

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

In the Matter of )  
 )  
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 )

To: Chief, Wireless Telecommunications Bureau

**REPLY TO CONSOLIDATED OPPOSITION OF M2Z NETWORKS, INC.**

Pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (the “Act”),<sup>1</sup> Section 1.939 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,<sup>2</sup> and the *M2Z March PN*,<sup>3</sup> NextWave Broadband Inc. (“NextWave”) submits this Reply to the Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny (the “Opposition”) filed in the above-captioned docket.<sup>4</sup> As NextWave argued in its Petition to Deny (“Petition”) the

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<sup>1</sup> 47 U.S.C. § 309(d)(1).

<sup>2</sup> 47 C.F.R. § 1.939.

<sup>3</sup> FCC Public Notice, *Wireless Telecommunications Bureau Sets Pleading Cycle For Application By M2Z Networks, Inc. To Be Licensed In The 2155-2175 MHz Band*, WT Docket No. 07-16, 22 FCC Rcd 4442 (2007) (“*M2Z March PN*”).

<sup>4</sup> It should be noted for the record that the pleading cycle established by the Wireless Telecommunications Bureau (“Bureau”) in the *M2Z March PN* was both highly prejudicial to parties like NextWave and favorable to M2Z. Specifically, M2Z’s Application was accepted for filing by Public Notice on January 31, 2007, and petitions to deny were due March 2, 2007. NextWave and others timely filed their petitions and served M2Z. M2Z was required to file its Opposition to such petitions on or before March 15 (assuming application of Section 1.4(h) of the Commission’s rules) and replies thereto were due on or before March 27 (again assuming application of Section 1.4(h) of the Commission’s rules). By Public Notice dated March 9, 2007, the Bureau extended M2Z’s deadline for filing its Opposition to March 26, and set a deadline of April 3 for filing replies thereto. Thus, M2Z was given an 11-day extension, for a total time period of 24 days from the initial March 2 deadline, to prepare its Opposition. M2Z used this bonus time awarded by the Bureau to prepare an opposition and various motions that collectively exceed 300 pages. By contrast, the Bureau provided only 6 business days to prepare replies to M2Z’s Opposition, and because of the inapplicability of Section 1.4(h) of the Commission’s rules, the Bureau’s

above-captioned application of M2Z Networks, Inc. (“M2Z” and the “M2Z Application” or “Application”), seeking an exclusive license for 20 MHz of valuable spectrum from 2155-2175 MHz (the “2.1 GHz Band”) would not be in the public interest, as required by the Act, and would be inconsistent with well-established Commission precedent and policies.<sup>5</sup>

M2Z and the Commission cannot avoid the indisputable fact that the Commission has received multiple applications for the 2.1 GHz Band that evidence intense demand for the 2.1 GHz Band. Faced with competing proposals for the 2.1 GHz Band, the Commission must now facilitate the highest and best use of the spectrum by adoption of either proposals that accommodate shared use among multiple users, such as NextWave’s proposal to issue nationwide, non-exclusive licenses, or licensing via competitive bidding. It is not the Commission’s role to undertake a comparative licensing process and make judgment calls about the relative merits of the different proposals. The Commission has a long history of not picking winners and losers with respect to authorizing services and technologies in spectrum allocations.

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actions actually afforded them 2 days less than they had before the prejudicial pleading cycle established by the Bureau. In total, then, the Bureau awarded M2Z 24 days to produce voluminous pleadings and shortened the time for filing replies to such pleadings under the Commission’s rules to 6 business days. This action was particularly egregious to parties like NextWave because, as NextWave explained in its letter submitted in this docket on March 30, M2Z clearly did not file its opposition in accordance with the procedures established by the Bureau and its Opposition was not available on the Commission’s Electronic Comment Filing System (“ECFS”) until Thursday afternoon, March 29, 2007. Because M2Z sent the service copies of its Opposition and related motions via U.S. mail, the lack of an electronic version on ECFS coupled with the time for delivery of the paper copy further reduced the time available to respond to the M2Z Opposition – in NextWave’s case, it received the service copy at 10:31 AM on March 29, approximately 5 hours before it was posted on ECFS, which left it with 4 business days to review and prepare responses, as appropriate, to more than 300 pages of pleadings. (NextWave notes that it inadvertently indicated in its letter submitted in the instant docket on March 30 that it had not received the service copy as of March 30, when in fact it had received the copy on March 29 – the same day it was posted on ECFS.) This mailing delay is, of course, is the very reason for the existence of Section 1.4(h) of the Commission’s rules, which relief the Bureau denied to NextWave and all other parties filing replies to the M2Z Opposition. This state of affairs was made known to the Bureau by both NextWave and AT&T Inc. in filings submitted in this docket on March 30. Although the Bureau had every opportunity to correct this deficiency through the Motion for Extension of Time filed in this docket on March 29 by CTIA, it instead summarily denied the motion and did not explain its highly prejudicial actions.

