

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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SUBMITTED: MAY 15, 2007

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REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

I. INTRODUCTION AND SUMMARY

Commenters overwhelmingly support CTIA’s position that Skype’s request to impose a *Carterfone* regime on the wireless industry ignores significant technical barriers to implementing such an approach, underestimates the competitiveness of the wireless service and device markets, and should be denied. The regulations that Skype requests would reduce competition, increase prices, degrade service quality, reduce service and device options, decrease investment, and decrease innovation.

Commenters supporting Skype’s proposal fail to overcome a fulsome record that implementing *Carterfone* for wireless is technically infeasible and unwise. Dissociating wireless service and handsets would degrade network performance, increase interference, impair compliance with important social obligations and undermine network and device security. From a consumer perspective, such an approach would result in degraded service quality, less innovation, and increased costs.

Skype supporters also fail to demonstrate that a *Carterfone* approach is necessary in light of vigorous competition in the wireless service and device markets. The original *Carterfone*

policy was adopted to introduce competition and innovation to the wireline end user equipment market. The *CPE Bundling Order* was adopted at a time when there was considerably *less*, not more, mobile wireless competition than today – a fact overlooked by some commenters. The wireless market is now vibrantly competitive and delivers a steady stream of innovative handsets, features and applications. Indeed, a chorus of economists agrees that a free market approach, rather than the intrusive regulation Skype proposes, is most likely to promote continued investment and innovation in the wireless space. The Skype Petition, by contrast, would result in less competition, innovation, and investment. Accordingly, the Skype Petition should be denied.

II. NO COMMENTER REBUTS THE OVERWHELMING RECORD THAT TECHNICAL DIFFERENCES BETWEEN WIRELESS AND WIRELINE NETWORKS RENDER A *CARTERPHONE* APPROACH INAPPROPRIATE FOR THE WIRELESS INDUSTRY.

CTIA and the vast majority of commenters produced a record that details the critical technical differences between wireless and wireline networks that render a *Carterfone* approach inappropriate for the wireless industry.¹ The record unmistakably shows that exposing wireless networks to untested mobile handsets and applications would degrade network performance, create harmful interference, prevent carrier compliance with important social policy obligations,

¹ See Opposition of CTIA – The Wireless Association®, RM-11361, at 38-43 (Apr. 30, 2007)(“Opposition Comments”); see also CTIA Opposition, Exhibit C – Wireless Handsets Are Part of the Network by Charles L. Jackson, at 41-43 (Apr. 27, 2007) (“Jackson Technical Statement”); Comments of AT&T Inc., RM-11361, at 41-44 (Apr. 30, 2007)(“AT&T Comments”); Declaration in Support of Comments of AT&T Inc., RM-11361 (Apr. 26, 2007)(“AT&T Declaration”); Comments of LG Electronics Mobilecomm USA, RM-11361, at 4-6 (Apr. 30, 2007)(“LG Comments”); Comments of Motorola, Inc., RM-11361, at 6-12 (Apr. 30, 2007); Opposition of QUALCOMM, Inc., RM-11361, at 12 (Apr. 30, 2007)(“QUALCOMM Opposition”); Comments of Sprint Nextel, Inc., RM-11361, at 7-15 (Apr. 30, 2007)(“Sprint Nextel Comments”); Comments of T-Mobile USA, Inc., RM-11361, at 19-25 (Apr. 30, 2007)(“T-Mobile Comments”); Comments of Verizon Wireless, RM-11361, at 30-31 (Apr. 30, 2007)(“Verizon Wireless Comments”).

and open networks to greater security threats. The few supporters in favor of the Skype proposal minimize and ignore the technical differences between wireline and wireless networks.²

Accordingly, the Commission should dismiss Skype's ill-conceived Petition.

