

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

In the Matter of)	
)	
Implementation of Section 6002(b) of the)	
Omnibus Budget Reconciliation Act of)	
1993)	WT Docket No. 09-66
)	
Annual Report and Analysis of)	
Competitive Market Conditions With)	
Respect to Commercial Mobile Services)	
)	

REPLY COMMENTS OF SKYPE COMMUNICATIONS S.A.R.L.

Skype Communications S.A.R.L. (“Skype”) hereby files these reply comments to counter the inaccurate picture of competition in the wireless marketplace set forth by wireless carriers and to remind the Commission that the market for mobile applications and devices remains imperfectly competitive and closed in critical ways. Skype does not disagree with commenters who argue that there is some amount of access-level competition between wireless providers.¹ However, Skype respectfully submits that we can do better than this minimal amount of competition in wireless.

The Commission can do better by introducing policies that protect new sources of competition and innovation in mobile. The Commission should resist

¹ See Comments of CTIA-The Wireless Association, WT Docket No. 09-66, at 5-8 (June 15, 2009) (“CTIA Comments”); Comments of AT&T Inc., WT Docket No. 09-66, at 17-30 (June 15, 2009) (“AT&T Comments”); Comments of Verizon Wireless, WT Docket No. 09-66, at 1-8 (June 15, 2009) (“Verizon Wireless Comments”).

dumbing-down success when it comes to defining competition in the CMRS marketplace, as wireless incumbents have suggested. Instead the Commission should adopt a “multi-modal” approach to competition policy. In so doing, the Commission would properly ground its analysis on the understanding that a truly competitive wireless marketplace means not only competition among wireless carriers, but also a free, unconstrained marketplace with respect to devices and applications.

I. THE MOBILE APPLICATION AND MOBILE DEVICE MARKETPLACES REMAIN IMPERFECTLY COMPETITIVE

Consumer groups² and smaller wireless carriers³ have explained convincingly the ways in which the wireless market lacks effective competition. A recent letter from Senator Kohl to the Commission and Department of Justice also outlines the areas of concern, including exclusive handset deals.⁴ Even members of the wireless industry itself contend that special access pricing remains a significant burden for all but the top two wireless carriers, AT&T and

² Comments of Consumer Federation of America et al., WT Docket No. 09-66 (June 15, 2009) (“CFA et al. Comments”).

³ See Comments of Sprint Nextel Corp., WT Docket No. 09-66 (June 15, 2009) (“Sprint Nextel Comments”); Comments of Cellular South, Inc., WT Docket No. 09-66 (June 15, 2009) (“Cellular South Comments”); Comments of MetroPCS Communications, Inc., WT Docket No. 09-66, at 2-19 (June 15, 2009) (“MetroPCS Comments”); Comments of Cricket Communications, Inc., WT Docket No. 09-66, at 5-12 (June 15, 2009) (“Cricket Comments”); Comments of The Rural Telecommunications Group, Inc., WT Docket No. 09-66 (June 15, 2009) (“RTG Comments”).

⁴ Letter from Sen. Herb Kohl (D-WI), to Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice and Julius Genchowski, Chairman, FCC, July 6, 2009.

Verizon.⁵ Inadequate roaming requirements also hurt competition by acting as a barrier to entry and growth for competitive and rural wireless carriers.⁶

Skype's concern has long been with the lack of openness in the market for wireless applications and devices, and the resultant harmful effect on competition in the wireless industry. Skype has long advocated the application to wireless broadband networks of the Commission's *Broadband Policy Statement*, with its assurance of application and device openness.⁷ Despite some movement toward the recognition that wireless openness is in the economic self-interest of carriers, wireless broadband networks are still insufficiently open to new sources of competitive supply. Wireless operators continue to deny consumers the right to use their 3G Internet connections for applications such as Skype.⁸

Skype agrees with comments by consumer groups that innovation is stunted when carriers block desirable applications and devices. A recent article in *Forbes* illustrates the way in which innovation is hampered by wireless carrier practices.⁹ At present, developers of mobile software applications cannot develop software that works on all networks, as they would for wireline broadband networks. Instead, if they want to develop an application for a smart

⁵ Sprint Nextel Comments at 3-9; *see also* CFA et al. Comments at 21-23.

⁶ CFA et al. Comments at 28-30; RTG Comments at 10-11; Cellular South Comments at 18-20; MetroPCS Comments at 11-19.

⁷ Skype Communications S.A.R.L., *Petition to Confirm A Consumer's Right To Use Internet Software and Attach Devices to Wireless Networks*, RM-11361 (filed Feb. 20, 2007).

⁸ *See* Ex Parte Letter from Free Press, WC Docket No. 07-52, April 3, 2009, at 1.

