

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of Public Knowledge, et al.)	
)	
For a Declaratory Ruling Stating That Text)	WT Dkt. No. 08-7
Messaging and Short Codes Are Title II)	
Services or Are Title I Services Subject to)	
Section 202 Nondiscrimination Rules)	

REPLY COMMENTS OF VERIZON WIRELESS

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Verizon Wireless submits these reply comments opposing the Petition for Declaratory Ruling filed by Public Knowledge and seven other groups.¹ Just as the Petition lacked factual or legal support for the requested declaration, in their initial comments, neither the Petitioners nor their few supporters demonstrate any reason why the Commission can as a legal matter, or should as a policy matter, declare that text messaging and provisioning short codes are Title II services, or are Title I services subject to Section 202 of the Communications Act.

SUMMARY

The Petitioners' requested declaratory ruling is premised on multiple mistaken assumptions.

- Petitioners and their supporters claim wireless providers block text messages; but, the carriers do not.
- Petitioners and their supporters continue to confuse text messaging and provision of common short codes, seeking regulation of both. But, provisioning common short codes, unlike text messaging, is not a transmission-based service, and is not subject to the Communications Act.

¹ Petition for Declaratory Ruling of Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, Educause, Media Access Project, New America Foundation, and U.S. PIRG ("Petition"), filed December 11, 2007. The Commission sought comments on the Petition, and extended the reply comment date to April 14, 2008. See Public Notice, DA 08-78, released Jan. 14, 2008; Order, DA 08-282, released Feb. 1, 2008.

- Petitioners and their supporters have attempted to import the debate over Internet neutrality as a justification for regulation; but, text messaging and common short codes are unrelated to Internet access services and unrelated to broadband services. The “net neutrality” debate is simply irrelevant in this proceeding.
- Petitioners and their supporters claim that the Commission needs to grant the Petition to prevent wireless providers’ censorship of speech. But, they have presented not one instance of so-called censorship that would justify regulation, and ignore the fact that private entities are not subject to the constraints of the First Amendment. Indeed, wireless providers have First Amendment rights that would be violated by the requested regulation of short code campaigns.
- Petitioners and their supporters claim that text messaging and short code-based promotional campaigns need regulation because they are innovative and growing in popularity. But, just the opposite is true. Text messaging and short code campaigns are thriving in an unregulated environment, in which wireless providers have implemented various guidelines and standards to protect consumers from illegal and unwanted content, spam and inadvertent charges.

The record is thus devoid of facts that suggest there is a problem with these offerings to consumers that needs to be addressed by the Commission, much less addressed through common carrier regulation. Not only have Petitioners and their supporters failed to point to any problem that needs to be addressed by the Commission, but they have also failed to grapple with the real problems that their proposal would unleash on wireless consumers: widespread availability of legal and illegal adult content on mobile devices, including devices used by minors; more spam and unwanted text messages that would impose additional charges on subscribers; and decreased usability of text messaging and short code campaigns, services that are now very popular. The history of the “900” pay-per-call services paints a vivid picture of the future for the mobile content industry if the Petitioners’ requested regime is implemented.

The lack of record evidence supporting grant of the Petition holds true for Rebtel’s requests regarding its international toll bypass service. The Communications Act does not require wireless operators to offer subscribers equal access to competitors’ toll calling services,

and the Commission does not require carriers to make billing services available to content providers. Rebtel's demands in this docket are meritless.

From a legal perspective, Petitioners and their supporters claim that common carrier regulation is required for text messaging and provisioning of common short codes under the *NARUC* line of cases, which outlines the parameters for identifying common carriage for communications services. In fact, these cases point to the opposite conclusion. Common carriage treatment cannot be imposed absent the presence of market power, and wireless providers lack such market power with respect to text messaging and common short code campaigns. Otherwise, a service can only be deemed common carriage when the carrier (a) holds itself out to serve indifferently all potential users and (b) allows customers to transmit information of their own design and choosing. If common short codes were analyzed as a communications service, wireless carriers' practices for reviewing individual short code campaigns demonstrate that none of these requirements can be found to apply. Similarly, unlike voice transmissions, since the sender cannot be deemed to control the information in a text message once it is delivered to the network, text messaging also fails the *NARUC* test for common carriage.

Moreover, as many commenters explained, text messaging and short codes cannot be deemed Commercial Mobile Radio Services, because they do not offer the required interconnection to the public switched network. There is also no market-based reason to regulate text messaging and short codes: Petitioners and their supporters have failed to demonstrate any market failure that would justify common carriage regulation. And, the Commission did not deem text messaging a common carrier service in its decision on automatic roaming, nor could it properly do so based on its technical characteristics and the applicable law. Finally, there is no

validity to Petitioners' arguments that regulation of text messaging and short codes is permissible under Title I and Title III. Imposing common carriage regulation under Title I or III on text messaging and short codes would directly conflict with the Act's clear mandate that non-common carrier services not be subject to Title II requirements.

The record shows that the self-regulating regime for short code campaigns established by the wireless and mobile content industries is working well, and that text messaging provides significant benefits to consumers and opportunities to content suppliers. Accordingly, from both the legal and public interest perspectives, the Commission should deny the Petition.

I. THE ARGUMENTS OFFERED TO SUPPORT COMMON CARRIER REGULATION OF TEXT MESSAGING AND SHORT CODES ARE BASED ON NUMEROUS FACTUAL AND LEGAL ERRORS.

Petitioners and a handful of supporters have advanced various policy arguments why the Commission should regulate the wireless text message service (or, "SMS") and the provision of common short codes ("CSC") as common carrier services subject to Section 202 of the Communications Act. However, these arguments are premised on factual errors that undercut any basis for imposing new regulation. The most common errors can be paraphrased as follows:

***Petitioners Claim:** Verizon Wireless and other wireless carriers block text messages.²*

As set forth in its initial Comments, Verizon Wireless does not block text messages, except those addressed to its subscribers that are captured by its spam filters, or that are affirmatively selected for blocking by its subscribers – practices Petitioners do not complain about. It has *not* blocked text messages sent to or from NARAL, Rebtel, or any other selected group. Nor do other wireless carriers.³ Accordingly, there is no factual record³ that would allow the Commission to conclude that text messaging services need to be regulated as common carriage specifically to

² Petition, at 4-5; ACLU Comments, at 1; Rebtel Comments, at 3; National Association of Realtors, at 1; Sixteen Members of Congress, at 1.

