

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

In the Matter of)	
)	
Petition of Public Knowledge, et al.)	
)	
For a Declaratory Ruling that Text)	WC Docket 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 CTIA – THE WIRELESS ASSOCIATION®

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REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

I. INTRODUCTION AND SUMMARY

CTIA – The Wireless Association® (“CTIA”)¹ hereby submits reply comments in response to the Public Notice seeking comment on a Petition proposing to regulate the Short Messaging Service (“SMS” or “text messaging”) and Common Short Codes (“CSCs” or “Short Codes”) as Title II services, or in the alternative, to apply a nondiscrimination requirement to the services under Title I.² SMS and Common Short Codes are information services and should be classified as such.³ The action the Petition

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

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

³ Comments of AT&T Inc., WT Docket No. 08-7, at 8-15 (filed Mar. 14, 2008) (“*AT&T Comments*”); Comments of Sprint Nextel Corp., WT Docket No. 08-7, at 9-14 (filed Mar. 14, 2008) (“*Sprint Nextel Comments*”); Comments of T-Mobile, USA, Inc., WT Docket No. 08-7, at 13-21 (filed Mar. 14, 2008) (“*T-Mobile Comments*”); Comments of Verizon Wireless, WT Docket No. 08-7, at 29-39 (filed Mar. 14, 2008) (“*Verizon Wireless Comments*”).

calls for is unwarranted and uncalled for as both a matter of law and policy. Nothing in the resulting comments warrants – or justifies – application of a common carriage regulation to what are clearly information services. Carrier SMS practices are intended to benefit consumers. Carriers do not block text messages sent between customers. Carriers only block nuisance text messages sent from Internet-based spammers (saving consumers millions of dollars in unwanted charges). Likewise, as discussed below, while carriers choose not to enter into marketing and advertising relationships through CSCs with certain companies, those marketers still can use SMS to directly contact consumers as long as the messaging is not SPAM. Carriers do not load Common Short Codes for marketers of certain products and services to protect consumers from fraud and unwanted or objectionable messages. Accordingly, in these areas, application of common carrier requirements – whether under Title II or under Title I – to these information services is antithetical to the regulatory regime of Communications Act (“the Act”) and would eviscerate the consumer protections that carriers are uniquely suited to offer consumers. Imposition of such a requirement will result in *less* consumer protection than consumers have today. The Petition should be dismissed.

II. SOME COMMENTERS MISREPRESENT THE FUNDAMENTAL DIFFERENCES BETWEEN SMS AND COMMON SHORT CODES

A small group of commenters continue to misrepresent the fact that SMS and the provision of Common Short Codes are distinct and separate.⁴ SMS is a person-to-person

⁴ Comments of Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, Assemblyman Richard L. Brodsky, Credo Mobile, Inc., WT Docket No. 08-7, at 3 (“*Public Knowledge Comments*”); Comments of Rebtel, Inc., WT Docket No. 08-7, at 1-4 (“*Rebtel*”).

messaging service. SMS is a service designed to facilitate short communications (up to 160 characters) between two wireless users.⁵ Although SMS is commonly associated with person-to-person texting, SMS supports a host of applications. SMS can, for example, be used to send or receive information in binary form, such as pictures or ring tones.⁶

CSCs, by contrast, are a tool used for mobile marketing. CSCs are simply short 5- to 6-digit numeric addresses that direct a one-way message to a third-party marketer or advertiser.⁷ When faced with a request from an advertiser or a marketer, carriers decide whether they want to endorse the company or product that is being marketed to its customers.

Despite these differences, Free Press, Public Knowledge and others continue to misrepresent the two services as though they are one and the same.⁸ These same commenters use this false premise to justify requests to regulate both services. Wireless carriers do not prevent wireless customers from using SMS. Wireless carrier practices do, for entirely legitimate reasons, prevent some marketers from using Common Short Codes to market to wireless consumers. Those marketers, however, are still free to use other traditional avenues to market their services and other ways to reach consumers on

Comments"); Comments of the American Civil Liberties Union, WT Docket No. 08-7 (*"ACLU Comments"*).