First, because wireless communications involve use of a shared spectrum resource, dissociating handsets from the network could harm network performance.³ Wireless carriers are subject to potential interference from, and into, adjacent and nearby spectrum-based services. Wireline networks are composed of dedicated pipes "built to uniform transmission standards."⁴ In this environment, non-performing equipment introduced by a consumer under the *Carterfone* regime degrades only the consumer's own service rather the service of other users. By contrast, wireless is a shared medium that consists of interdependent base and mobile stations that share available radio spectrum simultaneously.⁵ Allowing users to experiment with less efficient and untested alternative handsets would undoubtedly decrease the quality of service – meaning more dropped and blocked calls – as well as the efficiency of spectrum re-use, increasing the required

² See Comments of Ad Hoc Public Interest Spectrum Coalition, RM-11361 (Apr. 30, 2007) ("PISC Comments"); Comments of the American Petroleum Institute, RM-11361 (Apr. 30, 2007); Comments of NASUCA, RM-11361 (Apr. 30, 2007) ("NASUCA Comments").

³ See CTIA Opposition at 38; AT&T Comments at 42 (stating that "[a]ll communications networks that rely on shared resources face important issues of congestion and resource constraints, and these problems are particularly acute in the wireless industry"); Jackson Technical Statement at 41-42; Motorola Comments at 8; Sprint-Nextel Comments at 19-20, 24; T-Mobile Comments at 19.

⁴ See Verizon Wireless Comments at 30 (noting that "uniform transmission standards obviate concerns about compatibility with heterogeneous end-user interface technologies"); CTIA Opposition at 38; LG Comments at 4; Motorola Comments at 6; Sprint-Nextel Comments at 19-20, 24; T-Mobile Comments at 19-20.

⁵ See AT&T Comments at 42; LG Comments at 5; Sprint-Nextel Comments at 19-20; T-Mobile Comments at 20; Verizon Wireless Comments at 30.

number of cell sites, and thus the cost, to serve the same number of users.⁶ Moreover, a requirement that carriers support all applications would result in “network abuse and spectrum hogging” by heavy-bandwidth users, thereby limiting the quality of service on the network overall.⁷

In this complex shared environment, a carrier must manage resources based upon the spectral efficiency of handsets, the number of users accessing a particular cell site, and the bandwidth requirements of applications running on users’ handsets.⁸ As commenters explained, carrier management and certification of phones must be permitted because it ensures that network elements work in tandem with handsets to provide the highest quality voice and data services.⁹ Moreover, in order to maximize spectral efficiency, carriers must be able to manage the use of applications that require large amounts of bandwidth or near-constant connections to the network, such as streaming media and peer-to-peer (“P2P”) services.¹⁰ Skype’s proposal

⁶ See CTIA Opposition at 38; AT&T Comments at 44; Jackson Technical Statement at 41; Motorola Comments at 9.

⁷ See T-Mobile Comments at 23; *see also* Verizon Wireless Comments, Exhibit C – Technical Statement in Response to Skype Petition by Brian Higgins, at 23 (Apr. 27, 2007) (“Higgins Technical Statement”); Motorola Comments at 11; QUALCOMM Opposition at 12; Sprint-Nextel Comments at 24.

⁸ See CTIA Opposition at 39; AT&T Comments at 43 (explaining how wireless “broadband subscribers lack incentives to safeguard the integrity, security, and efficient use of the wireless network as a whole”); Higgins Technical Statement at 19; LG Comments at 5-6; Motorola Comments at 6; T-Mobile Comments at 21; Verizon Wireless Comments at 31.

⁹ See AT&T Comments at 58-62 (detailing AT&T’s “crucial” handset and application certification process which ensures “high quality end-to-end service”); Higgins Technical Statement at 3-6; LG Comments at 5; Motorola Comments at 9 (stating that “wireless carriers carefully choose their preferred vendors through experience with their products and extensive field testing before supporting any wireless device on their network[s]”).

¹⁰ See CTIA Opposition at 40; Higgins Technical Statement at 22-23; Motorola Comments at 11 (stating that “because of limited spectrum and limited backhaul and call processing

would undermine the ability of wireless carriers to manage the shared spectrum environment and erode network efficiency.

