Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
A National Broadband Plan for	)	GN Docket No. 09-51
Our Future	)	

To the Commission

COMMENTS OF M2Z NETWORKS, INC.

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EXECUTIVE SUMMARY

The American Recovery and Reinvestment Act of 2009 calls on the Federal Communications Commission to implement a National Broadband Plan that will "ensure that all people of the United States have access to broadband capability." With this sweeping mandate, Congress and the President have clarified that ubiquitous access to broadband is a pressing national priority on par with our country's previous efforts to establish interstate highways and achieve rural electrification. The time for excuses and defensiveness about this country's shameful international broadband ranking is over; the National Broadband Plan must lead to action and results.

Broadband adoption in the United States is abysmal relative to its global competitors with over 100 million Americans left without broadband connections. This is true despite data from incumbent carriers suggesting that most homes are "passed" by broadband. But passing homes with broadband is not the same as connecting people to broadband. The call of the Recovery Act is to connect all Americans to broadband; and we believe this laudable goal will be accomplished if the Commission takes three critical steps:

- Reform the country's duopoly broadband market by introducing new nationwide competition and enforce existing and new public interest obligations on licensees that will enhance consumer welfare;

- Take immediate action on pending items that help accomplish the goal of increasing broadband adoption including the AWS-3 matter (WTB 07-195) that is currently on circulation at the FCC following 3 years of debate on how to best achieve affordable broadband adoption; and

- Complete the National Broadband Plan by the end of the Fiscal Year 2009 so that new initiatives for achieving the plan can be launched as soon as possible.

When broadband becomes truly affordable for everybody, Americans will stampede to obtain broadband connections in light of its multiple proven benefits.

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In its April 8, 2009 Notice of Inquiry in the above-captioned proceeding the Federal Communications Commission ("FCC" or "Commission") seeks comment on a variety of topics with the goal of establishing a National Broadband Plan[1] as mandated by the American Recovery and Reinvestment Act of 2009 ("ARRA" or "Recovery Act).[2] The Recovery Act directs the FCC to establish a National Broadband Plan that will "ensure that all people of the United States have access to broadband capability."[3] This is the next great infrastructure undertaking for the United States.

The critical task facing the Commission is determining how to accomplish this mission as quickly and as efficiently as possible. The National Broadband Plan will be successful if the Commission takes the following actions:

- ***Tackle the Broadband Market's Duopoly Structure by Taking Decisive Corrective Actions.*** The National Broadband Plan can be neither a paper tiger nor a federal brainstorming session. Congress and the President have tasked the FCC with establishing "a detailed strategy for *achieving* affordability of [broadband] service and maximum utilization of broadband infrastructure and

[1] *See* Notice of Inquiry, In the Matter of a National Broadband Plan for Our Future, GN Docket No. 09-29 (rel. Apr. 8, 2009) ("Notice of Inquiry" or "NOI").

[2] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[3] *Id.* at § 6001(k)(2).

service by the public." The FCC must therefore decisively address the duopoly market structure for broadband services by introducing new nationwide competition. It must also hold its licensees accountable by imposing consumer welfare-enhancing public interest obligations making broadband more affordable and more widely available.

- ***Take Immediate Action on all "Shovel Ready" Broadband Matters.*** The Recovery Act does not ask the FCC to start thinking about broadband from scratch. In the weeks, months and years before the Recovery Act passed, the Commission was working on petitions that asked it to address the country's need for increasing broadband adoption that make broadband more universally affordable. These efforts should not languish for want of a "Plan." Specifically, the long pending AWS-3 item that is currently on circulation at the FCC (after 3 years of debate) and which pointedly addresses the problems identified herein and offers a comprehensive and innovative solution should be adopted as soon as possible as an important first step of the National Broadband Plan.

- ***Establish a Reasonable yet Aggressive Timeline for the Remaining Portions of the National Broadband Plan.*** Timely action is critical in a crisis and the rapid nature of the Recovery Act's passage underscores this reality. Therefore, the Commission should make every effort to implement the National Broadband Plan within six months of the release of the National Broadband Plan NOI in order for the marketplace to respond to the Commission's roadmap and make commensurate investments. Given that the Commission aspires to complete merger reviews within 180 days. M2Z strongly believes that the National Broadband Plan deserves a higher priority than mergers that add to market concentration.

I. THE NATIONAL BROADBAND PLAN MUST INCLUDE CONCRETE ACTIONS TO ADDRESS FAILURES IN THE CURRENT BROADBAND MARKETPLACE AND THE COMMISSION'S CURRENT REGULATORY FRAMEWORK

Two years ago, in response to the Commission's 706 inquiry,[4] M2Z Networks, Inc. stated "[t]he current state of U.S. broadband deployment is unacceptable."[5] Our focus was and continues to be to work with the Commission to create an environment that encourages equal access to broadband for all Americans using private investment and

[4] *See* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45, FCC 07-21 (rel. Apr. 16, 2007)

[5] *See* Comments of M2Z Networks, Inc., GN Docket No. 07-45, FCC 07-21 at 9 (filed May 16, 2007).

leverages genuine competition. With the passage of time, M2Z's assessment of the state of broadband in the United States has sadly remained accurate.[6]

Even before taking office, President Obama, on December 6, 2008, debunked the idea that all Americans enjoy access to reasonable and timely broadband deployment. "It is unacceptable that the United States ranks 15th in the world in broadband adoption. Here in the country that invented the Internet, every child should have the chance to get online and they'll get that chance when I'm President."[7] Similarly, Congress has sent the message that the Commission must take a more active role in ensuring greater broadband deployment and adoption.[8]

In order for the Commission to effectively tackle this challenge for the United States, it must directly address the root causes for why there is poor adoption. Specifically, the Commission must target: (1) the duopoly market structure in broadband that has led to artificially high consumer prices and limited competition between

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[6] The Government Accountability Office, Congressional Research Service (in multiple reports to Congress), and even the FCC itself have all acknowledged that consumers have limited choice in broadband providers resulting in a de facto duopoly. *See e.g*. "Broadband Deployment is Extensive throughout the United States, but it is Difficult to Assess the Extent of Deployment Gaps in Rural Areas," Government Accountability Office, Report to Congressional Committees, GAO-06-426, (May 2006) ("Broadband Deployment GAO"); Charles B. Goldfarb "Access to Broadband Networks," Congressional Research Service Report for Congress, (Jun. 28, 2006) ("Access to Broadband Networks"); Patricia Moloney Figliola, et al., "The Evolving Broadband Infrastructure: Expansion, Applications and Regulation," Congressional Research Service Report to Congress, p. 3 (Feb. 19, 2009) ("Evolving Broadband"); "Broadband Internet Access and the Digital Divide: Federal Assistance Programs," Congressional Research Service Report to Congress p. 1 (Mar. 19, 2009) ("Broadband Internet Access"); FCC, High-Speed Services for Internet Access: Status as of Dec. 31, 2005 at 2, Table 3, Chart 6. Moreover according to widely accepted data by Pew, affordability remains a heavy barrier to broadband adoption. *See* Horrigan, John, Pew Internet & American Life Project, "Home Broadband Adoption 2008" p. ii, Dec. 16, 2008, available at: http://www.pewinternet.org/Reports/2008/Home-Broadband-2008.aspx ("Home Broadband Adoption 2008").

[7] President-elect Barack Obama, Radio Address on the Economy (Dec. 6, 2008).

