

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

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| In the Matter of |) | |
| |) | |
| Petition for Declaratory Ruling that Text |) | WT Docket No. 08-7 |
| Messages and Short Codes are Title II |) | |
| Services or are Title I Services Subject to |) | |
| Section 202 Non-Discrimination Rules |) | |

COMMENTS OF THE OPEN INTERNET COALITION

The Open Internet Coalition (OIC)¹ supports the Commission’s efforts to consider whether its rules prevent wireless network operators from constraining speech through the discriminatory allocation of short-codes. For the reasons discussed below, the OIC urges the Commission to grant the Petition for Declaratory Ruling filed by Public Knowledge (PK) and other public interest groups (“PK Petition”)² and make clear that text messages and short codes are subject to nondiscrimination rules under the Communications Act. Doing so will protect important consumer and speech rights and will not cause any cognizable harm to wireless carriers, while also preserving the ability of the Commission to act expeditiously when confronted with any future acts of discrimination by wireless network operators. By granting the PK Petition, the Commission will have taken an important first step toward establishing a

¹ Open Internet Coalition supporters include the following organizations: eBay, Google, IAC, Sling Media, TiVo, Free Press, Educause, Earthlink, American Library Association, American Association of Law Libraries, Association of Research Libraries, the Computer and Communications Industry Association, Data Foundry, Electronic Retailing Association, Internet 2, NetCoalition, Public Knowledge, Skype, TechNet, US PIRG, and the Future of Music Coalition. A more complete list and more information can be found at www.openinternetcoalition.org.

² Public Knowledge et al., *Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules*, WT Docket No. 08-7 (filed Dec. 11, 2007).

comprehensive, consumer-focused communications policy that treats equally various converging modes of communications.

In this proceeding the Commission is confronted with a simple choice: it can side with the speech rights of consumers or it can side with the unfettered ability of wireless operators to constrain such speech. More broadly, the Commission can choose to support a consistent policy framework that encourages an Internet that is nondiscriminatory and available to all or it can choose a fragmented, siloed, special-purpose network where wireless network operators act as gatekeepers and viewpoint censors. The Commission should seize this opportunity to side with consumer interests and an open and nondiscriminatory Internet.

I. AS COMMUNICATIONS PLATFORMS AND METHODS CONTINUE TO CONVERGE, THE COMMISSION SHOULD ADOPT A COMPREHENSIVE INTERNET POLICY

As wireless networks continue to grow in popularity, consumers are using their mobile handsets in new and different ways. The days of consumers using their wireless phones only for roadside emergencies are long gone; today, consumers use mobile handsets for voice calls and text messaging, and, in many cases, for broadband Internet access. Text messaging has become an increasingly important mode of communications for many consumers and seemingly the exclusive mode for teenagers and young adults. In addition, consumers are increasingly using their wireless handsets for mobile commerce and other interactive applications that make use of short codes.³

Shorts codes are a means for conveying users' speech, distributing applications and making donations, among other uses. At issue in this proceeding is whether wireless carriers

³ Text messages — also referred to as short message service or “SMS” — are short communications between phones, typically between wireless phones. Text messages can be sent to any existing mobile telephone number. PK Petition at 2-3. Short codes are typically five- or six-digit numbers that are used for text-based services. *Id.* at 3.

should act as censors for the speech and applications that their customers wish to transmit and use. As more and more political activity moves to the Internet and as consumers' use of the Internet becomes more mobile, the Commission should take care to ensure that the internal corporate policies of wireless carriers do not constrain a consumer's ability to enjoy unimpeded access to the wireless Internet. Just as such discrimination would not be tolerated in the wireline space, it should not be permitted in the wireless arena.

Short codes and text messages are used for a variety of different types of applications and communications, from political speech to personal communications, from mobile commerce to voting for TV show contestants. Non-profit advocacy groups such as NARAL use short codes to stay in touch with their members who sign up to receive alerts periodically on key issues. At least one major presidential campaign uses short codes to send text messages to supporters who sign up to receive reminders to vote and updates on election news. Skype uses short codes to enable its users to transmit text messages of their own choosing to friends, family, and business associates.⁴ Finally, of course, short codes are used for various interactive applications such as voting for one's preferred performer on *American Idol* or the "fans' choice" for the MVP of the Super Bowl.