<sup>5</sup> See Petition to Deny submitted by NextWave, WT Docket No. 07-16 (filed on Mar. 2, 2007).

Finally, the Commission should dismiss M2Z's Application because it is a scheme intended to provide M2Z with a multi-billion dollar government subsidy that it can leverage to establish anti-competitive pricing in the market for wireless broadband Internet access and related services.

**I. THERE IS INDISPUTABLE MUTUALLY EXCLUSIVE DEMAND FOR THE 2.1 GHZ BAND THAT REQUIRES RECONCILIATION THROUGH NON-EXCLUSIVE USE ARRANGEMENTS OR AUCTIONING**

As the many mutually exclusive applications submitted in response to the *M2Z January PN* demonstrate, there is clear and unmistakable desire on the part of many parties for use of the 2.1 GHz Band.<sup>6</sup> Even without this recent development, there should be no question that there is widespread demand for the 2.1 GHz band. Just months ago Advanced Wireless Service ("AWS") spectrum was auctioned and attracted 252 applicants, among the highest number of applicants ever. The auction resulted in 104 separate and distinct winning bidders.<sup>7</sup>

Contrary to the arguments made by M2Z, Section 309(j)(6)(E) does not permit granting an exclusive use license to a single party as the means to avoid mutual exclusivity. Such a result would render meaningless the Section 309(j)(3) mandate to award mutually exclusive license applications by auction.<sup>8</sup> Moreover, M2Z does not, has not and cannot cite to any Commission action in which it eschewed competitive bidding in favor of granting an *exclusive* license to a

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<sup>6</sup> FCC Public Notice, *Wireless Telecommunications Bureau Announces That M2Z Networks, Inc's Application For License And Authority To Provide A National Broadband Radio Service In The 2155-2175 MHz Band Is Accepted For Filing*, WT Docket No. 07-16, 22 FCC Rcd 1955 (2007) ("*M2Z January PN*"). The *M2Z January PN* represented the first time that the Bureau has ever invited applications for the 2.1 GHz Band.

<sup>7</sup> FCC Public Notice, *Auction Of Advanced Wireless Services Licenses Closes Winning Bidders Announced for Auction No. 66*, 21 FCC Rcd 10521 (2006). The spectral location of the 2155-2175 MHz band makes it uniquely attractive to AWS-1 licensees, as they could utilize this band to supplement their existing AWS downlink capacity for broadband applications.

<sup>8</sup> Courts do not interpret clauses of statutes in a way that would make other clauses of the statute meaningless. *See, e.g., Applications of TelQuest Ventures, L.L.C.*, Memorandum Opinion And Order, 16 FCC Rcd 15026, ¶ 29 n.75 (2001) (citing *Toro Corp. v. White Consolidated Indus., Inc.*, 199 F.3d 1295, 1300 (Fed. Cir. 1999); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *Hughes Air Corp. v. Public Util. Comm'n of Cal.*, 644 F.2d 1334, 1338 (9th Cir. 1981)).

