August 30, 2007

Via Electronic Filing

Samuel L. Feder
General Counsel
Federal Communications Commission
445 Twelfth Street, SW, TW – A325
Washington, DC 20554

Re: Written Ex Parte Presentation: Litigation Risk Associated with Proposed Draft Order in WT Dockets Nos. 07-16 and 07-30

Dear Ms. Dortch:

On August 27, 2007, Mr. Milo Medin, Chairman of M2Z Networks, wrote to Commissioner Tate and committed that M2Z would forbear for a reasonable interval from exercising litigation options that became available when the Commission failed to render a timely decision on M2Z's application as required by Section 7 of the Communications Act. Mr. Medin wrote that the company extended this offer in the hope that "it will provide a useful path forward to bring the benefits of our proposed new service to the millions of Americans who are waiting for free, family-friendly broadband." In honor of that commitment, and in light of press reports that the Commission is considering alternative approaches for the assignment of the spectrum sought in the M2Z application, we have contacted each of the Commissioners to discuss how the National Broadband Radio Service (NBRS) proposed in M2Z's application could still come to market for the benefit of American consumers and the public interest. We will diligently pursue these discussions because we believe that they can lead to an outcome that serves the public interest and launch this innovative broadband service across the country.

As we have pursued our advocacy at the Commission this past week, we have also come to understand from the various Commissioner offices that they have not been fully briefed on the potential litigation risk entailed in the proposed Order denying M2Z's license application and forbearance petition. We are frankly surprised that the Commissioners have not been afforded the opportunity to fully comprehend the myriad of legal and regulatory challenges, extending far beyond Section 7 compliance, that this proposed Order on circulation would raise for the Commission under judicial scrutiny. We believe there are serious defects likely enveloped in this proposed Order. We believe it is prudent and obligatory for a party who has identified legal issues regarding a decision under consideration by the Commission to communicate its concerns to the Commission and the Office of the

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General Counsel. We therefore respectfully ask to meet with you so we can discuss with you in detail the potential legal defects in the decision under consideration and help frame your advice to the members of the Commission.

In summary, it is our view that any Commission decision like the proposed Order reportedly now on circulation would be vulnerable to judicial attack on several substantive legal grounds under the Administrative Procedure Act and other relevant statutory provisions. Our review of the extensive record indicates that the Commission's proposed order, would be vulnerable to challenge as (1) contrary to law, (2) arbitrary and capricious, (3) not supported by the record and (4) not sufficiently reasoned.[1]

We respectfully ask for the opportunity to discuss with you, as quickly as possible, our views on the serious and substantial litigation risks associated with the current proposed Order. I will be contacting your office to schedule a meeting later today. I can be reached directly at (703) 894-9090 or at uonyeije@m2znetworks.com.

[1] An agency action will be set aside as a violation of the Administrative Procedure Act ("APA") if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." (*See* 5 U.S.C. § 706(2)(A)) Agency action is also infirm to the extent it is "contrary to constitutional right, power, privilege, or immunity," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." (*See Id.* § 706(2)(C)-(E)) Accordingly, the Commission may not deprive any person or entity of property without the due process of law guaranteed by the Fifth Amendment or violate any statutory command enacted by Congress. Agency action will be held arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (*See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) "Although the arbitrary and capricious standard of review is deferential, the court will intervene to ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action. Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [a reviewing court] must undo its action." (*See BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999) (quotation marks and brackets omitted). The agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (*See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. *See also Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) ("The Commission did not even attempt to explain why forbearance is not appropriate or . . . indeed, the Commission denied forbearance without ever considering the requirements of § 10."); *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001) ("[U]ntil the Commission has adequately explained the basis for [its] conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act.") (holding that the Commission erred in denying a petition for forbearance). Finally, when an agency departs from its own precedents it must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." (*See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970).) An agency's failure to come to grips with conflicting precedent constitutes "an inexcusable departure from the essential requirement of reasoned decision making." (*See Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C.Cir.1971).

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Thank you for your prompt consideration of this matter.

Sincerely,

Uzoma C. Onyeije
Vice President Regulatory Affairs

cc: Erika Olsen
Bruce Gottlieb
Renee Crittendon
Wayne Leighton
Angela Giancarlo

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