

**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 for Forbearance Under	)	WT Docket No. 07-30
47 U.S.C. § 160(c) Concerning Application	)	
of Sections 1.945(b) and (c)	)	
Of the Commission’s Rules and Other	)	
Regulatory and Statutory Provisions	)	

**EX PARTE WRITTEN COMMENTS OF M2Z NETWORKS, INC.**

M2Z welcomes the opportunity afforded by the Ex Parte Written Comments of the Public Interest Spectrum Coalition (“PISC”) dated August 28, 2007 to clarify its position on several issues raised as it relates to its license Application and Forbearance Petition.

First, M2Z agrees with PISC that the public interest would be served by a full and fair deliberative process over the issues raised in these dockets, including the constitutional issues regarding family-friendly filtering that PISC raised in its recent comments. We endorse PISC’s proposal that the Commission extend the time allotted for consideration of M2Z’s Forbearance Petition.

We reiterate our position that the deadline for the Commission to comply with its statutory duty under Section 7 to consider the public interest merits of M2Z’s Application has long since passed. In spite of the Agency missing the provision’s statutory deadline, Section 7 remains a substantive element of the FCC’s continued consideration of M2Z’s

application as it requires the burden of proving that the grant of M2Z's Application to provide a free and family friendly broadband service is not in the public interest to be shifted to those that oppose M2Z's license application. But as Milo Medin, Chairman of M2Z, committed in his letter to Commissioner Tate, dated August 27, 2007, M2Z will forbear for a reasonable interval from enforcing its judicial remedies with particular respect to the expiration of the Section 7 deadline because it is in the public interest to afford more time to the Commission's deliberative processes.<sup>1</sup>

Thus, we join PISC in urging the Commission not to act precipitously, on or before September 1, 2007, to deny M2Z's Application and Forbearance Petition.<sup>2</sup> Instead, we urge the Commission to afford itself additional time as permitted by Section 10 of the Communications Act so as to fully consider the interplay between the various complex policy and statutory issues that are implicated by M2Z's innovative application.

Second, we reiterate our commitment to a meaningful, nondiscriminatory wholesale offering in the spectrum band for which we seek a license, and our commitment to operate the network on an "open devices" platform. The latter goes well beyond the "open publication" commitment acknowledged by PISC and includes an arms-length, objective certification process not covered in PISC's filing, which M2Z believes would fence out the

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<sup>1</sup> Letter from Milo Medin, Chairman of M2Z Networks, Inc. to Commissioner Deborah Taylor Tate, WT Docket Nos. 07-16 and 07-30 (filed August 27, 2007)

<sup>2</sup> PISC raised, incidental to its main arguments, questions about M2Z's Title II status. In March 2007, the Commission determined that wireless broadband Internet access services are information services, and that such services are not commercial mobile radio service ("CMRS") as that term is defined in the Act and implemented in the Commission's rules. See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd 5901 ¶¶ 18-28 (2007) ("*Declaratory Ruling*"). Accordingly, M2Z plans to submit a modification to its pending license application to clarify that it does not propose to be regulated as a CMRS based on the services it plans to provide as defined by the FCC's Declaratory Ruling.

harms identified by PISC.<sup>3</sup> We also reiterate our desire to work with the Commission and its staff to translate these commitments into meaningful, binding service rules promulgated for the 2155 – 2175 MHz spectrum band, with which M2Z would comply if granted the license.<sup>4</sup>

Third, while we continue to urge the Commission that granting M2Z's Application as filed best serves the public interest, we acknowledge the possibility, raised in the PISC August 28 filing, that the Commission may be inclined to find it is in the public interest to implement alternative assignment mechanisms including an auction<sup>5</sup> and to issue a Notice of Proposed Rulemaking seeking comments on how to best implement such mechanisms. In that event, it is of the utmost importance to the public interest that the rules (1) ensure a speedy resolution of the NPRM and equally speedy conduct of the auction so as to ensure near-term deployment in the spectrum band; (2) insist upon a free service offering (i.e., no recurring airtime charges for a broadband service made available in the spectrum band);

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<sup>3</sup> See Letter from Uzoma Onyeije to Marlene H. Dortch, Secretary, FCC, WT Dockets 07-16 & 07-30 (filed Aug. 24, 2007) (detailing M2Z's position on the provision of wholesale broadband services and the deployment of an open platform for devices).

