

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)	
)	
M2Z Networks, Inc.)	
)	
Application for License and Authority to)	
Provide National Broadband Radio Service)	WT Docket No. 07-16
In the 2155-21755 MHz Band)	
)	
Petition for Forbearance Under)	
47 U.S.C. § 160(c) Concerning Application of)	
Sections 1.945(b) and (c) of the Commission’s)	WT Docket No. 07-30
Rules and Other Regulatory and Statutory)	
Provisions)	
_____)	

To: The Commission

***EX PARTE* WRITTEN COMMENTS OF
THE PUBLIC INTEREST SPECTRUM COALITION**

Media Access Project, on behalf of the Public Interest Spectrum Coalition (PISC),¹ files the following written *ex parte* comments in this proceeding.

SUMMARY

The M2Z *Application* promises significant benefits to the American people. In particular, M2Z has offered to provide free wireless service on a national basis, to open its network to devices that do not harm the network (“open device” or “wireless *Carterfone*”), to operate under principles of network neutrality, and to foster a wholesale market by making its capacity available on a wholesale basis. As the recent proceedings with regard to the 700 MHz Auction demonstrate,

¹PISC consists of the following organizations: Champaign-Urbana Wireless Network (CUWIN), Consumers Union (CU), Consumer Federation of America (CFA), Free Press (FP), EDUCAUSE, Media Access Project (MAP), National Hispanic Media Coalition (NHMC), New America Foundation (NAF), Public Knowledge (PK), and U.S. PIRG.

substantial public and industry support exists for all of these proposals. In addition, PISC support the use of a royalty payment rather than an auction to return a portion of the value for use of the spectrum to the public.

At the same time, however, certain aspects of the *M2Z Application* – such as mandatory filtering for the free tier and “opt out” provision for the paid tier – raise serious concerns. In addition, while M2Z had expressed support for the principles described above, it has sought to retain flexibility in its license. The proposed license conditions do not adequately ensure that M2Z would operate under open device rules or network neutrality rules of sufficient stringency to confer the full benefits of innovation and free expression to the public. Nor has M2Z committed to a mandatory, nondiscriminatory wholesale requirement.²

Given these concerns, PISC cannot support grant of the *Application* as filed. However, if the Commission imposed a wholesale obligation similar to that proposed by PISC in the 700 MHz proceeding,³ imposed network neutrality conditions similar to those imposed in the AT&T/BellSouth Merger,⁴ imposed open device rules similar to those recently imposed on the “C Block” in the 700 MHz proceeding⁵ (in addition to the open publication condition in the *Application*), and eliminated the filtering condition, PISC would support grant of the *Application*.

²We understand that M2Z filed an *Ex Parte* on August 24, 2007 stating its willingness to abide by a wholesale obligation. While a positive step forward, this does not provide the same certainty as a mandatory condition such as that proposed by PISC.

³See Comments of *Ad Hoc* Public Interest Spectrum Coalition, *In re Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, WT Docket No. 06-150 at 12-28, and Appendix A (filed May 23, 2007) (“*PISC 700 MHz Comments*”).

⁴*In re AT&T, Inc. And BellSouth Corp.*, 22 FCCRcd 5662, 5814-15 (2007).

⁵*In re Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order*, WT Docket No. 06-150 (rel. August 10, 2007) (“*700 MHz Auction Order*”).

If the Commission denies the *M2Z Application*, it should not let this valuable spectrum continue to lie fallow. Rather, the Commission should move immediately to a Notice of Proposed Rulemaking (NPRM) to establish service rules for the band. Because other applicants have stated on the record they will provide service on terms similar to M2Z, the Commission should begin with these conditions as a minimum service level, with the modifications suggested by PISC above.

In addition, an NPRM should also explicitly seek comment on whether to open the band to “unlicensed” or “license-lite” use, such as that approved in the 3650-3700 MHz Band.⁶ The AWS-3 band lies between the existing 2.4 Ghz unlicensed bands and 900 MHz unlicensed bands. Existing Part 15 chipsets are capable of transmitting and receiving on the 2.155 GHz band, although manufacturers suppress this capacity to comply with existing certification rules.⁷ If the Commission modified Part 15 to permit operation of unlicensed devices in the band under rules similar to those for 2.4 Ghz devices, users could immediately take advantage of this new capacity by modifying existing equipment software. In a stroke, the Commission could exponentially increase the ability of community network operators, municipal operators, and commercial wireless ISPs (WISPs) to provide broadband services.