[8] *See e.g.*; H.R. 5846, 110th Cong. § 2 (H)(iv) (2008); S. 5846 110th Cong. (2008); Recovery Act § 6001(k)(2)(C); Food, Conservation, and Energy Act of 2008, Pub. L. 110-234, 122 Stat. 923, §§ 6110, 6112 (2007); Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 165, §§ 6110, 6112 (2008); Broadband Data Improvement Act, Pub. L. 110-385, 122 Stat. 4096, § 103(b)(1) (2008); S. 649 111th Cong. (2009); s*ee also* Letter of Senator Byron L. Dorgan to Chairman Kevin J. Martin, FCC, WT Docket Nos. 07-16 and 07-30 (filed Apr. 9, 2007).

providers, and (2) its own recent history of a *laissez-faire* attitude toward licensees leading to the marked absence of consumer welfare-enhancing public interest obligations that could make broadband more affordable and more widely available.[9] This combination of a failed market structure and an anemic regulatory model has led to a broadband infrastructure that is geographically uneven in throughput, affordability and availability. The unfortunate result of this uneven and highly balkanized approach has been to deny broadband, and the economic empowerment it provides, to poor, rural and minority Americans — the very people that would benefit the most from adopting broadband.

a. The FCC's National Broadband Plan Must Explicitly Address the Duopoly Market Structure for Broadband Services by Introducing New Competition Through Its Spectrum Authority

i. U.S. Broadband Adoption is Stalled Because of a Duopoly Market Structure

Six years ago, the Congressional Budget Office ("CBO") asked a poignant question in the very title of its assessment of the advanced services marketplace — "Does the Residential Broadband Market Need Fixing?"[10] This early report observed the broadband market in an optimistic light and viewed market "problems" as "function[s] of the market's relative youth and immaturity and . . . not necessarily permanent features."[11] Even in this early assessment of the broadband marketplace, however, CBO recognized

[9] *See* Derek S. Turner, Free Press, Broadband Reality Check II: The Truth Behind America's Digital Divide at 7, Available at http://www.freepress.net/files/bbrc2-final.pdf (Aug. 2006) (noting that problems concerning broadband are "due to market and policy failures" and cautioning that "[p]olicymakers should stop trying to gloss over the shortcomings and instead focus on real solutions that will bring advanced communications technologies to every American.").

[10] "Does the Residential Broadband Market Need Fixing?" Congressional Budget Office, 2003.

[11] *Id.* at 15.

the broadband market structure as problematic: "[t]he current domination of many markets by only two broadband providers, however, could turn out to be more long-lived."[12]

In the years that followed, nothing in the marketplace has mooted the CBO's concern over unacceptable levels of broadband market concentration. Instead, there is a mountain of evidence supporting that conclusion including more recent reports by the General Accountability Office (GAO)[13] and the Congressional Research Service (CRS).[14] Indeed, in 2006, CRS explicitly declared that there is as a "cable and telephone broadband duopoly."[15]

The number of homes passed by broadband providers has not significantly changed the equation when it comes to adoption. A large percentage of homes do not have broadband despite the fact that cable modem service is "available" to over 99 million households (about 89% of all U.S. households).[16] A view of the DSL marketplace further demonstrates that widespread deployment has also not led to adoption. Notably, telephone service is available to over 95% of the households in the U.S. and the Organization for Economic Cooperation and Development estimates that

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[12] *Id.*

[13] GAO Broadband Deployment *supra* note 6.

[14] Access to Broadband Networks *supra* note 6.

[15] *Id* at 17. CRS continues to describe the broadband market place as a duopoly noting that "the primary residential broadband technologies deployed continue to be cable modem and DSL." *See* Evolving Broadband *supra* note 6 at 2; Broadband Internet Access *supra* note 6 at 1.

[16] FCC Form 325 data for 2004 indicates that more than 93% of homes passed by cable have access to high-speed Internet service. At the end of 2004, cable systems passed 108.6 M occupied homes (not all with a television). Thus, according to the FCC data, cable modem service was available to about 99 M households at the end of 2004. According to the U.S. Census data, there were about 111 M households at the end of 2004, which means that the overall availability of cable modem service was about 89.4% of households. *See* 13th Annual Report to Congress on Video Competition, FCC 07-206 (rel. Jan. 16, 2009).

84% percent of U.S. telephone lines are DSL *capable*.[17] And while there has been broadband growth in the U.S. — it is currently stalled at just above 50% penetration of U.S. households.[18]

The amount of broadband access that carriers claim is "available" simply is not reflected in our nation's adoption numbers. According to a January 2009 Report of the Pew Internet & American Life Project, approximately 27.8% of adults surveyed indicated that they did not sign up for broadband because it was not relevant, it was not affordable or it was unavailable.[19] Thus, while broadband services are available, the "value" of these services (the combination of price and utility) to consumers is inadequate because nearly a third of the population declines to take these services.

Although wireless broadband has long been celebrated as the solution for spurring broadband deployment and competition in the U.S., the FCC's processes for spectrum allocation and assignment have failed to deliver this promise.[20] A necessary precursor for

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[17] OECD Communications Outlook 2005, Organization for Economic Cooperation and Development.

[18] High Speed Services for Internet Access: Status as of December 30, 2007, Table 3. We note that America showed only sluggish increases in broadband adoption from 2000 to 2007 while there was exponential growth in broadband adoption in the leading countries during the same time period. *See e.g.* OECD Broadband Statistics 3a. OECD Broadband penetration and population densities, available at: http://www.oecd.org/dataoecd/21/60/39574903.xls; OECD Key ICT Indicators 6c Households with Broadband Access 2000-2007, available at: http://www.oecd.org/dataoecd/20/59/39574039.xls.

[19] *See* Horrigan, John, Pew Internet & American Life Project, "Stimulating Broadband: If Obama builds it, will they log on?" at 2, Jan. 21, 2009, available at http://www.pewinternet.org/Reports/2009/Stimulating-Broadband-If-Obama-builds-it-will-they-log-on.aspx.

[20] *See e.g.* Robert Crandall et al., "The Effects of Broadband Deployment on Output and Employment: A Cross-sectional Analysis of U.S. Data," No. 6 Issues in Economic Policy, The Brookings Institution at 15 (Jul. 6, 2007) available at: http://www.brookings.edu/~/media/Files/rc/papers/2007/06labor_crandall/06labor_crandall.pdf ("Effects of Broadband"); Jon M. Peha, "Bringing Broadband to Unserved Communities," The Brookings Institution, (Jul. 2008) available at: http://www.brookings.edu/~/media/Files/rc/papers/2008/07_broadband_peha/07_broadband_peha.pdf ("Bringing Broadband"); Philip J. Weiser, "The Untapped Promise of Wireless Spectrum" The Brookings Institution, (Jul. 2008) available at: http://www.brookings.edu/~/media/Files/rc/papers/2008/07_wireless_weiser/07_wireless_weiser.pdf. ("Untapped Promise").

wireless broadband competition is for new would-be competitors to have access to spectrum to roll out their services.[21] It has been well documented that the Commission's cumbersome (multi-year) spectrum allocation and assignment process, including its focus on pure monetary auctions for spectrum assignments with little or no enforceable public interest obligations, has proven hostile to new competitive entry.[22] These high barriers to entry have led to the concentration of spectrum holdings in the hands of incumbents.[23]

ii. Diffusing Market Concentration is an Obama Administration Priority

The duopoly nature of the broadband market combined with the unrivaled dominance of large carriers has perhaps the most profound impact on consumers. According to Dr. Gregory Rose "major incumbents and speculators have dominated previous FCC spectrum auctions generally and broadband spectrum auctions in particular."[24] Dr. Rose concludes that:

> a small number of bidders have disproportionately prevailed at auction in virtually all FCC spectrum auctions and that major incumbents and speculators have absolutely dominated broadband spectrum auctions. These developments have been paralleled by record levels of market

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[21] Effects of Broadband *supra* note 20; Bringing Broadband *supra* note 20 at 19-21; Untapped Promise *supra* note 20 at 24-31.

