

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY OF VERIZON WIRELESS

Verizon Wireless hereby replies to M2Z Networks, Inc.’s (“M2Z’s”) Consolidated Opposition (“Opposition”) to the petitions to deny filed by Verizon Wireless and numerous other entities against M2Z’s above-captioned application to provide National Broadband Radio Service in the 2155-2175 MHz band (“Application”).¹ As echoed uniformly by the petitioners in this proceeding, M2Z’s Application must be promptly denied as it is fatally flawed. It seeks free access to spectrum that must be licensed through competitive bidding. It seeks licensing before the adoption of the requisite service rules for this spectrum. And it utterly fails to provide adequate assurance that M2Z has the financial wherewithal to build the system and provide the

¹ M2Z also submitted a Consolidated Motion to Strike and Dismiss Petitions to Deny and Alternative Proposals, in which it claimed, among other things, that Verizon Wireless’ Petition to Deny must be dismissed because it did not make a *prima facie* showing as to why grant of M2Z’s Application would be inconsistent with the public interest and because Verizon Wireless did not submit an affidavit attesting to the facts in its pleading. M2Z’s allegation is completely without basis. Plainly, the arguments in Verizon Wireless’ Petition to Deny (and those of the other petitioners) present an extremely strong *prima facie* case that M2Z’s Application has multiple and serious legal deficiencies that preclude its grant. Further, Verizon Wireless’ arguments were entirely based upon legal grounds and any facts presented were M2Z’s own. Accordingly, no affidavit attesting to new facts presented was required.

service it is proposing. Nothing in M2Z's Opposition cures these glaring deficiencies. Accordingly, the Commission should move promptly to deny M2Z's Application.

I. THE COMMUNICATIONS ACT AND FCC PRECEDENT CLEARLY REQUIRE THE USE OF COMPETITIVE BIDDING TO LICENSE THE SPECTRUM M2Z SEEKS

As Verizon Wireless explained in its Petition to Deny, the spectrum sought by M2Z must be auctioned and cannot simply be licensed to one entity for free. The Communications Act ("Act") clearly mandates the use of competitive bidding to select from among "mutually exclusive applications . . . for any initial license."² While there are limited and narrow exceptions to this mandate, M2Z's proposed service plainly does not fall within any of them.³ Further, the interest of numerous parties in the 2155-2175 MHz band is made abundantly clear by the filing of six competing applications for this spectrum.⁴ The existence of mutual exclusivity requires the Commission to conduct an auction.

M2Z attempts to assert that the alleged public interest benefits associated with its proposed service require the Commission to ignore other interested parties and to award

² 47 U.S.C. § 309(j)(1).

³ As explained in Verizon Wireless' Petition to Deny, M2Z's proposed service is clearly not (1) a public safety radio service, (2) a digital television service that will be provided by an existing terrestrial broadcast licensee, or (3) a noncommercial educational broadcast service. As such, none of the exceptions to the competitive bidding mandate apply. *See* Verizon Wireless Petition to Deny at 2-5 (filed Mar. 2, 2007).

⁴ Nextwave Broadband Inc., Application for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band; Open Range Communications, Inc., Application for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band; Commnet Wireless, LLC, Application for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Service in the 2155-2175 MHz Band; NetfreeUS, LLC, Application for License and Authority to Provide Wireless Broadband Service in the 2155-2175 MHz Band; McElroy Electronics Corp., Application for a Nationwide 2155-2175 MHz Band Authorization; Towerstream Corp., Application for a Nationwide 2155-2175 MHz Band Authorization.

M2Z a license outside of the requisite auction process.⁵ M2Z bases its argument on Section 309(j)(6)(E) of the Act, which directs the Commission “to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.”⁶ However, M2Z is not asking the Commission to adopt reasonable service rules or appropriate threshold qualifications to ensure the license is awarded to the entity best able to serve the public interest. Rather, M2Z is asking the Commission not to consider any other applicants for this spectrum and not to adopt service rules at all. Such a reading of this provision is just not plausible. It would also be the equivalent of providing a “pioneer’s preference” – a policy that Congress has previously and expressly eliminated.⁷

M2Z also asserts that the Commission is obligated to determine the highest and best use of the 2155-2175 MHz band.⁸ Verizon Wireless does not disagree. However, in Section 309(j), Congress made clear that this goal is generally best accomplished by awarding initial spectrum licenses through competitive bidding. For years, FCC precedent has found accordingly. M2Z has been unable to point to any appropriate precedent – concerning mutually exclusive *initial* licenses for an auctionable service – where competitive bidding has not been used.⁹ Further, M2Z has failed to distinguish the

⁵ Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny at 33-53 (filed Mar. 26, 2007) (“Opposition”).

