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April 19, 2007

**VIA ECFS**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: M2Z Networks, Inc.  
WT Docket Nos. 07-16 and 07-30  
Notification of Oral Ex Parte Presentation**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter notifies the Commission that on April 18, 2007, John Muleta, Uzoma Onyeije, and Mike Meece on behalf of M2Z Networks, Inc. met with Erika Olsen, Acting Legal Advisor to Chairman Kevin J. Martin, and Fred Campbell, Chief, Wireless Telecommunications Bureau. During the meeting, Mr. Muleta's upcoming testimony before the U.S. House of Representatives, Subcommittee on Telecommunications and the Internet, a copy of which is attached hereto, was distributed and discussed. Other matters discussed during the meeting are reflected in M2Z's prior written submissions in these proceedings.

Sincerely,

/s/

Christopher Tygh

Enclosure

cc: Ms. Erika Olsen (via e-mail)  
Mr. Fred Campbell (via e-mail)

**U.S House of Representatives  
Subcommittee on Telecommunications and the Internet  
Hearing on  
“Digital Future of the United States: Part 3 –  
Spectrum Opportunities and the Future of Wireless”**

**Written Testimony of John B. Muleta  
CEO, M2Z Networks, Inc.**

**April 19, 2007**

**Background**

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today. My name is John Muleta, and I am the co-founder and CEO of M2Z Networks, Inc. My business partner, Milo Medin, and I founded M2Z Networks in 2005 with the support of three prominent venture capital firms that have backed a long list of innovative technology companies of the digital age such as Netscape, Google, Tivo, MySpace and Amazon. Milo previously founded @Home Networks, and was one of the key innovators in the cable broadband industry. It is in large part due to Milo’s leadership that the cable broadband industry grew from zero subscribers only a few short years ago to more than 40 million today.

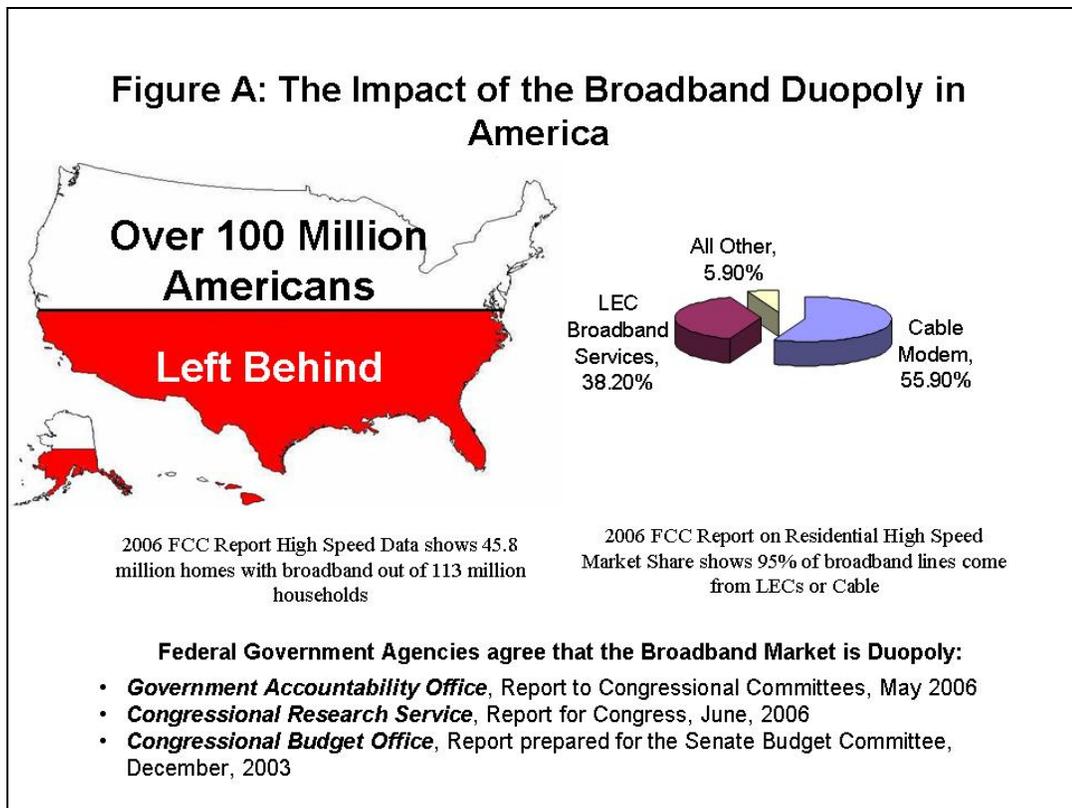
As for myself, I have more than 22 years of experience in the wireless and wireline telecommunications industries. As a businessman and entrepreneur, I

have worked with companies that helped to pioneer the Internet, including GTE and PSINet, Inc. At PSINet, I headed up efforts to build fiber and IP networks in 28 countries, and worked to open up developing markets through competition from IP-enabled services. I also served as the Chief of the Wireless Telecommunications Bureau at the Federal Communications Commission (FCC or Commission) between 2003 and 2005, and was Deputy Bureau Chief and Chief of the Enforcement Division of the FCC's Common Carrier Bureau during the implementation of the 1996 Telecommunications Act.

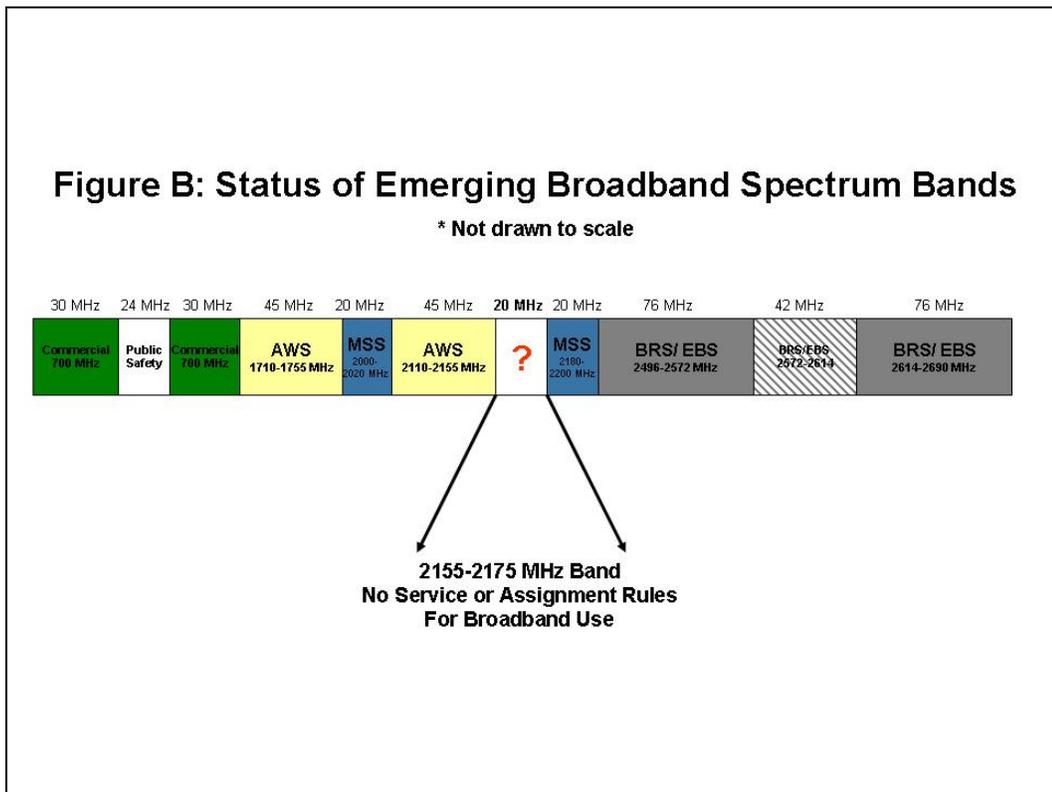
The Subcommittee was kind enough to ask me here to speak about spectrum management and how it affects our country's digital future. Today, spectrum management must place particular focus on the need for additional consumer broadband access across the country because of the educational and economic impact it will have on our country's global competitiveness in the future. Broadband availability for all U.S. citizens has been identified as a top priority by leaders in both parties, including President Bush, Speaker Pelosi, FCC Chairman Martin, and many of the distinguished members of this Subcommittee. I am happy to report that M2Z has identified a path to reach this paramount goal by utilizing 20 MHz of unpaired, historically underutilized, and largely fallow spectrum at 2155-2175 MHz for which it has sought an FCC license.

