

Before the  
Federal Communications Commission  
Washington, DC 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 47 U.S.C. § ) WT Docket No. 07-30  
160(c) Concerning Application of Sections )  
1.945(b) and (c) of the Commission's Rules )  
and Other Regulatory and Statutory Provisions )

To: The Wireless Telecommunications Bureau

**OPPOSITION TO MOTION TO STRIKE**

AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates ("AT&T"), hereby opposes the motion to strike submitted by M2Z Networks, Inc. ("M2Z") on July 16, 2007.<sup>1</sup> The motion relates to AT&T's contention that M2Z failed to serve information that, in M2Z's own words, "supplements information provided in [M2Z's] Application" that is "relevant to the FCC's review" of its application.<sup>2</sup>

M2Z first claims that the response is "unnecessary" and serves no purpose other than to make a "written assault" on M2Z.<sup>3</sup> To the contrary, the response serves several important purposes. First, it reminds M2Z of the continuing need to serve amendments and like filings on

<sup>1</sup> M2Z, Motion to Strike, WT Docket Nos. 07-16 & 07-30 (filed July 16, 2007) ("M2Z Motion").

<sup>2</sup> M2Z, Request for Confidential Treatment, WT Docket Nos. 07-16 & 07-30, at 1-2 (filed June 4, 2007) ("M2Z Confidentiality Request"), *quoted in* AT&T, Response to Request for Confidential Treatment, WT Docket Nos. 07-16 & 07-30, at 1-2 n.2 (filed June 20, 2007) ("AT&T Response"). M2Z has also filed a response to AT&T's June 20, 2007 Freedom of Information Act ("FOIA") request. AT&T's reply to that response is being filed this date under separate cover, a copy of which is attached and is hereby incorporated by reference.

<sup>3</sup> M2Z Motion at 2.

all parties to the proceeding<sup>4</sup> — a requirement M2Z has called “fundamental to . . . due process” and “central . . . [to] orderly decision making.”<sup>5</sup> Second, it incorporates by reference arguments in AT&T’s separate FOIA request concerning the need for petitioners to “be afforded access to all information submitted by licensees that bear upon their applications” in order to preserve those arguments in the record of these proceedings for appellate purposes.<sup>6</sup> Finally, it seeks to ensure an additional 30 days is afforded to comment in these proceedings once the disputed information is made available under a suitable protective order.<sup>7</sup>

M2Z next claims that it could not serve AT&T because it would have destroyed the confidential nature of the recent June 4<sup>th</sup> Letter.<sup>8</sup> Yet, the purpose of the service requirement is to provide “adequate notice of an adverse filing.”<sup>9</sup> At a minimum, M2Z should have served a copy of the accompanying cover letter and request for confidentiality on AT&T and the other parties to provide notice without impacting the claimed confidential nature of the letter.

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<sup>4</sup> 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.”), *cited in* AT&T Response at 2.

<sup>5</sup> See Consolidated Motion of M2Z to Strike and Dismiss Petitions to Deny and Alternative Proposals, WT Docket Nos. 07-16 & 07-30, at 12 (Mar. 26, 2007) (“March 26<sup>th</sup> Motion”). According to M2Z, “ECFS is no substitute for formal service and parties should not be encouraged to effectuate service in any manner other than how the Act and the Commission’s rules have long specified.” *Id.* at 12 n.46.

<sup>6</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 F.C.C.R. 24816, 24837 (1998), *cited in* AT&T Response at 2 & n.6; see also *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.”).

<sup>7</sup> See AT&T Response at 3 & n.8.

<sup>8</sup> See M2Z Motion at 2-3. The M2Z Motion is limited to what has been designated the “June 4<sup>th</sup> Letter” in the AT&T Response. AT&T’s FOIA request relates to both the June 4<sup>th</sup> Letter and a separate submission designated the “March 26<sup>th</sup> Filing.”

<sup>9</sup> March 26<sup>th</sup> Motion at 12.

M2Z also claims the designation of this proceeding as permit-but-disclose for *ex parte* purposes has somehow overridden the rule requiring service of any amendments.<sup>10</sup> In support, it cites a public notice from an unrelated assignment proceeding.<sup>11</sup> But, a public notice cannot effectuate a change to the service rule (nor does the cited public notice purport to do so).<sup>12</sup> As a fallback, M2Z claims for the first time that its recent letter was not an amendment but an *ex parte* filing.<sup>13</sup> The cover letter and confidentiality request that accompanied the letter are not labeled as such,<sup>14</sup> however, and M2Z itself has described the letter as “supplement[ing] information

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<sup>10</sup> See M2Z Motion at 3-4.

<sup>11</sup> *Id.* at 3 n.12.

<sup>12</sup> It is fundamental that agencies must follow their own rules, see *Achernar Broad Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995), and must provide notice and an opportunity to comment before changing or eliminating them, see 5 U.S.C. § 553(b)-(c); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). While the Commission could waive the service rule in Section 1.927(i) on its own motion for good cause shown, see 47 C.F.R. § 1.3, it has not done so here — either in the public notice designating these proceedings as permit-but-disclose or elsewhere. See generally *Public Notice*, “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,” DA 07-492 (rel. Jan. 31, 2007) (containing no reference to Section 1.927(i) of the rules).