[22] *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) (concluding that the median length of time from commencement of spectrum allocation proceedings to completion of an auction was 6.7 years).

[23] *See e.g*. Gregory Rose and Mark Lloyd "The Failure of FCC Spectrum Auctions" at 15 (May 2006) available at: *http://www.americanprogress.org/kf/spectrum_auctions_may06.pdf*; Gregory Rose "How Incumbents Blocked New Entrants in the AWS-1 Auction: Lessons for the Future" at 9 (Apr. 20, 2007) available at:*http://www.mediaaccess.org/file_download/180*; Gregory Rose, "Tacit Collusion in the AWS-1 Auction: The Signaling Problem" (Apr. 20, 2007) available at: http://www.mediaaccess.org/file_download/181; Letter to Chairman Kevin Martin from Professor Simon J. Wilkie, WT Docket 07-195 (filed Dec. 14, 2007) (resubmitting paper entitled "Spectrum Auctions are Not a Panacea: Theory and Evidence of Anti-competitive Rent-seeking Behavior in FCC Rulemakings and Auction Design").

[24] *See* FNPRM Reply Comments of Dr. Gregory Rose, WT Docket Nos. 07-195 and 04-56, Exhibit II at ¶ 3, Sec. II A-B (filed Aug. 11, 2008) ("Dr. Gregory Rose Reply").

> concentration in both the wireline and wireless broadband markets, which affords major incumbents the opportunity to exercise market power against consumer welfare.[25]

Dr. Rose also examines the Herfindahl-Hirschman Index[26] ("HHI") in order to quantify the egregious market concentration in the wireless industry. Using available data and examining HHI by economic area (EA) he notes "the wireline broadband industry has an HHI of 3388.23 as of the fourth quarter of 2007."[27] Compared to the DOJ measure for high concentration of 1800,[28] the study by Dr. Rose demonstrates extreme levels of concentration. Thus, the National Broadband Plan must address this significant concentration because it is the lack of competition that allows incumbents to limit innovation, provide poor service, and manipulate output in order to charge higher prices to consumers.[29]

The Obama Administration has made it a priority to address market concentration using competition as the preferred lever. According to Assistant Attorney General Varney, the Administration is committed to ensuring that there is vigorous competition because "[t]here is no adequate substitute for a competitive market, particularly during

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[25] *Id.*

[26] "HHI" refers to the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

[27] Dr. Gregory Rose Reply *supra* note 24, at Sec. II C, ¶ 18.

[28] *See* U.S. Dept. of Justice and Federal Trade Commission, Horizontal Merger Guidelines, § 1.51. ("Horizontal Merger")

[29] See Anusua Datta, Divestiture and Its Implications for Innovation and Productivity Growth in U.S. Telecommunications, 69 S. ECON. J. 644 (2003); Chris Doyle, Promoting Efficient Competition in Telecommunications, 159.1 NAT'L INST. ECON. REV. 82 (1997). We note that high market concentration is generally accepted as being detrimental to consumers. For example, when evaluating mergers, the U.S. Dept. of Justice and the Federal Trade Commission use market concentration as an indicator of whether or not consolidation will harm consumers. Horizontal Merger *supra* note 28, § 1.

times of economic distress."[30] The FCC must also take a similarly aggressive stance to address this same failure in the broadband sector. We note, however, that the Commission is not limited to just its enforcement authority as is the Department of Justice. The Commission must also take advantage of its unique authority over public spectrum to foster new entry and spur nationwide competition by injecting new spectrum into the marketplace.

iii. The Commission is Uniquely Positioned to Address the Need for Additional Competition

As explained above, the Commission's National Broadband Plan should recognize that the fundamental drivers for poor adoption rates is the lack of price competition and spectrum policies and processes that handicap new nationwide competitors (and their service innovations) from challenging the telco/cable duopoly.[31] As long as the broadband market remains a duopoly, there will be a continued and persistent barrier to greater broadband adoption.

We note that the FCC itself describes the current situation for broadband as a "problem."[32] However, that recognition, standing alone, is insufficient. The Commission must take action. The Commission's Strategic Plan includes a goal that "[a]ll Americans should have affordable access to robust and reliable broadband products and services."[33] Despite the inclusive language in the Strategic Plan, that broad policy pronouncement has

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[30] *See* Christine A. Varney, Asst. Att'y Gen., Dept. of Just., Antitrust Division, Remarks as Prepared for the Center for American Progress (May 11, 2009).

[31] Not surprisingly, the OECD has concluded that "business and residential customers benefit from increased competition." *See* OECD, "Broadband Growth and Policies in OECD Countries," p. 52 (2008).

[32] Notice of Inquiry *supra* note 1, ¶ 8.

[33] Federal Communications Commission, FCC Strategic Goal Broadband, available at: http://www.fcc.gov/broadband/

not translated into an acceptable level of broadband adoption in the United States, let alone broadband access for everyone.

Congress has directed the Commission, quite simply, to put spectrum to its highest and best use *in the public interest*.[34] Where competitive bidding is employed, the Commission maintains the discretion to "design" auctions so long as the FCC does so consistent with Section 309(j)(3). Under Section 309(j)(3) the Commission is tasked to safeguard the public interest and seek to promote various socioeconomic objectives, including the "development and rapid deployment of new technologies, products and services for the benefit of the public" and the promotion of "economic opportunity and competition" by "avoiding excessive concentration of licenses."[35] The Commission, therefore, must, as explained *infra*, move beyond idyllic policy statements and, consistent with the Communications Act and the American Recovery and Reinvestment Act,[36] use its unique authority over spectrum to take concrete actions to counter the broadband duopoly by introducing new nationwide competition.

b. The National Broadband Plan Must Fix Failed Regulatory Approaches

The Recovery Act itself is an answer to years of inadequate regulation which, in turn, has contributed to the worst economic climate in decades. We are all aware of the lax governance and supervision of financial companies during the past several years. Government failed to protect consumers due to the theory that a permissive environment

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[34] *See* 47 U.S.C. §§ 301, 303, 308 and 309. The broad goals of the Communications Act are stated as the obligation "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and worldwide wire and radio communication service with adequate facilities at reasonable charges. . . ." *See* 47 U.S.C. § 151.

[35] 47 U.S.C. §§ 309(j)(3)(A)-(B).

[36] Recovery Act, *supra* note 2.

of self-regulation was the best course of action. Of course that thinking is now proving to be utterly mistaken. As explained below, that faulty philosophy was not limited to the financial services industry.

