

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re:	)	
	)	
M2Z NETWORKS, INC.	)	
	)	
Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band	)	WT Docket No. 07-16
	)	
Petition for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Section 1.945(b) and (c) of the Commission’s Rules and Other Regulatory and Statutory Provisions	)	WT Docket No. 07-30

**REPLY OF T-MOBILE USA, INC. TO CONSOLIDATED OPPOSITION  
OF M2Z NETWORKS, INC. TO PETITIONS TO DENY AND OPPOSITION TO  
CONSOLIDATED MOTION OF M2Z NETWORKS, INC. TO STRIKE AND DISMISS  
PETITIONS TO DENY AND ALTERNATIVE PROPOSALS**

T-Mobile USA, Inc. (“T-Mobile”),<sup>1</sup> pursuant to Section 309(d) of the Communications Act of 1934, as amended (“Communications Act”) and Section 1.939 of the Commission’s rules, submits this Reply to Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny and Opposition to Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals (“Reply”).<sup>2</sup> M2Z Networks, Inc. (“M2Z”) fails to meet its burden of demonstrating that the public interest, convenience and necessity would be served by granting its Application for License and Authority to Provide a National Broadband Radio

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<sup>1</sup> T-Mobile is a national provider of wireless voice, messaging, and data services. T-Mobile recently paid almost \$4.2 billion to the U.S. Treasury for AWS licenses in the 1.7/2.1 GHz bands—spectrum immediately adjacent to the spectrum M2Z proposes to use to provide nationwide advanced data services.

<sup>2</sup> Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny (Mar. 26, 2007) (“M2Z Opposition”) and Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals (Mar. 26, 2007) (“M2Z Motion”).

Service in the 2155-2175 MHz Band (“Application”).<sup>3</sup> M2Z’s allegations that T-Mobile’s March 2, 2007 Petition to Deny (“Petition”) is defective also fail. For the reasons discussed herein, as well as in its Petition, T-Mobile requests that the FCC promptly deny M2Z’s Application.

**I. THE PUBLIC INTEREST WOULD NOT BE SERVED BY THE GRANT OF M2Z’S APPLICATION.**

Even after providing hundreds of pages of documents to the Commission, M2Z has not begun to demonstrate that the public interest would be served by awarding it 20 MHz of nationwide spectrum without a rulemaking or an auction or any immediate payment. Bypassing a rulemaking that informs the Commission's decisions on the relevant service, technical and licensing issues, as M2Z urges, is imprudent and fraught with risk. The multitude of interests of the various stakeholders in this spectrum, including the concerns of co-channel and adjacent channel licensees, cannot be resolved properly absent an appropriate opportunity for public comment and deliberation by the Commission.

The Commission should deny the M2Z Application and opt, instead, to establish service and technical rules that allow the spectrum to be auctioned to the highest bidder, consistent with the Commission’s obligations under Section 309(j) of the Act.<sup>4</sup> Competitive bidding has proven to be the best way to get licenses into the hands of the parties that value them the most and who are most likely to provide service and ensure that spectrum will be allocated to the highest and

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<sup>3</sup> Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, M2Z Networks, Inc., WT Docket No. 07-16 (filed May 5, 2006 and amended Sept. 1, 2006) (page references herein are to Sept. 1, 2006 amendment). M2Z also filed a Petition for Forbearance on September 1, 2006.

<sup>4</sup> Section 309(j)(1) of the Communications Act *requires* that the Commission license any spectrum that is subject to mutually exclusive applications through “through a system of competitive bidding,” unless the license is exempted under Section 309(j)(2). 47 U.S.C. § 309(j)(1). As M2Z acknowledges, the license requested in M2Z’s Application does not satisfy any of the three exemptions set forth in the statutory provision. M2Z Opposition at 34-35.

best use. The Commission should not establish the precedent that naked promises and pledges can supplant the proven competitive bidding process for licensing valuable spectrum.

M2Z's continued reliance on the language of Section 309(j)(6)(E) for the proposition that the Commission should not accept competing applications on the basis of a public interest determination remains misplaced. While its argument is not altogether clear, M2Z seems to be saying that the compelling public interest showing in its Application itself triggers Section 309(j)(6)(E) and requires dismissal of competing applications. This argument has one major flaw—namely, that there is no basis for M2Z's unilateral assumption that grant of its Application would further the public interest. As T-Mobile and other petitioners demonstrated, quite the opposite is true.<sup>5</sup>

Further, contrary to M2Z's implication, Section 309(j)(6)(E) does not address in any way whether or under what circumstances the Commission may or must preclude the filing or acceptance of competing applications. The statutory section by its very terms only addresses applications that already have been accepted for filing. Also, the public interest benefit of an application is not one of the factors that the Commission analyzes in determining mutual exclusivity under Section 309(j)(6)(E). Rather, the Commission, through "engineering solutions, negotiation, threshold qualifications, service regulations and other means,"<sup>6</sup> must determine whether mutual exclusivity exists among competing applications. If the FCC thereby finds mutual exclusivity, then it must auction the spectrum. Only after the auction will the Commission consider the public interest showing of the winning bidder. Simply put, M2Z is

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<sup>5</sup> For example, M2Z argues that immediate grant of its application would produce more public interest benefits than auctioning the spectrum. M2Z Opposition at 47. It later explains that granting the application would introduce a new competitor into the market, whereas employing an auction likely would result in incumbents or speculators warehousing the spectrum. *Id.* at 53. M2Z provides no data or even logic to support these summary and speculative conclusions.