<sup>13</sup> M2Z Motion at 4. M2Z also makes the unremarkable observation that the AT&T response is not an *ex parte* submission. M2Z Motion at 4 n.15. Whether a submission is considered *ex parte* relates to whether notice was provided. Unlike M2Z, AT&T served its submission on all parties to the proceeding, which by definition means it is not *ex parte*. See 47 C.F.R. § 1.1202(b)(1) (an *ex parte* presentation is any presentation which “[i]f written, is *not* served on parties to the proceeding”) (emphasis added). In any event, the Commission may consider a filing outside the normal pleading cycle to ensure a complete record, particularly when served on all parties so no party is prejudiced. See, e.g., *Application of Verizon Hawaii Inc. et al.*, 19 F.C.C.R. 24110, 24111 (WCB 2004).

<sup>14</sup> See M2Z Confidentiality Request and accompanying transmittal letter; 47 C.F.R. § 1.1206(b)(1) (a written *ex parte* presentation “must be labeled as an *ex parte* presentation”). While the June 4th Letter has not been made available, a redacted version of the March 26<sup>th</sup> Filing was recently placed in the docket. If that filing is any guide, it bears no *ex parte* designation. M2Z’s post hoc *ex parte* claim is also curious, as it could render information M2Z deems “relevant” to the FCC’s review of its application a mere discretionary matter for the FCC to consider. See, e.g., *Facilitating Opportunities for Flexible, Efficient, and Reliable Spectrum Use Employing Cognitive Radio Technologies*, 20 F.C.C.R. 5486, 5492 n.22 (2005).

provided in the application.”<sup>15</sup> The bottom line is AT&T was not served as required with supplementary material to the application which appears to be related to AT&T’s challenge that there is an absence of information needed to grant the application.

For the foregoing reasons, the motion to strike is without merit and should be denied.

Respectfully submitted,

**AT&T INC.**

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*Its Attorneys*

July 23, 2007

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<sup>15</sup> See *supra* note 2.

**CERTIFICATE OF SERVICE**

I, Sarah Dahlia Gutschow, hereby certify that on this 23<sup>rd</sup> day of July 2007, copies of the foregoing Opposition to Motion to Strike were served by first-class mail on the following:

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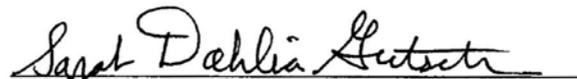
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A handwritten signature in cursive script that reads "Sarah Dahlia Gutschow". The signature is written in black ink and is positioned above a horizontal line.

Sarah Dahlia Gutschow

**ATTACHMENT**

July 23, 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**  
*FOIA Control No. 2007-414*

*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"), hereby replies to the response of M2Z Networks, Inc. ("M2Z")<sup>1</sup> concerning AT&T's limited request for inspection of records pursuant to the Freedom of Information Act ("FOIA").<sup>2</sup> As noted in its underlying FOIA Request, AT&T has filed a petition to deny the application of M2Z in this matter and seeks limited access pursuant to a protective order to review two documents — designated the March 26<sup>th</sup> Filing and the June 4<sup>th</sup> Letter — which M2Z obviously believes are decisionally significant to its pending application.<sup>3</sup>

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<sup>1</sup> Letter to Marlene H. Dortch, Secretary, FCC, from Erin L. Dozier, Counsel for M2Z, re: FOIA Control No. 2007-414 (July 16, 2007) ("M2Z Response").

<sup>2</sup> Letter to Anthony Dale, Managing Director, FCC, from L. Andrew Tollin, Counsel for AT&T (June 20, 2007), FOIA Control No. 2007-414 ("FOIA Request"); see 47 C.F.R. § 1.45(c).

<sup>3</sup> See FOIA Request at 2-3; see also, e.g., M2Z, Request for Confidential Treatment, WT Docket Nos. 07-16 & 07-30, at 1-2 (filed June 4, 2007) (stating that the June 4<sup>th</sup> Letter contains information "that is relevant to the FCC's review" and "supplements information provided in the Application and other filings by M2Z in these proceedings

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M2Z argues first that access to the March 26<sup>th</sup> Filing has been rendered moot by a recent order resolving a FOIA request by NetfreeUS, LLC (“NetfreeUS”).<sup>4</sup> That decision, however, is factually inapposite. NetfreeUS sought open, unrestricted access to the filing,<sup>5</sup> not limited access pursuant to a protective order sought by AT&T. As a result, the Division found “limited disclosure under a ‘Protective Order’ to allow a party to review confidential materials pursuant to certain restrictions would be more appropriate than the unfettered public disclosure” sought by NetfreeUS in its FOIA request.<sup>6</sup> Thus, if anything, the Netfree decision supports the relief requested by AT&T.<sup>7</sup> Moreover, while NetfreeUS filed a competing application, it did not file a petition to deny. As a result, NetfreeUS did not seek, and the Division did not rule upon, the need to protect and weight the rights of a petitioner, which are well established.<sup>8</sup>

M2Z’s second point that AT&T does not need access to the June 4<sup>th</sup> Letter because it “has already commented thoroughly and repeatedly” on M2Z’s financial abilities is just wrong.<sup>9</sup> AT&T has not commented substantively on the financial data, because it has not seen any of it. It has only commented on *the absence thereof* in the application.<sup>10</sup>

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which demonstrate M2Z’s financial fitness to be a Commission licensee and its financial ability to construct and deploy [its nationwide broadband network] within a specified timeframe”).