To fully explore these options, the Commission should consider extending the deadline for a decision. M2Z filed a Forbearance *Petition* pursuant to Section 10(c) of the Communications Act, 47 U.S.C. §160(c), on September 1, 2006. If the Commission determines that Section 10

⁶See, *In re Wireless Operations in the 3650-3700 MHz Band*, 20 FCCRcd 10692 (2005), *affirmed on reconsideration* 22 FCCRcd 10421 (2007).

⁷See, e.g., Data Sheet, XtremeRange 2-2.3 GHz Atheros Radio Module, available at <http://www.ubnt.com/downloads/xr2-2.3datasheet.pdf> (Last viewed August 27, 2007).

forbearance properly applies here⁸ (a question on which PISC takes no position), the Commission must make a determination by September 1, 2007 or extend the time another 90 days.⁹ It would enhance the opportunity to develop the public record, and thus serve the public interest, if the Commission extended the time to decision 90 days.

ARGUMENT

I. THE COMMISSION SHOULD EXTEND THE FORBEARANCE DEADLINE NINETY DAYS.

The 700 MHz debate has educated and energized the public on spectrum issues. More than 250,000 individuals filed comments, as did public interest organizations and others that do not generally participate in spectrum proceedings. M2Z presents here the same issues that drove the public debate in the 700 MHz auction – wireless *Careterfone*, network neutrality, wireless wholesale, and ubiquitous wireless deployment. Given the opportunity, members of the public and the public interest community will once again make themselves heard, to the enormous benefit of the Commission and the rulemaking process.

The Commission faces two potential deadlines. M2Z has both filed a *Petition* for Forbearance under Section 10 and asserted that its *Application* falls under Section 7, and that the Commission must therefore make a determination within one year of M2Z's filing of its *Application*. PISC does not, here, take any position on the merits of these arguments. Even assuming both are

⁸PISC notes that Section 10, by its terms, applies to “telecommunications carriers” and “telecommunications services,” not “information services” or even wireless service not subject to Title II regulation. This is not to say that Section 10 does not apply here. Rather, PISC notes the question is unsettled and that both the Commission and M2Z may wish to avoid testing the applicability of Section 10 here by extending the time for review.

⁹M2Z has also asserted a right to a Commission decision under Section 7(b) of the Act. As explained below, whatever determination the Commission makes with regard to the applicability of Section 7, the Commission can still extend the time for review.

applicable, however, the Commission has the authority to extend the time for further comments.

Section 10, by its own terms, allows the Commission to unilaterally extend the deadline for a decision by 90 days before the *Petition* is deemed granted. The only apparent obstacle to extending the deadline, therefore, is the Section 7(b) requirement that the Commission decide “within one year after such petition or application is filed.” Even assuming Section 7 applies (a point on which PISC takes no position), the Commission has several options before it.

First, M2Z takes the position that the deadline for a decision under Section 7 expired on May 5, 2007. *See* Letter of Uzoma C. Onyeige to Marlene Dortch, WT Docket Nos. 07-16, 07-30 (filed August 23, 2007). M2Z therefore seems content to wait until the Commission resolves its Forbearance *Petition* before seeking judicial redress. As long as M2Z is assured of “full transparent and timely review of the record,” *id.*, it is difficult to see why an additional 90 days should matter, or what remedy M2Z could hope for based solely on a failure of the Commission to decide the Section 7 *Application* within a year. Unlike a *Petition* under Section 10, a Section 7 *Application* is not “deemed granted” by a Commission failure to make a determination within a year. While M2Z can seek mandamus to force the Commission to decide, that process will take more than the additional 3 months of the Forbearance *Petition*.

