

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

In the Matter of)
)
)
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

REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

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Summary

MetroPCS Communications, Inc. (“MetroPCS”) respectfully files these Reply Comments in response to the Petition for Declaratory Ruling (the “Petition”) filed by Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, and U.S. PIRG (the “Petitioners”) requesting the Commission clarify the regulatory status of text messaging services, including short-code-based services, sent from and received by mobile telephones, and declare that such services are governed by the anti-discrimination provisions of Title II of the Communications Act in the above captioned proceeding. As noted previously by MetroPCS and many of the commenters, short code services are neither CMRS nor Title II services, and should not be subject to any regulation. However, basic short text messaging services (“SMS”) from mobile telephone number to mobile telephone number are interconnected services, rather than information services, and should be classified by the Commission as commercial mobile radio services (“CMRS”).

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REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits reply comments on the Petition for Declaratory Ruling (the “Petition”) filed by Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, and U.S. PIRG (the “Petitioners”) requesting that the Commission clarify the regulatory status of text messaging services, including short code based services, sent from and received by mobile telephones, and declare that such services are governed by the anti-discrimination provisions of Title II of the Communications Act of 1934, as amended (the “Act”) in the above captioned proceeding.² As is set forth in greater detail below,

¹ For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² Petition for Declaratory Ruling of Public Knowledge, Free Press, Consumer Federation of America, Consumers union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, filed December 11, 2007; Public Notice, “Wireless Telecommunications Bureau Seeks Comment on 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, DA 08-78 (rel. Jan. 14, 2008); *In the Matter of Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Service or are Title I Services Subject to Section 202 Non-Discrimination Rules*, Order, WT Docket No. 08-7 (rel. Feb. 1, 2008) (extending Comment period deadline to March 14, 2008 and Reply Comment deadline to April 14, 2008).

MetroPCS wholeheartedly agrees with the majority of commenters who demonstrate that short code services are not commercial mobile radio services (“CMRS”), and should not be subject to CMRS or common carrier regulation. However, MetroPCS maintains that basic short text messaging services (“SMS”) from mobile telephone number to mobile telephone number should be classified as commercial mobile radio services (“CMRS”) for the reasons set forth in its original comments as supplemented by these Reply Comments.

I. SHORT CODE SERVICES ARE NOT CMRS SERVICES

As an initial matter, MetroPCS supports the many commenters who demonstrated that short code services are separate and distinct from SMS services.³ For example, CTIA is correct that “it is critical that the Commission has a correct understanding of SMS messaging and Short Codes and the distinction between the two.”⁴ And, Sprint Nextel has properly noted that, “SMS and [Short Code Services] are entirely different services.”⁵ Most important, as demonstrated previously by MetroPCS and others, short code services are properly categorized as information services, not subject to the Title II protections of the Communications Act (the “Act”).⁶ Properly viewed, short code services do not meet the definitions of “commercial mobile radio service” because they are not interconnected with the public switched network using the North American Numbering Plan.⁷ In addition, Petitioners have not demonstrated any market failure which would justify the Commission applying its Title I ancillary jurisdiction to the provisioning of short code services.⁸

³ CTIA Comments at 5; Sprint Nextel Comments at 2; T-Mobile Comments at 2.

⁴ CTIA Comments at 5.

⁵ Sprint Nextel Comments at 8.

⁶ MetroPCS Comments at 8-16; CTIA Comments at 45-58; Sprint Nextel Comments at 12.

⁷ *See, e.g.*, MetroPCS Comments at 9; Sprint Nextel Comments at 12; CTIA Comments at 47.

⁸ MetroPCS Comments at 13-16; Verizon Wireless Comments at 44-45.

II. MOBILE-TO-MOBILE SMS SERVICES ARE CMRS SERVICES

Mobile-telephone-to-mobile-telephone (“mobile-to-mobile”) SMS services should be classified the same as short code services. In the view of MetroPCS, unlike short codes, mobile-to-mobile SMS services meets the definitions of CMRS services and as a consequence are governed by Title II of the Act.⁹ MetroPCS sets forth in these Reply Comments the basis for its disagreement with various commenters who regard mobile-to-mobile SMS services as an information service.

