

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
M2Z NETWORKS, INC.	)	
	)	
Application for License and Authority to	)	WT Docket No. 07-16
Provide National Broadband Radio Service	)	
In the 2155-2175 MHz Band	)	
	)	
Petition for Forbearance Under	)	WT Docket No. 07-30
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	)	
	)	

To: Chief, Wireless Telecommunications Bureau

**MOTION TO STRIKE**

Pursuant to Section 1.41 of the rules of the Federal Communications Commission (“FCC” or “Commission”),<sup>1</sup> M2Z Networks, Inc. (“M2Z”), by its attorneys, respectfully moves to strike the Response of AT&T, Inc. (“AT&T” and the “Response”)<sup>2</sup> to M2Z’s Request for Confidential Treatment of a letter submitted to the Commission on June 4, 2007 (the “June 4th Letter”) in support of M2Z’s Application for License and Authority to Provide National

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<sup>1</sup> See 47 C.F.R. § 1.41.

<sup>2</sup> See Response of AT&T Inc. to Request for Confidential Treatment, WT Docket Nos. 07-16 & 07-30 (filed June 20, 2007) (“Response”). On June 20, 2007, AT&T filed a Freedom of Information Act (“FOIA”) request for inspection of the March 26th Letter and the June 4th Letter. See Freedom of Information Act Request, Letter from L. Andrew Tollin, Counsel to AT&T, Inc., to Anthony Dale, Managing Director, FCC (filed June 20, 2007) (“FOIA Request”). M2Z responds to the merits of AT&T’s FOIA Request in a letter filed under separate cover today, a copy of which is attached to this motion.

Broadband Radio Service in the 2155-2175 MHz Band (the “M2Z Application”).<sup>3</sup> As discussed below, AT&T’s Response is both procedurally and substantively infirm and should be struck from the records of the above-captioned proceedings.

As an initial matter, AT&T’s response is procedurally improper and should be afforded no consideration in these proceedings. The rules governing the submission of confidential materials to the Commission contain no procedure for third parties to “respond” to confidentiality requests, as AT&T purports to do in its Response.<sup>4</sup> Rather, the rules only permit AT&T to request inspection of confidential materials pursuant to the Freedom of Information Act (“FOIA”).<sup>5</sup> Although AT&T has filed such a FOIA request separately,<sup>6</sup> its Response is entirely unnecessary and unrelated to the merits of its FOIA request. Indeed, the Response cannot even be considered as an informal request for Commission action because it fails to seek any form of relief from the Commission.<sup>7</sup> Instead, the Response serves no purpose other than to make a gratuitous and unauthorized written assault on M2Z. For these reasons, AT&T’s Response is a superfluous pleading subject to dismissal at the Commission’s discretion and should be struck from the records of these proceedings.

Furthermore, substantively, AT&T’s Response makes no sense. AT&T incorrectly claims that M2Z was required to serve a copy of the June 4th Letter upon AT&T because AT&T

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<sup>3</sup> The June 4th Letter was submitted to the Commission under a request for confidential treatment pursuant to Sections 0.457(d)(2) and 0.459(b) of the Commission’s rules. *See* 47 C.F.R. §§ 0.457(d)(2) & 0.459(b); *see also* Request for Confidential Treatment of M2Z Networks, Inc., WT Docket Nos. 07-16 & 07-30 (filed June 4, 2007).

<sup>4</sup> *See* 47 C.F.R. § 0.459.

<sup>5</sup> *See* 47 C.F.R. § 0.461.

<sup>6</sup> *See* Freedom of Information Act Request, Letter from L. Andrew Tollin, Counsel to AT&T, Inc., to Anthony Dale, Managing Director, FCC (filed June 20, 2007).

<sup>7</sup> *See* 47 C.F.R. § 1.41.

is a party to these proceedings.<sup>8</sup> However, had M2Z served AT&T with a copy of the June 4th Letter, such service would have destroyed the confidential nature of the letter itself and obviated M2Z's request for confidential treatment. Indeed, AT&T's interpretation would frustrate the very purpose of the Commission's confidential filing procedures and deter applicants from ever submitting confidential material to the Commission due to the risk of incurring mandatory service and disclosure obligations. Surely, the Commission's rules do not require such absurd and self-defeating results.

