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Ex Parte via Electronic Filing

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Presentation (WT Docket No. 06-150; WT Docket No. 06-129; PS Docket No. 06-229; WT Docket No. 96-86)

Dear Ms. Dortch:

Google Inc. ("Google") respectfully submits this *ex parte* letter in the above-referenced dockets, and requests that it be made part of the public record for those proceedings. In response to an ongoing discussion within the Commission prompted by Verizon, we explain that the most appropriate interpretation of the "open platforms" language in the FCC's 700 MHz Second Report and Order[1] is to ensure that it applies both to the network side and to the handset side of the wireless service provided by a C Block licensee.

Initially, Google must express its concern about the procedural posture of this discussion. As far as can be discerned, the sole reason the Commission is considering this issue at this time is that representatives from Verizon raised its interpretation of the Second Report and Order in a September 17th *ex parte* meeting with Chairman Martin and his staff, the actual content of which was not disclosed until days after the meeting.[2] This only undermines the ability of interested parties to assess and respond meaningfully to important legal and policy arguments, as intended under the FCC's *ex parte* rules.[3]

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[1] *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Docket No. 06-150, *et al*., FCC 07-132 (rel. Aug. 10, 2007) ("Second Report and Order").

[2] Notably, Verizon filed its *ex parte* notification letter on September 19th – a day later than required by the FCC's regulations – indicating only that the company discussed its views in the 700 MHz proceeding, "including its positions regarding paragraphs 206 and 222 of the 700 MHz Order." Letter from Ann D. Berkowitz, Verizon, WT Docket No. 06-150 (Sept. 19, 2007).

[3] Only after the Wireless Telecommunications Bureau requested a more fulsome statement of Verizon's position did it file a more complete letter on September 25, 2007. Even in that instance, Verizon's statement of position is limited to a single (albeit lengthy) sentence. *See* Letter from John T. Scott III, Verizon Wireless, WT Docket No. 06-150 (Sept. 25, 2007) ("Verizon Sept. 25th Letter").

That some interested parties have managed to piece together something of the substance of the undisclosed discussions between Verizon and the FCC does not cure the improprieties.[4]

Moreover, Verizon's *ex parte* activity and position plainly is a request for FCC reconsideration or clarification of the Second Report and Order. Given that Verizon already has appealed the order in the U.S. Court of Appeals for the D.C. Circuit, however, it may not also at the same time seek FCC reconsideration.[5] Under these circumstances, the Commission should declare that Verizon may not sidestep the mandatory procedures of the Communications Act and the Commission's rules by denying the public the right to understand and respond to its reconsideration positions – or enjoying two bites at the proverbial apple.

Critically, the substance of Verizon's position is not well founded. As far as can be discerned, Verizon argues that the open platforms requirement of the Second Report and Order applies only to the network side of the C Block licensee's relationship with customers. Under the Verizon interpretation, a C Block licensee would be permitted to sell to customers only closed handsets where functionality has been removed or crippled, and where applications are designed to block or supplant the use of third-party applications. As long as consumers can buy open handsets elsewhere that are compatible with the network, asserts Verizon, the open platforms requirement of the Second Report and Order would be satisfied.[6]

Verizon's position, however, is flatly contrary to the FCC's newly-adopted rules governing the C Block. Rule 27.16(b) states that licensees "shall not deny, limit, or restrict the ability of *their customers* to use the devices and applications of their choice…,"[7] which plainly proscribes the licensee from selling handsets to customers that do, in fact, hinder the customer's ability to use applications of the customers' (but not the licensee's) choice. Similarly, the "handset locking prohibited rule" states explicitly that "no licensee may disable features on handsets it provides *to customers*…."[8] This reference to "their customers" unambiguously would apply to any and all customers of

[4] *See* Verizon Sept. 28 Letter (arguing that its conduct was permissible because parties were able to respond to the positions advanced by Verizon Wireless in its September 17th, 2007 meeting).

