

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

In the Matter of)
)
Skype Communication S.A.R.L.) RM-11361
)
Petition to Confirm a Consumer’s Right to)
Use Internet Communications Software)
and Attach Devices to Wireless Networks.)

**COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

On February 20, 2007, Skype Communication S.A.R.L. (“Skype”) filed the above-captioned Petition, asking the Federal Communications Commission’s (“FCC” or “Commission”) to:

make unmistakably clear that *Carterfone* will be enforced in the wireless industry, to initiate a proceeding to evaluate wireless carrier practices in light of *Carterfone*, and to create an industry-led mechanism to ensure the openness of wireless networks.¹

Enforcing *Carterfone*² for wireless carriers would allow “consumers to attach any device to the network as long as it did not harm the network.”³ Skype correctly notes that *Carterfone* “led to an explosion of innovation in the market for consumer premises equipment (CPE).”⁴ Likewise, Skype says:

¹ Petition at ii.

² *Use of the Carterfone Device in Message Toll Service*, 13 F.C.C.2d 420, 424-425 1968) (“*Carterfone*”).

³ Petition at 5-6.

⁴ Id. at 6.

[t]hat same principle, applied to Internet applications and other wireless devices, would liberate software innovation and free equipment manufacturers from unreasonable control by carriers, enabling them to incorporate a variety of features in handsets.⁵

The National Association of State Utility Consumer Advocates (“NASUCA”)⁶ supports Skype’s Petition, and submits these comments in response to the Commission’s Public Notices seeking comment.⁷

The wireless industry in the United States requires, as far as customers know, that customers use only CPE provided by the customer’s carrier.⁸ Such CPE can be used on the carrier’s network and no others; neither can the customer “bring his own phone” and use it on the carrier’s network -- unless of course the phone originally came from that carrier. NASUCA submits that at this point it should be up to the wireless carriers to justify this restrictive practice.

For most of the history of the telephone, consumers were required to use only the incumbent local exchange carrier’s (“ILEC’s”) telephones. That changed with *Carterfone*. As Skype notes, *Carterfone* led to an explosion in the CPE market. This

⁵ Id.

⁶ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

⁷ Public Notice, “Consumer & Governmental Affairs Bureau Reference Information Center Petition For Rulemakings Filed,” Report No. 2807 (CGB rel. Feb. 28, 2007); see also DA 07-1318 (rel. March 15, 2007).

⁸ This is very different from the standard in most of Europe and Asia, where Subscriber Identity Module (“SIM”) cards are transferable among phones. See Petition at 17.

seismic change was an early part of the seemingly inevitable movement to a competitive telecommunications environment. The wireless industry's "locking" of cellphones is a reversion to the era before *Carterfone*.

It will certainly be argued that *Carterfone* arose in a monopolistic environment, in stark contrast to wireless, which was ostensibly competitive at the outset, somehow justifying cellphone locking.⁹ But the wireless market, like many other markets in telecom, is becoming more consolidated, not more competitive.¹⁰ And practices that might have made sense when wireless was an upstart may no longer make sense today, when there are more wireless telephones in the United States than wired phones.¹¹

Likewise, it will certainly be argued that consumers benefit from the wireless carriers' practices, which have in fact led to an explosion for CPE in the wireless industry.¹² A benefit that essentially results from a lack of customer choice is to some extent illusory; one can only imagine the greater explosion of CPE that will come from opening the cellphone lock.

The practice of cellphone locking is similar to other wireless company practices that limit customer choice. These include the use of early termination fees ("ETFs"), which lock consumers in to one-year or more typically two-year contracts, and the

⁹ See <http://www.techliberation.com/archives/042060.php>.

¹⁰ See Petition at 21-22.

¹¹ According to CTIA -- The Wireless Organization®, as of April 25, 2007, there were almost 236 million wireless subscribers in the U.S. See <http://www.ctia.org/> (accessed April 25, 2007). The FCC's latest (January 2007) edition of the *Local Telephone Competition Report* shows 172 million wirelines in the U.S. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf.