AT&T also erroneously claims that the June 4th Letter was required to be served upon AT&T by citing a rule section that is applicable only to amendments to pending applications.<sup>9</sup> Specifically, AT&T cites Section 1.927(i) of the Commission's rules to support this argument,<sup>10</sup> which provides: "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."<sup>11</sup> To be sure, AT&T is a petitioner in these proceedings. However, in permit-but-disclose proceedings involving applications, such as the instant proceedings, Section 1.927(i) is applicable only if the Commission expressly modifies, and announces by public notice, that more stringent procedures will require *ex parte* filings to be served on the parties.<sup>12</sup> No such stringent *ex parte* procedures have been announced in these proceedings.<sup>13</sup>

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<sup>8</sup> See Response at 2 ("M2Z did not serve AT&T with a copy of the June 4th Letter, as required by the FCC's rules.").

<sup>9</sup> See Response at 1-2 & n.4.

<sup>10</sup> See *id.* at n.4.

<sup>11</sup> 47 C.F.R. § 1.927(i).

<sup>12</sup> See, e.g., "Price Communications Corporation and Cellco Partnership d/b/a Verizon Wireless Seek FCC Consent for Assignment of Wireless Licenses; Pleading Cycle Established," Public Notice, 16 FCC Rcd 989 (2001) ("Pursuant to 47 C.F.R. § 1.1200(a), which permits the Commission to adopt modified or more stringent *ex parte* procedures in particular proceedings if

In any event, the June 4th Letter is not an amendment to M2Z's Application. Rather, the letter is an *ex parte* filing submitted consistent with the Bureau's designation of these proceedings as permit-but-disclose.<sup>14</sup> As such, M2Z is permitted to submit written materials in support of its Application, such as the June 4th Letter, without having to serve the parties to these proceedings.<sup>15</sup> Indeed, by definition, a written *ex parte* presentation "is *not served* on the parties to the proceeding."<sup>16</sup> If AT&T's interpretation were correct, M2Z would be required to serve every party to these proceedings every time it makes an *ex parte* presentation. Again, this is an absurd result that finds no support in the Commission's rules or in the procedural posture of these proceedings.

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the public interest so requires, we announce that this proceeding will be governed by permit-but-disclose *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206. Pursuant to the requirements of 47 C.F.R. § 1.927(i), *ex parte notifications filed must be served on all parties to the proceeding.*" (emphasis added).

<sup>13</sup> See "Wireless Telecommunications Bureau Announces that M2Z Networks, Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band Is Accepted for Filing," Public Notice, WT Docket No. 07-16, DA 07-492, at 2 (rel. Jan. 31, 2007) ("[G]iven the fact that [the M2Z Application] implicates broadly applicable policy issues, we do not believe that it would serve the public interest either to allow presentations to be made off the record or to proscribe *ex parte* presentations altogether. Accordingly, pursuant to Section 1.1200(a) of the Commission's rules, we find that this proceeding should be treated for purposes of the *ex parte* rules as a permit-but-disclose proceeding."); see also "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," WT Docket No. 07-30, DA 07-736, at 2 (rel. Feb. 16, 2007) ("This matter shall be treated as a 'permit-but-disclose' proceeding in accordance with the Commission's *ex parte* rules.") (collectively, the "M2Z Public Notices").

<sup>14</sup> See *id.*

<sup>15</sup> See 47 C.F.R. §§ 1.1206(a) & (b)(1). In contrast, AT&T's Response is not viable as an *ex parte* submission because it does not advocate any position to decisionmaking personnel and instead serves only to attack M2Z.

<sup>16</sup> 47 C.F.R. § 1.1202(b)(1) (emphasis added).

For the foregoing reasons, AT&T's Response is procedurally and substantively flawed and should be struck from the records of these proceedings.