<sup>6</sup> 47 U.S.C. § 309(j)(6)(E).

turning the Section 309(j) analysis on its head and improperly demanding that a public interest finding be made far too early in the licensing process.

None of the cases M2Z cites in previous proceedings in which licenses have been awarded without an auction<sup>7</sup> support the proposition that the Commission can grant M2Z's Application without adopting service and licensing rules, accepting competing applications and auctioning the spectrum. For example, the 800 MHz rebanding was a response to serious and immediate concerns about commercial spectrum users interfering with public safety operations, and the Commission's order followed extensive industry-wide negotiations and information gathering. Despite M2Z's claims, no exigencies compel immediate licensing of the 2155-2175 MHz spectrum or justify forsaking the proven public interest benefits of normal rulemaking and licensing procedures. Similarly, although the FCC conferred additional usage rights on Instructional Television Fixed Service and Educational Broadband Service licensees, this evolution of existing licenses has no bearing on new licensing. As M2Z acknowledges, moreover, the Mobile Satellite Service precedent it cites related to the Commission allowing existing licensees to use their spectrum for additional services and had nothing to do with initial issuance of licenses. Likewise, M2Z's reference to the Commission's statement about its goals in granting the first Direct Broadcast Satellite service licenses in 1982 is of no relevance here because it preceded the enactment of Section 309(j) by a more than a decade.<sup>8</sup>

Nor can M2Z find any support for its position in Section 7(b) of the Act, which provides that the Commission "shall determine whether any new technology or service proposed in a

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<sup>7</sup> M2Z Opposition at 55-57.

<sup>8</sup> M2Z also cites Section 27.321 of the FCC's rules to support its conclusion that "[t]he Commission's flexibility to award spectrum licenses by means other than auction" precludes opening the spectrum to competing applications. M2Z Application at 37-38. M2Z fails to acknowledge, however, that this rule section applies only to the processing of mutually exclusive applications and has no relevance to the acceptance of competing applications or the auction process. 47 C.F.R. § 27.321.

petition or application is in the public interest within one year after such petition or application is filed.”<sup>9</sup> M2Z has not provided any evidence to back up its statement that its proposed “National Broadband Radio Service” constitutes an “innovative new service to the public, using new technologies”<sup>10</sup> and, accordingly, there is no basis for its argument that the burden has shifted to the petitioners to show that M2Z’s proposal is inconsistent with the public interest. To the contrary, as T-Mobile demonstrated in its Petition,<sup>11</sup> M2Z’s proposed service offers nothing new in terms of technology or service compared to wireless broadband services already available throughout the country.<sup>12</sup>

Likewise, the forbearance language in Section 10(a)<sup>13</sup> does not benefit M2Z’s argument, because M2Z has not met the standards for statutory relief under this section. Specifically, as noted above, M2Z has failed to provide any evidence that rushing to grant its Application by sidestepping the rulemaking and auction processes usually required to assign commercial spectrum would be in any manner “consistent with the public interest.”<sup>14</sup>

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<sup>9</sup> 47 U.S.C. § 157(b). *See* M2Z Opposition at 23-25.

<sup>10</sup> M2Z Opposition at 24.

<sup>11</sup> T-Mobile Petition at 10-12.

<sup>12</sup> M2Z also cites Section 706 of the Telecommunications Act of 1996, which “directs the Commission to encourage broadband deployment by utilizing ‘measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment.’” M2Z Opposition at 25. It is unclear just what barriers M2Z believes will be removed by granting its Application. It is clear, however, that the FCC would not in any manner be erecting any barriers by establishing service and licensing rules for this important spectrum and auctioning the spectrum to the highest bidder.

<sup>13</sup> 47 U.S.C. § 160(a). *See* M2Z Opposition at 27-28.

<sup>14</sup> 47 U.S.C. § 160(a)(3).

Finally, there is no merit to M2Z's argument that the Commission's *Northpoint* order<sup>15</sup> compels Commission grant of M2Z's Application without consideration of competing applications. To the contrary, as T-Mobile argued in its Petition, the *Northpoint* case demonstrates precisely the opposite—that the Commission is reluctant to grant a premature application without conducting a rulemaking to adopt licensing and service rules and without opening a filing window. Far from supporting M2Z's position, *Northpoint* makes clear that, absent compelling reasons not present here, the public interest is best served by assigning spectrum through the competitive bidding process.

