

**DOCKET FILE COPY ORIGINAL**  
Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FILED/ACCEPTED

APR - 3 2007

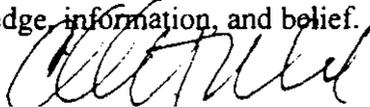
Federal Communications Commission  
Office of the Secretary

In the Matter of	)	
	)	
M2Z NETWORKS, INC.	)	
	)	
Application for License and Authority to	)	WT Docket No. 07- 6
Provide National Broadband Radio Service In	)	
the 2155-2175 MHz Band	)	
	)	
Petition of M2Z Networks, Inc. for Forbearance	)	
Under 47 U.S.C. § 160(c) Concerning	)	
Application of Sections 1.945(b) and (c) of the	)	WT Docket No. 07-30
Commission's Rules and Other Regulatory and	)	
Statutory Provisions	)	

**AFFIDAVIT OF CHRISTOPHER CUTTMAN-MCCABE IN SUPPORT OF  
REPLY OF CTIA - THE WIRELESS ASSOCIATION@**

I, Christopher Gunman-McCabe, do hereby declare under penalty of perjury the following:

1. I am Vice President for Regulatory Affairs of CTIA - The Wireless Association®.
2. I have read the foregoing Reply of CTIA - The Wireless Association@ and the CTIA - The Wireless Association@ Petition to Deny that was filed on March 2, 2007, and any facts stated therein, of which the Federal Communications Commission may not take official notice, are true and correct to the best of my knowledge, information, and belief.

Signature:   
Christopher Guttman-McCabe  
Vice President, Regulatory Affairs  
CTIA - The Wireless Association@  
1400 16<sup>th</sup> Street, NW, Suite 600  
Washington, D.C. 20036

Date: 4/3/07

Subscribed and sworn to before me this 3<sup>rd</sup> day of April, 2007  
Notary Public: Sanjeev K. Christopher 4/3/07  
My Commission Expires: 11/14/2011  
Residing at: District of Columbia

**Sanjeev K. Christopher**  
Notary Public, District of Columbia  
My Commission Expires 11/14/2011

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utilizing newer technologies. Section 7 **does** not supersede Section 309(j)'s competitive bidding requirements nor does it mandate the grant of any application that **the** applicant sweepingly proclaims **falls** under this provision. **Further**, M2Z's proposed service and technology is plainly not new **or** novel, **as** contemplated by this provision.

M2Z's illusory public interest claims also are based on flawed assumptions and do not justify a Commission decision to subsidize a for-profit entity like M2Z with government subsidized access to spectrum based on a promise to pay later. Indeed, M2Z's proposal to deliver "free" wireless broadband services would be of limited benefit as such services – at higher speeds than M2Z **proposes** – are available today to the American public from a variety of sources. Finally, M2Z's allegations of procedural infirmities in the petitions to deny and competing applications are overstated or incorrect. Thus, they do not form a basis **for** the dismissal of these filings. For these reasons and those addressed by **CTIA** in earlier filings in this proceeding, the Commission should promptly deny or dismiss M2Z's Application for a license in the 2155-2175 MHz band and M2Z's Petition for Forbearance.

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

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

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**REPLY OF CTIA – THE WIRELESS ASSOCIATION@**

CTIA – The Wireless Association®<sup>1</sup> (“CTIA”) respectfully submits this Reply in response to the Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny<sup>2</sup> and the Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals that were filed on March 26, 2007.<sup>3</sup> CTIA files this Reply on behalf of its members who purchased at auction Personal Communications Service (“PCS”) and Advanced

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, advanced wireless services, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> Consolidated Opposition of M2Z Networks, Inc. to Petitions *to* Deny, WT Docket Nos. 07-16, 07-30 (filed Mar. 26, 2007) (“M2Z Opposition”).

<sup>3</sup> Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals, WT Docket Nos. 07-16, 07-30 (filed Mar. 26, 2007) (“M2Z Motion”).