<sup>4</sup> Id. Although not directly applicable, M2Z has reviewed and supports the "net neutrality" provisions found in the BellSouth/AT&T merger conditions as those particular conditions are designed to prevent bottleneck facilities from being used to limit consumers' access to applications and devices. M2Z also recognizes that these conditions were merger specific and contemplated to be applied to an incumbent wireless/wireline retail carrier and require refinement in its application to a network such as the one contemplated by M2Z Networks which, unlike the AT&T network, is a wireless-only new entrant network operated by a service provider without any market power or control over end-to-end backbone resources. Accordingly, to the extent applicable to the unique circumstances of M2Z's proposed network, M2Z intends to deliver 'net neutral' (as defined in the BellSouth/AT&T merger conditions) free and premium retail services with the exception of mechanisms that are required to meet its public safety commitments and its commitment to provide consumers with a free and family friendly broadband offering. Additionally, M2Z will at all times operate the entirety of its network to optimize the availability and efficiency of all of its services to all of its subscribers (free and premium) and all of its business partners (wholesale) using network management and operational tools.

<sup>5</sup> M2Z applauds the PISC's welcome suggestion that the Commission should consider a fee based assignment mechanism as proposed by M2Z. See *Ex Parte* Written Comments of the Public Interest Spectrum Coalition, WT Docket 07-16 & 07-30 at 2 (filed Aug. 28, 2007).

and (3) require a nationwide population based buildout of the network in the spectrum band of greater than 95% within ten years of licensing.

Fourth, M2Z acknowledges, as PISC observes, that M2Z's proposed family-friendly filtering in the possible context of service rules raises important constitutional issues that deserve careful deliberation. M2Z continues to stand firmly by its commitment to offer family-friendly network-based filtering, if it is awarded the license, whether as proposed in its Application, or at auction and regardless of whether this is required in service rules for the spectrum band. M2Z believes that such a filter is an integral part of a responsible free service offering.<sup>6</sup> But the issue of how to treat this important issue is a serious one and there are highly divergent views.<sup>7</sup> This provides yet another reason for the

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<sup>6</sup> See attached document for additional background.

<sup>7</sup> See, e.g., Comments of Most Reverend Paul S. Loverde, WT Docket Nos. 07-16 and 07-30, at 2 (submitted Mar. 2, 2007) (emphasizing the importance of advancements like M2Z's network level filter to protect families from Internet pornography); Comments of United Families International, WT Docket Nos. 07-16 and 07-30, at 1-2 (submitted Mar. 16, 2007) (supporting access to "clean" wireless broadband for American families); Comments of Global H.A.W.C., WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 21, 2007) (supporting M2Z's filtering of destructive pornographic images); Comments of Family Watch International, WT Docket Nos. 07-16 and 07-30, at 2 (Submitted Mar. 16, 2007) (supporting M2Z's provisioning of high speed Internet access using a "very sophisticated filtering system"); Comments of Internet Keep Safe Coalition, WT Docket No. 07-16 and 07-30, at 2 (submitted Mar. 1, 2007) (expressing approval of M2Z's network-level filtering of indecent and pornographic material); Comments of Enough is Enough, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Mar. 13, 2007) ("By making a commitment to use highly effective network based filtering, M2Z has found an innovative balance between spurring the rapid adoption of high speed internet service and protecting children and families from on line pornography and sexual predators."); Comments of the National Center for Missing and Exploited Children, WT Docket Nos. 07-16 and 07-30, at 2 (submitted Aug. 6, 2007) (supporting M2Z's network based filter as "one of the best tools we have to fend off online predators, and prevent inappropriate content from reaching children."); Comments of University of Southern California's Center for Digital Future, WT Docket Nos. 07-16 and 07-30, at 2 (submitted Feb. 22, 2007) (supporting network level filtering as a means to "minimize the dangers of the Internet and help put the minds of parents and teachers at rest as their children and students go on-line."); Comments of Representative Mike Honda, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Feb. 21, 2007) (supporting filtering of the M2Z network in order to "keep impressionable children safe"); Comments of Representative Zoe Lofgren, WT Docket Nos. 07-16 and 07-30, at 1 (submitted July 31, 2007) (pointing out that M2Z has committed to provide "free, family friendly wireless broadband" to 95 percent of Americans); Comments of Representative Joe Pitts, WT Docket Nos. 07-16 and 07-30, at 1 (submitted May 24, 2007) (declaring that M2Z's offer to filter offensive content "would clearly benefit consumers"); Comments of Senator Sam Brownback, WT Docket Nos. 07-16 and 07-30, at 1-2 (submitted Mar. 23, 2007) (supporting giving parents the choice to adopt a filtered broadband Internet service); Comments of Senator Orrin Hatch, WT Docket Nos. 07-16 and 07-30, at 1 (submitted Feb. 16, 2007) (supporting "M2Z's commitment to filter indecent material from the free

Commission to afford itself more time for deliberation and not arbitrarily deny M2Z's Application and Forbearance Petition..

