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September 27, 2007

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte* Communication
WT Docket Nos. 96-86, 06-150; PS Docket No. 06-229; AU Docket No. 07-157

Dear Ms. Dortch:

Verizon's recent ex parte letters and actions raise serious procedural and substantive issues that need to be addressed.

Abuse of Commission Procedures

On September 19, 2007, Verizon Wireless filed an ex parte letter with the Commission that can only be described as opaque. That letter provided just a one-sentence description of the September 17, 2007 meeting between high-level Verizon executives and the Chairman, his staff and the Wireless Bureau Chief, and was so deliberately obfuscatory that it did not bother to even identify the issues discussed, but instead referenced *the paragraph numbers* of the Second Report & Order.¹ This arrogant violation of Section 1.1206(b)(2) of the Commission's rules (which states, "More than a one or two sentence description of the views and arguments presented is generally required") is sanctionable under Section 1.1216. Those sanctions include barring Verizon from participating in the upcoming auction, barring further filings in the related auction proceedings, as well as fines and ordering Verizon to correct the record by providing detailed notes concerning any and all communications to the Commission in this and related proceedings. The Commission should investigate Verizon's conduct immediately and take appropriate action to protect the integrity of its rules.

We commend the Bureau, in response to this plain violation of the Commission's rules, for directing Verizon to finally supply "a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed." 47 C.F.R. 1.1206(b)(2). On September 25, 2007, Verizon filed a one-paragraph description of the September 17, 2007 meeting, and this can

¹ This was an interesting technique because the ex parte notice referenced exclusively to materials Verizon had filed before the Second Report & Order was issued and because Verizon has not filed a petition for reconsideration with respect to that decision.

only be described as translucent. Verizon stated its opposition to the open access requirements, because it wants to (1) maintain its current walled-garden approach of arrogating to itself (as opposed to consumers) “the right to configure the services and applications it provides over its own devices”; and (2) maintain its use of subsidized hand sets to ensure that its walled-garden approach endures and no other handset options or applications can succeed. This position, which is in essence a petition for reconsideration, raises important substantive issues.

Reversal of Open Access Requirements

The unmistakable outcome of what Verizon requested in the September 25, 2007 ex parte letter is a reversal of the Commission’s decision reached in the Second Report & Order. If Verizon’s irregular and extraordinary request were granted *nothing would change in the wireless market* and the headlines of a new age for wireless broadband that greeted the Commission’s July 31 decision will have been proven false. There is no other conclusion that can be drawn from Verizon’s irregular request.

From the thin description that Verizon Wireless supplied, it appears that Verizon is concerned that it could be required to allow downloads of “all lawful applications that are not configured to accommodate any and all applications.” The Commission should only begin to take this claim seriously when it receives an affidavit, under penalty of perjury from the highest ranking legal officer of Verizon, that (a) its dial-up Internet service since 1994; (b) its DSL-service; and (c) all its wireless services since 1995, allowed downloads only to devices “configured to accommodate any and all applications.” Verizon has created a test that it cannot meet. In short, consumers and application providers constantly encounter device limitations. In a vibrant market, consumers respond (if they want it enough) by purchasing new devices, and application providers respond with application variations that tailor their service to the screen on which it would appear. Of course, that is a market driven by choice and competition, one that Verizon does not favor. But to suggest that the “need” to limit consumer choice is the basis to throw out the open access rules is nothing but a play by an incumbent to protect its current lucrative business model that ignores historical precedent and serves no public interest.

The second issue Verizon asserts is that consumers would somehow not be able to choose a “Verizon package” of services versus taking a third-party supplied device and different services. This debate is as old as the *Carterfone* decision itself. Verizon’s position in 2007 is not that different than Ma Bell’s in 1967: “Trust us. We know best what the consumer wants. Choice is confusing.” The Commission, thankfully, rejected that view in 1967 and it should do so again here. Of course, Verizon wants to use its current business model – locked-in, subsidized phones with limited capabilities – into the future. The Commission rightly decided that approach was anti-consumer, anti-innovation, and not in the public interest.² Nothing has changed to alter that conclusion.

² Verizon, of course, can disagree, but it has two alternative paths to object: (1) petition for reconsideration, or (2) file an appeal with a Court of Appeals. It chose the latter, but wants to have it all, and seeks to pursue Commission (continued...)

Carterfone, a term frequently cited by Commissioners at the Commission's July 31 meeting adopting the *Second Report & Order* and by Members of Congress in Congressional hearings on the 700 MHz auction, means that carriers cannot interfere with consumer choice of (i) what device they use with a network, and (ii) the lawful applications they use with that device. Verizon's September 25, 2007 proposal is at war with those principles. The Commission's choice is clear: embrace consumer choice, or allow the entrenched incumbents to abuse the process to accomplish their goal of thwarting change.

Some have suggested that because wireline carriers today can offer CPE, that wireless carriers also should be able to offer handsets on their own terms. That assertion conveniently ignores nearly thirty years of history. *Carterfone*, an important decision when issued, finally held meaning in 1975 when the Commission adopted Part 68, prohibiting the Bell companies from bundling CPE with service and requiring a separate subsidiary to offer the service.³ Because of that seminal decision, a vibrant and robust wireline CPE industry developed. Yes, after the Telecommunication Act of 1996, the Bells were allowed to creep back into the vibrant and robust CPE business, but that was only because the industry was competitive. One cannot compare the wireline CPE market in 2007 with the wireless handset market in 2007. The wireless handset market in 2007, unlike the wireline handset/CPE market, (a) never was competitive, and (b) never will be competitive, absent Commission action. Those who argue based on the current wireline CPE market deliberately and conveniently ignore this history.

Sincerely,



Gerard J. Waldron
Counsel to Frontline Wireless, LLC

cc: Hon. Kevin Martin
Hon. Michael Copps
Hon. Jonathan Adelstein
Hon. Deborah Taylor Tate
Hon. Robert McDowell
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relief, in contravention of courts procedures. Verizon's tactic of making up procedures to suit its own needs should be firmly rejected.

³ *Interstate and Foreign Message Toll Telephone Service*, First Report and Order, 56 FCC 2d. 593 (1975).

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