

April 10, 2009

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Ex Parte Notice
WT Docket Nos. 07-195 and 04-356**

Dear Ms. Dortch:

On behalf of T-Mobile USA, Inc. (“T-Mobile”), I am writing to respond to the March 20, 2009 “draft” letter and memorandum submitted by M2Z Networks, Inc. (“M2Z”) to the Commission on March 27, 2009 (“Draft Memorandum”).^{1/} M2Z’s proposals have always been a bad idea – and not just because of interference issues, but because the spectrum giveaway it seeks is bad policy. That said, the Draft Memorandum represents a new low in the advocacy in this proceeding. Having exhausted its legal and technical arguments, M2Z has now repackaged them in the form of highly irresponsible allegations that T-Mobile has engaged in misrepresentation, lack of candor, and even perjury.

It is one thing to disagree over complex engineering and spectrum management matters, but it is nothing short of outrageous for M2Z to cast any disagreement with M2Z as perjury. As a Commission licensee, T-Mobile takes seriously its responsibility to deal openly and truthfully with the Commission, and it has done so in this proceeding. When stripped of the baseless

^{1/} The provenance of the letter and memorandum is somewhat murky. It was submitted on March 27 in response to a “clarification” from two Commission attorneys in the Office of General Counsel following up an *ex parte* meeting they had with M2Z, apparently, on March 20. See Letter from Uzoma Onyeije, M2Z Networks, to Ajit Pai and Joseph Palmore, FCC, WT Docket Nos. 07-195 and 04-356 (filed March 27, 2009) and Letter from Uzoma Onyeije, M2Z Networks, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 and 04-356 (filed March 23, 2009). The Draft Memorandum is dated March 20, suggesting that the letter and memorandum formed the basis of that earlier meeting. The fact that the documents are marked “draft” and are unsigned also raises questions about their status and content. T-Mobile welcomes the Commission’s renewed focus on transparency in FCC proceedings and appreciates its apparent insistence that M2Z submit a document that may have been shared previously with Commission staff. Now that M2Z has placed these baseless allegations in the record, however, T-Mobile has an obligation to respond.

Ms. Marlene H. Dortch
April 10, 2009
Page 2

claims regarding candor, M2Z's latest charges are nothing more than a rehash of its prior arguments with respect to the filters in T-Mobile's AWS-1 handsets, T-Mobile International's TDD operations in the Czech Republic, and the results of testing at the Boeing Laboratory last summer. Notably, T-Mobile, together with numerous other parties to this proceeding, has responded in full to these arguments. It is M2Z's groundless charges, not the efforts by T-Mobile and many other parties to provide a full record for the Commission, that risk compromising the regulatory process here.

M2Z's stop-at-nothing tactics are particularly troubling because of the impact they may have on free and fair debate in this and future Commission proceedings. In its Draft Memorandum, M2Z fires a barrage of loaded terms like "misrepresentation," "perjury," and "lack of candor" at T-Mobile as if those were commonplace descriptors. In fact, as the Commission has found, these are "serious charge[s]" that "should not be lightly made nor lightly concluded."^{2/} Not only have M2Z's wholly unsupported and reckless allegations lowered the level of discourse, they represent a serious abuse of Commission processes.

At the very least, the Commission should strike M2Z's Draft Memorandum from the record as unverified and unsupported, and therefore in violation of section 1.52 of the Commission's rules.^{3/} Given the recklessness of the allegations and the peculiar nature of the pleading, the Commission should also consider whether further sanctions against M2Z are warranted.^{4/}

Following is a more specific response to the allegations in M2Z's Draft Memorandum.

Disagreements over Policy Decisions and Technology Do Not Amount to Perjury, Misrepresentation, or Lack of Candor.

M2Z implores the Commission to "punish" T-Mobile by imposing sanctions such as "the striking of unsupported pleadings, exclusion from further participation in these proceedings, potential forfeitures, license or permit revocations, and other remedies within the Commission's discretion."^{5/} As discussed below, however, M2Z's allegations amount to nothing more than

^{2/} *Fox River Broadcasting, Inc., De Pere, Wisconsin, et al.*, Decision, 88 FCC 2d 1132, ¶ 6 (1982) ("*Fox River I*").