Wireless Service (“AWS”) licenses that would compete in the same geographic and product space with M2Z, and who would be harmed by a Commission decision to distort the competitive market for commercial wireless services by providing M2Z with free (or installment payment-based) spectrum in lieu of conducting open, competitive auctions.<sup>4</sup>

In its Opposition, M2Z repeats its request that the FCC provide M2Z with a 15-year exclusive, nationwide license for the entire 2155-2175 MHz band. M2Z also reiterates its pledges to build out a nationwide wireless broadband network to a percentage of the country over a 10-12 year period, to pay the U.S. Treasury five percent of the gross revenues generated from M2Z’s broadband subscription services, and to provide government subsidized (advertiser-driven) broadband services to the public.

CTIA requests that the Commission dismiss or deny M2Z’s Application because M2Z’s plan would create a number of legal and public policy problems without effectively serving the public interest. First, M2Z’s plan ignores the clear requirements of the Communications Act of 1934, as amended (“Communications Act”), and FCC precedent that call for an auction and the promulgation of service rules for the 2155-2175 MHz spectrum band. Second, M2Z improperly attempts to use the general provisions of Section 7 of the Communications Act to seize this spectrum, even though the technologies and services M2Z proposes are by no means new or novel. Third, M2Z’s public interest claims are based on flawed assumptions, and do not warrant a Commission decision to subsidize a for-profit entity like M2Z with free access to spectrum. Finally, M2Z’s allegations of procedural infirmities in the Petitions to Deny and competing Applications are overstated and do not warrant the dismissal of these filings.

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<sup>4</sup> CTIA reiterates that it has standing based on associational standing principles. *See* CTIA – The Wireless Association® Petition to Deny, WT Docket No. 07-16, n.4 (filed Mar. 2, 2007) (“CTIA Petition to Deny”).

awarded to the entity that values it most highly, has the financial resources to put it to good use, and has the incentive to utilize it efficiently. In addition, the auction proceeds enable the government to support much-needed programs and services. In contrast, subsidizing a commercial entity like M2Z with spectrum outside of an open, competitive auction does not honor congressional intent. As discussed below, the illusory benefits offered by M2Z do not alter this public interest analysis.” Although M2Z has argued that its Application represents the “only legitimate proposal” to serve the public interest,<sup>12</sup> M2Z’s conclusion is completely inconsistent with Congress’s directive in Section 309(j)(1) to utilize auctions to assign this spectrum.

M2Z’s novel suggestion that Section 309(j)(6)(E)<sup>13</sup> somehow trumps Section 309(j)(1)’s competitive bidding requirements should be ignored. M2Z’s reference to Section 309(j)(6)(E) to justify its position that the Commission has a duty to avoid mutual exclusivity is deeply flawed and contrary to Commission precedent. The Commission previously has explained that Section 309(j)(1)’s cross-reference to Section 309(j)(6) does not “turn avoidance of mutual exclusivity into the paramount goal of the statute.”<sup>14</sup> Section 309(j)(6)(E) simply reminds the Commission that “engineering solutions, negotiation, threshold qualifications, service regulations, and other

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(Continued. . .)  
for the public, and encouraging efficient use of spectrum”)

<sup>11</sup> See *infra* Section III.

<sup>12</sup> See M2Z Opposition at 12.

<sup>13</sup> 47 U.S.C. § 309(j)(6)(E).

<sup>14</sup> *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 22709, ¶ 22 (2000).

means” may be used to benefit the public interest.” This provision cannot be read to unravel the competitive bidding mandate that Congress made clear in Section 309(j)(1), nor does **this provision justify** a Commission decision not to accept other legitimate spectrum applications.

Moreover, M2Z fails to refute the controlling Northpoint precedent, in which the Commission rejected a similar proposal to ignore Congress’s auction directive for initial commercial licenses.<sup>16</sup> In that case, the Commission determined that it was required to award applications for initial Multichannel Video Distribution and Data Service (“MVDDS”) spectrum through competitive bidding because the filing of mutually exclusive applications was possible and was in the public interest.” The Commission concluded that “awarding licenses to [bidders] that value them most highly fosters Congress’s policy objectives because those bidders are **more** likely to rapidly introduce new and valuable services and deploy those services quickly.”” The Commission also expressly asserted that Section 309(j)(6)(E) did not alter this public interest determination.<sup>19</sup> This precedent is directly on point and requires the use of competitive bidding to assign initial licenses for the 2155-2175 MHz band. That applications mutually exclusive with M2Z’s proposal have been filed makes the case for **an** auction even more compelling.

