

ATTACHMENT

June 20, 2007

VIA TELECOPIER AND E-MAIL

Anthony Dale
Managing Director
Federal Communications Commission
445 12th Street, SW, Room 1-A836
Washington, DC 20554

Re: **Freedom of Information Act Request**
*M2Z Networks, Inc., Application for License and Authority to Provide National
Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16*

*M2Z Networks, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)
Concerning Application of Sections 1.945(b) and (c) of the Commission's Rules
and Other Regulatory and Statutory Provisions, WT Docket No. 07-30*

Attn: FOIA Officer

Dear Mr. Dale:

AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates ("AT&T"), by its attorneys, hereby submits this limited request for inspection of records pursuant to the Freedom of Information Act ("FOIA") and Section 0.461 of the Commission's rules.¹ As a petitioner challenging the above-referenced application and companion petition for forbearance, AT&T seeks the right to inspect, pursuant to a protective order, information submitted under cover of confidentiality by M2Z Networks, Inc. ("M2Z") which it claims relates to its application. The Commission should afford AT&T the opportunity to comment on the information within thirty days after it becomes available.

• ***Background***

AT&T is a party to the above-referenced proceedings initiated in response to an application (and companion petition for forbearance) filed by M2Z which seek the issuance, without an auction, of a 20 MHz exclusive nationwide license at 2155-2175 MHz to construct and operate a nationwide wireless broadband network. On March 2, 2007, AT&T filed a petition

¹ 5 U.S.C. § 522, *et. seq.*; 47 C.F.R. § 0.461.

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to deny the application challenging, *inter alia*, M2Z's failure to demonstrate that it has the financial wherewithal to construct and build its proposed nationwide network.² Petitions to deny were also filed by other parties,³ several of which raised similar concerns.⁴ On March 26, 2007, M2Z submitted a consolidated opposition in which it "note[d]" that its financial resources "are far greater than the \$400 million" mentioned in its application, and referenced a purported filing made the same day under cover of confidentiality concerning assurances to receive that funding (the "March 26th Filing").⁵ No copy of the March 26th Filing, redacted or otherwise, was served on AT&T or even made available via ECFS. On April 3, 2007, AT&T responded that petitioners could not assess the validity of M2Z's claims and emphasized that "where an applicant seeks licensing outside the financial checks inherent in the competitive bidding process, detailed support demonstrating financial qualifications is needed."⁶ Access to the March 26th Filing remains pending, despite AT&T's earlier request that such information be made available to the parties to the proceeding pursuant to a protective order, if necessary.⁷

On June 4, 2007, M2Z supplemented its application by means of a letter (the "June 4th Letter") that again responds to the challenges to M2Z's financial ability to construct and operate raised by AT&T and others. As described by M2Z in an accompanying request to treat the June 4th Letter as confidential in its entirety:

The [] Letter contains confidential and privileged information **relating to M2Z's financial qualifications** that is relevant to the FCC's review of the above-captioned matters. . . . The Letter **supplements information provided in the Application** and other filings by M2Z in these proceedings which demonstrate M2Z's **financial fitness** to be a Commission licensee and its **financial**

² See AT&T, Petition to Deny, WT Docket No. 07-16, at 6-7 & n.19 (Mar. 2, 2007) ("AT&T Pet.") ("While M2Z references access to approximately \$400 million, it does not support this claim or address whether there are any conditions that may limit use of those funds, nor does it show that the \$400 million is sufficient to complete a nationwide network and operate on that scale.") (footnotes omitted); see also AT&T, Opposition, WT Docket 07-30 (Mar. 19, 2007).

³ See CTIA - The Wireless Association, Petition to Deny, WT Docket 07-16 (Mar. 2, 2007); Motorola, Inc., Petition to Deny, WT Docket 07-16 (Mar. 2, 2007); NextWave Broadband Inc., Petition to Deny, WT Docket 07-16 (Mar. 2, 2007); Rural Broadband Group, Petition to Deny, WT Docket 07-16 (Mar. 16, 2007); TowerStream Corporation, Petition to Deny, WT Docket 07-16 (Mar. 15, 2007) T-Mobile USA, Inc., Petition to Deny, WT Docket 07-16 (Mar. 2, 2007) ("T-Mobile Pet."); Wireless Communications Association International, Inc., Petition to Deny, WT Docket 07-16 (Mar. 2, 2007); Verizon Wireless, Petition to Deny, WT Docket 07-16 (Mar. 2, 2007) ("Verizon Pet.").

