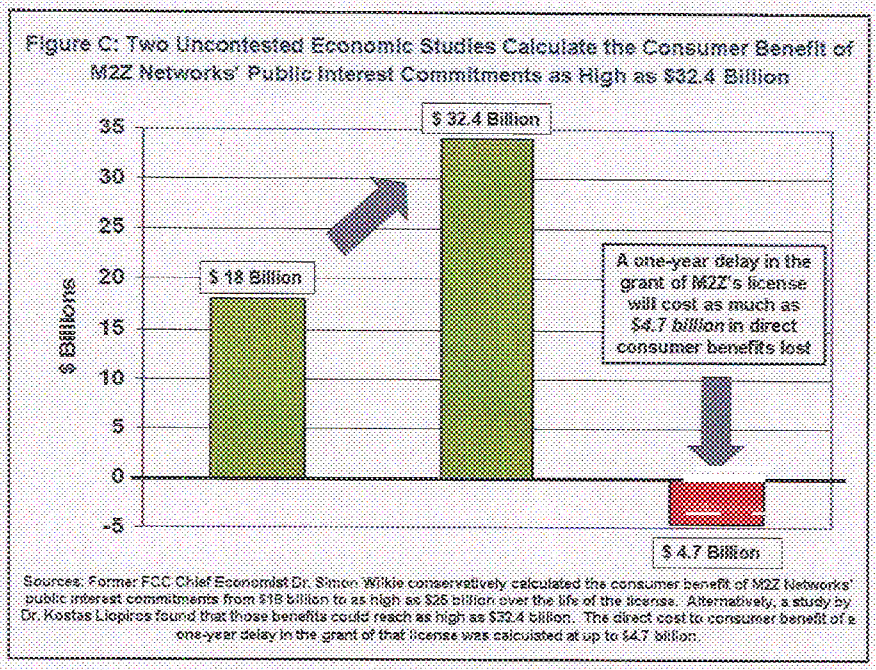

Indeed, Dr. Liopiros' study finds that the consumer welfare benefit of M2Z's network will decrease significantly (by as much as 4.7 billion dollars) for each year of delay in granting the license application.

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

M2Z Application

M2Z will deliver Free, Fast, Family Friendly consumer wireless Broadband to a minimum of 95% of me 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, 53% in 5 years
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- Will not take fmm USF; will pay into USF
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> Greater Than

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- $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

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.

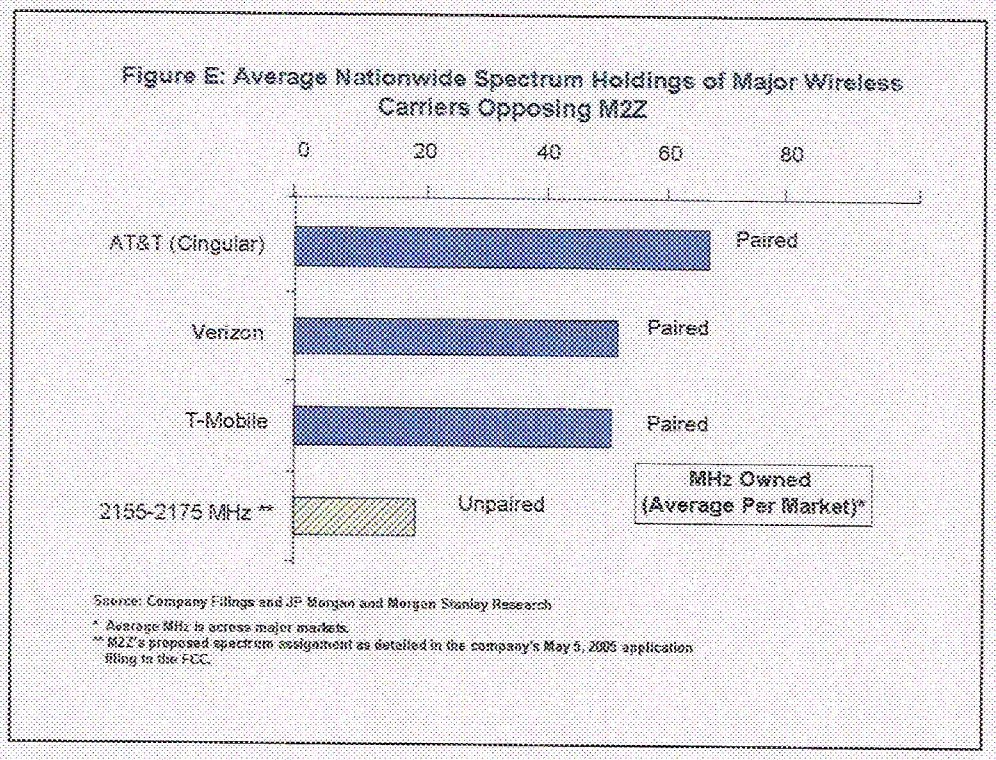
Further, despite what the proponents of competitive bidding might argue, it