M2Z's mission is to provide Americans, of all means and all demographics,

the opportunity to access a free, fast, and family friendly nationwide wireless broadband data network. This network will finally bring broadband Internet access to over 100 million adult Americans – in addition to their millions of children who need fast, reliable Internet access to augment their education – who currently have no Internet access or who use outdated dial-up connections. For others, M2Z will provide a welcome choice to the current broadband duopoly.



In order to provide this valuable free service, M2Z has applied to the FCC for a license to construct its network at 2155-2175 MHz as depicted in Figure B below.



This particular block of spectrum is largely unused and underutilized; it is also unpaired and thereby unattractive to incumbent wireless operators who cannot use it in conjunction with their existing mobile voice networks that rely on paired spectrum assignments. Yet, as a technical matter, virtually all experts agree that unpaired spectrum technologies are the most efficient and effective means of transporting wireless broadband data.

M2Z has thus responded to the national imperative for more broadband with a solution that uses spectrum that currently is lying fallow<sup>1</sup> and which is a poor fit

<sup>1</sup> Although there is a long circuitous twelve year path to how this band ended up in its current situation, it is where it is and there is no need to review the sordid history. What is clear is that

for existing mobile technologies. There simply is no public policy reason not to allow M2Z to proceed with deployment of its network. Indeed, the only opposition that M2Z has encountered comes from incumbent operators, their representatives, and other would be competitors that fail to meet or rebut the high public interest standard set by M2Z's free broadband initiative.

### **Spectrum Management And The Problems of the Digital Age**

Today, one of the greatest impediments to the realization of the promise of the digital age is the fact that the broadband market is a duopoly that limits consumer choice and provides little incentive for existing competitors to drive prices down. This should come as a surprise to no one. The Government Accountability Office (“GAO”)<sup>2</sup>, the Congressional Budget Office (CBO)<sup>3</sup> and the Congressional Research Service (“CRS”)<sup>4</sup> have reached the same conclusion. Similarly, FCC reports on the status of broadband Internet access show that incumbent local exchange carriers (“LECs”) and cable operators dominate the residential broadband market, with LECs serving 38.2% of the market, and cable

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the spectrum band has no service rules in place to define its new use and no geographic blocks for assignment.

<sup>2</sup> Broadband Deployment is Extensive throughout the United States, but It’s Difficult to Assess the Extent of Deployment Gaps in Rural Areas, United States Government Accountability Office, GAO-06-426, May 2006

<sup>3</sup> “Does the Residential Broadband Market Need Fixing?” Congressional Budget Office, 2003.

<sup>4</sup> “Access to Broadband Networks,” Congressional Research Service Report for Congress, June 28, 2006.

operators serving 55.9% of residential broadband subscribers.<sup>5</sup> Only 5.9% of all residential broadband subscribers use other technologies.<sup>6</sup> Finally, and most disappointing, well over half of all U.S. adults do not have access at all to broadband at home.<sup>7</sup>

As these data demonstrate, the broadband Internet access market would benefit greatly from the entry of a new, nationwide, facilities-based competitor,<sup>8</sup> and the most likely source of such facilities-based competition is a wireless

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<sup>5</sup> See FCC, *High-Speed Services for Internet Access: Status as of December 31, 2006*, at 3, Table 3, See Chart 4. According to the 2006 Report, of the 50.4 million lines which were faster than 200 kbps in *both* directions, 55.9% were cable modem, 36.3% were ADSL, 1.9% were SDSL or traditional wireline, 1.4% were fiber to the end user premises, and 4.5% used other technologies.

<sup>6</sup> Unfortunately, DSL service is proving to be little or no constraint on cable modem prices. Last year, two LECs announced that they would not reduce the price of DSL service to reflect the Commission's elimination of certain USF contribution fees. Instead of passing the savings from these fees on to consumers, BellSouth and Verizon reported that prices would remain the same. See, e.g., Amy Schatz, *Verizon and BellSouth DSL Users Won't See Lower Bills as Fee Ends*, WALL STREET JOURNAL, Aug. 22, 2006, at A2. Commission reaction to protect consumers was swift; reports of the Commission's commencement of enforcement proceedings were widespread. See, e.g., Amy Schatz, *FCC Questions DSL Customer Fees*, WALL STREET JOURNAL, Aug. 25, 2006, at A4. Within a few days, the carriers eliminated the fees. See *Statement of FCC Chairman Kevin Martin on Verizon And BellSouth Eliminating Recently Imposed DSL Fees* (rel. Aug. 30, 2006) ("Consumers should receive the benefits of the Commission's action last summer to remove regulations imposed on DSL service.").

<sup>7</sup> There are 45.8 million residential broadband lines in the U.S. See FCC, *High-Speed Services for Internet Access: Status as of December 31, 2006*. According to the Census Bureau, there were 113 million households in the United States in 2005. See U.S. Census Bureau, "Households by Type, 1940 to the Present," May 25, 2006 (available at <http://www.census.gov/population/socdemo/hh-fam/hh1.pdf>). The percentage of households with broadband access is therefore approximately 38%.

<sup>8</sup> The principal barriers to widespread broadband use are the retail cost of service and the fact that broadband infrastructure is not universally deployed. Accordingly, the Commission has identified greater broadband access as a strategic goal, stating that "[a]ll Americans should have affordable access to robust and reliable broadband products and services." Federal Communications Commission, *Strategic Plan 2006-2011* at 5 (2006).

platform.<sup>9</sup> But don't look for that competition to come from the large incumbent providers,<sup>10</sup> which have little incentive to deploy a broadband wireless service that will compete with their current offerings.<sup>11</sup> If policy makers want robust broadband competition from a wireless provider, they must turn their attention to nurturing new entrants that are unaffiliated with existing cable modem, DSL, or incumbent wireless carriers.

M2Z is one such potential new entrant whose proposal, in my opinion, is superior because it is complete, transparent and replete with the technical and

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<sup>9</sup> See, e.g., *Martin Tells Reporters He Sees Progress on Broadband, Video, '911'*, TR DAILY (Mar. 17, 2006) (wireless broadband will be an “important component” of high-speed service and regulatory relief should be offered to new investors in the broadband marketplace); Remarks of Commissioner Jonathan Adelstein at the Wireless Communications Association Annual Convention (June 27, 2006) (“If we are going to see real broadband competition, it probably has to come from wireless.”).