^{3/} 47 C.F.R. § 1.52; *see Application of Nationwide Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 5654 (1998) (FCC staff "should dismiss pleadings that appear to be primarily designed to cause harm or delay . . . rather than to air legitimate, substantive objections relevant to the application proceeding in which they are filed"); *see also Litigation Recovery Trust*, Memorandum Opinion and Order, 17 FCC Rcd 21852, ¶ 11 (2002) (sanctions may be appropriate where a party's pleadings "go beyond legitimate advocacy" and are filed "primarily for abusive purposes").

^{4/} *See* n.1, *supra*.

^{5/} M2Z Draft Memorandum at 1.

Ms. Marlene H. Dortch

April 10, 2009

Page 3

disagreements over policy and technical issues.^{6/} M2Z provides no evidence – nor is there any – to support its empty accusations of misrepresentation, lack of candor, and the like that it flings at T-Mobile and its executives.

The Commission has long held that technical or policy-based disagreements do not amount to lack of candor.^{7/} Indeed, no rational reader of T-Mobile’s filings could regard them as anything other than good-faith efforts to address the complex technical and policy issues raised in this contentious proceeding. The purpose of a rulemaking proceeding is to “enhance the agency’s knowledge of the subject matter of the proposed rules and to afford the public an adequate opportunity to provide data, views and arguments with respect to the agency’s proposals and any alternative proposals.”^{8/} T-Mobile devoted substantial time, energy, and resources to ensure that the Commission and all stakeholders – including M2Z – had all possible information available to it. T-Mobile conducted multiple rounds of empirical testing at its own expense and filed the test results in the record. It also developed an alternative band plan for the AWS-3 spectrum that would allow the band to be used for broadband services without causing interference to neighboring users.^{9/} T-Mobile’s advocacy and that of many others in the wireless industry has been constructive and designed to inform rather than encumber the agency’s decision-making

^{6/} The Commission has consistently cautioned that charges of misrepresentation – which the Commission equates with perjury – are “highly stigmatizing” and “should not be made frivolously.” *Fox River I* ¶ 6. Similarly, an allegation charging lack of candor must demonstrate that the alleged misconduct is “of such a blatant and unacceptable dimension that its existence cannot be denied.” *RKO General, Inc. v. FCC*, 670 F.2d 215, 235 (D.C. Cir. 1981); *Swan Creek Commc’ns, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (finding lack of candor where there were blatant inconsistencies in the submissions and testimony of a particular party).

^{7/} See, e.g., *Application of Radio Akron, Inc. for Renewal of License of Station WHLO, Akron, Ohio*, Memorandum Opinion and Order, 62 FCC 2d 987, ¶¶ 12-18 (1977) (finding no misrepresentation or lack of candor where “petitioners merely disagree with [their opposition’s] opinion”); *Application of Storer Broadcasting Co. for Renewal of License of Station WJBK-TV, Detroit, Michigan*, Memorandum Opinion and Order, 62 FCC 2d 618, ¶ 9 (1977) (finding no misrepresentation where “the alleged intentional misrepresentation appears to be nothing more than a disagreement of interpretation” between the parties); *Tequesta Television, Inc., et al.*, 2 FCC Rcd 7324, ¶ 4 (1987) (stating that there is generally no basis for faulting parties’ vigorous prosecution of their causes); *Anderson Radio Broadcasting, Inc. Application for Minor Modification of Licensed Station KIBG(FM), Bigfork, Montana*, 23 FCC Rcd 578 ¶ 10 (2008) (finding allegations of misrepresentation and lack of candor “baseless” where the alleging party is “essentially reargu[ing]” previous arguments that were considered and decided by the Commission); *In re News International, PLC Petitions for Relief*, Memorandum Opinion and Order, 97 FCC 2d 349, ¶ 44 (1984) (finding no misrepresentation or lack of candor because “[a] disagreement as to the applicability of the law is not misrepresentation”).

