

**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.)

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

Pursuant to the Public Notices in this proceeding,¹ the National Association of State Utility Consumer Advocates (“NASUCA”)² submits these reply comments in response to the comments opposing the Petition filed by Skype Communication S.A.R.L. (“Skype”). The Petition asked 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

¹ 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).

² 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.

carrier practices in light of *Carterfone*, and to create an industry-led mechanism to ensure the openness of wireless networks.³

NASUCA filed comments supporting Skype's Petition. Enforcing *Carterfone*⁴ for wireless carriers would allow "consumers to attach any device to the network as long as it did not harm the network."⁵ Likewise, Skype says:

[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.⁶

Those who oppose Skype's Petition are those who do not benefit from introducing more customer choice and competition into the wireless market. NASUCA does not contend that the market is not competitive, but the opponents apparently think that more customer choice would not be a good thing. They merely extol the wonders of the current market, where cellphones are typically locked, and do not look beyond that.⁷

The opponents include wireless associations,⁸ wireless carriers,⁹ and, not surprisingly, cellphone manufacturers who benefit from the current situation.¹⁰

³ Petition at ii.

⁴ *Use of the Carterfone Device in Message Toll Service*, 13 F.C.C.2d 420, 424-425 (1968) ("*Carterfone*").

⁵ Petition at 5-6.

⁶ *Id.*

⁷ Carriers that assert they do not lock their cellphones say they do not in their comments, but one wonders whether consumers really know about the "non-locked" or unlocked phones.

⁸ CTIA - The Wireless Association® ("*CTIA*"). Given CTIA position as spokesperson for the entire industry, these reply comments principally address the arguments raised by CTIA, which are echoed by the other opponents.

⁹ AT&T Inc. ("*AT&T*"); MetroPCS Communications, Inc. ("*MetroPCS*"); Sprint Nextel Corporation ("*Sprint*"); T-Mobile USA, Inc. ("*T-Mobile*"); United States Cellular Corporation ("*USCC*"); Verizon Wireless ("*VZW*").

¹⁰ LG Electronics Mobilecomm USA ("*LGE*"); Motorola, Inc. ("*Motorola*"); Qualcomm Incorporated ("*Qualcomm*").

Supporters of the Petition, on the other hand, include a variety of consumer representatives¹¹ and those whose markets would be expanded by granting the Petition.¹² As noted at the outset, NASUCA's reply comments will be directed to the unavailing arguments raised by the opponents of the Petition.

CTIA understandably touts the benefits that wireless service has brought to the Nation.¹³ CTIA describes at length, the current level of competition within the wireless industry.¹⁴ Yet one need not question those benefits to support the Skype Petition, which seeks **additional** benefits for consumers.¹⁵ This addresses VZW's doctrinaire argument that only market failure justifies regulation¹⁶; the purpose of applying *Carterfone* to wireless carriers is to improve that imperfect -- not failed -- market.

And CTIA touts the number of handset choices that customers currently have.¹⁷ LGE notes that it "sells handsets through its wireless carrier customers, direct to the consumer (e.g., via its website), and through various retail channels."¹⁸ There are a large number of cellphones on LGE's website,¹⁹ but it is clear that one cannot purchase a phone

¹¹ NASUCA: Consumers Union, Consumer Federation of America and Free Press ("Consumers Union, et al."); American Petroleum Institute.

¹² Consumer Electronics Association, the VON Coalition.

¹³ CTIA Comments, Executive Summary at iv-v.

¹⁴ Id. at 5-19; see also VZW Comments at 6-10. CTIA acknowledges that there are only four national wireless carriers (id. at 5), but then proceeds to list other carriers (CTIA Comments at 5-8), without any indication of which of those carriers compete against each other.

¹⁵ And one need not really be concerned, in this context, about the service quality problems that have dogged the industry.

¹⁶ VZW Comments at i.

¹⁷ CTIA Comments at vi; see also id. at 36-38; see also VZW Comments at 11-15.

