

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**REPLY COMMENTS OF AMERICAN FOUNDATION FOR THE BLIND,
AMERICAN ASSOCIATION OF THE DEAF-BLIND AMERICAN COUNCIL OF
THE BLIND, COALITION OF ORGANIZATIONS FOR ACCESSIBLE
TECHNOLOGY, AND COMMUNICATION SERVICE FOR THE DEAF**

The American Foundation for the Blind, American Association of the Deaf-Blind, American Council of the Blind, Coalition of Organizations for Accessible Technology, and Communication Service for the Deaf (collectively, the “Organizations”), through counsel, hereby submit reply comments (the “Organizations’ Comments”), in the above-referenced rulemaking. The Organizations’ Comments here are timely submitted pursuant to the Commission’s published order, DA 08-282, 73 FR 10775 (2008), 23 FCC Rcd 1265 (2008).

1. These Organizations provide national leadership in resources and advocacy for people with disabilities, including those who are blind or visually impaired, as well as other service organizations, and the general public. The Organizations collectively work for equality of access and opportunity for people with disabilities to ensure freedom of choice in their lives.
2. The Organizations reply, here, to comments as to whether text messaging and related “short code provisioning” should be classified as information services or

telecommunications services. The outcome will determine whether mobile phone carriers are able to block access for proprietary reasons, based solely on their own competitive needs, or whether they must follow certain rules designed to maximize user rights. In the Comments that preceded this Reply, providers, such as T-Mobile USA, Inc., argued that “Regulation . . . is not needed and would likely hurt consumers.”¹ By contrast, advocacy groups contested the rights of mobile phone providers to act as content gatekeepers.²

3. Our comments on the Petition for Declaratory Ruling address an additional crucial issue: text messaging, an increasingly significant communications mode, is not accessible to people with vision loss or many other disabilities unless such messages are converted to another form. As such, the classification matters a great deal. If defined as a telecommunications service, mobile phone providers could be required to make their systems accessible, providing people with disabilities equal opportunities to use this important communications tool.

4. Section 255 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 255, is a Congressional mandate to ensure such equality in communications. Although its roots lay in plain old telephone service (“POTS”), its scope has always been broader.

¹ *Comments of T-Mobile, USA, Inc.*, filed Mar. 14, 2008, at 6.

² *E.g. Comments of Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, et al*, filed Mar. 14, 2008.

5. The Commission has long recognized that as POTS metamorphosed into new services, the mandates of Section 255 remained viable. The first of these were facsimile transmission and TTY services. There was no debate that transmission of such text-based media, whatever information they contained, took place on regulated transmission lines. While the Commission may not have had the authority (and rightfully so under the First Amendment) to regulate the contents of such old style text messages, it certainly had authority to require accessibility features, pursuant to Section 255, as carriers established standards and practices for transmission.

6. Similarly, as the Commission recognized, in *Request for Declaratory Ruling and Investigation by Graphnet Systems, Incorporated*, CC Docket No 79-6, Memorandum Opinion and Order 73 FCC 2d (1979) (“Graphnet”), an early version of computerized document delivery was similar subject to regulation under Title II.³ The Commission held that the proposed service, known as ECOM “is designed to offer consumers a service whereby information can be transmitted from a point of origination to one or more points of termination by means of electronic communications facilities. We therefore conclude that ECOM will be a communications service, pursuant to the statutory definition in sections 3(a) and

³ The proposed service, marketed as “ECOM,” was designed to use the regulated transmission capabilities of the old Western Union Telegraph system, whereby a “user will prepare its messages in electronic form and transmit them over communications channels to Western Union’s facilities... employing its switching and communications, [it] will then transmit the messages to the appropriate destination post offices...for physical delivery by postal employees.” *Graphnet* at 284.

3(b) of the Act.”⁴ The Commission went on to say: “Not only is the proposed service ‘communications by wire or radio’ it is also a common carrier activity....of a for profit service which affords the public an opportunity to transmit messages of its own design and choosing” (emphasis added).⁵

7. ECOM, albeit in the technologically cruder ‘mainframe’ universe offered nothing different than what text messages offer today. It used a regulated transmission system (Western Union’s telegraph lines) to deliver content of the users choosing. When a mobile phone consumer keys in a message for delivery, the FCC should similarly regulate its transmission over mobile telephone systems. It may not, of course, regulate the information. But this proceeding seeks not a declaratory ruling on whether the Commission can supervise the content text messages. It cannot. However, the FCC can and must regulate technical transmission matters – and must do so to ensure that carriers do not install proprietary features that would undermine the mandates of Section 255 and harm a significant segment of wireless consumers.

8. The legislative history could not be clearer. Section 255 became law as part of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (“1996 Act”) at Sec. 101(a). As the Senate Report noted, these provisions were enacted to “permit more ready accessibility of communications technology by individuals with disabilities.” S. Rep. No 23, 104th Cong., 1st Sess. at 53 (1995)

⁴ *Id.* at 288. Then Section 3(a) is currently Section 3(52)

⁵ *Graphnet* at 289 (emphasis added).

