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Verizon's "Certification Process" and Why the FCC Needs To Take a Stand

P.J. GREYTER*

INTRODUCTION

Jeff Jarvis is quite upset with Verizon Wireless, and he has a right to be.¹ In September 2013, Google released its newest tablet, dubbed the Nexus 7. Mr. Jarvis was one of the first consumers to get the tablet, and he quickly took it to a Verizon Wireless store to obtain a SIM card to activate the tablet on Verizon's 4G Long Term Evolution (LTE) Network.² Much to Mr. Jarvis's dismay, the Verizon store employees notified him that the tablet could not be activated on the Verizon Network "because the IMEI numbers weren't added to Verizon's system"³—for reference, an IMEI number is a "15 or 17 digit unique number to identify mobile devices."⁴

Following his frustrating visit to the Verizon store, Mr. Jarvis voiced his irritation by publicly calling out the wireless company on Twitter, writing, "Knock, knock, @VZWSupport, is anybody there? I'm trying to give you money. You're making it hard. No, impossible." He also provided a link to a more in-depth rant on his personal Google Plus page.⁵ Verizon Wireless responded through its company Twitter page a day later, tweeting, "I'm excited you got your Nexus 7 but not all LTE tablets are created equal. It's not part of our lineup & can't be activated."⁶ The problem, however, was that the Nexus 7 *could* be activated on Verizon's network.⁷ Jarvis

* J.D. candidate, 2015, Indiana University Maurer School of Law. First, I would like to thank the Lord; without His help and guidance, I wouldn't be here today. Second, I want to thank my mom (Barb), dad (Phil Sr.), and sister (Jillian) for always pushing me to become the best man I can be. There have been many ups and downs, but their support and belief in me have never wavered, and for that I am forever grateful. I would also like to thank my gorgeous fiancée (Charlotte) who has graciously and bravely endured the peaks and valleys that go along with being the significant other of a law school student; she is a living example of hard work and serves as my daily inspiration. Additionally, I would like to thank Danton Bryans and Professor Michael McGregor for guiding me throughout this whole Note-writing process. Last but not least, I would like to thank Dr. Linda Maule, Dr. Robert (Bob) Van Sickle, and Professor Heather Roberts, three professors at Indiana State University who were instrumental in my development as a writer and an aspiring attorney.

1. See Jeff Jarvis, *TelHell Thus Far*, BUZZMACHINE (Sept. 19, 2013), <http://buzzmachine.com/2013/09/19/telhell-thus-far/> (discussing Verizon's "crime" of not allowing Jarvis to activate his Nexus 7 on its 4G LTE Network).

2. E.g., Kevin Parrish, *Verizon Answering to FCC Over Nexus 7 "Block,"* TOM'S HARDWARE (Sept. 22, 2013, 11:00 AM), <http://www.tomshardware.com/news/nexus-7-verizon-fcc-4g-lte-open-access-rules,24346.html>.

3. *Id.*

4. *What Is IMEI Number?*, IMEI TOOLS, <http://imei-number.com/what-is-imei-number/>.

5. Jeff Jarvis, TWITTER (Sept. 16, 2013, 12:00 PM), <https://twitter.com/jeffjarvis/status/379681316931108864>.

6. VZW Support, TWITTER (Sept. 17, 2013, 5:35 AM), <https://twitter.com/VZWSupport/status/379946773730443264>.

7. Parrish, *supra* note 2.

proved this by removing a currently activated Verizon 4G LTE SIM⁸ card from his Chromebook Pixel, placing it in his Nexus 7, and showing that the tablet did indeed function properly on Verizon's LTE network.⁹

Verizon's dismissive response to Jarvis's complaint, accompanied by Jarvis's realization that the tablet could run on the network—but that Verizon was not ready to allow it—led Jarvis to file a complaint with the FCC.¹⁰ Jarvis based his complaint on the open-access rules that Verizon agreed to abide by when it purchased the 700-megahertz (MHz) C-Block spectrum to operate its 4G LTE network in 2008.¹¹ To support his claim, Jarvis cited language from § 27.16 of the Code of Federal Regulations, which states, in part, “[Verizon] shall not deny, limit, or restrict the ability of their customers to use the devices and applications of their choice on [Verizon's] C Block network.”¹² Jarvis's social-media bashings and formal FCC complaint resulted in Verizon issuing a statement that cited its “rigorous”¹³ certification process for all devices attempting to run on its 4G LTE network.¹⁴ The wireless company pointed to its publicly laid-out certification process,¹⁵ claiming that it generally takes four to six weeks to complete.¹⁶ Verizon argued that the process was in place to “guard[] the safety and security of [its] network,”¹⁷ a direct (albeit uncited) reference to § 27.16(b)(1) of the C-Block rules, which allowed Verizon to establish technical standards “reasonably necessary for the . . . protection of [its] network.”¹⁸ Then, in an even more peculiar turn of events, Verizon released a statement at the beginning of November, blaming Google and Asus (joint manufacturers of the Nexus 7) for the fact that the tablet still could not be activated on Verizon's network because of a “systems issue.”¹⁹ Verizon told the public that

8. SIM is an acronym for the phrase “Subscriber Identity Module”; SIM cards are used to identify mobile phone subscribers. See *What Does SIM CARD Mean?*, INTERNETSLANG.COM, http://www.internetslang.com/SIM_20CARD-meaning-definition.asp.

9. Parrish, *supra* note 2.

10. *Id.*

11. See FCC, *Auction 73: 700 MHz Band*, FCC.GOV, http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73 (last updated June 19, 2012); Matthew Lasar, *Verizon: We Promise To Honor the Block C Open Access Rules*, ARS TECHNICA (May 7, 2008, 7:12 PM), <http://arstechnica.com/uncategorized/2008/05/verizon-we-promise-to-honor-the-block-c-open-access-rules/>.

12. 47 C.F.R. § 27.16(b) (2013); see also Jeff Jarvis, *My FCC Complaint Against Verizon*, GOOGLE PLUS (Sept. 18, 2013), <https://plus.google.com/+JeffJarvis/posts/WfZVMTjJ1N7>.

13. Kellex, *Verizon Further Explains Nexus 7 LTE Debacle, Blames 4-6 Week Certification Process*, DROID LIFE (Sept. 18, 2013), <http://www.droid-life.com/2013/09/18/verizon-further-explains-nexus-7-lte-debacle-blames-4-6-week-certification-process/>.

14. *Id.*

15. See VERIZON WIRELESS, OPEN DEVELOPMENT DEVICE CERTIFICATION PROCESS (2010), available at <https://odi-device.verizonwireless.com/Info/Open%20Development%20Device%20Docs/Certification%20Process%20Documentation/ODDeviceCertificationProcess.pdf>.

16. Lance Whitney, *Verizon: Google Nexus 7 LTE Support Is Coming. Really*, CNET (Sept. 19, 2013, 5:52 AM), http://news.cnet.com/8301-1035_3-57603624-94/verizon-google-nexus-7-lte-support-is-coming-really/ (quoting a public statement released by Verizon).

17. *Id.*

18. 47 C.F.R. § 27.16(b)(1) (2013).

19. Sean Hollister, *Verizon Won't Activate the Nexus 7 Until Google Delivers a KitKat*

“Google and Asus asked Verizon to suspend its certification process until Google’s new OS [operating system] was available on the Nexus 7,” and that was why the tablet still could not be activated.²⁰

However, the whole situation is somewhat suspicious, and the certification process, as a whole, still raises concerns, regardless of Verizon’s latest explanation. After all, the tablet ran on the Verizon network (as shown by Jarvis),²¹ and you could obtain a SIM card for the tablet from AT&T or T-Mobile on the day of the tablet’s release.²² Furthermore, Verizon admitted it received the tablet for testing in August—so why was it still not cleared for activation in the latter part of September?²³ There are two main issues that arise out of this ordeal: (1) whether this lengthy certification process violates the C-Block rules,²⁴ and (2) whether other considerations (discussed *infra*) should forbid the certification process.

