

SUMMARY OF TESTIMONY

As a small business owner, my philosophy is the fewer regulations the better. But when it comes to wireless spectrum, I don't have a choice. I can't buy or sell spectrum freely, and there is no substitute. Therefore I seek Open Access: the freedom to offer my own services alongside the carriers', without having to ask my competitors' permission to enter the market. I don't mind paying their toll, and I am happy to meet any safety standards they set. But many small businesses still can't get to market on any terms.

There are two ways to deliver the benefits of Open Access: through regulation and through market forces. I am one of many voices calling for mandatory Open Access to some of the beachfront spectrum coming up in the 700 MHz auction, if only as a regulatory experiment. I have an obligation to explain why we cannot achieve the same goal through competition alone. Despite the fact that cellular is the most competitive telecommunications market in America, there are four broad categories of mobile devices and services that seldom or never make it to market today:

- Devices or services that require the permission of *all* of the carriers to launch
- Devices or services that compete with the carriers' own initiatives
- Business models that expose the carrier to significant legal risk
- Any device or service for which initial demand appears low

If competition cannot deliver the benefits of Open Access – and almost party to the debate agrees that those benefits are substantial – then I respectfully call upon Congress and the FCC to act.

I wish to thank the Subcommittee for their invitation to contribute to this important hearing.

My name is Jason Devitt and I am an entrepreneur. I have built and sold one successful small business and I recently started another. Regulations, in general, are a burden to me. Although I was born in Ireland, I have chosen to make America my home in part because this country offers entrepreneurs like me broad freedom to create new products and services, and great rewards for success. I am here to call for deregulation: the elimination of certain regulatory protections that the wireless carriers currently enjoy. I do not believe that the Federal Government ought to be shielding Verizon and AT&T from competition with me.

Last month, I was one of a group of fifteen successful entrepreneurs who signed a letter calling for Open Access rules to be applied to a portion of the spectrum in the forthcoming 700 MHz auction. The propagation characteristics of this frequency band have led some to call it 'beachfront property.' The auction represents the best chance we have for the foreseeable future to create new and much needed competition in broadband services. As I will explain, Open Access rules would ensure that Americans were no longer denied access to innovative new mobile products and services and familiar services at lower prices. But personally, I believe that Congress and the FCC should go much further, and consider applying Open Access rules to all our existing wireless networks.

Open Access means, quite simply, the freedom to innovate without permission: the freedom to attach any non-harmful device to the network, sometimes called the Carterfone principle, the freedom to run any application on that device and to access any content. The goal falls far short of so-called network neutrality. In wireless, the idea of equal treatment for every packet is a remote fantasy. We are often not allowed to launch our services in the first place.

Open Access is an unfamiliar term for a very familiar idea. The private companies who build and maintain our highways don't get to dictate what kind of car I drive. I don't have to ask Wal-Mart for permission to open a retail store next door to one of theirs. ConEd and PG&E can't limit my choice of vacuum cleaner, and I don't have to ask Verizon for permission to launch a web site. However, I have to ask Verizon Wireless for permission to sell a phone that runs on their network or an application that runs on their phones.

AT&T and T-Mobile are more liberal, but they claim the right to change their policies at any time, and since they control 80% of the distribution for their products and press the remaining 20% of retailers not to carry unapproved devices, there is little practical difference.

I am well aware of the investment that Verizon Wireless, AT&T, and other carriers have made in their respective networks, and I respect their right to recover that investment. I am happy to pay a toll, and I am happy to meet any safety standards they set out, provided that they hold their own equipment to the same standard. Ideally, if we couldn't come to terms, I'd build my own wireless network and compete with them. I am sure that my colleagues in the Wireless Founders Coalition for Innovation feel the same way. But there's a problem. There is not enough spectrum to support fifteen new nationwide wireless networks, so you won't let us build them, anymore than you would let us dig up the streets to lay fifteen new cables to every home in the land, regardless of the benefits to consumers.

If we cannot permit every entrepreneur to build his or her own network, there are still two ways to ensure that innovative new products and services get to market. One is to mandate some degree of Open Access so as to guarantee entrepreneurs access to existing networks. The other approach is to trust that competition between wireless carriers will obviate the need for regulation; surely there will always be at least one carrier willing to give an entrepreneur permission to innovate on their network?

As the FCC and the CTIA are forever pointing out, the cell phone market is the most competitive telecommunications market in the United States. Consumers often have six or seven providers to choose from. Nevertheless, there are hundreds of compelling wireless products and services that never get to market.

How do I know this? I've spent eight years working on applications and services for mobile and wireless devices. My first company, Vindigo, brought twenty different products to market, partnering with every major wireless carrier and many smaller carriers and MVNOs. As an entrepreneur-in-residence at a small venture capital firm that specializes in wireless data, I had the opportunity to review dozens of business plans from innovative startups. I explored a wide range of potential business models before starting my new company, Skydeck, and I spend a lot of time exchanging advice and ideas with other entrepreneurs in the wireless market. I believe that there are four broad categories of businesses that seldom or never get permission to launch, despite the number of competing carriers:

1. Devices or services that require the permission of *all* of the carriers to launch

Imagine a phone that worked across every wireless network in the US, switching to whatever network offered the best coverage in a given area. I call this idea the xPhone. Technically it's quite straightforward. A customer would need to have billing relationships with multiple carriers, but the xPhone provider could intermediate these for her. Since 27% of Americans who change carrier do so primarily to get better coverage, demand for an xPhone ought to be high, from salespeople to law enforcement. But it's not enough for one carrier to give permission to launch the xPhone; every major carrier would have to agree. And the carriers that compete on the basis of network coverage say no.

