

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
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Verizon Request for Declaratory Ruling, or,)	WT Docket No. 06-150
in the Alternative, for Partial Waiver,)	
Regarding the Handset Locking Rule for)	
C Block Licensees)	
)	
)	
)	

COMMENTS OF PUBLIC KNOWLEDGE

Verizon seeks a declaratory ruling that Section 27.16(e) of the Commission’s Rules, 47 C.F.R. 27.16(e), the “open device” condition, does not prevent Verizon from configuring each of the 4G LTE handsets it provides to customers who sign up for its service with a temporary 60 day lock on accessing other providers of mobile service. In the alternative, it seeks a waiver of the Rule. It advances as grounds for the relief that it is being subjected to very high levels of fraud.

For the reasons discussed below, Public Knowledge supports Verizon’s request for partial waiver as meeting the high burden required to demonstrate that waiver of the rule would serve the public interest in this specific case. Because the requested declaratory ruling would violate the plain text of the language and the clear intent of the adopting Order, and because the grant of a declaratory ruling would have significant application beyond the immediate circumstances, Public Knowledge strongly opposes the request for a declaratory ruling.

ARGUMENT

In its request, Verizon argues that the language in the “open device” condition, as codified in 47 C.F.R. § 27.16(e), is ambiguous and warrants a declaratory ruling. The condition reads that no C Block licensees “may disable features on handsets it provides to customers...nor configure handsets it provides to prohibit use of such handsets on other providers’ networks.”¹ Specifically, Verizon argues that the word “customer” only means “legitimate customer,” and that locking phones for 2 months for both “legitimate” and “illegitimate” customers should be permissible as a means of separating the true customers from the thieves.

Public Knowledge is sympathetic to Verizon’s goal of thwarting individuals from using stolen identities and fake credit cards to steal expensive mobile handsets. Public Knowledge recognizes that ultimately consumers pay for these losses with increased prices. For this reason, as discussed below, Public Knowledge supports Verizon’s request for a waiver. However, Public Knowledge cannot support the requested declaratory ruling. First, the language of the relevant Rule is not ambiguous. The Commission can only issue a declaratory ruling “to resolve uncertainty.”² The language of the Rule, and the language of the adopting Order, make the meaning of customer and application of the “Open Device” Rule perfectly clear.

Second, even if the Commission granted Verizon’s requested clarification, Verizon’s anti-theft policy would not merely lock new phones for “illegitimate” customers. Verizon’s legitimate customers, who make up the overwhelming majority of new customers, would be subject to the same network locking as the “illegitimate” customers. It is irrelevant that Verizon has submitted evidence that the impact of the Rule on legitimate customers would be minimal. Verizon therefore asks for a second declaration that while locking the phones operating on C

¹ 47 C.F.R. § 27.16(e).

² 47 C.F.R. §1.2.

Block is forbidden, the specific circumstances of this case make this locking “not the locking with which the C block rules were concerned.”

This precisely the sort of fact-specific inquiry suitable for waiver relief, and completely unsuitable for a declaratory ruling. Only a waiver can exempt Verizon from application of the Rule. Happily, Verizon has met its burden of demonstrating that the limited waiver requested would serve the public interest by deterring a very real, non-hypothetical problem of theft of expensive handsets. For this reason, the Commission should grant the requested waiver.

THE COMMISSION SHOULD DENY VERIZON’S REQUEST FOR A DECLARATORY RULING ON ITS TEMPORARY LOCKING PROPOSAL BECAUSE THE LANGUAGE OF THE RULES IS NOT AMBIGUOUS.