This Note will give an in-depth review of the legality and policy implications of Verizon’s lengthy certification process. Part I will give a short background of the time leading up to Verizon’s purchase of the C-Block. It will then review the actual rules of the agreement between Verizon and the FCC at the time of the purchase, as well as the pertinent history following the purchase. Part II will analyze whether Verizon’s lengthy certification process violates the C-Block rules or the general spirit of Verizon’s agreement to abide by the rules. Part III will then argue that, even if Verizon’s certification process does not violate the original rules of the agreement, recent developments and various public policy considerations should preclude Verizon from stalling before allowing various devices onto its network. Finally, Part IV will conclude with a proposal on how the FCC should handle this certification-process problem going forward.

I. VERIZON’S PURCHASE OF THE C-BLOCK AND THE RESTRICTIONS THAT CAME WITH IT

A. Verizon’s Purchase of the C-Block

On August 23, 2007, the FCC issued a notice seeking public comments on the competitive bidding procedures for an upcoming spectrum auction.²⁵ Following a brief comment period, the FCC issued another notice proclaiming that the auction

Update, VERGE (Nov. 6, 2013, 8:08 PM), <http://www.theverge.com/2013/11/6/5075028/verizon-wont-activate-the-nexus-7-until-google-delivers-a-kitkat>.

20. *Id.* It should be noted that the tablet finally became active on Verizon’s network on February 13, 2014, nearly six months after the tablet was released to the general public. Sarah Silbert, *Verizon Will Offer Google’s Nexus 7 Tablet Starting This Thursday*, ENGADGET (Feb. 10, 2014, 3:18 PM), <http://www.engadget.com/2014/02/10/verizon-nexus-7-tablet-on-sale/>.

21. *See supra* text accompanying notes 7–8.

22. Parrish, *supra* note 2.

23. *Id.*

24. *See, e.g.*, Karl Bode, *Don’t Expect FCC To Act on Verizon’s Snub of Nexus 7*, DSLREPORTS.COM (Sept. 19, 2013, 12:10 PM), <http://www.dslreports.com/shownews/Dont-Expect-FCC-to-Act-on-Verizons-Snub-of-Nexus-7-125887>.

25. Auction of 700 MHz Band License Scheduled for January 16, 2008, 72 Fed. Reg. 48,272 (Aug. 23, 2007).

would take place on January 24, 2008.²⁶ Up for grabs were a series of licenses for the 698–806 MHz band (commonly referred to as the 700 MHz band) of the electromagnetic spectrum.²⁷ This band of the spectrum had been freed up by the FCC’s requirement that all “full-power television stations . . . broadcast exclusively in a digital format.”²⁸ As a result, all of the analog television stations moved off this band of spectrum, leaving it vacant and available for allocation.²⁹

The 700 MHz band was especially attractive to wireless companies because it could carry wireless signals three to four times further than other bands of spectrum, translating to greater wireless coverage for the majority owner of the spectrum.³⁰ The spectrum itself contained five “blocks” in all: Blocks A, B, C, D, and E; Block C, however, was the most sought-after section of the spectrum.³¹ It was the largest of all of the blocks, spanning 22 MHz, and it would be the main prize of the FCC’s auction.³² The auction was held in January 2008, and Verizon came out the big winner, spending \$9.63 billion total—\$4.75 billion of that amount going toward the purchase of a majority share of the coveted C-Block.³³

B. The Rules and Verizon’s Promise to Abide

Now that it has been shown how Verizon Wireless came to be the majority owner of the C-Block, this subpart will briefly discuss the C-Block rules and their origins. On August 10, 2006, the FCC began “seeking comment on the possibility of revising a variety of licensing and service rules affecting . . . spectrum in the [700] MHz band[.]”³⁴ In response to this call for comments, Skype Communications S.A.R.L. (“Skype”) submitted a lengthy comment asking the FCC to extend and enforce its *Carterfone* provisions on the entire 700 MHz band.³⁵ *Carterfone* was a 1968 FCC decision³⁶ that held consumers had the right to attach a device to a wireline network

26. Auction of 700 MHz Band Licenses Scheduled for January 24, 2008, 72 Fed. Reg. 62,360 (Nov. 2, 2007).

27. *Id.*

28. *Digital Television*, FCC.GOV, <http://www.fcc.gov/digital-television>.

29. *See id.*; *see also* Chris Ziegler, *The FCC’s 700 MHz Auction: What You Need To Know*, ENGADGET (Jan. 24, 2008, 12:01 AM), <http://www.engadget.com/2008/01/24/the-fccs-700mhz-auction-what-you-need-to-know/>.

30. *See* Grant Gross, *A Primer on the FCC’s 700 MHz Auction*, PCWORLD (Dec. 3, 2007, 7:00 PM), <http://www.pcworld.com/article/140245/article.html>.

31. Ziegler, *supra* note 29.

32. *See id.*; *see also* Gross, *supra* note 30.

33. *See* FCC, FCC 700 MHz BAND AUCTION, ATTACHMENT A (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-595A2.pdf; Michael Finneran, *700 MHz Winners and Non-Winners*, UNIFIED COMM. STRATEGIES (Mar. 21, 2008), <http://www.ucstrategies.com/detail.aspx?id=2636>.

34. Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, 71 Fed. Reg. 57,455, 57,455 (proposed Sept. 29, 2006).

35. Petition To Confirm a Consumer’s Right To Use Internet Communications Software and Attach Devices to Wireless Networks, Skype Commc’ns S.A.R.L., RM-11361 (FCC Feb. 20, 2007) [hereinafter *Skype Petition*], *available at* <http://newamerica.net/files/Skype%20Petition.pdf>.

36. Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C.2d 420 (1968).

as long as “their access cause[d] no technical harm to carrier networks.”³⁷ Skype encouraged the FCC to extend this ruling on wireline networks to wireless networks, like the one that Verizon operates.³⁸ Following Skype’s petition, the Public Interest Spectrum Coalition (PISC) submitted various rule proposals for governing the 700 MHz band.³⁹ The most pertinent suggestion (like Skype’s) revolved around the implementation of open-access rules.⁴⁰ PISC argued that wireless companies “routinely choke bandwidth to users, cripple features, and control the user experience.”⁴¹ PISC, along with Skype, Frontline Wireless, and others, proposed that open-access rules should be applied to all “60 MHz auctioned in the band” being employed for commercial use.⁴²

After a series of comment periods and research, the FCC, in August 2007, issued its *Second Report and Order*, containing an in-depth discussion on the 700 MHz band, the pending auction, and the various rules that would govern that spectrum.⁴³ In this document, FCC Chairman Kevin Martin declared that the Commission would be “impos[ing] certain conditions on the C Block . . . to provide open platforms for devices and applications.”⁴⁴ Martin detailed a series of policy reasons for why the FCC had chosen not to apply these rules to all of the blocks and why the C-Block was the prime band of spectrum for this type of open-access requirement.⁴⁵ Shortly after the *Second Report and Order* was issued, these open-access requirements were codified in the Code of Federal Regulations; the law required that licensees on the C-Block (Verizon) will “not deny, limit, or restrict the ability of their customers to use the devices and applications of their choice.”⁴⁶ The law goes on to say that a C-Block licensee would only be able to exclude an application or device if the use of either “would not be compliant with published technical standards reasonably necessary for the management or protection of [Verizon’s] network.”⁴⁷ Last, the rule elaborates on the term “technical standards,” saying they must be “reasonably necessary for third parties to access [Verizon’s] network . . . without causing objectionable interference to other spectrum users or jeopardizing network security.”⁴⁸

This particular aspect of the rules did not sit well with Verizon.⁴⁹ To voice its opposition, Verizon elected to file a lawsuit against the FCC, contending that these

37. Rob Frieden, *Hold the Phone: Assessing the Rights of Wireless Handset Owners and Carriers*, 69 U. PITT. L. REV. 675, 686 (2008).

