

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

In the Matter of)
)
Petition of Public Knowledge, et al. for) WT Docket No. 08-7
Declaratory Ruling Stating Text Messaging)
And Short Codes are Title II Services or are)
Title I Services Subject to Section 202)
Non Discrimination Rules)

REPLY COMMENTS OF AT&T INC

AT&T Inc, through undersigned counsel, hereby submits its Reply Comments to the captioned petition for declaratory ruling filed by Public Knowledge, et al. (Petitioners). For the reasons set forth below, the Commission should deny the petition.

It is important for the Commission to be clear as to what this proceeding is about, and more importantly, what it is not about. This proceeding is not about the ability of wireless customers to exchange Short Message Service (SMS) messages with other wireless customers. Neither the Petitioners nor their supporters have alleged that any wireless carrier has blocked or censored the SMS messages of its subscribers. What is at issue is whether wireless carriers can be forced to enter into joint marketing arrangements with content providers through the activation of short code campaigns. For the reasons set forth in the carriers' opening comments and as discussed below, the Commission should decline to do so.

In its opening Comments AT&T demonstrated that SMS is clearly an information service: it utilizes store-and-forward technology, frequently involves net protocol conversion and facilitates customer interaction with stored data.¹ Other commenting parties reach the same

¹ AT&T Comments at 9-12.

conclusion.² By contrast, Public Knowledge and its supporters offer no analysis of the nature of SMS or how it is provisioned. Instead, Public Knowledge argues that SMS is provided on a common carrier basis because carriers offer the service “to the public at large.”³ This argument ignores the express provisions of the Telecommunications Act of 1996. Section 3(44) exempts information services provided by common carriers from common carrier regulation.⁴ The 1996 Act establishes mutually exclusive categories of services, “telecommunications services” and “information services”.⁵ The Commission has held that a service can be classified as either a “telecommunications service” or an “information service”, but not both.⁶ SMS clearly meets the definition of an “information service”, and therefore is not subject to common carrier regulation.

MetroPCS argues that SMS meets the definition of Commercial Mobile Radio Service (CMRS) and therefore is subject to common carrier regulation.⁷ MetroPCS’s analysis is fundamentally flawed. First, MetroPCS defines “SMS” to mean only messages transmitted between a mobile 10-digit NANP telephone number and another mobile 10-digit NANP telephone number.⁸ However, this is just one type of SMS call. As T-Mobile demonstrates, SMS messages can be sent between mobile devices, between a mobile device and computer-

² See Comments of CTIA—The Wireless Association® (CTIA) at 32-40; Comments of Sprint Nextel Corporation (Sprint) at 9-12; Comments of T-Mobile USA, Inc. (T-Mobile) at 13-19; Comments of Verizon Wireless (Verizon) at 30-36.

³ Comments of Public Knowledge et al. (Public Knowledge) at 3-5.

⁴ 47 U.S.C. § 153(44) provides, in pertinent part: “A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunication services....”

⁵ See 47 U.S.C. § 153(20), defining “information service”; 47 U.S.C. § 153(43), defining “telecommunications”; 47 U.S.C. § 153(46), defining “telecommunications service”.

⁶ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005)(“*Wireline Broadband Order*”).

⁷ Comments of MetroPCS Communications, Inc. (MetroPCS) at 3-6.

⁸ MetroPCS at 4.

based e-mail platforms, and between a mobile device and computer-based Instant Messaging (“IM”) platforms. SMS messages to e-mail or IM accounts are routed over the Internet, and involve substantial net protocol conversions.⁹ Such messages are clearly information services. As the Commission has held, if a service is properly classified as an information service, it cannot be classified as CMRS.¹⁰

SMS messages also fail to meet the statutory requirement that CMRS must be “interconnected” to the public switched network.¹¹ The Commission has defined “interconnected service” as a service “that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.”¹² As AT&T explained in its opening comments, SMS does not give subscribers this capability. SMS allows a subscriber to interact, via SMS, only with other SMS enabled devices, not with everyone on the public switched network.¹³

The Open Internet Coalition, which includes Petitioners among its members, makes the bald assertion that text messages are “interconnected with the PSTN.”¹⁴ OIC provides no analysis of SMS service provisioning, the Communications Act or the Commission’s Rules to support this assertion. As demonstrated above, the Commission’s existing rules preclude any

⁹ T-Mobile at 3-4.

¹⁰ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007)(“*Wireless Broadband Order*”) ¶ 52.

¹¹ 47 U.S.C. §332(d).

¹² 47 C.F.R. § 20.3; *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶45; T-Mobile Comments at 21-22.

¹³ See AT&T Comments, 12-13. SMS currently does not permit text messaging to wireline phones, which constitute a substantial portion of the public switched network. While Sprint has recently introduced Text to Landline SMS, in which text messages are converted to speech and delivered to landline phones, the service is not offered by all carriers. Moreover, as Sprint demonstrates, this service has all of the defining characteristics of an information service. See Sprint Comments at 11-12.

¹⁴ Comments of the Open Internet Coalition (OIC) at 5.

finding that SMS is an “interconnected service”. To the extent OIC would like to see the rules changed, it should petition for rulemaking.