<sup>10</sup> Incumbent broadband providers that offer cable modem or DSL service have little incentive to deploy a broadband wireless service that will compete with their own wireline offerings. See, e.g., Tiernan Ray, *Comcast Sending Strong Buy-Cell Signals*, BARRON'S, Aug. 29, 2006 (observing that Comcast is not likely to construct a wireless network until such service will complement, rather than compete with, its existing network); Karen Brown, *BellSouth Expands Broadband Wireless Plans*, MULTICHANNEL NEWS, July 10, 2006 (BellSouth's director of product development explains that BellSouth will use its wireless communications service (WCS) spectrum to supplement its wireline network, stating that: “Even in metro areas, we have spaces where we don't have DSL coverage. And then when we get out to rural areas where we have DSL, but it goes so far out and the economics don't carry it farther . . . So what you are seeing is our plan using wireless broadband to push broadband farther out.”).

<sup>11</sup> The Commission recently granted all WCS licensees (in the 2.3 GHz band), including entities such as AT&T, BellSouth, NextWave, and Verizon Wireless, an additional three years until July 2010 to satisfy their applicable construction build out requirements. See *In the Matter of Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, ¶ 13 (2006). The WCS waiver order limited the breadth of the original request because it lacked certainty and “could act as a disincentive for WCS licensees to expeditiously develop technological solutions for the band and construct systems” and “undermine one of the purposes of the construction requirement to prevent spectrum warehousing.”

business foundations to succeed in the marketplace. M2Z was founded to offer an alternative to the broadband duopoly by using spectrum that has been abandoned by the marketplace and which is all but unused. The 2155-2175 MHz band that M2Z seeks access to in order to compete in the marketplace has no identified future use, no specific time or date for assignment, and no incumbent users that have not already been ordered to transition out of the band.<sup>12</sup> M2Z has proposed a solution to use this spectrum and directly address the three most vexing problems in growing the U.S. broadband market: affordability, availability, and accessibility.

As explained in detail in its license Application, filed now almost a year ago on May 5, 2006, M2Z proposes to make available free, broadband Internet access to nearly every consumer, business, non-profit and public safety entity in the United States. To make this service possible, M2Z filed an application for an exclusive, nationwide authorization, with a 15-year license term, to operate in 20

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<sup>12</sup> See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14165, ¶¶ 37-38 (2004) (“*BRS R&O*”) (ordering the relocation of users from the 2150-2156 MHz and 2156-2160 MHz bands to 2496-2502 MHz and 2618-2624 MHz respectively); *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*, Eighth Report and Order, Fifth Notice of Proposed Rulemaking and Order, 20 FCC Rcd. 15866, ¶ 6 (2005) (“*AWS 8<sup>th</sup> R&O*”) (ordering the relocation of users of the Fixed and Mobile Service allocations in the 2155-2160 MHz band and designating the 2155-2175 MHz band for AWS use). See also *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*, ET Docket No. 00-258, Ninth Report and Order, FCC 06-45 (rel. Apr. 21, 2006) (“*AWS 9<sup>th</sup> R&O*”) (establishing procedures for relocation of incumbents).

MHz of spectrum.<sup>13</sup> In return, M2Z is willing to assume specific and enforceable public interest obligations, including, among others:

- (1) provision of a free wireless broadband service throughout M2Z's national footprint;
- (2) rapidly build out its network to 95% of Americans in 10 years, with interim benchmarks of 33% of the population in 3 years and 66% in five years;
- (3) finance the build-out without using the Universal Service Funds (USF);
- (4) filter pornography and other obscene and indecent material on the free network in order to make broadband access safe for children and their parents;
- (5) provide access to an interoperable wireless broadband platform free of charge for public safety organizations; and
- (6) voluntarily pay to the U.S. Treasury a five percent spectrum usage fee based on subscription revenue.

One might reasonably ask, then, when M2Z will be licensed so it can begin deploying its network? It turns out the answer has to do with the potential of incumbent licensees and speculators to manipulate the FCC 's spectrum assignment process as a way of delaying competitive entry or otherwise thwarting innovation that is in the public interest.

### **The Fundamental Goal Of Spectrum Management: Serve The Public Interest**

Let me now turn to the purpose of spectrum management and the FCC's spectrum assignment process. Congress directed the Commission, quite simply, to

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<sup>13</sup> See Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (filed May 5, 2006) ("*Application*").

put spectrum to its highest and best use *in the public interest*. In terms of spectrum assignment, Congress afforded the FCC a number of tools to achieve that end. These tools range from direct assignment using threshold licensee qualifications to spectrum sharing as well as competitive bidding as warranted by the public interest in each particular circumstance.<sup>14</sup>

In empowering the FCC, Congress has also rightly provided the FCC the discretion to select the best method that fits the public interest objective at hand. Thus, contrary to what entrenched players in the industry and their speculative brethren might argue, there is no shorthand process for making assignment decisions; Congress did not direct the Commission to thoughtlessly jump to competitive bidding at every instance.

For example, the FCC's timely decision to accept and seek comment on M2Z's license application has helped develop a record that fully illuminates the public interest considerations relevant to the use and assignment of the 2155-2175 MHz band. That record makes it plain that, first, the band should be allocated for the development of a national broadband radio service, as suggested by M2Z's application, and second, that licensing the spectrum by using threshold qualifications and technical parameters, based on a well established record, would

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<sup>14</sup> See 47 U.S.C. §§ 301, 303, 308 and 309

be more effective than resorting to time consuming, counter-productive, and redundant rulemakings.

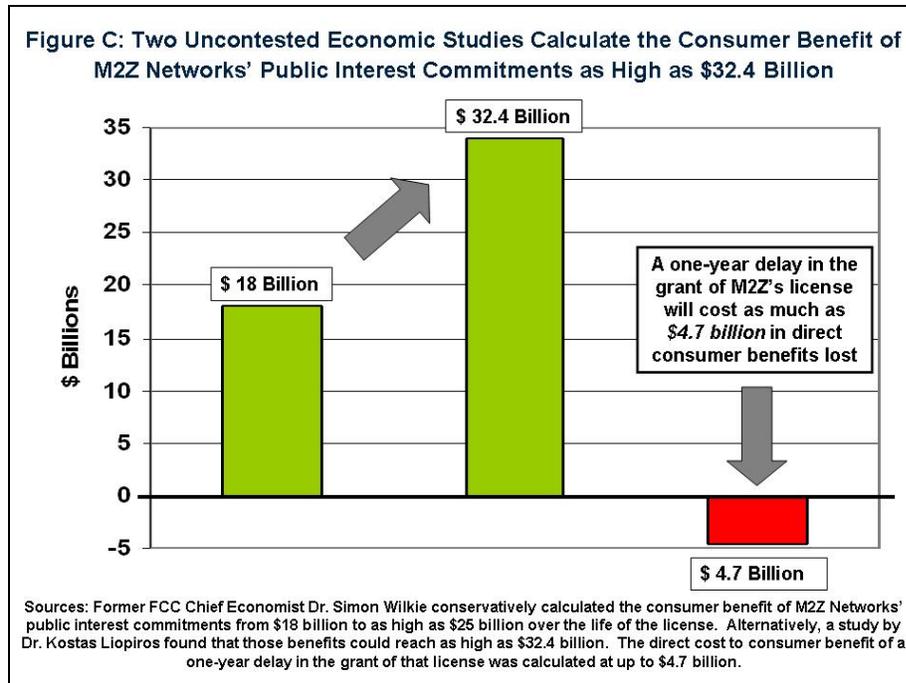
That is a strong statement, but the record supports it. Nearly 1,000 comments have been filed urging the FCC to grant M2Z's license application.<sup>15</sup> By M2Z's last count, these supportive comments come from people and organizations representing the interests of over 26 million Americans.<sup>16</sup> Moreover, the record contains two authoritative and uncontested economic studies, one submitted by a former FCC Chief Economist and the other by a respected technical consultant, Dr. Kostas Liopiros that estimate that deployment of M2Z's network will generate up to 32.4 billion dollars in direct consumer welfare benefits.<sup>17</sup>

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<sup>15</sup> The Commission's Strategic Plan notes that "[t]he Commission shall seek to understand consumer demand for broadband and to encourage deployment across multiple platforms to ensure that access is not a barrier to adoption of affordable broadband technologies *as they become available*." FCC Strategic Plan at 5 (emphasis added).