³ See Sprint Nextel Comments, at 16; CTIA Comments, at 8-9.

achieve the nondiscrimination obligations of Title II. As AT&T notes, Petitioners' failure to document a single instance of a blocked text message renders the bulk of their request for Title I regulation of SMS "patently frivolous."⁴

Petitioners Claim: *Text messaging and short codes are one and the same service.*⁵ A carrier's individualized decision to activate a short code, or a common short code, is *not* a text messaging service, nor even a transmission-based service. Any transmission service to and from the short code must be supplied separately. Thus, while text messaging does fall within Title I of the Communications Act, the provisioning of short codes is not subject to the Act at all. Any regulation of short codes based on regulation of text messaging, as sought by the Petitioners, is neither logical nor lawful.⁶

Petitioners Claim: *The Commission must regulate SMS and CSC to protect the Internet access principles in the Broadband Policy Statement.*⁷ Simply put, neither text messaging nor provisioning short codes is an Internet-based service, nor do these products use, or rely on, broadband Internet access services. The arguments made by the Petitioners and their few supporters related to Internet neutrality, consumer access to content on the Internet, and reasonable broadband network management are being debated in other Commission dockets,⁸ but are completely irrelevant in this docket.

Petitioners Claim: *The Commission must regulate SMS and short codes because the 'free speech' of political, religious and various advocacy groups is in jeopardy by carrier censorship*

⁴ AT&T Comments, at 19-20.

⁵ Petition, at 6; Open Internet Coalition Comments, at 3-4, 6; Sixteen Members of Congress, at 1; National Association of Realtors, at 1.

⁶ See Sprint Nextel Comments, at 2-9 (explaining differences between SMS and short codes); T-Mobile Comments, at 2-4 (same).

⁷ Petition, at 19; ACLU Comments, at 3-4; Rebtel Comments, at 17-18; Open Internet Coalition Comments, at 5, 7-8; National Association of Realtors, at 1.

⁸ Cf. *Broadband Industry Practices*, Notice of Inquiry, WC Docket 07-52, 22 FCC Rcd 7894 (2007); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) ("Broadband Policy Statement").

*practices.*⁹ Petitioners' rhetoric belies the fact that they have failed to document *even one instance* where a wireless carrier has blocked the speech of an advocacy group.¹⁰ In fact, even though there was no legal requirement to do so, Verizon Wireless publicly changed its existing policies to ensure that advocacy groups can "speak" through short code campaigns.¹¹ In any event, even if a wireless carrier did "censor" speech, the First Amendment does not apply to private parties, as the Commission has recognized.¹² Petitioners fail to acknowledge that it is *government* regulation, not carriers' practices, that the First Amendment constrains, and, that Verizon Wireless and other providers that activate short code campaigns have a First Amendment right to exercise editorial discretion with respect to content delivered over their networks. The Commission does not have the authority to force regulated entities to carry certain content, except in narrowly proscribed circumstances, and, therefore, there is no basis grounded in protection of speech for the regulatory regime sought by Petitioners.¹³

Petitioners Claim: *The Commission must regulate text messaging and short codes because they are becoming more prevalent and innovative.*¹⁴ In a piece of twisted logic, the Petitioners and their supporters cite to the burgeoning success of text messaging and short code campaigns as a reason why the Commission must regulate carriers who offer these products.¹⁵ In

⁹ Public Knowledge et al. Comments, at 6, 9; ACLU Comments, at 1-3; Open Internet Coalition Comments, at 2-3, 6; Sixteen Members of Congress, at 1; People Calling People, at 1.

¹⁰ The debate over a content aggregator's right to exercise editorial discretion versus a content provider's right to publish has arisen in other new media contexts. Internet giant Google has been accused of unfairly declining to publish on its website an ad concerning abortion law from The Christian Institute of the United Kingdom. In rejecting the ad based on editorial discretion, Google stated: "At this time, Google policy does not permit the advertisement of websites that contain 'abortion and religious-related content.'" The Christian Institute stated that it would sue Google on grounds of religious discrimination under English law. Posted at Foxnews.com, <http://www.foxnews.com/story/0,2933,348869,00.html> (Apr. 9, 2008).

¹¹ See Verizon Wireless Comments, at 21 & Att. G.

¹² *Audio Communications, Inc.*, 8 FCC Rcd 8697, 8701 (1993).

¹³ See Verizon Wireless Comments, at 45-58; see also CTIA Comments, at 54-58; Sprint Nextel Comments, at 14-15.

¹⁴ Public Knowledge et al. Comments, at 7-8; Open Internet Coalition Comments, at 2; Rebtel Comments, at 3, 12-13; Sixteen Members of Congress, at 1; People Calling People, at 1; National Association of Realtors, at 1.

¹⁵ See, e.g., Public Knowledge et al. Comments, at 8 (citing growth of SMS).

fact, of course, the success of these products has developed in an unregulated environment, in which carriers must, and do, respond to consumers, competitors and the marketplace. “Rather than demonstrating a need for regulatory intervention to ensure the ability to utilize SMS, the Petition shows that the market is working, as one would expect in the robustly competitive wireless marketplace.”¹⁶

The growth and innovation in text messaging and short code campaigns belie the Petitioners’ and their supporters’ suggestion that there is any problem with these products that needs to be fixed through imposition of common carrier regulation. To the contrary, the carriers’ practices regarding text messaging and common short code campaigns are promoting robust growth in these products to the benefit of consumers.

The Commission’s recent report on competition in the wireless industry demonstrates that there is no market failure in the text messaging ecosystem. Overall wireless subscribership continues to increase dramatically – there were 241.8 million subscribers by the end of 2006, an increase of 100 million in just four years.¹⁷ Wireless usage has also increased: *average* usage was 714 minutes of use in 2006, up from 708 in 2005 and 584 in 2004.¹⁸ The monthly volume of text messaging grew to 18.7 billion messages during December 2006, nearly double the volume of text messages during December 2005.¹⁹ Verizon Wireless alone is handling over 20 billion text messages a month now, up from 10 billion in mid-2007. Even as the number of wireless subscribers and their use of wireless services grow, prices have fallen. Wireless revenue per

¹⁶ CTIA Comments, at 51.

¹⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Twelfth Report*, FCC 08-28, ¶ 2 (2008) (“Twelfth CMRS Report”).

¹⁸ *Id.*

¹⁹ *Id.*

minute fell from \$0.11 in 2002 to \$0.07 in 2005 and 2006.²⁰ And, the average price of text messaging fell in 2006, after rising for the previous four years.²¹

The record in this docket also reflects a healthy market for premium and promotional text message campaigns. Petitioners themselves point out that short code campaigns are developing in popularity as innovative applications to reach consumers.²² In the last five years, “[t]he short code business has grown steadily and legitimately, and enables millions of text messages a day across a great variety of application uses.”²³

But, the record also reflects that the growth in applications and usefulness of short code campaigns to consumers and marketers would be stifled if the Commission were to impose common carrier regulation on this offering. CTIA notes that “the ability to protect consumers from fraud, illegal or objectionable material is one that exists solely with the carriers. Government regulation in this area has routinely been struck down by the Courts.”²⁴ Accordingly, “[d]epriving wireless carriers of the ability to screen out Short Codes will unnecessarily expose wireless customers, including minors, to inappropriate content or unscrupulous business practices by third parties who seek to use short codes to perpetrate fraud.”²⁵ In other words, the self-regulating market for short code campaigns is ensuring exactly

²⁰ *Id.*

²¹ *Id.*, ¶ 202.