⁵ A wireless customer's phone number is their address for SMS messages.

⁶ See e.g., Short Message Service/SMS Tutorial, *available at* <http://www.developershome.com/sms/> ("Besides text, SMS messages can also carry binary data. It is possible to send ringtones, pictures, operator logos, wallpapers, animations, business card (e.g., VCards) and WAP [Wireless Application Protocol] configurations to a mobile phone with SMS messages.").

⁷ If the Common Short Code application replies, the reply is sent using the wireless customer's phone number as the address.

⁸ Public Knowledge Comments at 4.

their mobile devices – including by use of text messaging. Rebtel, for example, supports SMS-based communications from U.S. wireless customers.⁹

Public Knowledge, in its comments, refers to text messaging as “both phone-to-phone and through ‘short codes’[.]”¹⁰ While it is true that wireless customers send a text message to a Short Code address, Public Knowledge’s request of the Commission is not the ability for consumers to send text messages – consumers already enjoy that service – but the ability of *companies and organizations* to force wireless carriers to enter into a marketing relationship through the CSC program. The continued misrepresentation of the real issue in this Petition allows the Petitioners to attempt to make this a consumer issue, when consumers are not being curtailed, marketers are. Moreover, it is consumers who would be harmed the most by the requested relief.

III. SMS AND CSCS ARE INFORMATION SERVICES, NOT COMMERCIAL MOBILE SERVICES, AND ARE PROPERLY REVIEWED UNDER TITLE I OF THE ACT

As CTIA noted in its comments, SMS is properly classified as an information service.¹¹ While most of the commenters agree that SMS is properly classified as an information service,¹² some commenters’ misunderstanding of the technology behind SMS leads them to claim that it is an interconnected service subject to Title II.¹³ Despite the claims of these commenters, there can be no question that the Short Message Service is an information service, subject to Title I of the Communications Act.

⁹ See Attachment A.

¹⁰ Public Knowledge Comments at 4.

¹¹ Comments of CTIA – The Wireless Association®, WT Docket No. 08-7, at 31-40 (filed Mar. 14, 2008) (“*CTIA Comments*”);

¹² AT&T Comments at 8-15; Sprint Nextel Comments at 9-14; T-Mobile Comments at 13-21; Verizon Wireless Comments at 29-39.

¹³ Comments of MetroPCS Communications, Inc., WT Docket No. 08-7, at 3-8 (“*MetroPCS Comments*”).

As CTIA stated in its initial comments, SMS bears all the hallmarks of services, like email and voice storage and retrieval, that have long been classified as enhanced or information services under the Modification of Final Judgment (“MFJ”),¹⁴ the Commission’s *Computer Inquiry* regime,¹⁵ and the Act. SMS’s “store-and-forward” functionality, like email, and net protocol conversion clearly establish its classification as an information service under the Act.¹⁶ SMS does not provide the ability to reach all users of the PSTN. SMS does not even use the PSTN to route messages. Rather it uses private data links and uses the Internet when the message originates on a computer. Despite the fact that SMS allows customers to use their phone number as an address for SMS, those messages are carried – via private data links – to an address associated with the consumer’s phone number, not over the PSTN.

Additionally, despite claims to the contrary, the Commission did not decide the regulatory classification of SMS in the *Roaming Reexamination Order* and nothing in the Order compels the Commission to apply Title II non-discrimination requirements to this clearly Title I information service. The Commission made no finding regarding the classification of SMS in the *Roaming Reexamination Order*. Rather, the Commission specifically stated that “nothing in this order should be construed as addressing [the] regulatory classification of push-to-talk, SMS or other data features/services.”¹⁷

¹⁴ *U.S. v. Western Electric Co., Inc.*, 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted).

¹⁵ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) (“*Computer II*”) (subsequent and prior history omitted).

¹⁶ See CTIA Comments at 34-7.

¹⁷ *Roaming Reexamination Order* at n.134.