Second, the use of unauthorized mobile devices on wireless networks would give rise to interference problems that have no parallel in the wired world.¹¹ Wireless carriers purchase licensed spectrum with the expectation of exclusive control. In a shared spectrum environment, the impacts of electromagnetic interference from a non-functioning or poorly manufactured handset will be felt at two levels: interference to the user's own network, and interference to the adjacent and surrounding networks of other licensees. As a result, FCC certification requirements are not a complete solution. This issue was illustrated throughout the 800 MHz public safety interference proceeding. It is also illustrated by the ongoing problem of illegally operated repeaters and jammers.¹² As one commenter noted, FCC certification of unauthorized devices would not resolve interference problems because such devices would not be "tested for performance or interoperability on carriers' networks."¹³ Dissociation of handsets from wireless networks would also increase the difficulty of identifying sources of interference and taking corrective measures. As Verizon Wireless notes, even in today's closely managed interference environment, a single piece of rogue equipment can be difficult to identify, and can create

resources, wireless providers must carefully manage how and when data can be transferred"); T-Mobile Comments at 22 (explaining how peer-to-peer applications "can seriously harm the quality of service enjoyed by others, even bringing down a wireless broadband network").

¹¹ See LG Comments at 5; Motorola Comments at 9 (stating that a "device with high levels of out-of-band emissions will cause interference to adjacent users"); Verizon Wireless Comments at 30.

¹² See CTIA Comments at 41-42.

¹³ See LG Comments at 5.

significant, disruptive interference problems.¹⁴ Forcing carriers to accept any device on to their networks could lead to interference levels in the cellular, PCS and AWS bands, which are licensed on an exclusive-use basis, comparable to the interference environments experienced in the unlicensed bands.¹⁵

Third, implementing *Carterfone* in the wireless environment would prevent carriers from complying with important social policy obligations.¹⁶ Network-based E-911 location systems, for example, require precise calculations of field strength and signal timing in the network to accurately estimate the location of subscribers, a task that would become more difficult with unknown and uncontrolled devices operating on wireless networks.¹⁷ Similarly, carriers would find it difficult to provide call identifying information and call content for law enforcement authorities, as required under CALEA.¹⁸ Carriers would be unable to guarantee that a certain number of handsets meet hearing aid compatibility requirements.¹⁹ And the ability of carriers to provide and ensure emergency alert warning systems, RF subscriber absorption rate levels, and local number portability would also be undercut by the Skype proposal.²⁰ Accordingly, more than simply disrupting routine wireless communications, the forced introduction of untested and

¹⁴ Verizon Wireless Comments at 34-35.

¹⁵ *See id.* at 34; LG Comments at 5-6.

¹⁶ *See* CTIA Opposition at 42-43; Motorola Comments at 10; QUALCOMM Opposition at 14; Sprint-Nextel Comments at 21-22; Verizon Wireless Comments at 35-44.

¹⁷ *See* CTIA Opposition at 42-43; Motorola Comments at 10; Sprint-Nextel Comments at 20-21; Verizon Wireless Comments at 39-44.

¹⁸ *See* Verizon Wireless Comments at 37-39.

¹⁹ *See* QUALCOMM Opposition at 14; Sprint-Nextel Comments at 21-22; Verizon Wireless Comments at 36.

²⁰ *See* QUALCOMM Opposition at 14; Verizon Wireless Comments at 36-37.

unapproved devices on to carrier networks would undercut key Commission policy objectives and be detrimental to the public interest.