²² Petition, at 19-21; *see* AT&T Comments, at 16 (“Nor do Petitioners dispute that provisioning of short codes is robust and thriving, that wireless providers continue to develop and enhance those services, and that the wireless industry has, without onerous mandatory regulations, developed and adopted guidelines (which have been widely praised by regulators) to protect customers from abuses of such services.”).

²³ Mark Lowenstein, “The Evolution of Text Messaging and the Role of Operators,” at 8 (March 2008) (Attachment H to Verizon Wireless Comments); *see also* MetroPCS Comments, at 13-14.

²⁴ CTIA Comments, at 52.

²⁵ *Id.* at 53.

what the Petitioners want: “the ‘widest possible dissemination of information from diverse and antagonistic sources.’”²⁶

Indeed, the circumstances of NARAL and Rebtel provide examples of exactly the type of problems that will arise were the Petitioners’ requested regime put in place.²⁷ As explained in its Comments, Verizon Wireless responded to NARAL’s request for reconsideration of its short code application within 24 hours of its management learning that the request had been denied.²⁸ Its decision to activate the NARAL short code was made even before the flurry of media and public attention.²⁹ In the competitive market for wireless services, when change is needed, providers must respond to consumers that quickly. If NARAL were required to file a Section 208 complaint at the Commission in order to reverse the decision as an unreasonable practice under Section 202, it would not have been able to implement its short code campaign as quickly, if at all.

Also, Verizon Wireless and other commenters explained the difficulty in regulating spam that would arise if the Commission imposed nondiscrimination obligations on text messaging. Rebtel argues that imposition of common carrier regulation on SMS and short codes would not open networks and customers to spam because it, and other users of short codes, only will send messages to those subscribers that opt-in to receive them.³⁰ Rebtel, however, has completely missed the point. The opt-in procedures put in place to protect subscribers are a product of the *current* self-regulating regime for common short code campaigns. If these products were offered

²⁶ Public Knowledge et al. Comments, at 8 (quoting *Comcast Corp.*, 17 FCC Rcd 23246, ¶ 27 (2002), quoting *Turner Broadcasting Syst., Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

²⁷ Cf. AT&T Comments, at 20 (explaining why Petitioners’ citations to NARAL and Rebtel issues fail to justify regulation of short codes); MetroPCS Comments, at 14 (same).

²⁸ Verizon Wireless Comments, at 20.

²⁹ *Id.* Those parties stating otherwise were not present for the decision, and make uninformed assumptions that are not based on the facts. See Public Knowledge et al. Comments, at 2; Rebtel Comments, at 5; ACLU Comments, at 2; Sixteen Members of Congress, at 1.

³⁰ Rebtel Comments, at 5-6.

under nondiscrimination requirements, the carrier-imposed requirements for strict opt-in procedures would be unenforceable.

The Commission can simply look at the tortured history of the common carrier regime imposed on wireline “900” pay-per-call services and the associated consumer difficulties with phone sex and exorbitant or deceptive charges to understand the harms that would result from the regulation Petitioners seek.³¹ As CTIA documents, the common carrier regulations adopted to “fix” the “900” services effectively killed their usefulness to consumers and content providers.³² The lesson of history here speaks loud and clear: Industry self-regulation serves consumers better than common carriage regulation for these commercial and promotional mobile content campaigns.

II. REBTEL’S DEMAND FOR A RIGHT TO A SHORT CODE IS MERITLESS.

Verizon Wireless explained in its Comments why it is under no obligation to activate a common short code for Rebtel.³³ Rebtel desires that the Commission require all wireless carriers to activate Rebtel’s common short code to facilitate its international toll call bypass service using local telephone numbers. According to Rebtel, it and other similar providers will be shut out of the U.S. market if wireless carriers are not required to activate their short code campaigns.³⁴

³¹ See CTIA Comments, at 14-27 (documenting history of regulation of 900 services).

³² See *id.* at 27.

³³ Verizon Wireless Comments, at 21.

³⁴ Rebtel Comments, at 2-4. It should be noted that Rebtel’s local call-based dialing service is neither new nor innovative. The Commission described essentially the same phone-to-phone “IP telephony” service 10 years ago in the Stevens Report, and noted that “[s]everal companies now offer commercial IP telephony products.” *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11541-42 (1998) (“Stevens Report”). Unlike some other forms of IP telephony, Rebtel’s service incorporates the disadvantage of overusing numbering resources because a subscriber gets a different local number for each international party called. See <http://www.rebtel.com/en/How-it-works/How-to-make-a-direct-call/>.

Neither Verizon Wireless nor any other wireless operator is under an obligation to provide its subscribers with access to a competing toll service.³⁵ Moreover, Rebtel's argument is based on a flawed premise that short code campaigns are necessary to its service. They are not. Rebtel, and similar services, can provide the necessary local telephone number information to their consumers using 10-digit numbers for voice calls or text messages, or through an email over the Internet. There is no legal basis for Rebtel's demands in this docket.

Rebtel also claims that Verizon Wireless "blocks" text messages between Rebtel and Verizon Wireless subscribers.³⁶ That is not true. Until recently, Rebtel's Channel Island-based telephone carrier, Jersey Telecom, had not entered into an intercarrier agreement for exchange of international SMS traffic with Verizon Wireless' international SMS carrier. Such an agreement has recently been implemented. Therefore, while Rebtel previously had no assurance that text messages to and from Verizon Wireless subscribers would be delivered, those text messages should now be delivered in the normal course. Thus, if there were failures in the flow of text messages between Rebtel and Verizon Wireless subscribers, they had nothing to do with the actions of Verizon Wireless or the regulatory status of text messaging and common short codes.

Nevertheless, Rebtel wants required grant of access to a common short code because U.S.-based messaging aggregators would offer a direct connection to wireless carriers' SMS gateways, and would obviate any need to have intercarrier agreements for exchange of SMS traffic. But, even if the Commission took the drastic step of imposing common carriage on wireless SMS, text messages to and from Rebtel (as opposed to the messaging aggregator) would not be delivered without an effective agreement for exchange of international SMS traffic with Rebtel's home carrier.

³⁵ See 47 U.S.C. § 332(c)(8).

³⁶ Rebtel Comments, at 3.