⁴ See, e.g., T-Mobile Pet. at 7-8; Verizon Pet. at 1, 10-14.

⁵ See Consolidated Opposition of M2Z to Petitions to Deny, WT Docket Nos. 07-16 & 07-30, at 113 & n.365 (filed Mar. 26, 2007) ("M2Z Opp.") (referencing the March 26th Filing).

⁶ AT&T, Consolidated Reply to Opposition to Petitions to Deny and Reply Comments Regarding Forbearance Petition, WT Docket Nos. 07-16 & 07-30, at 11-12 (Apr. 3, 2007) ("AT&T Rep.").

⁷ See AT&T Pet. at 6-7 n.19 ("The Commission should therefore take M2Z up on its offer to make available supporting financial information, . . . which information should be made available to parties to the proceeding. . . . To the extent necessary, the Commission can adopt a protective order to protect access to confidential information."), cited in AT&T Rep. at 12 n.42.

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ability to construct and deploy [its nationwide broadband network] within a specified timeframe.⁸

AT&T was once again not provided with a copy of the June 4th Letter,⁹ and only learned of the Confidentiality Request by monitoring ECFS.

- ***Description of Records Requested***

AT&T seeks limited inspection rights, pursuant to a customary protective order, to review the March 26th Filing and the June 4th Letter.

- ***Statement of Reasons for Inspection***

To obtain access to records sought to be withheld from inspection under Section 0.459(a), the requesting party must make “[a] persuasive showing as to the reasons for inspection” in a filing which must “contain a statement of the reasons for inspection and the facts in support thereof.”¹⁰ The Commission has indicated that the basis for requiring submitters to disclose confidential information is generally “to ensure fairness to the other parties in the proceeding.”¹¹ This is especially true in contested application proceedings where, as here, “petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.”¹²

The information requested, by M2Z’s own admission, bears directly upon whether M2Z has the financial ability to construct and deploy its proposed network.¹³ Absent review of this information, it is impossible for AT&T to provide meaningful comment on whether M2Z has the financial ability to fulfill the otherwise unsubstantiated promises it has made concerning its ability to timely construct and build a proposed nationwide network. In light of the fact that this is a contested proceeding and the financial information submitted in the March 26th Filing and the June 4th Letter is directly relevant to charges raised by AT&T and others, limited inspection rights are clearly warranted.¹⁴ Indeed, “Petitioners clearly have a legitimate interest in reviewing

⁸ M2Z, Request for Confidential Treatment, WT Docket Nos. 07-16 & 07-30, at 1-2 (filed June 4, 2007) (emphasis added) (“Confidentiality Request”).

⁹ See 47 C.F.R. § 1.927(i) (“If a petition to deny or other informal objection has been filed, a copy of any amendment (or other filing) must be served on the petitioner.”); see also *id.* § 1.744(a).

¹⁰ 47 C.F.R. §§ 0.457(d), 0.461(c), quoted in *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 F.C.C.R. 24816, 24827 (1998) (“*Confidential Treatment Order*”).

¹¹ *Confidential Treatment Order*, 13 F.C.C.R. at 24828.

¹² *Id.* at 24837, quoted in *Mobile Communications Holdings, Inc.*, 18 F.C.C.R. 133, 134 (IB/SD 2003) (“*MCHP*”); see also *Motorola Inc.*, 16 F.C.C.R. 17056, 17057 (IB/SRD 2001) (“*Motorola*”).

¹³ See *supra* note 8 and accompanying text.

