

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Complaint of Free Press)
)
Against Cellco Partnership d/b/a Verizon Wireless) ___ - _____
)
for Violating Conditions Imposed on)
)
C Block of Upper 700 MHz Spectrum)

COMPLAINT

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SUMMARY

As wireless broadband achieves faster speeds and greater ubiquity, more and more Americans now use their mobile phones as wireless hotspots. This practice, known as tethering, allows a user to connect multiple devices—such as a laptop, digital camera, or GPS system—to the Internet via a mobile phone’s broadband service. In essence, the consumer uses the phone in the same way that he might rely on a wireless router at home—tethering allows him to use one data connection with multiple devices.

The practice is user-friendly. It boosts productivity. It encourages innovation in the market for wireless applications and devices. In particular, it provides a low-cost way for users to try new devices because they may use those devices without having to purchase a separate Internet connection.

Nevertheless, most major wireless carriers, including Verizon Wireless,¹ AT&T, and T-Mobile, limit access to third-party tethering applications. If users wish tether their phones, they are forced to subscribe to the carriers’ own tethering service—at rates of up to \$30 per month.

This practice restricts consumer choice and hinders innovation regardless of which carrier adopts such policies, but when Verizon Wireless employs these restrictions in connection with its LTE network, it also violates the Federal Communications Commission’s rules. In Verizon’s case, limiting access to tethering applications is not just a bad business practice and a bad policy choice; it also deliberately flouts the openness conditions imposed on Verizon’s LTE spectrum.

When Verizon purchased the spectrum licenses associated with its LTE network, it agreed that it would not “deny, *limit*, or *restrict*” the ability of its users to access the applications

¹ As set forth more fully below, Verizon Wireless is the business name (“d/b/a”) of Celco Partnership, a joint venture of Verizon Communications and Vodafone. Throughout this Complaint, we use “Verizon” to refer to Verizon Wireless, not the Verizon Communications.

and devices of their choosing. Recent news reports suggest that at Verizon's behest, Google has disabled Verizon customers' access to third-party tethering applications in Google's Android Market application store. Plainly, Verizon's actions in disabling access to the tethering applications limit and restrict the ability of users to access those applications. Because users download tethering applications for the express purpose of connecting additional devices to their data connections, Verizon's actions also limit and restrict the ability of users to connect the devices of their choice to the LTE network. The Commission should immediately investigate this apparent violation of its rules and assess all appropriate penalties.

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INTRODUCTION

For Americans of nearly all walks of life, the smartphone is becoming a ubiquitous accessory for people on the go. And for smartphone users who travel frequently or access the Internet away from home and office, the ability to turn one's phone into a mobile hot spot can be an invaluable feature. Through this practice — known as tethering — a college student at a café, a corporate executive on her morning commute, or a mom taking the bus to pick up her child from day care can connect her laptop to the Internet using nothing more than some basic software and the data connection offered by her wireless provider. The phone plays the same role as a wireless router does in the residential setting — it allows users to connect multiple devices through the same data connection.

This practice is consumer-friendly. It boosts productivity. And it encourages innovation in the market for wireless devices by providing users with a low-cost, easy way to try new products and maximize use of their existing devices. But this user-friendly feature is increasingly controlled by major wireless carriers, who would prefer that consumers pay them an extra \$20 or \$30 per month for the privilege of tethering. In particular, Verizon Wireless, AT&T, and T-Mobile all ban tethering unless the subscriber pays an additional monthly fee.²

Efforts to disable smartphone features and create barriers to this useful, productive, pro-innovation activity should cause concern no matter who initiates them; but when Verizon Wireless interferes with the use of third-party tethering applications, that conduct also violates the rules governing its LTE network. When Verizon purchased the licenses for the spectrum over

² As discussed in greater depth below, Verizon currently offers free tethering in connection with its LTE service, but tethering is offered for free solely during an introductory period, and users will be charged for the service beginning June 15, 2011.

which it has deployed LTE, it agreed to abide by a set of pro-consumer, pro-innovation openness principles. In particular, Verizon promised that it would not “deny, limit, or restrict the ability of [its] customers to use the devices and applications of their choice.”³ Verizon’s recent move to limit and restrict access to tethering applications by actively requesting that Google make them unavailable in the Android Market (the Google market for mobile applications) deliberately and unequivocally violates this prohibition. The FCC should immediately open an investigation to assess Verizon’s practices and determine appropriate penalties for this clear breach of the Commission’s rules.