38. Skype Petition, *supra* note 35, at ii.

39. See Comments of the *Ad Hoc* Public Interest Spectrum Coalition, Service Rules for the 698–746, 747–762, and 777–792 MHz Bands, No. 06-150 (FCC May 23, 2007), available at <https://www.publicknowledge.org/pdf/pisc-fcc-comments-20070523.pdf>.

40. *Id.* at 12.

41. *Id.* at 7.

42. *Id.* at 12.

43. Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, 22 FCC Rcd. 15,289 (2007) (second report & order).

44. *Id.* at 15,363, para. 202.

45. *Id.* at 15,361–65, paras. 195–205.

46. 47 C.F.R. § 27.16(b) (2013).

47. 47 C.F.R. § 27.16(b)(1).

48. 47 C.F.R. § 27.16(c)(1).

49. See Tom Corelis, *Verizon Sues FCC over Open-Access 700 MHz Rules*, DAILYTECH (Sept. 13, 2007, 8:59 PM), <http://www.dailytech.com/Verizon+Sues+FCC+Over+Openaccess+700>

rules were arbitrary and capricious and violated the Communications Act of 1934, the U.S. Constitution, and the Administrative Procedure Act.⁵⁰ However, after the courts denied fast-tracking Verizon's suit, the company elected to drop it altogether, making certain cursory comments that it would abide by the C-Block rules.⁵¹

The next couple months were rather quiet, with Verizon completing the purchase of the C-Block. However, Google—being both a manufacturer of devices and a designer of applications—had a substantial interest in ensuring that Verizon played by the rules, and it was not yet convinced that Verizon was going to obey.⁵² Based on these suspicions, Google petitioned the FCC, contending that Verizon intended to, among other things, “exclude its handsets from the open access condition,” and Google demanded that the FCC get Verizon's word that it would obey the rules.⁵³ Immediately following Google's petition to the FCC, Verizon made a curt statement: “Verizon Wireless . . . understood the FCC's rules for using that spectrum in advance of the auction. . . . Of course we'll abide by those rules.”⁵⁴ Furthermore, the FCC had issued a statement that it would conduct another auction without these open-access requirements if the reserve for the C-Block was not met,⁵⁵ yet Verizon went ahead and purchased the C-Block anyway. Both Verizon's statement and its purchase of this band of spectrum demonstrate that the wireless company was fully aware of its obligations when it won the auction.⁵⁶ If Verizon truly wanted to avoid these open-access rules, then it could have waited and purchased the C-Block when the FCC reaucted the spectrum without those requirements.

C. The 2012 Consent Decree Between the FCC and Verizon

The next couple years came and went without any violation, and it seemed that Verizon truly did intend to play by the rules. But then, in mid-2011, tethering (mobile hotspot) applications began disappearing from the Android application (“app”) store.⁵⁷ This upset millions of consumers and consumer organizations. As

+MHz+Rules/article8875.htm; Bryan Gardiner, *Verizon Dumps on Open Access, Sues FCC*, WIRED (Sept. 13, 2007, 8:52 PM), <http://www.wired.com/business/2007/09/verizon-dumps-o/>.

50. Petition for Review, *Cellco P'ship v. FCC*, No. 07-1359 (D.C. Cir. Sept. 10, 2007); see also Corelis, *supra* note 49.

51. Matthew Lasar, *Google Holds Verizon's Feet to Fire on 700MHz Open Access*, ARS TECHNICA (May 6, 2008, 12:35 AM), <http://arstechnica.com/uncategorized/2008/05/google-holds-verizons-feet-to-fire-on-700mhz-open-access/> (“[T]he wireless giant has contented itself with making comments that suggest that the company will obey the open platform rule . . .”).

52. Sandro Brusco, Giuseppe Lopomo & Leslie M. Marx, *The 'Google Effect' in the FCC's 700 MHz Auction*, 21 INFO. ECON. & POL'Y 101, 103 (2009); see also Petition to Condition Grant, Application of Cellco P'ship d/b/a Verizon Wireless for 700 MHz C Block Spectrum Licenses, No. AUC-73 (FCC May 2, 2008) [hereinafter Google Petition].

53. Google Petition, *supra* note 52, at 3, 8.

54. Lasar, *supra* note 11.

55. Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, 22 FCC Rcd. 15,289, 15,403–04, para. 313 (2007) (second report & order).

56. Lasar, *supra* note 11.

57. Matthew Tonner, Note, *Tethering Applications and Open Internet Rules for the Mobile Broadband: Lessons from the FCC-Verizon Settlement*, 35 HASTINGS COMM. & ENT. L.J. 471, 481 (2013).

a result, Free Press, a media-reform organization, “filed an administrative complaint against Verizon on June 6, 2011, alleging that Google [which runs the Android app store] was acting at [Verizon’s] request.”⁵⁸ A few months later, the FCC decided to delve into the issue further by “issu[ing] a letter of inquiry to Verizon on October 12, 2011.”⁵⁹

Over the next ten months, the FCC investigated the removal of these applications.⁶⁰ The investigation revealed that “Verizon requested that Google remove 11 apps from its Android Marketplace.”⁶¹ And then, on July 31, 2012, the FCC issued a press release notifying the public that Verizon had agreed to pay \$1.25 million to put an end to the investigation.⁶² Along with the \$1.25 million payment, Verizon agreed to notify the app store operators that tethering applications would now be allowed on its network.⁶³ Additionally, Verizon agreed to implement a “compliance plan,”⁶⁴ which required that

- employees [would] receive training on compliance with the C Block rules;
- future communications with application store operators regarding the availability of applications to Verizon Wireless customers [would] be reviewed in advance by legal counsel; and
- Verizon [would] report any instances of noncompliance with the rule at issue that might occur during the two-year term of the plan.⁶⁵

Last, and perhaps most importantly, the FCC’s press release contained a statement by FCC Chairman Julius Genachowski: “Today’s action demonstrates that compliance with FCC obligations is not optional. The open device and application obligations were core conditions when Verizon purchased the C-block spectrum.”⁶⁶

Now that the groundwork has been laid for the C-Block rules, this Note will examine whether Verizon’s certification process violates the 2008 C-Block agreement between the FCC and Verizon Wireless.

58. *Id.*

59. *Id.* at 482.

60. *Id.* at 483; Mikey Campbell, *Verizon To End Tethering App Blockage Following \$1.25M FCC Settlement*, APPLEINSIDER (July 31, 2012, 6:46 PM), http://appleinsider.com/articles/12/07/31/verizon_to_end_tethering_app_blockage_following_125m_fcc_settlement.

61. Campbell, *supra* note 60.

62. Press Release, FCC, Verizon Wireless To Pay \$1.25 Million To Settle Investigation into Blocking of Consumers’ Access to Certain Mobile Broadband Applications (July 31, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-315501A1.pdf.

63. *Id.* (“Verizon . . . has committed to notifying the application store operator that it no longer objects to the availability of the tethering applications to C-Block network customers in the operator’s online market.”).