The economic philosophy that necessitated the ARRA is alive and well in broadband regulations. In March 2009, the Congressional Research Service indicated that "[t]he Bush Administration pursued a broadband policy that emphasized deregulation, nonintervention by government in the marketplace, and general tax policies intended to foster overall economic growth."[37] The CRS Report goes on to state that "[t]he Bush Administration broadband policy embraced the view that a minimum of government intervention would create an economic climate favorable to private sector investment in the broadband market."[38]

The Bush Administration's broadband policies, however, were unsuccessful. It is clear that the Bush Administration miserably failed in its pledge to establish "universal broadband access by 2007."[39] The new FCC should avoid taking the same route towards meeting the ARRA's goal of "*achieving* affordability of such service and maximum utilization of broadband infrastructure and service by the public."[40]

M2Z is not alone in this assessment. According to Free Press, new policies are needed for real broadband competition and deployment: "Congress and the FCC have the

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[37] Broadband Internet Access *supra* note 6 at 7.

[38] *Id.*

[39] *See* President George W. Bush Remarks in Albuquerque, N.M, .Mar. 26, 2004. In June 2007, NTIA Asst. Sec. John Kneuer claimed that President Bush's goal of universal broadband access had been met by moving the goal post. Dismissing the importance of affordability, he suggested that the issue was "whether every household has access to broadband, not whether every household has made the consumer choice to subscribe." *See* Heather Forsgren Weaver, "Kneuer Says U.S. Will Meet Bush's 2007 Broadband Goal", Communications Daily, June 15, 2007. The Obama Administration also wants to resolve the broadband problem and a process that demands both planning and thoughtful action will help achieve its goal.

[40] Recovery Act, *supra* note 2, § 6001(k)(2)(B) (emphasis added).

power to reverse these disturbing trends, but they need to take an honest look at the lack of meaningful competition in the broadband services market. Faith-based policy and wishful thinking will not bring broadband to rural areas, and the repeated use of misleading data will not help low-income consumers afford broadband."[41] Similarly, Representative Dingell stated: "President [Bush] set an ambitious goal for universal broadband access by 2007, yet, like many Administration initiatives, offered no specific benchmarks or policy directives. The lack of an up-to-date, comprehensive strategy forces the communications sector to muddle through a landscape marked by disparate government programs. 2007 has arrived and it remains unclear who, if anyone, in the Administration is taking up the mantle of *assuring affordable broadband access* to those who most need it."[42]

In crafting the National Broadband Plan, the Commission should not fall prey to the false choice between command and control regulation and the "hands off" philosophy that has been the prevailing wisdom for the last eight years. This is particularly true for spectrum matters. Spectrum is a national asset and entities seeking to utilize it should do so in a manner that forwards the public interest.[43] The Commission must hold its licensees that use the nation's spectrum highly accountable through "smart" regulation that protects the public interest while promoting vigorous competition. Establishing hybrid spectrum assignment policies that prioritize the national interest in universal

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[41] *Id.* at 5 (emphasis added).

[42] *See* The Honorable John Dingell, Affordable Broadband for Everyone, The Hill, Feb. 26, 2007, available at http://thehill.com/leading-the-news/affordable-broadband-for-everyone-2007-02-06.html (emphasis added).

[43] There is no property right in spectrum. As the Communications Act clarifies the Commission licenses radio channels "to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." *See* 47 U.S.C. § 301.

access, affordability, rapid build out, openness and competition is not a return to command and control, it is just basic common sense that reflects the underlying problems with the broadband sector.

It is the hallmark of intelligent regulatory policy to establish license conditions and operational obligations that further important national policy goals.[44] For example, smart regulations in this area would include the continued adoption of open application and platform rules similar to those in the 700 MHz Order which put the focus of new spectrum assignment on the needs of consumers, rather than the self interest of carriers.[45] In the future, the Commission should consider other competition and consumer welfare-enhancing regulations such as ensuring the participation by new entrants in future spectrum auctions.[46] The recent Canadian AWS-1 auction is an example of the benefits of this type of smart regulation. Prior to the 2008 Canadian AWS-1 auction, less than 60 percent of the population subscribed to wireless mobile services. To address that dismal number, the 2008 Canadian AWS-1 auction set aside for new entrants three of the six blocks (accounting for 40% of the available spectrum).[47] In the end the auction shattered

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[44] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, ¶ 207 (2007) ("700 MHz Second Report and Order") ("As a general matter, the Commission has the authority to establish license conditions and operational obligations, such as the requirements we adopt here, if the condition or obligation will further the goals of the Communications Act without contradicting any basic parameters of the agency's authority."); *see also id.* at ¶ 207 n.471 (listing sources of authority). In adopting the requirements, the Commission rejected several arguments made by Verizon Wireless, including one asserting that the Commission's imposition of such requirements would be inconsistent with prior determinations regarding the regulation of broadband services. *See id.* ¶¶ 208-09.

[45] 700 MHz Second Report and Order at ¶ 207.

[46] Such regulations are consistent with the long held notion that the public interest standard is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). As explained in Section I.a.iii of these comments encouraging new competition is an explicit statutory requirement that must be forwarded through specific Commission policies.

[47] *See Licensing Framework for the Auction for Spectrum Licenses for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, Gazette Notice DGRB-011-07 (Dec. 2007) available at http://www.ic.gc.ca/epic/site/smt-gst.nsf/vwapj/awslicensing-e.pdf/$FILE/awslicensing-e.pdf; *see also*

all expectations[48] and a number of new potential wireless carriers (ranging from startups backed by financial entities to power companies) participated in the bidding for the new entrant blocks and led to a four-fold increase in the expected revenues from the auction.[49] Other smart regulations that could be applied to the Commission's existing spectrum assignment and auction policies would be to establish stringent build-out requirements, establish baseline operational requirements and require the availability of wholesale services from spectrum licensees as licensing conditions in order to advance competition and consumer welfare.[50]

News Release, Industry Canada, "Government of Canada Opens Up Wireless Industry to More Competition" (May 27, 2008) available at http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04212.html. Industry Canada also mandated that existing carriers share towers and roaming spectrum in order to give new entrants an opportunity for achieving scale.

[48] At the conclusion of the auction, Minister of Industry Jim Prentice stated: "The auction exceeded our expectations in terms of the level of competitive bidding activity. I hope the industry keeps this competitive spirit alive as it enhances and expands its services with improved access to the spectrum." *See* News Release, Industry Canada, "15 Companies Bid Almost $4.3 Billion for Licenses for New Wireless Services" (Jul. 21, 2008) available at: http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04175.html.

[49] *See, e.g.*, David George-Cosh, "Wireless auction raises $4.25 billion; About 300 licenses up for grabs. Canadians will have up to five more firms to choose from in each province, territory," Montreal Gazette, July 22, 2008 at B2; David George-Cosh, "Wireless Users Stand to Win; Bidding Ends; New choices to emerge in cellphone market," National Post, July 22, 2008 at A1; *see also* CIBC World Markets, "AWS Auction Finally Ends – $4.25B Is A Big Tally," at 4 (Jul. 21, 2008) ("The set-aside spectrum [for new entrants] was, in our opinion, one of the key factors that led to the high level of competitive bidding (and hence, higher prices), luring in bidders that would have otherwise not participated in the auction.").