(“Senate Report on 1996 Act”).⁶ Congress did not hedge here, and neither should the Commission.

9. While it is also true that the deregulatory thrust of the 1996 Act favored policies that foster competition, new technologies and freer markets, the Act left the FCC with much leeway to craft regulation and policy to respond to actual market developments, *See, e.g.*, 47 U.S.C. Sec. 257, and to meet the needs of people with disabilities.

10. In implementing the 1996 Act, and when the Internet revolution was young, the Commission often used its discretion to foster new markets and technologies. The predominant view was that a hands-off approach would foster innovation and economic growth. Today, however, the once-nascent marketplace went through its adolescent crisis during the “dot-com bust.” And now, the survivors are fully grown economic actors – many with valuations and revenues exceeding those of longer-established “old economy” companies, classifying many as solidly blue chip.⁷

11. As the “new economy” is now mature and represents a dominant piece of the U.S. economy, the public policy considerations militating for “hands-off” regulation no longer exists. It is time, then, for the Commission to recognize that,

⁶ The Conference Agreement notes that original Senate proposal placed these provisions at Section 262, rather than the Section 255 location where they were incorporated into the Communications Act.

⁷ In 2006, for instance, Business Week reported: “No longer do all companies in technology have a strong tailwind of 15% to 25% growth. Instead, the overall tech sector is growing at single digit rates.” Article at http://bwnt.businessweek.com/tech_hot_growth/2006/ .

like Western Union of old, mobile telephone companies today are simply acting as a conduit from one user to another when the sender provides the content. That is, they are common carriers subject to the provisions of Section 255.

12. This is true even when mobile phone licensees' facilities are used to transmit something other than the mobile equivalent of POTS. Functionally, a text message is like a fax sent over phone lines. It may be faster and shorter, but it consists of visual items, usually text, sent from one user to another via a regulated phone system operating on licensed spectrum owned, ultimately, by the Federal Government and the American people. True, mobile phone licensees might also sell information and entertainment for delivery by these systems. But the regulation required by Section 255 is not about the message – it concerns the means by which the message is sent and received. And that means the FCC has an obligation to ensure that those with disabilities are not denied access because mobile phone companies place roadblocks to accessibility as part of their efforts to extract additional rent from users through promotion of proprietary content and services.

13. While the roadblocks may not be designed to deprive people with disabilities of access, any proprietary hindrances designed to favor a mobile provider's content that incidentally hinders accessibility does not comply with the requirements of Section 255. The phone companies can sell whatever information services they desire, but those rights end where mere transmission service begins and the disability rights, conferred by Section 255, apply.

14. In this proceeding, the Commission has a unique opportunity to clearly uncouple content from carriage. The messages carried, whether for business, pleasure, education or entertainment, may be imbued with First Amendment protections. That means keeping regulatory fingers off content, but exercising appropriate oversight over transmission to guarantee access to all.

15. In order for the Commission to ensure that people who are blind or visually impaired do not become third-class citizens, it must ensure that they have access to current and next generation communications services. Access to communications systems by people who are visually impaired is likely to be more and more difficult and, at the same time, more and more important as baby boomers age and technology continues to advance. As the legislative history of Section 255 notes, the section was crafted “as preparation for the future given that a growing number of Americans have disabilities.” *Senate Report on 1996 Act* at 52. “This requirement will foster the design development and inclusion of new features in communications technologies that permit more ready accessibility.” *Id.* But this won’t happen in text messaging if carriers are given a free hand to block or hinder non-proprietary applications.

16. Section 255 contains the authority and policy mandate for the Commission to regulate the transmission itself to ensure accessibility – while still honoring the First Amendment principal eschewing content regulation.

17. Even absent a Commission declaration that text messaging is a communications service rather than an information service, the Commission may –

and should – apply Section 255 protections to text messaging through its ancillary jurisdiction. The Commission has often used this mechanism, with positive effect to, ensure accessibility. For instance, it extended ancillary jurisdiction to telephone company voice mail and interactive menu services to ensure and facilitate the accessibility and usability of telecommunications services and equipment.⁸ The same reasoning must apply to text messaging, which is increasingly replacing the short phone call in both personal and business communications. The Commission must not deny millions of those who are blind or visually impaired the access to what is rapidly becoming a ubiquitous means of communication. Section 255, quite simply, demands inclusiveness.

18. In sum, text messaging is now ubiquitous. The Commission must use its authority, whether through a declaration that text messaging is a communications service, or through its ancillary jurisdiction, to ensure that people who are blind or visually impaired are not excluded. Section 255 demands no less.

Respectfully submitted,

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⁸ *Id.* at Sec. 103.

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