^{8/} *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, Order, Notice of Inquiry, and Interim Policy Statement, 68 FCC 2d 804 (1978).

^{9/} See Letter from Thomas J. Sugrue, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 and 04-356 (filed Nov. 17, 2008).

Ms. Marlene H. Dortch
April 10, 2009
Page 4

processes.^{10/} By contrast, M2Z's casual accusations of serious infractions against T-Mobile seem calculated to cover up the deficiencies in its own case.

Not surprisingly, when allegations of misconduct similar to those set forth in M2Z's Draft Memorandum have been put forward, the Commission has rarely entertained them. To the contrary, the Commission has noted that "[a]lthough the seizing of an isolated word or phrase to impeach" an adversary "may satisfy the dramatic inclinations of the viewers of 'Perry Mason,' Commission [] proceedings – mundane as they might be – cannot be transmogrified into undisciplined, adversarial romps in pursuit of some elusive 'smoking gun.'"^{11/} The FCC has expressed its exasperation with these types of tactics and with the parties who resort to them.^{12/}

M2Z's Latest Filing Merely Resurrects – Under the Cloak of Claims Regarding "Candor" – Arguments That It Has Already Made to the Commission.

Having failed conclusively to convince the Commission on the merits of its arguments, M2Z has clumsily repackaged its substantive disagreements with T-Mobile and others in the wireless industry as "evidence" of misconduct. But recasting these arguments as charges against T-Mobile's character does not make them meritorious. T-Mobile and others have responded at length to the substantive claims M2Z puts forward in the Draft Memorandum. T-Mobile does so again here briefly.

^{10/} See *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969) (noting that the purpose of notice and comment proceedings is to "give the public an opportunity to participate in the rule-making process" and enable "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated"); see also *Batterton v. Marshall*, 648 F.2d 694, 703-04 (D.C. Cir. 1980).

^{11/} *Fox River I* ¶ 10; see also *Applications of Millard Orick, Jr., Payson, Arizona, et al.*, Decision, 89 FCC 2d 571, ¶ 2 (1982) ("Yet, a charge of misrepresentation or lack of candor is easy to lodge, harder to prove, and more difficult to affirmatively disprove. Skillful and zealous advocates tend to marshal minor application errors, omissions, or inconsistencies, in an all but irresistible . . . attempt to stick the competition with a misrepresentation or lack of candor finding as a surefire way to secure the license.") (internal quotations omitted).

^{12/} *Fox River I* ¶ 10 n.15 (stating that the frequency with which Commission licensees attempt to "stick the competition with a misrepresentation or lack of candor finding" has resulted in the Commission's "case law [being] littered with allegations of prevarication to the point where an unfamiliar reader would deduce that [the Commission's] files are a collective rap sheet of the nation's pathological liars").

Ms. Marlene H. Dortch
April 10, 2009
Page 5

T-Mobile's handsets, which include its filtering technology, have been approved by the Commission, and, in any event, M2Z's proposed operations will cause interference that filters will not alleviate.

M2Z's Draft Memorandum accuses T-Mobile executives of misrepresentation with respect to the filters in T-Mobile's handsets. Specifically, M2Z accuses these executives of conveying false information to the Commission when they signed sworn declarations stating that T-Mobile's handset filter technology had been designed for use in the AWS-1 band and were reviewed and approved by the FCC.^{13/} M2Z also alleges that T-Mobile "concealed" the "material fact" that its AWS-1 handsets do not comport with its AWS-1 spectrum assignments and on numerous occasions submitted a "misleading diagram" suggesting that the roll off of its AWS-1 filter is much steeper than T-Mobile previously admitted.^{14/}