FACTUAL BACKGROUND

1. Parties

Free Press is a national, nonpartisan, nonprofit organization. Through education, organizing, and advocacy, Free Press works to increase informed public participation in crucial media policy debates. Free Press has approximately 500,000 members. Free Press and its members have been involved on a wide range of media policy debates and have played a lead role in advocating for net neutrality, including acting as the Coordinator of the SavetheInternet.com Coalition. The SavetheInternet.com Coalition includes hundreds of nonprofit organizations, small businesses, religious groups, educational institutions and scholars, video gaming groups, bloggers, and other organizations that have banded together in support of open Internet principles.

Verizon Wireless is the business name (“d/b/a”) for Cellco Partnership, the largest provider of mobile phone and telecommunications services in the United States, with over 100 million subscribers. Verizon Communications, a United States telecommunications company,

³ 47 C.F.R. § 27.16(b).

owns 55% of Verizon Wireless. Vodafone Group Plc, a British telecommunications company, owns the remaining 45%. Verizon Wireless holds a population-weighted average of 87.7 MHz of spectrum, including nationwide licenses for the 700 MHz Upper C block. Verizon Wireless has begun deploying a nationwide LTE network on its 700 MHz spectrum and currently offers LTE service over that spectrum in 39 markets. It expects to cover 147 U.S. cities by the end of 2011.

2. At the request of several mobile carriers, including Verizon, Google restricts access to tethering applications.

In the first two weeks of May, numerous news outlets reported that Google has disabled access to tethering applications from its Android Market at the explicit request of various mobile broadband providers, including Verizon.⁴ If a user purchases an HTC Thunderbolt smartphone for use on Verizon's LTE network, for example, that user will not be able to download certain tethering applications from the Android Market.⁵ (The applications remain available to customers of those carriers that have not submitted requests for blocking.)⁶

⁴ See Chris Ziegler, *Google Plays Ball with Carriers to Kill Tethering Apps, Violates Spirit of the 'Open Access' It Bid \$4.6B to Protect, This is My Next*, <http://thisismynext.com/2011/05/02/verizons-removal-tethering-apps-android-market-shame-fcc-violation/>, May 2, 2011; see also *Is Wireless Tether About to Get the Android Axe, Carriers Finally Starting to Block It?*, <http://www.droid-life.com/2011/04/29/is-wireless-tether-about-to-get-the-android-axe-carriers-finally-starting-to-block-it/>, Apr. 29, 2011. The Android Market on the web features at least fifteen different tethering applications, many of which are free. The most expensive one costs \$31.05, but the vast majority cost less than fifteen dollars. See Android Market, <https://market.android.com/search?q=tethering&so=1&c=apps> (last visited June 3, 2011).

⁵ Declaration of Joel Kelsey in Support of Free Press Complaint, ¶ 7 (filed June 6, 2011) (Kelsey Decl.).

⁶ See Android Market, *supra* note 4 (confirming the existence of tethering applications in the Android Market); Jared Newman, *Free Android Tethering Blocked by AT&T, Verizon and T-Mobile*, Technologist: A Smarter Take on Tech, <http://technologist.com/2011/05/02/free-android-tethering-blocked-by-att-verizon-and-t-mobile/>, May 2, 2011; Marguerite Reardon, *Tethering Apps 'Blocked' in Android Market*, Signal Strength: CNet News, http://news.cnet.com/8301-30686_3-20059461-266.html, May 3, 2011;

Reports note that Verizon asked Google to eliminate access in the Android Market to tethering applications for devices connected to Verizon's network.⁷ Google has suggested that various carriers' decisions to limit access to these applications stemmed from carriers' arguments that tethering applications violate terms and conditions of data usage contracts between users and their mobile broadband providers.⁸ A Verizon spokeswoman would not confirm or deny whether Google was limiting access to the applications at Verizon's behest.⁹

3. Removing applications from the Android Market severely limits and restricts their distribution.

Removing applications from the Android Market severely restricts their use. If an application is included in the Android Market, a consumer with an Android phone clicks one button on his phone to open the Market, searches for the desired application, selects it, and then clicks one more button to either buy the application or install it free-of-charge.¹⁰ By contrast, most consumers face multiple challenges in finding and installing mobile applications outside of the Android Market. First, if a consumer cannot find an application in the Android Market, he may not know that he can obtain it elsewhere. For example, for some users, a search within the Android Market for particular tethering applications yields no relevant results.¹¹ Other users

