

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

**COMMENTS OF THE
PUBLIC INTEREST SPECTRUM COALITION**

On behalf of the Public Interest Spectrum Coalition (PISC),¹ Media Access Project files these comments in support of Google's *Motion to Condition Grant* (filed May 2, 2008).²

Even before Google became engaged in the process, PISC and its members urged the Commission to adopt a "wireless *Carterfone*" condition as part of a number of license conditions that would serve the public interest. *See, e.g.*, Comments of Public Interest Spectrum Coalition, Docket No. 06-150 (filed April 4, 2007). Indeed, PISC had sought application of the current open device "C Block" conditions to the entire block of spectrum auctioned. The Commission, however, rejected the additional consumer protection and pro-competition conditions proposed by PISC. *See In re Service Rules For The 698-746, 747-762 And 777-792 MHz Bands, 2nd Report & Order*, 22 FCCRec 15289 (2007) ("700 MHz Order"). While recognizing the enormous First Amendment value and importance to innovation of protecting the ability of subscribers to connect any device and run any application on that device, the Commission determined that it would apply the open device condition only to C Block. *Id.* at 15361-65. Although the Commission made clear that it absolutely prohibited locking devices operating on C Block spectrum to Verizon's network or crippling extant features or applications in any device connecting to C Block, see 47 CFR §27.16(e), the Commission otherwise preferred to rely on the general guidance offered in the *Order*. At the same time, the Commission warned future C Block licensee that the Commission would respond

vigorously to any complaints from subscribers, applications developers, or others. *700 MHz Order*, 22 FCCRec at 15369-72.

As a result of these Commission decisions, the actions the Commission will take in response to Google's *Motion* take on enormous significance. The Commission must make it clear from the very beginning that it will not permit any sort of "two door" policy that would undermine the C Block conditions by allowing Verizon to retail a category of devices that are locked to Verizon's network, that block consumer access to certain web-based applications or content, or that fast-track equipment that fits its traditional business model while creating delays and barriers to potentially disruptive devices and applications. If the Commission grants Google's *Motion*, it will inspire confidence on the part of developers and device makers that the Commission means business, encouraging investment in new wireless technologies and applications. It will inspire confidence on the part of the public in the integrity of the Commission's processes. And it will send a strong message to wireless carriers that the Commission will, indeed, act swiftly and vigorously to facilitate an open wireless network and hold the industry accountable for its promises of further openness.

On the other hand, if the Commission does not take action in response to Google's *Motion*, it will significantly undermine everything the Commission hopes to achieve with the C block rules. It is understandable that Verizon will want to preserve its traditional business model to the greatest extent possible. If the Commission fails to respond to trial balloons such the "two door" policy, Verizon will continue along the path of least resistance. The rest of the wireless industry will understand that the FCC does not intend to scrutinize the commitments to further open their networks too closely, and the momentum the Commission has counted on to create greater openness without regulation will slow, or stop altogether. Developers will understand the same message, and will be far less likely to invest the needed time and resources needed to create the next generation of wireless applications.

Verizon's Deliberate Vagueness Increases the Need For Swift and Definitive Action.

As is the nature of trial balloons, it is unclear precisely what Verizon means when it suggests it will have a "two door" policy. Does Verizon mean that it will retail devices that operate on C Block frequencies and are effectively locked to Verizon's network? And does Verizon mean that it intends to

retain the right to cripple features on these devices, or to preclude – by its terms of service or otherwise – consumers from using its devices to access any web-based application or content of their choice, as is Verizon’s current practice? Or is Verizon “merely” suggesting that manufacturers that “voluntarily” abide by conditions set by Verizon will go through an expedited “first door,” while developers unwilling to abide by Verizon’s conditions go through a slower “second door.” Either practice, or any practice that places third-party equipment or third-party applications at a disadvantage, violates the “any device, any app” condition. Likewise any practice or term of service that limits the applications or content that can be accessed later by consumers who purchase devices, whether from a third-party vendor or directly from Verizon, would violate the C Block condition. As the Commission stated in the Order: “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.” *700 MHz Order*, 22 FCCRec at 15361-65 (emphasis added). Whether end users initially purchase their device from Verizon or a third-party vendor does not change their right under the Order to subsequently access any application, web-based service or content not harmful to Verizon’s network.

The vague nature of this trial balloon has several chilling effects. First, it raises doubts in the minds of developers, manufacturers and investors that will deter the development of new, open devices. Second, it places parties in the difficult position of needing to exhaust themselves trying to anticipate any combination of conditions Verizon might use to advantage its own equipment under a “two door” policy. Third, Verizon no doubt hopes that such vagueness will deter the Commission from taking action. Verizon will no doubt maintain that Google’s *Motion* is untimely, absent a concrete description of the “two door” policy.