Verizon argues that its temporary locking proposal does not violate the Rule because the locking would only apply until such time that Verizon can determine that the handset is provided to a legitimate “customer.” Verizon is arguing that the “customers” in the Rule does not apply in its situation because “a temporary lock is unlikely to affect a legitimate customer.”³ Verizon also argues that even if the Rule were to be implicated, a temporary lock does not “configure handsets...to prohibit use” on other providers’ networks, because “legitimate customers will be able to use their handsets on other networks as soon as the 60 days expire.”⁴

Varying nuances of a definitional meaning in the Rule may be argued if there were an ambiguity in the meaning. However, the meaning of “customer” and “configure” are not ambiguous, as argued by Verizon, because the open device condition is clear in its intent, general meaning, and interpretation as applied to its licensees. Even under Verizon’s definition, there is no doubt that “legitimate” customers – the overwhelming majority of customers – will have their

³ Verizon Request for Declaratory Ruling, or, in the Alternative, for Partial Waiver, WT Docket No. 06-150, at 4 (filed Feb. 22, 2019) (“Verizon Request”).

⁴ *Id.* at 11.

phones locked to the network for 60 days in direct violation of the plain language of the Open Device Rule.

This plain language is further supported both by the language of the Second Report and Order and the individual Commissioner statements.⁵ The open device condition is a statement of principle that sets down a marker for promoting competition in the device and application market. If the Commission granted Verizon's request, then the open device principles that were adopted by the Commission would be compromised. In the Second Report & Order, the Commission has stated that it believes that "the open platform requirement for devices and applications...will make it easier for customers, device manufacturers, third-party application developers, and others to use or develop devices and applications made by small entities on the network of the C Block licensee."⁶

The Commission adopted such an explicit definition for the strong policy reasons of promoting competition and innovation and to encourage the wireless market to move generally to a more open and competitive market for handsets. As Commissioner Adelstein noted: "a truly open wholesale model would stand as a breeding ground for innovation, for allowing new and diverse competitors to flourish, and for spurring unparalleled levels of competition into the broadband marketplace."⁷ Chairman Martin similarly expressed his pleasure with the Commission adopting a "fair and balanced plan that will help...provide a more open wireless platform that will facilitate innovation and investment."⁸ As such, the Commission, when voting on these rules, agreed on a bipartisan basis that the Open Device Rule served a vitally important

⁵ See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, *Second Report and Order*, FCC 07-132 (rel. Aug. 10, 2007) ("Second Report and Order"), <https://docs.fcc.gov/public/attachments/FCC-07-132A1.pdf>.

⁶ *Id.* at 286.

⁷ *Id.* at 302.

⁸ *Id.* at 294.

function in the evolution of the handset market, and created clear and unambiguous rules to serve this purpose.

The explicit and unambiguous nature of the Rule is further buttressed by the unusually detailed accountability mechanisms the Second Report and Order adopted to ensure compliance. The requirement for the licensee to publish technical standards, the prohibition of licensees from giving special deals to “preferred vendors,” and strong endorsement of non-proprietary protocols are all evidence of the Commission’s attempt to ensure the accountability and responsibility of C Block licensees.⁹ Furthermore, once a complainant sets forth a *prima facie* case that a C Block licensee has violated any of such requirements, then the licensee has the burden of proof to “demonstrate that it has adopted reasonable network standards and reasonably applied those standards in the complainant’s case.”¹⁰ As Chairman Martin stated: “[the Commission] will ensure these open platform rules are implemented, through significant enforcement mechanisms that place the burden on the licensee to demonstrate their compliance and that their policies are fair and reasonable.”¹¹ As such, with the open device condition, the Commission has carefully thought through the intent, application, and enforcement measures on the C Block licensees.

As Verizon has always understood, the Rule clearly prohibits locking a phone to the network at the point of sale. Nor does Verizon challenge that clear understanding now. Instead, Verizon argues that because the impermissible locking will only be long enough to distinguish thieves from customers, and is not intended to be permanent, it should not be considered prohibited locking. This logic properly justifies a waiver, not a declaratory ruling. As discussed above, the plain language and supporting statements of the Commissioners make it crystal clear

⁹ Second Report and Order at 230.

¹⁰ *Id.* at 230-31.