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<sup>15</sup> 47 U.S.C. § 309(j)(6)(E).

<sup>16</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: Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7GHz Band*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶¶ 238-240 (2002) (“*Northpoint Proceeding*”).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at ¶ 241.

<sup>19</sup> *Id.* at ¶¶ 239-240

M2Z ignores Northpoint, **and** instead, analogizes to several proceedings that are simply not relevant to the instant situation. The 800 MHz re-banding proceeding,<sup>20</sup> the Instructional Television Fixed Service (“ITFS”) proceeding,<sup>21</sup> and the Mobile Satellite Service (“MSS”) proceeding<sup>22</sup> all involved the modification of existing licenses or the grant of additional rights to existing licensees, not the award of an initial license **for** spectrum as contemplated by M2Z’s Application. M2Z’s citation of certain cases involving “additional **services**,”<sup>23</sup> including the Wireless Medical Telemetry Service, the Dedicated Short Range Communications Service, the 3650-3700 MHz band and the 70/80/90 GHz band, is also inapposite **as** these all involved shared use of spectrum – such shared use cannot give rise **to** mutually exclusive applications and thus is not subject to the requirement.<sup>24</sup> Finally, M2Z’s discussion of the initial Direct Broadcast Satellite licenses distributed without auctions “[p]rior to the end **of** 1995, but **after** the 1993 enactment of the competitive bidding provisions in Section 309(j)” is **misleading**.<sup>25</sup> In this case, the Commission simply continued the existing licensing process adopted prior **to** Congress’s grant of auction authority, which provided existing DBS permittees with first rights to additional

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<sup>20</sup> See M2Z Opposition at 55; *Improving Public Safety in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, ¶ 5 (2004). Importantly, these modifications were necessary to correct harmful interference into critical public safety communications networks, a fact that is clearly not present in this circumstance.

<sup>21</sup> See M2Z Opposition at 57-58.

<sup>22</sup> See *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).

<sup>23</sup> See M2Z Opposition at 60.

<sup>24</sup> See 47 C.F.R. §§ 95.1111, 90.375, 90.1307, 101.1501.

<sup>25</sup> See M2Z Opposition at 58.

channel assignments upon surrender or cancellation of a **DBS** construction permit.<sup>26</sup> Shortly thereafter, in 1995, the Commission revised this process to utilize auctions for DBS licenses? Any initial DBS licenses granted outside of auctions between 1993 and 1995 were simply the result of Commission delay in applying the new competitive bidding rules to DBS.<sup>28</sup> That is not the case now regarding the assignment of CMRS licenses.

In sum, notwithstanding M2Z's efforts to invoke irrelevant precedent, Congress's directive in Section 309(j)(1) and the Northpoint case make clear that the Commission must utilize competitive bidding to license the 2155-2175 MHz band.

**B. M2Z's Attempt to Resurrect the Banned Pioneer's Preference Policy and Failed Installment Payment Program Must Be Rejected.**

Despite its protestations that it is not doing so, M2Z seeks to avail itself of failed and rejected licensing schemes of the past, including the pioneer's preference and installment payment programs. The Commission should not allow M2Z to bypass Congress' requirement for competitive auctions in favor of licensing and payment mechanisms that Congress and the Commission have explicitly rejected.

Although M2Z states in its Opposition that it **is** not seeking a pioneer's preference,<sup>29</sup> any

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<sup>26</sup> See *Continental Satellite Corp.*, Memorandum Opinion and Order, 4 FCC Rcd 6292 (1989).

<sup>27</sup> See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712, ¶¶ 131, 134 (1995) (concluding that "this reassignment policy, adopted in an era before Congress explicitly authorized the Commission's use of auctions and well before any DBS system actually went into operation, no longer serves the public interest, and therefore should be abandoned").

<sup>28</sup> Indeed, the Commission has auctioned DBS spectrum since 1995. See e.g., *Wireless Telecommunications Bureau Announces Winners of DBS Auction*, Public Notice (Jan. 29, 1996) at <http://wireless.fcc.gov/auctions/08/releases/Auction%208+9%20Winning%20Bidders.pdf>.

