

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

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

REPLY COMMENTS OF THE OPEN INTERNET COALITION

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Dated: April 14, 2008

SUMMARY

The Open Internet Coalition urges the Commission to grant the Petition for Declaratory Ruling filed by Public Knowledge and other consumer groups and make explicit that text messaging and short codes are subject to a nondiscrimination rule under Title II, or, in the alternative, pursuant to the Commission's Title I ancillary jurisdiction. By doing so, the Commission would protect the speech interests of wireless consumers and would provide greater assurance to entities seeking to use short codes that they will be treated fairly.

Though wireless carriers characterize short codes as nothing more than a "billing and marketing tool," the reality is that short codes are a technical means for enabling all types of communications ranging from political organizing to issue advocacy to interconnecting various text messaging platforms. Moreover, as communications such as text messaging, voice communications, and instant messaging converge and as networks become increasingly interconnected, the Commission should adopt a coherent regulatory approach that protects consumers' expectations of unfettered communications. The Commission's approach should prohibit blocking or discrimination against messages and content across the various converging communications services.

The Commission need not adopt detailed and burdensome rules to address unreasonably discriminatory conduct by wireless carriers in their treatment of text messaging services and provisioning of short codes. Instead, the Commission should evaluate allegations of discrimination using a case-by-case approach modeled after its

approach in the recent 700 MHz C Block open platform rules. A case-by-case approach to handling any complaints that arise under the proposed nondiscrimination rules appropriately balances the need to protect consumers with the reality that wireless carrier practices with respect to the growing text messaging market and the provisioning of short codes for new, innovative services are continuing to evolve.

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REPLY COMMENTS OF THE OPEN INTERNET COALITION

The Open Internet Coalition (OIC)¹ urges the Commission to grant the Petition for Declaratory Ruling filed by Public Knowledge (PK) and other public interest groups (“PK Petition”)² and make clear that text messages and short codes are subject to a nondiscrimination principle under the Communications Act. The OIC further urges the Commission to begin a proceeding to enact rules, similar to those adopted in the Commission’s recent 700 MHz Auction Order. Under such rules, complaints of discrimination with respect to text messaging services and the provisioning of short codes would be enforced on a case-by-case basis.

¹ Open Internet Coalition supporters include the following organizations: eBay, Google, IAC, Amazon.com, Sling Media, TiVo, Free Press, Educause, Earthlink, American Library Association, American Association of Law Libraries, Association of Research Libraries, the Computer and Communications Industry Association, Data Foundry, Electronic Retailing Association, Internet 2, NetCoalition, Public Knowledge, Skype, TechNet, US PIRG, and the Future of Music Coalition. A more complete list and more information can be found at www.openinternetcoalition.org.

² Public Knowledge et al., *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 (filed Dec. 11, 2007).

I. SHORT CODES ARE MORE THAN SIMPLY A MARKETING TOOL; THEY ENABLE A WIDE RANGE OF NONCOMMERCIAL AND COMMERCIAL SPEECH BY USERS

Despite efforts by wireless carriers to characterize short codes as nothing more than a “billing and marketing tool,”³ the reality is that short codes are a technical means for enabling all types of communications ranging from political organizing to issue advocacy to interconnecting various text messaging platforms. As the OIC discussed in its comments, short codes are used by a variety of entities for a wide variety of purposes, including:

- By public interest organizations such as NARAL, Climate Citizens and Amnesty International, who keep wireless phone users who sign up to receive text messages informed of issues and activities;
- By political campaigns, such as those of Barack Obama, Hillary Clinton, Mitt Romney, and Ron Paul, to send text messages to supporters who sign up to receive reminders to vote and updates on election news; and
- By online communications entities such as Skype and AOL, to enable their users to transmit text messages to friends, family, and business associates; and

Short codes are no more for “billing and marketing” than ten-digit NANPA phone numbers are for telemarketing or the Internet is for e-commerce.

While it is true that short codes are typically used by third-party companies and organizations rather than wireless end users, the above examples demonstrate that short codes are central to the free exchange of ideas and interpersonal communications and that far transcend “billing and marketing.”