To justify its request for activation of a short code, Rebtel also states that it wants access to the billing capabilities of common short codes.³⁷ But, Rebtel’s subscribers can credit their accounts for international call charges at the Rebtel website,³⁸ so it is not apparent why Rebtel is arguing here that it needs access to short code billing features. If Rebtel wants access to wireless carriers’ billing systems, it would need to seek a change in existing law. Wireless carriers are under no obligation to provide such access to Rebtel or any other content provider, directly or through a messaging aggregator. Billing and collection services have long been declared by the Commission to be non-common carriage, not subject to Title II regulation.³⁹ The Commission has firmly declined to modify the status of billing services – in very similar circumstances.⁴⁰

Nor can the Commission address billing functions in this proceeding. Even if granted, a declaratory ruling can only clarify “the *existing* state of the law.”⁴¹ The existing state of the law on billing and collection services is that they are non-common carrier services. The Commission cannot change its analysis and policies on billing services without initiating and concluding a rulemaking, and explaining why it has decided to change course on the regulatory status of billing.⁴² Rebtel’s requests provide no grounds for granting the Petition.

In any event, such action with respect to billing services for content providers in short code campaigns would unleash a host of problems for wireless carriers were the Commission to

³⁷ See *id.* at 6 (use of long codes is not a solution for Rebtel because “long codes do not have the technical or billing capabilities that short codes possess”).

³⁸ See <http://www.rebtel.com/en/Get-Help/faq/Billing-and-Payment/>.

³⁹ See *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150, 1167-69 (1986); T-Mobile Comments, at 18; CTIA Comments, at 47-48.

⁴⁰ See *Audio Communications, Inc.*, 8 FCC Rcd 8697 (1993) (refusing to declare billing and collection services common carriage for 900 pay-per-call service).

⁴¹ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, 7476 (2004) (separate statement of Commissioner Abernathy) (emphasis in original).

⁴² See *Request of MCI Communications Corporation British Telecommunications plc*, 9 FCC Rcd 3960, 3965, ¶ 26 (1994).

require common carriage in this context. T-Mobile expressed this very concern if it were required to provide billing services for providers of unsavory content:

[I]f billing itself were treated as a common carrier service, T-Mobile and other carriers would be asked to participate in such providers' scams by billing and collecting the associated charges. Forcing T-Mobile to associate its brand with objectionable content and dishonest providers not only would be contrary to the wishes of T-Mobile's customer base, but also would undermine T-Mobile's central mission of providing the best customer service in the industry.⁴³

There are simply no legal or policy grounds for addressing billing services, or any of Rebtel's demands, in the context of the Petition.

III. THE NARUC LINE OF CASES DOES NOT SUPPORT COMMON CARRIER REGULATION OF SHORT CODES OR SMS.

The Petitioners and Rebtel argue that the *NARUC* line of cases⁴⁴ requires the Commission to regulate text messaging and short codes as common carrier offerings.⁴⁵ These cases require no such conclusion. Indeed, the *NARUC* line of cases teach just the opposite.

A. The Decision to Activate a Short Code Satisfies No Part of the *NARUC* Test for Defining Common Carriage Offerings.

As an initial matter, activation of a common short code on the Verizon Wireless network falls outside any test for common carriage for two fundamental reasons. First, as Verizon Wireless explained in its initial Comments, provisioning a common short code is not a transmission-based, communications service, and, therefore, falls outside the Communications Act altogether.⁴⁶ Second, Verizon Wireless is not in privity with the holder of the common short

⁴³ T-Mobile Comments, at 12.

⁴⁴ *National Assoc. of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir.) (*NARUC I*), cert. denied, 425 U.S. 992 (1976); *National Assoc. of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II*).

⁴⁵ Public Knowledge et al. Comments, at 3-5; Rebtel Comments, at 7-9.

⁴⁶ See Verizon Wireless Comments, at 37-39; 47 U.S.C. §153(44) (a common carrier must be "engaged in providing telecommunications services"); AT&T Comments, at 15; *accord Eagleview Tech., Inc. v. MDS Assocs.*,

code.⁴⁷ Requests for activation of a common short code are generally submitted through a messaging aggregator whose content provider-client is the holder of the code.⁴⁸ Thus, Verizon Wireless does not offer to, or contract with, holders of common short codes to provide any product or service.⁴⁹

Even assuming, however, that the lack of jurisdiction and lack of privity issues are not relevant, Verizon Wireless is not a common carrier for the provision of common short codes. Under the two-part test in the *NARUC* line of cases, whether a service can be regulated as a common carrier service is considered in light of how the service is offered. The first part of the test considers:

If the carrier chooses its clients on an individual basis and determines in each case “whether and on what terms to serve” and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.⁵⁰

“A second prerequisite to common carrier status [is] ... that the system be such that customers transmit intelligence of their own design and choosing.”⁵¹

As an initial matter, and contrary to the first prong of the test, Verizon Wireless’ common short code “practice is to make individualized decisions, in particular cases, whether and on what

190 F.3d 1195, 1197 (11th Cir. 1999) (“MDS was not a common carrier as defined by the Act because it did not provide communications services”).

⁴⁷ See Verizon Wireless Comments, at 38.

⁴⁸ Verizon Wireless enters into contractual relationships with various messaging aggregators, which include the ability to have charges imposed for common short code campaigns. This relationship is not CMRS and non-common carriage: it is not available to the public and is “provided only for internal use or only to a specified class of eligible users.” *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1509, ¶ 265 (1994).

⁴⁹ See 47 U.S.C. §153(46) (telecommunications service means “the offering of telecommunications for a fee directly to the public”).

⁵⁰ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994), citing *NARUC II*, 533 F.2d at 608-09 and *NARUC I*, 525 F.2d at 643.

⁵¹ *NARUC II*, 533 F.2d at 609 (internal quotation marks omitted); see also *U.S. Telecom. Assoc. v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002), quoting *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 3040, 3050 (1999); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d at 1480; accord *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

terms to deal.”⁵² As detailed in its opening Comments, Verizon Wireless does not indiscriminately offer to activate any and all common short codes. Rather, it conducts a review of the campaign proposal, and, applying its own content and procedure guidelines, decides whether to activate the short code and permit the campaign to reach its subscribers, whether to request modifications to the initial proposal to meet its guidelines, or whether to reject the campaign altogether.⁵³ This is the antithesis of a common carriage approach to offering a product or service.

Nor is there any legal or regulatory compulsion to serve the public indifferently with respect to provisioning short codes. Common short codes are only one way that advertisers, advocates and purveyors of content can reach consumers. Content providers can use 10-digit numbers for voice calls or text messages, the Internet, or any of the traditional media. Moreover, the Commission has repeatedly found that the market for wireless services is characterized by the presence of multiple operators in almost every area of the country,⁵⁴ and content providers can – and do – choose from multiple wireless networks for activation of short codes, sometimes intentionally only using one network.⁵⁵ The availability of numerous facilities to achieve the same result obviates any need for imposition of monopoly utility style regulation based on a legal compulsion to require common carriage for short code products. In these circumstances, the Commission must let market forces, rather than Title II regulations, guide the development of

⁵² *NARUC I*, 525 F.2d at 641 (footnote omitted).

