

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of M2Z Networks, Inc. for)	
Forbearance under 47 U.S.C. § 160(c))	WT Docket No. 07-30
Concerning Applications of Sections)	
1.945(b) and (c) of the Commission’s)	
Rules and Other Regulatory and Statutory)	
Provisions)	
)	
In the Matter of)	
)	
M2Z Networks, Inc.)	WT Docket No. 07-16
)	
Application for License and Authority to)	
Provide a National Broadband Radio)	
Service in the 2155-2175 MHz Band)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

I. INTRODUCTION

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ submits these comments in response to the Federal Communications Commission’s

¹ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

(“FCC” or “Commission”) request for comments in the above-captioned proceedings.²

These applications implicate technical questions and issues regarding spectrum allocation and interference about which NASUCA professes limited expertise. These applications also necessarily involve M2Z Networks Inc.’s (“M2Z”)s request for exclusive use of spectrum, which under normal circumstances and as a general principle would not be favorably received by NASUCA’s membership.³

Yet M2Z’s commitment for free ubiquitous broadband service appears to be superior to the competing petitions that were filed by other parties.⁴ And the bases of the various petitions to deny⁵ do not appear to be impediments to granting M2Z’s Petitions, in the furtherance of the public interest.

NASUCA’s comments concern primarily the public interest benefits of M2Z’s proposal to offer free broadband access to approximately 95% of the U.S. population

² On January 31, 2007, a Public Notice was issued in WT Docket 07-16, “Wireless Telecommunications Bureau Announces That M2z Networks, Inc.’s Application For Licensee And Authority To Provide A National Broadband Radio Service In The 2155-2175 Mhz Band Is Accepted For Filing” DA 07-492 (rel. January 31, 2007) (“Spectrum Public Notice”). On March 9, 2007, a Public Notice was issued in that docket setting a pleading cycle, with Petitions to Deny due March 16, 2007, oppositions to Petitions due March 26, 2007, and replies due April 3, 2007. DA 07-987 (rel. March 9, 2007). In WT Docket 07-30 a Public Notice, “Pleading Cycle Established for Comments on Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160 (c) to Permit Acceptance and Grant of its Application for a License to Provide Radio Service in the 2155-2175 MHZ Band,” DA 07-736 (rel. February 16, 2007) (“Forbearance Public Notice”) set comments on the petition for forbearance as due March 19, 2007, with reply comments due April 3, 2007. M2Z has requested that the applications be considered in tandem. NASUCA is submitting these comments as combined comments on the forbearance petition and as opposition to the Petitions to Deny filed to date.

³ Likewise, NASUCA has concerns about supporting a single company’s business plan.

⁴ Applications were filed by Commnet Wireless, LLC (“Commnet”), McElroy Electronics Corporation (“MEC”), by NetfreeUS, LLC (“NetFree”), by NextWave Broadband Inc. (“NextWave”), and by Open Range Commuincations, Inc. (“Open Range”). As noted above, NASUCA will not address the technical issues raised by the applications.

⁵ Petitions to Deny were filed by AT&T Inc. (“AT&T”); CTIA - The Wireless Association® (“CTIA”); NextWave; Motorola, Inc. (“Motorola”); T-Mobile USA, Inc. (“T-Mobile”); Verizon Wireless (“VZW”); and the Wireless Communications Association International, Inc. (“WCA”).

within 10 years of the approval of its Application.⁶ M2Z proposes that it be granted a 15 year license for use of the 2155-2175 MHZ spectrum for its network without the use of the competitive bidding processes set forth in 47 U.S.C. 309(j).⁷

In addition to stating that it will provide free access to broadband to most of United States in accordance with its proposed construction benchmarks, M2Z's Application also states that it will:

- apply automatic "state of the art filtering" to block obscene or indecent material⁸;
- provide a "secondary, interoperable" broadband network for first responders⁹; and
- pay to the U.S. Treasury a "usage" fee in the amount of five percent (5%) of the gross revenues derived from its offering of its Premium Service.¹⁰

NASUCA believes that M2Z's Application is, over all, in the public interest. The public interest factors that M2Z has identified in its Application are significant and should be given serious consideration by the Commission. NASUCA believes, however, that the benchmarks set forth by M2Z lack sufficient detail and proper enforcement mechanisms, and NASUCA also has other concerns. The Commission should ensure that any benchmarks proposed by M2Z are concrete and enforceable, and should address NASUCA's other concerns, set forth below. NASUCA welcomes the opportunity to

⁶ See Application of M2Z Networks, Inc. for License and Authority to Provide and National Broadband Radio Service in the 2155-2175 MHZ Band (filed May 5, 2006) ("Application") at 1. On September 21, 2006, M2Z amended its Application to incorporate by reference its separately filed Forbearance Petition.

