

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of

M2Z NETWORKS, INC.)
) WT Docket No. 07-16
NEXTWAVE BROADBAND INC.)
OPEN RANGE COMMUNICATIONS, INC.)
)
COMMNET WIRELESS, LLC)
)
NETFREEUS, LLC)
)
McELROY ELECTRONICS CORPORATION)
TOWERSTREAM CORPORATION)
)
For Authority to Construct and Operate a)
Nationwide Broadband System in the)
2155-2175 MHz Band)

To: Secretary, For further distribution to:
Chief, Wireless Telecommunications Bureau

**OPPOSITION TO MOTION TO DISMISS AND
MOTION TO STRIKE**

Commnet Wireless, LLC (“Commnet”), by its attorneys and pursuant to Section 1.45 of the Commission’s Rules, hereby submits its Opposition to Motion to Dismiss and Motion to Strike (“Opposition”). This Opposition is filed in response to the so-called “Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals” (“Motion to Dismiss”) and “Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals” (“Motion to Strike”, and collectively with the Motion to Dismiss, the “M2Z Motions”), each filed March 26, 2007 by M2Z Networks, Inc. (“M2Z”). As discussed

herein, insofar as the M2Z Motions argue that the captioned Commnet application should be dismissed or “stricken,” they are without merit.¹

I. Commnet Had No Obligation to Serve M2Z with Its Application

In its Motion to Strike, M2Z argues first that the filing of a competing application is tantamount to the filing of a petition to deny, and therefore each of the competing applicants was required to serve a copy of its competing application upon M2Z. In the case of Commnet, M2Z goes further, and points to Exhibit 7 of the Commnet application, where Commnet noted that it believed the M2Z application to be defective. However, Commnet explicitly refrained in its application from stating any basis for this belief, and sought only simultaneous consideration with M2Z, not dismissal of the M2Z application. Specifically, the portion of the Commnet application referenced by M2Z reads as follows:

Commnet believes the M2Z application to be defective and not acceptable for filing, for reasons that shall be set forth, possibly in WT Docket No. 07-30, the separate docket where the Commission has requested comments and petitions pertaining to the M2Z September 1, 2006 Petition for Forbearance with respect to the processing of its application.

Ultimately, Commnet elected not to argue that the M2Z application was defective, and at no time has sought dismissal of the M2Z application as defective, either in WT Docket No. 07-16 or WT Docket No. 07-30. So the argument that the Commnet application, in and of itself, acts as a petition to deny the M2Z application, is a frivolous argument. Since that underlying argument is frivolous, so is M2Z’s corollary argument that Commnet was required to serve a copy of its application upon M2Z.

¹ This Opposition is timely filed. Under Section 1.45 of the Rules, there are ten days, plus three additional business days, to file an opposition to a motion which has been served by mail. Thus, the due date for this Opposition is Tuesday, April 10, 2007.

II. M2Z’s Claim to Be a Comparatively Superior Proposal, Even if True, Would Not Be Grounds to Support a Petition to Deny²

M2Z devotes the first fifty pages of its Motion to Dismiss to various arguments as to what the comparative criteria should be, and why its own application is comparatively superior to the various competing applications. Commnet disputes M2Z’s self-serving description of what the comparative criteria ought to be (no such criteria ever having been adopted by the Commission), M2Z’s argument that Section 7 of the Communications Act of 1934 as amended (“Act”), 47 U.S.C. § 157, compels the Commission to adopt M2Z’s proposed comparative criteria, and M2Z’s assertion that under those criteria, M2Z would prevail if compared to the other applications.³ However, even if all of those arguments were meritorious, they would not constitute grounds for dismissing Commnet’s, or any other, competing proposal *in advance* of a proceeding making the comparison among the competing applications.

Unless and until the Commission establishes a set of comparative criteria, and then sets up some sort of procedure (*e.g.*, comparative hearing, lottery, auction) for making the comparison under those criteria, the Commission has no basis for dismissing any of the competing applications on the ground that one of them is better than the others. M2Z’s argument to the contrary is without merit.

² While styled as a motion to dismiss, M2Z references Section 309 of the Act to support its right to file its pleading, which is effectively a petition to deny the Commnet application in Commission practice.

³ Neither a Motion to Dismiss nor an Opposition thereto is the appropriate place to argue what the comparative criteria should be, or whether Section 7 of the Act repeals all other sections of the Act and therefore solely governs the question of the appropriate comparative criteria. When the Commission establishes a docket for addressing those questions, which docket could be either WT Docket No. 07-16 or 07-30, if and when the Commission releases a Public Notice to that effect, Commnet will respond to M2Z’s arguments on those issues.

111. M2Z's Attack on Commnet's Financial Qualifications Is Frivolous

M2Z attacks Commnet for having included a letter from its parent company, a profitable major publicly-traded company with a long track record of financial success, which M2Z deems insufficient. This argument is not merely frivolous, but laughable. Leaving aside that the Commission has not yet issued any standards for basic financial qualifications for the license at issue,⁴ M2Z itself has provided nothing but anecdotal evidence of financial qualifications.⁵ If M2Z applied to itself the standard it proposes to apply to Commnet, the M2Z application would fail miserably.