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.[18] 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

[18] The Office of Management and Budget has said that "[u]ser fees will help to ensure that spectrum is put to its highest arid 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.[19] 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

[19] *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 Febnuary 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.[20]

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

[20] 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.[21] **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.[22] Elsewhere, the Chairman and Commissioner Tate have acknowledged that forbearance **is** among the available means by which the Commission can "establislh a policy environment that facilitates and encourages broadband investment, allowing market forces to deliver the benefits of broadband to consumers."[23] Having long advocated competitive entry into the broadband

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[21] ***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).

[22] ***See Martin Tells Reporters h e Sees Progress*** *on* ***Broadband, Video, '911'***, TR **DAILY** (Mar. 17, 2006).

[23] ***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.[24] Likewise, Commissioner McDowell has lauded not only the benefits of broadband, but the public interest benefits of new competition in the broadband marketplace.[25] 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."[26]

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).

[24] ***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)).

[25] ***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").

[26] 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.

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

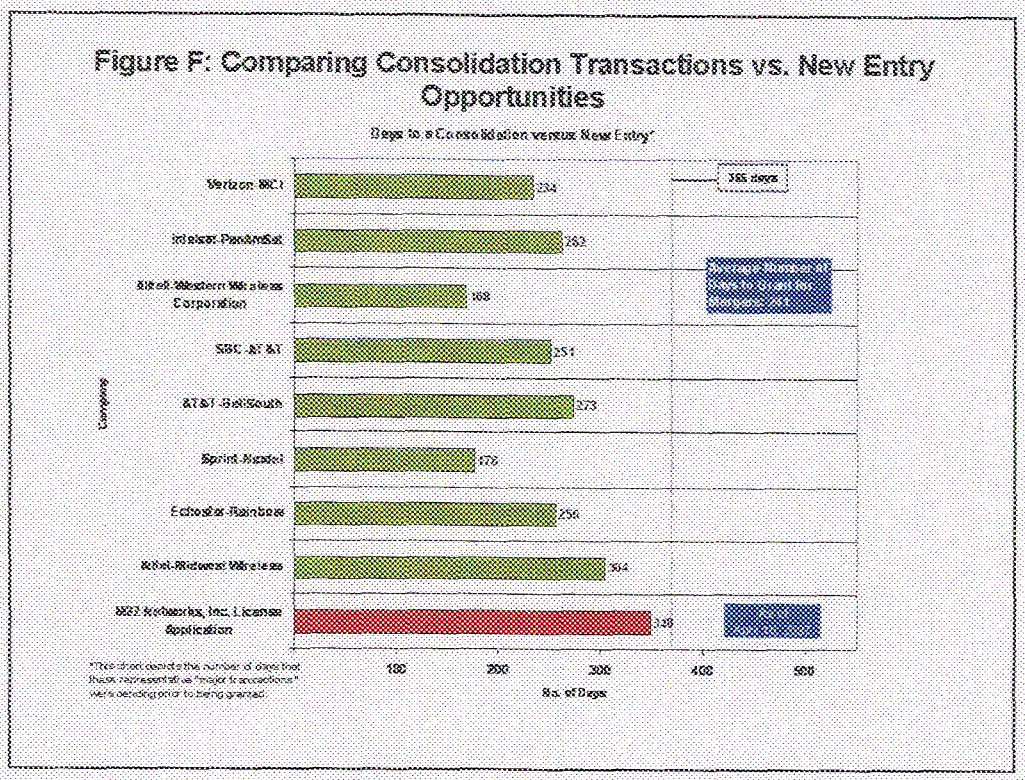
Notably, Section 7 of the Act, 47 U.S.C. § 157, provides that the Commission "shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed." This statutory provision was enacted to: (1) "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."[27] 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.[28] The key to promoting the public interest is to have spectrum licensing procedures that promote market entry.[29] In light of the Commission's self-imposed policy of providing expeditious review of mergers and license transfer transactions that lead

