

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Application of Cellco Partnership)	Report No. AUC-73
d/b/a Verizon Wireless)	File No. 0003382444
)	
For 700 MHz C Block Spectrum Licenses)	
WU-REA001-C, WU-REA002-C,)	
WU-REA003-C, WU-REA004-C,)	
WU-REA005-C, WU-REA006-C,)	
and WU-REA008-C)	

To: The Chief, Wireless Telecommunications Bureau

PETITION TO CONDITION GRANT

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May 2, 2008

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PETITION TO CONDITION GRANT

Pursuant to Section 1.939 of the FCC’s Rules, 47 C.F.R. § 1.939, and in accordance with the Commission’s April 22, 2008 Public Notice (DA 08-927), Google Inc. and Google Airwaves Inc. (collectively, “Google”), by their attorneys, respectfully request that the Commission grant the above-referenced Application of Cellco Partnership d/b/a Verizon Wireless (“Verizon”) pursuant to a written order reiterating Verizon’s obligations under Section 27.16 of the Commission’s rules as set forth herein, and expressly conditioning grant of the Application on Verizon’s affirmative acknowledgement and agreement to comply with such order. In support hereof, the following is respectfully shown.

I. Preliminary Statement

As the Commission is aware, Google was an active participant in the proceedings that resulted in the service rules for the 700 MHz spectrum, including the network access rule

codified in Section 27.16, § 47 C.F.R. 27.16,¹ as well as in the proceedings adopting procedures for the auction of C Block and other 700 MHz licenses.² Google also filed an application to participate, and was an active bidder, in Auction 73.³ Google applauds the Commission for its successful conduct of Auction 73, which resulted in the reserve prices being satisfied for the A, B, C, and E Blocks, and the triggering of the network access obligations for the C Block, which will foster the Commission’s public interest objectives specific to that spectrum. As the Commission observed when it adopted the open network requirements:

[W]hat we decide here is important to the evolution of the next generation of wireless technology, industry structure and institutional arrangements. This auction provides a window of opportunity to have a significant effect on the next phase of mobile wireless technological innovation, and on the evolution of market and institutional arrangements—such as arrangements regarding open platforms for devices and applications to the benefit of consumers—that will go along with that innovation.... we believe that it is appropriate to take a measured step to encourage additional innovation and consumer choice at this critical stage in the evolution of wireless broadband services, by removing some of the barriers that developers and handset/device manufacturers face in bringing new products to market.⁴

Google urges prompt grant of all C Block licenses in a manner that is fully consistent with the Commission’s vision for this spectrum, including the swift construction and operation of a nationwide C Block network. Google submits this petition for the limited purpose of ensuring that, immediately upon grant of Verizon’s C Block licenses, all parties sharing an interest in the

¹ See, e.g., Comments of Google Inc., WT Docket No. 06-150 (May 23, 2007); Letters from Richard S. Whitt, Washington Telecom and Media Counsel, Google Inc., to Marlene Dortch, Secretary, FCC (May 21, 2007, Jul. 9, 2007, Oct. 1, 2007, Oct. 23, 2007, Nov. 6, 2007, and Nov. 21, 2007); Letter from The Coalition for 4G in America to Marlene Dortch, Secretary, FCC, WT Docket No. 06-150 (Mar. 6, 2007).

² See, e.g., Letters from Mark J. O’Connor, Counsel for Google Inc., to Marlene Dortch, Secretary, FCC, AU Docket No. 07-157 (Sept. 17, 2007, Sept. 19, 2007, and Sept. 28, 2007).

³ See FCC Form 175 of Google Airwaves Inc., FCC File No. 0003247017.