<sup>16</sup> See WT Docket Nos. 07-16 and 07-30 available at [http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi).

<sup>17</sup> See Simon Wilkie, "The Consumer Welfare Impact of M2Z Networks Inc.'s Wireless Broadband Proposal," WT Docket Nos. 07-16 & 07-30 (submitted Mar. 2, 2007); Kostas Liopiros, "The Value of Public Interest Commitments and the Cost of Delay to American Consumers," WT Docket Nos. 07-16 & 07-30 (submitted Mar. 19, 2007).



Indeed, Dr. Liopiros' study finds that the consumer welfare benefit of M2Z's network will decrease significantly (by as much as 4.7 billion dollars) for each year of delay in granting the license application.

But economic papers and demands by the public for better and cheaper broadband service are not necessary to understand the public interest benefits of a free, nationwide wireless broadband platform. The benefits of M2Z's proposal are immediately obvious. Indeed, the FCC has recently suggested that even incremental additional broadband deployment and competition, though it may pale in comparison to the promise of M2Z's new network, would serve the public interest.

In its decision to allow the \$86 billion merger between AT&T and

BellSouth, the FCC gave one view of what constitutes the public interest. In a transaction the scale and scope of which with regard to consolidation has no parallel in the telecommunications industry, BellSouth reluctantly (and at the last minute) agreed to a set of merger conditions that the Commission found to be in the public interest. BellSouth agreed to provide unbundled access to DSL, and guaranteed to offer, for 3 years, a "low-cost" DSL service (\$10 per month) throughout its service territory covering 9 million people. BellSouth also offered to build out several trial markets using its unused 2.3 GHz spectrum covering the same population, but without any description of the specific services that consumers will receive. And again, its commitment to construct trial markets using its 2.3 GHz spectrum is limited to 3 years. Finally, it agreed to divest itself of spectrum held in the 2.5 GHz band, which it had obtained some 10 years ago and which, by all appearances, it has merely been warehousing in the interim.

Figure D below contrasts these public interest conditions with the binding commitments offered by M2Z.

## Figure D: M2Z's Public Interest Commitments Exceed even the AT&T/BellSouth Merger Requirements

<u>M2Z Application</u>	<u>AT&amp;T BellSouth Merger Conditions</u>
<p><b>M2Z will deliver Free, Fast, Family Friendly consumer wireless Broadband to a minimum of 95% of the US Population for the 15 year license</b></p> <ul style="list-style-type: none"> <li>» Free Service at minimum 384 kbps with no contract or long term commitment</li> <li>» Family Friendly service with filtering in the network for the Free Service</li> <li>» Build-out commitments as a condition of the license: 95% of the US Population in 10 years with intermediate milestones of 33% in 3 years, 66% in 5 years</li> <li>» Public Safety – free use of the network with traffic prioritization and pre-emption in emergencies</li> <li>» Will not take from USF; will pay into USF</li> <li>» Pay 5% of premium services for use the spectrum</li> </ul>	<p><b>Combined AT&amp;T/BellSouth has been required to provide broadband service to their service territory for 3 years</b></p> <ul style="list-style-type: none"> <li>» \$10 unbundled DSL service to new customers</li> <li>» Free modems to customers that upgrade from dial-up <u>with</u> a 12-month contract</li> <li>» Report in 12 months on efforts to provide high quality service to customers with disabilities</li> <li>» Divestiture of 2.5 GHz Spectrum to new broadband entrant (Clearwire)</li> <li>» Mandated interim build out of 2.3 GHz holdings</li> </ul>

  
**Greater Than**

M2Z is offering a free broadband service with a network that will reach, at a minimum, 95% of the population. M2Z has extended its offer to include those that protect and serve our homeland by offering free access to every public safety officer. M2Z's offer is neither limited nor temporary. It is not an offer made in light of public and private pressure in the context of a merger review, but was instead made willingly and eagerly, and with the vigor of a new entrant.

### **Process Should Not Defeat Progress**

Not surprisingly, several competitors or would-be competitors to M2Z have opposed M2Z's license application, and are now seeking to use the regulatory

process as an anticompetitive weapon. Many of them conveniently presuppose that spectrum assignment by competitive bidding is an absolute requirement of the Communications Act. They also argue that this process requires lengthy and tedious further rulemakings and fact findings to ensure efficiency and fairness. Their positions are both legally erroneous and factually flawed.

As to the legal requirements guiding the FCC's determination, a reading of the relevant statutes and FCC precedent reveals that auctions are not required by the Communications Act where they are not needed or appropriate. Rather, Congress recognized that auctions are just one of among the panoply of methods for assigning spectrum in accordance with the public interest.

Again, at the risk of reciting Congress' own handiwork, let me be more specific about the statutory basis of the FCC's spectrum assignment processes. The clear and plain meaning of Section 309 of the Communications Act, as interpreted by the FCC and the courts of jurisdiction, is that Congress requires assignment by competitive bidding only when other alternatives fail. Specifically, Sections 309(j)(1) and 309(j)(6)(E), when read together, direct the FCC to use a variety of means, including "threshold qualifications, engineering solutions and other means" in order to avoid mutual exclusivity, which is the necessary precondition for licensing by competitive bidding.