Respectfully submitted,

**M2Z NETWORKS, INC.**

By: \_\_\_\_\_/s/\_\_\_\_\_

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Its Attorneys

July 16, 2007

**ATTACHMENT**

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July 16, 2007

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

**Re: Freedom of Information Act Request of AT&T Inc.,  
FOIA Control No. 2007-414; WT Docket Nos. 07-16 and 07-30**

Dear Ms. Dortch:

On behalf of M2Z Networks, Inc. and in response to a letter dated July 9, 2007 from Jennifer Tomchin, Deputy Chief, Broadband Division,<sup>1</sup> this letter addresses the limited request for inspection of records pursuant to the Freedom of Information Act ("FOIA") and Section 0.461 of the Commission's rules filed on June 20, 2007 by AT&T Inc. ("AT&T" and the "FOIA Request").<sup>2</sup> AT&T seeks access to two privileged and confidential letters filed by M2Z concerning the above-referenced proceedings pursuant to a protective order. The letters at issue are dated March 26, 2007 (the "March 26th Letter") and June 4, 2007 (the "June 4th Letter") and were submitted by M2Z under separate requests for confidential treatment in support of M2Z's Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band (the "M2Z Application") and related forbearance petition. As set forth in M2Z's requests for confidential treatment, the letters contain highly sensitive financial information, including the identity of M2Z's sources of funding, and the terms thereof, which the Commission routinely withholds from public inspection.<sup>3</sup> For the reasons discussed below, AT&T's FOIA Request should be dismissed as moot as to the March 26th Letter and should be denied as to the June 4th Letter.

<sup>1</sup> See Letter to W. Kenneth Ferree, Erin L. Dozier, and Christopher G. Tygh, Sheppard, Mullin, Richter & Hampton, LLP from Jennifer Tomchin, Deputy Chief, Broadband Division, FCC Wireless Telecommunications Bureau (July 9, 2007).

<sup>2</sup> See Freedom of Information Act Request, Letter from L. Andrew Tollin, Counsel to AT&T, Inc., to Anthony Dale, Managing Director, FCC (filed June 20, 2007) ("FOIA Request").

<sup>3</sup> See Request for Confidential Treatment of M2Z Networks, WT Docket Nos. 07-16 & 07-30 (filed Mar. 26, 2007); Request for Confidential Treatment of M2Z Networks, WT Docket Nos. 07-16 & 07-30 (filed June 4, 2007).

AT&T's FOIA Request concerning the March 26th Letter has been rendered moot by a recent decision by the Wireless Telecommunications Bureau ("Bureau") adjudicating the merits of a similar FOIA request filed by NetfreeUS, LLC.<sup>4</sup> On May 23, 2007, the Bureau, by letter decision ("FOIA Decision"), granted in part and denied in part M2Z's request for confidential treatment of the March 26th Letter in response to NetfreeUS's FOIA request.<sup>5</sup> In the FOIA Decision, the Bureau held that the March 26th Letter should be withheld from routine public inspection under Exemption 4 of the FOIA because "parts of it contain commercial or financial data that M2Z has not made public."<sup>6</sup> Consequently, the Bureau determined that it will not make available for public inspection "those parts of the [March 26th] Letter that identify the source of [M2Z's] potential funding including indirect, identifying information, as well as specific funding terms."<sup>7</sup> Neither M2Z nor NetfreeUS has sought review of this decision.<sup>8</sup> Consequently, the FOIA Decision has become final as to the March 26th Letter and serves as binding precedent for adjudicating the merits of AT&T's FOIA Request. For this reason, AT&T's request for inspection of the March 26th Letter should be dismissed as moot.

AT&T's request for inspection of the June 4th Letter should be denied. To obtain access to the June 4th Letter, AT&T bears the burden of making "[a] persuasive showing as to the reasons for inspection."<sup>9</sup> AT&T fails to meet this burden. AT&T states that inspection of the June 4th Letter is necessary to allow AT&T to "comment on whether M2Z has the financial ability . . . to timely construct and build a proposed nationwide network." As AT&T readily admits, however, it already has commented thoroughly and repeatedly on these issues.<sup>10</sup> The pleading cycles in these proceedings have now closed, and the matter is now before the Bureau to decide. Obtaining access to the particular terms and conditions of M2Z's access to funds at this time will not enhance AT&T's arguments in this regard, but such disclosure could result in substantial competitive harm to M2Z. As explained in M2Z's request for confidential treatment,

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<sup>4</sup> See Freedom of Information Act Request of NetfreeUS, LLC, WT Docket No. 07-16 (filed Apr. 10, 2007).