<sup>29</sup> M2Z Opposition at 69-70.

C. **The Commission Should Not Grant an Application for This Spectrum Until It Adopts Service Rules.**

M2Z claims that the Commission *should move forward* to grant its application before adopting service rules for the 2155-2175 MHz band.<sup>38</sup> The Commission should reject this request. As past Commission practice indicates, it is imperative that the Commission lay the ground rules for operation in a given band before permitting operation in that band. Moreover, the Administrative Procedures Act (“APA”) requires that the Commission provide adequate notice of its intention to adopt such rules, and the Commission has not provided notice in its Public Notices on M2Z’s application.

The Commission’s historic practice has been to initiate a formal rulemaking to adopt service rules for a given spectrum band prior to authorizing operation in the band.<sup>39</sup> These service rules include operational specifics that ensure that harmful interference will not occur to co-channel or adjacent licensees and that displaced incumbents are equitably and expeditiously relocated. Further, service rules determine the appropriate number and scope of licenses in a particular band, as well as other types of service requirements that ensure the public will be best served. A formal rulemaking provides an opportunity for all interested parties to comment on these issues in order to provide a full record for the Commission’s consideration.

The record in response to M2Z’s application is not sufficient for the Commission to establish the requisite service rules. Moreover, **under** the APA, the Commission must provide notice of “**either** the terms or substance of the proposed rule or a description of the subjects and

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<sup>38</sup> See *id.* at 75-84.

<sup>39</sup> See, e.g., *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18FCC Rcd 25162, ¶ 1 (2003) (adopting “service rules for Advanced Wireless Services (AWS) in the 1710-1755 and 2110-2155MHz bands, including provisions for application, licensing, operating and technical rules, and for competitive bidding.”).

issues involved.” The Commission’s Public Notice seeking comment on M2Z’s Application did not provide the required information, nor did it indicate that the Commission would act to adopt such rules in this proceeding. Indeed, the Commission previously stated its intention to initiate a separate rulemaking for the 2155-2175 MHz band.<sup>41</sup> Thus, the Commission cannot and should not adopt service rules in this limited, adjudicatory proceeding. Rather, it should undertake a rulemaking for that purpose.

## **II. M2Z’S APPLICATION DOES NOT QUALIFY AS A NEW SERVICE OR TECHNOLOGY APPLICATION UNDER SECTION 7 OF THE ACT**

In its Opposition, M2Z attempts for the first time to assert that Section 7 of the Communications Act not only provides a basis for granting its Application, but for doing so by May 5, 2007.<sup>42</sup> M2Z, however, grossly misunderstands the purpose and goals of Section 7.

As an initial matter, the courts and the Commission have repeatedly characterized Section 7 as a broad policy statement, rather than an affirmative obligation with which the Commission must comply. For example, the Fifth Circuit has described Section 7 as “merely a broad statement of policy conferring substantial discretion on the Commission to determine how best to provide for new technologies and services.”<sup>43</sup> Similarly, the Commission has noted that Section 7 is “a broad policy statement reflecting congressional delegation on policy matters to the

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<sup>40</sup> 5 U.S.C. § 553(b)(3).

<sup>41</sup> See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Ninth Report and Order and Order, 21 FCC Rcd 4473, 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.”).

<sup>42</sup> M2Z Opposition at 23-25,

<sup>43</sup> *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608,615 n.3 (5th Cir. 2000).

Commission's discretion."<sup>44</sup> Thus, Section 7 does not require the Commission to grant licenses to an applicant simply because the applicant invokes Section 7 or claims it could provide new services *or* technologies. Rather, it merely directs the Commission to consider whether an applicant will offer new and/or novel services utilizing newer technologies and whether such offerings will be in the public interest.