¹² Even so, it has been noted that "the cellular phones widely available in the United States are just a small fraction of the phones available in the world." Tim Wu, "Wireless Net Neutrality: Cellular Carterfone and Consumer Choice in Mobile Broadband," New America Foundation Wireless Future Program Working Paper #17 (February 2007) ("*Wireless Net Neutrality*") at 7, available at http://www.newamerica.net/publications/policy/wireless_net_neutrality.

industry's unwillingness to provide equal access for long-distance calling, which forces the consumer to use the wireless carrier for long distance service.¹³ Again, it can be argued that consumers have benefited from these practices, but consumers also need to be able to choose other benefits if they want.

Customer choice is key to the "broad customer rights under Section 201(b) and 202(a) of the Act."¹⁴ Those rights, as they pertain to the use of CPE, saw their first major affirmation in *Hush-a-Phone*,¹⁵ which allowed customers to use "a cup-like device of the same name, which snaps on to a telephone instrument and makes for privacy of conversation, office quiet and a quiet telephone circuit."¹⁶ Today, it seems incredible that the ILECs even attempted to prohibit the use of Hush-a-Phones.

Carterfone, in its turn, involved a device that allowed customers on wireline services to be connected to a mobile radio station.¹⁷ The Commission rejected the ILECs' attempt to prevent the use of the Carterfone, finding that:

the tariff is unreasonable in that it prohibits the use of interconnecting devices which do not adversely affect the telephone system. See *Hush-A-Phone Corp. v. U.S.*, 99 U.S. App. D.C. 190, 193, 238 F. 2d 266, 269 (D.C. Cir., 1956), holding that a tariff prohibition of a customer supplied "foreign attachment" was "an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." The principle of

¹³ The wireless companies' software restrictions also act to deny customers the ability to use voice over Internet protocol ("VoIP") services, like Skype's, for their long-distance calling needs.

¹⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC2d 384, 440 (1980); *modified on recon.*, 84 FCC2d 50 (1980); *further modified*, 88 FCC2d 512 (1981); *aff'd sub nom.*, *Computer and Communications Industry Ass'n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert denied*, 461 U.S. 938 (1983).

¹⁵ *Hush-a-Phone v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

¹⁶ *Id.* at 267.

¹⁷ *Carterfone*, 13 F.C.C.2d at 420.

Hush-A-Phone is directly applicable here, there being no material distinction between a foreign attachment such as the Hush-A-Phone and an interconnection device such as the Carterfone, so far as the present problem is concerned. Even if not compelled by the Hush-A-Phone decision, our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others. A tariff which prevents this is unreasonable; it is also unduly discriminatory when, as here, the telephone company's own interconnecting equipment is approved for use.¹⁸

It does not appear that there has been any argument that unlocked phones would harm the wireless network.¹⁹

The Commission has always allowed bundling of wireless CPE and services.²⁰

The Commission said that bundling produced consumer benefits.²¹ But bundling was allowed with a major condition:

[W]e will adopt our initial proposal and allow cellular CPE and cellular service to be offered on a bundled basis, *provided that the service is also offered separately at a nondiscriminatory price.* This policy will ensure that facilities-based carriers who provide cellular CPE and cellular service on a packaged basis will continue to be required to offer cellular service to agents, resellers and other customers at a nondiscriminatory rate. We wish to emphasize that our responsibility is to assure that the public interest, including maintaining a level playing field and fostering competition, maximizes benefits to subscribers.²²

¹⁸ Id. at 423.

¹⁹ See <http://www.ctia.org/media/press/body.cfm/prid/1669>.

²⁰ *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Services*, CC Docket No. 91-34, Report and Order, FCC No. 92-207, 7 FCC Rcd 4028 (1992) (“*Wireless CPE Bundling Order*”).

²¹ Id. at 4030-4031.

²² Id. at 4032 (emphasis added; footnotes omitted).

It does not appear that cellular service today is *offered* separately at a non-discriminatory price. Certainly, most consumers do not know about such offers, even if the service is available. The common assumption is that the consumer is stuck with the phones made available by the carrier.