M2Z's allegations regarding T-Mobile's statements on FCC approval are without merit. Mr. Ray's statement that "[T-Mobile] handsets have used standards-based equipment, *including filter technology*, that has been reviewed and approved by the Federal Communications Commission for use in the United States"^{15/} is correct and accurate. T-Mobile's handsets use standards-based equipment, and included within that standards-based equipment is filter technology. The FCC has consistently required equipment manufacturers to provide a full parts list, which would include the filters used in the device, to demonstrate compliance with the requirements of section 2.1033 of the Commission's rules.^{16/} Sections 2.1033(c)(10) and (c)(13) are specific in the requirements for equipment authorization certification for the AWS band. In particular, for equipment employing digital modulation techniques (such as the technology used by AWS licensees), the response characteristics "of any filters" must be submitted^{17/} and a description of all circuitry and devices provided for "suppression of spurious radiation"^{18/} is required as part of the certification application. That, in fact, is the import of the statement in the Ray Declaration cited by M2Z as well as the statement in the slide used by Cole Brodman in his July 2008 meeting.^{19/}

^{13/} M2Z Draft Memorandum at 5-7.

^{14/} *Id.* at 4, 8-9.

^{15/} *Id.* at 5-6 (emphasis added; M2Z emphasis on "reviewed and approved" omitted).

^{16/} See required exhibits for FCC Form 731, available at <https://fjallfoss.fcc.gov/oetcf/eas/help/easweb.pdf>.

^{17/} See 47 C.F.R. § 2.1033(c)(13).

^{18/} See *id.* § 2.1033(c)(10).

^{19/} Not only are the statements M2Z challenges completely truthful and accurate, they are characterizations of the Commission's type certification process that was developed and implemented by the Commission itself. Unlike statements about facts uniquely within the knowledge of a party, such characterizations are matters the Commission is quite competent to assess. The Commission, not the parties, is the principle expert on the scope and significance of its own processes.

Ms. Marlene H. Dortch

April 10, 2009

Page 6

Likewise, M2Z willfully distorts the plain meaning of a diagram used by T-Mobile in the AWS-3 proceeding in order to fabricate its claim that the diagram “misleadingly suggest[s] that the roll off of its AWS-1 filters is much steeper than what T-Mobile admitted on September 3, 2008.”^{20/} M2Z’s hyperbole aside, it is clear that the first diagram is intended only to convey a general picture of receiver overload and out-of-band emission (“OOBE”) effects. T-Mobile never asserted that this diagram represented the actual performance of the AWS-1 handsets; indeed, as M2Z itself points out, T-Mobile described in great detail in the very next slide in its September 3, 2008 *ex parte* filing the actual performance of the AWS-1 handsets.^{21/} In that same *ex parte* filing, T-Mobile detailed how its testing regime tested for a variety of possible filter characteristics and explained that the front-end filtering M2Z seems so concerned about would have no effect whatsoever on the OOBE interference that would occur under M2Z’s proposed AWS-3 plan.^{22/}

More fundamentally, these claims are nothing more than M2Z’s thinly veiled attempt to resurrect its argument that T-Mobile’s “European” filters are somehow to blame for the predicted interference from AWS-3 handsets. As extensive empirical evidence submitted in the record has conclusively demonstrated, the principal source of interference under the FCC’s proposal for the AWS-3 band would be OOBE from the AWS-3 licensee leaking into the adjacent AWS-1 band where T-Mobile and other carriers are offering broadband services today.^{23/} No amount of filtering in AWS-1 devices can protect against that – a fact that numerous commenters repeatedly emphasized.^{24/} Even M2Z has acknowledged that “[t]here is general agreement that the OOBE

^{20/} M2Z Draft Memorandum at 9.

^{21/} *See id.* at 8 (citing T-Mobile September 3, 2008 *Ex Parte*).

^{22/} T-Mobile September 3, 2008 *Ex Parte* at 9.

