

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands)	WT Docket No. 06-150
)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules)	WT Docket No. 06-169
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	
Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010)	WT Docket No. 96-86
)	

**COMMENTS OF AT&T INC.
IN RESPONSE TO GOOGLE *EX PARTE***

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To: The Commission

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AT&T Inc. ("AT&T") hereby submits its comments on the May 21, 2007 *ex parte* filing by Google Inc., pursuant to the Commission's public notice inviting comments.¹

I. INTRODUCTION

Google filed its *ex parte* letter two days before the comment deadline in this proceeding raising what it concedes are new issues. In its *ex parte*, Google, an entity that does not hold any FCC licenses or operate any network facilities, argues that, based on its experience in conducting real-time dynamic auctions for online advertising placement,

¹ *Ex Parte* Letter from Richard Whitt, Counsel to Google, to Marlene Dortch, FCC Secretary (May 21, 2007) ("Google *ex parte*") (also attached to Google Comments (May 23, 2007)); Public Notice, *Comment Sought on Google Proposals Regarding Service Rules for 700 Mhz Band Spectrum*, WT Docket 06-150 *et al.*, DA 07-2197 (May 24, 2007), *summarized*, 72 Fed. Reg. 29930 (May 30, 2007). Quotations and page citations herein are referenced to the copy attached to the May 23 Google Comments.

similar dynamic auctions could be used by licensees for selling the rights to use their radio spectrum.² The letter asserts that “dynamic auction techniques, such as real-time auctions and per-device registration fees” should be considered as a possible model for spectrum usage in the 700 MHz band.³ It provides the following cursory explanation:

Real-time airwaves auction model.

For each available spectrum band, the licensee could bestow the right to transmit an amount of power for a unit of time, with the total amount of power in any location being limited to a specified cap. This cap would be enforced by measurements made by the communications devices. For channel capacity efficiency reasons, bands should be allocated in as large chunks as possible. The airwaves auction would be managed via the Internet by a central clearinghouse.

Per-device registration fees.

As part of a real-time auction process, the communications device itself could become key to the payment process. For example, the consumer’s price to purchase a device could include an airwaves registration fee (say, \$5.00-10.00), which would grant the ability to gain unlimited use at a specified power level. The device could include collision-detection and back-off features (similar to Wi-Fi) to limit congestion.⁴

Google asserts, without any explanation, that “[t]he existing rules governing the commercial bands of the 700 MHz spectrum appear already to allow licensees to employ these kinds of dynamic spectrum management techniques,” and asks the Commission to declare this to be the case “to eliminate any doubt.”⁵ It also asks the Commission to

² Google *ex parte*, Appendix A, at 1.

³ Google *ex parte* at 2.

⁴ *Id.* at 3-4.

⁵ *Id.* at 4.

consider whether “to mandate such treatment for some, or even all, of the commercial spectrum to be auctioned in the 700 MHz bands.”⁶

Google also proposes that the Commission mandate that the Lower 700 MHz E Block be “utilized for interactive, two-way broadband services . . . connected to the public Internet, and . . . used to support innovative software-based applications, services, and devices.”⁷

While Google suggests that its proposal is an open market approach, it ignores the fact that the spectrum auction to be conducted by the Commission is just such an open market event — one that encourages those who seek to maximize the value of their investment in spectrum to bid the highest amount to acquire the desired assets. Rather than being an open market solution, Google seeks to impose a single regulation-based model on those who incur the risk of buying spectrum, by mandating how that spectrum will be put to work, all presumably without Google spending any capital to acquire spectrum, or build and maintain a network.

II. GOOGLE’S DYNAMIC RE-AUCTION “PROPOSAL” IS MERELY A GENERIC CONCEPT THAT DOES NOT ADDRESS APPLICABLE FCC RULES AND STATUTES

Google’s proposal concerning the real-time dynamic re-auction of spectrum usage rights by 700 MHz licensees is a generic concept and nothing more. Google has not identified how it would implement such re-auctions, and it has not shown how that implementation fits within the existing rules. There is simply nothing to evaluate.

⁶ *Id.*

⁷ *Id.*

The Commission has extensive rules concerning the sale of spectrum use rights, including the real-time sale of spectrum bandwidth. In 2000, the Commission preceded its *Secondary Markets* proceeding with a public forum, at which Professor Peter Cramton advocated a “real-time spot market” for spectrum.⁸ Selling spectrum usage, however, is subject to many constraints that do not apply to sales of other things, such as online advertising or commodities. As Professor Cramton said, “spectrum isn’t like pork bellies.”⁹ A secondary spectrum market requires compliance with 47 U.S.C. § 310, which imposes nationality-based ownership and control requirements and also requires regulatory approvals for transfers of control of spectrum rights; there are also other statutory provisions that may affect the use of spectrum in this way.¹⁰

The Commission has sought to allow the development of a secondary market for spectrum usage.¹¹ In its *Secondary Markets* proceeding, the Commission permitted, but did not require, a wide variety of licensees including all 700 MHz commercial licensees, to transfer or lease spectrum usage rights to others through the secondary market. However, it required compliance with rules addressing four models for secondary market

⁸ Testimony of Prof. Peter Cramton, FCC Forum on Secondary Markets, at 17 (May 31, 2000), available at <<http://www.fcc.gov/realaudio/tr053100.pdf>>.