*single* applicant for an *initial* license. In fact, in the cases cited by M2Z, the Commission rejected arguments that it had to adopt licensing approaches *other than* auctioning pursuant to Section 309(j)(6)(E).<sup>9</sup> Finally, as set forth in NextWave’s Petition, even if Section 309(j)(6)(E) did authorize the granting of an application for an exclusive use, initial license, as opposed to being limited to methods that avoid mutual exclusivity by accommodating multiple users, M2Z’s application fails to meet the public interest criteria set forth in Section 309(j)(3).<sup>10</sup>

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<sup>9</sup> See Opposition at nn.121 and 125. In the 800 MHz rebanding context, cited by M2Z, the Commission modified Nextel’s existing licenses so as to substitute, on a nationwide basis, 10 MHz in the 1.9 GHz band for licenses Nextel returned to the Commission (and other consideration). See *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 64 (2004) (“*800 MHz Report and Order*”). Whereas various parties had argued that the Commission must auction the 1.9 GHz spectrum in issue, the Commission indicated that the modification of Nextel’s licenses to resolve pervasive interference to public safety operations in the 800 MHz band – so that multiple parties could use that band – was an example of using alternative methods to avoid mutual exclusivity as identified in Section 309(j)(6)(E). *Id.*, ¶ 73. Unlike that situation, M2Z is seeking an initial license and not modifying an existing license. Moreover, also unlike that situation, here, *the Commission has expressly authorized the filing of mutually exclusive applications, and multiple applications have in fact been filed*. Similarly, the various proceedings cited by M2Z as examples of “post-Section 309(j) license grants made without auctions” are inapposite to the instant situation. See Opposition at pp. 55-60. Specifically, not one of these proceedings involved a situation in which the Commission granted an exclusive use license to a single entity. In fact, one of the services cited by M2Z – the 3650-3700 MHz band service, *Wireless Operations in the 3650-3700 MHz Band*, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502, ¶ 1 (2005) – represents the licensing model proposed by NextWave in its mutually exclusive application for the 2.1 GHz band.

<sup>10</sup> See NextWave Petition at pp. 6-20. NextWave also rejects M2Z’s arguments that Section 7 of the Act, 47 U.S.C. § 157, applies to its Application. Specifically, M2Z’s Application does not propose a “new technology or service” within the meaning of Section 7. M2Z’s proposes to utilize time division duplexing (“TDD”) technology, but there is nothing new about TDD technology. NextWave, for example, is developing TDD network technologies that are based upon WiMAX certification standards and many other companies manufacture and operate TDD systems today. Further, M2Z proposes to provide a broadband Internet access service. There is nothing new about the nature of this service – it has been around for many years and this fact is not altered by whether or not M2Z would offer one speed for “free” and another for a fee. See, e.g., *Applications of Telquest Ventures, L.L.C.*, Memorandum Opinion And Order, 16 FCC Rcd 15026, ¶ 30 (2001) (wherein the Commission concluded that offering Direct Broadcast Service (“DBS”) through U.S.-based earth stations communicating with Canadian satellites was merely “an additional DBS service option” and not a new service or technology under Section 7). Moreover the data rates described in M2Z’s Application are in fact passé as compared to the data rates available *today* by multiple providers throughout the country.

## II. THE COMMISSION SHOULD ALLOW MARKET FORCES TO DECIDE THE HIGHEST AND BEST USE OF THE 2.1 GHZ BAND

As NextWave explained in its Petition, the Commission has a long history of not picking winners and losers with respect to authorizing services and technologies in spectrum allocations.<sup>11</sup> The Commission's spectrum management policies have shifted from command-and-control approaches under which the Commission dictated spectrum use to "flexible use" approaches under which services are deployed in response to market demand. As the Wireless Broadband Access Task Force recommended,

In order to provide more flexible use policies, we encourage the Commission to explore proposals to transition spectrum from traditional "command and control" regulation to more efficient, flexible frameworks ... Any such efforts by the Commission to alter its rules should seek to provide spectrum users with the maximum possible flexibility to determine the uses or services to be provided on the spectrum, and the ability to choose a technology that would be best for that spectrum.<sup>12</sup>

The Commission can and must make determinations as to the public interest in spectrum allocations, but it has already done this with respect to the 2.1 GHz Band.<sup>13</sup> The Commission

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<sup>11</sup> See NextWave Petition at 16-17.

<sup>12</sup> *Report by the Wireless Broadband Access Task Force*, Report, GN Docket No. 04-163, 2005 FCC LEXIS 1488, \*161 (rel. Feb. 2005). See also *Spectrum Policy Task Force Report*, ET Dkt. No. 02-135, at 16 (Nov. 2002), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-228542A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf) ("In most instances, a flexible use approach is preferable to the Commission's traditional 'command-and-control' approach to spectrum regulation, in which allowable spectrum uses are limited based on regulatory judgments."); *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Service*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, ¶ 38 (2004) ("We believe that the flexibility that results from a simplified set of licensing rules gives licensees freedom to determine the choice of technologies and services the market demands and ultimately leads to more efficient spectrum use."); *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178, ¶ 10 (2000) ("The assignment of spectrum through competitive bidding has facilitated more efficient and rapid licensing of spectrum to those who value it the most.").