⁷ Id. at 34-40.

⁸ Id. at 23.

⁹ Id. at 24.

¹⁰ Id. at 26.

comment on M2Z’s groundbreaking Application. The public interest benefits of M2Z’s Application as well as NASUCA’s concerns about the lack of adequate benchmarks in the Application and other aspects of the Application are addressed below.

II. PUBLIC INTEREST FACTORS

A. Provision of Free Broadband Data Service

NASUCA agrees with M2Z that access to a high-speed data network would prove valuable to many Americans in addition to being a vast improvement for those that have access to only dial-up service today. Users of M2Z’s free broadband service, termed National Broadband Radio Service (“NBR”) will not be assessed monthly recurring fees.¹¹ NBR, as proposed, would be available to 95% of U.S. consumers within 10 years of the granting of M2Z’s license. In addition, NBR service would provide access to the internet at a speed “at least six times greater than dial-up service.”¹² The proposed wide coverage of M2Z’s network also bodes well for coverage of areas that are currently either unserved or underserved.¹³

NASUCA believes that the provision of free access to broadband service is in the public interest. As noted below, however, NASUCA has some reservations, including the lack of specificity with the construction benchmarks and enforcement guidelines associated with the rollout of the service, among others.¹⁴

¹¹ Id. at 3.

¹² Id. at 23.

¹³ Id., fn 59.

¹⁴ In presentation materials, M2Z indicates that it will generate revenue to support its free broadband access service through the provision of “text search” advertising. The Commission should ensure that such advertising does not violate users expectations of privacy and is not in violation of prior Commission CPNI decisions.

B. Specific Benchmarks

M2Z states in its Application that it will be subject to certain construction benchmarks in return for the grant of its license. These benchmarks are set forth in Appendix 2 to the Application¹⁵ and include:

- A base station will be placed in operation in at least one Standard Metropolitan Statistical Area within 24 months of the grant of the license;
- On the third anniversary of the grant of the license M2Z “will have constructed sufficient base stations to provide service to thirty-three percent (33%) of the U.S. population measured by counties”¹⁶;
- On the fifth anniversary of the grant of the license “will have constructed sufficient base stations to provide service to sixty-six percent (66%) of the U.S. population measured by counties”; and
- On the tenth anniversary of the grant of the license “will have constructed sufficient base stations to provide service to ninety-five percent (95%) of the U.S. population measured by counties.”

The benchmarks seem laudable. The provision of near-universal free access to broadband high speed data service within ten years would be in the public interest. NASUCA supports this goal and welcomes initiatives that help achieve such access. NASUCA believes, however, that the benchmarks outlined above need strengthening by M2Z and/or the Commission.

M2Z states in the Application that its “goal” is to “[p]rovide free high speed connections to 95% of U.S. consumers.” The benchmarks set forth in Appendix 2 state

¹⁵ Appendix 2 is entitled “Conditions for Grant of M2Z’s License and Operation of its Network.”

¹⁶ It is not entirely clear what the phrase “population as measured by counties” means. For instance, when M2Z states that it will provide service to 33% of the U.S. population measured by counties, does this mean that M2Z will serve all of counties that include 95% of the total U.S. population or only part of those counties? If the latter, the benefits of M2Z’s application would be substantially decreased.

that M2Z will have “constructed sufficient base stations to provide service” to the requisite percentage of the U.S. population on the third, fifth, and tenth anniversaries of the grant of the license. The benchmark may be sufficient so long as *access* to M2Z’s network is provided by each anniversary. “Access” must include the availability of consumer premises equipment (“CPE”) to access M2Z’s network, and any other build-out, in addition to the construction of base stations, that is necessary to provide access to the network.