⁴ *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd 15289, ¶201 (2007) (“700 MHz Second R&O”), recon. pending; appeal pending *sub nom. CTIA v. FCC*, Case No. 07-1432 (D.C. Cir., filed Oct. 22, 2007).

promise of open networks also have a common understanding regarding Verizon's compliance with at least one fundamental aspect of the license conditions.⁵ Action now is especially necessary given the long lead time typically required for software applications developers and device manufacturers to design, develop, and deploy their products to the public, as well as the uncertainty Verizon has introduced publicly regarding its compliance with the open access obligations. The Commission will best promote its goals by reiterating those obligations and rejecting, at the time of license grant, Verizon's so-called "two-door" position regarding these obligations. If the correct direction is not set now, concurrent with the application review and grant process, the Commission's policy goals will be thwarted, and public participation in development of the C Block stands to be muted.

II. Open Access Obligations Apply to Devices Provided by C Block Licensees

The Commission's open access rule is clear that C Block licensees "shall not deny, limit, or restrict the ability of *their customers* to use the devices and applications of their choice...."⁶ The rule also is explicit that C Block licensees may not "disable features on *handsets it provides to customers*."⁷ The rule thus plainly proscribes a C Block licensee from selling handsets to customers that hinder a customer's ability to use applications of their choice, and applies to all customers of a C Block licensee.

Notwithstanding the clarity of the rule, Verizon has taken the public position that it may exclude its handsets from the open access condition. Verizon believes it may force customers

⁵ The scope of this Petition is narrow. Google does not raise here broader questions related to post-licensing implementation and enforcement of the open applications and open handsets requirements, which are more appropriate for a separate proceeding involving clarification of C Block network access obligations.

⁶ 47 C.F.R. § 27.16(b) (emphasis added).

⁷ 47 C.F.R. § 27.16(e) (emphasis added).

who want to access the open platform using a device not purchased from Verizon to go through “Door No. 1,” while allowing customers who obtain their device from Verizon access through “Door No. 2.”⁸ As Google previously made clear,⁹ Verizon’s position would completely reverse the meaning of the rule such that the open access condition would apply to *none* of Verizon’s customers, and thereby render the condition a nullity. Because this “two-door” position espoused by Verizon is contrary to the plain meaning of the rule, as well as the Commission’s public interest findings and policy objectives set forth in the *700 MHz Second R&O*, it must be rejected.

A. Verizon’s Stated Position Is That It Can Block Applications on Its C Block Devices

After the network access rule was adopted, but before becoming the high bidder on C Block licenses, Verizon, in oral and written *ex parte* presentations to Chairman Martin, other Commissioners, and Commission staff, stated its “position” that “the Commission should not force C Block licensees to allow any and all lawful applications to be downloaded to any devices that *licensees* provide, including devices that are not configured to accommodate any and all applications.”¹⁰ Verizon has kept to its written position and, despite ample opportunity, has not subsequently disavowed this position in any on-the-record filing with the Commission, including

⁸ See Information Week, “Web 2.0 Summit: Verizon Wants ‘2-Door’ Policy For 700 MHz Auction,” Richard Martin, Oct. 19, 2007, available at <http://www.informationweek.com/news/mobility/wifiwimax/showArticle>.

⁹ Letter from Richard S. Whitt, Washington Telecom and Media Counsel, Google Inc., to Marlene Dortch, Secretary, FCC, WT Docket No. 06-150, at 2 (Oct. 1, 2007).

¹⁰ Letter from R. Michael Senkowski, Counsel for Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 06-150, at 2 (Sept. 28, 2007) (emphasis added) (“Verizon Sept. 28 *Ex Parte*”). See also Letter from Ann D. Berkowitz, Associate Director-Federal Regulatory Advocacy, on behalf of Verizon Communications and Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 06-150, at 1 (Sept. 19, 2007); Letter from John T. Scott, III, Vice President and Deputy General Counsel, on behalf of Verizon Communications and Verizon Wireless, WT Docket No. 06-150, at 1 (Sept. 25, 2007).