64. *Id.*

65. *Id.*

66. *Id.*

II. DOES MR. JARVIS DESERVE A REMEDY UNDER THE CURRENT C-BLOCK RULES, OR IS VERIZON LAWFULLY PROTECTING ITS NETWORK AND ITS USERS?⁶⁷

As mentioned above, Mr. Jarvis has good reason to be upset with Verizon;⁶⁸ he possessed a working tablet but was unable to activate it on his network of choice. However, based on the letter of the law and overall spirit of the C-Block rules, Verizon's certification process is not a violation of these rules as they are currently written.⁶⁹

A. The Letter and Interpretation of the Law

The first reason why Verizon's certification process does not violate the C-Block rules hinges on the term "reasonably necessary," featured in the relevant section of the Code of Federal Regulations, and what that term tells us about the FCC's intentions.⁷⁰ As discussed above, the FCC allowed a licensee to block a device if it did not comply with published technical standards reasonably necessary for third parties to access the network without causing harm.⁷¹ To show why this language is so important, this Note will employ a canon of construction⁷² known as the *new textualist* theory.⁷³ The new textualist theory of interpretation posits that lawmaking bodies have a reason for using certain language and that language is the best indicator of the enacting body's intent.⁷⁴ New textualists often "consult contemporary dictionaries" to interpret the language.⁷⁵

With this theory in mind, let's first look at the term *reasonable*. *Black's Law Dictionary* defines this word to mean "[f]air, proper, or moderate under the circumstances; sensible."⁷⁶ Furthermore, *Black's Law Dictionary* says the word *necessary* implies something "[t]hat is needed for some purpose or reason."⁷⁷ Combining the two definitions and applying the textualist theory in this context, it follows that the FCC intended the term *reasonably necessary* to mean a certification process that is "needed for some purpose" (to allow third parties to access the licensee's network without causing harm), but only if it is "proper . . . under the

67. See 47 C.F.R. § 27.16(b) (2013); see also Parrish, *supra* note 2 (quoting a public statement made by Verizon, which argued that "Verizon's certification process . . . is a straightforward way to ensure that devices attached to the Verizon Wireless network do not harm the network or other users").

68. See *supra* text accompanying note 1.

69. See Kellex, *supra* note 13 (arguing that the Internet made this a bigger deal than it really was and that the story ended when Verizon justified the delay by explaining its certification process).

70. See 47 C.F.R. § 27.16(b)(1).

71. *Id.*

72. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010) ("The 'canons of construction' are a set of background norms and conventions that are widely used by courts when interpreting statutes.").

73. See *id.* at 348.

74. See *id.*

75. *Id.*

76. BLACK'S LAW DICTIONARY 1456 (10th ed. 2014).

77. *Id.* at 1192.

circumstances [or] sensible” for the licensee to do so. This textual analysis serves as substantive evidence that the FCC set an extremely low bar when establishing this requirement, because the FCC virtually leaves it to the licensee to establish what is proper or sensible.⁷⁸ Therefore, if questioned by the FCC about this issue, Verizon would simply point to its public streamlined certification process⁷⁹ and argue that the process is proper and sensible under the circumstances to protect the network and its users. The FCC would have an extremely difficult time rebutting that argument, due to how the law is written.⁸⁰

Second, the FCC has taken a case-by-case approach to determining what constitutes “reasonable network management,”⁸¹ which is virtually synonymous with the “reasonably necessary” standard pioneered in the C-Block rules.⁸² The definition of reasonable network management came to the forefront in 2008, when the FCC found that Comcast Corporation’s (“Comcast”) blocking of certain peer-to-peer connections violated “federal policies that protect the vibrant and open nature of the Internet.”⁸³ The FCC had just recently concluded an investigation of Comcast’s practice of “selectively block[ing] specific types of connections known as peer-to-peer connections.”⁸⁴ In defense of these allegations, Comcast argued that its blocking of the applications constituted reasonable network management.⁸⁵ The FCC rejected Comcast’s defense, holding that Comcast’s practices were

ill-tailored to serve [the] goal [of fighting network congestion]: they affect customers who are using little bandwidth simply because they are using a disfavored application; they are not employed only during times of the day when congestion is prevalent; the company’s equipment does

78. See, e.g., Karl Bode, *700 MHz: Devil in the Details*, DSLREPORTS.COM (Aug. 15, 2007, 3:05 PM), <http://www.dslreports.com/shownews/700Mhz-Devil-In-the-Details-86657> (quoting law professor Susan Crawford, who said these provisions contained “substantial limitations,” with the licensee being able to block devices in the name of “reasonable network management and protection”); Ryan Whitwam, *Verizon Pleads Incompetence, Skirts Illegality by Refusing To Activate Nexus 7 on Its LTE Network*, EXTREMETECH (Sept. 17, 2013, 4:24 PM), <http://www.extremetech.com/mobile/166763-verizon-pleads-incompetence-skirts-illegality-by-refusing-to-activate-nexus-7-on-its-lte-network> (arguing that the C-Block rules have a “reasonable network security” provision, and all Verizon needs to do to avoid punishment is claim the Nexus 7 is a security risk).

79. See VERIZON WIRELESS, *supra* note 15.

80. See Bode, *supra* note 78.

81. Scott Cleland, *Takeaways from FCC Decision on Reasonable Network Management*, PRECURSOR BLOG (Aug. 1, 2008, 3:20 PM), <http://www.precursorblog.com/?q=content/takeaways-fcc-decision-reasonable-network-management> (“What is ‘reasonable’ depends entirely on the unique facts of any given case, network, or company . . .”).

82. See Susan Crawford, *Why Block C Matters*, PUB. KNOWLEDGE (Mar. 21, 2008), <https://www.publicknowledge.org/news-blog/blogs/why-block-c-matters> (“Verizon will be able to lock and block devices . . . as long as they can show that their actions are related to ‘reasonable network management and protection . . .’”).

83. Press Release, FCC, Commission Orders Comcast To End Discriminatory Network Management Practices (Aug. 1, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284286A1.pdf.

84. *Id.*

85. *Id.*

not target only those neighborhoods suffering from congestion; and a customer may use an extraordinary amount of bandwidth during periods of network congestion and will be totally unaffected so long as he does not utilize an application disfavored by Comcast.⁸⁶

This extended quote from the FCC's press release is included to illustrate the fact that a company must do something *very* wrong to violate the reasonable network management requirement. It is difficult to argue that the FCC's interpretation of this requirement sets anything but an extremely low bar.⁸⁷

It should be noted that Comcast later appealed this FCC decision; the case reached the United States Court of Appeals for the District of Columbia Circuit.⁸⁸ The D.C. Circuit held that the Commission did not have the power to "regulate an Internet service provider's network management practices" through its ancillary authority under the Communications Act of 1934.⁸⁹ However, the fact that the FCC did not have jurisdiction in that particular case does not affect the Commission's interpretation of reasonable network management. Therefore, based on its prior interpretation, it is unlikely that the FCC would find Verizon, taking some additional months to certify a device, in violation of reasonable network management.⁹⁰

Having applied a textualist-theory approach to specific language in the regulations, and having examined the FCC's prior interpretation of reasonable network management, this Note concludes it is unlikely that the FCC would find Verizon's certification process in violation of the actual letter of the law.

B. *The Spirit of the Agreement*

Mr. Jarvis not only contended that Verizon was violating the letter of the law; he also contended its certification process was violating the "spirit" of the law.⁹¹ To analyze whether this argument has merit, the canons of construction suggest applying the *intentionalist* theory.⁹² This theory employs a "[c]areful study of the legislative process,"⁹³ often viewing "extrinsic legislative sources as legitimate sources of authority."⁹⁴ Looking at extrinsic evidence to the actual C-Block rules, it is clear that the FCC meant to give the C-Block licensees ample wiggle room. In fact, there was an underlying notion consistently reinforced by the FCC's actions and words: freedom.⁹⁵

86. *Id.*

87. See Crawford, *supra* note 82 ("We've already seen how loosely 'reasonable network management' has been interpreted in the Comcast fracas.").

88. Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

89. *Id.* at 644.

90. See Jon Brodtkin, *Verizon Blocks Nexus 7 and Will Probably Get Away with It*, ARS TECHNICA (Sept. 20, 2013, 1:43 PM), <http://arstechnica.com/tech-policy/2013/09/verizon-blocks-nexus-7-and-will-probably-get-away-with-it/>.

