

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re:)	
)	
Google Proposals Regarding Service Rules for the 700 MHz Band)	DA 07-2197
)	
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 CTIA—THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”), by its attorneys, hereby submits its comments in response to the *ex parte* letter filed by Google Inc. (“Google”) in the above-captioned proceedings.¹ As CTIA understands the filing, which lacks sufficient detail so as to provide a full and complete understanding of what Google seeks, or how it would effectuate what it seeks, the Google *ex parte* letter has three distinct components:

¹ Letter from Mr. Richard Whitt, Esq., Google Inc., to Ms. Marlene H. Dortch, Federal Communications Commission dated May 21, 2007 (“Google *Ex Parte*”) (filed in WT Docket No. 06-150; WC Docket No. 06-129; PS Docket No. 06-229; WT Docket No. 96-86); *see also* FCC Public Notice DA 07-2197 (rel. May 27, 2007). Although Google has been a participant in this docket since March 2007, it has provided no explanation for electing to defer filing until after the comment cycle had been initiated. *See* Letter from Ruth Milkman on behalf of Access Spectrum, DIRECTV, EchoStar, Skype, Google, Intel and Yahoo! to Marlene H. Dortch, Federal Communications Commission dated Mar. 26, 2007 (filed in WT Docket 06-150).

- A request to allow licensees to implement certain “dynamic auction” business models using 700 MHz spectrum;
- A separate and distinct request to *mandate* that E Block and potentially other 700 MHz licensees use a dynamic auction business model; and
- A requirement 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.”²

Google’s proposed dynamic auction mechanisms include per device registration fees, which apparently contemplate permitting licensees to deploy opportunistic transmitters on a fixed fee basis, and real time auctions, which CTIA takes to mean using—in effect—short term leases to allow intermediaries to purchase the right to serve customers using the spectrum on a real-time basis.

CTIA opposes further consideration of Google’s eleventh hour *ex parte* proposals.

Imposing Google’s proposed conditions on 700 MHz licenses would run counter to pro-competitive Commission policies for both the mobile marketplace generally and for bidding in the auction itself. Moreover, to the extent Google’s “dynamic auction mechanisms” are comprehensible, they are either already permitted or they have been previously rejected and should be dismissed now. While some aspects of Google’s request already may be authorized under the *Secondary Markets* policies, the remainder of the *ex parte* letter largely recycles previously rejected proposals that raise major public policy concerns. As detailed below, the Commission should move forward with the 700 MHz auction without encumbering licenses in the 700 MHz band with unnecessary or onerous conditions concocted by Google at the last minute.

² Google *Ex Parte* at 4.

I. CTIA STRONGLY OPPOSES ANY PROPOSED USE LIMITATIONS ON THE E BLOCK FOR THE UPCOMING 700 MHZ SPECTRUM AUCTION

CTIA opposes conditioning the 700 MHz auction licenses as Google proposes. In its *ex parte* letter, Google states that “to unlock the long-term commercial potential of the E Block and create the greatest possible efficient uses,”³ the E Block should be subject to restrictions that mandate use of its so-called dynamic auction mechanisms and that mandate only certain services may be provided.⁴ CTIA strongly opposes Google’s proposed conditions for the obvious reason that restrictions on the use of the 700 MHz E Block license would adversely impact the 700 MHz auction and would adversely affect competition in mobile services generally. Contrary to Google’s assertions that the E block “lacks any significant immediate commercial value,”⁵ CTIA believes, as evidenced by Qualcomm’s purchase and deployment of the D block in the last 700 MHz auction, that the spectrum does hold value for potential bidders and should not be conditioned.

First, as CTIA has noted, Google’s proposal comes at a time when the FCC is attempting to finalize the auction rules for the 700 MHz band under an impending statutory requirement to commence the auction by January 28, 2008.⁶ With the breadth of issues to be decided in the Commission’s existing *Further Notice of Proposed Rulemaking*,⁷ the Commission must act quickly and decisively to provide licensees with the six month lead time that has been prior

³ *Id.*

⁴ *Id.* (stating “[t]he Commission should designate ... [the E-Block] as suitable, primarily or exclusively, for the deployment of broadband communications platforms ... (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”).