Moreover, contrary to Petitioners' claims, the Commission made no finding that SMS was an interconnected service, because SMS is not an interconnected service.¹⁸

The Commission's decision to impose roaming obligations on SMS was based on its finding that SMS is bundled with "other CMRS services, such as real-time, two-way switched mobile voice or data, that are interconnected with the public switched network," and that consumers expect seamless connectivity of SMS just like voice services.¹⁹ The FCC undertook no analysis of whether SMS is an interconnected service, nor did it cite a single comment to suggest that it was. Claims that the *Roaming Reexamination Order* somehow compels a finding that SMS is a commercial mobile radio service lack any support.

Similarly, MetroPCS's analysis of the regulatory classification misstates the Commission's decision in the *Roaming Reexamination Order* and a fundamental misstatement of the way that SMS communication is accomplished. MetroPCS claims that, as a result of the Commission's *Roaming Reexamination Order* and the definition of CMRS, the Commission is compelled to define SMS as a Title II service. Both are incorrect. As explained above, nothing in the *Roaming Reexamination Order* compels the Commission to define SMS as CMRS. In fact, the Commission went out of its way to say that it had *not* decided the classification of SMS. Furthermore, attempts to shoehorn SMS into the definition of CMRS ignores the fact that the underlying transmission medium for SMS is not the PSTN, but private data links. MetroPCS admits in its comments that in order to be considered CMRS a service must be "provided via interconnection to the public switched telephone network" and "allow users the ability to

¹⁸ CTIA Comments at 40-3.

¹⁹ *Roaming Reexamination Order* at ¶ 56.

communicate with ‘all other users’ over that network.”²⁰ As CTIA explained in its comments, neither of these conditions are met.²¹ In the absence of interconnection with the PSTN or the ability to connect with all the users of the PSTN, classification of SMS as CMRS would be counter to the clear language of the Act.

IV. CARRIERS HAVE A FIRST AMENDMENT RIGHT TO REJECT ADVERTISEMENTS

The Petitioners’ demand that wireless carriers provide short codes on a common carrier basis raises serious First Amendment concerns. A wireless carrier’s refusal to carry a short code campaign is an exercise of editorial discretion no different than a broadcaster’s, cable company’s, or newspaper’s refusal to run commercial advertisements or advocacy pieces. Because CSCs are an advertising medium that uses a wireless carrier’s network to deliver the advertising, carriers are entitled to deny any such advertising. There is a long judicial history confirming that a business is not obligated to accept the advertising of its competitor.²² For example, even in more heavily regulated spectrum services, broadcasters can not be required to run advertising for competitors – NBC does not have to carry advertising from CBS or Fox.

The Petitioners seek to have the FCC require that wireless carriers host advertising campaigns for competitors. Rebtel provides a prime example of this in their comments. The Rebtel service consists of one wireless user sending a message to either a CSC or a telephone number that in turn sends out two text messages, one to the original sender and one to a third-party that the original sender wishes to call through the Rebtel

²⁰ MetroPCS Comments at 5.

²¹ CTIA Comments at 31-45.

²² CTIA Comments at 51-59; Verizon Wireless Comments at 45-51.

service.²³ Despite Rebtel's claims that parties opt-in to their service, the third-party has not opted-in and will receive an unrequested text message advertising the Rebtel service.²⁴ This is precisely the type of advertising that wireless carriers have a First Amendment right to reject on their networks to protect not only their brand, but also their customers from unwanted or inappropriate advertising messages.

Because the editorial discretion of wireless carriers is protected from abridgement by the First Amendment, any government intrusion upon that right must satisfy rigorous constitutional requirements. A rule implementing forced access to short codes would, at a minimum, be subjected to intermediate scrutiny. Such a rule will survive First Amendment review only if: (1) It furthers an important or substantial governmental interest; (2) If the governmental interest is unrelated to the suppression of free expression; and (3) The incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.²⁵

As CTIA described in its comments, the Petitioners cannot even satisfy the first prong of the test.²⁶ The Petition and subsequent comments provide no serious support that any government interests are threatened by carriers' exercise of discretion in rejecting common short code marketing campaigns. Petitioners or any other entity remain free to access wireless carriers' networks to make phone calls and send messages regardless of the wireless carrier's policies for acceptance of short code marketing

²³ See note 9, *supra*.