Further, the Application lacks meaningful sanctions for not attaining the benchmarks. M2Z notes that the Commission has “ample jurisdiction” to enforce the commitment made in the Application.¹⁷ M2Z, however, cites only that the Commission has authority to revoke its certificate without a hearing.¹⁸ While the FCC has the authority to revoke M2Z’s certificate, more realistic incremental measures should be agreed to by M2Z and adopted by the Commission to ensure the timely rollout of the network.

M2Z also claims that its “hard” population coverage benchmarks are much more substantive than the “substantial service” test outline in the Commission’s rules. See 47 C.F.R. §§ 27.14(a)-(b). NASUCA agrees in principle with M2Z but recommends that enforcement provisions for failure to meet the proposed benchmarks be put in place before M2Z’s license is granted.

¹⁷ Id. at 32

¹⁸ Id. at 33, fn 102.

C. Filtering

M2Z proposes mandatory filtering of indecent and obscene material as one of the public interest benefits of its NBRs. NASUCA takes no position on this aspect of the Application.

D. Public Safety Commitments

M2Z proposes that its network can serve as an “interoperable data network” for first responders.¹⁹ Again, M2Z proposes that access to its network will be provided free of charge to such public safety users. Since M2Z’s network can be accessed by all public safety entities, such as police and fire departments, consumers will benefit as well.

E. Equipment Costs

In its Application, M2Z asserts that the CPE necessary to access its network will also be “relatively inexpensive.”²⁰ M2Z’s estimates that the standalone “gateway” device will cost under \$250.²¹ NASUCA believes that CPE costs that approach \$250 would be prohibitive for many residential consumers, and reduce the value of the “free” monthly service.²² NASUCA recommends that the FCC require M2Z to substantially reduce the CPE cost and consider requiring M2Z to provide some form of support to make access more affordable to low-income consumers.²³

¹⁹ Id. at 24.

²⁰ Id.

²¹ Id. at 22. The residential gateway model is described as a desktop model. A portable gateway model is designed to work with laptops and other portable devices. Id.

²² For example the cost to a customer for five months of M2Z’s service would be \$50 a month, including CPE, which would be the same as the cost of a service with free CPE and a monthly recurring charge of \$50.

²³ Such support could be used as an offset to the usage fee discussed in the next section.

F. Five Percent Revenue-Based Usage Fee

M2Z offers to pay five percent of gross revenues from its Premium Service to the U.S. Treasury in return for the FCC's grant of its license.²⁴ The Application posits that the usage fee will avoid unjust enrichment of M2Z for the value of the public spectrum being utilized by NBRIS.²⁵ The payment of such a usage fee is in the public interest and strengthens the merits of the Application. Again, the FCC should adopt enforcement provisions to ensure that this usage fee is paid to the U.S. Treasury annually once M2Z implements its Premium Service.

III. POTENTIAL ADDITIONAL BENEFITS

In addition to the public interest benefits outlined in its Application M2Z claims that its provision of free broadband service will provide additional benefits,²⁶ including:

- Increased broadband penetration that will drive competition;
- The price of existing broadband service should decline because of M2Z's provision of free broadband access; and
- The value of broadband service will increase because of direct and indirect network effects.²⁷

²⁴ Id. at 26.

²⁵ Id.

²⁶ Id. at 27.

²⁷Id. In its Application, M2Z states that direct network effects occur when a subscribers are made better off by having more subscribers with whom to interact. Also, indirect network effects arise through lower prices and the increased availability of broadband service because there is a larger base of customers for the application developers to target.

Although these additional benefits are difficult to quantify, it is logical to assume that secondary and indirect benefits will result from the deployment of M2Z's NBRS. More consumers will be able to communicate with each other because of the increased access to high speed broadband. Both social and economic improvements should result from easier access by consumers to the community and the marketplace. Greater access to broadband on the scale proposed by M2Z may indeed drive down prices and make broadband and related CPE more affordable for all consumers.