Actually (as is typical in telecommunications), the matter is somewhat more complicated. In the United States, we have two different standards for wireless service. There is the Global System for Mobile Communications (“GSM”), which is “the world’s most popular standard.”²³ GSM is used by AT&T Wireless and T-Mobile.²⁴ GSM uses SIM cards, which can allow the phone to be used on a different network “simply by plugging in new SIM cards.”²⁵ Yet “[m]ost, if not all, of the American GSM phones sold by carriers are locked, disabling the SIM system.”²⁶

The cellphones using the Code Division Multiple Access (“CDMA”) system -- needed for Verizon Wireless and Sprint/Nextel services -- have identifying characteristics that carriers can use to block service.²⁷ Verizon Wireless -- the largest wireless carrier in the United States -- blocks all cellphones that are not sold by Verizon Wireless itself.²⁸ Sprint, by contrast, does not block its service.²⁹ But it is not at all clear that consumers

²³ *Wireless Net Neutrality* at 8, n.§.

²⁴ *Id.* at 8.

²⁵ *Id.* at 9.

²⁶ *Id.*

²⁷ *Id.* at 8.

²⁸ *Id.*

²⁹ *Id.*

know that this one of the four major carriers will allow use of any CDMA phone; Sprint does not advertise that fact.³⁰

In the *Wireless CPE Bundling Order*, the Commission stated, “[T]here is no evidence that cellular carriers refuse to provide service to customers that purchase another brand of CPE.”³¹ Such is clearly not the case today. As Skype requests, the Commission must act, not to prohibit bundling of CPE with wireless service, but to prohibit **mandatory** bundling. Clearly, unbundled service is not available, much less at a non-discriminatory price.

If *Carterfone* is applied to wireless CPE, that takes care of only part of the problem. Skype correctly notes that “[i]ncreasingly, consumers are using wireless handsets not only for mobile voice service but for a range of Internet applications that have been customized to run on 3G handsets.”³² Professor Wu’s article provides an extensive discussion on the multitude of limitations wireless carriers place on customers’ ability to use their phones for advanced services.³³ NASUCA agrees with Skype that the Commission should act to prevent practices whereby “carriers are using their considerable influence over handset design and usage to maintain an inextricable tying of

³⁰ See, e.g., http://www1.sprintpcs.com/explore/ueContent.jsp?FOLDER%3C%3Efolder_id=1491973&CURRENT_USER%3C%3EATR_SCID=ECOMM&CURRENT_USER%3C%3EATR_PCode=None&CURRENT_USER%3C%3EATR_cartState=group&scTopic=whySprint.

³¹ *Wireless CPE Bundling Order* at 4030.

³² Petition at 4.

³³ *Wireless Net Neutrality* at 10-19.

applications to their transmission networks and are limiting subscribers' rights to run applications of their choosing."³⁴

It is important to note that, as Skype states:

the marketplace inertia that is keeping carriers from adopting better practices -- e.g., unlocking consumer handsets and making them "portable" -- is closely analogous to the inertia that the Commission recognized when it required wireless local number portability ("LNP"). ... [T]here is a natural impulse on behalf of regulators to assume that the anti-consumer practices of wireless providers will naturally self-correct through ... "maverick" behavior. The fact that no "maverick" has emerged may say more about the business models of the leading four wireless carriers and their reliance upon selling minutes or buckets of minutes than any technological impediment to enhanced innovation and price competition from software-defined services.³⁵

The bottom line is that the Commission must act in this area, as it did in *Carterfone*.

Skype has two suggestions for actions to follow the Commission making it "unmistakably clear that *Carterfone* will be enforced in the wireless industry...."³⁶

NASUCA supports the proposal to open a rulemaking to "examine[] carrier practices with respect to the wireless handset industry and software marketplace."³⁷ The rulemaking should include, as recommended by Skype:

[i]n addition to reexamining the structure of the marketplace... whether carrier practices such as device whitelisting, feature crippling, handset locking, exclusive equipment deals, terms of service limitations, and the lack of open platforms are consistent with the "bedrock consumer protection obligations" of Sections 201 and 202 of the Act and expressed in *Carterfone*.³⁸

³⁴ Petition at 2.

³⁵ Id. at 24-25.

³⁶ Id. at ii.

³⁷ Id. at 29.

³⁸ Id.

NASUCA also supports Skype's proposal for the creation of "a mechanism to establish ... technical standards updated to take into account the unique environment of the mobile Internet."³⁹ NASUCA particularly supports the involvement of consumer groups in this "industry-led forum."⁴⁰

For the reasons set forth in Skype's petition and here, Skype's "Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks" should be granted.

Respectfully submitted,

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³⁹ Id. at 30.

⁴⁰ Id. at 31.