Fourth, imposing a *Carterfone* regime on the wireless industry would harm the security interests of wireless users.²¹ In its Technical Statement, Verizon Wireless noted that the two major categories of security breaches include attacks caused by malware downloaded onto mobile devices and external attacks through localized wireless capabilities like WiFi and Bluetooth.²² So far, these security breaches have been minimized by careful traffic and application management and rigorous review of device and feature security in the carrier handset certification process.²³ Skype's proposal would strip carriers of the ability to perform these critical network and device security functions, jeopardizing consumers' quality of service, if not the continuity of service. Were Skype's proposal to be implemented, security breaches inevitably would increase, as would the possibility of massive service disruptions over entire networks.²⁴

Some commenters refuse to acknowledge the consensus in the wireless industry that technical roadblocks make Skype's *Carterfone* proposal unworkable. In its comments, the Ad Hoc Public Interest Spectrum Coalition ("PISC") asserts that non-discrimination requirements that allow consumers to attach equipment of their choice to networks will "ensure that applications on those consumer-chosen devices function properly over carrier-managed

²¹ See AT&T Comments at 61-63; Higgins Technical Statement at 10-16; LG Comments at 5; Motorola Comments at 10-11; QUALCOMM Opposition at 13; T-Mobile Comments at 22.

²² See Higgins Technical Statement at 12.

²³ See AT&T Comments at 60-63; Higgins Technical Statement at 12-16; LG Comments at 5.

²⁴ See AT&T Comments at 61-63; Higgins Technical Statement at 15-16; LG Comments at 5; QUALCOMM Opposition at 13.

networks.”²⁵ As commenters repeatedly explained, wireless services “utilize different technologies and operate in multiple frequency bands,”²⁶ and also address public safety obligations like E-911, CALEA, and HAC in different ways. Because of these differences, a handset must be compatible with a specific wireless carrier’s network in order to operate on that network. Although a non-discrimination requirement might provide consumers open access to networks, by no means would it ensure that a user’s device actually operates properly.

Another supporter of Skype’s proposal suggests that users be able to operate handsets that are interoperable with multiple broadband networks and that users be empowered to switch networks on the user’s command.²⁷ This suggestion goes beyond dissociating the handset from the wireless network and dissociates the customer from the network, reducing wireless carriers to wholesale access providers. Neither API nor any other commenter identifies a market failure or other policy rationale justifying such a regulatory intrusion to radically restructure the functioning and competitive wireless industry. The proposal appears to be pure whimsy and the Commission should not take it seriously. Indeed, proposals that require technology agnostic, completely interoperable networks and devices that support all air-interfaces and operate across all frequency bands would significantly increase consumer costs and would remove the competitive network evolution efforts that have driven wireless to become a viable broadband competitor. The Commission is not forcing technology homogenization on other broadband network providers. It certainly should not force technology changes on the newest spectrum-based broadband competitors. As Professor Thomas Hazlett notes, a “forced openness” policy

²⁵ See Ad Hoc Public Interest Spectrum Coalition Comments at 7.

²⁶ See Motorola Comments at 7; see also AT&T Comments at 57-58; LG Comments at 4; Sprint-Nextel Comments at 7-8; T-Mobile Comments at 23-24.

²⁷ See American Petroleum Institute Comments at 7-8.

would hurt consumers by “pre-empt[ing] their opportunity to capture efficiencies gained by adopting one technology to the exclusion of others.”²⁸

III. COMMENTERS OVERWHELMINGLY AGREE THAT THE WIRELESS SERVICE AND HANDSET MARKETS ARE COMPETITIVE, AND THAT THE REGULATORY INTERVENTION PROPOSED BY SKYPE IS NOT NECESSARY.

CTIA established in its comments that the wireless service and handset markets are robustly competitive and that regulatory intervention of the type Skype proposes is both unnecessary and unwise.²⁹ The comments in this proceeding overwhelmingly support CTIA’s position. Commenters provided extensive evidence that both the wireless and handset markets are increasingly competitive and significantly different from the wireline market at the time *Carterfone* was adopted, making intervention unwarranted.