Further, despite what the proponents of competitive bidding might argue, it

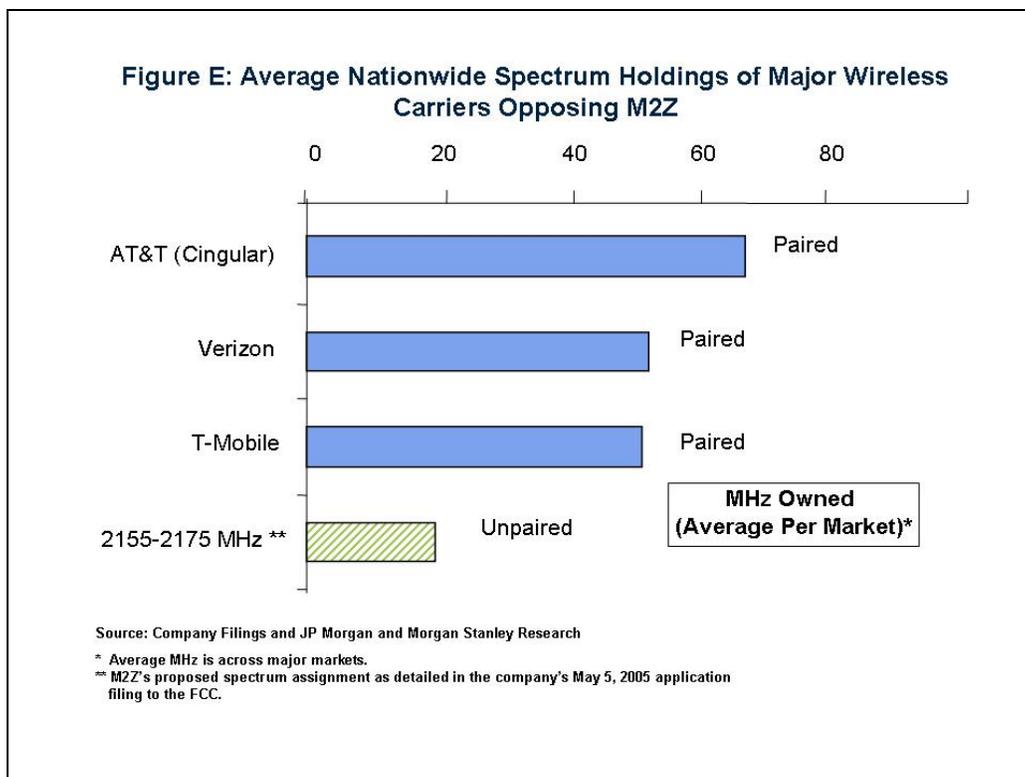
is not clear that license auctions actually result in the greatest recovery to the public for the use of its spectrum. Assigning licenses through competitive bidding provides the U.S. Treasury with a one-time payment that represents a potential licensee's best estimate of the value of that particular license at the time of bidding. If spectrum is undervalued by auction participants, the public has no recourse; a licensee that earns billions using a spectrum license that cost a fraction of one year's annual revenue doesn't share that windfall with the public that owns the spectrum. For example, Personal Communications Services ("PCS") spectrum garnered a total of \$17 billion in winning bids at auction over a course of 12 years. Today, the PCS industry enjoys annual revenue of \$100 billion using this spectrum. If the PCS industry were paying a five percent share of its revenues to the U.S. Treasury, as contemplated by M2Z in its pending license application, the public would be benefiting by \$5 billion for 2006 alone, with similarly large annual contributions in perpetuity.<sup>18</sup> Thus, the amounts collected through spectrum auctions do not necessarily reflect the true value of this public asset.

With regard to the claims of efficiency and effectiveness of auctions, empirical studies confirm that some past FCC auctions used to assign spectrum

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<sup>18</sup> The Office of Management and Budget has said that "[u]ser fees will help to ensure that spectrum is put to its highest and best use, by internalizing the value of spectrum to the license holders." available at <http://www.whitehouse.gov/omb/budget/fy2007/other.html> See also "Major Savings and Reforms in the President's 2007 Budget, Executive Office of the President, February 2006

may not only have been inefficient but also competitively unfair. Dr. Simon J. Wilkie, former FCC Chief Economist, recently completed a report, which is included in M2Z's dockets at the FCC and which M2Z is submitting into the record of this hearing, comparing the theoretical underpinnings of past auctions with the empirical results.<sup>19</sup> Dr. Wilkie's paper clearly demonstrates that incumbent competitors have the financial incentives and, in most cases, the means to prevent competitive entry by warehousing spectrum rather than allow it to fall into the hands of new entrants.



Wilkie's analysis found that it is only when there is active *ex-ante* intervention by

<sup>19</sup> See Simon Wilkie, PhD., "Spectrum Auctions Are Not a Panacea: Theory And Evidence Of Anti-Competitive and Rentseeking Behavior in FCC Rulemakings and Auction Designs," WT Docket Nos. 07-16 & 07-30 (filed Mar. 26, 2007)

the FCC – such as by imposing spectrum caps for incumbents or other means – is it likely that incumbents will be prevented from stifling new competitive entry through unproductive spectrum warehousing. Of course, one need not be an expert economist to comprehend the weakness of the unbounded use of auctions as a spectrum assignment tool. According to a scientific and bipartisan national survey conducted in February that M2Z is today submitting into the record of this Hearing, over sixty-percent of those surveyed supported issuing a spectrum license for the provision of a free high-speed Internet service based on the public interest instead of simply granting it to the entity that promises to pay the most.<sup>20</sup>

Nonetheless, several of the parties who have opposed M2Z continue to pound the table with their figurative shoes calling for an auction. The obvious attraction, of course, is that an auction provides an opportunity, at least, for an incumbent operator to freeze out new entry. More insidious still, however, is the use of the auction process strategically to run out the clock on entrepreneurial plans to provide new services. Those who would smother an infant service in its crib have a near perfect murder weapon in the auction process, which by its nature allows parties to add layer upon layer of procedural hurdles before any would-be

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<sup>20</sup> Voter Consumer Research and Lake Research Partners collaborated to conduct a nationwide survey of 1,003 registered voters. The margin of error for this poll was +/- 3.1%. See Memorandum of Dr. Jan van Lohuizen, "Public Support for New Model of Wireless Licensing," Voter Consumer Research, February 28, 2007 and Memorandum of David Mermin, "Public Support for Licensing Wireless Broadband Service," Lake Research Partners, February 28, 2007, to be submitted for the record.

new entrant.

An oft-quoted study by Dr. Thomas Hazlett concluded that the median length of time from commencement of spectrum allocation proceedings to completion of an auction was 6.7 years.<sup>21</sup> As Dr. Hazlett convincingly argues, a regulatory snail's pace in Washington is not keeping up with the demands of our digital future and rapid technological advances. More to the point, process is not a substitute for policy.

This Commission, however, does not appear likely to delay an effort to expand broadband access. Chairman Martin has emphasized the importance of wireless offerings to the rapid deployment of broadband service, and has stated that grant of regulatory relief to new investors in this sector would spur further deployment.<sup>22</sup> Elsewhere, the Chairman and Commissioner Tate have acknowledged that forbearance is among the available means by which the Commission can “establish a policy environment that facilitates and encourages broadband investment, allowing market forces to deliver the benefits of broadband to consumers.”<sup>23</sup> Having long advocated competitive entry into the broadband

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<sup>21</sup> See Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punch Line to Ronald Coase's Big Joke: An Essay on Airwave Allocation Policy*, 14 HARVARD L.J. 335, 481, Table 8 (2001).

<sup>22</sup> See *Martin Tells Reporters He Sees Progress on Broadband*, Video, '911', TR DAILY (Mar. 17, 2006).

<sup>23</sup> See *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Docket

marketplace, Commissioner Copps has indicated that wireless technology holds promise as a potential entrant.<sup>24</sup> Likewise, Commissioner McDowell has lauded not only the benefits of broadband, but the public interest benefits of new competition in the broadband marketplace.<sup>25</sup> Having concluded that “the public interest means securing access to communications for everyone,” Commissioner Adelstein “look[s] for opportunities for new entrants . . . who are seeking to compete in spectrum-based services.”<sup>26</sup>

### **Congress Provided Safeguards Against Regulatory Delay**

Even with the vigilance of individual FCC Commissioners to safeguard the public interest, Congress has also provided the whole Commission with the power and authority to overcome any unforeseen challenges that would delay its licensing process. It is crucial that the FCC use that authority to prevent incumbents from

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04-440 (rel. Mar. 20, 2006).

<sup>24</sup> See *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Power Line Systems, Carrier Current Systems, Including Broadband over Power Line Systems*, Statement of Commissioner Michael J. Copps, FCC 06-113 (rel. Aug. 7, 2006) (“Along with *wireless technologies*, Broadband over Power Line is a credible candidate for a ‘third pipe’ that could bring meaningful competition to this market” (emphasis added)).

<sup>25</sup> See *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Power Line Systems, Carrier Current Systems, Including Broadband over Power Line Systems*, Statement of Commissioner Robert M. McDowell, FCC 06-113 (rel. Aug. 7, 2006) (expressing optimism about broadband over power lines because new entry into broadband market would “help drive down consumer prices and foster innovative technologies”).

