBRS by making it easier for the vast majority of Americans to gain access to a wider amount of such information via affordable broadband connections. See, e.g., *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, ¶ 14 (2005) (discussing the benefits of “preserving the benefits of free, over-the-air local broadcast television for

the Commission's licensing of such commercial services, grant of M2Z's Application would engender far greater public interest benefits. Moreover, when it comes to direct payments made as partial compensation for continued spectrum use, there simply is no comparison between M2Z's proposal to pay such usage fees and the practice of commercial licensees that have never made such payments.

C. The Commission May Not Take Potential Revenues Into Account, and Especially Should Not Be Swayed by Petitioners' Attempts to Distort Estimates of Potential 2155-2175 MHz Auction Revenues, in Assessing M2Z's Application

M2Z concurs with then-Commissioner Martin's statement summarizing his conclusions in the *Northpoint Order*: "As a general policy matter . . . competitive bidding can be a useful mechanism for distributing licenses, but auctions are not a goal in and of themselves."²⁰⁰ Several Petitioners, however, make the fundamental mistake of assuming that auctions – and, more particularly, auction revenues – are in and of themselves a legitimate goal during the spectrum license assignment process. As a result, these Petitioners speculate that the Commission could

viewers[] and [thereby] promoting the widespread dissemination of information from a multiplicity of sources"). Just as the licensing of commercial broadcasting allowed Americans of all kinds to disseminate, receive, and exchange ideas as never before, so too would the licensing of M2Z's NBRs by facilitating the deployment of affordable broadband services in areas where broadband service is either too expensive (due to lack of effective competition) or not available at all. Just as the licensing of commercial broadcasting spurred the development of a wide variety of ancillary businesses and economic activities that have contributed greatly to the prosperity of the United States economy, so too would the licensing of M2Z's NBRs by making the transformative powers of broadband available to talented individuals and innovative businesses that, because of either location or lack of resources, currently cannot take advantage of such powers. Unlike the early commercial broadcasters, however, M2Z has committed to providing several concrete and enforceable public interest benefits and voluntary payments to the U.S. Treasury. Whatever the public interest benefits of commercial broadcasting may be, officials within the current Administration have questioned the rationale for perpetuating the use of spectrum without any direct payments to the U.S. Treasury by this particular class of Commission licensees. *See Bush administration proposes user fees on unauctioned spectrum*, BROADCAST ENGINEERING, Feb. 13, 2006, available at <http://broadcastengineering.com/news/bush-spectrum-fee-20060213> (last visited Feb. 16, 2007). Yet, the questions now being raised regarding the use of the public airwaves by the commercial broadcasting industry would not apply to M2Z because the Application commits M2Z to making direct payments to the U.S. Treasury while also generating public interest and consumer welfare benefits similar to or greater than those provided by commercial broadcasters. *See Wilkie, "Consumer Welfare Impact,"* at 1-3.

²⁰⁰ Separate Statement of Commissioner Kevin J. Martin, *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 (2002) ("*Northpoint Order*").

generate more revenue from the 2155-2175 MHz band by auctioning a license than by granting M2Z's Application.²⁰¹ Without explaining the basis for their estimate, or by using out-of-context citations to the source for their supposed valuations, they suggest that a nationwide license would have a potential auction value of \$5 billion.²⁰² These Petitioners conveniently omit the fact, however, that Congress has prohibited the Commission from considering potential auction revenues when assigning spectrum rights. In addition, even if the Commission were to hypothesize about auction revenues, the \$5 billion valuation that the Petitioners attribute to the 2155-2175 MHz band stems from an academic exercise never meant to be used as a conjecture regarding the value of the 2155-2175 MHz spectrum at auction.

1. Potential Auction Revenues Are Irrelevant to the Commission's Review of M2Z's Application

Section 309(j)(7)(A) of the Act flatly prohibits the Commission from making a spectrum use decision based on potential auction revenues.²⁰³ The statute reads:

In making a decision . . . to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to [Section 309(j)], and in prescribing regulations [for such proposed use], the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.²⁰⁴

²⁰¹ See CTIA Petition to Deny at 5 ("In addition to assigning commercial spectrum to its highest and best use, spectrum auctions provide the Treasury with billions of dollars that the government can use to fund communications-related programs."); Verizon Wireless Petition to Deny at 5-6 (arguing that past results in other CMRS spectrum auctions indicate that there would be a "strong interest in [the 2155-2175 MHz band] by a wide variety of entities" and citing total net revenues revenue totals for past PCS, SMR, and AWS spectrum auctions).

²⁰² See CTIA Petition to Deny at 5 (citing the M2Z Application, Appendix 5, at 24). As illustrated below, CTIA plucks this \$5 billion figure out of the Application and ignores all of the qualifying language surrounding the raw number suggested in Appendix 5 to the Application, in the analysis prepared on M2Z's behalf by Drs. Rosston and Wallsten. AT&T takes a different tack by acknowledging some of the careful qualifying language used in this economic analysis, but then faulting M2Z for failure "to adequately determine the present value of the requested license, which could be substantial." AT&T Petition to Deny at 8-9. AT&T thus takes a different route to arrive at the same wrong conclusion: namely, that the potential value of the spectrum compels the Commission to raise revenues by auctioning the spectrum.

²⁰³ See 47 U.S.C. § 309(j)(7)(A).

²⁰⁴ *Id.*