[27] 47 U.S.C. § 160(a).

[28] ***See*** Extended Remarks of Hon. **John** R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (**Jan.** 24, 1984).

[29] 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. [30] 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

[30] 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

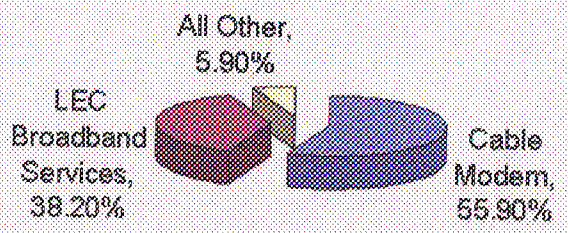
Figure E: Average Nationwide Spectrum Holdings of Major Wireless Carriers Opposing M2Z

Figure F: Comparing Consolidation Transactions vs. New Entry Opportunities

April 19,2007

Figure A: The Impact of the Broadband Duopoly in America

2006 FCC Report High Speed Data shows 45.8 million homes with broadband out of 113 million households



2006 FCC Report on Residential High Speed Market Share shows 95% of broadband lines come from LECs or Cable

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**

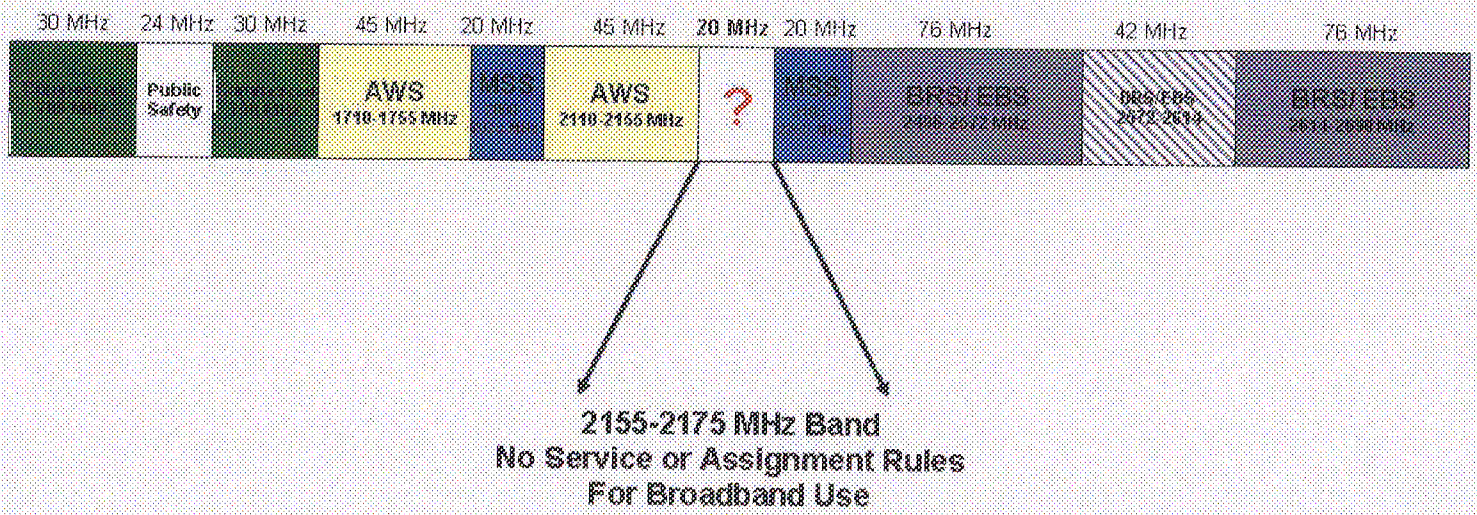
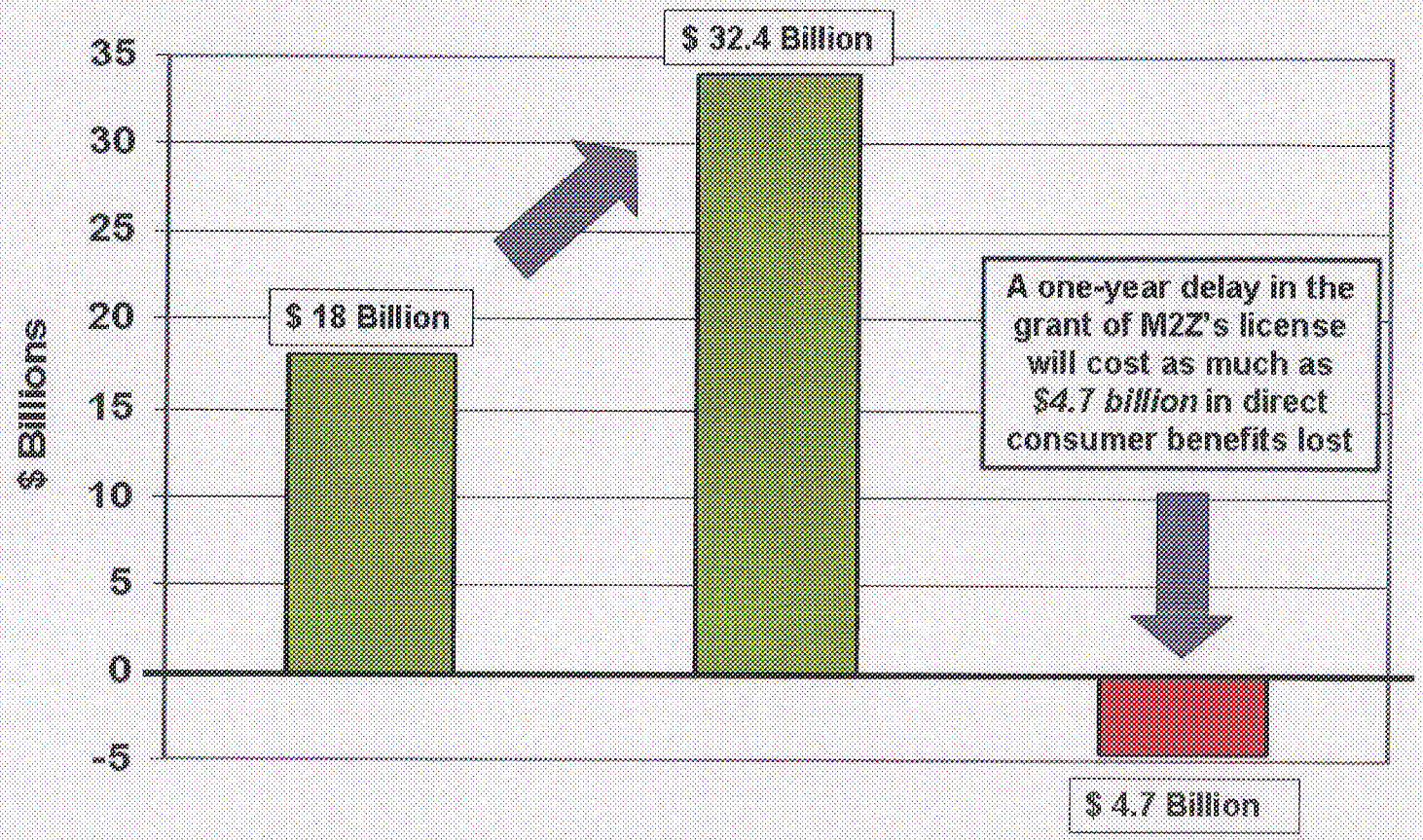