Fifth, we respectfully disagree with PISC that unlicensed or "license-lite" use represents the highest and best use of the 2155-2715 MHz spectrum band. As an initial matter, the Commission has already fully considered this type of use and already made the determination to not allocate the band for unlicensed use when it allocated 2155-2175 for fixed and mobile services. In the *AWS Eighth R&O*, the Commission designated the 2155-2175 MHz band for AWS use and harmonized the allocation of the entire block of spectrum by allocating the 2155-2160 MHz band to Fixed and Mobile Services in order to allow the provision of AWS in this band.<sup>8</sup> PISC's suggestion that the band be reallocated even before the Commission permits a licensee to provide the services for which the band was allocated and designated would simply add to the needless delay that has taken place in putting this spectrum to good use. Moreover, as explained below, an unlicensed allocation in this band would be problematic in several other respects.

The application of unlicensed underlays as proposed by the PISC is appropriate for spectrum that is using inefficient, non-adaptive waveform technology. There are many spectral bands where such inefficient technologies are being used. However, the proposed NBRS band is not one of them. M2Z is proposing a nationwide broadband network that will employ state-of-the-art efficient, adaptive waveform technology. Here, the

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broadband network" as "a much needed and long overdue private sector remedy to protect minors from the dangers of accessing pornography and indecent material over the Internet.").

<sup>8</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, ET Docket No. 00-258, *Eighth Report and Order, Fifth Notice of Proposed Rule Making, and Order*, 20 FCC Rcd at 15872, ¶ 9 (2005) ("*AWS Eighth R&O*").

combination of both applications, NBRS and unlicensed underlays, would generate significantly less efficient use of the spectrum compared to NBRS alone and less efficient use compared to unlicensed alone. In addition, the FCC last year rejected this approach and need not revisit that decision in light of the highly spectrally efficient use proposed by M2Z and the broad based consumer benefits that have been overwhelmingly and conclusively documented in the above-referenced M2Z dockets.

Further, the reallocation of this particular band solely for unlicensed use would also constitute highly inefficient use of this spectrum, particularly in light of M2Z's proposed use. Past allocations of unlicensed bands have demonstrated that unless there is sufficient spectrum allocated, the non-interference aspect of unlicensed devices create a "tragedy of the commons" resulting from congestion as no single party can effectively address interference and overall capacity utilization that comes with rapid consumer adoption.<sup>9</sup> Thus, recent FCC practice has been to allocate large quantities of spectrum for such types of shared uses. Additionally, despite PISC's statements to the contrary, developing unlicensed equipment for the 2.1 GHz band while affording protection to the neighboring bands, although possible and theoretically appealing, has not taken place and would take significant effort, time and expense to make a reality.

Finally, although the PISC believes that unlicensed use and unlicensed underlays provide for additional opportunities for use of this band, M2Z believes that such uses will

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<sup>9</sup> According to the FCC's Spectrum Policy Taskforce "unlicensed devices" and "unlicensed consumer devices" are used to refer to intentional radiators or low power transmitters regulated under Part 15, and include a wide range of devices ranging from cordless telephones, remote control toys as well as computer and data networking devices. The core premise of all Part 15 unlicensed operation is that unlicensed devices cannot cause interference to licensed operations nor are they protected from any interference received.

not guarantee American consumers a free, competitive, nationwide broadband access network.<sup>10</sup>

Respectfully submitted,



Uzoma C. Onyeije  
VP of Regulatory Affairs  
M2Z Networks, Inc.