91. Jeff Jarvis, *I Just Received a Letter from Verizon's VP and Associate General Counsel*, GOOGLE PLUS (Sept. 19, 2013), <https://plus.google.com/+JeffJarvis/posts/VUsUHmYFqqZ>.

92. See Scott, *supra* note 72, at 348.

93. *Id.*

94. *Id.*

95. See Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, 22 FCC Rcd.

The first piece of evidence for this conclusion is the FCC's recognition of the risks these rules could impose upon wireless companies.⁹⁶ In its *Second Report and Order*, following its proclamation that it would enforce open-access rules, the FCC took time to note "the risks network operators face in protecting against harmful devices."⁹⁷ The Commission went on to clarify that, as a result of these risks, it would allow wireless providers to "use their own certification standards and processes,"⁹⁸ saying it was "reasonable for [a licensee] to maintain network control features that permit dynamic management of network operations . . . and to restrict use of the network to devices compatible with these network control features."⁹⁹ This spirit of freedom demonstrates that the FCC intended¹⁰⁰ to give C-Block licensees ample liberty in defining their own certification processes. Thus, it is highly unlikely that the FCC would find Verizon's process to be outside of this intended freedom.¹⁰¹

The second piece of supporting evidence from the FCC's *Second Report and Order* is derived from the fact that the Commission looked at the C Block as an experiment for these types of rules.¹⁰² The FCC confessed that it believed these requirements had a positive net public-interest benefit, but if the reserve price was not met, that failure would "provide sufficient evidence to conclude that [it had] weighed the public-interest balance incorrectly . . . indicat[ing] inherent problems with operating a wireless system under this type of open platform regime."¹⁰³ Further driving this point home, the FCC—in its justification for limiting these rules to the C-Block spectrum—stated that it could not "rule out the possibility that such . . . requirement[s] may have unanticipated drawbacks."¹⁰⁴ The fact that the FCC virtually stated that this was an experiment furthers the underlying notion expressed above: the FCC intended to give the C-Block winners freedom under these open-access rules.¹⁰⁵

The final piece of supporting evidence for this notion of freedom is the FCC's repeated reference to establishing a balance with these open-access requirements.¹⁰⁶ The FCC proclaimed it was attempting to establish a "balanced spectrum policy that recognizes that, in certain instances, it may be necessary to vary the regulation of

15,289, 15,371, para. 223 (2007) (second report & order) (The FCC is "mindful of the risks network operators face" and leaving the wireless companies the freedom to "use their own certification standards and processes.").

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See Scott, *supra* note 72, at 348 ("[I]ntentionalists view extrinsic legislative sources as legitimate sources of authority, if only as evidence of legislative *intent* . . ." (emphasis added)).

101. See *supra* notes 76–80 and accompanying text.

102. See Service Rules, 22 FCC Rcd. at 15,403–04, para. 313 (discussing the fact that the FCC would react to the C-Block with lesser restrictions if the auction reserve was not met with the stated open-access rules).

103. *Id.*

104. *Id.* at 15,364, para. 205.

105. Crawford, *supra* note 82 ("[T]hese [open-access] requirements are hedged in by substantial limitations . . .").

106. Service Rules, 22 FCC Rcd. at 15,364, para. 203 ("We are taking a similarly *balanced* approach here by requiring the licenses [of the C-Block] . . . to provide open platforms for devices and applications." (emphasis added)).

spectrum use to achieve certain critical public interest objectives.”¹⁰⁷ Furthermore, the FCC mentioned it was trying to “foster[] greater balance between device manufacturers and wireless service providers.”¹⁰⁸ This notion of balance is prevalent throughout the FCC’s discussion of imposing these open-access requirements.¹⁰⁹ Therefore—much like the FCC’s recognition of the risks facing wireless providers¹¹⁰—the FCC’s goal of striking a balance among wireless providers, device manufacturers, and the American public shows (1) that the FCC wanted to give some wiggle room to the wireless providers and (2) that the certification process falls within the breadth of that wiggle room.¹¹¹

Taking the analysis of both the letter of the law and the spirit of the agreement, it is highly unlikely that the FCC would find Verizon’s certification process in violation of the C-Block rules. However, this conclusion does not end the debate.

III. RECENT FCC DECISIONS, POLICY CONSIDERATIONS, AND FUTURE IMPLICATIONS SHOULD PRECLUDE VERIZON’S LENGTHY CERTIFICATION PROCESS

Verizon’s certification process may not violate the original C-Block rules or the original spirit of the agreement, but there are numerous reasons why the FCC needs to take a stand on this issue. Mr. Jarvis and consumers everywhere deserve to have an FCC that is not afraid to defend the rights of consumers. This Part will show that the FCC’s 2012 Consent Decree, policy considerations, and future economic implications require the FCC to stand up to Verizon Wireless.

A. The Shift in “Spirit” Caused by Language in the FCC’s Consent Decree

As discussed in Part I.C of this Note, the FCC issued a Consent Decree in July 2012, punishing Verizon for blocking tethering apps and “enforcing the pro-consumer open access obligations of the C Block rules.”¹¹² The FCC, by issuing this Consent Decree, changed the spirit of the C-Block rules.¹¹³

The language used in the FCC’s press release, detailing the different aspects of the agreement, supports this notion.¹¹⁴ Not only did FCC Chairman Julius Genachowski explicitly say that “compliance with [these] obligations is not optional,” the press release went on to say that Verizon “shall not deny, limit, or restrict the ability of [its] customers to use the devices and applications of their choice . . .” subject to *narrow* exceptions.”¹¹⁵ The phrase “narrow exceptions” set an entirely

107. *Id.* at 15,364, para. 202.

108. *Id.* at 15,363, para. 201.

109. *See id.* at 15,363–69, paras. 201–18.

110. *See supra* notes 96–99 and accompanying text.

111. *See* Bode, *supra* note 78; Crawford, *supra* note 82.

112. Press Release, FCC, *supra* note 62.

113. *See id.*; *see also* Ryan Whitwam, *How Everyone Benefits from Verizon’s FCC-Mandated Free Tethering*, EXTREMETECH (Aug. 2, 2012, 9:11 AM), <http://www.extremetech.com/electronics/133810-how-everyone-benefits-from-verizons-fcc-mandated-free-tethering> (implying that the FCC was prepared and willing to bolster its enforcement of these rules).

114. *See* Press Release, FCC, *supra* note 62.

115. *Id.* (emphasis added).

different tone than the term “reasonable network management.”¹¹⁶ This piece of language signified a shift in the FCC’s thinking regarding this term. Reasonable network management had officially been placed under an umbrella labeled “narrow exceptions.” Verizon’s lengthy certification process will have a much more difficult time passing as a narrow exception, as opposed to reasonable network management.

There is additional language that signifies a shift in the FCC’s approach on the enforcement of these C-Block rules. As noted by Enforcement Bureau Chief P. Michele Ellison, “This case [is] the first of its kind in enforcing the pro-consumer open access obligations of the C Block rules.”¹¹⁷ The FCC’s punishment under the C-Block rules was a product of opportunity, but it also suggested the FCC was removing itself from the experimental phase of the C-Block rules. As noted in Part II.B of this Note, the FCC admitted that these types of requirements could have unanticipated drawbacks, and as a result, it was taking a tentative, cautious approach to this type of regulation.¹¹⁸ Therefore, it follows that the FCC had concluded that these open-access rules did not have unanticipated drawbacks and that it was ready to begin holding Verizon accountable under these regulations. The Consent Decree sent “a strong message about how much this Commission cares about rules [it] adopt[s] to protect consumers and promote competition.”¹¹⁹ This was the FCC proclaiming a new (and stronger) commitment to the enforcement of these rules.¹²⁰ As then-Congressman Henry A. Waxman said, “The FCC must continue to remain vigilant in enforcing its rules that protect consumers and promote innovation and competition online.”¹²¹ If the FCC allows Verizon to continue this charade of allowing devices onto its network whenever it deems fit, it will not be protecting consumers or promoting innovation, and it will be contravening the general spirit of the Consent Decree,¹²² as discussed above.