⁵³ Verizon Wireless Comments, at 15-20; *accord* CTIA Comments, at 45-48. The statement by Verizon Wireless’ CEO Lowell McAdam to Chairman Dingell is not to the contrary. *See* Public Knowledge et al. Comments, at 5. As Mr. McAdam notes, he was addressing the issue of short code campaigns proposed by “advocacy groups,” and committed to activate short codes for “any group that is delivering legal content to customers who affirmatively indicate they desire to receive that content.” *See* Verizon Wireless Comments, Att. G. Even these groups would be held to compliance with the Mobile Marketing Association’s procedural guidelines for signing up and maintaining subscribers.

⁵⁴ *See Twelfth CMRS Report*, ¶¶ 2, 38; *cf.* AT&T Comments, at 18 (“wireless providers are competing fiercely in the provision of SMS-related services”).

⁵⁵ *See* CTIA Comments, at 51-54.

the short code marketplace.⁵⁶ The D.C. Circuit has applied the *NARUC* test for common carriage in this way, holding that common carrier regulation may only apply where a provider's market power justifies the imposition of such intrusive requirements unless the provider itself chooses to operate as a common carrier, which Verizon Wireless has not with respect to common short codes.⁵⁷

The Petitioners' attempt to turn Verizon Wireless' actions on short codes into common carriage is unavailing. They claim that carriers offer short codes "to the public at large" because "as a practical matter, they are being offered to everyone save the select few who have been singled out for discrimination."⁵⁸ But that is precisely the point: Wireless carriers offer to activate short codes through "individualized decisions" based on internal reviews of the proposed campaign. A provider's inherently selective business model cannot be transformed into a nondiscriminatory service simply by ignoring those parties with whom the provider has refused to deal. Similarly, just because the Common Short Code Administrator has a promotional statement that short code campaigns represent a marketing opportunity for "anyone" does not mean that Verizon Wireless, or any individual carrier, offers to activate a short code on a nondiscriminatory basis.⁵⁹

Turning to the second prong of the *NARUC* test, while Verizon Wireless does not interfere with messages sent after a campaign is approved and activated, it cannot be said to

⁵⁶ See *Cable & Wireless, plc*, 12 FCC Rcd 8516, 8522-23 (1997) (where there are multiple competing facilities available, "there is no public-interest reason under *NARUC I* to require that C&W's proposed cable facilities be provided on a common carrier basis"); *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589, ¶ 9 (1998) *aff'd*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); see also, e.g., *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 1 FCC Rcd 561, 561 ¶ 5 (1986) (finding no "compelling reason" to impose common carrier regulation on a carrier that had "little or no market power").

⁵⁷ *NARUC I*, 525 F.2d at 642-44; see also *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, 5913 (2007) ("Wireless Broadband Ruling") (transmission component of wireless broadband Internet access "is a telecommunications service only if the entity that provides the transmission voluntarily undertakes to provide it indifferently on a common carrier basis").

⁵⁸ Public Knowledge et al. Comments, at 5.

⁵⁹ See *id.* at 4 (quoting from the CSCA website).

allow “customers to transmit intelligence of their own design and choosing.” The D.C. Circuit has noted that this prong of the test “is intended to confine common carrier status to operators that do not regulate the content of their customer’s communications.”⁶⁰ Verizon Wireless does regulate the content of short code campaigns, as the Petitioners concede *and object to*. Indeed, if, post-activation, a campaign adopts modified content that is inconsistent with Verizon Wireless’ standards, Verizon Wireless will terminate the campaign or require modifications for continuance.

Therefore, even assuming that the Commission agreed with Petitioners’ objections to wireless carriers’ decisions regarding whether to activate specific short codes, it cannot simply declare this product to be common carriage, when in fact it is not being offered within the boundaries of that regulatory classification.

B. SMS Is Also Not a Common Carrier Service Within the Scope of the *NARUC* Definition.

SMS itself also falls outside the scope of the definition of common carriage in the *NARUC* line of cases. Although SMS as a service is generally available to any subscriber with an SMS-capable handset, the competitive wireless market demonstrates that there is no legal or regulatory need to require SMS be offered as common carriage. Text messaging plans are available from multiple carriers, including the five carriers that have filed comments in this docket.⁶¹ In the United States, more than 98 percent of the population can choose among three or more wireless carriers, and 94 percent have the choice of four or more.⁶² More than 50 percent of wireless subscribers use text messaging regularly, and SMS is being used by an ever

⁶⁰ *USTA v. FCC*, 295 F.3d at 1335.

⁶¹ *Cf.* CTIA-The Wireless Association®, Comments, at 5, WT Dkt. No. 08-27 (filed Mar. 26, 2008) (more than 150 wireless companies providing service in the United States).

⁶² *Id.* at 13-14.

increasing cross section of the market.⁶³ In this competitive market for SMS, carriers must compete on multiple levels as they respond to consumer demand. For example, text messaging has expanded to text, photographs and video messaging.⁶⁴ Whereas subscribers used to only be able to text in-network subscribers, wireless providers have worked to ensure the interoperability of text messaging.⁶⁵ And, carriers are competing in pricing, for example, recently, in the development of unlimited usage plans.⁶⁶ As noted above, in similar competitive markets, the Commission has found that there is no need to impose intrusive common carrier regulation.⁶⁷

Moreover, SMS is not configured to meet the second prong of the *NARUC* test, so that “the content of the transmission ... may ... be under the customer’s control.”⁶⁸ As explained in Verizon Wireless’ initial Comments, the text messaging service is not provided in the same way as voice services.⁶⁹ When a subscriber initiates a voice call, various signaling properties are communicated to the network, which opens a circuit, if available, between the caller and the called party, and the parties then transmit content of their own choosing to one another without modification of the content itself.

On the other hand, like email, messaging is a store and forward service.⁷⁰ The customer can edit the message, forward it to others, reply by text, or even reply by voice by clicking the

⁶³ Mark Lowenstein, *supra* note 23, at 3; *see* C. Kang, “Running L8 But CU Soon. Luv, Mom,” *The Washington Post*, A1, col.1 (Apr. 11, 2008) (describing parents’ use of text messaging).

⁶⁴ *See Twelfth CMRS Report*, ¶ 218 (text messaging is most widely used type of messaging, but “the volume of photo messaging and other multimedia messaging services is also growing”).

⁶⁵ *See, e.g.*, Mark Lowenstein, *supra* note 23, at 3; “GSM and CDMA MMS Interoperability Report Announced,” *Mobile Tech News* (May 7, 2004), <http://mobiletechnews.com/info/2004/05/07/105706.html>.