¹¹ *Id.* at 293.

that any mechanism used to lock the handset to the network for any length of time, for any reason, violates the Rule.

Issuing the requested declaratory ruling would *confuse* the interpretation of the Rule rather than “clarify” the Rule. If the plain language of the Open Device Rule can be “clarified” to allow locking handsets where the overwhelming majority of customers are “legitimate,” for a full two months, what other types of locking or blocking might be permissible? This is precisely why the plain language was so crystal clear, and why the accountability mechanisms place such strong burdens on the licensee. Once the Rule begins to countenance locking legitimate customers for any length of time, for whatever reason, certainty vanishes. What other types of locking for legitimate customers will the Rule countenance? And for how long? The requested “clarification” would therefore brew confusion for other C Block licensees and for Verizon’s future conduct as well. In the Second Report & Order, the Commission made clear its intent in implementing these rules, its prioritization of open devices and an open network, and its plan to enforce its rules on the C Block licensees. The Commission should not now rewrite these rules to undermine their clarity and purpose under the guise of issuing a “clarification.”

THE COMMISSION SHOULD GRANT VERIZON’S REQUEST FOR A PARTIAL WAIVER TO THE OPEN DEVICE CONDITION BECAUSE SUCH A WAIVER WOULD LEAD TO A REDUCTION OF DEVICE THEFT AND IDENTITY FRAUD.

The arguments of policy and special circumstances that Verizon presents are textbook examples of the specific showing needed for a waiver. The entire point of the waiver process is the recognition that for any rule of general applicability, specific circumstance may make enforcement of the rule inappropriate or even deleterious to the public interest. As Verizon correctly notes, the Commission has the authority to issue a partial waiver to 47 C.F.R. § 27.16(e). The Commission may waive the Rule “for good cause shown, in whole or in part, at

any time.”¹² As the D.C. Circuit has explained, a waiver is appropriate “where particular facts would make strict compliance inconsistent with the public interest.”¹³

Verizon has met its burden to show that the requested partial waiver is appropriate. Verizon’s concern for device theft and identity fraud issues with its unlocked devices is a conspicuous problem, and that problem is a fact-specific one. Verizon has submitted evidence of the nature and scope of the problem, and explained why the waiver will impose only a minimal burden on legitimate customers.¹⁴

Verizon also clarifies in its request that both measures of a declaratory ruling and a partial waiver are functionally equivalent for its purposes. Accordingly, Verizon would get the relief that it wants without affecting the vitality of the open device principle.

Preventing and deterring theft and fraud is in the public interest. Without the requested waiver, Verizon’s unlocked devices continue to disproportionately suffer from device theft and identity fraud, compared to other carriers’ locked phones. As Verizon states, a “targeted partial waiver is necessary to further reduce these harms, which is precisely why other large wireless carriers have implemented even more stringent locking practices than those Verizon proposes.”¹⁵ Because a partial waiver can enable Verizon to combat fraud and theft in ways less restrictive than those imposed by other wireless carriers, while protecting consumers and preserving their

¹² 47 C.F.R. § 1.3.

¹³ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see also AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006).

¹⁴ Public Knowledge notes that, as Verizon concedes, there may be some legitimate customers who decide to switch providers even within the first two months of the contract. While this behavior is uncommon, it is not non-existent. A customer may unexpectedly move to an area where Verizon has limited service, or may be tempted by a promotion from a competitor. The Rule is specifically designed to permit and even encourage such competition. In this specific case, however, Verizon has made the requisite showing that this potential barrier to switching carriers by legitimate customers is minimal compared to the considerable benefits to all customers of preventing wide-scale theft. This is precisely the balancing for which waivers – rather than declaratory rulings -- are designed.

¹⁵ Verizon Request at 17.

choices, the Commission should grant a partial waiver as a measure to combat targeted theft of open devices.

CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's request for a declaratory ruling, but grant its request for a partial waiver from the open device condition in 47 C.F.R. § 27.16(e).

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