⁷ See Lynette Luna, *Updated: Are AT&T, Verizon Blocking the Android Wireless Tether App*, FierceWireless, <http://www.fiercebroadbandwireless.com/story/are-att-verizon-blocking-android-wireless-tether-app/2011-05-02>, May 2, 2011 ("A spokesman for Google said that while it is not blocking the app in [*sic*] Android Market, it is making it unavailable for download at the request of wireless carriers."); J.R. Raphael, *Verizon's Android Tethering Block: What Really Happened and Why*, ComputerWorld, http://blogs.computerworld.com/18227/verizon_android_tethering, May 3, 2011.

⁸ See Luna, *supra* note 7.

⁹ Matt Hamblen, *Free Android Tethering Apps Blocked By Most Carriers*, ComputerWorld, http://www.computerworld.com/s/article/9216380/Free_Android_tethering_apps_blocked_by_most_carriers, May 3, 2011.

¹⁰ Kelsey Decl., ¶ 4.

¹¹ *Id.*, ¶ 7.

receive a rejection message stating that they cannot download tethering applications. The message states, “This item is not available on your carrier.”¹² For the ordinary consumer, this language clearly suggests that for some reason, the application is not compatible with his carrier’s service. It does not suggest that consumers may be able to obtain the same application elsewhere on the Internet. Third, even if a user both (a) knows that he can access mobile applications outside the Android Market and (b) remains undeterred by the rejection message, he may still lack the time and technical proficiency to seek out other means of obtaining access to the application. In order to take advantage of “sideloading” — the term for loading applications onto one’s phone through a mechanism other than the platform’s authorized mobile application store, such as the iPhone app store or the Android Market — consumers first need to authorize their phones to accept applications from outside the Android Market.¹³ Doing so requires completion of a multistep process that itself may discourage most consumers. For example, midway through the process, the phone advises the user, “Your phone and personal data may be more vulnerable to applications from unknown sources. You agree that you are solely responsible for any damage to your phone or loss of data that may result from using these applications.”¹⁴ Having completed that multistep process, the user then must find non-market applications elsewhere on the Internet or e-mail a developer to send the application to him. After obtaining the application, the user will need to install it. In some cases, this last step could be minimal — by clicking on a link on a website, the app may download and install. In other cases, this last step may be more complex. In fact, software programmers have developed a whole

¹² See Ziegler, *supra* note 4.

¹³ See Joe Levi, *How to Install Non-Market Apps on Your Android Phone*, Pocketnow.com, <http://pocketnow.com/how-to/how-to-install-non-market-apps-on-your-android-phone>, Feb. 18, 2010.

¹⁴ *Id.*

separate application that purports to guide users through the process.¹⁵ Even this application — which attempts to streamline the process — contains complex language and instructions. For example, it instructs a user to “be sure [his] phone is plugged into [a] computer, USB debugging is enabled, and [the user’s] USB connection is set to ‘change only.’”¹⁶ It is safe to say that the average user likely does not know either what USB debugging is or how to enable it. At a minimum, the complexity associated with jumping through these hoops is a far cry from the simplicity of a one-, two-, or three-click download offered by the Android Market.

4. Mobile broadband providers, including Verizon, offer their own expensive tethering services that compete with the free and low-cost options offered in the Android Market.

Mobile broadband providers have a financial stake in limiting access to third-party tethering applications. As noted above, many tethering applications are available for free or for a modest fee. Of the approximately fifteen tethering applications listed in the web version of the Android Market, the most expensive one costs \$31, but many are free and the vast majority cost less than \$15.¹⁷ By contrast, when Verizon introduced the Droid, it charged \$30 *per month* for tethering service on top of its \$30 per month “unlimited” data plan.¹⁸ Verizon also intends to charge for tethering on its LTE network: while LTE users enjoy free tethering until June 15,

¹⁵ See Phil Nickinson, *Sideload Android Apps All You Want with the Sideload Wonder Machine*, AndroidCentral, <http://www.androidcentral.com/sideload-android-apps-all-you-want-sideload-wonder-machine>, July 10, 2010.