A. Mobile-to-Mobile SMS Services are Interconnected Services

As noted previously by MetroPCS, the relevant determination as to whether a mobile service qualifies as a CMRS service subject to Title II regulations is threefold: (1) the mobile service must be provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) the mobile service is an interconnected service; and (3) the mobile service is available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public.¹⁰ No commenter disputes that this is the appropriate test or that mobile-to-mobile SMS services satisfy the 1st and 3rd prongs of the determination. However, a number of commenters claim that SMS service is not a CMRS service because it does not meet the Commission’s definition for “interconnected service.”¹¹ These commenters are wrong.

“Interconnected service” is defined by the Commission as:

A service:

- (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the

⁹ See MetroPCS Comments at 4-5.

¹⁰ See *id.* at 4; 47 U.S.C. § 20.3

¹¹ AT&T Comments at 4; T-Mobile Comments at 21; Verizon Wireless Comments at 36-37.

public switched network; or

- (b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.¹²

For instance, AT&T argues that “[r]egardless whether messages are routed directly to a 10-digit number or indirectly through a short code translation, AT&T’s wireless text messaging services do not give subscribers the capability to communicate to or receive communications from all other users on the public switched network. In particular, text messaging subscribers cannot use AT&T’s service to receive communications from (or send texts to) the many tens of millions of wireline users of the PSTN.”¹³ Moreover, T-Mobile notes that its “SMS offering does not . . . permit end users to transmit messages to users with landline phone numbers.”¹⁴

However, these arguments gloss over the fact that mobile wireless customers only have to be *capable* of receiving SMS messages from “all other users on the public switched network” to be encompassed by the definition of “interconnected service.” And, the related definition of “interconnected service” states that the relevant service must give “subscribers the *capability* to communicate to *or* receive communication from all other users on the public switched network” (emphasis added).¹⁵ Mobile-to-mobile SMS messaging allows such capability. For example, mobile wireless carriers generally allow a landline caller to a mobile unit who rolls into voice

¹² 47 U.S.C. § 20.3.

¹³ AT&T Comments at 4.

¹⁴ T-Mobile Comments at 22.

¹⁵ 47 U.S.C. § 20.3.

mail to opt to send a SMS message in lieu of leaving a voice message.¹⁶ This functionality allows the mobile wireless user to “receive communications from all other users on the public switched network.”¹⁷ This being the case, it becomes irrelevant whether landline phones are capable of receiving SMS messages from wireless units since the “or” in the definition of “interconnected service” is met as soon as wireless devices have demonstrated capability to receive such messages from landline phones.¹⁸ Since all mobile wireless customers have the *capability* to receive SMS services from all users on the public switched network, SMS services qualify as “interconnected services” under the Commission’s rules.

Some commenters argue that the interconnected service definition is not met because, in some instances, callers may not be able to use SMS service to reach a mobile wireless phone that is not SMS service enabled.¹⁹ However, the fact that not every mobile wireless user opts to utilize every capability offered by a carrier does not mean the capability does not exist and does not exclude mobile-to-mobile SMS services from being a CMRS service. Again, as long as such services have the *capability* to “receive communications from all other users on the public switched network,” such services are encompassed by the definition of “interconnected service.”²⁰ All users of the public switched network can use mobile-to-mobile SMS services if

¹⁶ Even if certain mobile wireless carriers do not allow such an option, the relevant fact for these purposes is the fact that mobile wireless phones are capable of receiving SMS messages from landline phones, as well as all other users of the public switched network.

¹⁷ If a particular wireless carrier decided not to offer this option, it would not alter the fact that the capability existed.

¹⁸ This is not a new view. The Commission has previously found one-way paging services to be CMRS services even though they cannot originate any communications to the public switched telephone network. *See* discussion *infra* at 10-11.

¹⁹ AT&T Comments at 12-13.

²⁰ For example, it is possible that a dedicated fax machine may not have voice capability; however, it would be absurd to argue that voice services are not “interconnected” because in isolated instances voice communications cannot be completed over that particular fax line.

(continued...)

they so choose. Thus, mobile-to-mobile SMS services clearly fall under the Commission's definition of "interconnected service" and are CMRS services subject to Title II regulation.

B. Mobile-to-Mobile SMS Services are Not Information Services

A number of commenters argue that SMS services are information services, and thus cannot be considered CMRS services.²¹ Such commenters offer a variety of reasons for their conclusion, including that protocol conversion is sometimes used during the transfer of SMS messages, that SMS messages can be converted from CDMA to GSM (another form of protocol conversion), that SMS messages may go through a SMS server prior to reaching the recipient and that SMS messages are similar to email messages or telemessaging.²² However, these arguments miss the mark.