B. FCC’s Established Policies and Verizon’s Violation of Those Policies

In light of the change in spirit caused by the 2012 Consent Decree, there are various public-interest objectives that require the FCC to take a stand on this certification issue:

116. *See supra* notes 82–86 and accompanying text.

117. Press Release, FCC, *supra* note 62.

118. *See supra* Part II.B.

119. Press Release, FCC, Statement of Commissioner Mignon L. Clyburn on Announcement of the Enforcement Bureau Entering into a Consent Decree with Verizon Wireless on Blocking of Access to Tethering Applications (July 31, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-315509A1.pdf.

120. *See id.*

121. Press Release, Rep. Henry A. Waxman, Rep. Waxman Statement on FCC and Verizon Consent Decree on “C Block” Violation (Aug. 1, 2012), *available at* <http://democrats.energycommerce.house.gov/index.php?q=news/rep-waxman-statement-on-fcc-and-verizon-consent-decree-on-c-block-violation>.

122. Jeff Jarvis, *Verizon Responds, and So Do I*, BUZZMACHINE (Sept. 19, 2013), <http://buzzmachine.com/2013/09/19/verizon-responds/> (The certification process “is in direct contravention of the spirit and letter . . . of the . . . FCC consent decree of July 2012 against Verizon demanding openness and consumer choice on the network.”).

(1) competition in the device market, (2) access to broadband networks, (3) innovation and consumer choice in the device market, and (4) public demand.

1. The “Public Interest”

Since its very inception, the public interest has been at the forefront of the FCC’s mind, a catalyst underlying each and every rule passed by the FCC.¹²³ This was evidenced by the fact that the Communications Act of 1934, which created the FCC,¹²⁴ pioneered the notion that the interest of the public was exceptionally important.¹²⁵ The Act went so far as to say, “It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”¹²⁶ This public-interest sentiment was the reason for the creation of the FCC; it was the FCC’s job to promote this general interest, and it remains the FCC’s job to this day.¹²⁷ The Commission, when discussing its decision to implement the open-access rules for the C-Block, said that it believed these open-access rules were in the public interest and would “achieve certain critical public interest objectives.”¹²⁸

2. Verizon’s Certification Process Is Sabotaging Competition and Could Have Tremendous Consequences

Verizon’s most blatant public-interest encroachment, as a result of its certification process, is its flagrant obstruction of competition in the mobile-device market. Competition is a public-interest policy objective that has been important since the beginning of the FCC. As communications scholar Jerry Kang wrote, “Since the beginning of the federal government’s regulation of [the] broadcast spectrum, it has been a basic tenet of the communications policy that ‘there be competition’” in all areas regulated by the FCC.¹²⁹ And while the broadcast spectrum and the wireless spectrum are generally treated differently, the importance of this policy objective was not lost on the FCC when it was determining the rules for the C-Block.¹³⁰ The

123. See STEVEN WALDMAN & WORKING GRP. ON INFO. NEEDS OF CMTYS., *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE* 280 (2011), available at http://www.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

124. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (2012)).

125. See 47 U.S.C. § 157 (2012).

126. 47 U.S.C. § 157(a).

127. WALDMAN & WORKING GRP. ON INFO. NEEDS OF CMTYS., *supra* note 123, at 280–81 (“The Communications Act announced the ‘criterion governing the exercise of the Commission’s licensing power’ using, once again, the phrase ‘public interest, convenience and necessity.’”).

128. Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, 22 FCC Rcd. 15,289, 15,364, para. 202 (2007) (second report & order).

129. JERRY KANG, *COMMUNICATIONS LAW AND POLICY* 452 (4th ed. 2012) (quoting *Mansfield Journal Co. (FM) v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950)).

130. See Service Rules, 22 FCC Rcd. at 15,361, para. 195 (“Although we generally prefer to rely on marketplace forces as the most efficient mechanism for fostering competition, we conclude that the 700 MHz spectrum provides an important opportunity to apply requirements

Commission was concerned about the lack of competition in the mobile-device marketplace, stating, “We have not found, however, that competition in the CMRS [Commercial Mobile Radio Services] marketplace is ensuring that consumers drive handset . . . choices”¹³¹ As a result, the FCC applied competition-stimulating, open-access rules by “removing some of the barriers that . . . handset/device manufacturers face in bringing new products to market [to forge a] greater balance between device manufacturers and wireless service providers.”¹³²

And, for the most part, these open-access rules *have* facilitated greater competition.¹³³ However, Verizon’s certification process substantially hinders this newfound competition. To illustrate this point, consider again the blocking of the Nexus 7, along with another newly released tablet. Verizon, on November 5, 2013, announced that it would be selling its very own tablet.¹³⁴ The tablet was dubbed the Ellipsis 7, was quickly certified on Verizon’s network (presumably because Verizon made it), and was out for sale two short days after its announcement. As if releasing a new tablet at this exact time was not obvious enough, “[t]he Ellipsis 7 has a 7-inch 1280 x 800 pixel in-plane switching LCD screen, which makes it a *direct competitor* with Google’s excellent Nexus 7 tablet.”¹³⁵

This situation serves as a perfect example to show how Verizon’s certification process can be used—and is being used—to restrict competition. “The reason for Verizon’s delay in approving the Nexus 7 is now obvious: the company wants customers to purchase its own tablet rather than Google’s.”¹³⁶ And the most disheartening aspect of this situation is that Verizon is allowed to do this under the current C-Block rules.¹³⁷ There is nothing stopping Verizon from continually delaying the connection and usability of various tablets and smartphones, using its “rigorous certification process” as a justification, and then introducing its own tablet or smartphone around the same time. Consumers will be able to purchase Verizon’s tablet, and it will immediately run on the network, avoiding the headache that Jeff Jarvis was forced to endure with his Nexus 7. The implications of this possibility alone should force the FCC to act. If the FCC continues to allow Verizon to prioritize the connection of its own devices in the future, it could have substantial, crippling effects on competition in the mobile-device market.

for open platforms . . .”).

131. *Id.* at 15,362, para. 200.

132. *Id.* at 15,363, para. 201; *see also* Google Petition, *supra* note 52, at 8.

133. As of January 2015, there are thirty-six smartphones and nineteen tablets for consumers to choose from on Verizon Wireless’s website. *Phones and Devices*, VERIZON WIRELESS, <http://www.verizonwireless.com/wcms/consumer/shop.html>.

134. Dante D’Orazio, *Verizon Announces Its Own 7-Inch Android Tablet, the First Product in the ‘Ellipsis Family,’* VERGE (Nov. 5, 2013, 10:58 AM), <http://www.theverge.com/2013/11/5/5068830/verizon-wireless-branded-ellipsis-7-tablet-announced>.

135. Eric Zeman, *Verizon Intros Low-Cost Ellipsis Android Tablet*, INFORMATIONWEEK (Nov. 5, 2013, 10:32 AM), <http://www.informationweek.com/hardware/handheld/verizon-intros-low-cost-ellipsis-android/240163558> (emphasis added).

136. *Id.*

137. *See supra* Part II.A–B (explaining that the letter of the law and the spirit of the agreement governing the C-Block allow Verizon to employ this type of certification process).

