

# Cell Phone Users -- Throw off Your Chains!

By Mitchell Lazarus  
703-812-0440  
lazarus@fhhlaw.com

Skype, a voice-over-Internet provider, wants the FCC to break the cell companies' stranglehold over customer handsets, reprising the liberation of wireline customers forty years ago.

## Background

Before 1968, the only way to put an extra phone in your house was to call the local phone company, usually AT&T, which sent a man in a truck to install it. The phone still belonged to the company, which assessed a monthly charge forever. Connecting a phone of your own violated the tariff, and could result in cessation of phone service.

That state of affairs changed abruptly in 1968, when the FCC's *Carterfone* order struck down the relevant tariff provision. AT&T strongly opposed that decision. To let people wire in anything they wanted, said AT&T, could bring down the network. The FCC responded by adopting rules that set technical standards, established a registration procedure, and prohibited unregistered phones.

To see the effects of *Carterfone* today, just stroll through Staples or Best Buy past the wired phones, cordless phones, answering machines, fax machines, headsets, ringers, caller ID boxes, and more. Equally important, *Carterfone* promoted competition that led to high-speed, low-cost modems – essential to the spread of the Internet.

Back now in the present, if you want a new handset for your wireless phone service, Staples and Best Buy probably cannot help. Instead you must go to Sprint, AT&T, Verizon, T-Mobile – your service provider. You pick one of the handsets the provider has chosen to make available. And you put up with the provider's possibly having disabled some of its features. No Wi-Fi, because otherwise you might not sign up for the provider's broadband service. No ability to load VoIP software, because otherwise you might not use a lot of expensive minutes. You must do your banking, music downloads, photo transfer, etc., only through companies the carrier has chosen (and which pay the carrier a percentage). Odds are the handset is "locked" against transfer to a competing provider. And, if you qualify for a discount, that too comes at a price – a required one- or two-year contract, over which you will pay back the discount, and more. To be fair, not all wireless providers impose all of these restrictions. But most providers do impose most of them.

## Skype's Request

Last February Skype petitioned the FCC to apply *Carterfone* principles to the wireless networks. Establish technical standards. Test handsets for compliance. Require the carriers to allow use of any handset that passes. Allow any software, any on-line services.

A few weeks later, Skype recast its request into one potentially even more threatening to the carriers. Skype now wants the FCC to carry over its four principles of broadband Internet regulation to wireless phone service. Those principles are:

1. users should have access to any lawful content;
2. users should be free to choose their applications and services;
3. users should be able to connect any compliant hardware; and

4. users should have the benefits of competition among providers.

Note that item (3) would accomplish much the same result as applying *Carterfone*, while (2) would presumably allow wireless phone users to load and use Skype software, if they choose.

## Opposition

To say that Skype's request touched a nerve among the cell phone carriers would be a serious understatement. The companies' response was immediate and outraged. Their trade association proclaimed: "Skype's self-interested filing contains glaring legal flaws and a complete disregard for the vast consumer benefits provided by the competitive marketplace." The oppositions eventually added up to many hundreds of pages. In all, they made two main kinds of arguments.

First, the carriers insist the Skype request is bad policy. The stunning growth of cell phone use over the past decades, they say, shows the benefits of active competition, and especially the benefits of a largely unregulated environment. The carriers' steady roll-out of new services is evidence that consumers are getting what they want. The discounting of handsets makes new technology more affordable, and so promotes innovation. Besides, say the carriers, uncontrolled handset deployment would threaten not only service quality, but customers' data security as well, as rogue handsets pry out people's call logs and passwords.

The carriers also challenge the *Carterfone* precedent on three grounds: (1) unlike wired phone service in 1968, the wireless phone market today is "vibrantly competitive"; (2) unlike AT&T in 1968, the carriers do not manufacture their own handsets; and (3) unlike telephone lines in 1968, the wireless network relies on shared radio spectrum, so a defective handset could potentially harm service to other subscribers.

Skype disputes the policy arguments. Even if letting carriers control handsets once made sense, it says, the evolution of cell phones into pocket-sized computing platforms has rendered that policy obsolete. And Skype points to numerous instances in which the carriers' vaunted new services and technology come with strings and limitations. While tacitly conceding the *Carterfone* arguments, Skype still aims to accomplish the same ends through application of the Four Principles.

## Prospects

Skype may be closer to its goal than it thinks. In a different proceeding, shortly after Skype's initial request, the FCC issued an order that deregulates wireless broadband Internet access. This was widely expected, as the FCC had already done the same for three competing technologies: cable modem, DSL, and broadband-over-power-line. The FCC did not mention it, but presumably that decision makes the Four Principles applicable to wireless broadband.

The FCC was careful to specify that its deregulatory order excludes "interconnected" service – *i.e.*, cell calls to or from a telephone number. Less clear, however, is the status of a "mixed" service that offers both interconnected calls and broadband Internet access. A wireless carrier that markets broadband services is competing with other broadband providers, and arguably should be made subject to the same regulatory standards, including the Four Principles, when its customers are accessing the Internet. An FCC decision along those lines, although a relatively small step, would give Skype everything it asked for.

The outcome of this dispute may be years away. Precedent at the FCC favors Skype, as "consumer choice" has long been the agency watchword. Indeed, wireless phone service is almost unique in allowing the service provider to control the end user's equipment. Still, the FCC has been generally sympathetic to the wishes of the phone companies. But the consumers are also chiming in. Well over 4,500 had written to the FCC by mid-June, albeit in form letters, nearly all of whom are deeply unhappy with the phone companies' handset

practices. The day may be coming when the wireless companies have to rethink their business model and give customers their freedom.