Information services are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."²³ Mobile-to-mobile SMS services do not fall into this definition.

The aforementioned arguments that mobile-to-mobile SMS services are information services ignore one critical fact about such services –the format of a SMS message is unchanged

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Similarly, the Commission did not differentiate between numeric and alphanumeric paging services when it classified all paging services as interconnected CMRS services even though specialized CPE generally is required to send to alphanumeric pages.

²¹ MetroPCS accepts the premise that the categories of "information service" providers and "telecommunications service" providers are intended to be non-overlapping, and only the latter category is subject to mandatory Title II common carrier regulation.

²² T-Mobile Comments at 14-17; CTIA Comments at 32-40; Sprint Nextel Comments at 10-13; Verizon Wireless Comments at 31-36.

²³ 47 U.S.C. § 153(20).

between users.²⁴ A mobile-to-mobile SMS message is designed to be delivered to a recipient from the sender exactly as the sender sends it – without addition or modification. While carriers may use internal conversions that alter the form of a particular SMS message during the transmission, the message delivered to the recipient is the same as the message that was sent. Regardless of the process that a particular carrier may use to transmit SMS services, the fact is that such messages remain unchanged from the sender to the end user recipient. Just because carriers may utilize an internal network protocol conversion, such as a change from CDMA to GSM, or that certain SMS services may go through different servers on their way to the public switched network, does not mean that such mobile-to-mobile SMS services should be classified as information services.²⁵ Indeed, the Commission could face considerable mischief and be forced to reclassify any number of services if carriers could alter the regulatory status of a service by temporarily manipulating the format of a message while it was in transit and then delivering the message in its original form at the final destination.

The Commission encountered and rejected a similar line of argument when it considered AT&T's Petition for Declaratory Ruling that its phone-to-phone IP telephony services were exempt from access charges.²⁶ AT&T's service consisted of "a portion of its interexchange voice traffic routed over AT&T's Internet backbone."²⁷ AT&T argued to the Commission that

²⁴ Even if certain mobile wireless carriers voluntarily add information to certain SMS services, that is not enough to change mobile-to-mobile SMS services to information services. The basic transmission of a mobile-to-mobile SMS service is a CMRS service.

²⁵ The Commission previously has found that inputting information from a DTMF keypad and displaying it on a LCD display with conversion from DTMF tones to BCD or ASCII did not constitute an information service.

²⁶ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361 (rel. Apr. 21, 2004). ("AT&T Declaratory Ruling").

²⁷ *Id.* at para. 11.

its service, in which an interexchange call is initiated in the same manner as a traditional interexchange call, and then converted for a portion of the transmission by AT&T from its existing format into an IP format, transported over AT&T's internet backbone, and then converted back from IP format into circuit switched voice and delivered to the called party through local exchange carrier local business lines, was an information service not subject to access charges.²⁸ The Commission rejected AT&T's argument, holding that AT&T's service "is a telecommunications service as defined by the Act."²⁹ The Commission found that "[u]sers of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files."³⁰ The Commission further found that "[t]o the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions, which the Commission has found to be "telecommunications services."³¹ Thus, the Commission found that "internetworking" net protocol conversion is not enough to change a service to an information service. Since the end user did not experience changes in the particular service due to net protocol conversion, the Commission did not apply its information service tag to the service at issue.³²

The Commission also repeatedly has determined that, when there is no net protocol conversion to an end user, the particular service is not an information service, noting that "[w]ith respect to protocol conversion and phone-to-phone services . . . certain protocol processing

²⁸ *Id.*

²⁹ *Id.* at para. 12.