³ Comments of CTIA – The Wireless Association, WC Docket No. 08-7, at 45 (Mar. 14, 2008) (“CTIA Comments”).

Carriers also argue that consumers have no need for short codes because they can always send text messages directly to intended recipients.⁴ However, without the use of short codes, text messages can be sent only to other wireless subscribers; instead, short codes enable two-way interconnection between mobile networks and Internet-based messaging services such as AIM and Skype.⁵

The carriers' comparison of short codes to pay-per-call 900 number services is also inapposite. Such numbers are specifically focused on pay-per-call services — in contrast to ordinary 10-digit phone numbers or toll-free 800 numbers — making them inherently more commercial and their use more limited. In contrast, as noted above, short codes enable a variety of communications, including many that are not pay-per-message and that do not require wireless carriers to engage in any billing and collecting activities.

The point is that services such as Internet access and online communications, text messaging, and voice communications are converging, and each are used for a variety of noncommercial and commercial purposes. The Commission's policies must reflect such convergence, and protect consumers across the range of services that they use. Accordingly, the OIC applauds Chairman Martin for recognizing that the principle of ensuring consumer access to content applies to text messaging services just as it does

⁴ CTIA Comments at 8.

⁵ An added advantage of short-code enabled interconnection between mobile text messaging and online instant messaging services is that consumers enjoy the benefits of interconnected networks and the ability to communicate with a wider audience without any technical requirements or mandates on mobile networks to enable such interconnection.

with respect to the Internet.⁶

II. AS COMMUNICATIONS CONVERGE, THE COMMISSION SHOULD ADOPT A COHERENT POLICY THAT PROTECTS CONSUMERS' EXPECTATIONS OF UNFETTERED COMMUNICATIONS, INCLUDING A BASIC NONDISCRIMINATION POLICY WITH RESPECT TO TEXT MESSAGES AND SHORT CODES

The PK Petition calls on the Commission to clarify the regulatory treatment of text messaging services. The OIC agrees and urges the Commission to provide consumers, applications developers, and network operators with greater certainty by making explicit that text messaging and the provisioning of short codes are subject to a regulatory scheme that reflects the increasingly converged nature of consumers' communications. Such a regulatory scheme must include a basic requirement of nondiscrimination, which is consistent with consumers' reasonable expectations.

Consumers know better than anyone that communications networks – wireless, wireline, Internet – are converging and becoming increasingly interconnected. With today's "smart" phones, a consumer can send and receive voice calls, text messages, and e-mail, as well as access the Internet to use a wide array of web-based applications.⁷ As the Commission recently noted, text messaging services are typically bundled with other CMRS services and consumers "expect the same seamless connectivity with

⁶ Letter from Chairman Kevin J. Martin to Senator Byron L. Dorgan, Jan. 11, 2008, at 1 ("I believe that the principle of ensuring consumer access to content on the Internet generally applies to providers of text messaging services as well.") ("Chairman Martin Letter").

⁷ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Docket No. 06-150, FCC 07-132, at 88, ¶ 197 (rel. Aug. 10, 2007) ("700 MHz Order").

respect to” text messaging as they do with voice services.⁸ In today’s converged world, the Commission should proceed from the consumers’ perspective and protect their interest in open and interconnected communications. Unless the Commission does so, consumers will face regulatory “silos” in which a consumer’s voice communications would be subject to Title II’s nondiscrimination rules but the consumer’s text communications using the same smart phone and bundled service plan would not be subject to the same rules – and indeed could be blocked or discriminated against by the carrier without recourse.

To protect consumers’ unconstrained access to content, the Commission should make explicit that text messaging and short codes are subject to a basic nondiscrimination rule under Title II. While carriers argue that text messaging/SMS is an information service because it involves “the storage and forwarding of messages, data conversion and data retrieval functions,”⁹ the OIC believes that this position elevates form over substance.