3. Availability of Broadband Services

Another public-interest objective, and one the FCC considered “most critical,”¹³⁸ was the “[r]apid deployment and ubiquitous availability of broadband services across the country.”¹³⁹ This was one of the main reasons that the FCC imposed open-access requirements upon devices, arguing that these technologies are “evolving into multi-media devices capable of surfing the web, sending e-mails,” and various other uses.¹⁴⁰ As a result of this evolution, the FCC found that opening up the playing field for device manufacturers to operate on as many networks as possible accomplished its public-interest objective by providing consumers with “more opportunities to access broadband services both at home and on the go.”¹⁴¹

This is a commendable (and important) objective; however, Verizon’s lengthy certification process is clearly at odds with this objective. Referring back to Mr. Jarvis’s situation, he purchased the Nexus 7 soon after it was released and took it to a Verizon store to have it activated.¹⁴² Mr. Jarvis, a member of the public, had the hope and expectation that he would be able to use Google’s newest tablet to access the broadband service being offered by Verizon, but Verizon’s certification process prohibited him from doing so—despite the fact that the Nexus 7 did function on the network. Considering that the Nexus 7 was the “eighth-best-selling tablet on Amazon”¹⁴³ in November 2013 and that Verizon Wireless had 144.8 million customers as of September 2012,¹⁴⁴ it is fairly reasonable to infer that there were (conservatively) thousands of others in the same situation as Mr. Jarvis. Verizon’s certification process effectively prevents members of the public from accessing broadband services through their selected devices. And if the FCC continues to allow this type of certification process, more and more consumers will be deprived of access in similar situations, essentially discounting the “critical policy objective[]”¹⁴⁵ pioneered by the FCC.

4. Innovation and Consumer Choice

Another public-interest objective the FCC was attempting to accomplish revolved around innovation and consumer choice.¹⁴⁶ The FCC stated, “[W]e believe that it is appropriate to take a measured step to encourage additional innovation and consumer

138. Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, 22 FCC Rcd. 15,289, 15,362, para. 196 (2007) (second report & order).

139. *Id.*

140. *Id.* at 15,362, para. 197.

141. *Id.*

142. *See supra* text accompanying note 2.

143. Ashraf Eassa, *Why Isn't Google's New Nexus 7 Outselling Its Predecessor*, MOTLEY FOOL (Nov. 11, 2013), <http://www.fool.com/investing/general/2013/11/11/why-isnt-googles-new-nexus-7-outselling-its-predec.aspx>.

144. *Verizon Communications Company Statistics*, STAT. BRAIN (Sept. 10, 2012), <http://www.statisticbrain.com/verizon-communications-company-statistics/>.

145. Service Rules, 22 FCC Rcd. at 15,362, para 196.

146. *See id.* at 15,363, para. 201.

choice at this critical stage in the evolution of wireless broadband services”¹⁴⁷ The open-access rules were developed to remove certain barriers so device manufacturers would be more willing to innovate, knowing their devices could be placed on various open networks, thereby increasing the number of choices for consumers.¹⁴⁸ While both innovation and consumer choice have increased since the enactment of these C-Block rules—evidenced by the exponential growth in tablet sales¹⁴⁹—Verizon’s certification process continues to restrict both consumer choice and innovation.

First, in terms of consumer choice, we return to Mr. Jarvis’s situation—serving as an anecdote for many going through similar problems—to give a very practical example of how Verizon’s certification process is restricting that choice. Mr. Jarvis selected the Nexus 7 as his device of choice, taking advantage of the innovation and freedom encouraged by the open-access rules.¹⁵⁰ However, as a result of the certification process, Mr. Jarvis was unable to obtain a SIM card from Verizon to attach the tablet to its network.¹⁵¹ Verizon’s policy directly undermines consumer choice. Verizon customers everywhere are exercising their freedom of commercial choice, but if the FCC continues to allow Verizon to postpone device certification for months at a time, this consumer freedom will remain limited. In the words of Google, the process is “eviscerating the consumer benefits of the [open-access] condition.”¹⁵²

This constriction of consumer choice also hinders innovation. Barbara van Schewick, in her book *Internet Architecture and Innovation*, discusses the need for consumer choice to promote innovation.¹⁵³ While van Schewick mainly discusses this need for innovation in the mobile-application market, all of her points readily apply to devices as well. In a related white paper, van Schewick notes, “[I]t is impossible to predict what future successful [devices] will be.”¹⁵⁴ She goes on to say that “enabling users to choose the [devices] they prefer is at the heart of the mechanism that enables innovation under uncertainty to be successful.”¹⁵⁵ In essence, giving the public the power to choose which devices they want to use aids in device innovation. Device manufacturers are able to look at the results of the market, identify the products that the public likes the most, and use this data to come up with even more innovative products in the future.¹⁵⁶

147. *Id.*

148. *Id.*

149. Christopher Mims, *250 Million Tablets Will Be Sold in 2013*, QUARTZ (May 20, 2013), <http://qz.com/86532/explosive-tablets-sales-will-overtake-pcs-in-1-to-2-years/> (projecting that the number of tablets sold in 2013 would increase by 63.9% from 2012).

150. See Jeff Jarvis, *The Verizon Saga Continues*, BUZZMACHINE (Nov. 6, 2013), <http://buzzmachine.com/2013/11/06/the-verizon-saga-continues/>.

151. See Jarvis, *supra* note 122.

152. Google Petition, *supra* note 52, at 7.

153. BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION* 9 (2010).

154. BARBARA VAN SCHEWICK, *NETWORK NEUTRALITY—WHAT A NON-DISCRIMINATION RULE SHOULD LOOK LIKE* 4 n.6 (2010), available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/121410stanford.pdf>.

155. *Id.*; see also Tonner, *supra* note 57, at 489.

156. See Tonner, *supra* note 57, at 489 (arguing that allowing for consumer choice puts consumers “in a position to determine which [devices] provided the most value,” which aids in the innovation of future products).

Verizon's lengthy certification process is constraining consumer choice; consequently, it is also hindering innovation in the device market. Looking at the case of the Nexus 7, consumers everywhere discovered that the tablet was unable to run on the Verizon network and began shying away from it.¹⁵⁷ Therefore, Google received skewed results from the public market and could not accurately analyze what the public thought of its newest tablet. Insufficient market data limited the company's ability to innovate in the future. As Skype predicted in its petition to the FCC, this type of restrictive certification process "creates an innovation bottleneck, as equipment manufacturers are forced to design equipment based on what carriers will allow [or certify], not necessarily what consumers want and the state-of-the-art will permit."¹⁵⁸

Additionally, Verizon's certification process is restricting innovation by "foster[ing] uncertainty and delay, rather than innovation and investment."¹⁵⁹ Former FCC Commissioner Michael J. Copps summed up the problem perfectly while describing the way restrictive processes, like Verizon's certification process, can hinder innovation by invoking uncertainty:

Let's look at it from an inventor's perspective. His or her job is to come up with the idea, go out and attract venture capital funding for it, and hopefully bring that innovation to consumers. Before they devote years of their lives, and ask investors to devote huge sums of money to their dream . . . [t]hey need to know that their innovation won't be prevented from getting to market Inventors and creators need to know, up-front, that they have the right to innovate without going on bended knee to seek permission from a few who have amassed too much control in their own hands.¹⁶⁰

Former Commissioner Copps believes that inventors need to know their hard work will pay off, instead of being stymied or hindered by wireless companies after putting in countless hours to create a product.¹⁶¹ If inventors have this worry, they will be less likely to innovate; in this way, Verizon's certification process is hindering innovation. Device manufacturers around the world will look at the Nexus 7 as an example, recognizing that their hard work in creating a device could easily be halted for months while Verizon takes its sweet time certifying the device under the guise of reasonable network management. Verizon's process casts a shadow of uncertainty over device manufacturers, which is precisely what the FCC was attempting to abrogate with these rules.¹⁶² As Mr. Jarvis aptly stated in another complaint to the FCC, allowing "Verizon to hide behind its claim of a right to certify

157. I was unable to find concrete statistics to support this notion. However, in my opinion, it is a safe assumption that consumers figuring out the tablet doesn't run on a certain network (especially Verizon customers) would result in them avoiding that tablet and looking elsewhere.