From the perspective of consumers, the various forms of communications — text messages, voice calls, e-mail, and instant messaging — are merging together, particularly as smart phones merge the power of computers with the portability of wireless devices and consumers use their wireless handsets for all such communications. As such communications merge, consumers reasonably expect these different forms of communication to occur

⁴ See e.g., www.skype.com/allfeatures/sms/. In this way, short codes provide a bridge between broadband networks and narrowband, mobile networks, even as these networks converge with the advent of 3G and 4G mobile services.

unimpeded. Thus, these various forms of communications should be subject to the same regulatory principle of nondiscrimination. Carriers should not be permitted to censor or otherwise act as gatekeepers with respect to communications to and from users, regardless of the form of communications.

The issues raised by the PK Petition demonstrate the importance of the free speech interests at stake in the broader open Internet discussion. As the Petition for Declaratory Ruling points out, allowing CMRS carriers free rein to act as gatekeepers and pick and choose which users can and cannot use their short code text messaging services harms free speech. Verizon engaged in what amounted to viewpoint-based discrimination against NARAL's communications, and while the company laudably corrected its course, the Commission should be deeply concerned that without the nondiscrimination protections of Title II it would have no means to address such blatant content- and viewpoint-based discrimination. In light of the facts raised in the PK Petition, the Commission must now act to confirm the bedrock communications policy principle of nondiscrimination.

II. TEXT MESSAGING AND SHORT CODES SHOULD BE SUBJECT TO NONDISCRIMINATION RULES

As explained above, text messages and short codes are merely technical means for enabling communications. There is nothing inherently commercial about short codes and text messages – short codes are simply a means for enabling communications, while text messages are simply a form of communications. Nothing about the content of such communications suggests that they should be subject to different regulatory regimes than wireless voice communications. From both the perspective of protecting consumers and the perspective of regulatory parity, it is important that the Commission make clear that text messages and short codes are subject to nondiscrimination rules under the Communications Act.

Short codes provide a bridge between broadband networks and narrowband, mobile networks. The use of short codes to enable user-to-user communications with mobile phones is surely “interconnected with the PSTN” within any ordinary meaning of that term. If the Commission were to hold otherwise, it would declare that mobile phones are not connected to the public telephone network – a conclusion belied by the billions of mobile-to-landline minutes terminated each day. Likewise, short codes serve a critical function in bridging messages between mobile devices and interconnecting the broadband internet with CMRS networks. OIC submits that it is not in the Commission’s interest to adopt a cramped, 1970’s-style definition of the public switched telephone network that removes any authority for the Commission to act in a way that protects consumers.

OIC agrees with the analysis submitted by Public Knowledge, which demonstrates that text messaging and the use of short codes for text messaging are subject to Title II’s nondiscrimination rules.⁵ Text messages are sent to wireless telephone numbers, most often from wireless telephones, and are interconnected with the PSTN. From the consumer’s perspective, text messaging is an integral part of wireless service, and wireless subscribers are able to send and receive text messages without signing up for an Internet or data plan.⁶ As short codes enable text messaging communications by and services and applications used by wireless telephone subscribers, they too are interconnected with the PSTN and should be considered integral to CMRS and subject to Title II.⁷

⁵ PK Petition at 7-13.

⁶ *See, e.g.*, PK Petition at 13-16 (describing how text messages and voice communications are intertwined forms of speech).

⁷ Although most of the cases brought to the Commission alleging violations of Section 202(a) are based on economically-motivated discrimination, the Commission has recognized that the Section’s nondiscrimination principle applies to other, perhaps more troubling forms of discrimination by carriers. For example, in a case involving alleged price discrimination by CMRS carriers, the Commission noted

Finally, OIC agrees with PK's position that if the Commission were to decide that text messaging services are not subject to Title II, it should nevertheless exercise its Title I ancillary jurisdiction over such services and apply a non-discrimination rule to prevent blocking and other forms of discrimination such as those discussed in the PK Petition.⁸

III. THE COMMISSION MUST PRESERVE ITS ABILITY TO PROMOTE THE PUBLIC INTEREST IN THE WIRELESS MARKETPLACE

The decisions made in this proceeding will cascade throughout other proceedings and impact the Commission's ability to advance the public interest as additional wireless technologies are deployed. How the Commission answers the questions raised by the PK Petition will impact directly the ability of the Commission to develop a comprehensive and consistent broadband policy.