¹⁸ LGE Comments at 3.

¹⁹ See <http://us.lge.com/products/category/list/mobile%20phones.jhtml>.

without purchasing the service of a specific carrier. For example, a consumer must have a Verizon Wireless account to purchase LGE's "White Chocolate" phone²⁰ or its VX8600.²¹ An AT&T (i.e., Cingular) account is needed to purchase LGE's CU 400 phone.²² One need not question the number of choices available, however, to support the Skype Petition, which seeks to further increase that customer choice -- including allowing customers to choose to take their handsets with them when they switch carriers.

CTIA says that the Skype Petition would "overturn" bundling, which "has brought consumers incredible benefits over the last 15 years."²³ Again, one need not dispute this to suggest that in the 21st Century, prohibiting **mandatory** bundling of cellphones with cellphone service would lead to additional benefits for consumers.²⁴

CTIA says that Skype "is now asking the FCC to upend a regulatory model that has worked so well to date -- because it does not fit into Skype's business model."²⁵ Applying *Carterfone* to the wireless market alters one small part of the regulatory model that wireless carriers have enjoyed -- a part of the regulatory model that carriers have

²⁰ See http://www.inphonic.com/specialoffer.aspx?cid=31932_33ed745939104190897c9c339268fca8 (accessed May 9, 2007).

²¹ See http://www.inphonic.com/specialoffer.aspx?cid=31932_33ed745939104190897c9c339268fca8 (accessed May 9, 2007).

²² See http://www.inphonic.com/specialoffer.aspx?cid=31932_33ed745939104190897c9c339268fca8 (accessed May 9, 2007).

²³ CTIA Comments at vii; see also *id.* at 3-4, 43-46; see also VZW Comments at 56-60.

²⁴ CTIA also says that granting the Skype Petition will remove carriers' incentives to invest in their networks. *Id.* at 3; see also VZW Comments at 5. CTIA's explanation (CTIA Comments at 24-30) provides absolutely no support for its warning. VZW's explanation, that "by forcing carriers to allow any device and any application to use their network, their incentives to design those network would be completely undermined" (VZW Comments at 5) makes no sense; one would hope that the incentives would be increased if the network had to be more flexible.

²⁵ *Id.* at v.

used to restrict customer choice.²⁶ And CTIA and its members oppose Skype's Petition because it does not fit into the current wireless carriers' business model.

CTIA also asserts that granting Skype's Petition is unnecessary because "U.S. consumers are able to download and use Skype software on wireless devices sold by major wireless carriers..."²⁷ If that is true, why should customers of other wireless carriers not have the same opportunity, and not just limited to Skype?²⁸

CTIA also says that Skype is instituting "the very network security practices it complains of."²⁹ If **that** is true, it certainly is not an argument against applying *Carterfone* to wireless carriers; it may be that Skype needs to be brought in line as well.³⁰ And Skype is clearly not locking customers in to handsets that cannot be used on other carriers' networks.

CTIA says that granting Skype's Petition will "remove many of the practices carriers use to ensure that handsets that operate on their networks are running software that protects the network and consumers' information."³¹ Unfortunately, this sounds much like AT&T's pleas in the '60s that Carterfones would ruin the network, and even a

²⁶ At base, the argument that *Carterfone* should not apply here because *Carterfone* arose from a monopoly environment and the current wireless environment is competitive (id. at 33), would, if taken to its logical conclusion, allow CLECs to adopt mandatory bundling like that used in the wireless industry.

²⁷ Id. at vi; see id. at 20-22.

²⁸ CTIA acknowledges that some carriers place firm limitations on software used on their handsets, "others have maintained a liberal policy allowing customers some flexibility to use the network moderately as they see fit." Id. at 21. Given the industry's practice of requiring two-year contracts, one doubts whether a customer would be able to determine soon enough that "some flexibility" for "moderate" use was inadequate.

²⁹ Id. at vi; see id. at 23-24.