[50] The Commission should not rely solely on so called "unencumbered auctions" to achieve critical Congressional goals in light of the variety of tools at its disposal. As the OECD has recognized, "[t]he means of promoting competition may vary from country to country but the goals are the same." *See* OECD, "Broadband Growth and Policies in OECD Countries," at. 52 (2008).

c. The National Broadband Plan Must Address the Historically Overlooked Needs of Poor, Rural and Minority Americans by Establishing Affordable Broadband Options and Encouraging Greater Adoption

There is near unanimous agreement on the benefits of broadband and its utility to the lives of all Americans.[51] Nevertheless, the broadband market structure and prevailing regulatory policies have failed to move the United States closer to the goal of ubiquitous affordable broadband. The result is that broadband remains out of reach of millions due to limited competition and incomplete coverage.

Addressing the growing gap in the affordability of broadband is one of the key goals of the ARRA. In this regard, the text of the legislation is clear. The Recovery Act mandates that the Commission formulate "a detailed strategy for *achieving* affordability of such service and maximum utilization of broadband infrastructure and service by the public."[52] Thus, establishing true broadband affordability in the United States is a statutory imperative.[53]

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[51] *See e.g.* Bringing Broadband to Rural America: Report on Rural Broadband Strategy ¶ 1, FCC, (rel. May 22, 2009) ("Rural Broadband Strategy Report"); In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45, FCC 08-88, ¶ 74 (rel. Mar. 19, 2008); In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, FCC 07J-4, ¶ 61 (rel. Nov. 20, 2007); Universal Service: Reforming the High-Cost Fund, Before the House Subcomm. on Communications, Technology and the Internet 111th Cong. (2009) (Statement of Congressman Rick Boucher) S. Derek Turner, Free Press, Down Payment on Our Digital Future at 7-8. (Dec. 2008) Evolving Broadband *supra* note 6; President Barack Obama, Weekly Address (Jan. 24, 2009); President Barack Obama, Remarks on the Economy (Jan. 28, 2009); President Barack Obama, Remarks to the Business Council (Feb. 13, 2009); President Barack Obama, Weekly Address (Feb. 14, 2009); President Barack Obama, Remarks at Meeting with Nation's Mayors (Feb. 20, 2009); President Barack Obama, Weekly Address (Mar. 7, 2009).

[52] Recovery Act *supra* note 2 at § 6001(k)(2)(B) (emphasis added).

[53] While still on the campaign trail, then Senator Obama said "As President, I will set a simple goal: every American should have the highest speed broadband access – no matter where you live, or how much money you have." *See* Senator Barack Obama, Remarks in Flint Michigan on Renewing American Competitiveness (Jun. 16, 2008). Upon taking office, President Obama has continued to focus on need to promote broadband by seeking stimulus funding in the American Recovery and Reinvestment Act (ARRA)

The President's assessment that the current state of broadband is "unacceptable" reflects the fact that too many Americans lack the financial resources to keep up with the high cost of recurring monthly charges that are unrestrained by true competition.[54] Because of differences in the technologies and the limitations of the telephone local loop, cable modem service typically offers higher data rates and is often priced at a premium to DSL.[55] Thus, there is little, if any, price competition in broadband. Indeed, current broadband providers appear willing to raise prices rather than to lower them.[56] Price competition, however, is critical to a healthy marketplace.

The Commission itself has recently acknowledged that "the most accurate marker for low broadband adoption is most likely low income."[57] Indeed, the FCC's Rural Broadband Strategy Report cited NTIA confirming that "[o]verall, fewer than 35% of households earning a family income of less than $50,000 subscribe to broadband

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for broadband, citing the need for this money as a down payment for America's continued competitiveness in the global economy. According to the President's weekly address from January 24, 2009, the stimulus funding for broadband in the ARRA is designed to "expand broadband access to millions of Americans, so business can compete on a level-playing field, wherever they're located." *See* President Barack Obama, Weekly Address (Jan. 24, 2009).

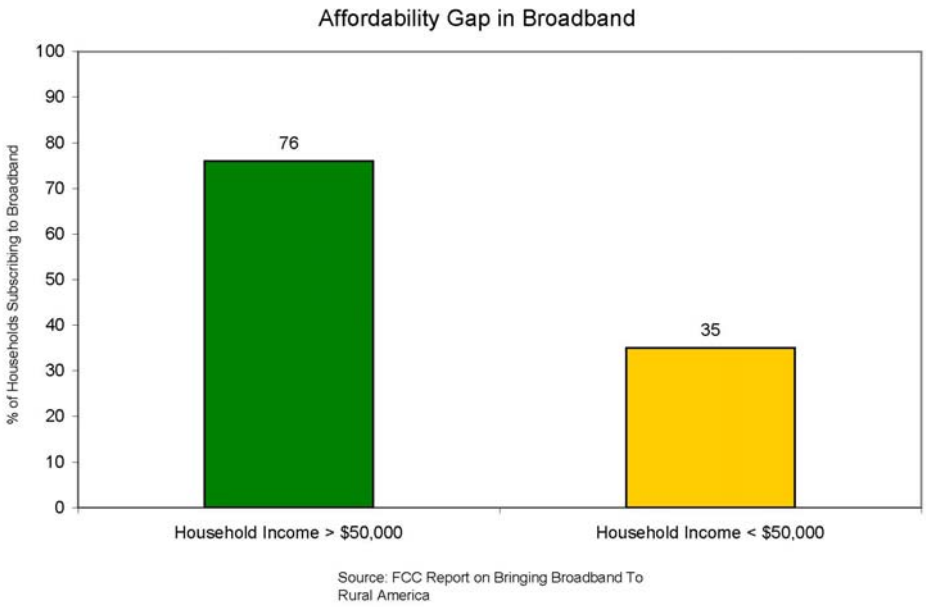
[54] Pew reports that in 2008 the average price of Internet service is $34.50. However, when compared to the DSL and cable pricing from 2004, 2005 and 2008 there has been little change in the price of broadband service. *See* Home Broadband Adoption 2008 *supra* note 6 at 7-8.

[55] According to the Center for Media Research, in December 2006, 85% of cable broadband lines had speeds of over 2.5 Mbps in the fastest direction, compared to 14% of DSL lines.

[56] In the recent past, Verizon attempted to effectively raise its DSL rates by approximately 10%. In late 2006, the Commission eliminated the federal Universal Service Fund fee ("FUSF") to create parity between DSL providers and cable broadband providers, as the latter were not obligated to pay the FUSF fee. Instead of passing the savings to consumers, Verizon announced that the FUSF would be dropped from its bills and in its place would appear a new line item: "Supplier Surcharge." Thus, Verizon's fast DSL users who had been paying $2.83 for the universal service tax would pay $2.70 in a Supplier Surcharge. And unlike the FUSF, the proceeds from which were passed on to the Government, the new surcharge would constitute a new revenue source for Verizon. BellSouth (now AT&T) quickly followed suit indicating that it planned to continue to collect its $2.97 a month FUSF under what it entitled a "regulatory cost recovery fee." Following consumer outrage and an impending FCC investigation, both companies scrapped the new surcharges. "Bell South Drops New DSL Fee", Broadcasting and Cable available at http://www.broadcastingcable.com/article/CA6366101.html; "Verizon drops DSL surcharge" available at http://news.zdnet.com/2100-1035_22-6111035.html

[57] Rural Broadband Strategy Report *supra* note 51, ¶ 28.

services, compared to 76% of households earning a family income more than $50,000."[58]



The National Broadband Plan can help alter the broadband marketplace so that it benefits all Americans,[59] including those with lower incomes.[60]

There are multiple ways of encouraging affordability, including subsidies and other government mechanisms. Indeed, the Recovery Act included sizable subsidies for extending fixed and mobile broadband access to underserved and unserved areas of the

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[58] *Id.*

[59] Although the provisions of the Recovery Act relevant to the National Broadband Plan are brief, they repeat the charge that the National Broadband Plan should benefit all Americans. Specifically, the Recovery Act requires that the National Broadband Plan "seek to ensure that all people of the United States have access to broadband capability." Recovery Act, *supra* note 2, § 6001(k)(1) (emphasis added). Further, the Recovery Act compels the FCC to conduct "an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States." Recovery Act, *supra* note 1, § 6001(k)(2) (emphasis added). Because the Recovery Act has as an explicit goal that everyone in the country enjoy broadband, the word "affordability" must be defined a way that gives meaning to these other provisions.

