

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

In the Matter of)
)
Skype Communications 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 SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation (“Sprint Nextel”) submits the following reply to the comments filed in the above captioned proceeding. The record before the Federal Communications Commission (“Commission”) establishes that the current wireless handset and wireless carrier markets are highly competitive.¹ None of the comments supporting the Skype Communications S.A.R.L. (“Skype”) *Carterfone Petition*² provide substantive evidence to the contrary. Without evidence of a market failure, there is no basis for replacing the existing dynamic and competitive wireless market with a regulatory regime that would dictate the types of technologies, services, and products that carriers are permitted to offer.

I. THE COMPETITIVE NATURE OF THE WIRELESS MARKET IS LARGELY UNDISPUTED

The overwhelming objective evidence presented to the Commission in this docket demonstrates that the current wireless market is highly competitive. CTIA – The

¹ Although there are threats to this competition unrelated to Skype. See *In the Matter of CMRS Competition*, Sprint Nextel Corporation Comments, WT Docket 07-71 (May 7, 2007).

² Petition to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks, filed February 20, 2007. Consumer and Governmental Affairs Bureau Public Notice issued February 28, 2007 (“*Carterfone Petition*”).

Wireless Association (“CTIA”) sets forth in exhausting detail the dramatic level of current competition.³ As compared to the wireless duopoly that existed at the time the Commission issued its *1992 Bundling Order*,⁴ CTIA notes that:

There are now four carriers that compete nationally for wireless subscribers. Beyond the four nationwide carriers, there are more than five regional carriers and more than 140 carriers that compete in smaller markets.... 98% of all Americans live in counties with four or more wireless competitors.⁵

These facts are confirmed by comments submitted by entities not affiliated with wireless carriers. Freedom Works, for example, notes that “Competition is brisk, prices are declining, and quality is significantly improving – hardly the signs of a non-competitive market.”⁶ Freedom Works does not simply allege that competition exists; it cites significant factual grounds for its position:

The wireless market is the fastest growing segment of the telecommunications sector, with wireless voice subscribers surpassing the wireline voice service. The number of subscribers has increased substantially, as has penetration of the population by wireless providers. Overall the number of subscribers increased from 128.5 million in 2001 to 213 million in 2005. At the same time the percentage of the population served by more than one wireless provider has increased. In 2005, 98 percent of the population had access to four or more providers. Four national providers and numerous regional providers offer service.⁷

Freedom Works also notes that the quality of wireless service has improved dramatically

³ Opposition of CTIA – The Wireless Association® (“CTIA Comments”) at p. 5-8. See also, Comments of AT&T Inc. Opposing Skype Communications’ Petition to Apply *Carterfone* Attachment Regulations to the Wireless Industry (“AT&T Comments”) at p. 1, 5-9; Comments of T-Mobile USA, Inc. (“T-Mobile Comments”) at p. 6-9; Comments of United States Cellular Corporation (“USCC Comments”) at p. 3; Opposition of Qualcomm Incorporated (“Qualcomm Comments”) at p. 2-4; Comments of Verizon Wireless (“Verizon Comments”) at p. 6-11.

⁴ *In the Matter of Bundling Cellular Customer Premises Equipment and Cellular Service*, Report and Order, FCC 92-207, 7 FCC Rcd 4028 (1992) (“*1992 Bundling Order*”).

⁵ CTIA Comments at p. 5-8.

⁶ Comments of Freedom Works at p. 1.