<sup>26</sup> Remarks of Commissioner Jonathan S. Adelstein, “Accessing the Public Interest: Keeping America Well-Connected,” 21st Annual Institute on Telecommunications Policy & Regulation, Washington, DC, December 4, 2003, at 1, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-241881A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241881A1.doc).

abusing regulatory processes to disadvantage new entrants that want to promote new and better service to the American people.

Notably, Section 7 of the Act, 47 U.S.C. § 157, provides that the Commission “shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.” This statutory provision was enacted to: (1) “encourage the availability of new technology and services to the public”; (2) prevent the Commission from “hamper[ing] the development of new services”; and (3) allow “the forces of competition and technological growth [to] bring many new services to consumers.”<sup>27</sup> As Congress recognized when it enacted the statutory provision, delays in authorizing new services often result from opposition from incumbents seeking to limit competition and thus placed the burden of proving that such new services and applications are not in the public interest on those that oppose it.<sup>28</sup> The key to promoting the public interest is to have spectrum licensing procedures that promote market entry.<sup>29</sup> In light of the Commission’s self-imposed policy of providing expeditious review of mergers and license transfer transactions that lead

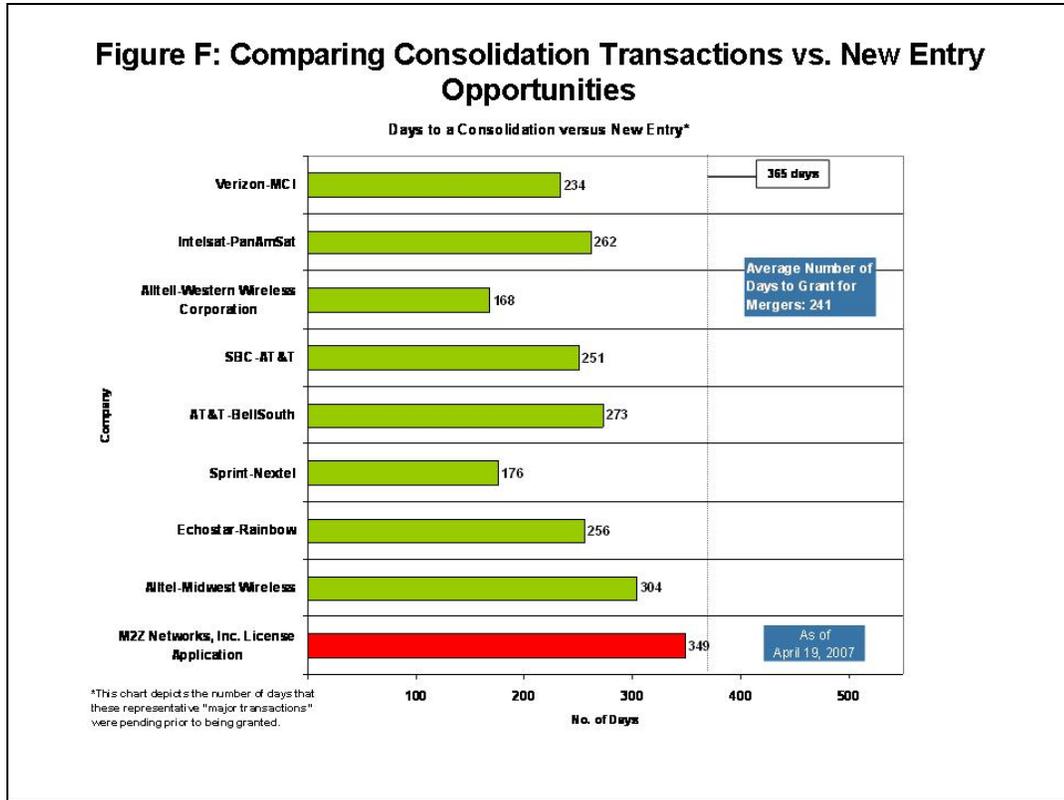
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<sup>27</sup> 47 U.S.C. § 160(a).

<sup>28</sup> See Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984).

<sup>29</sup> The goal of Section 7 to expedite market entry was repeated in the 1996 Act with the passage of Section 271. That section permitted entry into new markets by large local exchange carriers based on a 90 day time clock. These statutory provisions reiterate the importance of Commission processes that promote timely market entry.

to market concentration, the Section 7 one year statutory timeframe approving new licenses and new services is more than appropriate.



Similarly, Section 10 of the Act requires the Commission to forbear from applying any rule or any provision of the Act that is neither necessary to protect consumers nor to ensure that rates are just, reasonable, and non-discriminatory, provided that forbearance otherwise is consistent with the public interest. Congress anticipated that the Commission would use its forbearance authority to end unnecessary regulation and reduce the regulatory burdens on new entrants. And again, to expedite action on forbearance requests, Congress expressly limited the length of Commission deliberations on Section 10 petitions. M2Z has sought

forbearance under Section 10 for any and all regulatory or statutory provisions that might impede or impair the full and rapid deployment of its network.

M2Z's Application provides an ideal case for the Commission to utilize the myriad of tools at its disposal to further the foundational Congressional goal of bringing new competitive and affordable services and technologies to the public on an expedited basis.<sup>30</sup> No auction is required, no new rulemaking proceedings are needed, no further fact finding studies or other regulatory machinations are necessary or appropriate. Swift action to grant M2Z's application, based on the authority conferred to the FCC in Section 309(j)(6)(E) and consistent with Section 7 and Section 10 of the Communications Act, will help to promote facilities-based competition in the provision of broadband commercial mobile radio service, increase broadband penetration, and make more efficient use of a national spectrum resource currently underutilized.

### **Conclusion**

No one has ever heard of an “analog divide” because it does not exist. One can buy an inexpensive TV or radio, plug it in and never have to pay a recurring fee. M2Z seeks to accomplish the same thing for broadband access. M2Z's Application proposes the licensing and deployment of an innovative nationwide

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<sup>30</sup> Congress created the Commission “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151.

wireless broadband system. The public interest benefits of the system are substantial and well documented. The record before the FCC is complete and, in light of previously enacted legislation, no additional Congressional action is needed. M2Z has the technology, the energy, the vision, the funding, the public support and we have made explicit and transparent commitments that will significantly advance the public interest. The only question remaining is whether the Commission's rules, procedures, and policies can be manipulated by those seeking to protect their current market position to create a barrier to the rapid deployment of M2Z's new and innovative competitive broadband service.