The same problem frustrates many novel messaging and community applications. Both sender and receiver must have the application, but they are not likely to be on the same network. A messaging application that works on only one carrier is worth very little, as US carriers learned themselves from trying to launch text messaging this way. Of course, it is theoretically possible to get the permission of all of the carriers to launch a new messaging application, but my point is that competition between carriers in this case is no help at all. If there are too few carriers they can extract monopoly rents; if there are too many the market is Balkanized.

Open Access would lead inevitably to the iPhone and enable many new messaging and community applications.

2. Devices or services that compete with the carriers' own initiatives

This is an obvious category, and the most obvious example of is Skype, an application banned by every US carrier. Other well-known examples include Verizon's blocking of all Bluetooth-based applications and services except for headsets, and AT&T's bar on dial-up networking applications.

A recent front page article in the Wall St Journal article (“A Fight Over What You Can Do On A Cellphone”, 6/14/07) described the efforts of cellphone manufacturers, particularly RIM, to give away applications that every carrier in the market wishes to charge for. Most manufacturers are unwilling to alienate carriers by selling directly to customers, so customers are forced to go on paying.

Imagine a phone that warned customers on monthly contracts whenever they had exceeded their monthly allowance of minutes. Most carriers provide customers with a means of checking their balance and some will even send alerts by email, but what about a phone that nags you to stop making calls?

No carrier will launch such a phone, for the same reason that no gym will call you to ask why you haven't been coming in for a workout.

For me as a consumer, the most glaring example of market failure is that no major carrier will offer me a discount on a service plan in return for bringing my own phone to their network. To be sure, several carriers will allow me to activate my own phone. But they charge me the same rate as they do customers whose handset is being subsidized, and to add insult to injury, they will charge me an early termination fee if I quit, to recover the cost of the handset I never asked for.

Carriers could not offer such a plan without voluntarily adopting Carterfone. And though there may be a dozen competing providers in my home market, none of them appears willing to take that step.

3. Business models that expose the carrier to significant legal risk

In escaping regulation as common carriers, wireless carriers have foregone immunity that this brings. They clawed back some protection under the Communications Decency Act, and again under the DMCA. But brace yourselves. I suspect that the industry will be coming back to this Subcommittee year after year to seek regulatory immunity for many different kinds of mobile application and service - all in the name of deregulation of course. In the meantime, consumers can expect slow progress or no progress in location-based services (are carriers liable for invasions of privacy?), mobile commerce (will carriers be held liable for fraudulent transactions?), and free speech (are carriers to be regulated like broadcast networks or cable?). The carriers have no choice.

Obviously, startups have far greater appetite for legal risk than incumbent carriers.

4. Any device or service for which initial demand appears low

To me this is the most important category of all. Inevitably, carriers are not interested in devoting time and resources to devices or applications that they don't believe will be of interest to the majority of their tens of millions of customers. Innovators can turn to small carriers instead, but there are very few small carriers or MVNOs that are practical launching pads for truly novel services. And there are fewer every day: within the last month, Dobson was acquired by AT&T and Amp'd Mobile went bankrupt.

Why does this matter? Because almost every major innovation in the history of telecommunications looked like a lemon when it was first proposed. Members of Congress laughed at the idea of funding Morse's telegraph; one brought up a joke bill proposing to fund research into mesmerism instead. Western Union passed on the chance to buy Bell's telephone patents. The old AT&T turned down a contract to build and operate what we now call the Internet and also opted out of the mobile phone business when their consultants forecast that the global market for mobile phones in 2000 would be one million subscribers.

Name a class of mobile application or service launched by a US carrier that had not already been proven successful in a foreign market. This is an indictment of the whole industry.

Forcing entrepreneurs to seek permission to innovate in mobile services is killing powerful new ideas before you ever get to hear about them. Imagine the founder of Amazon having to persuade Sprint in 1995 that he could do a better job selling books online than Barnes & Noble. Imagine the founder of eBay trying to explain to a mid-level manager at Verizon that trading stamps, coins, and dolls online would be a good way to make money. Picture the founders of Google in 1999 persuading AT&T to let them launch another search engine. This is the daily reality for those who develop mobile applications,

the “tarpit of misery, pain, and destruction” as one developer described it in Professor Tim Wu's paper on Cellular Carterfone.

If you believe that these services, from the telegraph to Google, have increased consumer welfare, then you will understand how Open Access might benefit innovators and entrepreneurs.

A Note On Network Safety

None of the devices and applications that I have described so far raise any serious concerns related to bandwidth consumption, security, or any other network management issues. Entrepreneurs have no desire to launch services that pose any risk to the wireless network. That would be suicidal. Their ideas are almost never rejected by the engineering department; they are rejected by the marketing department, for business reasons alone.

Carriers' objections to cellular Carterfone on the grounds of network safety would be more credible if they were not at the same time selling data cards that allow customers to connect any virus-ridden, malware-laden laptop in the world to the same vulnerable networks.

As I stated at the beginning, the fewer regulations the better. But why should the networks of the wireless carriers be treated differently from every other network – DSL, cable, even non-cellular wireless networks like WiFi – all of which are subject to Carterfone? In a free market, why should I need to ask carriers' permission to enter the market, especially when they are free to compete with me? Why can I not get access to networks that are built on public property – scarce wireless spectrum – that I am not allowed to purchase myself?

Finally, I would love to think that competition between carriers is sufficient to ensure that entrepreneurs like me will always be able to launch compelling new products and services. But as I have explained, it is not.

Once again, my thanks to the Subcommittee for their invitation and for the opportunity to present my thoughts.

Sincerely yours,

Jason Devitt