<sup>13</sup> *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Notice of Proposed Rulemaking, 17 FCC Rcd 24135, ¶ 15 (2002) ("[W]e tentatively conclude that it serves the public interest to assign licenses for all portions of the AWS bands by the same mechanism. Accordingly, assuming we adopt a licensing scheme that permits the filing of mutually exclusive applications, consistent with both statutory obligations we propose to resolve such applications for AWS licenses through competitive

should not accept M2Z's invitation to pick winners or losers in the wireless broadband marketplace by providing one broadband competitor, M2Z, with an exclusive multi-billion dollar government subsidy to get its wireless broadband Internet access services off the ground.

M2Z argues that the Commission must make a determination as to the highest and best use of the 2.1 GHz Band, and that in making such determination, the Commission must compare the public interest benefits associated with M2Z's applications against those generated by "alternative uses."<sup>14</sup> In other words, M2Z calls for a return to the comparative application procedures of the bygone days of command-and-control spectrum management. M2Z's request does not square with the Commission's current policies of flexible use and letting the market decide what use and technology are best for a given band. Nor is the Commission well-equipped to make the determination M2Z requests. Advances in technology and factors like consumer preferences are constantly evolving and shifting over time. Indeed, the 384 kbps downstream / 128 kbps upstream data rate that M2Z asks the Commission to establish as the baseline broadband standard already has become the equivalent of yesterday's dial-up, as software and video applications require increasingly large capacity requirements. No one knows what tomorrow's standard will be, but we do know that economically motivated commercial providers will evolve their service offerings to meet shifting demand, whereas M2Z's "basic" service would forever lock its users into static limitations.

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bidding. Our recommendations here with respect to all portions of the AWS bands are informed by our obligations under both section 3002 of the Balanced Budget Act of 1997 and section 309(j) of the Communications Act." (internal citations omitted)); *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 25 (2003) ("[W]e are adopting a geographic area licensing scheme that permits the filing of mutually exclusive applications. Accordingly, pursuant to Section 309(j) of the Communications Act and Sections 3002(b), (c)(1)(D), and (c)(3) of the Balanced Budget Act of 1997, we must resolve mutually exclusive applications for licenses in these bands through competitive bidding." (internal citations omitted)).

<sup>14</sup> See Opposition at 10.

Moreover, while M2Z indicates that the Commission must enter into comparative application assessments of alternative uses, it simultaneously seeks to have all current pending mutually exclusive applications dismissed for one meritless reason or another, all the while arguing that the Commission must act on its application by May 5, 2007.<sup>15</sup> In short, M2Z is not genuinely interested in having a head-to-head comparison with any other proposed alternative uses, but instead simply wants the Commission to grant its Application before any new ones are filed.

### **III. M2Z'S PROPOSAL IS ANTI-COMPETITIVE AND INJURIOUS TO PROVIDERS OF COMMERCIAL BROADBAND INTERNET ACCESS SERVICES**

The Commission must not be misled by M2Z's attempts to portray the "free" basic service or its "voluntary" contributions of 5 percent of its revenues derived from its fee-based "premium" services as amounting to any kind of sacrifice on M2Z's part. The Commission must instead address the fundamentally anti-competitive nature of M2Z's proposal, which at bottom is nothing more than a request for a \$4 billion subsidy to get its commercial broadband Internet access "premium" service off the ground.<sup>16</sup> While M2Z soft-peddles its "premium" service,

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<sup>15</sup> See M2Z Opposition at 45. See also Consolidated Motion of M2Z Networks, Inc. To Dismiss Alternative Proposals, WT Docket No. 07-16 (filed with the Secretary's Office on March 29, 2007), and Consolidated Motion of M2Z Networks, Inc. To Strike And Dismiss Petitions To Deny And Alternative Proposals, WT Docket No. 07-16 (filed with the Secretary's Office on Mar. 29, 2007).