⁶⁶ *Twelfth CMRS Report*, ¶ 118; CTIA Comments, WT Dkt. No. 08-27, *supra* note 61, at 17-18.

⁶⁷ *See, e.g.*, cases cited *supra* note 56.

⁶⁸ *NARUC II*, 533 F.2d at 610. Thus, Rebtel’s assertion (Comments, at 9) that it is “axiomatic” that SMS subscribers transmit content of their own choosing is at best only true to the extent that a subscriber decides what content to deliver to the network.

⁶⁹ *See* Verizon Wireless Comments, at 30-36; *see also* CTIA Comments, at 31-40 (describing differences between voice and text).

⁷⁰ *See* Sprint Nextel Comments, at 3-4, 10-12; T-Mobile Comments, at 14-18.

associated phone number on the message.⁷¹ But, when a customer delivers a text message to the network, the message itself is no longer under the control of the sender. Various routing information is added to, or subtracted from, the message depending on its destination,⁷² and the message is stored at the SMS gateway until the recipient device is available to receive it. There is no real-time transmission transaction in which the sender participates.

Moreover, after the message is delivered to the network, the message itself is subject to transformation – without any input from the sender. If a text message as delivered to the network by the sender is too long, it will be truncated; if a message contains content that cannot be delivered to the addressee’s device (e.g., an image, photograph, or video), that part of the message will be deleted. Whether all content in the message is delivered depends in part upon the addressee’s provider’s network capabilities, and, in some circumstances, whether the addressee decides to accept the content. If the message cannot be delivered within the time allotted for storage, the content will be deleted and never delivered. The user is thus not in control of the message once it is delivered to the network.

Accordingly, SMS meets neither prong of the *NARUC* test, and cannot be deemed a common carrier service.

C. Under the *NARUC* Line of Cases, Each of a Provider’s Offerings Must Be Analyzed Separately and Only with Respect to Its Functional Characteristics.

Two other tenets of the *NARUC* case line provide additional reasons why the Petitioners’ analysis of SMS and short codes is flawed. Petitioners contend, for example, that because mobile voice and SMS are frequently offered together for the same subscriber and device, the

⁷¹ *Cf. Stevens Report*, 13 FCC Rcd at 11538-39 (discussing manipulation of email).

⁷² *See T-Mobile Comments*, at 14-15.

two services must be treated alike with respect to common carriage.⁷³ That argument runs directly counter to the recognition throughout the *NARUC* line of cases that “[t]he mere fact that [providers] are common carriers with respect to some forms of telecommunications does not relieve the Commission from supporting its conclusion that [providers] provide [another service] on a common carrier basis.”⁷⁴ In other words, any one service must be considered separately from other services offered by the provider in determining whether the Commission may regulate the service as common carriage. Given the characteristics of text messaging, described above, and in detail in the initial comments,⁷⁵ and the differences in the way voice and SMS are offered and configured, the Commission cannot find that SMS should be regulated as common carriage because mobile voice is so regulated.⁷⁶

Second, the Petitioners ignore the fact that the common carriage analysis is a functional analysis, and the Commission cannot impose common carriage on a service simply because that achieves some policy goal. “While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.”⁷⁷ As the D.C. Circuit noted in *NARUC I*:

[W]e reject those parts of the [FCC] Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications

⁷³ Petition, at 13; Rebtel Comments, at 10.

⁷⁴ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d at 1481; see *NARUC II*, 533 F.2d at 608 (“it is at least logical to conclude that one can be a common carrier with regard to some activities but not others”).

⁷⁵ See Verizon Wireless Comments, at 30-36.

⁷⁶ See CTIA Comments, at 31-40 (describing functional differences between voice and SMS).

⁷⁷ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d at 1481.

entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.⁷⁸

The *NARUC* line of cases thus definitively points to non-common carriage treatment of text messaging and provisioning of common short codes, and no aspect of Petitioners' or their supporters' arguments prove otherwise.

IV. TEXT MESSAGING SERVICES ARE NOT CMRS.

RebTel and MetroPCS offer several arguments that SMS is a “commercial mobile radio service” (“CMRS”) within the meaning of Section 332(c) of the Communications Act (47 U.S.C. § 332(c)), and, thus, must be treated as a “telecommunication service.”⁷⁹ None of these arguments is legally or factually correct. In any event, they do not support the action Petitioners and RebTel request – common carrier regulation of *short codes*.

A. SMS Is Not an Interconnected Telecommunications Service

Verizon Wireless explained in its Comments that SMS is not “interconnected” with the Public Switched Telephone Network, and, therefore, cannot be deemed CMRS. A CMRS service must give the end user the capability “to communicate to or receive communications from *all other users* on the public switched network.”⁸⁰ Text messaging does not provide this interconnected capability. Standing alone, text messaging only gives a subscriber the capability to interact via text messaging with other SMS-enabled devices. Without reliance on some other service, the subscriber has no capability to reach landline phones. Sprint Nextel points out, for example, that for a text message to reach a landline customer, there must be intervention of yet another service, e.g., its “Text to Landline” service, which, like SMS, is a separate information

⁷⁸ *NARUC I*, 525 F.2d at 644.

⁷⁹ RebTel Comments, at 9-10; MetroPCS Comments, at 3-8.

⁸⁰ *Wireless Broadband Ruling*, 22 FCC Rcd at 5916; *see also* AT&T Comments, at 12-13; CTIA Comments, at 40-43; Sprint Nextel Comments, at 12-14.

service.⁸¹ In terms of “interconnecting” users to the public switched network, a text messaging service is not equivalent to either mobile or landline phone service. As a result, text messaging cannot be deemed CMRS.

Also, as Verizon Wireless and others explained in detail,⁸² SMS cannot be classified as a “telecommunications service,” but rather is properly classified as an “information service.” Again, as an information service, SMS cannot also be CMRS. The Commission itself has ruled that an information service cannot be CMRS, and that this “exclusion is consistent with and furthers the Act’s overall intent to allow information services to develop free from common carrier regulations.”⁸³

While MetroPCS agrees that short codes are not CMRS or a Title II service,⁸⁴ it argues that SMS between 10-digit North American Numbering Plan (“NANP”) telephone numbers is a telecommunications service and CMRS.⁸⁵ For the reasons stated above, MetroPCS is incorrect regarding the status of SMS as CMRS because SMS is not provided as an “interconnected” service. Indeed, MetroPCS relies on the routing of text messages to short codes to argue that short codes are *not* interconnected with the PSTN.⁸⁶ Yet, the routing of text messages to short codes appears no different than the routing of text messages to 10-digit numbers.⁸⁷ MetroPCS is also incorrect in its assertion that text messages between NANP numbers are not subject to the

⁸¹ Sprint Nextel Comments, at 11-12.