¹⁶ *Id.*

¹⁷ See Android Market, *supra* note 4.

¹⁸ See Tim Stevens, *Verizon Confirms DROID Tethering Cost, Will Ask Subscribers to Double-Down on Their Data Plan*, Engadget, <http://www.engadget.com/2009/11/06/verizon-confirms-droid-tethering-cost-will-ask-subscribers-to-d/>, Nov. 6, 2009 (noting that Verizon has charged \$30 per month for tethering in the past); see also Verizon Wireless, Mobile Broadband Connect, http://www.verizonwireless.com/b2c/mobilebroadband/?page=products_connect (last visited May 13, 2011) (noting that Mobile Broadband Connect costs \$20 per month in addition to a \$30 data plan).

2011, the promotion will expire after that date.¹⁹ With respect to the HTC Thunderbolt, Verizon has stated publicly that “[a]fter the promotion ends May 15 [now apparently June 15], customers who initiate the hotspot will be advised to add Mobile Hotspot for a yet-to-be-determined price.”²⁰ By limiting access to tethering applications, Verizon and other carriers can drive users to sign up and pay for the carriers’ own tethering services, thereby monetizing a service consumers could otherwise either obtain for free or obtain from another source at lower cost.

ARGUMENT

Verizon’s actions in cutting off access to tethering applications unlawfully “limit” and “restrict the ability” of its customers “to use the devices and applications of their choice.”

By asking Google to remove tethering applications from the Android Market, Verizon violates the rules under which it operates its LTE network. When the FCC auctioned the C Block of the Upper 700 MHz spectrum — the spectrum on which Verizon has deployed its LTE offering — the Commission adopted important license conditions to protect the openness of broadband networks. It provided that licensees using that spectrum “shall not *deny, limit, or restrict* the ability of their customers to use the devices and applications of their choice.”²¹ In the words of Chairman Kevin Martin, the Commission adopted the conditions to ensure that

¹⁹ Kelsey Decl., ¶ 10 & Ex. 1; *see also Verizon Extends Free LTE Smartphone Hotspot Promotion*, FierceWireless, <http://www.fiercewireless.com/story/verizon-extends-free-lte-smartphone-hotspot-promotion/2011-04-26>, April 26, 2011; Chuong Nguyen, *Verizon Undecided About 4G LTE Hotspot Pricing on HTC Thunderbolt*, GottaBeMobile: Mobile Phone, Tablet, and Touch Computing News & Reviews, <http://www.gottabemobile.com/2011/05/16/verizon-undecided-about-4g-lte-hotspot-pricing-on-htc-thunderbolt/>, May 16, 2011; Josh Smith, *What Happens to Free HTC Thunderbolt Tethering on May 15th?*, GottaBeMobile: Mobile Phone, Tablet, and Touch Computing News & Reviews, <http://www.gottabemobile.com/2011/05/05/what-happens-to-free-htc-thunderbolt-tethering-on-may-15th/>, May 5, 2011 (noting Verizon advisory to customers that they will be charged a “yet-to-be-determined” price for tethering after May 15, 2011)

²⁰ *See* Smith, *supra* note 19; *see also* Nguyen, *supra* note 19.

²¹ 47 C.F.R. § 27.16(b) (emphasis added).

“[c]onsumers will be able to use the wireless device of their choice and download whatever software they want onto it.”²²

1. Disabling access to tethering applications from the Android Market for Verizon’s customers effectively limits a user’s ability to use the applications of his choosing.

Disabling applications in the Android Market violates the C Block rules because it limits or restricts the ability of consumers to “use the . . . applications of their choice.” The words “limit” and “restrict” in the rule do not connote a categorical bar; rather, limiting includes “curtail[ing] or reduc[ing] in quantity or extent,”²³ and restricting means “confin[ing] within bounds [or] restraining.”²⁴ In the *C Block Order* itself, the Commission elaborated on this requirement, explaining that a licensee may not “*interfere* with the ability of end users to download and utilize applications of their choosing.”²⁵ Removing the applications from the Android Market curtails, restrains, and interferes with the ability of subscribers to use the applications of their choice by making it more difficult to download and install those applications.