⁵ *Id.*

⁶ 47 U.S.C. §309(j)(15)(C)(v).

⁷ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007).

policy.⁸ Opening a Pandora's box of new issues at Google's behest—containing issues that, as discussed below, implicate major legal and public policy concerns, some of which have been addressed and dismissed—threatens the FCC's ability to meet Congressionally-mandated timetables for the auction, provides insufficient time to analyze the economic and policy ramifications of license conditions on the auctioned spectrum, and introduces needless uncertainty that negatively impacts the formation of business plans for entities preparing to bid.

Second, imposition of license conditions on 700 MHz spectrum contradicts Google's stated goals of ensuring that spectrum is used in the most effective and competitive manner.⁹ License conditions—by definition—limit the range of potential uses of spectrum, which necessarily decreases the potential market for the spectrum. Not only does this decrease bidding competition, it is axiomatic that encumbering spectrum with use requirements limits licensees' ability to innovate new technologies and services in response to consumer demand. This artificially restrains competition in the mobile marketplace. In fact, the proposal is directly contrary to Google's own advocacy of “a flexible, marketplace-driven spectrum regime, one responsive to economic signals and the public interest.”¹⁰ While a licensee may or may not use the spectrum for broadband, requiring one type of use would reverse the Commission's sound precedent of allowing flexible use by licensees that win the spectrum at auction. Implementing Google's conditions does not “unlock ... long-term commercial potential,” but rather the opposite—it creates barriers to ensuring that spectrum is put to the most highly-valued use.

Third, CTIA notes that the specific conditions proposed by Google are vague at best. The conditions require that the spectrum be “utilized for interactive, two-way broadband

⁸ See, e.g., *Public Service Wireless Svcs, Inc.*, 22 FCC Rcd 5267 (rel. Mar. 9, 2007) (discussing revisions to Advanced Wireless Services auction start date to afford bidders additional time).

⁹ Google *Ex Parte* at 4.

¹⁰ *Id.* at 2.

services,” “connected to the public Internet,” and “used to support innovative software-based applications, services, and devices.”¹¹ While CTIA envisions that 700 MHz auction spectrum likely will be utilized for broadband data services, Google presumably intends for its proposed conditions to exclude certain applications. Otherwise, no conditions would be necessary. However, other than one-way services, it is unclear to CTIA exactly what services or uses Google seeks to prohibit. And, CTIA notes that Qualcomm’s MediaFLO service, deployed in the lower 700 MHz Block adjacent to the E Block, is a one-way service and no basis appears to exist to preclude that type of activity.¹²

In sum, Google’s attempt to introduce undefined and unclear conditions on 700 MHz licenses should not be condoned. Restricting spectrum use squarely contradicts Google’s stated goals of achieving the highest and best use of the spectrum and “unlocking” value in the 700 MHz band, and is contrary to the Commission’s goals.¹³ If, in fact, a business plan based on Google’s dynamic mechanisms is the highest and most valued use of the E Block, that result will be vindicated through the auction without Commission intervention. A condition mandating use of these dynamic mechanisms as a condition to the auction would artificially relegate the E Block to the deployment of such mechanisms where that use, in fact, may *not* be the highest and most valuable use of spectrum.

¹¹ Google *Ex Parte* at 4.

¹² See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 21 FCC Rcd 10947 (rel. Sept. 29, 2006) at ¶ 164 (discussing consumer uptake of mobile video offerings).

¹³ Google states, without economic or factual support, that the E Block “appears to lack any significant immediate commercial value.” Google *Ex Parte* at 4. Imposition of use conditions—the type of “command-and-control” regulation Google criticizes—is antithetical to increasing that value. *Id.* at 2 (stating that “‘command-and-control’ spectrum policies too often have a tendency to lock in incumbent users and uses”).