<sup>4</sup> See FOIA Request of NetfreeUS, FOIA Control No. 2007-258, Letter Decision (adopted May 23, 2007; posted online via ECFS July 6, 2007) (“NetfreeUS Decision”). In the NetfreeUS Decision, the Broadband Division of the Wireless Telecommunications Bureau (the “Division”) granted M2Z’s request to treat the March 26<sup>th</sup> Filing as confidential, but ordered that a redacted version of the filing be placed in the public record.

<sup>5</sup> See NetfreeUS Decision at 2, 5.

<sup>6</sup> See *id.* at 5; compare *Pegasus Development Corporation*, 20 F.C.C.R. 14670, 14673 & n.24 (IB 2005) (generally denying a FOIA request seeking unfettered public disclosure but adopting a protective order to allow restricted access) with *MCHI*, 18 F.C.C.R. at 134 (granting a FOIA request seeking limited access pursuant to a protective order).

<sup>7</sup> M2Z’s suggestion that the NetfreeUS Decision – an adjudicatory decision to which AT&T was not a party and of which it had no notice until after the decision became final – somehow binds AT&T is simply wrong as a matter of law. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party . . . and therefore has never had an opportunity to be heard.”).

<sup>8</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 F.C.C.R. 24816, 24837 (1998) (“*Confidential Treatment Order*”) (“[P]etitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.”), quoted in *Mobile Communications Holdings, Inc.*, 18 F.C.C.R. 133, 134 (IB/SD 2003) (“*MCHI*”); see also *Motorola Inc.*, 16 F.C.C.R. 17056, 17057 (IB/SRD 2001) (“*Motorola*”); *Confidential Treatment Order*, 13 F.C.C.R. at 24823-24, 24939.

<sup>9</sup> M2Z Response at 2.

<sup>10</sup> See AT&T, Petition to Deny, WT Docket No. 07-16, at 6-7 & n.19 (Mar. 2, 2007) (“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); 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) (“M2Z has failed to demonstrate that [it] has the financial wherewithal to build and operate a nationwide network on the scale proposed in its application. . . . While M2Z references a submission [the March 26<sup>th</sup> Filing] concerning the \$400 million under seal, petitioners cannot assess how real this is and certainly cannot determine whether it is

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M2Z's final assertion is that its need for confidentiality is paramount to general concerns of fairness and the need for a complete record, but it offers no rebuttal to the weight of case law cited in AT&T's FOIA request balancing an applicant's need for confidentiality with a petitioner's need for access by adopting a protective order.<sup>11</sup> Indeed, *M2Z makes no showing why a limited protective order would not protect its rights*. While it is true that the Commission has held in Title III proceedings applicants "should not necessarily be required to forgo confidential information as a condition of obtaining a license,"<sup>12</sup> the Commission also said in virtually the same breath that "the Commission will consider requests . . . to limit disclosure of confidential information to . . . entities who file a petition to deny and who execute a protective order" and "[w]here appropriate, the Commission will issue protective orders."<sup>13</sup> Moreover, the FCC has held:

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 . . . .<sup>14</sup>

For all these reasons, the request of AT&T to inspect the March 26<sup>th</sup> Filing and June 4<sup>th</sup> Letter pursuant to a protective order should be granted. AT&T reiterates its request that it be afforded thirty (30) days to comment on the material from the date it is made available.<sup>15</sup>

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enough based on the meager financial and cost information provided to date. Where an applicant seeks licensing outside the financial checks inherent in the competitive bidding process, detailed support demonstrating financial qualifications is needed.").

<sup>11</sup> See FOIA Request at 3-4.

<sup>12</sup> *Confidential Treatment Order*, 13 F.C.C.R. at 24838-39, cited in M2Z Response at 3 & n.13 and Netfree Decision at 5.

<sup>13</sup> *Confidential Treatment Order*, 13 F.C.C.R. at 24839; see also Netfree Decision at 5 n.32.

<sup>14</sup> *Motorola*, 16 F.C.C.R. at 17057 (emphasis added).

<sup>15</sup> 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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Should you have any questions, please contact the undersigned at 202.783.4141.

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cc: Ms. Jennifer Tomchin (via e-mail)  
Mr. Peter J. Daronco (via e-mail)  
Attached Service List

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I, Sarah Dahlia Gutschow, hereby certify that on this 23<sup>rd</sup> day of July 2007, copies of the foregoing Reply to Response to Freedom of Information Act Request were served by first-class mail on the following:

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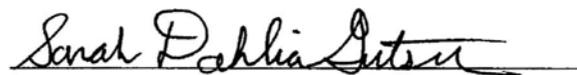
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