³⁰ *Id.*

³¹ *Id.*

³² The Commission should reject the idea that conversion from GSM to CDMA is a net protocol conversion. Otherwise, voice calls connected between these formats would not qualify as CMRS.

services that result in no net protocol conversion to the end user are classified as basic services; those services are telecommunications.”³³ In the *Stevens Report*, the Commission stated that “[t]he protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service’s classification, under the Commission’s current approach, because it results in no net protocol conversion to the end user.”³⁴

In the case of mobile-to-mobile SMS services, the end user is not experiencing any net protocol conversion – rather, the end user is receiving the mobile-to-mobile SMS message in the same basic form in which it was sent originally. The only protocol conversion that is occurring is within a particular carrier’s network, and this should be considered “internetworking” under the Commission’s *AT&T Declaratory Ruling*. The Commission’s rationale expressed in the precedent above confirms why mobile-to-mobile SMS services are not information services – as SMS services are unchanged from sender to receipt. Just because certain wireless carriers may alter the message internally does not change the fact that such messages are unchanged via the end users. Since any net protocol conversion that takes place with respect to mobile-to-mobile SMS services is not seen by the end user recipient, any such net protocol conversion would not transform mobile-to-mobile SMS services into an information service.

Moreover, SMS is distinguishable from email, contrary to the claims of AT&T.³⁵ Unlike e-mail and other information services, mobile-to-mobile SMS messages do not routinely include additional information as part of the relay of the message. For example, unlike e-mail, a mobile-to-mobile SMS message does not include header information relating to the message. Mobile-to-mobile SMS messages also do not include the kind of routing information that often is included

³³ *AT&T Declaratory Ruling* at para. 7.

³⁴ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 at para. 52 (1998) (“*Stevens Report*”).

³⁵ AT&T Comments at 10.

with e-mail. Accordingly, the content of the message generally is unchanged from end to end. This is much different from email services, in which additional information is added to a message and seen by the end user recipient. In contrast, the end user recipient of mobile-to-mobile SMS messages, sees exactly what the sender intended the recipient to see. This supports the conclusion that the provision of SMS services is a telecommunications service. In addition, as discussed in greater detail below, the fact that SMS is a store-and-forward technology does not preclude it from being a CMRS service. The Commission has previously rejected such a distinction when it classified one-way paging as CMRS services.

The best analogous service for SMS Messages is alpha-numeric paging services which have in fact been classified as CMRS services by the Commission. “In most paging systems, unlike two-way services, there is no ‘real-time’ link through the telephone network between the sender and the receiver of the paging messages.”³⁶ Instead the sender typically delivers the message to the paging carrier using a conventional telephone line, after which the carrier “stores and forwards” the information, either manually or by computer, for transmission at a subsequent time. Nonetheless, the Commission clearly has ruled that such “store-and-forward” services are classified as interconnected services under the Commission’s definitions, and has treated them as CMRS services. This fact contradicts the claims of commenters who insist that store and forward services consistently have been treated as information services.³⁷ For example, the Commission stated that “[u]nder the broader definition of interconnection adopted in the Second

³⁶ *Implementation of Sections 3(N) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*; Notice of Proposed Rulemaking, 8 FCC Rcd 7988 at para. 21 (rel. Oct. 8, 1993).

³⁷ See CTIA Comments at 34.

Report and Order [on the regulatory treatment of mobile services³⁸], we believe that all paging licensees should be presumed to be providing interconnected service regardless of their existing station classification.”³⁹ The Commission described this ruling as follows: “In the case of Part 90 paging licenses, we concluded previously that all such licensees will be presumed to be providing interconnected services to the public for purposes of determining their regulatory status.”⁴⁰ The net result of these rulings was to treat broad categories of store-and-forward paging services as CMRS services. Since a text message is stored and forwarded in much the same way a page is stored and forwarded, it should be treated in the same manner. Thus, since paging services have been classified as CMRS services by the Commission, mobile-to-mobile SMS services should be classified as CMRS services by the Commission.

III. CONCLUSION

For the foregoing reasons, the Commission should clarify that mobile-to-mobile SMS services are Title II services under the Communications Act and that short code services should not be regulated by the Commission at this time.

Respectfully submitted,

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³⁸ *Implementation of Sections 3(N) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*; Second Report and Order, 9 FCC Rcd 1411 at para. 57 (rel. Mar. 7, 1994).

³⁹ *Implementation of Sections 3(N) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*; Further Notice of Proposed Rulemaking, 9 FCC Rcd 2863 at para. 150 (rel. May 20, 1994).

⁴⁰ *Implementation of Sections 3(N) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*; Third Report and Order, 9 FCC Rcd 7988 (rel. May 20, 1994).

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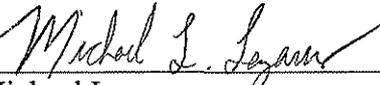
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April 14, 2008

CERTIFICATE OF SERVICE

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