⁸² Verizon Wireless Comments, at 30-36; T-Mobile Comments, at 21-22; CTIA Comments, at 32-40. As T-Mobile points out, neither SMS nor short code products can be deemed “adjunct to basic,” and regulated as telecommunications services. Adjunct to basic services were restricted to services used to facilitate telecommunications services, and the protocol processing and storage and retrieval properties of SMS do not serve that function. T-Mobile Comments, at 19-20.

⁸³ *Wireless Broadband Ruling*, 22 FCC Rcd at 5920.

⁸⁴ MetroPCS Comments, at 9-12.

⁸⁵ *Id.* at 3-8.

⁸⁶ *Id.* at 9-10 (quoting Common Short Code Administration’s description of text message routing).

⁸⁷ *Cf.* CTIA Comments, at 34 (SMS not routed over PSTN).

same technical limitations and transformations as other messages,⁸⁸ and so, its analysis of what form of messaging is or is not an “information service” is fundamentally flawed.

Although it apparently distinguishes SMS to or from the Internet and short codes as an information service,⁸⁹ MetroPCS has not identified any technical difference that would justify a significant regulatory distinction between number-based (telecommunications service) and Internet-based (information service) text messages. Moreover, this theory is simply unworkable. Under MetroPCS’ theory, SMS exchanged between a 10-digit NANP number and a short code or email address would not be classified as CMRS, and would be subject to different regulatory obligations than SMS between NANP numbers. It would be impractical for the Commission to apply, for a carrier to follow and for consumers to grasp the different regulatory obligations applicable to apparently identical text messages based on examination of both the sending and receiving addresses to determine whether only one or both are 10-digit NANP numbers.

B. The Marketing of, and Market for, SMS Does Not Determine Its Regulatory Status.

The mere fact that SMS is generally offered to the same subscribers that subscribe to CMRS voice services is not determinative of its regulatory status.⁹⁰ Unlike Internet access and email, cited by Rebtel as an example of “conjoined” services resulting in one regulatory classification,⁹¹ SMS and voice services use the same device and phone number, but are functionally and technically distinct.⁹² SMS is not a real-time service, voice is; SMS is not an interconnected service, voice is. One can send a fax over a voice line, but not via SMS. One can make a 9-1-1 call using a voice line, but not using SMS. On the other hand, as the Commission

⁸⁸ Compare MetroPCS Comments, at 6 with CTIA Comments, at 36-37 (describing transformations affecting text messages).

⁸⁹ See MetroPCS Comments, at 6 n.18, 9-12.

⁹⁰ See Rebtel Comments, at 10-12.

⁹¹ *Id.*

⁹² See also *supra* § III(C) (NARUC test for common carriage must be applied to each product or service individually).

pointed out, Internet access enables a platform of services, because all those services (email, web browsing, web hosting) are based on “access” to the Internet.⁹³ Accepting Rebtel’s argument would lead to the Commission classifying as CMRS any product or service that can be accessed from a wireless device, and the Commission has already rejected that position for offerings such as wireless Internet access and email.⁹⁴

Rebtel also argues that SMS must be CMRS because “the CMRS provider’s possession of market power in the CMRS marketplace requires application of Title II,”⁹⁵ and carriers are using that power to harm consumers. Rebtel’s claims are bereft of any actual support and are flatly in conflict with the Commission’s repeated findings of vigorous CMRS competition.⁹⁶ Rebtel offers no evidence that wireless service providers can actually harm consumer welfare through the exercise of any market-based dominance. Indeed, to the contrary, the Commission has consistently found that vigorous competition in the wireless industry has brought consumers extraordinary benefits.⁹⁷

Furthermore, imposing new regulation based on unsupported claims that bottlenecks could develop would be patently contrary to legislative and Commission policy even if these products were CMRS. The Commission and Congress have followed a deregulatory approach for wireless services for more than a decade – an approach that has proven hugely successful for the American economy and for consumers. In the Omnibus Budget Reconciliation Act of 1993

⁹³ *Stevens Report*, 13 FCC Rcd at 11539. The Commission also noted that the Internet access provider does not necessarily know what applications the subscriber is using, which is not generally the case with subscribers to wireless services.

⁹⁴ *Wireless Broadband Ruling*, 22 FCC Rcd at 5919-20 (Internet access); *Stevens Report*, 13 FCC Rcd at 11538-39 (email). Indeed, the Commission has lumped together multiple such wireless applications as “non-voice information services ranging from paging/messaging to vehicle tracking from satellites to wireless Internet connections and electronic mail via telephone handset, portable computers or Personal Digital Assistants (“PDAs”).” *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Services*, 16 FCC Rcd 596, 603 (2001).

⁹⁵ Rebtel Comments, at 12.

⁹⁶ See, e.g., T-Mobile Comments, at 6-7; AT&T Comments, at 16-17.

⁹⁷ E.g., *Twelfth CMRS Report*, ¶¶ 1-2; see also § III.

(OBRA), Congress amended the Communications Act to implement its “general preference in favor of reliance on market forces rather than regulation,”⁹⁸ and to permit the mobile wireless market to develop subject only to the degree of regulation “for which the Commission and the states demonstrate a clear-cut need.”⁹⁹ The Commission has declared that the “overarching congressional goal” in OBRA was “promoting opportunities for economic forces – not regulation – to shape the development of the CMRS market.”¹⁰⁰

This means that any new mandate for mobile wireless services must have a clear factual record justifying it, such as evidence of market failure. Such a factual record has not been submitted by the Petitioners or Rebtel.¹⁰¹ “Petitioners have not provided a single example of a purported market failure for text messaging – no blocking of messages or customer complaints.”¹⁰² That failure alone requires denial of the Petition.

C. The Commission’s Automatic Roaming Decision Does Not Require SMS Be Treated as a Common Carrier Service.

Finally, the Commission’s automatic roaming order is not dispositive of the regulatory classification of messaging, as Rebtel suggests.¹⁰³ In that order, the Commission specifically *declined* to classify subscriber-based SMS as a Title II service.¹⁰⁴ And, Rebtel ignores the fact

⁹⁸ *Petition of New York State Public Service Commission*, 10 FCC Rcd 8187, 9190 (1995).

⁹⁹ *Petition of the State of Hawaii*, 10 FCC Rcd 7872, 7874 (1995).

¹⁰⁰ *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988, 8004 (1994).

¹⁰¹ See U.S. Chamber of Commerce Comments, at 3 (“The Commission should reject the Petition because it fails to show any evidence that there is a market failure regarding the ability to send text messages to or from wireless subscribers that would justify the imposition of onerous new regulations on the industry.”); *id.* at 4 (same with respect to short codes); T-Mobile Comments, at 6 (noting lack of discussion of market failure, or “the role played by the market in policing provider behavior”); MetroPCS Comments, at 13 (Petitioners have shown no market failure in provisioning short codes).