Second, Section 7 applies only to *new and novel* technologies and services. Section 7 "cannot be interpreted to endorse methods for the provision of existing services at additional locations, *or* the continued use of older, outmoded technologies."<sup>45</sup> Further, the Commission has specifically found that a technology will not be considered "new" if it "concerns the continued use, and extension of useful life, of an old technology in lieu of the use of a new technology."<sup>46</sup> Similarly, the Commission has found that a service is not "new" if it is merely being provided in an arguably new way.<sup>47</sup>

M2Z's proposed service and technology are clearly not new or novel in any way, and certainly do not **rise** to the level of the new services and technologies contemplated by Section 7. In its Application, M2Z proposes to offer a wireless broadband service to consumers for "**free**"

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<sup>44</sup> *Amendment of Parts 2, 25, and 87 of the Commission's Rules to Implement Decisions from World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, Order on Reconsideration, 21 FCC Rcd 5492, ¶ 15 (2006).

<sup>45</sup> *Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6*, Memorandum Opinion and Order, 6 FCC Rcd 3760,131 (1991).

<sup>46</sup> *Id.* at ¶ 30.

<sup>47</sup> *Id.* at ¶ 31 (finding that the use of alternate technologies to provide equal access is not a "new service"). Thus, M2Z's plan to provide wireless broadband service for "free" does not convert it into a "new" service under Section 7.

a governmental subsidy to compete in the wireless broadband marketplace.<sup>55</sup> In response to this point, M2Z argues that: (1) many of CTIA's members obtained cellular spectrum licenses *without participating in an auction*;<sup>56</sup> (2) *the Commission grants* thousands of licenses *per* year without holding an auction;<sup>57</sup> and (3) its Application will permit new entry into the market and spur competition.<sup>58</sup> M2Z's response is unavailing and unresponsive.

First, with the exception of initial cellular licenses assigned prior to the FCC's receipt of competitive bidding authority, CTIA members have obtained their commercial wireless licenses at auction.<sup>59</sup> Indeed, if auction authority were available when those licenses were issued, it is abundantly clear the Commission would have used that licensing mechanism.<sup>60</sup> Moreover, pre-auction cellular applicants were subject to either comparative hearings or lottery processes prior to grant of their initial licenses.<sup>61</sup> Licenses were not: (1) issued to the first party that applied, (2) on a nationwide basis, or (3) without grant of competing applications, as M2Z here

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<sup>55</sup> See CTIA Petition to Deny at 3.

<sup>56</sup> See M2Z Opposition at 110.

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 102.

<sup>59</sup> Even if the original licenses were not awarded through auction, CTIA's members have purchased many of these cellular licenses through subsequent private transactions.

<sup>60</sup> Following the receipt of auction authority, the Commission scheduled and held an auction for mutually exclusive cellular unserved area applications with 14 licenses granted to 10 applicants for better than \$1.8 million. See *Cellular Unserved Areas Auction Closes, Winning Bidders in the Auction of 14 Licenses to Provide Cellular Service in Unserved Areas*, Public Notice, DA 97-153 (Jan. 22, 1997).

<sup>61</sup> See e.g., *Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify other Cellular Rules*, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185, ¶ 75 (1991).

requests. In addition, prior to accepting cellular license applications, the Commission conducted a *rulemaking process* to adopt appropriate service rules for those licenses.<sup>62</sup>

M2Z's second argument that thousands of licenses each year are issued by the Commission without an auction is equally unavailing. Many of these licenses are for shared use of spectrum<sup>63</sup> or do not involve mutually exclusive applications,<sup>64</sup> and thus are not subject to the auction mandate. CTIA is unaware that any of these licenses are granted for "the provision of commercial services"<sup>65</sup> and M2Z provides no such examples in its **Opposition**.<sup>66</sup>

M2Z also argues that its request would permit new entry into the marketplace and spur competition.<sup>67</sup> This argument has been consistently refuted by the Commission itself. Just in the last week, Chairman Martin noted that the wireless industry is "the most competitive" of all telecommunications industries regulated by the Commission.<sup>68</sup> The Eleventh Wireless Competition Report found robust competition among wireless providers, with competing

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<sup>62</sup> See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems: and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, Report and Order, 86 FCC 2d 469 (1981).

<sup>63</sup> See e.g., 47 C.F.R. § 90.179

<sup>64</sup> For example, licenses issued on a site-by-site basis, with full coordination by private frequency coordinators for individual, localized communications needs, generally do not result in mutual exclusivity. See e.g., 47 C.F.R. §§ 90.175, 101.103.

<sup>65</sup> See M2Z Opposition at I 10-11.

