

Google Inc.
1001 Pennsylvania Ave. NW
Suite 600 South
Washington, DC 20004



Main 202 742-6520
Fax 650 618-1806
www.google.com

July 24, 2007

Ex Parte via Electronic Filing

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: WT Docket Nos. 96-86, 06-150, and 06-169; PS Docket No. 06-229

Dear Chairman Martin:

Google Inc. (“Google”), by its attorney, 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. This letter addresses the need for specific, enduring, and enforceable license conditions related to the blocking of applications and the locking of handsets.¹

The Draft Order Marks An Important Step Forward, But More Is Necessary

The FCC reportedly is considering a draft order in the 700 MHz proceedings that will include a so-called “no-locking/no-blocking” provision. According to your written testimony today before the U.S. House Commerce Committee, your proposal would require that the license winner for about one-third of the available commercial spectrum in the auction “be required to provide a platform that is more open to devices and applications.”² As you explained:

A network more open to devices and applications can help ensure that the fruits of innovation on the edges of the network swiftly pass into the hands of consumers. Consumers would be able to use the wireless device of their choice and download whatever software they want.³

¹ While Google continues to strongly support four “open platforms” license conditions -- including wholesale wireless services and network interconnection -- as necessary for developing true network-based broadband competition, this letter focuses solely on the applications and devices conditions. See Letter from Richard S. Whitt, Washington Telecom and Media Counsel, Google Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-150 et al., filed July 9, 2007 .

² Written Statement of The Honorable Kevin J. Martin, “Oversight of the Federal Communications Commission,” House Subcommittee on Telecommunications and the Internet, July 24, 2007, at 6. (“Written Statement of Chairman Martin”).

³ *Id.*

Google applauds you for taking this important step forward. As you note, consumers are the ultimate winners in a world of edge-based innovation at the handset and applications layers. A broad coalition of high tech companies and public interest organizations share your goal of using the upcoming spectrum auction to ensure that consumers can use unblocked applications and unlocked devices.⁴

At the same time, we are concerned by various reputable reports that the draft order does not contain any additional language spelling out the precise contours of the “no-locking/no-blocking” requirement, and even its ultimate enforceability.⁵ As just one example, in its written statement of support for your proposal, AT&T called the open applications and devices conditions “an experiment... without mandating changes to existing business models....”⁶ Obviously, should an incumbent wireless carrier become a licensee for the encumbered spectrum block, that carrier would be obligated to alter its existing business model for that particular spectrum, to the extent it did not already embrace the open devices and applications conditions. If the draft does not make even that point crystal-clear, the conditions are no conditions at all.

Without more than the draft order now contains, we are deeply concerned that your laudable vision of empowering consumers and driving edge-based innovation will never find firm roots. As we discuss further below, the Commission needs to adopt strong and effective license conditions, in order for consumers eventually to enjoy the resulting tangible benefits from the upcoming 700 MHz auction.

The Applications and Devices Conditions Should Be Specific

A license condition apparently premised only on a vague “open devices and applications” phrase is far too ambiguous to be effective. Obviously there are a number of ways to add precision to the draft language. In its July 9th ex parte letter, Google defined the “no blocking of applications” condition in the following way:

all commercial licensees seeking to provide a CMRS-type commercial service using 700 MHz spectrum must not block,

⁴ Joint Filing of Technology Sector Organizations and Public Interest Organizations Concerning Open Access, WC Docket No. 06-150 et al., filed July 18, 2007. ; Coalition for 4G, WC Docket No. 06-150 et al., filed July 20, 2007.

⁵ See, e.g., Stifel Nicolaus, “700 MHz Auction Rules Circulated: Open Access Proponents Maintain Toehold,” July 12, 2007, at 1 (the draft text “does not further define the scope of this ‘open access’ requirement, including dealing with thorny issues such as multi-band carrier devices or carrier device discounts, or include express enforcement language related to the open-access condition.”).

⁶ “AT&T Statement Regarding the Pending Spectrum Auction,” July 18, 2007, at 1.

impair, impede, or otherwise unreasonably limit the ability of end users to download and utilize software applications.

In a similar fashion, Google defined the “no locking of handsets” condition in the following manner:

all commercial licensees seeking to provide a CMRS-type commercial service using 700 MHz spectrum must allow end users to utilize lawful handsets in conjunction with their CMRS service.