^{23/} *See, e.g.*, T-Mobile Further Notice Comments at 10-11; T-Mobile Further Notice Reply Comments at 4-6; Nokia Further Notice Comments at 4; SpectrumCo Further Notice Comments at 4; U.S. Cellular Corp Further Notice Comments at 3-5; AT&T Further Notice Comments at 13-18; CTIA Further Notice Comments at 35-36; Ericsson Further Notice Comments at 5-6; Motorola Further Notice Comments at 5-6; Letter from David Shively, AT&T, Charles Jackson, CTIA, Ahmad Armand, MetroPCS, Randy Leenerts, Nokia, and Yasmin Karimli, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 07-195, at 1 (filed Sept. 10, 2008) (“AT&T, *et al.* Sept. 2008 Letter”).

^{24/} *See, e.g.*, T-Mobile Further Notice Comments at 10-11; T-Mobile Further Notice Reply Comments at 8-9; AT&T Further Notice Comments at 25-27 (“there is simply nothing an AWS-1 device can do to filter out OOBE from AWS-3 transmitters”); CTIA Comments at 41 (“filtering is no solution to the interference caused by OOBE”); Ericsson Further Notice Comments at 4 (“[T]he additional front-end filtering proposed by M2Z to protect AWS-1 receivers from AWS-3 signals would only occur for signals above 2170 MHz. And the resulting increase in the passband loss for *all* terminals would cause a loss of capacity [and] coverage for the entire AWS-1 system.”); Motorola Further Notice Comments at 5-6 (It is “not technically possible today or in the foreseeable future to protect receivers in the 2110-2155 MHz band from an unacceptably high level of interference from immediately adjacent TDD operations in the 2155-2175 MHz band” and M2Z has made a “false assumption that this interference can be addressed

Ms. Marlene H. Dortch
April 10, 2009
Page 7

are the dominant interference mechanism in nearby coupling situations . . . ,”^{25/} putting to rest the myth that better filters could somehow protect against AWS-3 interference. Given the weight of evidence in the record on this point, no allegation of lack of candor or misrepresentation against T-Mobile can stand.^{26/}

M2Z’s attempt to use FDD/TDD operations in the Czech Republic as a corollary for U.S. operations is inaccurate and misleading.

M2Z claims that a statement in a letter from Joachim Horn, CTO, T-Mobile International AG, submitted by T-Mobile in this proceeding, that “[i]n Eastern Europe, we operate a UMTS-TDD system adjacent to an FDD-UMTS system operated by Telefonica O2 Czech Republic’ and that ‘there is an effective 5 MHz guard band between the systems’” is false.^{27/} M2Z is wrong. Mr. Horn’s statement is true and accurately describes the situation in the Czech Republic. He did not say or imply that the 5 MHz of spectrum is *assigned* as a guard band; rather, he made clear that the spectrum between the two systems functions as a guard band, *i.e.*, there is an *effective* guard band. Mr. Horn’s statement also is entirely consistent with T-Mobile’s characterization of the spectrum as a “*de facto* guard band” – “*de facto*” means “being such *in effect* though not formally recognized.”^{28/} And, far from contradicting Mr. Horn’s statement, M2Z’s Draft Memorandum essentially *concedes* its accuracy, acknowledging that “[i]n the Czech Republic, T-Mobile and Telefonica are separated by a 5 MHz block” of “unassigned spectrum.”^{29/} As with the rest of its baseless charges, M2Z’s attempt to portray phraseology as perjury should be given no credence.^{30/}

through use of better filters or changes in equipment design.”); Nokia Further Notice Comments at 6; U.S. Cellular Corp Further Notice Comments at 4; Letter from Patricia Paoletta, Counsel to 3G Americas, to Marlene Dortch, Secretary, FCC, WT Docket No. 07-195, at 4 (filed June 25, 2008) (debunking the “myth of the magic filter”).

^{25/} Letter from Uzoma Onyeije, M2Z Networks, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket. Nos. 07-195 and 04-356, at 12 (filed Sept. 23, 2008).