⁷ *Id.* at p. 2.

as well, “a fact that is borne out in customer satisfaction research.”⁸

Supporters of the Skype Petition, on the other hand, either avoid discussion of the current state of wireless competition altogether,⁹ or simply reference the unsupported allegations of the original petition.¹⁰ The *Ad Hoc* Public Interest Spectrum Coalition (“*Ad Hoc* Coalition”), for example, observes helpfully that “While there may be several competitors, there are definite limits to the competition.”¹¹ In support of these alleged “limits” on competition, however, the *Ad Hoc* Coalition merely attaches the same paper referenced in the *Carterfone Petition*.¹² Likewise, the National Association of State Utility Consumer Advocates (“NASUCA”) argues that the wireless industry was “ostensibly competitive at the outset” but that “like many other markets in telecom, is becoming more consolidated, not more competitive.”¹³ NASUCA simply cites the *Carterfone Petition* in support of this comment, and provides no evidence or other frame of reference. Perhaps they cite to no support for their claim because, as discussed in Sprint Nextel’s initial comments, the number of wireless competitors has increased

⁸ *Id.* See also Comments of the Information Technology Industry Council (“ITI Comments”) at p. 6 (“The commission should also be careful not to upset the benefits and innovations that consumers already enjoy in a market for wireless services that is significantly more competitive than the market for wired services.”); Comments of LG Electronics MobileComm USA (“LG Comments”) at p. 1 (“Given the highly competitive nature of today’s wireless handset and services markets, a *Carterfone* policy is not needed.”); Comments of Motorola, Inc. at p. 1. (“the wireless market is vibrantly competitive”).

⁹ Comments of Consumers Union, Consumer Federation of America and Free Press in Support of the Skype Petition (“Consumers Union Comments”).

¹⁰ Comments of the National Association of State Utility Consumer Advocates (“NASUCA Comments”) at p. 3 (“the wireless market, like many other markets in telecom, is becoming more consolidated, not more competitive.”) (Citing p. 21-22 of the *Carterfone Petition*).

¹¹ Comments of the *Ad Hoc* Public Interest Spectrum Coalition (“Ad Hoc Comments”) at p. 8.

¹² Ad Hoc Comments Appendix A. *Compare* Skype Petition at 13, nt. 22, citing *Wireless Net Neutrality: Cellular Carterfone and Consumer Choice in Mobile Broadband*, by Tim Wu, February, 2007 (“Wu Paper”). It is interesting to note that Professor Wu’s paper in turn relies upon anonymous sources which Professor Wu indicates “cannot be disclosed.” Wu Paper at p. 7.

¹³ NASUCA Comments at p. 3 (citing the *Carterfone Petition* at p. 21-22).

substantially in every market within the United States since 1992.¹⁴

Sprint Nextel agrees with the Voice On Net Coalition (“VON Coalition”) that “[a] light touch regulatory policy is particularly appropriate in situations in which the market in question is competitive and in which consumers have a wide array of choices. Said differently, absent a showing of market failure the Commission should not impose economic regulation, particularly on dynamic technologies or markets.”¹⁵ Neither Skype nor any of its supporters have demonstrated a wireless market failure.

II. WIRELESS DEVICES HAVE A DIRECT IMPACT ON WIRELESS NETWORKS

As noted in Sprint Nextel’s opening comments, even sophisticated users frequently do not understand the integrated nature of wireless handsets and wireless networks. While they may understand that wireless networks use different air interfaces, they rarely understand the other technical issues associated with operating wireless handsets on a mobile network. This lack of technical understanding is reflected in the comments of those supporting the *Carterfone Petition*. Thus, API states:

Over and above the lack of interoperability between GSM and CDMA technologies, there is no business or technological requirement that dictates or requires customers to combine wireless service and wireless device procurements.¹⁶

As outlined in Sprint Nextel’s opening comments, however, there are in fact many technological and business reasons why specific handsets are tied to specific wireless networks.¹⁷ Sprint Nextel’s discussion of the technical operation of wireless networks is

¹⁴ Comments of Sprint Nextel Corporation (“Sprint Nextel Comments”) at p. 3.

¹⁵ Comments of the VON Coalition at p. 3.

¹⁶ API Comments at p. 4.