In classifying services as telecommunications services, the Commission has focused on the perspective of end users rather than the intricacies of how the network handles traffic.¹⁰ Thus, text messaging/SMS meet the definition of

⁸ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143, ¶ 55 (rel. Aug. 16, 2007) (protecting the consumer expectation in seamless connectivity of text messaging services by imposing an automatic roaming obligation on wireless carriers with respect to such services).

⁹ CTIA Comments at 33.

¹⁰ See *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, FCC 04-197, at 3, ¶ 4 (rel. Apr. 21, 2004) (“IP-in-the-Middle Order”).

“telecommunications” – “the transmission, between or among points specified by the user, of information of the user’s choosing without change in the form or content of the information sent and received”¹¹ – and should be classified as a telecommunications service subject to Title II. Such a classification matches the logic of the connection from the consumer’s standpoint. In sending a text message, the consumer specifies the recipient of the message, who receives the text message with no net protocol conversion. The specific routing techniques for text messages do not affect this end-to-end analysis.¹²

Regardless, however, of whether the Commission classifies text messaging, and the provisioning of short codes to enable text message-based communications, as telecommunications services or information services, such services should be subject to a basic nondiscrimination rule. Contrary to the carriers’ claims, the Commission has the authority under its Title I ancillary jurisdiction to adopt a rule prohibiting unreasonable discrimination with respect to text messaging and short codes services even if such services are classified as “information services.” In the debate regarding network neutrality and the Commission’s Broadband Policy Statement, the Commission has recognized that it has authority under Title I to adopt nondiscrimination rules with respect to information services.¹³ The same analysis holds true with respect to text messages and short codes should they be classified as information services.

¹¹ 47 U.S.C. § 153(43).

¹² See *IP-in-the-Middle Order*, ¶ 4.

¹³ *Broadband Industry Practices*, Notice of Inquiry, FCC 07-31, ¶¶ 4-7 (rel. Apr. 16, 2007).

The carriers' arguments with respect to the regulatory classification of text messaging and short code services underscore the perils of engaging in definitional gymnastics without paying attention to the underlying market characteristics and consumer expectations, which support the policy rationale for regulation. For example, carriers analogize text messaging to information services, such as e-mail, notwithstanding the fact that e-mail can be and is provided by third parties that do not own networks. Thus, consumers have hundreds of choices of e-mail providers and are not limited to selecting from among a very limited number of network operators. In contrast, text messaging services are provided by wireless carriers only as part of service plans that are bundled with voice service. Thus, the market for text messaging services is nearly identical to the market for wireless voice services, which are classified as telecommunications services and regulated under Title II. It goes without saying that in establishing policies designed to protect competition, the Commission should focus on the nature of competition in the market.

Wireless carriers argue that nondiscrimination rules are not necessary because the wireless marketplace is "hyper-competitive."¹⁴ The reality, however, is that while the market for wireless services is more competitive than the traditional wireline market, it still falls far short of the level of competition that could justify the Commission's giving up its oversight role. The two major wireless carriers, AT&T and Verizon, dominate the market under almost all metrics – from increasing market

¹⁴ Comments of Verizon Wireless, WC Docket No. 08-7, at 10 (Mar. 14, 2008) ("Verizon Wireless Comments").

shares to exclusive deals to offer popular new devices such as the iPhone to the significant market power of their respective wireline affiliates with respect to the special access services used by their wireless competitors for wireless backhaul. The results of the recent 700 MHz spectrum auction only increase the market dominance of these two leading wireless carriers.

In addition, the Commission recently recognized that while the wireless marketplace has seen effective competition with respect to pricing plans, consumer choices may not effectively drive the market with respect to wireless applications and devices.¹⁵ This marketplace reality, if not failure, belies the wireless carriers' claim that their subscribers can simply switch to a competing service provider if their current carrier refuses to implement a particular short code or otherwise discriminates with respect to text messaging services.