[60] According to research by Pew, between 2007 and 2008, low income Americans (under $20,000 annual income) showed no significant growth in home broadband adoption after strong growth in previous years. Clearly, lack of affordable options makes broadband connectivity a low priority luxury for low income Americans. *See* Home Broadband Adoption 2008 *supra* note 6.

country. Subsidies are a useful piece of the puzzle and the NOI asked several questions about how subsidies would help in eliminating affordability as a barrier to broadband adoption.[61] However, the very fact that the Commission was tasked with establishing a plan to ensure broadband access by all Americans concurrently with the creation of these subsidy mechanisms clarifies that the subsidies and prior policies alone are not intended as the full solution to enhancing our nation's broadband ranking. In the long term, the best solution is to stimulate the private sector to address these needs through vibrant and long lasting competition.

One innovative way to ensure affordability is to create the proper market incentives to ensure that carriers are lowering prices and providing more value to consumers. As explained below, proceedings concerning the future assignment of the AWS-3 band have been ongoing for three years and affordability and nationwide competition have been intensely debated therein making Docket 07-195 an immediate mechanism for advancing the goals of the President, Congress and ARRA.

Establishing national competition has a track record of success in driving down retail prices and creating considerable consumer benefits. According to Goolsbee and Petrin's study in 2003, the introduction of Direct Broadcast Services (DBS) to the video market generated a 15% reduction in the overall prices for multi-channel video services resulting in annual savings of up to $5 billion to consumers.[62] Similarly, the introduction of uniform nationwide competition from wireless broadband will have an even more salutary effect on broadband services as described supra. AWS-3 can provide such an

[61] Notice of Inquiry *supra* note 1, ¶ 54.

[62] *See* Austan Goolsbee and Amil Petrin, "The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV," pp. 30-31 (Sept. 15, 2003).

incentive and quick action by the FCC to enable national broadband competition will result in the benefits accruing to consumers faster, because, as past studies have demonstrated, the mere announcement of market entry affects the behavior of incumbents.[63]

II. THE COMMISSION SHOULD MOVE SWIFTLY TO ADOPT RULES FOR AWS-3 THAT HELP ADDRESS EVERY ASPECT OF THE NATIONAL BROADBAND PLAN'S STATUTORY PURPOSE

Immediately adopting the pending service rules for the AWS-3 band will promote broadband affordability while at the same time encouraging greater broadband adoption. Moreover, adoption of the draft order on AWS-3 will help achieve several of the goals outlined in the Recovery Act and will also have a dramatic and positive impact on our sluggish economy.[64]

A. The Potential of AWS-3 Spectrum

As outlined in last year's AWS-3 Further Notice of Proposed Rulemaking,[65] the pending AWS-3 order will significantly advance the public interest with the inclusion of several important and consumer-friendly provisions:

- *Open Access Network* (no blocking of content);[66]

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[63] *See* Austan Goolsbee and Chad Syverson, "How Do Incumbents Respond to the Threat of Entry? Evidence from the Major Airlines*," (Dec. 2004) (Demonstrating that even the threat of new entry causes incumbents to drop prices in order to stay competitive.).

[64] *See infra* pp. 22-23, for a detailed discussion of the economic impact of moving forward with the AWS-3 proceeding.

[65] *See Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band; Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz, and 2175-2180 MHz Bands*, WT Docket Nos. 07-195 & 04-356, Further Notice of Proposed Rulemaking, FCC 08-158 (rel. Jun. 20, 2008) ("AWS-3 FNPRM").

[66] As the Commission found when it promulgated the service rules for the Upper 700 MHz C Block, "there is evidence that wireless service providers [ ] block or degrade consumer-chosen hardware and applications without an appropriate justification." 700 MHz Second Report and Order *supra* note 44 at 200. For that reason, it is sound policy to likewise require the AWS-3 licensee "to allow customers, device

- *Open Platform Network* (no proprietary end-user equipment);
- *Aggressive Build-out Requirements* (National build-out with 50% of the population receiving coverage in 4 years and 95% within 10 years);
- *"Stringent Enforcement of Build-out Requirements"* (including the loss of one's license for failure to meet build-out obligations); and
- *Free Service* (a minimum of 25% of the network capacity must be dedicated to providing a free (no monthly subscription charge or other fees) broadband service at 768kbps meeting the FCC's current definition of basic broadband.

And while the AWS-3 FNPRM did not address a wholesale requirement for the licensee or the designation of the AWS-3 band for new entrants, M2Z has been and continues to be a big proponent of these two additional requirements that would enhance the public interest in the use of the spectrum.[67]

The entry of a free nationwide broadband service into the marketplace will be a meaningful step towards achieving the goals of the Recovery Act. Among other things, a free nationwide broadband service will address many of the policy goals specifically outlined in Section 6001(k)(2)(D) of the Recovery Act[68] including advances in consumer welfare,[69] civic participation,[70] public safety and homeland security,[71] community development,[72] entrepreneurial activity,[73] job creation[74] and economic growth.[75]

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manufacturers, third-party application developers, and others to use or develop the devices and applications of their choice." *Id.* ¶ 195.

[67] *See e.g.* Letter from Uzoma C. Onyeije, M2Z Networks, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 07-195 (filed May 5, 2008). There have been multiple proposals submitted in the AWS-3 proceeding suggesting certain eligibility restrictions. *See, e.g.*, AAPC FNPRM Comments, WT Docket No. 07-195 filed Comments at 5-9 (filed Jul. 25, 2008) (suggesting exclusion of Tier I and Tier II broadband CMRS licensees, as well as affiliates of such licensees, from eligibility for the nationwide AWS-3 license); FNPRM Reply Comments of Broadband Wireless Partners, WT Docket 07-195 at 9 (filed Aug. 11, 2008) (same); Comments of the Rural Telecommunications Group, Inc., WT Docket Nos. 07-195 and 04-356 at 11-12 (filed Jul. 24, 2008) (proposing 110 megahertz spectrum aggregation limit for all spectrum below 2.3 GHz, including AWS-3, to combat increasing consolidation in wireless marketplace); National Telecommunications Cooperative Association Initial Comments, WT Docket Nos. 07-195 and 04-356 at 5 (filed Jul. 25, 2008) (proposing spectrum caps to prevent largest wireless carriers from getting larger).

[68] Recovery Act *supra* note 2, § 6001(k)(2)(D).

[69] *Id. See also* Letter from Reverend Jesse L. Jackson to Chairman Kevin J. Martin, WT Docket Nos. 07-195 and 04-356 (filed Jul. 2, 2008).