Numerous parties supported CTIA’s view that competition is healthy in the wireless services and handset market, resulting in significant innovation and consumer benefits. Verizon Wireless noted that in the wireless services market “competitive choice has propelled expansion in output and reductions in price,”³⁰ and in the handset market “manufacturers vigorously compete to offer the most innovative and cutting edge products and services to wireless customers.”³¹ LG Electronics showed that new entrants, like Apple, “continue to penetrate the [handset] market.”³² Indeed, as numerous parties noted, the Commission itself has recognized

²⁸ See Verizon Wireless Comments, Exhibit A – Wireless *Carterfone*: An Economic Analysis by Professor Thomas W. Hazlett, at 5 (Apr. 30, 2007)(“Wireless *Carterfone*”).

²⁹ See CTIA Opposition at 5-17, 36-38.

³⁰ See Verizon Wireless Comments at 8.

³¹ *Id.* at 12.

³² See LG Comments at 2.

the vibrant competition in the wireless market.³³ Moreover, parties drew stark contrasts between the competitive environment of the current marketplace and the monopolistic, vertically integrated wireline market of 1968 that led to the adoption of the *Carterfone* principle.³⁴ As AT&T, Inc. wrote, “[w]hereas *Carterfone* was designed to spur competition in a mature, vertically integrated, monopoly environment, the competitive conditions of the wireless industry today are different in every respect.”³⁵

Parties also provided economic analyses showing that Skype’s proposal is unnecessary and actually may have anti-consumer results. Ford, Koutsky, and Spiwak write that a wireless “net neutrality” or *Carterfone* policy is inapplicable to the wireless market and would lead to a commodification of wireless networks.³⁶ The ultimate impact of this commodification would be “increased industry concentration, ... higher prices, and potentially less innovation.”³⁷ Professor Thomas Hazlett notes that “the premises of the *Carterfone* policy – that new rules were required to deal with a rate of return regulated monopoly – are wholly absent in the wireless markets

³³ See Comments of MetroPCS Communications, Inc., RM-11361, 34-35 (Apr. 30, 2007)(“MetroPCS Comments”)(noting the Commission’s findings that 98 percent of U.S. counties are served by three or more wireless providers and citing *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eleventh Report, WT Docket No. 06-17, 21 FCC Rcd 10947 (2006)(“*Eleventh Report*”)); QUALCOMM Opposition at 5-10 (providing an extensive review of the Commission’s findings regarding competition in the *Eleventh Report*); Verizon Wireless Comments at 10 (Apr. 30, 2007); T-Mobile Comments at 11-14; Comments of United States Cellular Corp. RM-11361, at 2-3 (Apr. 30, 2007).

³⁴ See T-Mobile Comments at 6; AT&T Comments at 25; Motorola Comments at 6.

³⁵ See AT&T Comments at 25; Verizon Wireless Comments at 48-53; LG Comments at 2.

³⁶ CTIA Opposition, Exhibit F – Wireless Net Neutrality: From *Carterfone* to Cable Boxes by George S. Ford, Ph.D., Thomas M. Koutsky, J.D., and Lawrence J. Spiwak, J.D. (Apr. 2007) (“Wireless Net Neutrality”).

³⁷ *Id.* at 13.

Skype seeks to apply” and that “absent monopoly and rate-of-return regulation, market incentives best determine, from the standpoint of consumer welfare, what terms and conditions for network access a carrier offers.”³⁸ Notably, Hazlett concludes that “‘Wireless *Carterfone*’ would...re-impose controls shown inferior to competitive market forces in the deregulation of wireless markets.”³⁹ All of these sentiments are echoed by Hahn, Litan, and Singer, who state that “the costs of implementing proposals to promote wireless net neutrality are likely to exceed the benefits”⁴⁰ and that “regulation...could easily do more harm than good if, for example, it blunts technological innovation.”⁴¹

Parties supporting Skype’s proposal, on the other hand, fundamentally misrepresent the state of the wireless marketplace and the potential impact of Skype’s proposal. First, at least one party contends that a *Carterfone* regime that eliminates cellphone bundling and locking/blocking will “lower consumer costs.”⁴² This is completely counter not only to logic, but to the actual practice in the market today. In fact, there is no evidence that wireless *Carterfone* will lead to lower costs. As Hahn, Litan, and Singer show, bundling of equipment with service provides an opportunity for carriers to subsidize handset costs, leading to lower upfront prices for consumers.⁴³ Consumers in the U.S. benefit from and prefer this model⁴⁴ and handset replacement rates are higher in the U.S. than in Europe.⁴⁵

³⁸ Wireless *Carterfone* at 8.