⁹ Brian Caulfield, *Why Your Smart Phone Is So Stupid*, July 8, 2009, available at <http://www.forbes.com/2009/07/08/iphone-ericsson-mobile-intelligent-technology-iphone.html>.

phone, software developers have to go through a laborious and obstacle-strewn, carrier-by-carrier process, with no guarantee that their application will be approved in the end. The *Forbes* article provides examples of software applications developers that have been unable to provide innovative products to consumers because of the barriers imposed by the wireless industry.¹⁰

Finally, as Skype's experience with its iPhone and other mobile applications shows, carrier networks and carrier-controlled devices are especially closed with respect to applications that they deem to be competing with their own offerings – even when applications such as Skype are highly valued by wireless network subscribers. (Skype's iPhone application has been downloaded by over 4 million subscribers since its release on March 31, 2009).¹¹ As discussed in more detail below, AT&T's motive apparently rests on the mistaken belief that Skype operates as a direct competitor to services offered by AT&T. Skype does not provide Internet access services, and with respect to voice products, AT&T continues to condition purchase of an iPhone on consumers buying both a voice plan and 3G Internet access. Nonetheless, in a market where as much as 50 percent of carrier revenues derive from "breakage"¹² – overage or underage fees

¹⁰ Caulfield, *supra* note 9 (discussing example of GadgetTrak, an innovative mobile application that worked on devices provided by manufacturers but not on devices provided by carriers because of the disabling of device features and software).

¹¹ Peter Parkes, *Skype for iPhone: 4 Million Downloads (and Happy Birthday, App Store)*, July 11, 2009,

at http://share.skype.com/sites/en/2009/07/skype_for_iphone_4_million.html.

¹² Gail McGovern and Youngme Moon, *Companies and the Customers Who Hate Them*, Harvard Business Review, June 2007, available

at <http://harvardbusiness.org/product/companies-and-the-customers-who-hate->

that result from consumers choosing plans that do not reflect their actual usage – providing consumers with more control over their communications options maximizes consumer benefits. Ultimately, consumers lose and carriers gain, when innovative applications and features are obstructed for anticompetitive reasons.

II. CONSUMERS BENEFIT NOT ONLY FROM SERVICES OFFERED BY WIRELESS CARRIERS, BUT ALSO FROM OPEN ACCESS TO MOBILE APPLICATIONS AND DEVICES

In recent testimony to the Senate, AT&T argued that, because it had subsidized the iPhone and views Skype as a direct competitor, it was justified in blocking Skype's iPhone application from accessing its network.¹³ The Commission cannot accept such reasoning. First, Skype is not a direct competitor to AT&T or other wireless carriers.¹⁴ Through various consumer-facing disclosures and by bridging the gap between desktop and mobile computers, Skype operates as a complement to a user's Internet connection, not a replacement for the access services provided by carriers. In the area of voice – where presumably AT&T perceived an overlap between Skype and AT&T – AT&T's unreasonable assertion that allowing consumers to use the Internet access they have paid for amounts to a subsidy fails to hold up to scrutiny.

Wireless carriers should not be permitted to keep consumers from using

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¹³ *The Consumer Wireless Experience*, Hearing Before the Senate Comm. on Commerce, Science & Transportation, June 17, 2009 (Testimony of Mr. Paul Roth, President, Retail Sales and Services, AT&T Services, Inc.).

¹⁴ Perhaps the best evidence that Skype is not a direct competitor to wireless carriers is the seven-nation partnership that Skype has struck with European carrier "3".

the products and services they have purchased for lawful and nonharmful purposes. Each iPhone user has purchased full-priced access to the Internet. Although AT&T subsidizes the cost of iPhones for certain consumers, iPhone users pay back the subsidy over the course of the contract term (or else pay a prorated early termination fee). In this way, through its rates, AT&T fully recovers the costs of its bundled devices and services tied to that device. The issue then is whether consumers will be able to use the Internet access they have paid for to run a lawful application such as Skype to, for example, lower the cost of international calling from the mobile platform, or whether the Commission will be content with limiting the range of competitive choices available to consumers by permitting carriers to ban Skype from its 3G networks unreasonably.

A marketplace in which wireless carriers block applications they view as competing is not open for applications and devices. In the end, the regulatory structure that the Commission should choose and enforce is one in which the *Broadband Policy Statement* applies to all broadband networks, with due consideration for the network management practices of each network. Under such a regulatory regime, consumers would be allowed to use their mobile broadband connections for any lawful purpose that does not harm the network. In that way, is innovation fostered and competition forwarded.

AT&T's position that it is justified in blocking Skype is indicative of a view of the wireless market in which innovation in the market comes only from

the wireless carriers. As a software developer, Skype understands that carriers must have incentives to build out their networks and offer broadband services to consumers – as Skype would not exist but for broadband connections. However, consumers benefit from an ecosystem in which carriers, device manufacturers, and software applications developers *all* have the incentive to innovate and offer new products and services.

This proceeding presents the Commission with an important opportunity to announce a new foundation of competition policy. It should reject the cramped, inter-modal competition policies of the 1996 Act in favor of a “multi-modal” competition policy where access providers, mobile device manufacturers and applications, such as Skype, collaborate to deliver more innovation and competition for mobile Internet users. It is only when the Commission re-frames its competition policy along these lines will it be able to legitimately describe its policy as one that maximizes consumer benefits. In short, the Commission can do better in the area of wireless competition by applying its *Broadband Policy Statement* to all the ways consumers access the Internet.

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Respectfully submitted,

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