⁶ 47 U.S.C. § 309(j)(6)(E).

⁷ See Verizon Wireless Petition to Deny at 6-7. Despite M2Z’s protestations that it is not seeking preferential treatment, that is exactly what it is requesting in seeking exemption from competitive bidding.

⁸ Opposition at 10-13.

⁹ As Verizon Wireless pointed out in its Petition to Deny, the Commission’s decisions in the 800 MHz Rebanding and Ancillary Terrestrial Component service proceedings both involved modifications of existing licenses, not the award of an initial license as is the case here. Verizon Wireless Petition to Deny at 8-9. In its Opposition,

case directly on-point, in which the Commission denied Northpoint Technology's request to be initially licensed without being subject to competing applications in an auction.¹⁰

In its Opposition, M2Z for the first time asserts that its Application proposes a new service using new technology and thus qualifies for special treatment under Section 7 of the Act.¹¹ As an initial matter, M2Z's proposal to provide wireless broadband services cannot possibly qualify as an innovative new service or technology as intended by Section 7.¹² Numerous entities currently provide wireless broadband services, many at faster speeds than M2Z proposes. M2Z appears to admit as much as it notes in its Opposition that it "seeks no preferential treatment on the basis of the technology that

M2Z also raises several additional cases as supporting its argument. Opposition at 57-60. However, virtually all of these involved either modifications to existing licenses or auction-exempt (shared) services and are thus inapposite. The DBS case M2Z identifies simply reflects the continuation of a methodology and process for initial DBS licensing imposed prior to Congress' adoption of auction authority. As noted by M2Z, the Commission shortly thereafter imposed competitive bidding on DBS licenses as well. *See Revision of Rules & Policies for the Direct Broad. Satellite Serv.*, Report & Order, 11 FCC Rcd 9712, 9763 (¶131), 9764 (¶134) (1995), *aff'd sub nom. DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

¹⁰ *Amendment of Parts 2 & 25 of the Comm'n's Rules to Permit Operation of NGSO FSS Sys. Co-Frequency with GSO & Terrestrial Sys. in the Ku-Band Frequency Range; Amendment of the Comm'n's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broad. Satellite Licensees & Their Affiliates; & Applications of Broadwave USA, PDC Broadband Corp. & Satellite Receivers, Ltd. to Provide Fixed Serv. in the 12.2-12.7 GHz Band*, Mem. Op. & Order & Second Report & Order, 17 FCC Rcd 9614 (2002), *aff'd sub nom. Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61 (D.C. Cir. 2005).

¹¹ Opposition at 23-27.

¹² *See Southwest Bell Tel. Co. Revisions to Tariff F.C.C. No. 6*, Mem. Op. & Order, 6 FCC Rcd 3760, 3764 (¶31) (1991) ("Section 7(b) refers to 'a new technology or service,' it cannot be interpreted to endorse methods for the provision of existing services at additional locations, or the continued use of older, outmoded technologies."); *id.* at 3763 (¶30).

M2Z proposes to deploy.”¹³ This candid admission is inconsistent with its request for Section 7 treatment.

Moreover, merely because M2Z has now christened its Application as one involving new services or technologies under Section 7 does not entitle M2Z to avoid competing applications or to be eligible for any other special treatment.¹⁴ Section 7 is merely a general statement of policy directing the Commission to encourage the availability of new services and technologies.¹⁵ Nothing in Section 7 or the precedent discussing it suggests this provision supersedes Section 309(j)’s competitive bidding mandate or the other requirements of the Act.