<sup>5</sup> See Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, FCC, to Stephen E. Coran, Counsel to NetfreeUS, LLC, and Erin L. Dozier, Counsel to M2Z Networks, Inc., FOIA Control No. 2007-258 (dated May 23, 2007) ("FOIA Decision").

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> See 47 C.F.R. § 0.461(i).

<sup>9</sup> 47 C.F.R. § 0.461(i); see also *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, ¶ 19 (1998) ("*Confidential Information Policy Order*").

<sup>10</sup> See Response of AT&T Inc. to Request for Confidential Treatment, WT Docket Nos. 07-16 & 07-30 (filed June 20, 2007) ("[T]hese issues [concerning M2Z's financial qualifications and ability to construct and operate its proposed nationwide network] were squarely raised by AT&T in its petition to deny [M2Z's] application . . ."); see also Petition to Deny of AT&T Inc., WT Docket No. 07-16, at 6-7 & n.19 (filed Mar. 2, 2007); Consolidated Reply to Opposition to Petitions to Deny and Reply Comments of AT&T Inc., WT Docket Nos. 07-16 & 07-30, at 11-12 (filed Apr. 3, 2007).

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such disclosure would prejudice M2Z's negotiations with other funding sources and would alert other communications providers of a potential source of funds.<sup>11</sup>

AT&T's other rationales for obtaining access to the June 4th Letter are similarly without merit. AT&T claims that fairness to the parties to these proceedings and the need to establish a complete record that will withstand judicial scrutiny require disclosure of the letters.<sup>12</sup> As the Bureau recently held in its FOIA Decision, however, Title III applicants such as M2Z "should not necessarily be required to forgo confidential information as a condition of obtaining a license."<sup>13</sup> The June 4th Letter contains substantially similar financial information, terms, and conditions to the March 26th Letter. Although the Bureau's previous FOIA Decision does not concern the June 4th Letter, the Bureau did determine that such financial information "constitute[s] the type of business information that may be properly withheld under FOIA."<sup>14</sup>

For these reasons, AT&T's request for inspection of the March 26th Letter and June 4th Letter under a protective order should be denied. If you have any questions concerning this matter, please do not hesitate to contact the undersigned.

Sincerely,

/s/

Erin L. Dozier  
*Counsel for M2Z Networks, Inc.*

cc: Mr. Fred Campbell  
Mr. Anthony Dale  
Ms. Cathy Massey  
Mr. Joel Taubenblatt  
Mr. Peter Daronco  
Ms. Jennifer Tomchin

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<sup>11</sup> Request for Confidential Treatment of M2Z Networks, WT Docket Nos. 07-16 & 07-30, at 3 (filed June 4, 2007).

<sup>12</sup> See FOIA Request at 4.

<sup>13</sup> FOIA Decision at 5, citing *Confidential Information Policy Order* at ¶ 34.

<sup>14</sup> FOIA Decision at 4.

**CERTIFICATE OF SERVICE**

I, Erin L. Dozier, an attorney in the law office of Sheppard Mullin Richter & Hampton, LLP, hereby certify that I have on this 16th day of July 2007 caused a copy of the foregoing letter response to the Freedom of Information Act Request of AT&T Inc. to be delivered by first-class mail to the following:

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Gary L. Phillips  
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*Counsel to AT&T*

/s/

\_\_\_\_\_  
Erin L. Dozier

**CERTIFICATE OF SERVICE**

I, Erin L. Dozier, an attorney in the law office of Sheppard Mullin Richter & Hampton, LLP, hereby certify that I have on this 16th day of July 2007 caused a copy of the foregoing Motion to Strike of M2Z Networks, Inc. to be delivered by first-class mail to the following:

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