

# Comment on the Proposed Rulemaking Submitted by Skype Communications S.A.R.L.

April 8, 2010

Prepared by Nikki Flores, J.D. candidate at Harvard Law School

## Executive Summary

In light of the D.C. Circuit's recent decision in *Comcast Corporation v. Federal Communications Commission*,<sup>1</sup> the FCC should suspend any action on this proposed rulemaking. The decision casts doubt on the authority of the F.C.C. to regulate in this area without further Congressional authorization and abrogates any binding effect of the 2005 Broadband Policy Statement. The FCC should delay any rulemaking until further Congressional action is taken. At that time, the FCC should undertake an entirely new rulemaking to allow interested parties to make arguments reflective of the new legal landscape.

### I. Agnostic on Policy Outcome

This comment takes no position on the question of whether to extend *Carterfone* principles to the wireless broadband policy context or to allow consumers to use the Internet communications software of their choice. Instead this comment emphasizes that in light of the *Comcast* decision, the FCC can no longer rely on the binding force of the 2005 Broadband Policy Statement. That decision also eliminates any notion that the FCC may have had congressional authorization to regulate in the area of net neutrality.

To reiterate, this comment does not argue against the policy wisdom of the Skype Petition, but notes that the F.C.C. lacks authority to act without further Congressional authorization.

### II. Effect of Comcast Decision on Skype's Proposal

The legal basis of the Skype Petition is undercut by the *Comcast* decision. The Skype Petition advocates two general policy objectives: [1] application of *Carterfone* principles to the wireless context, and [2] protection of consumers' rights to use the Internet communications software of their choice.<sup>2</sup> These are two related but quite distinct policy objectives. The *Comcast* decision significantly weakens Skype's arguments for a rulemaking to apply *Carterfone* principles. The *Comcast* decision also undercuts Skype's arguments for a rulemaking for wireless broadband software neutrality.

The D.C. Circuit's decision in *Comcast* has received significant media attention and has prompted hyperbolic statements of its breadth and impact. While an important case, the holding was specific: The D.C. Circuit held that the Commission could not exercise ancillary jurisdiction in the wireline broadband area due to failure to satisfy step two of the test for jurisdiction stated in *American Library Ass'n v. FCC*.<sup>3</sup> The test is stated as follows: the FCC "may exercise

---

<sup>1</sup> Docket No. 08-1291. April 6, 2010.

<sup>2</sup> Skype Petition 7-9. February 20, 2007.

<sup>3</sup> 406 F.3d 689, 692 (2005).

ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdiction grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."<sup>4</sup> In *Comcast*, the first part of the test was met since Comcast's Internet services is covered under Title I of the Communications Act. Similarly, the wireless broadband Internet services provided by the various wireless carriers subject to the FCC's regulations provide a service covered under Title I of the Communications Act.

But the Order at issue in *Comcast* failed at step two of *American Library* because it was not "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." That same test would apply to the regulations proposed in the Skype Petition, and Skype's proposed regulations would similarly fail. Because the Skype Petition proposes two related but distinct regulations, each is addressed in turn.

#### [1] Application of *Carterfone* principles to the wireless context

The bulk of the Skype Petition focuses on the application of *Carterfone* principles to the wireless broadband context. The Petition argues that:

[T]he Commission has acknowledged wireless consumers' existing *Carterfone* right to attach CPE of their choice when it noted that "current nondiscrimination requirements preclude a cellular carrier from refusing to provide service to a customer on the basis of what CPE the customer owns."<sup>5</sup>

The Skype Petition derives this quote from the *1992 CPE Bundling Order*. There are two difficulties in relying on the *CPE Bundling Order*. First, the order is long overdue for an update; the Skype Petition actually calls for just such an update in policy guidance. Second, the order pertains to wireless telephone services, not to wireless broadband services. Modern-day advanced cellular phones serve two functions: voice communications and broadband Internet access. Although one set of devices serves both functions, these functions are legally distinct.

To bridge the gap between the wireless voice communications contemplated in the *CPE Bundling Order* and wireless broadband networks, the Skype Petition relies on the 2005 Broadband Policy Statement, in which "the Commission has found that *Carterfone*'s basic nondiscrimination principle – as to 'attachment' and applications – applies to wireline broadband services regulated under Title I."<sup>6</sup> The Skype Petition subsequently argues that it is illogical to differentiate between wireless and wireline broadband communications, particularly given that some devices can interoperate between them. The 2005 Broadband Policy Statement is critical to the Skype Petition.

The *Comcast* decision appears to abrogate the 2005 Broadband Policy Statement by ruling that the FCC does not have ancillary jurisdiction to regulate the wireline broadband providers in this

---

<sup>4</sup> *Id.*

<sup>5</sup> Skype Petition 26-27. February 20, 2007.

<sup>6</sup> *Id.* at 27.

manner. Without the Broadband Policy Statement, the Skype Petition fails to explain the extension of the *CPE Bundling Order* to wireless broadband networks.

## [2] Protection of Consumers' Rights to Internet Communications Software Neutrality

The final pages of the Skype Petition call for a mechanism to protect consumers' rights to use the Internet communications software of their choice. The language of the Skype Petition focuses on software, but the ability to use communications software is valueless without the ability to transmit on the network. The practical import of such a regulation would be to require the wireless broadband service providers to not discriminate between the types of transmissions being made from the devices attached to the network.

The ability of the FCC to regulate in this way appears directly foreclosed by *Comcast*. If the FCC lacks jurisdiction to prevent Comcast from interfering with peer-to-peer programs on its network to manage scarce network capacity, the FCC would by extension lack jurisdiction to prevent wireless broadband service providers from preventing the transmission of Skype signals.

### III. Conclusion

For the Skype Petition to have the effect that its author and many supporters desire, both goals stated in the Petition must be met. Even if the FCC had the ability to apply *Carterfone* to the wireless context, the ability to connect devices to the network would not accomplish the overall goal of the Skype Petition: the use of Skype and similar communications programs on wireless broadband networks. Since *Comcast* forecloses the ability of the FCC to mandate such network neutrality, at least without a further legislative authorization, the FCC does not have the authority to deliver what the Skype Petition.

Therefore, this comment requests that the FCC suspend any action on this proposed rulemaking until such time that Congress takes action clarifying the scope of the FCC's jurisdiction in the area of wireline and wireless broadband communications.