\* \* \*

**APPENDIX 1**

**OF**

**Testimony of John B. Muleta**  
**CEO, M2Z Networks, Inc.**

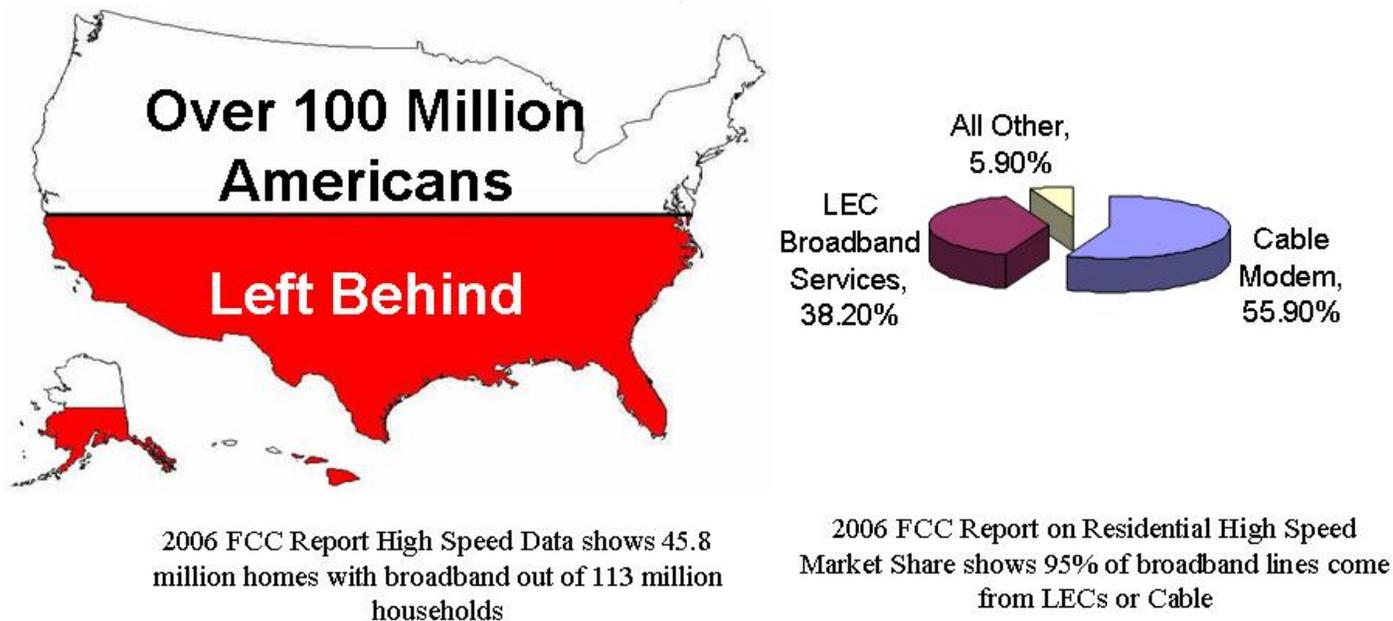
**(Graphical Illustrations)**

**Contents:**

- Figure A: The Impact of the Broadband Duopoly in American
- Figure B: Status of Emerging Broadband Spectrum Bands
- Figure C: Two Uncontested Economic Studies Calculate the Consumer Benefit of M2Z Networks' Public Interest Commitments as High as \$32.4 Billion
- Figure D: M2Z's Public Interest Commitments Exceed even the AT&T/BellSouth Merger Requirements
- Figure E: Average Nationwide Spectrum Holdings of Major Wireless Carriers Opposing M2Z
- Figure F: Comparing Consolidation Transactions vs. New Entry Opportunities

**April 19, 2007**

## Figure A: The Impact of the Broadband Duopoly in America

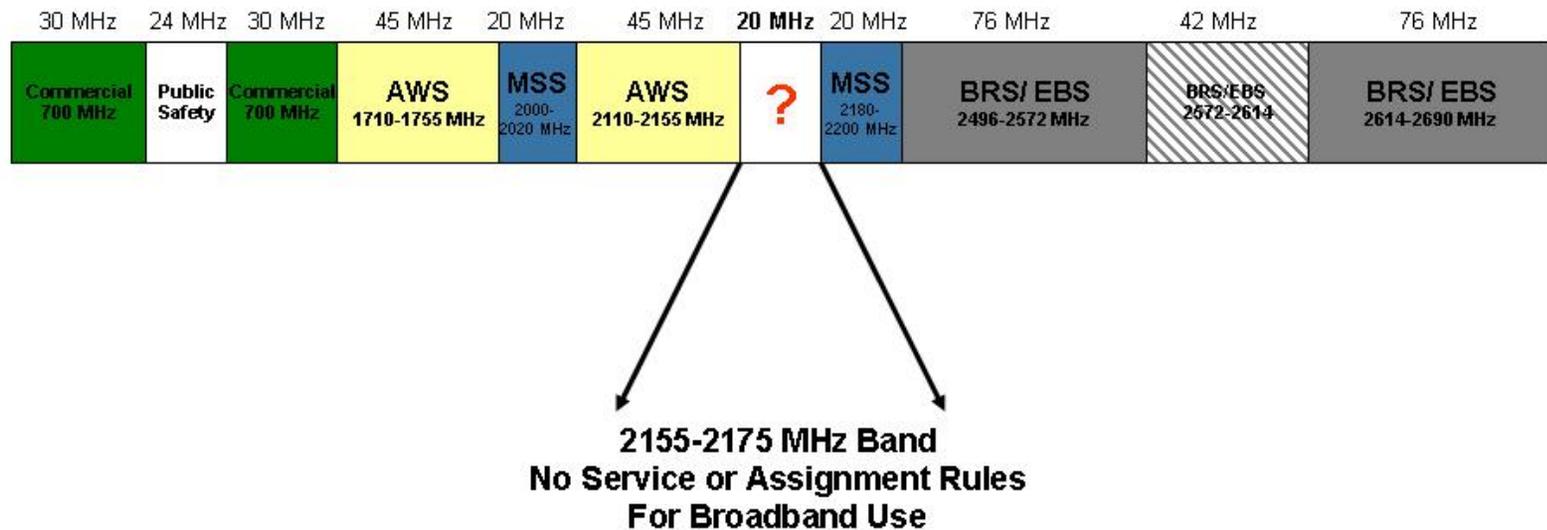


### Federal Government Agencies agree that the Broadband Market is Duopoly:

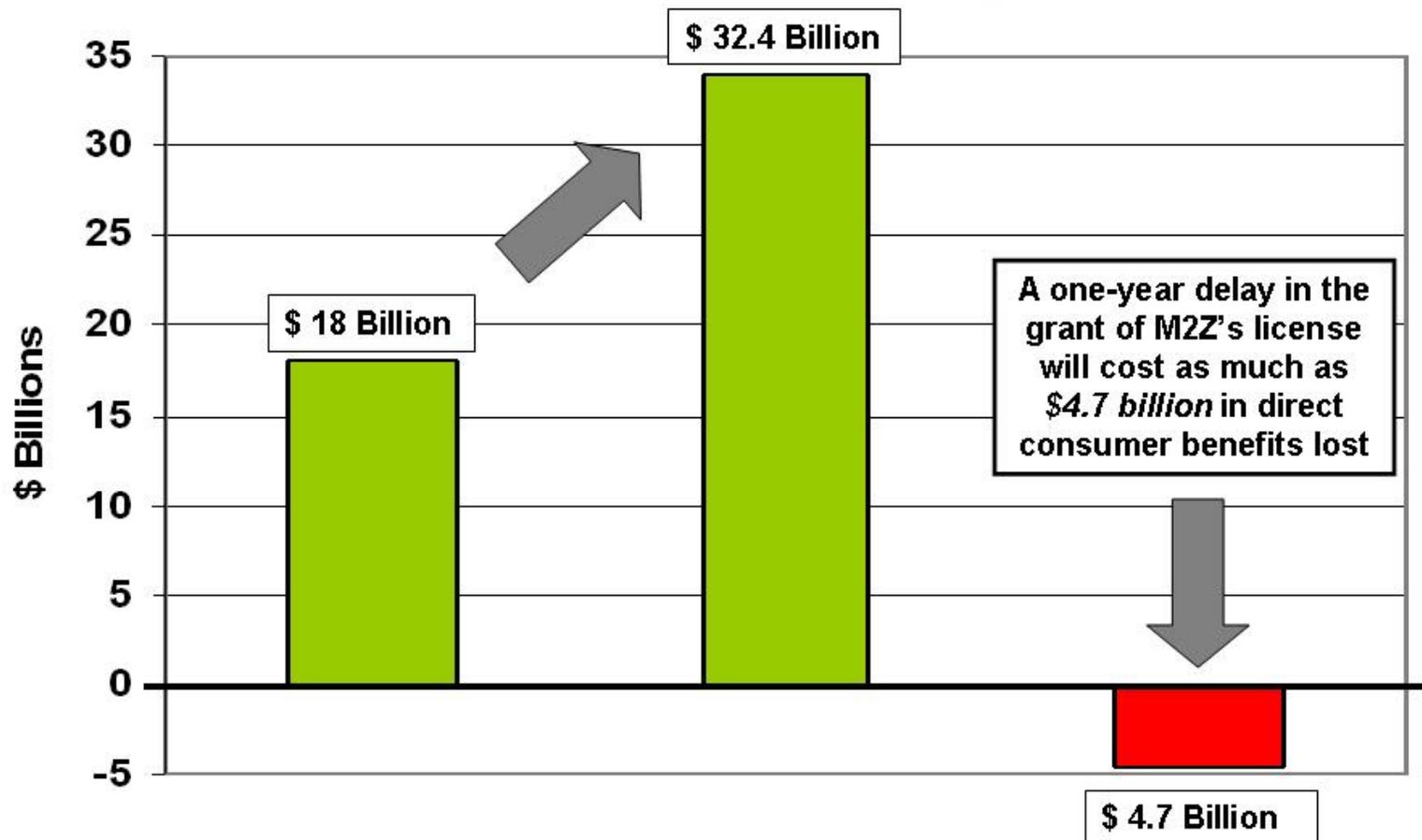
- **Government Accountability Office**, Report to Congressional Committees, May 2006
- **Congressional Research Service**, Report for Congress, June, 2006
- **Congressional Budget Office**, Report prepared for the Senate Budget Committee, December, 2003