¹⁰² AT&T Comments, at 16.

¹⁰³ See Rebtel Comments, at 9-10; see also MetroPCS Comments, at 7; *cf. Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007).

¹⁰⁴ *Roaming Order*, 22 FCC Rcd at 15837 n. 134 (“We note that nothing in this order should be construed as addressing regulatory classifications of push-to-talk, SMS or other data features/services.”); see AT&T Comments, at 13; CTIA Comments, at 41-42.

that the *NARUC* line of cases, which it requests be applied to SMS, demonstrates that SMS and short codes are *not* common carrier services.¹⁰⁵

Nor should SMS be regulated as common carriage by analogy to the Commission's decision on roaming. Offering to carry messages indifferently from other providers' subscribers is not the same as offering SMS on a common carrier basis. As described above, acceptance and deliverance of the content in messages is subject to the limitations of each carrier's SMS network, and the service is provided on essentially a "best efforts" basis. The content that a subscriber puts into a message is not necessarily what the addressee receives, if the content is received at all, which is antithetical to a common carrier service, in accordance with the *NARUC* cases discussed above. While wireless providers do not block text messages, just as they do not block voice messages, imposing telecommunications service and quality expectations on SMS equivalent to voice services is not technically feasible.¹⁰⁶ The technical features of SMS presented in this docket and the analysis of common carriage in the *NARUC* line of cases point out that SMS is not offered on a common carrier basis, and the Commission cannot legally impose Title II obligations on SMS.

V. THE COMMISSION CANNOT USE ITS TITLE I OR TITLE III AUTHORITY TO IMPOSE NONDISCRIMINATION OBLIGATIONS ON SMS OR SHORT CODES.

Limits on Regulation Under Title I. Rebtel echoes the Petitioners' argument that the Commission should use its ancillary authority under Title I to impose nondiscrimination

¹⁰⁵ See *supra* § III.

¹⁰⁶ See, e.g., Verizon Wireless, Terms & Conditions – Text, Picture and Video Messaging (“We do not guarantee that messages will be received and are not responsible for lost or misdirected messages.”), <http://support.vzw.com/terms/products/messaging.html>.

requirements on text messaging.¹⁰⁷ According to Rebtel, “[n]othing in the Act or the Commission’s precedent precludes this approach.”¹⁰⁸

As Verizon Wireless explained in its Comments,¹⁰⁹ that is simply wrong, because the imposition of a nondiscrimination requirement on text messaging is barred by the Communications Act. SMS is clearly an information service, and Section 153(44) of the Communications Act provides that a “telecommunications carrier shall be treated as a common carrier under this Act *only* to the extent it is engaged in providing telecommunications services.”¹¹⁰ The Commission has repeatedly recognized that Congress “inten[ded] to maintain a regime in which information service providers are not subject to Title II regulation as common carriers”¹¹¹ and, accordingly, it has found that providers of non-telecommunications services “are exempt from mandatory Title II common carrier regulation.”¹¹² Imposition of a non-discrimination obligation on text messaging would conflict with this explicit statutory prohibition against subjecting information services to common carriage obligations.¹¹³

Moreover, as T-Mobile points out, even if the Commission were to attempt to use its ancillary authority to impose common carrier regulation on non-common carrier offerings, the regulation “must be necessary to further effective regulation of *the underlying common carrier services*.”¹¹⁴ Petitioners’ and Rebtel’s assertions about the benefits of imposing regulation of text messaging and short codes do not satisfy this regulatory standard for exercise of ancillary

¹⁰⁷ Rebtel Comments, at 14-17.

¹⁰⁸ *Id.* at 16.

¹⁰⁹ Verizon Wireless Comments, at 42-45.

¹¹⁰ 47 U.S.C. § 153(44) (emphasis supplied).

¹¹¹ *Wireless Broadband Ruling*, 22 FCC Rcd at 5916.

¹¹² *Id.* at 5903; *see also Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) (“The Act regulates telecommunications carriers, but not information-service providers, as common carriers.”).

¹¹³ *See also* T-Mobile Comments, at 22-24.

¹¹⁴ *Id.* at 25 (emphasis in original); *cf. American Library Ass’n v. FCC*, 406 F.3d 689, 702-03 (D.C. Cir. 2005) (FCC’s Title I ancillary jurisdiction must be interpreted as not “unbounded” and with “meaningful limits”).

jurisdiction because they fail to demonstrate how such regulation would advance the Commission's statutory responsibilities to regulate in another area, e.g., CMRS voice. There is in fact no evidence that the unregulated status of text messaging and short codes is threatening CMRS services, or that regulation of SMS and short codes would facilitate regulation of regulated CMRS services.¹¹⁵ Therefore, Petitioners and Rebtel have failed to demonstrate that regulation of SMS and provisioning short codes would be "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of" a related service.¹¹⁶

Limits on Regulation Under Title III. Similarly, the Commission could not impose nondiscrimination requirements on SMS under its general authority in Title III, as suggested by Petitioners.¹¹⁷ As noted above, Congress amended Title III to add Section 332(c) specifically to deregulate wireless services. The Commission cannot assume that its general authority over spectrum-based services allows it to impose the very type of regulatory regime that Congress intended to eliminate with the very specific amendment to Section 332. Moreover, using Title III in this manner would constitute an unlawful end run around the Act's clear direction that non-common carrier services cannot be subject to Title II requirements.

¹¹⁵ Rebtel suggests exercise of the Commission's Title I jurisdiction could be ancillary to Section 230 of the Act regarding the Internet and other services. Rebtel Comments, at 15. But, Section 230 has no regulatory impact on common carrier services; it offers protection against liability for Internet service providers, and supports "a minimum of government regulation." And, while the Act does promote consumers having the ability to "choose from among competing providers," Rebtel does not explain how regulation of SMS would be ancillary to fulfilling that goal in the regulation of pole attachments (47 U.S.C. § 224), interconnection (47 U.S.C. § 251), or tower siting (47 U.S.C. § 332(c)(7)). *Id.*

¹¹⁶ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see* T-Mobile Comments, at 25-26; *see also* MetroPCS Comments, at 16 (FCC has recognized exercise of ancillary jurisdiction is inappropriate where "appropriate market-driven business incentives exist to discourage discrimination"); A&T Comments, at 16 (FCC has recognized that where there is no evidence of market failure, Title II regulations "would only hamper investment and innovation, and ultimately would harm consumers").

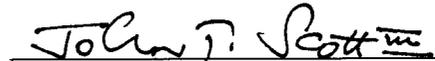
¹¹⁷ Public Knowledge et al. Comments, at 6-7.

VI. CONCLUSION

For the reasons discussed in Verizon Wireless' Comments and in these Reply Comments, the Commission should deny the Petition.

Respectfully submitted,

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