II. THE COMMISSION MUST ADOPT SERVICE RULES FOR THE 2155-2175 MHZ BAND BEFORE IT CAN CONSIDER GRANTING ANY LICENSE APPLICATION FOR THIS SPECTRUM

M2Z asserts that the Commission should just grant M2Z’s Application and has no obligation to conduct a formal rulemaking to develop service rules for the 2155-2175 MHz band.¹⁶ M2Z is just wrong. There is a reason that the Commission typically completes a rulemaking to adopt service rules before licensing a particular band of spectrum. It is to ensure that the spectrum is used efficiently and to minimize the

¹³ Opposition at 70.

¹⁴ That M2Z first identifies its Application as one under Section 7 more than ten months after filing and then attempts to invoke a one-year deadline for action is outrageous. M2Z’s failure to request such expedited treatment at filing should bar it from doing so now.

¹⁵ *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 615, n.3 (5th Cir. 2000); *Amendment of Parts 2, 25 & 87 of the Comm’n’s Rules to Implement Decisions from World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz & 36 GHz & to Otherwise Update the Rules in this Frequency Range, Amendment of Parts 2 & 25 of the Comm’n’s Rules to Allocate Spectrum for Gov’t & Non-Gov’t Use in the RadioNavigation-Satellite Serv.*, Order on Recon., 21 FCC Rcd 5492, 5500 (¶15) (2006).

¹⁶ Opposition at 75-84.

possibility of interference and other technical problems in the deployment and use of the frequencies.¹⁷ The FCC’s public interest mandate, as well as Administrative Procedure Act (“APA”) requirements, demand that the Commission initiate and complete a rulemaking to adopt service rules for the 2155-2175 MHz band prior to granting a license to M2Z or any other entity.

A review of the issues put forth in the petitions to deny make particularly clear why a rulemaking to adopt service rules is so imperative. Substantial questions have been raised about M2Z’s obligation to, and process for, relocating incumbent users of the 2155-2175 MHz band. Notwithstanding M2Z’s assertion in its Opposition that it will relocate certain incumbents,¹⁸ the process for doing so requires full discussion and the adoption of appropriate rules to govern how it will be accomplished. Although rules have been promulgated for the relocation of Fixed Microwave and Broadband Radio Service incumbents in the 2155-2175 MHz band, these rules were based on an expectation that AWS license holders that participated in an auction would face such relocations. As a Fixed Microwave Service licensee in the 2155-2175 MHz band, Verizon Wireless is concerned that M2Z would not have the financial backing and resources to reimburse Fixed Microwave Service relocation. Clearly, an auction participant would have demonstrated its financial qualifications by successfully participating in a Commission auction. Further, it is unclear that the sunset period that was contemplated based on the initial grant of an AWS license would be governed by a

¹⁷ See *Serv. Rules for Advanced Wireless Servs. in the 1.7 GHz & 2.1 GHz Bands*, Report & Order, 18 FCC Rcd 25,162, 25,164 (¶1) (2003) (explaining that service rules for AWS will “ensure that this spectrum is efficiently utilized and will foster the development of new and innovative technologies and services, as well as encourage the growth and development of broadband services”).

¹⁸ Opposition at 89.

grant of a license to M2Z. Requirements to guide this process cannot be adopted on the basis of the limited comments to M2Z's Application. Nor does M2Z's statement that AWS relocations will go at least as smoothly as the PCS relocations¹⁹ end the need to explore how such processes would work in this spectrum and with M2Z's proposed service.

Similarly, substantial questions have also been raised as to how adjacent and co-channel licensees will be protected from interference by M2Z's operations. In its Application, M2Z recognizes that harmful co-channel interference could occur during the relocation of incumbent operations and that there is a high potential for interference to certain out-of-band licensees.²⁰ Extensive discussion – and the participation of potentially affected parties – is required in order to ensure appropriate interference mitigation techniques are imposed. The limited record responding to M2Z's Application is not adequate to do so. In particular, as M2Z has failed to detail the equipment and operating parameters it expects to use for its proposed service, co-channel and adjacent channel license holders are unable adequately to estimate the effects that M2Z would have on their existing and future network deployments. The crucial point of a notice and comment rule making process is to establish the potential interference environment wrought by a potential service. M2Z has utterly failed to provide sufficient detail for the Commission to reach any conclusions on the possibility of interference that its proposal would cause.