³⁹ *Id.* at 20.

⁴⁰ CTIA Opposition, Exhibit E – The Economics of “Wireless Net Neutrality” By Robert W. Hahn, Robert E. Litan, and Hal J. Singer, at 48 (Apr. 2007) (“Hahn, Litan, and Singer”).

⁴¹ *Id.*

⁴² PISC Comments at 4.

⁴³ Hahn, Litan, and Singer at 23-24.

Second, parties, including NASUCA and Consumers Union, suggest that Skype's proposal will lead to greater innovation and investment.⁴⁶ Yet, every economist on the record disagrees with this proposition. As noted above, Ford, Koutsky, and Spiwak see a potential for less innovation and investment if wireless services are commodified and provide evidence that the light regulatory touch in the United States led to greater competition in the provision of 3G wireless services than in most European countries.⁴⁷ Hahn, Litan, and Singer note that "[g]iven the rapid pace of innovation in the wireless industry, combined with the rapidly decreasing prices, it is hard to imagine that a regulatory elixir could actually improve on the status quo."⁴⁸ Hazlett writes that implementation of Skype's proposal would "disrupt the ability of wireless networks to craft their packages, organizing investments, technologies, infrastructure, equipment, applications, business models, and customer service" and "would render impossible the high degree of economic development that is on display in the wireless marketplace."⁴⁹

Finally, proponents of Skype's petition preposterously contend that the wireless marketplace today is less competitive than it was in 1992, at the time of the *CPE Bundling Order*.⁵⁰ As many commenters rightly recognized, the competitive environment of 1992 was

⁴⁴ See Sprint Nextel Comments at 18 (stating that consumers "overwhelmingly prefer the bundled package offerings of carriers" to purchasing unbundled CPE).

⁴⁵ See Verizon Wireless Comments, Exhibit B – Implications of Skype Petition for Wireless Carriers and Consumers, Mark Loewenstein, at 5 (Apr. 30, 2007).

⁴⁶ NASUCA Comments at 3; Comments of Consumers Union, RM-11361, at 5 (Apr. 30, 2007).

⁴⁷ Wireless Net Neutrality at 14-15.

⁴⁸ Hahn, Litan, and Singer at 48.

⁴⁹ Wireless *Carterfone* at 20-21.

⁵⁰ NASUCA Comments at 3 (suggesting that the wireless industry is becoming more consolidated than it was "at the outset, somehow justifying cellphone locking").

marked by a duopoly, whereas almost all customers today have a choice among three, four, or five national or regional carriers.⁵¹ Ford, Koutsky, and Spiwak note “the United States wireless market has in most cases more competitors than most other industrialized countries, higher usage rates of wireless networks, and significantly lower prices.”⁵² Indeed, in 2006, no wireless carrier in the United States had more than a 26.6% market share.⁵³ To suggest that the wireless market is less competitive today than it was in 1992 is therefore ludicrous.

Given the overwhelming record evidence that Skype’s proposal is unnecessary and potentially harmful to the wireless industry, the Commission should reject Skype’s Petition.