Alternatively, the Commission could resolve the applicability of Section 7 but not dismiss the *Application*. If the Commission determines that Section 7 does not apply, then no Section 7 deadline exists and the Commission may extend the Section 10 deadline 90 days without concern. If the Commission decides that Section 7 does apply, it could decide that the *Application* as filed does not serve the public interest, but would do so subject to the changes suggested by PISC and seek further comment on the PISC proposals.

Whatever approach the Commission takes, it would serve the public interest for the Commission to allow more time for consideration. The Commission should therefore extend the deadline for the Forbearance *Petition* and permit further development of the record.

II. THE *APPLICATION* AS FILED DOES NOT SERVE THE PUBLIC INTEREST, BUT COULD WITH MODIFICATION.

As currently proposed, the *Application* does not serve the public interest. M2Z lays great stress on offering a free tier, but compromises the value of this service by requiring that all users – whether adults or minors – must abide by mandatory content filtering. Even those who purchase the premium tier must explicitly “opt out” of this filtering. *M2Z Application* Appendix 3. This raises significant statutory and constitutional concerns. Because M2Z is not a “broadcast service,” it does not fall under the indecent content prohibition of 18 U.S.C. § 1464. Nor does the proposed filtering system have the exceptions that rescue 18 U.S.C. § 1464 from constitutional attack. For example, M2Z does not propose to limit filtering to those hours when children are most likely to use the service. Accordingly, M2Z’s proposed filtering license condition violates the prohibition on mandatory censorship. *See* 47 U.S.C. § 326.

Further, because M2Z explicitly seeks regulation as a common carrier under 47 U.S.C. §332, *see M2Z Application* Appendix 2 at 5, the correct Constitutional framework for First Amendment analysis would appear to be that of common carriers. The Supreme Court has held that neither Congress nor the Commission may censor speech that is merely indecent made via common carrier to protect minors, despite the ubiquity of telephones. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1990). Granting the license subject to a filtering condition therefore raises serious First Amendment concerns as well as statutory concerns.

M2Z’s insistence on flexibility in its business plan, as well as the Commission’s actions in

the recent *700 MHz Auction Proceeding*, have likewise undercut the value of M2Z's *Application*. M2Z does not commit to a wholesale model, nor does it commit to enforceable network neutrality provisions. The public safety and open device conditions urged by M2Z fall short of the Commission's recent actions in the *700 MHz Auction Order*. With regard to interoperability, M2Z commits to providing a published standard for a customer premise device, but apparently would retain the right to reject devices that comply with technical specifications that would assure that the device does not harm the network. This falls well short of the level of openness mandated by the Commission for the "C Block" licensees in the upcoming 700 MHz Auction. *700 MHz Auction Order* at ¶¶ 222-225. Similarly, the creation of the "D Block" and associated public-private partnership greatly reduce the benefit of the permitting public safety entities to use the M2Z network.

PISC do not consider the *Application* devoid of public interest features even as written. For example, PISC applaud the requirement that the licensee pay a regular return of 5% of the gross revenue from its premium tier as a mechanism for ensuring a return to the public of a portion of the value of the use of the public spectrum resource. Substituting such an approach for the current auction approach would facilitate participation by small businesses. It would also relieve licensees of the burden of crushing debt at the beginning of the license period, facilitating capital investment in network build out and encouraging licensees to provide service under models that promoted slow and steady growth rather than maximizing immediate cash flow to pay down debt incurred during the auction.

Nevertheless, the benefits to the public in the *Application* as written do not warrant providing a nationwide license to M2Z. PISC therefore cannot support grant of M2Z's *Application* as

submitted. The Commission can, however, impose conditions that would serve the public interest.

A. The Commission May Impose License Conditions That Serve The Public Interest.

Under Title III of the Communications Act, the Commission has broad authority vested in it by Congress to regulate and guide the development of radio technology, subject to the “touchstone” of the public interest standard. *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 214-217 (1943). As the Commission recently reaffirmed, this authority does not depend on a finding of any specific market conditions, such as a failure of adequate competition for existing services or a lack of possible alternate technologies capable of providing comparable and competitive services in the future. *700 MHz Order* at ¶¶ 200-01 (while the Commission “generally relies on the competitive marketplace,” it may take whatever action it deems appropriate to promote the public interest regardless of the state of the market). Furthermore, the Commission has explicitly found that facilitating the development of open communications platforms promotes the values of the First Amendment by facilitating greater means for expressive communication. *Id.* at ¶ 217. *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-91 (1969) (“Rather than confer frequency monopolies...the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it.”)

