

FHH Telecom Law
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M2Z 2 FCC:
Let's Make A Deal

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In the mid-to-late 1800's the U.S. government gave away swaths of land across the country, land that had been considered public commons, to railroad companies ostensibly in order to spur the development of a transcontinental railroad. The railroad industry didn't just get the land they needed to physically build the tracks; they also got the adjacent land that they could sell to settlers once the tracks were laid. Depending on your view of history this was either a corrupt land grab, or a boon to the national economy by connecting the East and West Coasts.

As Mark Twain may or may not have remarked, "History doesn't repeat itself, but it rhymes." On February 1, the FCC placed on public notice an application by M2Z Networks to acquire an exclusive nationwide license in the 2155-2175 MHz band. M2Z proposes to use this spectrum to offer a free nationwide broadband Internet service. M2Z will also offer a higher speed pay service. Any device that operates on this network would have to be certified by M2Z.

To be clear, M2Z is proposing that the FCC circumvent the normal auction approach to granting wireless licenses, and that the Commission grant this license to M2Z on terms proposed by M2Z. The proposed conditions would require M2Z to:

Provide broadband services nationwide with no recurring costs to consumers who purchase an M2Z certified device;

Within 10 years have network coverage to 95% of the country, with benchmarks of 33% coverage in 3 years and 66% in 5 years;

Block access to indecent content transmitted over the "family-friendly" free service;

Provide interoperable service to public safety officials; and

Pay 5% of gross revenues from the paid subscription service to the U.S. Treasury.

The statutory basis that M2Z cites for circumventing the auction process and substituting its own proposal is found in 47 U.S.C. §309(j)(6)(E), which states that the competitive bidding language in the Communications Act should not "be construed to relieve the Commission of the obligation in the public interest to continue to use . . . other means in order to avoid mutual exclusivity in application and licensing proceedings." The

Commission has rejected reliance on this statutory provision in other contexts, and it noted that it may yet dismiss the M2Z application “as defective under existing rules or under future rules.”

Among many issues that could crop up with M2Z’s application are First Amendment concerns raised by an applicant proposing to condition its non-broadcast license on regulating the flow of indecent (not obscene) content. Can the FCC accept an offer to condition such a license in a way that would be unconstitutional if the FCC itself were to demand it?

M2Z proposes that if it misses any of its deployment benchmarks the FCC can revoke the license, thereby obviating any spectrum warehousing concerns. But if people become reliant on a free service – one that they paid money for a device to connect to – would the FCC realistically step in and revoke the license? M2Z probably realizes that this is not very likely, so its offer to have its license revoked sounds somewhat hollow. Revocation would be especially unlikely if public safety officials became major users of the M2Z service, as M2Z proposes.

The Commission will also have to address whether it actually has authority to grant this proposed application on the 309(j) grounds cited by M2Z. The Congressional mandate to the FCC is clear that competing applications for licenses should ordinarily be granted by auction. Here M2Z would circumvent the problem of competing applications by having the FCC simply grant its own application without allowing others to apply. Instead, the FCC has opened a window for competing applications to be filed. The filing of even one competing application could present M2Z with an insurmountable obstacle since mutually exclusive initial applications must be awarded by auction.

And the biggest and most fundamental question for the Commission: is the public interest really being served by foregoing the auction process, as M2Z suggests? Why is this proposal better for the public than an auction for a national license in this band? Such an auction would likely be worth billions of dollars to taxpayers. There is no telling how many years it would take for the 5% revenue sharing proposal by M2Z to match the amount raised at auction (although they make some speculative claim that 5% is more, relying on PCS auction numbers).

Speaking of history repeating itself, the M2Z plan echoes the plan of Cyren Call to have a big chunk of free spectrum allocated to a new entity in exchange for free or reduced cost service to public safety entities. M2Z’s plan would use a different frequency block, but the basic concept (gimme a lot of free spectrum and I’ll take care of public safety communications for ya) seems to be this season’s bright idea *du jour*.

The soonest the FCC could grant the application would be March 5. Any time prior to a grant by the Commission a party may file a Petition to Deny or its own competing application to use spectrum in the proposed band.