IV. THE COMMISSION NEED NOT ADDRESS WHETHER THE BROADBAND POLICY STATEMENT APPLIES TO WIRELESS.

Skype’s Petition does not raise the question of whether the 2005 Broadband Policy Statement (“BPS”)⁵⁴ applies to the wireless industry, and the Commission need not address it. Some commenters ask the Commission to “clarify” that the BPS applies to wireless services,⁵⁵ suggesting the policy presently is in effect. But it is not at all clear that the BPS currently applies, and the record strongly suggests that its extension to wireless would be a change in Commission policy. Moreover, there is no need for the Commission to address the issue, as it is

⁵¹ Sprint Nextel Comments at 3, 16-20; T-Mobile Comments at 9-17.

⁵² Wireless Net Neutrality at 15.

⁵³ *Id.* at 16, Table 1.

⁵⁴ See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 FCC Rcd 14986 (2005).

⁵⁵ See Comments of VON Coalition, RM-11361 at 6 (Apr. 30, 2007) (“VON Coalition Comments”); Comments of Information Technology Industry Council, RM-11361, at 4 (Apr. 30, 2007) (“ITI Comments”); Comments of Consumer Electronics Association, RM-11361, at 2 (Apr. 30, 2007) (“CEA Comments”).

squarely raised in the currently pending *Broadband Industry Practices Notice of Inquiry* (“NOI”).⁵⁶

While the record that gave rise to the BPS reflects the Commission’s desire to develop multiple and competing broadband platforms, and interest in regulatory consistency, it does not address application of the BPS to wireless. The BPS itself makes no explicit mention of wireless services. In addition, each of the matters and dockets associated with the BPS was directed to telephone or cable-based broadband technologies and were managed by FCC Bureaus charged with regulating cable and telephone services.⁵⁷ In fact, the BPS is based on the broadband principles for consumer connectivity filed with the FCC by the High-Tech Broadband Coalition (“HTBC”) and endorsed by many wireline broadband providers. The HTBC principles were expressly limited to “cable modem and DSL broadband services.”⁵⁸

More importantly, however, no entity has made an adequate showing of why such regulation is necessary. In fact, the Information Technology Industry Council (“ITC”) and the

⁵⁶ *In the Matter of Broadband Industry Practices*, Notice of Inquiry, FCC 07-31 (rel. Apr. 16, 2007) (“*Broadband NOI*”).

⁵⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC (i.e., *Common Carrier Bureau*) Docket No. 02-33; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185; *Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS (i.e., *Cable Services Bureau*) Docket No. 02-52.

⁵⁸ See Letter from High Tech Broadband Coalition (“HTBC”), to Michael K. Powell, Chairman, FCC, CS Docket No. 02-52; GN Docket No. 00-185; CC Docket Nos. 02-33, 95-20 & 98-10 (Sept. 25, 2003), available at http://netcompetition.org/docs/others/htbc_principles.pdf (last visited May 15, 2007); see also Letter from HTBC to Kevin J. Martin, Chairman, FCC, CS Docket No. 02-52; GN Docket No. 00-185; CC Docket Nos. 02-33, 95-20 & 98-10 (Aug. 2, 2005).

VON Coalition – both of whom support applying the BPS to wireless – caution the Commission against adopting any regulations to enforce the BPS.⁵⁹ ITI, in particular, details the many considerations that are unique to wireless networks and require close FCC scrutiny before such regulations are imposed.⁶⁰ CTIA agrees, and thinks those same issues require consideration before extending the BPS, much less new regulation, to the wireless platform. As discussed above, there are a host of differences between the wireless and wireline environments, including, but not limited to – heterogeneous technologies and standards, capacity constraints arising from use of a shared spectrum resource, interference issues both into, and from, multiple sources, and security concerns. The Commission should consider each of these fundamental technological differences in deciding whether extension of the BPS to wireless is desirable or necessary.

However, there is no need for the Commission to conduct that analysis at this time. The recently released *Broadband Industry Practices NOI* provides the appropriate forum for the Commission to study issues raised by the Skype Petition, including whether and how to apply the BPS to wireless networks.⁶¹ The *NOI* expressly seeks comment on the behavior of all broadband market participants in relation to the BPS, asks for comment on revising the BPS in view of current market conditions, and whether – if at all – the BPS should be applied to wireless broadband.