¹⁹ *Id.* at 91.

²⁰ Application for License & Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band at 20 (filed May 1, 2006) (“Application”).

Finally, the Public Notice of M2Z's Application is unlikely to be deemed sufficient under the APA to provide adequate notice to adjacent and co-channel licensees and other interested parties that requirements affecting their relocation and/or interference protection would be discussed and adopted in this proceeding. The APA requires that the Commission provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."²¹ The Public Notice requesting comment on M2Z's Application neither provided such required information nor indicated that the Commission would act to adopt such rules in this proceeding.²² On the contrary, the Commission previously announced its intention to initiate a separate rulemaking for the 2155-2175 MHz band. Further, the Public Notice of M2Z's Application was not published in the Federal Register, the accepted method for providing sufficient notice of proposed rules. Accordingly, the procedural steps taken thus far on the M2Z Application do not form a proper basis for the adoption of the requisite service rules for the 2155-2175 MHz band. The Commission must initiate and complete a formal rulemaking adopting such rules before acting on any license applications for this band.

III. M2Z STILL FAILS TO PROVIDE ADEQUATE ASSURANCE OF ITS FINANCIAL QUALIFICATIONS

Even as supplemented by the Opposition, M2Z's Application remains bereft of adequate information to conclude that it is financially qualified to hold a license. As

²¹ 5 U.S.C. § 553(b)(3).

²² See *Amendment of Part 2 of the Comm'n's Rules to Allocate Spectrum Below 3 GHz for Mobile & Fixed Servs. to Support the Intro. of New Advanced Wireless Servs., Including Third Generation Wireless Systems, Serv. Rules for Advanced Wireless Servs. in the 1.7 GHz & 2.1 GHz Bands*, Ninth Report & Order & Order, 21 FCC Rcd 4473, 4477 n.22 (2006) ("We note that we are not deciding here how to assign this new AWS spectrum at 2155-2175 MHz but will consider this issue in a separate service rules proceeding at a later date.").

Verizon Wireless explained in its Petition to Deny, the FCC has previously found that an auction typically demonstrates a potential licensee's financial seriousness and wherewithal. However, where as here M2Z seeks a license without the upfront payment demonstration that an auction provides, a more substantive showing is needed that it has the requisite funding to deploy a nationwide broadband network within its proposed construction period.²³ M2Z has also failed to provide sufficient detail about its proposal for the FCC to ensure that its business plan is economically feasible.²⁴ Particularly since M2Z proposes as payment for the spectrum an annual contribution based on a percentage of its revenues, it is essential for the Commission to review the viability of M2Z's business case.

What M2Z has provided by way of financial information is clearly not sufficient to show its financial ability to carry through its proposal. In its Application, M2Z states that it has financial commitments of \$400 million.²⁵ Even if substantiated, such commitments would not be sufficient to demonstrate financial ability to construct and operate a nationwide network that could cost as much as \$18 billion to build. M2Z's notation in its Opposition that its backers "are undoubtedly capable of seeing the network build out through to completion"²⁶ certainly does not indicate that these backers have in any way committed the necessary funds. As such, M2Z has failed to provide adequate assurance of its financial qualifications.

²³ Verizon Wireless Petition to Deny at 11-12.

²⁴ *Id.* at 13.

²⁵ Application at 8.

²⁶ Opposition at 113 n.365.

IV. CONCLUSION

For the foregoing reasons, M2Z's Application is fatally flawed as it seeks free access to spectrum that Congress requires be licensed through competitive bidding, seeks licensing before the adoption of much needed service rules for this spectrum, and fails to provide adequate assurance that M2Z has the financial wherewithal to build the system and provide the service it is proposing. Accordingly, the Commission should promptly deny M2Z's Application.

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Dated: April 3, 2007

CERTIFICATE OF SERVICE

I, Patricia Destajo, do hereby certify that on this 3rd day of April 2007, I caused copies of the foregoing “Reply of Verizon Wireless” to be delivered to the following via First Class U.S. mail and/or email.

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