PISC therefore urge the Commission, if it chooses to grant the *M2Z Application*, to impose conditions that will ensure that the grant of the license maximizes benefit to the public and serves the public interest. In addition to the five percent royalty payment and free use by public safety already proposed, PISC recommend the following additional conditions.

Requirement to provide wholesale access. PISC filed lengthy comments in the 700 MHz proceeding explaining why a meaningful wholesale obligation serves the public interest by creating

increased wireless competition, promoting deployment of wireless services, and facilitating free and open communication. This will further both the interests of the Communications Act and the interests of the First Amendment. PISC incorporate by reference its previous comments and proposals for wholesale filed in Docket No. 06-150 here.

In a recent ex parte filing, M2Z states that it is “committed to provide subscription based wholesale services....as a standalone consumer service or for bundling with their [‘wholesale partners’] other products, applications and services.” See Letter of Uzoma C. Onyeige to Marlene Dortch, WT Docket Nos. 07-16, 07-30 (filed August 24, 2007). Regardless of M2Z’s stated intentions, PISC believes that the obligation to provide open and nondiscriminatory wholesale access should be an explicit license condition and apply to at least 50 percent of the network’s capacity in each of the nation’s Cellular Market Areas (or comparably localized area).

Enforceable network neutrality conditions. The Commission should mandate as permanent conditions network neutrality obligations identical or more stringent than those imposed as conditions in the *AT&T/Bell South Merger Order*.¹⁰ As the Commission observed when it adopted its *Framework for Wireless Broadband Services*, wireless services remain subject to Commission determinations on appropriate service rules pursuant to its authority under Title III. See *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCCRcd 5901, 5914-15 (2007). Furthermore, because M2Z has explicitly sought treatment as a CMRS carrier protected pursuant to Section 332, it has an obligation to provide “telecommunications services” not merely “information services.” The Commission therefore has authority to impose network neutrality conditions without regard to the classification of its

¹⁰22 FCCRcd at 5814-15.

broadband service as an “information service.”

Full Wireless Carterfone. The Commission has already taken steps to guarantee to the public a platform for open devices. Success of this platform remains uncertain, however, and the Commission has left considerable discretion in the hands of the ultimate licensee. The pending *M2Z Application* creates an opportunity to apply a more rigorous open device condition that will, especially when combined with wholesale and network neutrality, demonstrate the superiority of the open platform model. PISC remain convinced that openness is the ultimate “killer app,” as it facilitates the development and delivery of every other “killer app.” It is for this reason that the incumbent networks have fought so fiercely to keep an open competitor from emerging. By imposing these three conditions in a meaningful way, the Commission can give the public a chance to “vote with their dollars” and force open other networks through competitive pressures.

Remove the mandatory filtering. As discussed above, the Commission cannot license a network in which it requires censorship as an “integral” component. Given that only one license for this service will exist, even permitting the licensee to build such an architecture voluntarily raises statutory and constitutional concerns. It is the “paramount” First Amendment right of the public that the Commission must protect here, not the right of the licensee to censor material. *See Red Lion*, 395 U.S. at 390. While the Commission may permit an “opt in” filtering mechanism, it may not permit (and certainly cannot require) mandatory filtering for indecent content.

Consider permitting an unlicensed underlay. In 2002, the Commission’s Spectrum Task Force recommended consideration of unlicensed as well as licensed opportunities for spectrum access. Unlicensed spectrum access offers considerable benefits for users (detailed below). Because M2Z would receive a license for free, it should not object to sharing access to the spectrum where

technically feasible.

III. IF THE COMMISSION REJECTS THE APPLICATION, IT SHOULD RELEASE AN NPRM TO SET SERVICE RULES FOR THE BAND.

If the Commission does not grant the *M2Z Application*, it should not allow the spectrum to remain fallow. Instead, the Commission should simultaneously release an *NPRM* setting service rules for the band. Because six other applicants have offered to provide similar service under similar terms to M2Z, the Commission should use the M2Z proposed license conditions as the minimum service rules it will consider.