[5] *See e.g.*, Motion of Frontline Wireless (Sept. 28, 2007) ("Frontline Motion") (explaining legal basis). Verizon is plainly off base when it asserts that it cannot be deemed to be seeking reconsideration here because that would mean that "any position taken in an *ex parte* meeting with Commission staff would be tantamount to a petition for reconsideration." *See* Letter of R. Michael Senkowski, Counsel to Verizon Wireless, WT Docket No. 06-150 (Sept. 28, 2007) ("Verizon Sept. 28th Letter") at 3. To the extent a party seeks a modification or clarification in an *ex parte* meeting with the FCC after an order has been released, that party is in fact seeking reconsideration within the FCC's rules. *See* 47 C.F.R. §1.429.

[6] Verizon Sept. 25th Letter, at 1-2.

[7] 47 C.F.R. §27.16(b) (italics added).

[8] 47 C.F.R. §27.16(e) (italics added).

the licensee, including (if Verizon wins the C Block) the vast majority of Verizon's wireless customers whom today purchase handsets at Verizon's retail stores. While perhaps consistent with Verizon's business objectives, Verizon's proposal to change the language and intent of the C Block open platforms condition so that it applies to "none of" its customers would completely reverse its meaning. The wording in the Second Report and Order underscores the Commission's intent as set forth in these rules, which clearly provide that the C Block licensee "will not be allowed to disable features or functionality in handsets…."[9] The FCC did not equivocate about which handsets or customers of the licensee, or under what circumstances, the rule applies to.

Moreover, from a commercial perspective, allowing any incumbent as a C Block licensee to close off its handsets from the open platforms condition would render the condition largely a nullity. The Second Report and Order spells out the compelling rationale for two-sided openness: the Commission has not found that competition in the U.S. CMRS marketplace ensures that consumers are able drive handset and application innovation and choices, especially in the emerging wireless broadband market. Rather, the FCC found evidence demonstrating that today's wireless service providers "block or degrade consumer-chosen hardware and applications without an appropriate justification."[10] More to the point, the Commission explains that its C Block open platforms condition looks to "foster 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."[11] Based upon its own experiences as a software applications company seeking access to the wireless market, Google endorses that cogent rationale.

Today's incumbent wireless carriers largely control the commercial relationships with equipment manufacturers and vendors, as well as software developers of mobile applications. Moreover, some 95 percent of all mobile handsets in the United States are solid in retail stores run by the wireless incumbents.[12] The Second Report and Order gets it exactly right: only with consumer-driven devices on an open network can this significant, decades-long imbalance of interests have any chance of being righted. American consumers deserve an environment where independent companies and entrepreneurs for the first time can bring their innovative applications and mobile devices to an open marketplace.

In short, Google shares the Commission's interest in fostering a robust and healthy wireless ecosystem that benefits from the Internet values of "innovation without

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[9] Second Report and Order, ¶ 222.

[10] Second Report and Order, ¶¶ 199-200

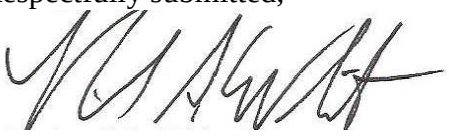
[11] Second Report and Order, ¶ 201.

[12] Skype Communications S.A.R.L.; Petition to Confirm A Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (filed Feb. 20, 2007).

permission." The consumer ultimately should have the right to decide what handset and applications they want to bring to the C Block licensee's network, without undue and unwanted mediation from the licensee. Should Google end up as a C Block licensee, we have every intention of implementing that fundamental tenet. In fact, as a potential bidder in the upcoming auction, Google finds the C Block license conditions to be more attractive, not less, if they correctly include a device-side openness requirement. As a licensee, Google would encourage third party applications, even those which may compete with our core services, on the Web-based belief that users desire not a protected set of limited products, but the right to pick and choose novel applications from any source based on their quality and relevance. Conversely, adopting the more limited, network-only openness mandate propounded by Verizon would only undermine the language and intent of the license conditions, and inject further uncertainty into the FCC's auction process.

In accordance with the FCC's *ex parte* rules, one electronic copy has been filed this day in the above-referenced dockets. Should you have any questions concerning this letter, please do not hesitate to contact the undersigned.

Respectfully submitted,



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