Finally, M2Z states that it will not be "unjustly enriched" through the grant of its Application.²⁸ NASUCA believes that concerns about the unjust enrichment of M2Z are misplaced. M2Z provides a compelling argument in its Application that the value of free access to broadband to be enjoyed by 95% of U.S. consumers means the value of the allocated spectrum will be recouped.²⁹ The five percent usage fee associated with the use of the Premium Service also helps ensure that M2Z will not be unjustly enriched through the grant of its Application.

IV. PETITION FOR FORBEARANCE

M2Z's petition for forbearance is filed pursuant to Section 10(c) of the Communication Act of 1934, as amended ("the Act").³⁰ The petition claims that the Application meets the three-pronged test of § 160(a) of the Act regarding forbearance in that:

²⁸ Id. at 31.

²⁹ Id.

³⁰ See U.S.C. § 160(c); 47 C.F.R. §1.53.

1. enforcement of FCC regulation and provisions in not necessary to ensure that the charges and/or practices of M2Z are unjust of discriminatory;
2. enforcement of the regulations or provision is not necessary for consumer protection; and
3. forbearance is in the public interest.³¹

NASUCA believes that with appropriate enforcement-backed benchmarks, M2Z's Petition should be granted. On its face, M2Z's Application is not discriminatory. Access to the network is to be provided to all consumers in the network coverage areas. Subject to sufficient enforcement provisions, the Application is clearly in the public interest, and appropriate enforcement of the benchmark provisions obviate the need for additional consumer protection measures.

V. THE ALTERNATE APPLICANTS FOR LICENSE DO NOT APPEAR TO MAKE AS STRONG A PUBLIC INTEREST SHOWING AS M2Z.

Of the alternative applicants, perhaps the most conceptually intriguing is NetFreeUS. NetFreeUS, unlike M2Z, would apparently not build a network if its application were granted. NetFreeUS would get others to build networks, and would act as the “manager of a nationwide ‘public commons’ system to provide free and competitive broadband service.”³² If NetFreeUS couldn't find the others, it would apparently have a limited but vague responsibility to construct.³³ NetFreeUS adds a layer of complication to M2Z's plans, being dependent on “new entrants, entrepreneurs and

³¹ Forbearance Petition at 19.

³² NetFreeUS Application at 3.

³³ Id. at 6.

municipalities” to expeditiously step up to the plate.³⁴; it seems that M2Z’s more direct role would engender a more direct commitment to the cause.

Commnet proposes an inexpensive -- but not free -- broadband service.³⁵ Commnet proposes to serve only 90% of the U.S. population when it is done,³⁶ rather than M2Z’s 95%. Comment makes a public safety commitment.³⁷ And Commnet will offer two premium services.³⁸ In no respect is Commnet’s proposal superior to M2Z’s; Commnet refers to M2Z’s proposal as “so patently unrealistic that it is difficult to believe M2Z intends to stand by it.”³⁹ That is pretty strong language when in the same paragraph, Comment described its plans as “not quite as aggressive” as M2Z’s.

MEC asserts that it makes “substantially the same threshold qualifications showings and public interest commitments that were made by M2Z.”⁴⁰ The difference is that MEC assumes that there will be an auction for the spectrum, so commits to pay its winning bid to the United States Treasury, instead of M2Z’s commitment of future revenues.⁴¹ The public interest issues raised by M2Z’s application are such that valuing the service should not be solely the function of an auction. Indeed, MEC’s commitments have value only if MEC wins the auction.⁴²

³⁴ Id. At 1.

³⁵ Commnet Application, Ex. 2 at 1.

³⁶ Id. at 2.

³⁷ Id. at 3.

³⁸ Id. at 2.

³⁹ Id.

⁴⁰ MEC Application, Exhibit 3, p. 3.

⁴¹ Id.

⁴² And how would MEC structure its bid to reflect the “true value” (id.) of a free broadband service?

On the other hand, Open Range proposes “to construct and operate a wireless broadband network serving rural areas of the United States.”⁴³ Open Range says it will charge \$37.95 per month for its service and equipment.⁴⁴ Open Range commits to free service to schools and medical facilities.⁴⁵ Open Range’s application is silent regarding any commitment regarding payments to the U.S. Treasury.