its Application for the seven C Block licenses on which it was the high bidder. Nor has Verizon made a formal request that the Commission reconsider the rule, or stepped back from its assertion that its “position” did not constitute an informal request for reconsideration.¹¹ Of course, Verizon did ask the U.S. Court of Appeals for the D.C. Circuit to “hold unlawful, vacate, enjoin, and set aside” the open platforms condition,¹² and withdrew its petition for review only after that Court denied Verizon’s request for expedited review,¹³ and concurrent with CTIA’s filing of an identical request, which remains pending.¹⁴

Given that Verizon’s “position” is in conflict with a fundamental obligation of Section 27.16, it is necessary and appropriate to ensure that Verizon and all interested parties clearly understand the Commission’s C Block condition at this time. Further, for the sake of its own public interest findings, and to ensure that investment and innovation is properly directed to the C Block, the Commission must ensure in this proceeding that Verizon stands ready to meet its obligations upon grant of its C Block licenses.

B. The Rule Is Clear: “Any Apps, Any Devices,” Not “Any Apps, Except on Verizon Devices”

As noted, Section 27.16(b) prohibits C Block licensees from limiting or restricting the ability of their customers to use the devices and applications of their choice on the licensee’s C

¹¹ Verizon Sept. 28 *Ex Parte* at 3.

¹² Petition for Review, *Cellco Partnership d/b/a Verizon Wireless v. FCC*, Case No. 07-1359 (D.C. Cir.), Sept. 10, 2007.

¹³ Motion of Cellco Partnership d/b/a Verizon Wireless for Voluntary Dismissal of Its Petition for Review and Protective Notice of Appeal, Case Nos. 07-1359 and 07-1382 (D.C. Cir.), Oct. 22, 2007.

¹⁴ Petition for Review, *CTIA v. FCC*, Case No. 07-1432 (D.C. Cir.), Oct. 22, 2007. Verizon intervened in the case on behalf of CTIA. Motion of Cellco Partnership d/b/a Verizon Wireless for Leave to Intervene, Case No. 07-1432 (D.C. Cir.), Nov. 21, 2007.

Block network, subject to reasonable network management.¹⁵ The language of the *700 MHz Second R&O* underscores the Commission’s intent as set forth in Section 27.16, stating that C Block licensees “will not be allowed to disable features or functionality in handsets....”¹⁶ The Commission did not equivocate about which handsets or customers the condition applies to. Thus, the rule mandates opening the C Block network for the use of *any* device, and for the use of *any* application *on any* device, regardless of whether an end user obtains the device from the licensee, another service provider, a manufacturer, or other third party. In short, the rule requires openness for “Any Applications, Any Devices” – not “Any Applications, Except on Verizon Devices,” as Verizon would interpret it.¹⁷ As Chairman Martin recently made clear, “consumers will be able to use the wireless device of their choice on those networks and download whatever legal software or applications they choose onto it.”¹⁸

Indeed, the terms of the rule unambiguously apply to C Block licensees’ “customers”; Verizon is not free to self-define the rule to exclude any and all Verizon devices. Such a re-write of the C Block condition would result in Verizon’s “two-door” exception swallowing the rule

¹⁵ 47 C.F.R. § 27.16(b). *See also 700 MHz Second R&O*, at ¶206 (“Specifically, a C Block licensee may not block, degrade, or interfere with the ability of end users to download and utilize applications of their choosing on the licensee’s C Block network, subject to reasonable network management.”).

¹⁶ *700 MHz Second R&O*, at ¶222.

¹⁷ Prior to Auction 73, Verizon announced an “open device initiative” for its non-C Block nationwide wireless network, which it referred to as an “any apps, any device” option. Verizon Wireless News Release, Nov. 27, 2007, “Verizon Wireless to Introduce ‘Any Apps, Any Device’ Option for Customers In 2008,” at <http://news.vzw.com/news/2007/11/pr2007-11-27>. This voluntary initiative, while a promising market development, must not be confused with the separate and independent obligations applicable to C Block spectrum with which Verizon, as a C Block licensee, must comply. While Verizon currently is free to restrict the use of third-party applications on Verizon-affiliated or Verizon-preferred devices on its *non-C Block* spectrum, Verizon is prohibited from imposing such restrictions on its C Block network.