¹⁷ Sprint Nextel Comments at p. 7-15.

confirmed by a number of other commenters. LG Electronics, for example, a large handset manufacturer, sets out several of the factors discussed in Sprint Nextel's

Comments:

Placing wireless devices on carrier networks involves compatibility and RF interference issues not present in the wireline context. Because Skype's proposal fails to account for these concerns, it could, if adopted, impair the quality of wireless service delivered to consumers or prevent proper functioning of such services entirely.¹⁸

Specifically, LG notes that the shared nature of wireless spectrum requires close supervision of the types of handsets used: "[B]ecause wireless devices operate through the transmission of RF energy using a shared, finite spectrum resource, an unauthorized wireless device may cause harm not only to carrier networks but to users of competing networks on adjacent frequencies."¹⁹ Carriers certification requirements include "stringent RF or vocoder requirements, which ensure spectral efficiency on the carrier's network," "remedy security vulnerabilities" and "help to maximize performance characteristics, such as battery life."²⁰

Motorola, Inc. provides a similar discussion of the unique nature of wireless handsets and their interaction with networks:

Unlike traditional wireline service, wireless networks do not utilize a dedicated copper line to the customer's premises. Rather, wireless services are radio spectrum based, posing unique technical challenges that require the careful management of both network components and handset devices being used on wireless networks in order to provide reliable, high quality service to consumers.²¹

Even those comments which support the application of the broadband policy

¹⁸ LG Comments at p. 4.

¹⁹ *Id.* at p. 5.

²⁰ *Id.*

²¹ Comments of Motorola, Inc. at p. 6.

statement to wireless broadband internet access services acknowledge that this would be difficult in the wireless context as a practical matter:

CEA recognizes that there are a number of marketplace restraints and technical issues, including network management that could potentially impact consumers' ability to attach devices of their choice to wireless broadband Internet access services.... For this reason, we believe that it is premature to issue a declaratory ruling in this instance to apply the *Carterphone* [sic] decision to wireless networks.²²

Likewise, the Information Technology Industry Council notes the technical distinctions between wireless and wireline:

ITI ... recognizes that wireless network operators have: (1) technical network management issues that are unique to wireless networks, (2) security requirements, including critical infrastructure protection, and (3) dynamic capacity constraints due to usage levels, available spectrum, and the particular technology being used. For example, the right to attach non-harmful devices to one particular wireless broadband network may necessarily be affected by the different air interface technologies, spectrum bands, and other technical requirements of that particular network.²³

Similarly, the VON Coalition "recognizes that [broadband] consumer rights are affected by the need of carriers to manage and prevent harm to their networks, and that such network management and technological concerns may be very different for wireless networks compared to wireline."²⁴ The VON Coalition goes on to note many of the technical issues raised in Sprint Nextel's initial comments including, "shared spectrum and bandwidth among customers, which make more acute the need for network management" and "E911 and hearing aid compatibility requirements."²⁵

Once again, the supporters of the *Carterfone Petition* fail to provide any evidence

²² Comments of the Consumer Electronics Association at p. 2-3.

²³ ITI Comments at p. 4-5.

²⁴ Comments of the VON Coalition at p. 7.

²⁵ *Id.* at p. 8.

that would refute the technological realities of operating wireless networks. On the contrary, those comments reflect only the most superficial understanding of wireless network operations. Indeed, the Commission should be concerned with the scope of the work being proposed to establish the wireless equivalent of Part 68 rules.²⁶ Based on this record, the Commission has no grounds upon which to pursue the radical restructuring of the wireless industry advocated in Skype's *Carterfone Petition*.

III. THE CONSUMER ADVOCATES' ARGUMENTS ARE LARGELY UNRELATED TO CARTERFONE OR MARKET FAILURE

While four organizations which style themselves as "consumer advocates" filed comments in support of the *Carterfone Petition*,²⁷ it is interesting to note that many of the arguments raised have little to do with the application of *Carterfone* to the wireless industry. Instead, these comments focus on the use of "locks" on carrier sold handsets.²⁸ API argues, for example, that the Commission should "prohibit CMRS licensees from engaging in the unreasonable practice of 'locking' wireless devices."²⁹ Handset locking, however, is neither a violation of the *Carterfone* principles nor evidence of a market failure.