The viewpoint-based discrimination endured by NARAL, however short-lived, is a reminder of why the Commission must ensure that it retains the ability to protect consumers by addressing discriminatory actions by wireless network operators. The market for text messaging services and short codes is essentially identical to the market for wireless voice communications, as consumers use their wireless handsets for both voice and text messaging services. While the wireless marketplace is more competitive than the traditional wireline telephony market, and the Commission has forborne from applying several of Title II's requirements to wireless carriers,

that a refusal to serve "any particular demographic group (*e.g.*, customers who are of a certain race or income bracket)" could lead to a finding of unreasonable discrimination. *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd 8987, 8997 at para. 21 (2002), *aff'd*, *Orloff v. FCC*, 352 F.3d 413 (D.C. Cir. 2003). Discrimination on the basis of a customer's opinions, or the content of its speech, is at least as reprehensible as discrimination based on race or income; and is surely contrary to the public interest, convenience, and necessity.

⁸ PK Petition at 16-24.

the Commission has deliberately retained Title II's nondiscrimination principle for CMRS in order to preserve its ability to protect consumers.⁹

Moreover, even as the amount of spectrum available for wireless communication grows, the wireless marketplace has become even less competitive since the time the Commission decided to retain the common carrier status of wireless carriers. Verizon and AT&T are the largest wireless carriers in the United States. Together, they account for more than half of the market – and analysts suggest that their share will continue to accelerate as Sprint continues to lose a disproportionate share of customers to Verizon and AT&T.¹⁰ In addition, each company offers wireless services as part of bundled service offerings that can include video, broadband Internet access, and legacy wireline telephone service. Regardless of how one views the degree of competition among providers of broadband and other communications services, the fact that consumers prefer bundled offerings provides AT&T and Verizon with a tremendous amount of leverage in the broadband and wireless marketplaces.

In exercising control over short codes and text messages, wireless carriers are attempting to shape consumers' Internet experience in a way diametrically opposed to what exists when users access the Internet using personal computers. By controlling consumers' use of text messaging through short codes and requiring application providers that distribute content using

⁹ *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 98-100, FCC 98-134, 13 FCC Rcd 16,857, 16,865-66, paras. 15-18 (rel. July 2, 1998) (noting that Sections 201 and 202 codify "the bedrock consumer protection obligations" and apply "even when competition exists in a market.").

¹⁰ In addition, Verizon and AT&T exert significant market dominance over their competitors because of their control over the special access facilities owned by their legacy RBOC affiliates across the country. See Comments of Sprint Nextel Corp., WT Docket No. 07-71, at i (May 7, 2007) ("[AT&T and Verizon] are effectively able to set a price floor for the provision of wireless services — thereby protecting their own landline broadband services from more intense competition from wireless alternatives."); Reply Comments of BT Americas, Inc., RM-11361, at 2-5 (May 15, 2007).

short codes to submit to wireless carriers' discretion, these carriers are attempting to create a wireless world in which they receive compensation on a transactional basis and have the ability to block those applications they would either prefer to provide themselves or deny access to altogether because they compete with their own service offerings. Allowing wireless carriers to engage in this kind of discrimination will stunt the growth of wireless applications, decrease demand for such services, and ultimately thwart the Commission's goal of ubiquitous broadband availability. Moreover, enabling wireless carriers to discriminate in their handling of short codes will make it more difficult for the Commission to intercede, as necessary, when new wireless technologies enter the market.

IV. CONCLUSION

This proceeding presents the Commission with the right opportunity to re-establish the right nondiscrimination duties for the wireless industry. In the wake of the *Brand X* decision, network operators have repeatedly acted in ways that are inconsistent with the Internet Policy Statement. The time has come for the Commission to reassume its public interest responsibilities and act to establish a consistent broadband policy that places consumer interests above any particular provider's goals. Granting PK's Petition would be an important step toward that end.

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Respectfully submitted,

OPEN INTERNET COALITION

/s/ Markham C. Erickson

Markham C. Erickson, Esq.

Executive Director

OPEN INTERNET COALITION

400 N. Capitol St., NW, Suite 585

Washington, DC 20001