⁹ *Id.* at 32.

¹⁰ *E.g.*, Communications Assistance for Law Enforcement Act (“CALEA”), 47 U.S.C. §§ 229, 1001 *et seq.*

¹¹ Even before its *Secondary Markets* proceeding, the Commission proposed an allocation for public service “band manager” licensees who would sublicense spectrum to others and separately proposed to license commercial band managers in the 700 MHz guardbands. *Implementation of Sections 309(j) and 337 of the Communications Act*, WT Docket 99-87, *Notice of Proposed Rulemaking*, 13 FCC Rcd 5206 (1999); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket 99-168, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999). In 2000, the Commission adopted rules for the auction of licenses for guardband managers, who would be able to “subdivide [their] spectrum in any manner [they] choose[] and make it available to any system operator, or directly to any end user for fixed or mobile communications.” *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket 99-168, *Second Report and Order*, 15 FCC Rcd 5299, 5300 (2000).

transactions: spectrum manager leases, short-term *de facto* transfer spectrum leases, long-term *de facto* transfer spectrum leases, and “private commons” leases.¹²

In the *Second Report and Order* in the *Secondary Markets* proceeding, the Commission said that “a variety of dynamic forms of spectrum leasing arrangements” could be employed, provided the rules were followed.¹³ The Google *ex parte* contains no facts that the FCC or interested parties can evaluate to make a determination whether FCC rules allow or do not allow the types of dynamic re-auctions that Google envisions.

In the absence of specifics, the Commission cannot provide the guidance Google requests. When asked to clarify the application of its rules to private commons auctions, the Commission declined due to the “scant record,” and said “the wide variety of ways in which a private commons could be implemented” left the Commission in “no position, based on what is before us, to make any determination by rule, . . . as to whether a particular mechanism may or may not be sufficient for a licensee (or spectrum lessee) to exercise its responsibilities in a given instance. . . .”¹⁴ Here, likewise, there is insufficient information about the “particular mechanism” that Google seeks to have endorsed. Accordingly, there is no way to evaluate its proposal, and no ruling can be made.

¹² See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003), *Erratum*, 18 FCC Rcd 24817 (2003); *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) (“*Second Report and Order*”); *Third Report and Order*, 22 FCC Rcd 7209 (April 11, 2007).

¹³ *Second Report and Order*, 19 FCC Rcd at 17547-48.

¹⁴ *Third Report and Order* at ¶ 9.

III. THE COMMISSION SHOULD NOT MANDATE COMPLIANCE WITH AN ILL-DEFINED CONCEPT PROPOSED LONG AFTER THE ELEVENTH HOUR

In addition to its request for clarification, Google has also asked the Commission to consider mandating the use of its nebulous concepts by some or all 700 MHz licensees. As noted above, Google does not present a concrete proposal that either the FCC or any prospective 700 MHz auction winner can evaluate and for that reason alone the FCC should not mandate use of the Google concept. Moreover, it is far too late for Google's proposal to be considered. The 700 MHz rulemakings have been underway since 1999, and the majority of the rules have already been established. Google never came forward during these proceedings.

The Commission is now finalizing the rules so that it can proceed with an auction that is subject to Congressionally-mandated deadlines. It issued the *Further NPRM*¹⁵ to resolve issues that had evolved over the long course of the proceeding, not to reopen every decision that had been made and open new ones, as well. Google did not come forward with its ideas until after the *Further NPRM* was issued and an expedited comment cycle was underway. If Google's proposals involve rule changes, it is simply too late. Its proposals are well beyond the scope of the proceeding now open for comment; Google does not even suggest that its concepts relate to any rule changes proposed in the *Further NPRM*. Accordingly, the Commission could not require 700

¹⁵ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Dockets 06-150 *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-72 (April 27, 2007) ("*Further NPRM*").

MHz bidders to comply with these concepts in the *Report and Order* the FCC will ultimately release establishing the bidding rules for the upcoming 700 MHz auction.¹⁶

Mandating that some or all auction winners employ dynamic auction techniques of the type Google describes would seriously interfere with an orderly auction in several ways. First, it would become more difficult for bidders to value the spectrum being auctioned, because a licensee would potentially not have full flexibility in deciding how to use the spectrum for which it paid. As a result, auction strategies would be upset and the value of spectrum will doubtless be discounted substantially. This has occurred in the past when the Commission has taken action causing uncertainty as to the value and utility of spectrum.¹⁷ Second, this self-serving proposal seems designed primarily to benefit only Google, a likely non-bidder,¹⁸ by requiring spectrum licensees to become potential customers for its real-time auction administrative services.¹⁹ It would not be fair, however, to those who have developed their own technologies and business strategies for the 700 MHz band; they would have to shift to an entirely different business strategy. Moreover, dynamic re-auctions of spectrum may be incompatible with some uses of this spectrum. Companies that have been planning for the use of the 700 MHz band and

¹⁶ Given that there has been no notice of what, specifically, Google seeks to have approved, or how licensees would comply with any mandate, further notice and comment rulemaking would be necessary. See 5 U.S.C. § 553(b)-(c) (requiring notice of the subject of proposed rules and opportunity to comment).