The Android Market provides the easiest and most obvious gateway for users to gain access to applications. Although applications may be made available to users through other means, many consumers may believe it is difficult, dangerous, or impossible to obtain applications outside the market. Indeed, consumers are discouraged from installing applications

²² Statement of Chairman Kevin J. Martin, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, 22 FCC Rcd 15289 (2007) (“*In C Block Order*”). For simplicity’s sake, we refer to the openness requirements adopted in the order and codified at 47 C.F.R. § 27.16 as the C Block Rules.

²³ Merriam-Webster, *limit*, <http://www.merriam-webster.com/dictionary/limit?show=1&t=1305210455> (last visited May 12, 2011).

²⁴ Merriam-Webster, *restrict*, <http://www.merriam-webster.com/dictionary/restrict> (last visited May 12, 2011).

²⁵ *C Block Order*, ¶ 206 (emphasis added).

from outside the Android Market by several different messages. First, some consumers receive a message noting that unapproved applications “[are] not available on [the] carrier.”²⁶ Second, users that attempt to download and install applications outside the Android Market are deterred by a notice advising the user: “Your phone and personal data may be more vulnerable to applications from unknown sources. You agree that you are solely responsible for any damage to your phone or loss of data that may result from using these applications.”²⁷ Moreover, installing applications onto a smartphone outside the context of an application store involves a complex, multistep process that many users lack the time and expertise to master.²⁸

Finally, even if the process of downloading applications outside the market were relatively simple, Verizon clearly decided to impose limitations on access to these applications in an effort to deter consumers from using them. It makes perfect sense for Verizon to do so because these tethering applications compete with Verizon’s own tethering service. But it was for this precise reason that the Commission adopted the C Block Rules: The Commission specifically recognized that blocking applications that “compete with wireless service providers’ own offerings”²⁹ harms users and innovators. In sum, Verizon plainly violates the C-Block rules when it seeks deliberately to limit user choice in the market for mobile applications.

2. Removing tethering applications from the Android Market also limits and restricts the ability of Verizon subscribers to use the *devices* of their choosing.

Verizon’s conduct also violates the portion of the C Block Rules forbidding limitations on devices that users might choose to attach to the network. In its order adopting the C Block conditions, the Commission emphasized that it sought to foster “greater balance between device

²⁶ Ziegler, *supra* note 4.

²⁷ Levi, *supra* note 13.

²⁸ See *supra* text accompanying notes 12-16.

²⁹ *C Block Order*, ¶ 222.

manufacturers and wireless service providers” in adopting device openness rules.³⁰ The order also consistently characterizes its own openness requirements as successors to *Carterphone* principles,³¹ and *Carterphone* spoke first and foremost to the consumer’s right to attach non-harmful devices to the telephone network. Indeed, both Chairman Kevin Martin and Commissioner Michael Copps referred to the *Carterphone* decision in their separate statements and cited the numerous types of innovative devices consumers attached to the wireline network as a result of that order, including cordless phones with voice mail and caller ID,³² fax machines, and dial-up modems.³³ Tethering software exists solely to help users easily attach additional devices, such as laptop computers, tablets, or digital cameras, to the network. These devices (and innovative new ones that have not yet made it to market) are the successors to the cordless phones and fax machines of yore. Without tethering applications, users would have to buy separate wireless connections for each of their devices — much as if a consumer were required to pay for a separate residential telephone connection for his fax machine, his dial-up modem, and his cordless telephone. By deterring users from using free tethering applications, and thereby driving users to Verizon’s own tethering service, Verizon can impose a tangible cost on a user’s ability to connect devices to the network. These added costs are borne directly by the consumer and indirectly by innovators who would like to bring new devices to the market, limiting and restricting the ability of both to attach the devices of their choice.³⁴

³⁰ *C Block Order*, ¶ 201.

³¹ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

³² Statement of Chairman Kevin J. Martin, *C Block Order*.

³³ Statement of Commissioner Michael J. Copps, *C Block Order*.

³⁴ It is worth noting that Verizon currently offers free tethering on its LTE network but the promotion is time-limited and set to expire in June. So while LTE subscribers currently enjoy free tethering with Verizon’s largesse, that circumstance will change shortly. Moreover, they are

3. Verizon’s actions violate the Commission’s Rules even though Verizon needs Google’s assistance to disable applications in the Android Market.