<sup>66</sup> *Id.*

<sup>67</sup> See M2Z Opposition at 102.

<sup>68</sup> See Todd Spangler, *Martin: Broadband Wireless Must Be On 'Same Footing,'* MULTICHANNELNEWS, Mar. 27, 2007, at <http://www.multichannel.com/article/CA64286.html> (last visited Apr. 2, 2007).

broadband wireless services available to **94** percent of the population.<sup>69</sup> M2Z **has** failed to *demonstrate* that a **government** handout of spectrum to it would provide any more meaningful competition for wireless broadband services than what exists today.

All of M2Z's arguments miss a key issue made in CTIA's Petition to Deny: namely, that in the robustly competitive wireless marketplace where licensees pay an upfront spectrum auction fee to enter the market, authorizing a new entrant excused from this start-up **cost** would only distort existing competition. Given that the wireless sector is consistently cited **as** a successful example of market forces at work, the Commission should not alter the existing competitive balance. Instead, the Commission should reject M2Z's attempt to secure an unfair advantage through government fiat.

**B. High Speed Broadband Services Are Being Rapidly Deployed and Are Increasingly Available.**

M2Z touts the delivery of nationwide broadband service as a significant benefit of its proposal. However, **as** CTIA noted in its Petition to Deny, high speed broadband services, including wireless broadband services, are widely available throughout the country, with the Commission finding that 59% of new net broadband additions were **wireless**.<sup>70</sup> M2Z ignores these arguments. The Commission recently found that **5**

The Commission cannot ignore that wireless broadband services are being provided by numerous wireless providers (Alltel, Verizon Wireless, T-Mobile, AT&T, Sprint Nextel, Clearwire, among others) at data rates that in many cases greatly exceed the **384** kbps data rate

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<sup>69</sup> See Eleventh Competition Report at ¶¶ 116-117.

<sup>70</sup> See CTIA Petition to Deny at 11. See also *High-speed Services for Internet Access: Status as of June 30, 2006*, FCC Wireline Competition Bureau, at 3-4 (Jan. 2007), *mailable at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270128A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf).

that M2Z proposes as its “free” speed for **customers**.<sup>71</sup> Indeed, as indicated above, wireless broadband services **are the fastest growing of any broadband service and currently are widely** available in counties covering the vast majority of the population.<sup>72</sup>

With this level of competition, customer needs for wireless broadband service can readily be met by the commercial marketplace. M2Z’s arguments that current broadband deployment is “not acceptable” **are** thus without merit and refuted by commercial reality.

**C. M2Z’s Proposed Service Is Not “Free”**

M2Z reiterates its arguments that it would provide a free, portable broadband internet access **service**.<sup>73</sup> However, the service will not be free of cost **to** users. Ancillary access requirements and the technical limitations of the service will both impose costs.

First, parties desiring to access M2Z’s service will be required to purchase customer premises equipment (“CPE”) that will cost at least \$250 by M2Z’s own **estimate**.<sup>74</sup> **Yet**, M2Z has failed to provide any documentation or proposed equipment demonstrating that such equipment exists or will be available. M2Z has not identified any manufacturer, nor provided any manufacturer contract, that demonstrates there will be products available at this price point. Without such a showing, there is no way to determine if such a price point or the scale necessary to provide nationwide CPE to consumers is even possible. The Commission cannot simply accept M2Z’s unsupported claims **as** a basis for authorizing use **of** extremely valuable AWS spectrum.

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<sup>71</sup> *See infra* n.52.

<sup>72</sup> *See infra* Section II.

<sup>73</sup> *See* M2Z Opposition at 99.

<sup>74</sup> *See* M2Z Opposition at 17.

**IV. M2Z’S ALLEGATIONS OF PROCEDURAL INFIRMITIES IN THE OPPOSING FILINGS ARE OVERSTATED AND DO NOT WARRANT THE DISMISSAL OF THESE FILINGS.**

M2Z alleges that all of the opposing filings suffer from one or more of the following procedural defects: failure to serve, failure to include affidavits, failure to make *prima facie* showing, and failure to plead facts demonstrating standing. However, the procedural infirmities M2Z alleges are generally overstated or simply wrong. They certainly do not form a basis for the Commission to dismiss the petitions to deny and competing applications.