¹⁸ Written Statement of the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, Before the Committee on Energy and Commerce, U.S. House of Representatives, at 5-6 (Apr. 15, 2008).

and eviscerating the consumer benefits of the condition, since it almost surely will be the case that Verizon will be the predominant device distributor on its own C Block network. The Commission must ensure that Verizon understands that this license obligation means what it says: Any Apps, Any Devices.

III. The Public Interest Will Be Served by Acting Now

Now that the auction has concluded, it is time for the Commission to ensure that Verizon recognizes that its “Any Apps, Except on Verizon Devices” position fails both the letter and the spirit of the license conditions. Verizon cannot be allowed to become a C Block licensee while it simultaneously seeks to undermine a core public interest obligation of C Block licensees.

The question of whether Verizon’s C Block network will be open to any applications on any device has an enormous impact on would-be customers, software applications developers, equipment manufacturers, service providers, investors, and others having a substantial interest in the prompt development of an “open” C Block network. The Commission will best serve the public interest and all affected parties by issuing an Order that affirmatively rejects Verizon’s stated position regarding its open access obligations, and requires Verizon to affirmatively acknowledge, and agree to comply with, the Any Apps, Any Devices obligation as a condition to the grant of the licenses. Failure to do so now will only foster uncertainty and delay, rather than innovation and investment. As Commissioner Copps recently noted, companies and individuals “need to know that their innovation won’t be prevented from getting to market by a handful of network operators who have consolidated their control.”¹⁹

Failure of the Commission to act now also would effectively allow Verizon to have precluded other potential licensees from fulfilling the “Any Applications, Any Devices”

¹⁹ Written Statement of Commissioner Michael J. Copps, *En Banc* Hearing on Broadband Network Management Practices, Stanford University, at 2 (Apr. 17, 2008).

mandate. As the primary C Block spectrum winner, Verizon cannot be allowed to become a bottleneck to the development of that spectrum by barring lawful applications on all devices on its C Block network. Verizon and other incumbent wireless carriers today largely control the commercial relationships with equipment manufacturers and vendors as well as software developers of mobile applications – indeed, approximately 95 percent of all mobile handsets in the U.S. are sold by mobile service providers, including through operator-owned retail stores.²⁰ As the Commission explained when it adopted the open platforms condition, the rule seeks to promote competition by “foster[ing] greater balance between device manufacturers and wireless service providers,” primarily “by removing some of the barriers that developers and handset/device manufacturers face in bringing new products to market.”²¹

In sum, to promote the critical federal policy objectives of “rapid deployment and ubiquitous availability of broadband services across the country” that it sought to further by adopting the open access obligations,²² the Commission should mandate, as a condition to grant of the licenses, that Verizon acknowledge and agree to comply with the Any Apps, Any Devices requirement.

²⁰ See Cnetnews.com, Marguerite Reardon, “Will unlocked cell phones free consumers?,” Jan. 24, 2007, available at http://www.news.com/Will-unlocked-cell-phones-free-consumers/2100-1039_3-6152735.html.

²¹ 700 MHz Second R&O, at ¶201.

²² *Id.*, at ¶196.

IV. Conclusion

WHEREFORE, for the foregoing reasons, Google requests that the Commission issue a written order granting the Verizon C Block license application consistent with this Petition.

Respectfully submitted,



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May 2, 2008

CERTIFICATE OF SERVICE

I, Sybil Anne Strimbu, hereby certify that I have on this 2nd day of May, 2008, caused a true and correct copy of the foregoing *Petition to Condition Grant* to be delivered by electronic mail to:

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