²⁴ Rebtel Comments at 2 ("The Rebtel system then provides a local number for the customer to call his friend and a local number for the friend to call Rebtel's customer. The local numbers are sent out to both the customer and the friend through a short message service ("SMS")⁴ (*i.e.*, two separate SMS communications are generated by the customer using the Rebtel web site).").

²⁵ See, *e.g.*, *Turner Broadcasting v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*").

²⁶ CTIA Comments at 56-7.

campaigns. The fact that some marketers or competitors will have to rely on other traditional advertising and marketing media or, specific to telecommunications, use ten digit telephone numbers for their marketing campaigns instead of a short code hardly rises to the level of an important government interest justifying the abridgement of wireless carriers' First Amendment rights under the relevant precedents.²⁷ Indeed, the attachment to this filing shows how Rebtel is taking full advantage of these alternatives.²⁸ Additionally, there is no basis to believe that competition is threatened. The wireless marketplace is highly competitive and no carrier has the ability to exercise market power.²⁹

V. CARRIERS ARE BETTER EQUIPPED TO CONTINUE TO PROTECT CONSUMERS THAN REGULATION

First, wireless carriers do not block text messages between wireless users. However, wireless carriers do employ a number of practices that are designed to protect consumers from fraud, as well as unwanted and objectionable material. Wireless carriers filter text messages that originate on the Internet to prevent spam and other unwanted messages from reaching wireless customers. In addition to the more than 48 billion text messages on U.S. wireless networks in December 2007,³⁰ individual carriers block as many as 200 million messages per month that originate on the Internet from entering their networks in order to prevent spam and other unwanted messages from inundating mobile

²⁷ See, e.g., *Hurley*, 515 U.S. at 577-78 (distinguishing the government's interest in *Turner I* of maintaining the very "survival of the speakers" from the *Hurley* plaintiff's interest in accessing but one more of many outlets for its speech even where that outlet is "an enviable vehicle for dissemination of [its] views.").

²⁸ See Attachment A.

²⁹ In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Twelfth Report, 23 FCC Rcd. 2241, ¶ 1 (rel. Feb. 4, 2008).

³⁰ Wireless Quick Facts, CTIA – The Wireless Association, available at <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (last accessed Apr. 14, 2008).

inboxes.³¹ These consumer-friendly practices prevent consumers from bearing the cost of the additional unwanted messages, including via SMS.

With regard to Common Short Codes, no commenter has provided a single example of a carrier preventing a consumer from reaching the legal information they desire. All of the examples of “discrimination” that are advanced by the proponents of common carrier regulation are attempts to enter into a business relationship with a carrier through the CSC program. This refusal to enter into a marketing relationship in no way prevented those organizations from reaching their target via numerous wireless and other marketing channels.

As many commenters in the docket have explained, wireless carriers reject CSC campaigns to protect consumers. Some examples that carriers have given include campaigns that lack an “unsubscribe” mechanism, campaigns that promote the illegal distribution of copyrighted materials, campaigns that feature sexually explicit content, and campaigns that are misleading or fraudulent.³²

While carriers can show that their policies with regard to both SMS and Common Short Codes protect consumers, Commission and Congressional attempts to adopt and implement laws and regulation to protect consumers from objectionable speech in other contexts, like three decades of pay-per-call regulation and litigation, have not passed Constitutional muster.³³ Consumers continue to benefit from carriers’ ability as private actors to protect their customers from spam, fraudulent and unwanted material. In fact, the State of Florida has affirmatively asked carriers to get *more* involved in preventing

³¹ Kim Hart, “Advertising Sent To Cellphones Opens New Front In War on Spam,” THE WASHINGTON POST, A1 (Mar. 10, 2008).