Rebtel argues that even if the Commission determines that SMS is an information service, it should exercise its Title I ancillary jurisdiction to impose non-discrimination obligations in connection with short code activations.¹⁵ First, as AT&T explained in its initial comments, the third-party contractual arrangements concerning short code activation involve no provision of “telecommunications” at all and thus these services are not communication services under the Act. To the extent these services could be classified as information services, however, the Commission has long recognized that the exercise of ancillary jurisdiction may not be used where markets are responding to competitive market conditions such as the case here. The Commission’s own analysis and data confirm that wireless services markets generally, and SMS-related markets specifically, are working with intense competition among competing providers. Accordingly, the Commission should not invoke its ancillary jurisdiction to regulate the provision of SMS or the activation of short codes based on the peculiarities of a particular business model.

Rebtel claims that it is “simply not viable” to provision its services using the customers’ regular telephone numbers because those numbers “do not have the technical or billing capabilities that short codes possess.”¹⁶ This highlights why the Commission should not seek to impose a non-discrimination obligation on short code activations. Short codes campaigns are much more than simply abbreviated dialing arrangements. Short code activation involves the carrier with the services of content providers, often involving customer care and billing arrangements. Carriers use individually negotiated contracts with content providers or

¹⁵ Comments of Rebtel Inc. (Rebtel) at 16.

¹⁶ Rebtel Comments at 4, 6.

aggregators to gain commitment from content providers to structure their campaigns to be consistent with the Mobile Marketing Association's Mobile Advertising Guidelines. These valuable consumer protections would be eroded if a strict non-discrimination obligation was imposed on short code activations. Rebtel claims that carriers are "crying wolf" in expressing concerns that their customers would be subject to SMS spam if a non-discrimination requirement were imposed. It notes that it only sends SMS messages to customers who "opt-in" to receiving such messages.¹⁷ But that "opt-in" requirement is a creature of the contracts negotiated between Rebtel and the carriers. Those contracts provide the means for carriers to protect their customers from SMS spam.¹⁸ As the U.S. Chamber of Commerce notes:

To ensure marketing tools provided to advertisers are not used to defraud consumers or as a means of sending unwanted, obscene, or indecent content to wireless subscribers, wireless carriers occasionally decline to activate Short Code campaigns. The Mobile Marketing Association and the wireless industry have established guidelines that have proven very successful. Consumers are protected from spam, excessive charges, and inappropriate or offensive content; while still allowing the market for communications between third-parties and wireless subscribers to develop.¹⁹

As AT&T demonstrated in its comments, short code provisioning does not involve any "transmissions" and therefore are not communications services at all, much less telecommunications services.²⁰ Short code activations are marketing services provided to content providers. Carriers should be free to determine with whom they enter into joint marketing arrangements.

¹⁷ Rebtel Comments at 6.

¹⁸ CTIA notes that even with existing controls, 28% of wireless customers who received a text advertisement did not opt-in to the advertising. CTIA Comments at 10 (citing M:Metrics survey).

¹⁹ Comments of the U.S. Chamber of Commerce at 4.

²⁰ AT&T Comments at 15.

OIC claims that the wireless marketplace has become “less competitive” and Rebtel claims that wireless carriers possess “market power.”²¹ Nothing could be further from the truth. Indeed, in the FCC’s 12th Annual CMRS Competition Report, the Commission once again held that the wireless market is subject to effective competition.²² In addition, CTIA has filed *ex parte* letters with the Commission demonstrating the vibrant competition that exists in the domestic wireless marketplace and the benefits to consumers that has resulted from the Commission’s “light regulatory touch.”²³ Consumers in the United States enjoy more competitive choices and a less concentrated wireless marketplace than any other of the Organization for Economic Cooperation and Development’s top 10 countries ranked by Gross Domestic Product.²⁴ The Commission should take no action in this proceeding that might interfere with the benefits of competition enjoyed by consumers of wireless services in the United States.

Those advocating the imposition of common carrier regulation on SMS and Short Code activations rely on the Commission’s *Roaming Order*²⁵ to advocate imposition of Title II regulation on SMS services.²⁶ The issue before the Commission in the *Roaming Order* was quite narrow: whether extending the automatic roaming requirement to SMS in some instances would

²¹ OIC Comments at 7; Rebtel Comments at 12.

²² Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Twelfth Report, FCC 08-28 (rel. Feb. 4, 2008).

²³ AT&T Comments at 17-19; *See* Written *Ex Parte* Communication of CTIA in re Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Service, WT Docket No. 07-71; in re: CTIA Petition for Expedited Declaratory Ruling on Early Termination Fees, WT Docket No. 05-194 (January 8, 2008); *Ex Parte Communication*; PS Docket No. 06-229; WT Docket Nos. 96-98, 05-194, 06-150, 06-169, 07-71 (January 23, 2008).

²⁴ *See* CTIA January 8, 2008 *ex parte* at 2-3.

²⁵ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007)(*Roaming Order*).

²⁶ Public Knowledge at 4; MetroPCS at 2, 7-8; Rebtel at 9-10.

further the public interest. The Commission expressly held in the *Roaming Order* that automatic roaming applies “only [to] services offered by CMRS carriers that are real-time, two-way switched voice or data services that are interconnected with the public switched network”²⁷ AT&T has demonstrated in its Comments and summarized above that SMS is not interconnected and is properly classified as an information service that is exempt from common carrier regulation.

People Calling People asks the Commission to “ban the wireless carriers’ from their present practice of arbitrary discrimination against political speech.”²⁸ AT&T does not discriminate against political speech. Nor does AT&T block or censor the content of mobile-to-mobile SMS messages. Parties advocating common carrier regulation of SMS services are advocating solutions in search of a problem. The Commission should dismiss the Public Knowledge petition.

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April 14, 2008

²⁷ AT&T Comments at 13; *Roaming Order*, ¶ 54 and note 134.

²⁸ Comments of People Calling People at 1.