The *C Block Order* contemplates that licensees shall not interfere *either directly or indirectly* with a user’s ability to access applications and devices of his choosing, and as a result, the fact that Google plays a part in actually removing applications from the Android Market does not immunize Verizon’s actions. The order seeks broadly to prevent actions by carriers that “imped[e] the development and deployment of devices and applications that consumers want to use,”³⁵ and it recognizes that coordinated action between a carrier and a third-party could constitute a violation of the rule. For example, the Commission observes that “wireless service providers . . . will not be allowed to disable features or functionality in handsets,” subject to certain exemptions.³⁶ Because handsets are manufactured by a third-party whose assistance would likely be required to disable particular features, the Commission clearly understood the rule as prohibiting wireless carriers licensed to use the C Block from doing indirectly what they could not do directly. Put another way, so long as it is “the wireless provider, not the consumer, who chooses what applications the consumer will be allowed to use on that new handset,”³⁷ there can be little doubt that the carrier violates the rule.

Recent press coverage demonstrates that Verizon bears primary responsibility for restricting its subscribers’ access to tethering applications. Google has specifically stated that “it is making [tethering applications] unavailable for download at the request of wireless carriers [AT&T and Verizon]” and that tethering applications may violate the terms and conditions of

forced to use *Verizon’s* tethering service; they cannot use competing third-party applications that offer the same or similar functionality.

³⁵ *Id.*, ¶ 207.

³⁶ *Id.*, ¶ 222.

³⁷ Statement of Chairman Kevin J. Martin, *C Block Order*.

carriers' data usage contracts.³⁸ Additional circumstantial evidence also suggests that AT&T and Verizon asked Google to block these applications. First, the applications remain available for download for customers of other carriers.³⁹ If Google were truly the driving force behind the removal of these applications, it would have blocked access to them for all carriers, not just a select few. Second, AT&T and Verizon — not Google — stand to profit from disabling access to tethering applications. If Verizon makes it difficult for users to gain access to free or low-cost tethering applications, it can charge users an extra \$20 per month for the privilege of using Verizon's own tethering application.⁴⁰ In sum, frustrating access to tethering applications on its network, even if it requires Google's assistance, clearly violates the C Block Rules' prohibition against "limit[ing] or restrict[ing] the ability of . . . customers to use the devices and applications of their choice."⁴¹

4. The exemptions set forth in the C Block Rules do not excuse Verizon's conduct.

The regulations governing the C Block provide for a limited exemption from this mandate that otherwise ensures user choice, but that exemption does not apply here. 47 C.F.R. § 27.16 states that licensees shall not restrict a user's ability to use the applications and devices of his choosing unless "such use would not be compliant with published technical standards reasonably necessary for the management and protection of the licensee's network."⁴² The regulation further defines published technical standards as follows: "technical requirements

³⁸ Luna, *supra* note 7.

³⁹ Reardon, *supra* note 6.

⁴⁰ Though Verizon currently offers tethering service for free on its HTC Thunderbolt, it will begin charging users for the service on June 15, 2011. It costs approximately \$20 per month to use tethering with other Verizon phones. *See* Verizon Wireless, Mobile Broadband Connect, http://www.verizonwireless.com/b2c/mobilebroadband/?page=products_connect (last visited May 13, 2011) (noting that mobile broadband connect costs \$20).

⁴¹ 47 C.F.R. § 27.16.

⁴² *Id.* § 27.16(b)(1).

reasonably necessary for third parties to access a licensee's network via devices or applications without causing objectionable interference to other spectrum users or jeopardizing network security. The potential for excessive bandwidth demand alone shall not constitute grounds for denying, limiting or restricting access to the network.”⁴³

A. Public statements justifying the removal of applications do not meet the Commission's criteria for exemptions from the C Block Rules.

The only public statements explaining why the use of these applications has been restricted has come from Google: a Google spokesman suggested that tethering applications “likely violate the terms and conditions of data usage contracts.”⁴⁴ Indeed, Verizon's Mobile Broadband Terms and Conditions note that “[c]ustomers who do not have dedicated Mobile Broadband devices [i.e., a MiFi or USB modem] cannot tether other devices to laptops or personal computers for use as wireless modems unless they subscribe to Mobile Broadband Connect.”⁴⁵

To the extent that these restrictions serve as the justification for limiting access to tethering applications, they fall far short. First, it is obvious that Verizon's terms of service could not supersede federal regulation. Second, the terms of service make no reference to any technical standards at all.

⁴³ *Id.* § 27.16(c)(1).