## Figure B: Status of Emerging Broadband Spectrum Bands

\* Not drawn to scale



**Figure C: Two Uncontested Economic Studies Calculate the Consumer Benefit of M2Z Networks' Public Interest Commitments as High as \$32.4 Billion**



Sources: Former FCC Chief Economist Dr. Simon Wilkie conservatively calculated the consumer benefit of M2Z Networks' public interest commitments from \$18 billion to as high as \$25 billion over the life of the license. Alternatively, a study by Dr. Kostas Liopiros found that those benefits could reach as high as \$32.4 billion. The direct cost to consumer benefit of a one-year delay in the grant of that license was calculated at up to \$4.7 billion.

## Figure D: M2Z's Public Interest Commitments Exceed even the AT&T/BellSouth Merger Requirements

### M2Z Application

**M2Z will deliver Free, Fast, Family Friendly consumer wireless Broadband to a minimum of 95% of the US Population for the 15 year license**

- » Free Service at minimum 384 kbps with no contract or long term commitment
- » Family Friendly service with filtering in the network for the Free Service
- » Build-out commitments as a condition of the license: 95% of the US Population in 10 years with intermediate milestones of 33% in 3 years, 66% in 5 years
- » Public Safety – free use of the network with traffic prioritization and pre-emption in emergencies
- » Will not take from USF; will pay into USF
- » Pay 5% of premium services for use the spectrum

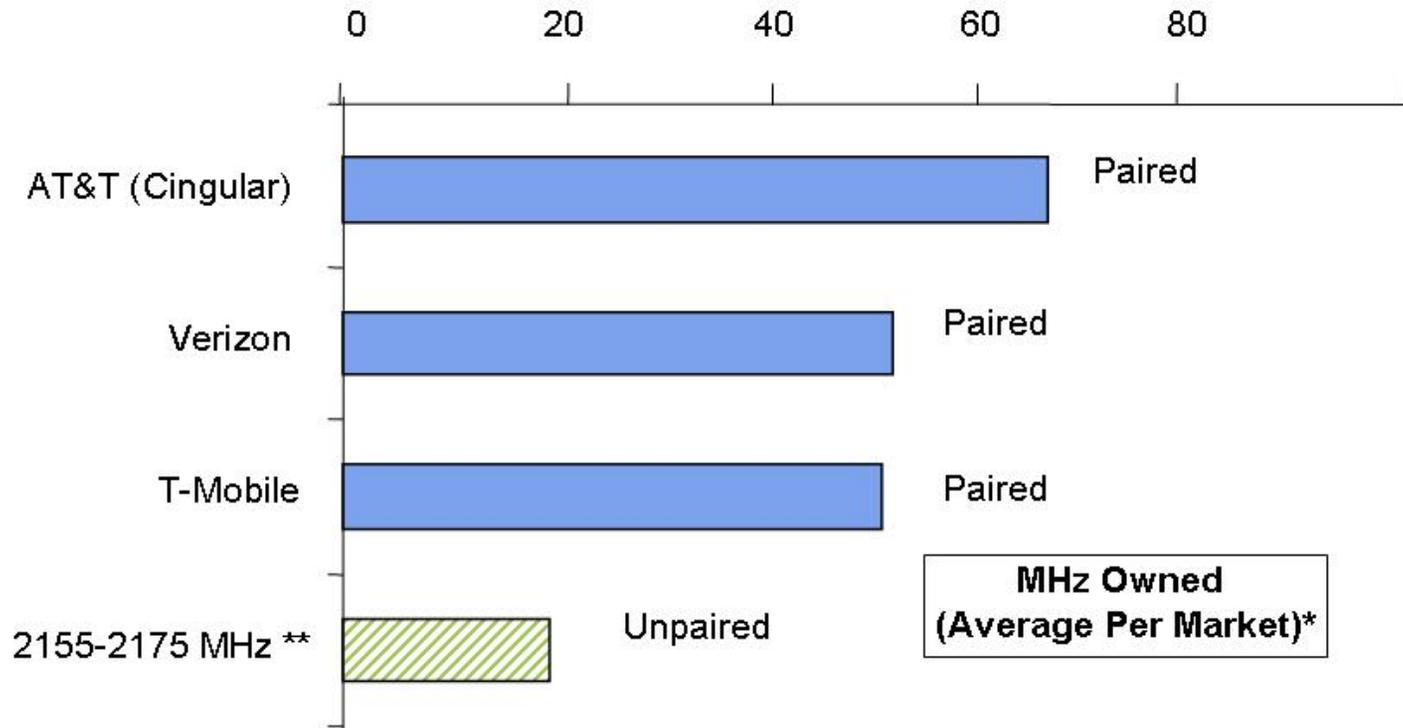
### AT&T BellSouth Merger Conditions

**Combined AT&T/BellSouth has been required to provide broadband service to their service territory for 3 years**

- » \$10 unbundled DSL service to new customers
- » Free modems to customers that upgrade from dial-up with a 12-month contract
- » Report in 12 months on efforts to provide high quality service to customers with disabilities
- » Divestiture of 2.5 GHz Spectrum to new broadband entrant (Clearwire)
- » Mandated interim build out of 2.3 GHz holdings

  
Greater  
Than

**Figure E: Average Nationwide Spectrum Holdings of Major Wireless Carriers Opposing M2Z**



Source: Company Filings and JP Morgan and Morgan Stanley Research

\* Average MHz is across major markets.

\*\* M2Z's proposed spectrum assignment as detailed in the company's May 5, 2005 application filing to the FCC.

## Figure F: Comparing Consolidation Transactions vs. New Entry Opportunities

Days to a Consolidation versus New Entry\*