The presence of a nationwide, highly affordable consumer broadband network that is open to new applications and new devices will be a noteworthy stimulus for innovation and creativity in each of these market segments. Moreover, the innovation in content, applications and devices driven by the presence of an affordable nationwide broadband service will likely drive the 19% of dial-up users who said "nothing would

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[70] *See* Joint Comments of the Minority Media and Telecommunications Commission (MMTC) and the Rainbow/ PUSH Coalition, WT Docket No. 07-195 (filed Dec. 14, 2007).

[71] *See* Comments of the National Association of Telecommunications Officers and Advisors, WT Docket No. 07-195, (filed Dec. 14, 2007); *See also*, Comments of the National Troopers Coalition, WT Docket No. 07-16, (filed Feb. 6, 2007).

[72] *See* Joint Comments of College Parents of America (CPA) and Higher Education Wireless Access Consortium (HEWAC), WT Docket No. 07-195, (filed Dec. 14, 2007); See also Reply Comments of the National Parent Teacher Association, WT Docket No. 07-195, (filed Jan. 14, 2008).

[73] *See* Comments of the Vermont Telecommunications Association, WT Docket No. 07-195 (filed Dec. 14, 2007); See also Comments of Mississippi State Senator Lee Yancy WT Docket No. 07-195 (filed Dec. 14, 2007); Reply Comments of Broadband Wireless Partners, WT Docket No. 07-195 (filed Dec. 14, 2007).

[74] *See* Comments of the Vermont Telecommunications Association, WT Docket No. 07-195 (filed Dec. 14, 2007); *See also* Comments of Mississippi State Senator Lee Yancy WT Docket No. 07-195 (filed Dec. 14, 2007); Reply Comments of Broadband Wireless Partners, WT Docket No. 07-195 (filed Dec. 14, 2007).

[75] *See* Comments of the Electronic Retailing Association, WT Docket No. 07-195 (filed Dec. 14, 2007); *See also* Comments of the Coalition for Free Broadband Now, WT Docket No. 07-195 (filed Dec. 14, 2007); Joint Comments of Free Press, Media Access Project, New America Foundation and Public Knowledge, WT Docket No. 07-195, (filed Dec. 14, 2007); Comments of Chris Pigott WT Docket No. 07-195, (filed Dec. 14, 2007) See also Comments of The Center for Digital Future, WT Docket No. 07-16 at 2 (filed Feb. 27, 2007); Comments of FiberTower Corporation, WT Docket No. 07-16 at 2 (filed Mar. 2, 2007); Comments of the California Association for Local Economic Development, WT Docket No. 07-16 at 2-3 (filed Feb. 14, 2007). In addition to these comments, M2Z filed two extensive studies detailing the economic benefits if a free broadband network in the AWS-3 band. *See e.g.* Simon Wilkie, "The Consumer Welfare Impact of M2Z Networks Inc.'s Wireless Broadband Proposal," WT Docket Nos. 07-16 and 07-30, (filed Mar. 02, 2007) ("Consumer Welfare Impact"); Kostas Liopiros, "The Value of Public Interest Commitments and the Cost of Delay to American Consumers," WT Docket No. 07-16 (submitted Mar. 19, 2007) ("Liopiros").

ever convince them to get broadband" [76] to consider broadband given that it provides them with more value than the dial up services they rely on today.[77]

Two key papers submitted to the Commission in Docket 07-16 demonstrate that the introduction of a free service into the marketplace for broadband and telecommunications services will by conservative estimates generate for U.S. consumers a net present value ranging from more than $18 billion to more than $32.4 billion. Dr. Simon Wilkie, Ph.D., Chair of the Economics Department at USC, Director of the USC Center for Communications Law and Policy, and former Chief Economist at the Federal Communications Commission found that a free broadband service as proposed in the AWS-3 proceeding would generate *a net present value of benefits to U.S. consumers ranging from "$18 billion to more than $25 billion."*[78] Dr. Kostas Liopiros estimates the total benefit at an even higher level due in part to inclusion of public safety agency benefits and concluded that: "American consumers and the public will experience average annual benefits of $3.8 billion, and aggregate consumer benefits over the 15-year term of the license would amount to $32.4 billion"[79]

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[76] Notice of Inquiry *supra* note 1, ¶ 54. Citing Pew Internet & American Life Project Survey, Adoption Stalls for Low-Income Americans Even as Many Broadband Users Opt for Premium Services That Give Them More Speed at iii (July 2008), available at: http://www.pewinternet.org/~/media//Files/Reports/2008/PIP_Broadband_2008.pdf (indicating that "19% of dial-up users said nothing would convince them to get broadband").

[77] Broadband affordability plays a critical role in adoption rates. Indeed, the text and structure of the Recovery Act link these two concepts. Nevertheless, the Commission's NOI explicitly seeks comment on whether a link exists and asks "[a]s broadband becomes more affordable, will more consumers use broadband?" Notice of Inquiry *supra* note 1, ¶ 52. The answer to that question is a resounding "yes." The more that the Commission does to address affordability, the more it will in turn do to address maximum utilization.

[78] *See* "The Consumer Welfare Impact of M2Z Networks Inc.'s Wireless Broadband Proposal," WT Docket Nos. 07-16 and 07-30, (filed Mar. 02, 2007) (emphasis added), available athttp://fjallfoss.fcc.gov/cgibin/websql/prod/ecfs/comsrch_v2.hts.

[79] Liopiros *supra* note 75, at i–ii.

Moreover, the cost of delays in the introduction of free service in the AWS-3 band continues to be significant.[80] The report entitled "M2Z Networks, Inc. The Value of Public Interest Commitments and the Cost of Delay to American Consumers", offers an eye-opening perspective of the effects on delay in the introduction of free services to the market.[81] Specifically, the report calculates the cost to society of each year of delay in the introduction of free broadband service in the marketplace (at speeds slower than currently under consideration by the FCC) as resulting in an annual cost to American consumers of $4.7 billion in lost benefits.[82]

The adoption of the pending AWS-3 rules would also have a significant positive impact on our struggling economy by reducing the need of taxpayer dollars to fund universal broadband access. In a 2006 paper reviewing one of the proposals to use AWS-3 for a free nationwide broadband service, Dr. Gregory Rosston, currently Deputy Director of SIEPR and Public Policy at Stanford and former deputy Chief Economist at the FCC, and Scott Wallsten, currently vice president for research at the Technology Policy Institute, made the following conclusion about the potential impact of this service: "[t]hese calculations [made consistent with OMB procedures] suggest that the net present value of savings just in terms of a slower rate of increase in the [Universal Services] high cost fund could range from *around $4 billion to $13 billion over 25 years*."[83]

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[80] Liopiros *supra* note 75 .

[81] *Id. at* 31.

[82] *Id.* at ii, 29-31.

[83] *See* The Benefits of Broadband Competition, FCC WT Docket Nos. 07-16 and 07-30, (filed May 5, 2006) (emphasis added) available at: http://www.m2znetworks.com/xres/uploads/documents/Appendix%205%20-%20Benefits%20of%20Broadband%20Competion%20(4).pdf.