⁴⁴ Karl Bode, *Google Blocking Tethering Apps for AT&T, Verizon*, DSL Reports, <http://www.dslreports.com/shownews/Google-Blocking-Tethering-Apps-For-ATT-Verizon-114024>, May 3, 2011.

⁴⁵ Verizon, *Mobile Broadband Terms and Conditions*, http://b2b.vzw.com/broadband/bba_terms.html (last visited May 15, 2011).

B. If Verizon attempted to argue that tethering applications do not comply with particular technical requirements, that argument would fail on both procedural and substantive grounds.

Nor does it seem likely that Verizon could justify its limitations with reference to technical requirements, had it the C Block licensee even made a show of referring to such standards.

i. Verizon has failed to comply with procedural requirements necessary to claim an exemption from the openness conditions.

The *C Block Order* creates basic procedural requirements designed to give consumers and application developers information regarding any restrictions imposed on the network by the licensee. In particular, the order provides that C Block licensees must publish their reasonable network management and openness standards.⁴⁶ With respect to applications running over the LTE network, Verizon's published open development guidelines state only that "in its initial release, the LTE specifications provide basic Internet Protocol (IP) access and transport specifications. Accordingly, there are *no additional specifications for applications written for IP.*"⁴⁷ As such, Verizon has failed entirely to provide users and application developers with notice of any technical requirements that might justify its decision to limit access to third-party tethering applications. Merely asking Google to remove the applications from the Android Market without notice plainly flouts these requirements.

⁴⁶ *C Block Order*, ¶ 224; 47 C.F.R. § 27.16(c)(3).

⁴⁷ Verizon Wireless, Open Development: Frequently Asked Questions, <https://www22.verizon.com/opendev/faq.aspx#LTEAnswer5> (last visited May 17, 2011) (emphasis added).

ii. Verizon’s categorical limitation on all tethering applications does not comply with the limited exemption set forth in the rules.

Finally, in addition to failing to meet the FCC’s notice requirement as discussed above, any Verizon claim that it has either security or network management concerns that justify banning all third-party tethering applications would not be credible. Verizon maintains a categorical ban on tethering *in addition to* restrictions that prevent users from activity “that interferes with [the] network’s ability to fairly allocate capacity among users, or that otherwise degrades service quality for other users.”⁴⁸ Moreover, the rules specifically note licensees may not discriminate against third-party applications based on the “potential for excessive bandwidth demand.”⁴⁹ The *C Block Order* further observes that “demand can be adequately managed through feasible facility improvements or technology-neutral capacity pricing that *does not discriminate against subscribers using third-party devices or applications.*”⁵⁰ In sum, the exemption set forth in the regulation does not provide Verizon with an out: Verizon has limited customers’ access to third-party applications that compete with its own tethering service and thus, limited access as well to devices of users’ choosing. This practice violates the Commission’s mandate preserving openness on the C Block spectrum.

CONCLUSION

In his separate statement concurring in the *C Block Order*, then-Commissioner Jonathan Adelstein observed that “the true test of the[] effectiveness [of the Order] will be seen over time and through future Commission actions and oversight.”⁵¹ Verizon objected strenuously to the

⁴⁸ Verizon Wireless, Open Development: Frequently Asked Questions, <https://www22.verizon.com/opendev/faq.aspx#LTEAnswer5> (last visited May 17, 2011).

⁴⁹ 47 C.F.R. § 27.16(c)(1).

⁵⁰ *C Block Order*, ¶ 222 (emphasis added).

⁵¹ Statement of Commissioner Jonathan S. Adelstein, *C Block Order*.

adoption of openness requirements in connection with the 700 MHz spectrum auction.⁵² Having lost that policy battle yet successfully acquired the licenses subject to the policy, Verizon appears to have adopted a new regulatory strategy: simply ignore the federal rules once they have been adopted, and draft terms of service to contradict the federal rules with which it disagrees. If the Commission's openness rules are to have any meaning, the FCC must act quickly to investigate Verizon's indiscriminate and arbitrary blocking of tethering applications.

Respectfully submitted,

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⁵² See, e.g., Comments of Verizon Wireless, *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, WT Docket No. 06-150, May 23, 2007, at 46-49, Verizon Wireless, Notice of Ex Parte Presentation, *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, WT Docket No. 06-150, July 24, 2007 (22-page letter detailing objections to openness requirements).