⁵⁹ See ITI Comments at 2, 6; VON Coalition Comments at 2, 3 (“A light-touch regulatory policy is particularly appropriate [where] the market in question is competitive and ... consumers have a wide array of choices.”).

⁶⁰ See ITI Comments at 4-5 (discussing network management, security, E911, and dynamic capacity issues).

⁶¹ See Verizon Wireless Comments at 63 n.68.

V. SKYPE’S REQUEST FOR A DECLARATORY RULING IS PROCEDURALLY DEFECTIVE.

The declaratory ruling component of Skype’s proposal turns the Administrative Procedure Act (“APA”) on its head. As Verizon Wireless correctly notes, under the APA, a rulemaking is the appropriate procedural vehicle if the Commission is to consider applying *Carterfone* to the wireless industry.⁶² Application of *Carterfone* to wireless is a matter of first impression, not a *grey area* under existing Commission rules. Where the Commission considers imposition of new rules of general applicability – as it did in the tariff investigation that gave rise to *Carterfone* and promulgating the Part 68 rules to implement its new requirements – the APA generally requires a rulemaking.⁶³

Skype’s Petition for Declaratory Ruling begs the question – precisely what rule is being clarified? The main focus of Skype’s Petition is the carrier practice of bundling wireless service and handsets, and offering handsets at a subsidized rate or even for free. But this practice was expressly permitted by the Commission in its 1992 *CPE Bundling Order*.⁶⁴ The relief Skype seeks requires a reversal of this policy, which requires a rulemaking to develop a record on whether such a change is warranted.

⁶² Verizon Wireless Comments at 67.

⁶³ See *Cnty. Television v. Gottfried*, 459 U.S. 498, 511 (1983); see also *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627-28 (5th Cir. 2001); *Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996); see also *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc., For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9138 ¶61, n.216 (2004).

⁶⁴ *In re Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028, ¶1 (1992) (“*CPE Bundling Order*”) (“[W]e are clarifying and modifying our policy to allow cellular CPE and cellular service to be offered on a bundled basis, provided that cellular service is also offered separately on a nondiscriminatory basis.”)

Indeed, even the original *Carterfone* decision and the new obligations it created – the centerpiece of Skype’s petition – arose from a rulemaking proceeding. As CTIA discussed in its opening comments, *Carterfone* involved an investigation of the prohibition on foreign attachments contained in AT&T’s tariffs.⁶⁵ Such a tariff investigation is itself a species of rulemaking proceeding.⁶⁶ The *Carterfone* decision, in turn, led to the promulgation of Part 68 of the Commission’s rules, again, by rulemaking. Given the technical challenges involved in implementing *Carterfone* in the wireless context, and the stark contrast between the competitiveness of today’s wireless market and the monopoly wireline world of 1968, a rulemaking on whether a *Carterfone* approach to wireless is feasible or necessary is far preferable to precipitous Commission action by declaratory ruling.

VI. CONCLUSION

For the foregoing reasons, Skype’s Petition should be denied. The record received in this docket overwhelmingly demonstrates that significant differences between wireline and wireless networks render a *Carterfone* approach for wireless technically infeasible and unwise. Moreover, in light of vigorous competition in the wireless service and handset markets, such an approach is simply unnecessary.

⁶⁵ CTIA Oppositon at 31-32.

⁶⁶ *Beehive Telephone Company, Inc. Beehive Telephone, Inc. Nevada; Tariff F.C.C. No. 1*, Order on Reconsideration, 13 FCC Rcd 11795, 11805-06, ¶23 (1998); *Cincinnati Bell Telephone Company Tariff FCC No. 35*, Memorandum Opinion and Order, 8 FCC 4409, n.55.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marlea Leary, do hereby certify that on this 15th day of May 2007, I caused copies of the foregoing “Reply Comments of CTIA – The Wireless Association®” to be delivered to the following via First Class U.S. mail or email:

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