But the Commission need not limit itself to the conditions proposed by M2Z. Rather, PISC urge the Commission to find that the modifications and conditions proposed by PISC better serve the public as the license conditions for this band. Alternatively, if the Commission does tentatively find that it should adopt the PISC license conditions, it should seek comment on these conditions.

IV. THE FCC SHOULD EXPLICITLY CONSIDER WHETHER IT WOULD SERVE THE PUBLIC INTEREST TO OPEN THE BAND ON AN UNLICENSED RATHER THAN ON A LICENSED BASIS.

Finally, rather than create a licensed service in the AWS-3 band at all, the Commission should consider the enormous value in opening the band on an unlicensed basis or on a non-exclusive licensed basis similar to the rules adopted in the 3650-3700 MHz band.¹¹ Rejection of all applications for exclusive use within the band and adoption of non-exclusive use rules would better serve the public interest than creation of an exclusive licensed service.

The AWS-3 Band lies between the existing 900 MHz unlicensed band and the existing 2.4 GHz unlicensed band. The popularity of these bands has rendered both increasingly congested over

¹¹See, *In re Wireless Operations in the 3650-3700 MHz Band*, 20 FCCRcd 10692 (2005), *affirmed on reconsideration* 22 FCCRcd 10421 (2007).

the years. The growing popularity of broadband services using existing broadly distributed “wifi” technology has further increased the demand for unlicensed spectrum. With sufficient unlicensed spectrum used in combination, wireless ISPs can deploy competitive broadband services, creating not just a “third pipe” but a fourth, fifth, and sixth, or as many competitors as the market can support. Opening the 2.155-2.175 GHz band to rules similar to that in the 2.4 GHz band, but subject to mandatory contention requirements to prevent undue congestion, would create a series of bands that “smart radios” could use to maximize capacity in the delivery of unlicensed wireless services.

Existing technologies already exist. Widely deployed chipsets from Atheros and others can transmit in any band between the existing 900 MHz unlicensed band and the 5.8 GHz unlicensed band. To comply with the Commission’s Part 15 rules, manufacturers deliberately suppress the ability of transmitters to operate in bands the Commission has not authorized for unlicensed use. If the Commission authorized use in the 2.155 GHz band, it would only require manufacturers to change the operating software to install new wireless transmission and reception capacities in existing equipment.

Consumers would not need to wait for manufacturers and the licensee to agree on standards and create a new national infrastructure from scratch. Opening the band to unlicensed use would leverage existing infrastructure and make the spectrum instantly available to any user anywhere in the country. Opening the band to unlicensed in this manner would serve the interests of the Communications Act and the First Amendment, *see, e.g.*, Harold Feld, “From Third Class Citizen to First Among Equals, Rethinking the Place of Unlicensed in the FCC Hierarchy,” 15 *CommLaw Conspectus* 53 (2007), as well as serving the broader public interest by promoting the distribution of affordable wireless services on an equal basis throughout the country.

In addition, opening the band on a non-exclusive basis eliminates the need for a contentious rulemaking and satisfies the requirement that the Commission seek mechanisms to minimize conflicting applications. *See* 47 U.S.C. §309(j)(6)(E). The Commission previously considered whether the band would serve the public as part of the licensed AWS service, and declined to include the band in the recent AWS auction. The limited interest in the band by potential licensees – even when stimulated by the M2Z application – strongly suggests that opening the band on a non-exclusive basis would better serve the public interest.

CONCLUSION

The Commission should not move hastily, but should carefully consider how the 2.155-2.175 GHz band can best serve the public interest. While grant of the M2Z license as proposed would not provide sufficient benefit to the public to warrant grant of the application, the Commission has the power to impose conditions that would genuinely serve the public interest. But the decision on how best to serve the public interest does not end with a decision to reject the *M2Z Application*. The Commission should give serious consideration to opening the band on a non-exclusive basis or, in the alternative, what rules for a licensed service would best serve the public.

Respectfully submitted,

_____/s/_____
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August 28, 2007