The M2Z Application is premature and of insufficient urgency or merit to outweigh the proven benefits of adopting service rules, allowing for the filing of competing applications, and auctioning the spectrum to the highest bidder. Additionally, for the reasons discussed in T-Mobile's earlier Petition, M2Z fails to demonstrate that it meets the basic qualifications for a license in the 2155-2175 MHz band. In view of these defects, M2Z's Application should be dismissed.

## **II. THE CONSOLIDATED MOTION TO STRIKE IS WITHOUT MERIT.**

In its Consolidated Motion to Strike and Dismiss, M2Z argues that the Commission should dismiss T-Mobile's Petition because it allegedly suffers procedural defects. In fact, M2Z's arguments merely constitute a thinly-veiled effort to direct the focus away from the real issue—whether M2Z has met its own burden of showing that granting its Application would serve the public interest, convenience and necessity.<sup>16</sup>

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<sup>15</sup> See *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, 9695-97 (2002) ("*Northpoint*") (dismissing Northpoint's application to allow for the filing of competing applications).

<sup>16</sup> See 47 U.S.C. § 309(a).

First, contrary to M2Z’s claims, T-Mobile has met the requirements of Section 309(d)(1), which provides that a petition to deny must “contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity].”<sup>17</sup> M2Z attempts to dismiss T-Mobile’s arguments by labeling them as “vague claims,” without in any way addressing T-Mobile’s specific statements or even mentioning them at all.<sup>18</sup> Instead, M2Z makes its own, unilateral finding as to the merits of its Application,<sup>19</sup> and then summarily condemns the various petitions as “insufficient to overcome the *concrete* public interest benefits of granting the M2Z Application.”<sup>20</sup> This distorted reasoning ignores M2Z’s burden to show that its application promotes the public interest, as well as its failure to meet this burden.

Second, M2Z’s argument that T-Mobile failed to support its allegation (that grant of the M2Z Application would not be in the public interest) with affidavits is misplaced, because T-Mobile does not rely upon or allege facts that need to be supported by affidavits. Section 309(d)(1) of the Communications Act requires that allegations of fact in a petition to deny “except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”<sup>21</sup> The T-Mobile Petition relied upon legal analysis,

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<sup>17</sup> 47 U.S.C. § 309(d)(1).

<sup>18</sup> M2Z cites certain statements made in certain petitions, not including T-Mobile’s, and characterizes them as “broad, conclusory and unsupported” or “general and unsubstantiated.” See M2Z Motion at 14-15. The closest it comes to addressing T-Mobile’s petition is with the vague catch-all “similarly vague claims from the other petitioners.” *Id.* at 15.

<sup>19</sup> M2Z concludes that it and its supporters “have made an overwhelming showing in this proceeding of the public interest benefits that would arise if the M2Z Application is granted.” *Id.*

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> 47 U.S.C. § 309(d)(1). See also Section 1.939(d) of the rules, which provides that petitions to deny must contain specific allegations of fact sufficient to make a prima facie showing that grant of the application would be inconsistent with the public interest, and that “[s]uch allegations of fact, except for those of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof.” 47 C.F.R. § 1.939(d). As also noted by M2Z, Section 1.16 provides that a petition “may be supported ... by

case precedent, citations to statutes and rules and facts, all of which official notice may be taken.<sup>22</sup> Based on the arguments T-Mobile made, affidavits are not required under the rules to support T-Mobile's allegations.<sup>23</sup> Accordingly, the M2Z Motion should be dismissed as to T-Mobile's Petition.

### **III. CONCLUSION.**

For the reasons set forth herein as well as in T-Mobile's March 2, 2007 Petition to Deny, the Commission should promptly deny M2Z's Application for an exclusive, free license in the 2155-2175 MHz band as fatally defective and premature. Instead, T-Mobile urges the Commission to conduct a rulemaking to establish licensing and service rules for this band and then set a schedule for the commencement of an auction to assign the licenses.

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the unsworn declaration, certification, verification, or statement in writing" of the person making the same. 47 C.F.R. § 1.16.

<sup>22</sup> Specifically, T-Mobile argued the Commission should establish service and technical rules for the 2155-2175 MHz spectrum and then auction the spectrum to the highest bidder. T-Mobile Petition at 2. T-Mobile also addressed M2Z's claim that Section 309(j)(6)(E) precluded the Commission from accepting competing applications. *Id.* at 5. Finally, T-Mobile demonstrated that M2Z's Application should be summarily dismissed as procedurally defective. *Id.* at 8-14.

<sup>23</sup> Any other facts, such as T-Mobile's license holdings in the adjacent AWS band, are facts of which official notice clearly may be taken.

Respectfully submitted,

By: \_\_\_\_\_ /s/

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Dated: April 3, 2007

**CERTIFICATE OF SERVICE**

I, Alison Minea, do hereby certify that on this 3<sup>rd</sup> day of April 2007, I caused copies of the foregoing "Reply" to be delivered to the following via First Class U.S. mail:

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