First, M2Z’s request for the dismissal of opposing filings for failure to serve M2Z is trivial and ignores relevant Commission precedent.<sup>75</sup> The Commission has consistently excused parties for failure to serve and other minor infirmities when the procedural mistake is “harmless” and does not “prejudice” the other party.<sup>76</sup> Specifically with regard to CTIA, M2Z was served.<sup>77</sup> Further, the failure to “serve” did not harm M2Z or disadvantage it in any way. Indeed, the length of M2Z’s Opposition and its reference to specific filings, indicates that it had ample opportunity to obtain and respond to these filings. The extended comment cycle also gave it adequate time to do so.<sup>78</sup> M2Z also acknowledges in an *ex parte* filing dated March 14—two

<sup>75</sup> See M2Z Motion at 13.

<sup>76</sup> See *Licenses from WorldCom, Inc. to Nextel Spectrum Acquisition Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 6232, ¶ 18 (2004); See generally *Bay Ventures Application for Renewal of 220 MHz Radio Station WPCX637, Key Largo, Florida*, Order, 17 FCC Rcd 8766, ¶ 9 (2002); *AT&T Corp., MCI Telecomm. v. Bell Atlantic—Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, n.254 (1998) (finding that because the party “suffered no prejudice, [the FCC] need not address its claim that the notice was defective”).

<sup>77</sup> In fact, on March 2, 2007 – within hours of filing its Petition to Deny – CTIA sent an e-mail to a M2Z representative summarizing the filing and including a web link to the full text of the pleading on the Internet. See, [http://files.ctia.org/pdf/filings/070302\\_CTIA\\_Petition\\_to\\_Deny\\_M2Z\\_Application.pdf](http://files.ctia.org/pdf/filings/070302_CTIA_Petition_to_Deny_M2Z_Application.pdf)

<sup>78</sup> The Commission set the deadline for filing Petitions to Deny for March 16, 2007. However, most petitioners — including CTIA — and competing applicants filed on March 2, 2007

days before the deadline to file Petitions — that it had reviewed the relevant petitions and applications.<sup>79</sup> As such, M2Z could not have been harmed by failures to serve and, indeed, M2Z *does not allege any actual harm.*

Second, the Commission also should ignore M2Z's suggestion to strike most every petition to deny for failure to provide an affidavit. Affidavits are required when a petitioner alleges unproven facts. CTIA's Petition to Deny and many of the others focused on the glaring legal infirmities inherent in M2Z's Application. The Petition to Deny did not present new unsupported facts. Accordingly, no affidavit was required. Nevertheless, out of an abundance of caution, CTIA attaches an affidavit to this Reply to cover the contents of both this filing and of its initial Petition to Deny, as permitted under Commission precedent. Repeatedly, the Commission has explained that it will accept late-filed affidavits that cover filings previously submitted in a proceeding, *so long as there is "no intent to abuse [the FCC's] procedures."*<sup>80</sup> CTIA assures the Commission that the failure to provide an affidavit was not done to abuse

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(Continued. . .)

pursuant to deadlines set in an earlier public notice. *Wireless Telecommunications Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band*, Public Notice, DA 07-492 (Jan. 31, 2007). As a result of this extension, M2Z had 24 days to respond to the various petitions to deny when it would normally receive 10 days. *See* 47 C.F.R. § 1.45. In contrast, CTIA had only three business days to respond to M2Z's Opposition. *See* Motion for Extension of Time, CTIA – The Wireless Association®, WT Docket No. 07-16 (filed Mar. 29, 2007).

<sup>79</sup>

*See* Letter from John B. Muleta, M2Z Networks, Inc., to Marlene Dortch, FCC, WT Docket Nos. 07-16, 07-30, Attachment at 5 (filed Mar. 14, 2007).