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<sup>10</sup> *See, e.g.*, Comments of New America Foundation, et. al. WT 06-49 (filed May 30, 2006). In this exhaustive filing, NAF and its colleagues describe the tortured history of the M-LMS band in 904-928 MHz band which is a reminder of the long delays with the FCC's spectrum management and assignment processes. The Commission began the proceeding for this band in 1974 culminating with a disappointing auction in 1999 which has led to limited development for the band for new services while continuing to stir regulatory debate to about the "highest and best use" of the band. The unusual history of this band makes it especially pertinent to the PISC's opinion for underlays and unlicensed uses in the 2155-2175 MHz band. The Commission allocated and assigned the 904-928 MHz band to dual use for both LMS and unlicensed uses with power limitations and a "safe harbor" to protect unlicensed users. The Commission's experiment with this band illuminates the challenges facing PISC's suggestion of co-joining different modes of spectral use in a relatively narrow slice of spectrum such as 2155-2175. When the M-LMS service was allocated and assigned by auction in 1999, the market accurately predicted---with a total of \$4.5 million paid for all the licenses in the country---the difficulty that M-LMS licensees would have in making effective and efficient use of this spectrum given the significant power limitations and "safe harbors" imposed on the band in order to accommodate unlicensed uses. This reality is in spite of the fact that the 900 MHz band has more ideal propagation characteristics than the 2155-2175 MHz band. On the other hand, the unlicensed community has despaired of making any greater use of this spectrum due the intense congestion from the rapid proliferation of all the varied types unlicensed devices designed to work in this band. More recent allocations of unlicensed and shared spectrum uses like the 5.0-5.8 GHz bands (250 MHz) and 3650-3700 (50 MHz) have involved significantly larger spectrum blocks in order to avoid such outcomes.

**Background on M2Z's Free & Family Friendly Nationwide Broadband Service Proposal,  
The Recent Comments from Family Values Advocates In Support of M2Z, and the Public Interest  
Spectrum Coalition Raising Constitutional Concerns**

**August 2007**

It is increasingly difficult to protect children from indecent material, especially given the pervasive nature of harmful sexual and violent content on modern communications media. In an era of media convergence that blurs the line between broadcast television, radio, broadband Internet, and traditional telecommunications like cellular, it has become nearly impossible for parents concerned about exposure of their children to indecent or unlawful material to find tools that allow them to easily and reliably monitor and avoid such content.

Further, it is not clear that the tools developed for each of these mediums when they were unrelated (such as the V-Chip for television and computer based content filtering based tools for the Internet) can be effective when all content is being automatically repurposed across different mediums. In other words, how do parents using the V-Chip to block inappropriate television ensure that their children don't go to the Internet and access the very same content their parents deemed inappropriate?

In light of this growing challenge that media convergence is bringing to the market, parents, state and federal legislators and regulators like the Federal Communications Commission (FCC) have been vexed by the fact that legislative and regulatory fixes are often no more than temporary measures because, in the final analysis, they have not comported with the federal judiciary's understanding of the Constitution. The Communications Decency Act was famously overturned 10 years ago and more recent efforts to find tailored solutions have also failed. Just this year, several well-intentioned state and federal government initiatives to protect children from indecency have also been rejected by the federal courts. With so much legal uncertainty surrounding government action in this area, a more durable solution is needed.

For companies subject to the jurisdiction of the FCC, a simple solution that passes constitutional muster is for the companies to work with the FCC to identify and implement voluntary means for protecting children from indecent materials on the various converged media platforms. This is the type of solution that M2Z's license application proposes and reflects the type of innovative approach that the cable industry adopted in the spring of 2007.

**M2Z's License Application to Provide Free and Family Friendly Nationwide Broadband**

America's broadband Internet deployment goals are going unmet and America's international rankings in broadband continue to fall rapidly. Many families, schools and libraries, in both rural and urban America, cannot access or afford broadband.

Once online, many families are also concerned about the growing threat to children of easily accessible indecent and pornographic material. In May 2006, M2Z applied for a license with the FCC to use fallow, unpaired spectrum to provide free and family-friendly wireless broadband Internet connectivity to at least 95% of the US population.

As there are significant Constitutional concerns regarding the blocking of indecent content on the Internet, M2Z has creatively sought to solve this problem by voluntarily imposing on itself the obligation to provide a family friendly network for its *free broadband service* using network based filtering technologies that are readily available and used by many corporations and institutions. M2Z also offers a "premium" subscription service that operates at a higher speed and allows adults the ability to remove the network based filter. Providing consumer choice addresses Constitutional concerns that could be implicated by a government mandated application of such a tool. M2Z believes that its *voluntary and market based* solution allows all Americans to access broadband equitably and represents a reasonable and sound market based solution to what is a recurring challenge for American parents and consumers.