II. CTIA SUPPORTS FLEXIBLE USE PROPOSALS THAT ARE CONSISTENT WITH MARKET-BASED DEREGULATORY POLICIES AND THE COMMUNICATIONS ACT

CTIA has traditionally supported market-based policies as promoting innovation and enhancing competition. Whether *Secondary Markets* or flexible use, CTIA believes that allowing licensees the latitude to create and invent free of regulatory use constraints—other than those designed to minimize interference—will result in the broadest possible range of offerings being made available to the public.¹⁴ On the other hand, CTIA has opposed certain measures, such as the uncontrolled introduction of unlicensed devices into licensed spectrum proposed in the *Interference Temperature* proceeding, that would artificially inhibit licensees’ ability to utilize efficiently and effectively spectrum acquired at auction.¹⁵ Unfortunately, based upon its *ex parte* letter, it is unclear into which category Google’s proposals fall and even whether the proposals are consistent with the rules.¹⁶ Further, CTIA is concerned that Google’s proposals may impact compliance with multiple statutory requirements.

A. To the Extent Google Is Proposing a Real-Time Bandwidth Exchange, the Proposal Raises Public Policy Issues Relevant To Compliance With Statutory Requirements

One of the “dynamic” mechanisms advocated by Google is a “real-time auction process” whereby the right to serve customers in an area is meted out by a license through an Internet-based auction. As far as CTIA can tell, many elements of Google’s proposal appear fundamentally no different than elements of prior “bandwidth exchange” and “spectrum brokerage” proposals by Enron and others that would have impacted compliance with statutory

¹⁴ See, e.g., Comments of CTIA—The Wireless Association®, WT Docket 00-230 (filed Feb. 9, 2001).

¹⁵ See, e.g., Comments of CTIA—The Wireless Association®, ET Docket 03-237 (filed Apr. 5, 2004).

¹⁶ Since Google has tendered no actual request for regulatory relief, Google’s request for clarification is speculative and not ripe for administrative review. First, no licensee may choose to do what Google proposes, whether or not the proposal is consistent with the rules. Second, if regulatory barriers are identified that would interfere with a 700 MHz licensee’s ability to fully utilize its spectrum, the appropriate regulatory mechanism is a request for waivers or petition for declaratory ruling.

requirements and that the Commission has addressed by the Orders issued in the *Secondary Markets* proceeding.¹⁷ As a result, at a conceptual level, the issues posed by Google have been “asked and answered” to the best of the Commission’s ability. Moreover, to the extent that Google is seeking regulatory relief that extends beyond the deregulatory framework adopted in the *Secondary Markets* proceeding, substantial public policy and statutory questions arise.

In the *Secondary Markets* proceeding, the Commission defined, subject to relevant Communications Act limitations, licensees’ ability to lease spectrum and removed, to the extent possible, transactional costs and inefficiencies in that context. However, the Commission found that limits to deregulation existed under the Communications Act, and that Lessees (among other obligations):

- Must comply with non-U.S. ownership limitations and licensee qualification requirements, such as the Anti-Drug Abuse Act of 1988;¹⁸
- Must comply, where relevant, with Title II obligations, such as USF, TRS, CALEA and E911 requirements;¹⁹ and
- Must comply with processes defined by Section 310(d) of the Act requiring, in most cases, prior approval for changes of *de facto* control.²⁰

As a result, *de facto* transfer lessors and lessees are required to file for prior approval before making their lease effective – a streamlined process that generally takes only a couple of days.

While Google suggests that a real-time auction is consistent with these rules, that suggestion is difficult to reconcile with the *Secondary Markets* policies. As noted, the prior consent required for leasing requires days, and the “real-time” nature of Google’s proposal

¹⁷ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, 18 FCC Rcd 20604 (rel. Oct. 6, 2003) (“*Secondary Markets R&O*”) at n.36 (listing parties interested in acting as spectrum brokerages and exchanges); see generally Initial Comments of Enron Corp., WT Docket 00-230 (filed Feb. 9, 2001) and Reply Comments of Enron Corp. (filed Mar. 9, 2001).

¹⁸ *Id.* at ¶ 143.

¹⁹ *Id.* at ¶ 149.