^{26/} See, e.g., T-Mobile Further Notice Comments at 10-11; T-Mobile USA, Inc., AWS-3 to AWS-1 Interference Laboratory Test Report (July 25, 2008), attached as Exhibit 1 to T-Mobile Further Notice Comments (“T-Mobile July Test Results”); T-Mobile Further Notice Reply Comments at 10-12 (refuting again M2Z’s argument that AWS-1 licensees could protect themselves with better handset filters).

^{27/} M2Z Draft Memorandum at 7-8.

^{28/} See Merriam-Webster Online Dictionary, available at: de facto.

^{29/} M2Z Draft Memorandum at 8.

^{30/} More generally, T-Mobile responded fully to M2Z’s arguments regarding the alleged inconsistency between T-Mobile’s position in this proceeding and T-Mobile International’s operations in the Czech Republic. T-Mobile Further Notice Reply Comments at 21-23. M2Z’s attempt to revisit these claims again is a waste of valuable Commission time and resources.

Ms. Marlene H. Dortch
April 10, 2009
Page 8

T-Mobile's interference testing demonstrates that harmful interference will occur from M2Z's proposed AWS-3 operations.

M2Z alleges that the results of T-Mobile's September 2008 testing revealed that T-Mobile's July 2008 tests were based on testing methodologies and environments that were "rigged" to show potential harmful interference in situations where no harmful interference could occur.^{31/} T-Mobile has previously filed with the Commission detailed information regarding its testing methodology and results.^{32/} In addition, T-Mobile responded in detail to each and every claim regarding potential interference that M2Z has asserted in the past and restated in the Draft Memorandum.^{33/} The test results were validated by engineers from the major wireless carriers and manufacturers.^{34/} M2Z's latest accusations demonstrate either its continued misunderstanding of the test results or its continued willingness to mischaracterize them to the Commission.

* * *

M2Z's allegations are an especially egregious example of an unsupported, unprofessional pleading that attempts to mask weaknesses in its own substantive arguments by adding the element of misrepresentation. For the reasons set forth above, the Commission should strike M2Z's Draft Memorandum from the record. Moreover, in light of the reckless nature of these charges and the unusual circumstances surrounding the manner in which the filing was made, the Commission should consider whether additional sanctions against M2Z are warranted.

^{31/} M2Z Draft Memorandum at 2-3, 9-10.

^{32/} See, e.g., T-Mobile Further Notice Comments at 12-17; T-Mobile Test Results at 20-29; T-Mobile Further Notice Reply Comments at 4-10.

^{33/} See, e.g., Letter from Thomas J. Sugrue, T-Mobile USA, Inc., to Marlene H. Dortch, WT Docket Nos. 07-195 and 04-356 (filed Sept. 26, 2008) (demonstrating in detail that M2Z failed to comprehend the signal strengths tested by T-Mobile; improperly characterized the results of the tests in order to make specious claims regarding the impact of low-power devices; failed to understand that the interference tests were actually more forgiving to AWS-3 OOB levels than real-world standards and devices; asserted erroneous, untested conclusions about the transmit power of AWS-3 mobile devices; and inaccurately argued that the drive test data was based on a partially constructed AWS-1 network).

^{34/} See AT&T, et al. Sept. 2008 Letter; see also Letter from David Shively, AT&T, David Urban, Comcast, Charles Jackson, CTIA, Jonas Naslund, Ericsson, Bill Alberth, Motorola, Randy Leenerts, Nokia, Vish Nandall, Nortel, Roberto Padovini & Jamshid Khun-Jsuh, QUALCOMM, Cole Brodman & Neville Ray, T-Mobile, Jeff Baenke, U.S. Cellular, to Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell, FCC, WT Docket Nos. 07-195 and 04-356 (filed Oct. 20, 2008).

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Ms. Marlene H. Dortch
April 10, 2009
Page 9

Sincerely,

A handwritten signature in black ink, appearing to read "Howard J. Symons", with a long horizontal flourish extending to the right.

Howard J. Symons

cc: Paula Michele Ellison
Ajit Pai
Joseph Palmore
Julius Knapp
James Schlichting
Paul Murray
Renée Crittendon
Angela Giancarlo