M2Z, a start-up company with no operating history, did not provide the Commission with any statement of its proposed sources and uses of funds, or any *proforma* operating projections from which the Commission could assess how much funding the M2Z proposal would require, or any firm commitment letters from any recognized financial institutions, or any balance sheet, *pro*

⁴ It was the absence of any such standard against which to measure the M2Z application which ultimately led Commnet to eschew requesting the dismissal of the M2Z application. See discussion in Part I, *supra*.

⁵ It is *possible* that M2Z may have very recently provided the Commission with additional information via some confidential manual filing not available to the public, because there is a reference to some sort of non-public filing having been made on March 26, 2007. Motion to Dismiss, p.45, n. 177. However, since the days of cellular comparative hearings, through the lottery regime, and into the auction regime, the Commission has uniformly refused to consider any such secret information when assessing the qualifications of an applicant. Virtually every post-auction, pre-long-form-application Public Notice contains the standard warning (emphasis added):

Applicants requesting confidential treatment for any information required as a condition to participate in the auction must follow the procedures set out in section 0.459 of the Commission's rules. *Because the required information bears on an applicant's qualifications, the Commission envisions that confidentiality requests **will** not be granted routinely.*

See, e.g., Public Notice, *Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Closes; Winning Bidders Announced for Auction No. 65*, 21 FCC Rcd 6309 (2006), Attachment C; Public Notice, *Auction Of Automated Maritime Telecommunications System Licenses Closes; Winning Bidders Announced For Auction No. 61*, 20 FCC Rcd 13747 (2005), Attachment C.

Since such secret additional information cannot lawfully be considered, it does not exist for purposes of assessing the merits of the M2Z Motions.

forma or otherwise, to show any amount of funds in hand or contractually committed by any outside person. While M2Z makes all sorts of bald statements about how much funding it has available, bald statements are not financial commitments. Even if bald statements were money in the bank, M2Z has never given the Commission any way to discern how much money M2Z would need until it becomes cash-flow positive, and therefore no way to determine whether M2Z has enough money.

The Commission should reject M2Z's effort to apply a different standard to Commnet than it applies to M2Z. That is especially so where, as here, the Commission has not yet established any threshold for basic financial qualifications for the license at issue. M2Z's effort to avoid comparative consideration against Commnet on this ground must be rejected.

CONCLUSION

Commnet has not sought the dismissal of the M2Z application, only simultaneous comparative consideration of its own application with that of M2Z. The notion that Commnet has some obligation to serve M2Z with a copy of the Commnet application, or that the failure to serve M2Z justifies, much less compels, dismissal of the Commnet application, is frivolous. The Commission does not require service of timely-filed competing applications upon an earlier applicant.

The Commission has not established any basic financial qualification standards for the spectrum at issue, and therefore cannot dismiss any pending application on the grounds of lack of financial qualifications unless and until it does so (and until it affords the applicants an opportunity to meet such a hypothetical newly-announced standard). In any event, based upon the publicly-available submissions of the parties, Commnet is infinitely more qualified

financially than is M2Z, so the Commission could never dismiss the Commnet application on that ground without first dismissing the M2Z application on the same ground.

In summary, the M2Z Motions are without merit and should be denied.

Respectfully submitted,
COMMNET WIRELESS, LLC



By: _____

David J. Kaufman,
Its Attorney

April 10, 2007

Brown Nietert & Kaufman, Chartered
1301 Connecticut Ave. NW, Suite 450
Washington, DC 20036
(202)-887-0600

CERTIFICATE OF SERVICE

I, Steve Denison, a paralegal at the law firm of Brown, Nietert & Kaufman, Chartered, hereby certify that I have caused a copy of the foregoing "Opposition to Motion to Dismiss and Motion to Strike" to be sent by electronic mail, this 10th day of April, 2007, to the following:

Fred Campbell, Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Fred.Campbell@fcc.gov

Joel Taubenblatt
Wireless Telecommunications Bureau
Federal Communications Commission
Joel.Taubenblatt@fcc.gov

Linda Kinney
EchoStar Satellite L.L.C.
linda.kinney@echostar.com

Stephen E. Coran
Rini Coran, PC
scoran@rinicoran.com

Jennifer McCarthy*
Nextwave Broadband Inc
12670 High Bluff Drive
San Diego, CA 92130

Julia M. Kearney
Consumer Electronics Association
jkearney@ce.com

Russell D. Lukas
Lukas, Nace, Gutierrez & Sachs, Chartered
rlukas@fcclaw.com

James H. Barker
Latham & Watkins, LLP
Jim.Barker@LW.com

Nancy J. Victory
Wiley Rein LLP
Victory@wrf.com

Erin Dozier
Sheppard Mullin
edozier@sheppardmullin.com

Steve B. Sharlley
Motorola, Inc.
Steve.Sharkey@motorola.com

Thomas Sugrue
T-Mobile USA, Inc.
tom.sugrue@t-mobile.com

Andrew Kreig
The Wireless Communications Association
International, Inc.
president@wcai.org

Gary L. Phillips
AT&T Inc.
gphilli@corp.sbc.com

Gregory W. Whiteaker
Bennet & Bennet PLLC
gwhiteaker@bennetlaw.com

Brian Peters *
Director, Government Relations
Information Technology Industry Council
1250 Eye Street, NW, Suite 200
Washington, DC 20005

Michael F. Altschul
CTIA-The Wireless Association
maltschul@ctia.org

Joe D. Edge
Drinker, Biddle, & Reath, LLP
edgejd@dbr.com



Steve Denison

“Sent first-class mail