²⁰ *Id.* at n.301.

implies leasing that would occur nearly instantaneously. To the extent Google is contemplating a mechanism that comports with the ordinary understanding of “real-time,” numerous major public policy questions arise, including, but not limited to:

- How would compliance with the leasing rules—and prior approval requirements in particular—be accomplished given the real-time nature of the auction, and, given the rapidly changing nature of which provider is actually using the spectrum, how would other licensees or the FCC track down the cause of interference to third parties?
- Is the licensee or the temporary service provider responsible for compliance with Title II obligations, such as E911 and CALEA, and how, in fact, could the service comply with CALEA given that the temporary service provider may change more rapidly than law enforcement’s ability to secure wiretaps or warrants?
- Given requirements under Section 201 and 202, would end user charges be regulated and billed by Google or would users be subject to charges billed by a multiplicity of service providers?

As CTIA has discussed, the Commission’s *Secondary Markets* policies arguably deregulated leasing to the extent permitted by the Act. As a practical matter, since it is difficult to see a real-time proposal meeting these requirements, Google’s proposal appears to violate the Act and may not serve the public interest.

B. CTIA Has Concerns With Google’s Per Device Registration To the Extent Google Is Resurrecting Interference Temperature Concepts Permitting Third Party Access to Licensed Spectrum

Google’s proposal for “per device registration fees” is no less opaque than its proposal for real time auctions. Under one reading, Google is requesting authority for licensees, on a consensual basis, to allow access to their licensed spectrum on a one time fee basis. To the extent the foregoing accurately characterizes what Google seeks, Google is merely defining the implementation of a private commons, which is already permitted under existing *Secondary Market* regulations.²¹

²¹ The *Secondary Market* rules authorize licensees to implement per device registration fees for opportunistic devices. Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, 19 FCC Rcd 1705 (rel. Sept. 2, 2004) (“*Secondary Markets R&O*”) at ¶¶ 91-99.

Troubling to CTIA, however, is Google’s allusion to secondary use and unlicensed use of “unused” spectrum.²² In contrast to a private commons approach, Google’s proposal could be interpreted to contemplate non-consensual use of licensed spectrum by devices. Not only is such a proposal not within the scope of a private commons, it is reminiscent of concepts raised—and sharply criticized—in the very recently terminated *Interference Temperature* proceeding. Ironically, the filing of Google’s *ex parte* letter occurred virtually simultaneously with the FCC issuing a notice that *terminated* the *Interference Temperature* proceeding.²³ In so doing, the FCC stated that “[c]ommenting parties generally argued that the interference temperature approach is not a workable concept and would result in increased interference in the frequency bands where it would be used.”²⁴ Given that large—some underutilized—allocations of unlicensed spectrum already exist for the implementation of opportunistic devices,²⁵ there is simply no reason to allow the unconstrained deployment of such devices in auctioned spectrum.

III. CONCLUSION

CTIA fully supports moving away from command-and-control regulation and allowing marketplace forces to drive competition and innovation in mobile services, but does not believe the Google proposals serve those ends. In fact, CTIA believes Google’s proposals would have the opposite effect. While discerning the specifics of Google’s actual proposals is difficult,

²² Although characterized as a “general forward-looking proposition” only, Google advocates “allow[ing] any spectrum that is unused at a particular place and time to be eligible for secondary uses by any lawful devices.” Google *Ex Parte* at 2. Google also notes that its proposal would provide “[p]ayments . . . in perpetuity as the spectrum is being used, rather than months or even years in advance,” which appears to be seeking to revise the auction-based licensing currently employed by the Commission and mandated by the Act. *Id.* at 3.

²³ Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands, ET Docket 03-237 (rel. May 4, 2007).

²⁴ *Id.* at ¶ 2.

²⁵ The FCC has made spectrum available at 1.9 GHz, 2.4 GHz, 3.65-3.7 GHz, and 5 GHz—and is considering opening TV whitespace—for unlicensed devices that could employ the types of interference reduction mechanisms discussed by Google.

imposing use conditions on spectrum does not promote either competition nor innovation. Moreover, the proposals appear to seek substantial changes implicating major policy and statutory concerns that should not be entertained at this time. For these reasons, CTIA respectfully urges the Commission to forego any further consideration of the Google *ex parte* letter, and to proceed with finalizing the 700 MHz auction rules under the existing *Further Notice of Proposed Rulemaking*.

Respectfully submitted,

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