158. Skype Petition, *supra* note 35, at 13.

159. Google Petition, *supra* note 52, at 7.

160. *Broadband Network Management Practices*, En Banc Hearing Before the FCC (2008) (statement of Michael J. Copps, Commissioner, FCC), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281625A1.pdf.

161. *See id.*

162. *See id.*

only brings needless confusion to the Commission's rules and rulings about open networks."¹⁶³ Unless the FCC's stated commitment to innovation and consumer choice was an empty promise, these policies require the Commission to forbid Verizon from employing its existing certification process.

5. For the Sake of Public Interest, This Is What the Public Wants

"Gathering and analyzing comments from the public is an important part of the Federal Communications Commission's rulemaking process. The FCC considers the public's input when developing rules and policies."¹⁶⁴ Given the FCC's express interest in public comment, it is troubling that the Commission has not thus far responded to the outcry from consumers like Jarvis.¹⁶⁵

Aside from Mr. Jarvis's various formal complaints, there is a large contingent of consumers who do not agree with Verizon's process and want to see a change. A BuzzMachine (blog) user had the same questions as Mr. Jarvis, writing, "If LTE devices designed to work with [Verizon Wireless's] network are built using a published specification, what possible testing is necessary?"¹⁶⁶ Another user on the website CNET voiced the same concern: "Verizon agreed when they leased the spectrum that it would be open (as they have no legal choice). There is no reason for this certification if the [LTE specification] is followed, and by doing this Verizon is violating the terms of the agreement"¹⁶⁷ Another user went so far as characterizing the certification process as a front to cover malicious motives, using the certification process to nitpick and find ways to keep other devices off of its network.¹⁶⁸ There are numerous comments across the Internet urging Mr. Jarvis to continue this fight, recognizing that change is needed.¹⁶⁹

Hundreds of additional comments—similar to the ones expressed above—could be used to further illustrate this point, but these four sufficiently signify that the public wants Verizon to change its practices. If public comments truly are "an important part of the [FCC's] rulemaking process,"¹⁷⁰ then the Commission needs to take note of the public outcry concerning this certification process and make a change: public interest demands it.

IV. PROPOSAL FOR A RETROACTIVE CERTIFICATION PROCESS

There is no denying that the FCC's open-access rules have done an immense amount of good, helping to provide consumers with more devices and applications

163. Jarvis, *supra* note 150.

164. FCC, CONSUMER GUIDE: HOW TO COMMENT 1 (2014), available at <http://transition.fcc.gov/cgb/consumerfacts/howtocomment.pdf>.

165. *See id.*

166. Christiaan Conover, Comment to Jarvis, *supra* note 122.

167. jdnoonan1972, Comment to Whitney, *supra* note 16.

168. Johmama, Comment to Whitney, *supra* note 16.

169. *See, e.g.*, Witold Witkowski, Comment to Jarvis, *supra* note 150 ("Keep the pressure on[,] Jeff. They responded, so they are starting to feel heat.").

170. FCC, *supra* note 164, at 1.

than ever before.¹⁷¹ However, the FCC, from the beginning, openly admitted that these rules were experimental in nature;¹⁷² the Commission was hoping to learn lessons along the way and would adapt its enforcement of the rules accordingly.¹⁷³ The FCC's punishment of Verizon for the blockage of tethering apps under the Consent Decree of 2012 was "the first of its kind in enforcing the pro-consumer open access obligations of the C Block rules."¹⁷⁴ It was the FCC's first step in adapting its enforcement of these rules, and it is time for the Commission to take another important step.

The FCC should amend the current C-Block rules to continue this adaptation of enforcement and to advance the policies discussed in this Note. The Commission should continue to allow Verizon to create and conduct its own certification process, but that certification process must be retroactive, as opposed to prophylactic.¹⁷⁵ The FCC must require Verizon to publish the technical standards for devices attempting to operate on the wireless company's network, as required by section 27.16(b)(1) of the current C-Block rules.¹⁷⁶ Device manufacturers would then be required to provide written justification to show that their device complies with the wireless company's published technical standards. An independent body within the FCC must be established to review the device manufacturer's justification prior to the device being released. At the same time, the device manufacturer must provide Verizon with a testing device that the wireless company can then run through its self-defined certification process.

Upon release of the device, purchasers of the tablet or smartphone would be allowed to connect to the network by obtaining a SIM card from Verizon. In the event a device is found to bring harm to the network (either through consumer use or the certification process), Verizon would be required to provide an explanation of the harm to the FCC's independent body and the general public—preferably through a press release. The FCC would then allow Verizon to temporarily deactivate the SIM cards within the problem-causing devices. Verizon would then be given a reasonable amount of time to correct the problem or, if the problem is unable to be corrected, deem that the device can no longer run on the network. Should Verizon conclude that the device can no longer run on the network, it would provide the FCC with an in-depth analysis of the problem, along with a substantive justification as to why it cannot be remedied.

This proposal reinforces the shift in spirit caused by the 2012 Consent Decree and protects the policy objectives that the C-Block rules were seeking to promote. It once again sends a message to Verizon that these rules are not to be taken lightly and that the FCC will continue to do everything in its power to protect consumer rights. Furthermore, this approach provides a well-balanced—but consumer friendly—

171. *See supra* text accompanying note 133.

172. *See supra* text accompanying note 118.

173. *See* Press Release, FCC, *supra* note 62 (adapting its enforcement of the C-Block rules by finding Verizon's blockage of tethering apps in violation of the rules).

174. *Id.*

175. Luke Olson, Comment to Jarvis, *supra* note 91 ("The default stance for Verizon should be allowing all LTE devices and blocking the disruptive ones[,] NOT blocking everything except the devices that have gone through certification.").

176. 47 C.F.R. § 27.16(b)(1) (2013) ("Insofar as such use would not be compliant with published technical standards . . .").

compromise between the Commission and the wireless company. This proposal allows the FCC to better promote competition, innovation, and access to broadband networks, while also giving consumers the freedom they desire—being able to choose whichever device and network they prefer. Additionally, this proposal considers and is sympathetic toward “the risks network operators face in protecting against harmful devices”¹⁷⁷ by allowing Verizon to continue to define its own certification process, making the device manufacturers provide justification that their devices are in compliance, and allowing the wireless company to deactivate devices that prove harmful. Verizon is empowered to protect its network and its users without compromising the proconsumer rights furthered by the open-access rules.

CONCLUSION

The enactment of the C-Block open-access rules was a substantial step in furthering various public-interest policy objectives, giving consumers more rights in the mobile-device market than ever before. However, Verizon’s delay in certifying the Nexus 7 signifies that, while the C-Block rules were a substantial step, the FCC needs to continue to adapt its enforcement to promote these policy objectives more effectively. If the Commission refuses to act in this situation, Verizon’s certification process will continue to undermine the objectives the FCC was attempting to promote with these rules.

As the FCC said when discussing its policy goals, “[T]he emphasis must be first and foremost on the interest, the convenience, and the necessity of the . . . public, and not on the interest, convenience, or necessity of the individual [wireless company].”¹⁷⁸ Amending the rules to use a retroactive certification process is the perfect way to show a true commitment to this sentiment: it places the public interest above the wireless company’s interest, but it does so without taking away Verizon’s right to protect its network.

177. Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, 22 FCC Rcd. 15,289, 15,371, para. 223 (2007) (second report & order).

178. 2002 Biennial Regulatory Review, 18 FCC Rcd. 13,620, 13,641 (2003) (alterations added and in original) (quoting FCC’s predecessor, the Federal Radio Commission).