On balance, the public interest would appear to favor M2Z’s application over that of Open Range. Although the focus of Open Range on rural areas is important, the greater ubiquity of M2Z’s service appears better to designed to achieve a national base for broadband service among the widest population, which will yield significant societal benefits.

NextWave proposes a fairly traditional spectrum-sharing arrangement,⁴⁶ that would not include an auction. Although there appear to be benefits from NextWave’s proposal,⁴⁷ it does not present the particular and substantial public interest benefits proposed by M2Z.

VI. THE ARGUMENTS IN THE PETITIONS TO DENY ARE NOT ADEQUATE BASIS FOR DENYING M2Z’S APPLICATIONS.

AT&T asserts that it is not clear whether the proposed service is viable and the

⁴³ Open Range Application at 1.

⁴⁴ Id. at 8. As discussed above, the cost of M2Z’s equipment is problematic.

⁴⁵ Id. at 4-5.

⁴⁶ See NextWave Petition to Deny at 3.

⁴⁷ See NextWave Application at 5-6.

alleged benefits are attainable.⁴⁸ AT&T also asserts that the “fee arrangement is discretionary and ... is fatally flawed because it is not tied to any meaningful valuation of the spectrum.”⁴⁹ If the service is not viable, all the public will have lost is the alternative uses of this spectrum that has lain fallow for six years now. AT&T also cites no authority for a specific requirement that the fee must be based on a valuation of the spectrum, given the difficulty of valuing the public interest benefits.

AT&T also asserts that there is no basis on which the Commission can grant an auction exemption.⁵⁰ The arguments in this area⁵¹ show only the weakness of the position.

NextWave’s opposition is premised on the merits of its competing application,⁵² discussed above. None of the other assertions in its petition to deny⁵³ are effectively supported in NextWave’s Petition.

T-Mobile, on the other hand, asserts that “M2Z merely describes a service that, at best, competes with other wireless broadband services that are available throughout the country.”⁵⁴ M2Z’s service is not really in competition with T-Mobile’s services which, at last examination, were not underlain by a free basic service like that proposed by M2Z.

⁴⁸ AT&T Petition at 3. This is inconsistent with AT&T’s later argument that there might be an “anticompetitive windfall” to M2Z. *Id.*; see also *id.* at 14-15.

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*; see also CTIA Petition at 2, VZW Petition at 1.

⁵¹ AT&T Petition *Id.* at 4-5.

⁵² NextWave Petition at 2.

⁵³ AT&T Petition at ii; CTIA Petition at 4-6; VZW Petition at 2-10.

⁵⁴ T-Mobile Petition at ii.

Motorola's petition with its two pages of text concludes that immediately granting M2Z's application "would seriously undermine the regulatory process."⁵⁵ M2Z's application was filed almost a year ago but was not accepted for filing until January 31. The pleading schedule is not exceptionally brief. And NASUCA does not anticipate that the Commission will be in a hurry to issue its decisions on M2Z's application.⁵⁶ Little undermining -- immediate or not, serious or not -- is taking place.

Finally, WCA asserts that "M2Z would preclude the Commission from even considering the possibility that other potential users of the band might have a better idea...."⁵⁷ One would hope that that is precisely the possibility that the Commission is considering in these dockets, given the Petitions to Deny and the applications filed by others for the spectrum that M2Z seeks.

CTIA says that "[t]he market for high speed, low cost mobile data services is already highly competitive...."⁵⁸ Would that were true.

VII. CONCLUSION

NASUCA believes that M2Z's Application, with some modifications, is in the public interest. Providing access to free broadband service to 95% of the population as well as first responders is in the public interest.

⁵⁵ Motorola Petition at 3.

⁵⁶ Even taking into consideration the statutory requirement that the Forbearance Petition be acted on in one year (absent extension).

⁵⁷ WCA Petition at 3.

⁵⁸ CTIA Petition at 3. CTIA fails to identify a single one of its members that provide a free service like that proposed by M2Z, and does not quote any of the so-called "low cost" rates its members charge.

NASUCA agrees with M2Z that the FCC has jurisdiction to ensure M2Z's compliance. Subject to certain enforceable conditions developed by the Commission, M2Z's Application should be approved.

Respectfully submitted,

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