**Recent Developments:**

## **Prominent Family Values Organizations File in Support of M2Z**

On August 22, 2007, The Family Research Council (FRC) joined hundreds of family organizations, federal, state and local elected officials who already support M2Z's family friendly broadband service. The FRC filed a letter to the FCC Commissioners urging Chairman Martin to immediately approve M2Z's application. Tony Perkins, FRC President said, "Congress granted the Commission broad powers to act in the public interest. M2Z will offer porn-free wireless access to the Internet... This could be a revolutionary product, and as the record shows, the reception to the M2Z concept has been overwhelmingly favorable." For more details on this letter, please go to: <http://www.m2znetworks.com/letters>

## **Public Interest Spectrum Coalition Ex-Parte Filing at the FCC**

On August 28, 2007, the Public Interest Spectrum Coalition (PISC) consisting of Free Press, Media Access Project and Consumers Union and others, filed comments into M2Z's public record at the FCC opposing M2Z's voluntary content filtering on its free broadband service. PISC added that, "granting the license subject to a filtering condition... raises serious First Amendment concerns as well as statutory concerns." For more details on the PISC Filing, please go to: [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519708118](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519708118)

## **Summary of Key FCC Statements on Indecency and the Internet**

**Chairman Martin** – "I continue to believe that the most important thing we should be doing in these areas is giving parents more control over content, and I think that you can do that most easily by letting them pick and choose which channels they want to buy. That is the single most important thing we could end up doing to give additional tools for parents to try to control content they are concerned about." Broadcasting & Cable, 4/9/2007

**Commissioner Tate** – "With one in five children being confronted by child predators online, we should all be concerned about protecting our children in cyberspace. I am pleased to see industry stepping up to provide more tools for parents." Press Statement by FCC Commissioner Deborah Taylor Tate on the National Cable and Telecommunications Association and the Creative Coalition Announcement of their Voluntary Internet Safety Initiatives. June 2007.

**Commissioner Copps** – "The FCC has a duty to find a way to breathe life into the laws that protect our kids. ...Enforcing the laws against indecency, profanity and obscenity must remain a Commission priority — America's families and children expect and deserve no less." Commissioner Copps Disappointed In Court Decision On Indecency Complaints. Press Release, June 4, 2007.

## **Background on Legal and Constitutional Issues Raised by M2Z's Voluntary Commitment to Provide Free and Family Friendly Nationwide Broadband**

**MARCH 2007 – STATE INDECENCY LEGISLATION OVERTURNED** --- Earlier this year, the Utah legislature passed a bill that repeals portions of the state's adult content law, *Pornographic and Harmful Materials and Performances*, that requires Internet service providers in the State of Utah to block sites the Utah Attorney General deems to be harmful to minors. The Bill was in response to a November 2006 decision of the U.S. District Court for the District of Utah that prohibited the enforcement of certain sections of the legislation establishing an adult content registry and requiring ISPs to (1) identify material "harmful to minors" and (2) block registered content to customers upon request as these provisions were deemed unconstitutional.

**MARCH 2007 – FEDERAL INDECENCY LEGISLATION OVERTURNED**---In March 2007 a federal court ruled that the Child Online Protection Act, a bi-partisan federal statute, violates First and Fifth

Amendment rights. The 1998 law included both civil and criminal penalties for those who make sexually explicit materials freely available on the Web. The court ruled that COPA is too "impermissibly vague and overbroad" to be constitutional, and that there are other less-restrictive means available for protecting children from content deemed inappropriate. The Judge rendering the decision noted that the law *mandated* his ruling and added his "personal regret at having to set aside yet another attempt to protect our children from harmful material."

**JUNE 2007 – TWO FCC INDECENCY ORDERS VACATED**---An appeals court determined that the FCC can't find broadcasts indecent if they include a single curse word. The court complained that the agency changed enforcement policy without giving sufficient reason for doing so or analyzing the change. In making its ruling, the U.S. Appeals Court, N.Y., remanded the whole "fleeting expletive" policy to the FCC, vacating 2 orders finding Fox's *Billboard* 2002 and 2003 shows indecent. The ruling was limited to Administrative Procedures Act considerations, but the court said the fleeting expletive policy may not be Constitutional. Observers believe it is very unlikely that: (i) an appeal would be granted and (ii) the FCC could win.

## **SUMMARY**

**VOLUNTARY EFFORTS ARE EFFECTIVE AND IMMEDIATE**---Unlike generalized government mandates, meaningful voluntary corporate efforts do not involve government action and do not transgress either the Bill of Rights or the Administrative Procedures Act. Thus, such commitments can be implemented without delay and are likely not to be subject to significant judicial uncertainty. This is critical because parents cannot afford to wait months or years to protect their children from the challenges presented by today's converged media environment. Moreover, the promotion of voluntary measures is, in fact, a fulfillment of the Constitutional directive that the government must explore "less-restrictive means" for protecting children from the harms of indecent material. The FCC should take every opportunity to promote and support voluntary industry efforts on indecency in order to protect America's children. If the FCC encourages more competition and a vibrant culture of "voluntary protection," consumers will demand that all service providers find ways to innovatively address these types of challenges in order to distinguish themselves in the marketplace.