Handset locking is generally implemented when a carrier sells a consumer a handset for use on its own network. There are numerous reasons for locking, only one of

²⁶ The original Part 68 rules required years if not decades to complete and involved numerous orders and appeals. See, e.g., *Part 68 First Order*, 56 F.C.C.2d 593 (1975), *Second Order*, 58 F.C.C.2d 736 (1976), *aff'd North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); *Third Order*, 67 F.C.C.2d 1255 (1978).

²⁷ Consumer Union Comments, Ad Hoc Comments, NASUCA Comments and API Comments (jointly "Consumer Advocates")

²⁸ See NASUCA Comments at p. 3 ("The wireless industry's "locking" of cellphones is a reversion to the era before *Carterfone*."); Consumers Union Comments at p. 2-3 (discussing the locking policies of various companies); API Comments at p. 2.; *Ad Hoc* Comments at p. 3.

²⁹ API Comments at p. 2.

which is the protection of the subsidy invested in the handset. For example, without the lock on handsets, customers could intentionally or unintentionally change the programming and operations of the handset, resulting in improper functioning of the phone, network inefficiencies and poor customer experience.

None of these reasons for locking are a violation of the *Carterfone* principles, however. Instead, these issues go to whether carriers can bundle wireless services and devices. The Commission has already deemed this practice as permissible and an advantage to consumers:

[T]he record supports a finding that the high price of CPE represents the greatest barrier to inducing subscription to cellular service. Thus, as several of the commenters, including the DOJ, have pointed out, bundling is an efficient promotional device which reduces barriers to new customers and which can provide new customers with CPE and cellular service more economically than if it were prohibited.³⁰

API argues that “The extension of *Carterfone* to wireless devices will not prevent carriers from specifying handsets, features and technologies that they choose to subsidize.”³¹ This statement is true, however, only if a carrier is permitted to restrict the use of a subsidized phone to the network which provided the subsidy. Without the ability to lock a handset, carriers would face the potential loss of their subsidy investment. Ultimately, carriers would be forced to abandon the subsidy model. The Skype supporters fail to explain how the elimination of such subsidies would be in the interest of consumers or is consistent with the pro-consumer policy established in the *1992 Bundling Order*. Sprint Nextel invested 1.724 billion dollars in 2006 toward handset

³⁰ *1992 Bundling Order*, at ¶ 19.

³¹ API Comments at p. 2. *See also* Consumer Union Comments at p. 3.

subsidies and Sprint Nextel's customers benefited from that investment.³²

Far from evidence of market failure, handset subsidies are simply one more indicator of the competitive nature of the wireless marketplace. If, as Skype maintains, there were a market failure that allowed carriers to exert control over the handset market, carriers would have no need to provide consumers incentives such as subsidized handsets. Carriers would exploit their market power to impose inflated handset costs on their consumers. Instead, carriers are being forced to risk billions of dollars in handset subsidies every year to win customers away from their competitors. This is evidence of a highly competitive market, not market failure.

Consumers Union argues that wireless carriers are inappropriately attempting to avoid a "commoditization of their services."³³ They suggest that any attempt to offer differentiated services, whether at the device layer, the network technology layer, or the services layer are anti-consumer. Consumers Union fails to explain, however, why the commoditization of wireless services would increase competition or benefit consumers. If wireless carriers are restricted to providing only one technology identical to that provided by all other carriers, it is unclear why there would continue to be four to six facilities based carriers providing service to the majority of the United States.

In the end, the Consumer Advocates are arguing that regulators – rather than the marketplace – should determine what services wireless carriers should be permitted to offer. By eliminating the ability of carriers to deploy unique technologies or specialized services which depend upon integration with the network, these Skype proponents would largely eliminate competition in the most dynamic area of telecommunications. Sprint

³² Sprint Nextel Corporation 10K, March 1, 2007, p. 46.

³³ Consumers Union Comments at p. 12.

Nextel submits that the comments provide no justification for such a radical restructuring of the industry.

CONCLUSION

For all of the above reasons, Sprint Nextel Corporation respectfully requests that the Commission dismiss the Skype *Carterfone Petition* as an unnecessary intervention into competitive markets.

Respectfully submitted,

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