In both cases, the obligation is spelled out with some specificity in terms of what consumers are allowed to do with applications and devices. At the same time, the language reserves to licensees the ability to impose “reasonable limitations” (such as network management) and preclude “unlawful devices” (such as those that materially harm the network).

The draft order’s conception of “open devices and applications” invites a number of questions. For example, is this required for all devices, including the carriers’ own, or just all third party devices? Can an end user bring any device to any carrier? Is this notion akin to the “just and reasonable discrimination” in Title II of the Communications Act, which in the past has allowed the imposition of supra-competitive charges? How is available bandwidth shared between the different applications? How is the consumer to be made aware of the carrier’s practices with respect to devices and applications? How these questions are answered will materially affect the consumer’s wireless experience.

Moreover, the order should explicitly address those potential carrier practices that could obviate the proposed license conditions. These include:

- The licensee ties the provision of user handsets to its wireless service;
- The licensee’s wireless network is integrated in a way that any device must use multiple bands, including non-700 MHz spectrum;
- The licensee bundles an “open” data service with another application (such as VoIP), and includes a bundling discount that drives consumers to use its own bundled offering;
- The licensee provides a device subsidy in exchange for the user choosing to use a “closed” device;
- The licensee prevents a user from downloading a particular application (such as VoIP) that the licensee has not “approved” through contracts with third parties, or an internal standards-setting process; and

- The licensee’s wireless service does not allow a user to access another network overseas while traveling because of contractual deals with foreign carriers.

Ostensibly, each of these practices would be acceptable under the language reportedly contained in the draft order. Each of these practices would have a negative impact on the ability of consumers to “use the wireless device of their choice and download whatever software they want.”⁷

Alternatively, the Commission may consider refining the details of these conditions in a separate post-rulemaking process, in which the licensee submits proposed practices for public comment and FCC approval.

The Applications and Devices Conditions Should Be Enduring

It is also unclear when the applications and device conditions actually take effect, for what spectrum holdings, and for what duration. We urge you to make the conditions effective upon the introduction of retail service using the spectrum blocks in question. To avoid any potential game-playing by carriers, the conditions also should apply to all service offerings that utilize 700 MHz spectrum, in whole or in part. In a multi-band environment, the licensee should not use any non-700 MHz spectrum as an excuse to “contaminate” the 700 MHz spectrum with non-open devices and applications.

The draft order reportedly included a ten year sunset provision. We believe this sunset is both unnecessary and potentially harmful to American consumers. We ask that the draft order be modified to remove the sunset provision, and otherwise not include any phase-out requirement.

The Applications and Devices Conditions Should Be Enforceable

Finally, the draft order must include an enforcement provision, complete with remedies. Any interested party – be they an ordinary end user, a handset manufacturer, or an applications developer – should have the right to seek redress. The Commission’s existing formal complaint process should be available to interested parties.⁸ Given the disparity in information possessed by the parties, the rules should specify that a complainant need only demonstrate a prima facie case of a violation, before the burden of proof shifts to the licensee to show why no such violation occurred. In addition, any party should have the ability to file a petition for declaratory ruling where a particular carrier practice both violates one of the license conditions and also may have broader market impact.

The full panoply of Commission remedies also should be available to complainants, including monetary penalties, damages, and cease-and-desist

⁷ Written Statement of Chairman Martin, July 24, 2007, at 6.

⁸ 47 U.S.C. § 208 (2007).

orders. While technically the Commission would have the power to suspend and even revoke a license, obviously such a remedy would be viewed as a last resort, and one rarely invoked.

Additionally, the Commission should rely primarily on recognized industry standards bodies to develop and implement the pertinent software and hardware interfaces. Should that process become tainted by anticompetitive designs, however, the Commission should expressly offer itself as a regulatory “backstop,” where aggrieved parties can be heard and gain appropriate redress.

We thank you for your leadership in this area. Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



Richard S. Whitt, Esq.
Washington Telecom and
Media Counsel
Google Inc.

cc: The Honorable Michael J. Copps, FCC Commissioner
The Honorable Jonathan S. Adelstein, FCC Commissioner
The Honorable Deborah Taylor Tate, FCC Commissioner
The Honorable Robert M. McDowell, FCC Commissioner