Figure C: Two Uncontested Economic Studies Calculate the Consumer Benefit of M2Z Networks' Public Interest Commitments as High as $32.4 Billion



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

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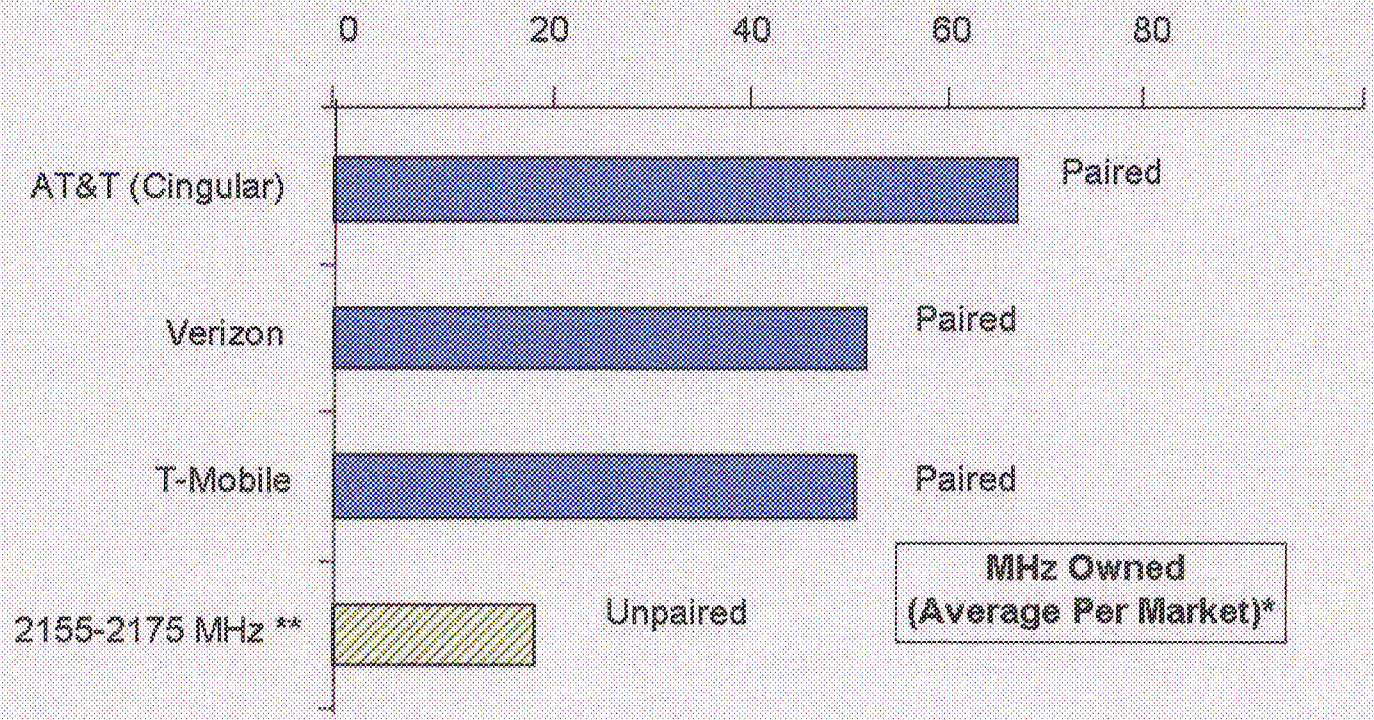
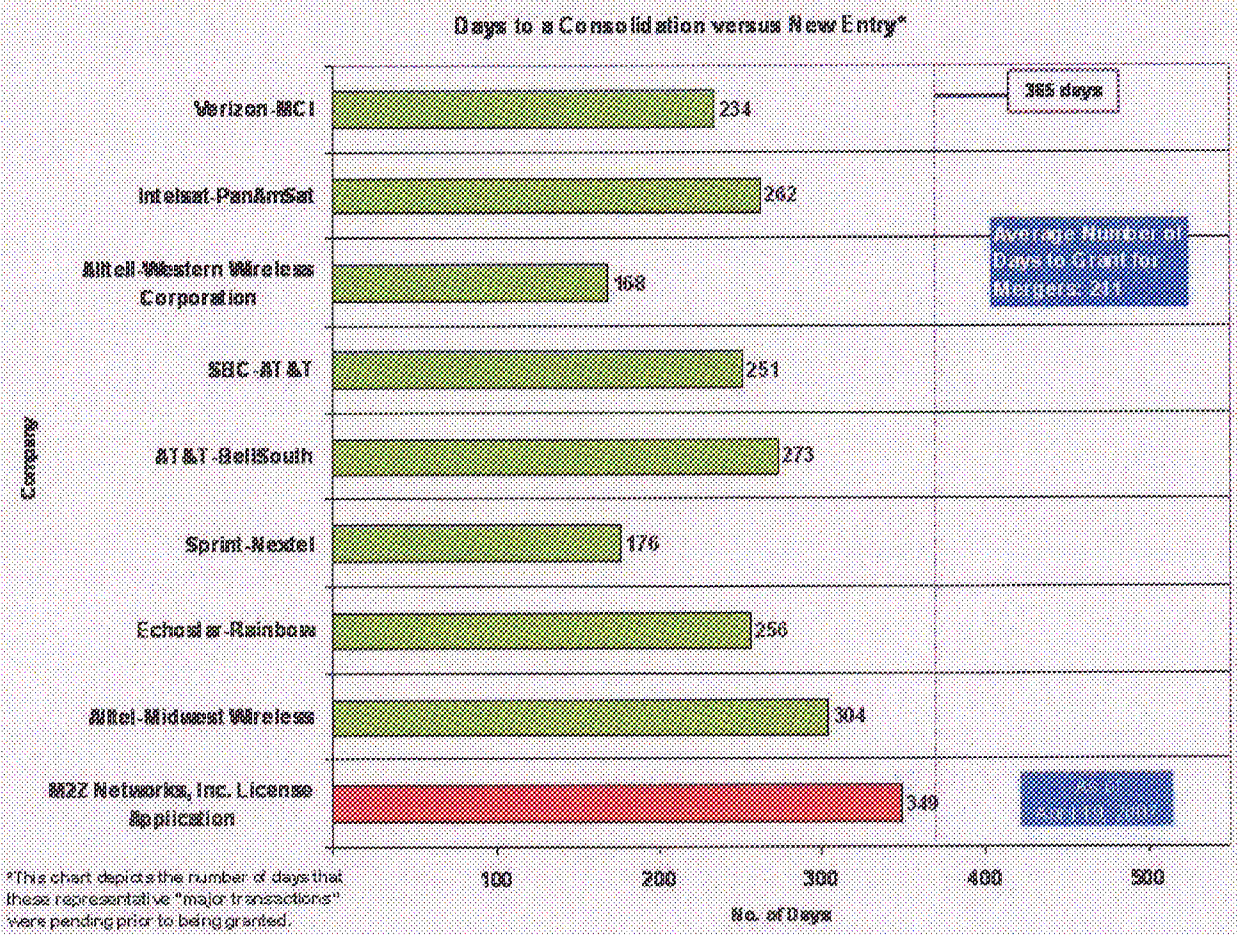
Figure E: Average Nationwide Spectrum Holdings of Major Wireless Carriers Opposing M2Z



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



*This chart depicts the number of days that these representative "major transactions" were pending prior to being granted.

Oral Testimony of John Muleta,
CEO of M2Z Networks, Inc.