B. Action on AWS-3 is Long Overdue

There is little doubt that the conclusion of the AWS-3 proceeding is woefully overdue. In September 2007, the FCC unanimously pledged to resolve the AWS-3 proceeding no later than August 14, 2008:

> We commit to issuing an order adopting rules in this proceeding within nine months following the publication of this Notice in the Federal Register. This commitment is intended to facilitate the introduction of new and innovative wireless broadband services to American consumers as soon as possible.[84]

That commitment (which was later reiterated to members of the Senate[85] and the House of Representatives[86]) is notable for two reasons. First, it demonstrates that the Commission itself recognizes the importance of timely action to establish the AWS-3 service rules. Second, the commitment signals that the goal of the AWS-3 NPRM is for the FCC to "facilitate the introduction of new and innovative wireless broadband services to American consumers *as soon as possible*."[87] And as far back as September 2007, a majority of the Commission expressed a strong desire to make this spectrum band

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[84] *See* Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, 22 FCC Rcd 17035 (2007) ("AWS-3 NPRM"). The NPRM was published in the Federal Register on November 14, 2007. Federal Communications Commission, Proposed Rules, Advanced wireless services in 2155-2175 MHz band, 72 Fed Reg. 64013–64018 (November 14, 2007). Thus, the Commission promised regulatory certainty for the companies interested in this spectrum by August 14, 2008. Unfortunately, the former FCC did not live up to its commitment to take final action.

[85] In a letter on February 14, 2008 concerning the AWS-3 rulemaking, Senator Inouye requested that the Commission "set a clear deadline by which the spectrum will be auctioned or made otherwise available for use" because "[e]stablishing a firm deadline by which the licensee will have access to the 2155-2175 MHz band is vital to expanding broadband services throughout our country." On April 16, 2008, the then FCC Chairman Kevin J. Martin wrote in response to Senator Inouye's letter and explained that the Commission was committed to "expedite" the AWS-3 proceeding and establish service rules by August 14, 2008.

[86] *See* Status of the DTV Transition: 370 Days and Counting. 110th Cong. (2008) (Response of Chairman Kevin J. Martin to question by Rep. Anna G. Eshoo) (video of this exchange is available at the 1 hour 29 minutes marker at http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.021308.DTV.Transition.shtml.

[87] AWS-3 NPRM *supra* note 84 at ¶ 4 (emphasis added).

available for advanced wireless services immediately.[88] Moreover, the Commission's desire for quick action was combined with critical administrative action a year ago when the FCC took the unusual (though helpful) step of seeking comment on the actual text of the proposed rules for AWS-3, allowing for full and informed public participation.[89]

Unused and underutilized spectrum is a lost opportunity for the public interest. For that reason, the Recovery Act and prior legislative efforts[90] were designed to promote timely government action.[91] Moving forward rapidly with AWS-3 will reward

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[88] Then Commissioner Copps noted in his statement accompanying the AWS-3 NPRM: "I am especially pleased that my colleagues have agreed to commit to issuing service rules for the AWS-3 band within 9 months from the date this item is published in the Federal Register. The one outcome that would plainly not serve the public interest is for this spectrum to remain unavailable for advanced wireless services." (emphasis added). Similarly, Commissioner Adelstein added "I am pleased that we are committing to conclude this proceeding and make this spectrum available in a fixed timeframe, although I would have preferred to do it sooner." Commissioner Tate endorsed the need for swift and certain action when she stated "I agree with my colleagues who urge that the rules for this band be established as quickly as possible in order to launch new services that may benefit consumers. The sooner we establish appropriate rules and make this spectrum available, the sooner providers may be able to make available advanced services that enable consumers to be more productive in their jobs, acquire information they need to benefit their health or quality of life, and educate and entertain themselves and their families."

[89] *See* AWS-3 FNPRM *supra* note 65. Releasing proposed FCC rules for comment is the very kind of openness that many have recommended that the new Commission implement. *See, e.g.*, Mark Cooper, Director of Research Consumer Federation of America, *Focus on the Public Interest and Restore the Pragmatic, Progressive Principles of The Communications Act of 1934* available at http://fcc-reform.org/response/focus-public-interest-and-restore-pragmatic-progressive-principles-communications-act-1934 ("The agency must open up the rulemaking process, putting actual rules out for public comment and engaging the public fully in the process."). It would be the height of irony for the Commission to send the message that openness and transparency leads to indecision.

[90] Ensuring the "efficient and intensive use of electromagnetic spectrum" as mandated by Section 309(j)(3) of the Communications Act is frustrated by further delay.

[91] There is also an ongoing statutory violation as a result of the Commission's inaction. Section 7(b) of the Communications Act states: "If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated." 47 U.S.C. § 157(b). This provision was enacted specifically 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. " See Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E73 (Jan. 24, 1984). Thus, Section 7(b) required the FCC to conclude the rulemaking by September 7, 2008. The Commission's failure to comply with the statute did not go unnoticed. Following the FCC's violation of Section 7, three members of Congress (Representative Solis, Representative Towns and Representative Rush) all of whom are members of the Committee of jurisdiction over the FCC wrote the Commission highlighting its statutory violation. *See* Letter from Representative Hilda Solis to Chairman Kevin J. Martin, WT Docket Nos. 07-195 and 04-356 (Oct. 3, 2008); *see also* Letter from Representatives Bobby L.

innovation, encourage investment, and accelerate the introduction of new services that advance the interests of consumers.

Each day that the Commission delays action on the AWS-3 rulemaking is another day that the goal of broadband Internet access for all Americans is unreasonably deferred. And the record in the prior AWS-3 dockets clarifies that such delay has a quantifiable negative impact on our economy.[92] Given the nature and extent of interests affected by the pendency of the AWS-3 rulemaking and the benefits that will accrue, the Commission should make it a high priority to immediately resolve the AWS-3 proceeding as promised.

Congress has already provided a telling example of the importance of swift action on Recovery Act-related items. With historic speed Congress debated, drafted and presented the Recovery Act to the President. Now timely implementation is in the hands of the FCC. And just like the Commission swiftly issued its Rural Broadband Strategy report after receiving public comment,[93] the same should be true here.

III. THE COMMISSION SHOULD RAPIDLY ESTABLISH THE NATIONAL BROADBAND PLAN

In addition to giving the AWS-3 proceeding accelerated consideration with a vote in the short term, the Commission must adopt a mindset that the entire National Broadband Plan deserves expedited treatment. The Commission should treat this undertaking with the same (if not more) urgency than it treats telecommunications mergers. Although mergers can fundamentally change the marketplace, the Commission

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Rush and Edolphus Towns to Commissioners Michael J. Copps and Jonathan S. Adelstein, WT Docket Nos. 07-195 and 04-356 (Dec. 3, 2008).

[92] Liopiros, *supra* note 75.

[93] Comments on the Rural Broadband Strategy were submitted to the Commission on Mar. 10, 2009 and the Report was released ten weeks later on May 22, 2009.

recognizes the need to provide regulatory certainty in the merger context and has established policy and operational goals to resolve most mergers in 180 days.[94] Thus, the Commission should set an internal goal of completing its work on all aspects of the National Broadband Plan within 180 days of the release of the April 8, 2009 NOI. Setting an outside date of 180 days — October 5, 2009 as a deadline for Commission action will demonstrate the Commission's recognition of the importance of these weighty matters and allow companies to make long needed investments in the broadband sector in a timely manner.

IV. CONCLUSION

The National Broadband Plan is a golden opportunity for the Commission to make lasting changes to the state of the United States broadband marketplace. The Commission should undertake its efforts to accomplish the lofty goals of the statute in a way that promotes the public interest by formulating a concrete plan of action and moving forward with such actions without delay.

Respectfully submitted,

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[94] See www.fcc.gov/transaction/timeline.html.