<sup>80</sup>

*See Application of Water Way Communications System, Inc.; For Authority to Construct and to Operate an Inland Waterways Communications System*, Memorandum Opinion and Order, 51 RR 2d 1655, ¶ 60 (1982); *KQED, Inc.; For the Renewal of Licenses of Noncommercial Stations KQED-FM, KQED-TV, and KQEC-TV San Francisco, California*, Memorandum Opinion and Order, 88 FCC 2d 1159, ¶ 15 (1982); *Corpus Christi Cellular Telephone Co. for Commission Consent to Transfer of Control of the Corpus Christi, Texas Non-Wireline Cellular Permit to McCaw Communications of Texas, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 1889, n.1 (1988).

Commission procedures. CTIA simply believed that an affidavit was not necessary to make its legal arguments.

Third, the Commission also should disregard M2Z's charge that all of the Petitions and competing Applications must be dismissed because the Petitioners and Applicants failed to make a *prima facie* showing that approval of M2Z's Application would be inconsistent with the public interest.<sup>81</sup> CTIA's Petition to Deny, as well as the filings of the other petitions, articulated many serious legal and indisputable factual flaws with M2Z's Application that all demonstrate how M2Z's proposal is inconsistent with existing law and the public interest. M2Z's suggestion that such arguments fail to make a *prima facie* case is simply correct.

Finally, M2Z's two-sentence assertion that CTIA "simply cit[ed]" a case and failed to present factual support that CTIA is a "party in interest" is disingenuous.<sup>82</sup> CTIA clearly explained at the beginning of its Petition to Deny that CTIA's filing was "on behalf of its members who purchased at auction Personal Communications Service ("PCS") and Advanced Wireless Service ("AWS") licenses."<sup>83</sup> CTIA then detailed that these members "would compete in the exact same geographic and product space with M2Z, and . . . would be harmed by a Commission decision to distort the competitive market for commercial wireless services by

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<sup>81</sup> See M2Z Motion at 13 (citing 47 U.S.C. § 309(d)).

<sup>82</sup> See *id.* at n.58.

<sup>83</sup> See CTIA Petition to Deny at 1. CTIA also provided the clear legal principles that justified CTIA's standing to file on behalf of its interested members. CTIA stated that it "has standing based on associational standing principles. Under associational standing principles, an association has standing in a proceeding *so long as*: (1) at least one of its members has standing to sue in its own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit. See, e.g., *Am. Library Ass'n v. FCC*, 401 F.3d 489 (D.C. Cir. 2005)." See CTIA Petition to Deny at n.4. Because CTIA's members had standing to file petitions to deny and CTIA was protecting the interests of these members, CTIA also had standing to file a petition to deny.

providing M2Z with free (*or* installment plan) spectrum in lieu of conducting open, competitive auctions.”<sup>84</sup> The Commission should thus ignore M2Z’s patently incorrect assertion that CTIA failed to demonstrate that it is a party in interest.

V. **CONCLUSION.**

For these reasons and the many others raised by all petitioners in this proceeding, the Commission should promptly dismiss or deny **M2Z’s** Application for a license in the **2155-2175** MHz band as well as **M2Z’s** Petition for Forbearance.

Respectfully submitted,

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Dated: April 3, 2007

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<sup>84</sup>

*See* CTIA Petition to Deny at 1-2.

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

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

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**AFFIDAVIT OF CHRISTOPHER GUTTMAN-MCCABE IN SUPPORT OF REPLY OF  
CTIA – THE WIRELESS ASSOCIATION@**

I, Christopher Guttman-McCabe, do hereby declare under penalty of perjury the following:

1. I am Vice President for Regulatory Affairs of CTIA – The Wireless Association@.
2. I have read the foregoing Reply of CTIA – The Wireless Association@ and the CTIA – The Wireless Association@ Petition to Deny that was filed on March 2, 2007, and any facts stated therein, of which the Federal Communications Commission may not take official notice, are true and correct to the best of my knowledge, information, and belief.

Signature: \_\_\_\_\_  
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Washington, D.C. 20036

Date: \_\_\_\_\_

Subscribed and sworn to before me this 2<sup>nd</sup> day of April, 2007.

Notary Public: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

Residing at: \_\_\_\_\_

## CERTIFICATE OF SERVICE

I, Brian Josef, do hereby certify that on this 3<sup>rd</sup> day of April 2007, I caused copies of the foregoing "Reply of CTIA – The Wireless Association®" to be delivered to the following via First Class U.S. mail and/or email.

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