³² See Verizon Wireless Comments at 18; T-Mobile Comments at 5; Sprint Nextel Comments at 16; AT&T Comments at 6.

³³ See CTIA Comments at 51-9.

consumer fraud in Short Codes. In February, AT&T Mobility entered into an agreement with the Attorney General of Florida whereby AT&T will “police representations made in internet advertising for cell phone content to ensure fair and full disclosure.”³⁴ A Commission grant of the Petitioner’s requests would eviscerate carriers’ abilities to provide customers with these protections. It means nothing if carriers identify a company committing fraud, if carriers are forced to provide them with the means to perpetrate the fraud.

VI. THERE IS NO BASIS TO EXERCISE THE COMMISSION’S ANCILLARY JURISDICTION TO IMPOSE TITLE II NON-DISCRIMINATION REQUIREMENTS ON SMS OR COMMON SHORT CODES

As described above, claims by Public Knowledge and others that SMS is common carriage simply because it is being offered to all wireless consumers ignores the vast body of regulatory and legal precedent defining Title I Information Services. Because SMSs and CSCs are information services and not CMRS, the FCC cannot – consistent with the Act’s framework – impose common carrier obligations. Congress established two mutually exclusive categories of service, telecommunications services (including CMRS) and information services.³⁵ The Act contains no mandate to regulate information services. To the contrary, the “Act’s overall intent [is] to allow information services to develop free from common carrier regulation.”³⁶ It would be counter to statutory construction to designate a service an information service, which Congress intended to remain free of common carrier regulation, only to subject the same service to the most

³⁴ News Release, “McCollum Retrieves Millions For Florida AT&T Wireless Customers Billed for ‘Free’ Ringtones,” Office of the Attorney General of Florida (Feb. 29, 2008).

³⁵ *1998 Stevens Report* ¶ 13 (“We conclude . . . that the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive.”).

³⁶ *Wireless Broadband Order* ¶ 54.

central of telecommunications economic regulations, the obligation to serve all indiscriminately. It would be unreasonable to impose the core common carrier obligation on services that Congress intended to “develop without the impediments of common carrier regulation.”³⁷ Moreover, imposing such a requirement on SMSs or CSCs would not advance any of the FCC’s statutory responsibilities, a necessary prerequisite to ancillary jurisdiction.

Additionally, the FCC recently found that excluding mobile broadband service, an information service, from the definition of CMRS is consistent with and furthers the Act’s overall intent to allow information services to develop free from common carrier regulation.³⁸ As the Commission has explained, treating an information service as a common carrier service creates a statutory contradiction.³⁹ The Commission’s reasoning compels the same result here. Treating SMS and CSCs, information services, as CMRS would elevate section 332 of the Act above section 3. It would result in applying common carrier regulation to non-telecommunications service, in violation of section 3. Moreover, the Commission found that construing the CMRS definition to exclude information services “is consistent with and furthers the Act’s overall intent to allow information services to develop free of common carrier regulations.”⁴⁰ The same rationale applies here to SMSs and CSCs.

VII. CONCLUSION

The action the Petition calls for is unwarranted and uncalled for as both a matter of law and policy. Nothing in the resulting comments warrants – or justifies – application

³⁷ *Wireless Broadband Order* ¶ 54.

³⁸ *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Order*”).

³⁹ *Id.* ¶ 49.

⁴⁰ *Id.* ¶ 54.

of a common carriage regulation to what are clearly information services, and Commission action subjecting an information service to a nondiscrimination requirement is inconsistent with the structure of the Act. Additionally, such an exercise of Commission authority will have the consequence of preventing wireless carriers from responding to consumer demand for protection from spam, fraud, and objectionable or unwanted advertising. Carriers are in a much better position than the Commission to provide consumers with such protections. The Commission should allow wireless carriers to continue to protect their customers from the very real threats of spam, fraudulent and unwanted material and dismiss the pending Petition.

Respectfully submitted,

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Dated: April 14, 2008

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