The U.S. House of Representatives Subcommittee on Telecommunications and the Internet
April 19,2007
*** as prepared for delivery**

Mr. Chairman and Members of the Committee, my name is John Muleta and I am the co-founder and CEO of M2Z Networks. Thank you for the honor of inviting me to testify on Spectrum and our country's digital future. **As** an initial matter, **I** would like to request that my testimony and supporting documents be incorporated into the record of this hearing.

Let me start by quickly telling you about M2Z. My business partner, Milo Medin, and I founded the company in 2005 with the support of three leading Silicon Valley

venture capital firms. Our goal was to use spectrum and wireless technologies to solve two of the more pressing and vexing challenges in the communications industry today. These challenges are:

- First, how to provide for **affordable, universally available and accessible broadband to the over 100 million** Americans, and their children, who continue to be stranded on the wrong side of the digital divide to our country's ultimate competitive disadvantage; and

- Second, how to make better use of underutilized and fallow spectrum---one of the country's most precious natural resources----with innovative technology so that it benefits American consumers

of all types and all means just as Congress intends spectrum to be used.

In light of these challenges, the key to equitable and effective use of spectrum is a transparent and timely assignment process that is driven by a well-defined public interest objective such as solving the broadband divide. There is bipartisan support---led by the President and the Speaker of the House---that the public interest today is best served by a renewed and aggressive commitment to solve the broadband divide. It is also manifestly clear---despite what you might hear otherwise---that auctions are not the short hand for determining such public interest.

In its license application, M2Z has transparently demonstrated the best and highest use of the 20 MHz of

unpaired and fallow spectrum found at 2155-2175 MHz band. M2Z has committed to build a family friendly nationwide broadband network that provides the public the following immediate and direct benefits:

- access to an always on free broadband connectivity at least six ***(6)*** times faster than dialup;
- filtering of pornography and other indecent material from the free network so it is safe and accessible to our children ;
- a free secondary interoperable broadband data network for public safety officials and first responders; and
- payments to the Federal Treasury of 5% of gross annual revenues from our premium subscription service.

Most importantly, M2Z is using private sector funding to build this competitive nationwide third pipe that will reach a minimum of 95% of the US population, all without taking any support from the Universal Service Funds.

Today, perhaps the greatest impediment to our nation's digital future is the sad fact that the US broadband market is a duopoly that limits consumer choice and discourages price competition. This is not a statement that I make of my own accord. In fact, both the GAO **and** the Congressional Research Service reported this very same conclusion to Congress in the past year. Likewise, the FCC's annual status report on broadband Internet access shows that incumbent phone and cable operators dominate the residential broadband market with 95% market share.

Without a doubt, U.S. broadband consumers are starving for services and prices like those that M2Z will bring to the market place. **As** you know, Spectrum is a critical if not the only means for new nationwide broadband players like M2Z to enter the market and create the vibrant competition needed to close the today's broadband divide.

M2Z wants to recognize and thank Congress for having the wisdom and vision to mandate transparent and timely procedures that invite innovative entrepreneurs like us to remedy this country's broadband challenge. Congress has done so by empowering the FCC with numerous statutory tools that facilitate the goal of providing universal and affordable broadband access for the American public. The FCC can use its statutory authority found in Section 7, Section 10,

Section 309 and Section 706 to immediately act on M2Z's License Application. The FCC has already acted wisely by establishing a full and complete record on the merits of M2Z's license application. The FCC record contains uncontested economic analyses as well as the support of thousands of citizens and government officials from nearly every part of the country who are in overwhelming support of M2Z's use of this fallow spectrum. Their support is based on M2Z's transparent and vigorous public interest commitments and, I am proud to say, the character of its principals. Nevertheless, but for Congress' vision, M2Z would not have the means or the incentive to forward its innovative plans to the FCC and, most importantly, to the American people.

In closing, the M2Z team has the technology, the capital, the energy, and the overwhelming public support to make Congress' call for a broadband future for ALL Americans a reality. M2Z has made explicit and **enforceable** commitments that will significantly advance the public interest. There is no **reason** to wait any longer in granting M2Z its license to provide a FREE, FAST and FAMILY FRIENDLY Broadband network to all Americans. Thank you again and I look forward to answering your questions.