³⁰ As NASUCA notes, NASUCA's support for the Skype Petition was not intended to show support for Skype's -- or any other provider's -- business model.

³¹ Id. at vii; see also VZW Comments at ii.

bit like the earlier warnings that the Hush-a-phone would devastate the network. CTIA, like AT&T before it, simply does not substantiate these warnings.³²

CTIA attempts to argue that wireless service is like wireline party-line service, such that *Carterfone* should not apply.³³ The brevity of the argument is a sign of the lack of weight CTIA assigns to it. Similarly, VZW points to the fact that in *Cellnet*,³⁴ the Sixth Circuit found that *Hush-a-phone*³⁵ did not **require** the FCC to order resale of wireless services.³⁶ This, of course, says little or nothing about whether the Commission should apply *Carterfone* to the wireless industry.³⁷

One argument that CTIA and the other opponents of the Skype Petition fail to address is the substantial economic waste caused by these current practices of the wireless industry. In the current market, the monthly price paid by consumers who enter into cell phone contracts is routinely inflated to recover the cost of “free” or “subsidized” phones. Therefore, “free” or “cheap” phones are never free and not as cheap as they might seem. In cases where a consumer has no need for a new phone, and where phone substitution actually becomes a detriment for the consumer who must reprogram an unwanted new one, the practice of locking the phone to the service provider creates a dead-weight economic loss. Undoubtedly, the large number of fully functional, but

³² See CTIA Comments at 38-43.

³³ Id. at 39-40.

³⁴ *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429 (6th Cir. 1998) (“*Cellnet*”).

³⁵ *Hush-a-Phone v. United States*, 238 F.2d 266 (D.C. Cir. 1956) (“*Hush-a-Phone*”).

³⁶ VZW Comments at 59.

³⁷ VZW raises a litany of concerns that supposedly may cause problems if customers can bring their own devices to wireless service, regarding interference (id. at 33-35), emergency services (id. at 35-37), law enforcement (id. at 37-39), E911 (id. at 39-44) and network reliability (id. at 44-48). These concerns are not sufficient to continue the current practice of allowing carriers to dictate policies on cellphone locking.

orphaned, cell phones also contributes to environmental harm. Skype's proposal would alleviate this unnecessary waste of resources and unnecessary cost to consumers.

A very recent article in *Information Week* crystallizes some of the issues here:

Cellular service providers rule their networks with iron fists, an ongoing source of frustration to millions of their customers. Disabled cell phone features, locked phones that work only on one network, a "walled garden" where Web access is controlled by the carrier--some call it cell phone tyranny. But change is in the airwaves, driven in part by business adoption of smartphones, where this play-by-our-rules approach won't be accepted.³⁸

It might be tempting for the Commission to rely on these trends to correct the situation.

business changes Yet in the meantime, consumers -- especially the residential customers left out of the changes for business-- will continue to suffer from fewer choices.

CONCLUSION

CTIA's characterization of the key issue here highlights the central flaw in its arguments: "Rather than allow consumers to pick and choose the features and service they find most appealing on the open market, Skype seeks to replace **carriers'** and consumers' judgment with regulatory mandate."³⁹ Regardless of Skype's goal, **NASUCA's** goal is to allow consumers to pick and choose the features and service they find most appealing on the open market, rather than just those that **the carriers** -- in their own interest -- choose to make available.

³⁸ Richard Martin, Elena Malykhina, "Cell Service Providers Get A Wake-Up Call From Business Users," *Information Week* (May 12, 2007), <http://www.informationweek.com/story/showArticle.jhtml?articleID=199501260> (accessed May 15, 2007).

³⁹ VZW Comments at 27 (emphasis added).

Respectfully submitted,

/s/ Charles A. Acquard

Charles A. Acquard, Executive Director
NASUCA

8380 Colesville Road, Suite 101

Silver Spring, MD 20910

Phone (301) 589-6313

Fax (301) 589-6380

May 15, 2007