¹⁷ See, e.g., SpectrumCo comments at 32-33 (referring to LMDS auction).

¹⁸ After Google filed its *ex parte* proposal, Google executives suggested to the press Google had no plans to bid in the auction. See John Markoff, *Google Proposes Innovation in Radio Spectrum Auction*, The New York Times, May 22, 2007, available at <<http://www.nytimes.com/2007/05/22/technology/22google.html>>.

¹⁹ Google obviously has specialized knowledge about the dynamic real-time auctions of online advertising that it believes should be a model for dynamic spectrum auctions. By mandating the use of such a model, the Commission may unwittingly be mandating that some or all 700 MHz licensees enter into a licensing agreement with Google or other entities possessing patents or trade secrets that are essential to dynamically auctioning spectrum. The cost of obtaining such rights is unknowable at this time, and that fact will significantly lower the amount that companies are willing to bid.

participating in the Commission’s proceedings about this band for many years should not be expected to drop their plans at the last minute merely because a latecomer to the proceeding files a letter that, in a few paragraphs, suggests a new approach.

IV. MANDATING DYNAMIC RE-AUCTIONS WOULD VIOLATE THE PRINCIPLES OF TECHNICAL AND SERVICE NEUTRALITY AND LICENSEE FLEXIBILITY

In the unlikely event that the Commission finds that particular dynamic auction procedures (which have not been identified at this point) are not inconsistent with its rules, it should not mandate that they be used for any portion of the 700 MHz band. The adoption of rules designed to promote particular technologies or services is inconsistent with the Commission’s long-standing policies of maintaining technical and service neutrality in its rules and allowing flexible spectrum use by licensees.²⁰

If dynamic re-auctions of spectrum can be conducted under existing rules and there is a business model to support them, licensees will choose to employ them. No mandate would be necessary. The Commission has already decided to allow the marketplace to determine how and when spectrum is to be made available by licensees to other parties. Mandating secondary market re-auctions is not a market-oriented approach, as Google claims; rather, it would be an instance of the very “command-and-control” regulation that Google claims to oppose. Licensees who do not want to

²⁰ See *Service Rules for the 746-764 and 776-794 MHz Bands*, WT Docket 99-168, *Third Report and Order*, 16 FCC Rcd 2703, ¶ 42 (2001); cf. *Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, Gen. Docket 87-390, *Report and Order*, 3 FCC Rcd 7033 (1988); *Memorandum Opinion and Order*, 5 FCC Rcd 1138 (1990); *New Personal Communications Services*, Gen. Docket 90-314, *Second Report and Order*, 8 FCC Rcd 7700 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994); *Third Memorandum Opinion and Order*, 9 FCC Rcd 6908 (1994); *FCC Strategic Plan – 2006-2011* at 8 (Competition Policy, Objective 1), available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf>; *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 FCC Rcd 19868, 19871-72 (1999).

implement dynamic auction procedures should not be forced into providing services or using a business model they do not want to use, particularly if it would be economically irrational to do so.

Frontline, in its comments responsive to the *Further NPRM*, endorsed Google's dynamic auction proposal and asked that the licensees of the possible new Upper 700 MHz E Block (should the Commission create this new block) be required to devote 25% of their spectrum to open auctions of this type.²¹ If there are E Block licenses, and Frontline wins them, and if, after careful consideration, the Commission determines that such auctions can be implemented under its rules, Frontline would be free to use them. Any licensee may already use secondary market mechanisms that are consistent with the rules. There is no basis, however, for *requiring* any licensee to use particular secondary market mechanisms for any part of its spectrum.

V. MANDATING USE OF THE LOWER 700 MHZ E BLOCK FOR “INNOVATIVE” BROADBAND INTERNET SERVICES WOULD VIOLATE THE PRINCIPLES OF TECHNICAL AND SERVICE NEUTRALITY AND LICENSEE FLEXIBILITY

Google proposes imposing a new regulatory structure on the Lower 700 MHz E Block. Two brief paragraphs of its letter address this proposal. It asks that the Commission rule that “the E Block only should be (1) utilized for interactive, two-way broadband services, (2) connected to the public Internet, and (3) used to support innovative software-based applications, services, and devices.”²² It provides only a few conclusory sentences by way of explanation for this request.

²¹ Frontline Comments at 23-24. This appears to be simply another example of Frontline seeking to impose spectrum restrictions that would make the proposed E block unattractive to any bidder other than Frontline.

²² Google *ex parte* at 4-5.

The Commission should reject this proposal because, again, it would be inconsistent with the doctrines of licensee flexibility and technical and service neutrality. The market will determine whether this would be the highest and best use of the Lower 700 MHz E Block. Moreover, this proposal, like Google's dynamic auction proposal, comes too late to be considered.

Respectfully submitted,

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