<sup>16</sup> As explained in NextWave's Petition, the market value of the 2.1 GHz band is approximately \$4.1 billion, which represents the total purchase price for six AWS F Block licenses that comprise 20 MHz of spectrum at 1745-1755 and 2145-2155. See NextWave Petition at 17. While M2Z argues that the value of the 2.1 GHz Band can be discounted because it is unpaired, that contention is belied by the facts that: (i) existing AWS-1 licensees can use the 2.1 GHz band to augment their downlink (or uplink) capacity, thus rendering it an extension of existing paired spectrum; and (ii) there are many TDD proponents, including NextWave, that would have an intense interest in acquiring 2.1 GHz Band licenses at auction. The spectrum prices for licenses in auctions cited by M2Z as examples of relevant value are wholly irrelevant. M2Z Opposition at 68-69. Specifically, all of the auctions cited either involved licenses that were much smaller in spectral size – 5 MHz, 6 MHz and paired 50 kHz channels (which M2Z mistakenly identifies as being unpaired) – and, therefore, inherently much lower in value than the contiguous 20 MHz of spectrum in the 2.1 GHz Band.

focusing attention on the alleged public benefits its “free” “basic” service would provide, it is clear that M2Z intends to compete with commercial wireless broadband Internet access services on a fee basis. To compete with the existing commercial wireless broadband Internet access services, providers must offer data rates well in excess of the 384 kbps downstream / 128 kbps upstream data rate of M2Z’s “free” “basic” service because that is where the market demand is today and that is where services are right now.

As explained in NextWave’s Petition, M2Z’s scheme now before the Commission would allow M2Z to establish a “premium” commercial broadband Internet access service (presumably including VoIP) that could be offered at prices well below the market price points established by other commercial services that had to pay for their spectrum. Such a scheme is by definition anti-competitive and subverts the government into playing favorites among otherwise similarly-situated parties.

#### **IV. CONCLUSION**

The M2Z Application is not in the public interest and should be denied for all the reasons set forth in NextWave’s Petition and this Reply. The Commission has now received multiple applications for the 2.1 GHz Band that can only be rationally and fairly reconciled through proposals that accommodate shared use among multiple users, such as NextWave’s proposal for non-exclusive licenses, or licensing via competitive bidding. The Commission should not accept M2Z’s invitation to turn this licensing procedure into a comparative application proceeding and declare M2Z’s Application the highest and best use of the 2.1 GHz Band. The Commission has a long history of not picking winners and losers with respect to authorizing services and technologies in spectrum allocations. At this juncture, the Commission must reject M2Z’s Application for what it really is – a scheme intended to provide M2Z with an exclusive multi-

billion dollar government subsidy that it can leverage to establish anti-competitive pricing in the market for wireless broadband Internet access and related services.

Respectfully submitted,

/s/ Jennifer M. McCarthy  
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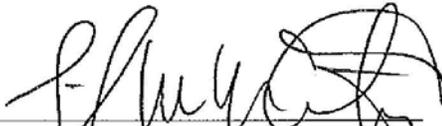
April 3, 2007

**EXHIBIT A**  
**DECLARATION**

**DECLARATION OF JENNIFER M. MCCARTHY IN SUPPORT OF  
REPLY TO CONSOLIDATED OPPOSITION**

1. My name is Jennifer M. McCarthy. I am filing this Declaration on behalf of NextWave Broadband Inc. ("NextWave"), a wholly owned subsidiary of NextWave Wireless LLC, which in turn is a wholly owned subsidiary of NextWave Wireless Inc., a Delaware C corporation.
2. I am the Vice President of Regulatory Affairs for NextWave. This Declaration is being submitted in support of NextWave's Reply to the Consolidated Opposition of M2Z Networks, Inc. in WT Docket No. 07-16.
3. I declare under penalty of perjury that the foregoing facts stated in the Reply are true and correct to the best of my personal knowledge, information and belief.

Executed on April 3, 2007

  
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## CERTIFICATE OF SERVICE

I, Carly T. Didden, certify on this 3rd day of April, 2007, a copy of the foregoing **REPLY TO CONSOLIDATED OPPOSITION OF M2Z NETWORKS, INC.** has been served by U.S. Postal Service First Class Mail, postage pre-paid, to the following:

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\* By electronic mail only.