For these reasons, the Commission must not delay. As the Commission well knows from its long regulatory history, uncertainty about the limits of the rules and the Commission’s willingness to enforce can prove as deadly to a rule as outright non-compliance. Worse, the longer the uncertainty persists, the more likely it is that behaviors that would have initially been considered unacceptable become accepted industry practices. The Commission should therefore act immediately to dispel the uncertainty and make it clear that it will not tolerate policies that undermine the C Block rules or the broader goals of the C Block

rules.

Locking or Crippling Devices Clearly Violates Section 26.16(e).

Previously, Verizon suggested that under its reading of the FCC's rules, it may continue to sell devices locked to Verizon's network or devices where Verizon has required a manufacturer to remove, limit or otherwise cripple a feature or application in accordance with its current business model. *See*, Letter of John T. Scott, III, Verizon Vice President and Deputy General Counsel Regulatory Law, to Marlene H. Dortch, Docket No. 06-150 (filed September 25, 2007); Letter of R. Michael Senkowski, Counsel to Verizon Wireless, to Marlene Dortch, Docket No. 06-150 (filed September 28, 2007). As PISC observed when Verizon first advanced this position, such actions would clearly violate the plain language of Section 27.16(e) and the general intent of the C Block conditions. *See* Letter of Harold Feld, Counsel to PISC, to Marlene Dortch, Docket No. 06-150 (filed September 25, 2007).

Providing Any Advantage to Any Particular Device or Manufacturer – Particularly Verizon's Own Devices, Would Violate Section 27.16(e) and the Intent of the C Block Rules.

The only other meaning of a “two door” policy is that Verizon plans to have an expedited process of some kind for one set of devices and a different process for others. As the Commission made clear in the *700 MHz Order*, however, any process that would provide such an advantage of would violate Section 27.16(e). *700 MHz Order*, 22 FCCRec at 15371-72. This is true whether Verizon favors its own devices, *Id.* at 15371 (“[s]tandards for third-party applications or devices that are more stringent than those used by the provider itself would likewise be prohibited”) or whether it attempts to favor particular manufacturers or devices that fit Verizon's traditional business model. *Id.* at 15372 (prohibiting the establishment of “preferred vendors” or engaging in “white listing”). Verizon's statements that it will engage in a “two door policy” that advantages either its own equipment or that of preferred vendors, despite this explicit language in the *700 MHz Order*, therefore raise disturbing questions that Verizon must answer before the Commission can grant the C Block licenses.

CONCLUSION

Because the Commission has made the C Block conditions the centerpiece of its efforts to encourage a more open wireless platform, the Commission has an obligation to protect these conditions

aggressively. Otherwise, the promise of C Block may never emerge. The Commission should therefore grant Google's *Motion* and clarify that any deliberate effort to sell devices that are locked to C Block, or to deliberately cripple features or applications in devices that attach to C Block, violates the plain language of Section 27.16(e). In addition, any "two door policy" or other policy that advantages one set of applications or equipment providers over another would violate the C Block conditions.

WHEREFORE, the Commission should grant Google's *Motion*.
Respectfully submitted,

Harold Feld
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
1625 K Street, NW
Suite 1000
Washington, DC 20006
Tel: (202) 232-4300
Fax: (202) 466-7656

May 9, 2008

1 PISC is, in alphabetical order: The CUWiN Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDUCAUSE, Free Press (FP), Media Access Project (MAP), the National Hispanic Media Coalition (NHMC), the New America Foundation (NAF), Public Knowledge (PK), and U.S. PIRG.

2 Although Google has captioned its pleading as a *Motion to Condition Grant*, PISC wishes to emphasize that PISC does not view this as a new condition. In addition, PISC notes that the regulation cited for authority, Section 1.1939 (47 CFR §1.1939), refers to *Petitions to Deny*. Accordingly, PISC treat this as a *Petition to Deny* the grant of the licenses absent a determination that Verizon will, indeed, apply the C Block open device rules, and that Verizon's statements with regard to a "two door" policy should be deemed as evidence that Verizon does not intend to comply with the rules. Although Verizon has recently stated publicly that it intends to abide by the rules, *see* Verizon Policy Blog, "Open Development and 700 MHz," by Jim Gerace, Verizon Vice President of Communications, posted May 6, 2008, available at <http://policyblog.verizon.com/PolicyBlog/Blogs/policyblog/JimGerace9/461/Open-Development-and-700-MHz.aspx> (last visited May 9, 2008), the Commission should still take this opportunity to clarify that any effort to undermine the C Block openness rules will result in swift action by the Commission.