¹⁴ See, e.g., *Motorola*, 16 F.C.C.R. at 16057 (“The Commission’s [*Confidential Treatment Order*] does not recognize any justification for denying petitioners to deny an application access to material submitted in support of the application. . . . We are therefore ordering the Applicants to disclose the documents in question to petitioners to deny”); see also *Visionstar, Inc.*, 16 F.C.C.R. 16967 (IB 2001) (“*Visionstar*”) (ordering proposed transferors of

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documents that the Applicants have filed with us . . . that clearly ha[ve] a material bearing on resolution of the [] issue that the Petitioners have raised.”¹⁵

Furthermore, to the extent the confidential information may form the basis for a decision on the issue of financial qualifications, limited disclosure pursuant to a protective order is essential for the order to withstand judicial scrutiny. An adjudicatory decision on a contested application cannot be made on the basis of *ex parte* submissions of evidence to decisionmakers not also made available to parties to the proceeding.¹⁶ Rather, petitioners must be afforded a “meaningful opportunity to comment.”¹⁷

In order to protect the rights of M2Z, while ensuring that AT&T has access to materials M2Z has submitted bearing on the application, the Commission should afford AT&T limited inspection rights to review the requested documents pursuant to a customary protective order.¹⁸ As the Commission has recognized, in contested proceedings where information is submitted under seal, it is appropriate to “limit disclosure of confidential information to individuals and entities who file a petition to deny and who execute a protective order.”¹⁹ Indeed, the D.C. Circuit has previously recognized the FCC’s use of a protective order to ensure confidential information was made available to parties to the proceeding.²⁰ In accordance with established practice, AT&T requests thirty (30) days to comment on the March 26th Filing and the June 4th Letter from the date the material is made available.²¹

a satellite authorization to disclose to petitioners to deny confidential information submitted in response to a Bureau request).

¹⁵ *MCHI*, 18 F.C.C.R. at 135.

¹⁶ See 47 C.F.R. §§ 1.1200, 1.1202, 1.1206(b)(1).

¹⁷ See, e.g., *Visionstar*, 16 F.C.C.R. at 16968 (“[R]equiring the Submitting Parties to disclose these documents to the Reviewing Parties pursuant to the terms of a Protective Order will provide adequate protection to the confidential information included in these documents, without depriving the Reviewing Parties of a meaningful opportunity to comment, as required by the Administrative Procedure Act.”); *Open Network Architecture Tariffs of Bell Operating Companies*, 10 F.C.C.R. 1619, 1621 (1995) (“The Administrative Procedure Act and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings.”), quoted in *MCHI*, 18 F.C.C.R. at 135 n.10.

¹⁸ *Confidential Treatment Order*, 13 F.C.C.R. at 24824 (recognizing that “disclosure under a protective order or agreement may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose”); see *MCHI*, 18 F.C.C.R. at 137-41 (example of a customary protective order).

¹⁹ *Confidential Treatment Order*, 13 F.C.C.R. at 24839.

²⁰ See *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1489 (D.C. Cir. 1995), aff’g *Craig O. McCaw*, 9 F.C.C.R. 5836, 5920 n.343 (1994).

²¹ See, e.g., *MCHI*, 18 F.C.C.R. at 135; see also *Confidential Treatment Order*, 13 F.C.C.R. at 24839.

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- *Search Fee*

In accordance with Section 0.461(b)(2) of the Commission's rules, AT&T hereby states that it is willing to pay for the Commission's reasonable research and copying services incurred in connection with this request. Should the Commission estimate that the charges will exceed \$250.00, AT&T requests the opportunity to confer with Commission personnel to authorize such an overage before the work is undertaken.²²

Should you have any questions, please contact the undersigned at 202.783.4141.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

By.



L. Andrew Tolman

Craig E. Gilmore

cc: Attached service list

²² See 47 C.F.R. § 0.467(e).

CERTIFICATE OF SERVICE

I, Sarah Dahlia Gutschow, hereby certify that on this 20th day of June 2007, copies of the foregoing Freedom of Information Act Request were served by first-class mail on the following:

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A handwritten signature in black ink, reading "Sarah Dahlia Gutschow". The signature is written in a cursive style with a horizontal line underneath.

Sarah Dahlia Gutschow