In a market characterized by bundled service offerings, bundling of handsets with wireless service contracts, and early termination fees, consumers cannot simply switch to a competing wireless carrier if they cannot access a particular short-code enabled application or service – certainly not without incurring significant costs. Moreover, wireless carriers have in effect a terminating access monopoly with respect to their networks – an individual or entity has no effective recourse in the marketplace to discipline a terminating carrier that blocks or discriminates against text messages sent

¹⁵ 700 MHz Order, ¶ 200.

to one of its subscribers.¹⁶

Accordingly, the Commission must retain its oversight role to protect the interests of consumers by ensuring that wireless carriers adhere to a basic principle of nondiscrimination¹⁷ with respect to text messaging and short code services – whether under Title II or Title I. As discussed in further detail below, such a role need not give rise to intrusive rules but can be implemented by adopting a general nondiscrimination rule and then focusing on instances of abuse on a case-by-case basis. In this way, the Commission would protect the speech interests of wireless consumers and would provide greater assurance to entities seeking to use short codes that they will be treated fairly.

III. THE FIRST AMENDMENT IS NO BARRIER TO A NONDISCRIMINATION RULE FOR TEXT MESSAGING AND SHORT CODES, AND SUCH A RULE WOULD NOT PREVENT WIRELESS CARRIERS FROM RESTRICTING SPAM OR OTHER UNDESIRABLE OR ILLEGAL CONTENT

Wireless carriers argue that the First Amendment precludes a non-discrimination

¹⁶ See *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, FCC 01-146, 16 FCC Rcd 9923, 9934-35, ¶ 28 (2001) (discussing the difficulties posed by the terminating access monopoly, and noting that “providers of terminating access may be particularly insulated from the effects of competition . . .”); Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 310-13 (2005).

¹⁷ See *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 98-100, FCC 98-134, 13 FCC Rcd 16,857, 16,865-66, paras. 15-18 (rel. July 2, 1998) (noting that “the bedrock consumer protection obligations” of nondiscrimination apply “even when competition exists in a market.”).

rule applicable to text messages and short codes.¹⁸ Such arguments, however, distort the common understanding of First Amendment law and are little more than a smokescreen that would permit the carriers to discriminate broadly and without reasonable limits.

The First Amendment does not shield network operators from generally applicable rules designed to foster openness in maintaining a channel of public communication and to guard against economic discrimination by wireless carriers against content or application competitors.¹⁹ A wireless carrier is not engaging in “editorial discretion” when it decides not to issue or implement short codes to a competitive VoIP provider or a mobile-commerce provider that may compete with the carrier or the carrier’s preferred commercial partner. Instead, such a carrier would be engaging in economic discrimination that is properly subject to regulatory oversight unconstrained by the First Amendment.

This is not an exercise of editorial discretion by the carriers. Carriers argue that the First Amendment protects their “discretion in deciding whether to affiliate themselves”²⁰ with a short code user does not reflect the reality of how short codes are used to enable communications between and among wireless users. When NARAL or other advocacy groups or political campaigns use short codes to communicate with

¹⁸ CTIA at 54-58.

¹⁹ Cf. 700 MHz Order, ¶ 217 (“To the extent that a choice of device or application implicates First Amendment values at all, we think that our requirements promote rather than restrict expressive freedom because they provide consumers with greater choice in the devices and applications they may use to communicate.”).

²⁰ CTIA Comments at 54.

their supporters via text messaging, or when AOL uses a short code to enable interoperability between SMS and AIM, the wireless carrier implementing the short code is not affiliating itself with the message being communicated any more than a telephone company affiliates itself with a fundraising or telemarketing call or an ISP affiliates itself with e-mail sent to a subscriber.

Unlike the parade organizer who decides who can march in a parade,²¹ wireless networks – and communications networks more generally – facilitate communications between third parties and end users of the networks, and no one interprets messages received via wireless networks as being crafted, endorsed, or in any way associated with the particular network operator.²² Under the expansive view urged by the wireless carriers, the Commission potentially would be prevented from addressing anti-competitive behavior on their part and network operators could freely block content, applications and services under the guise of “editorial discretion.” Under this logic, a carrier might argue that interconnection requirements were a form of compelled speech, or that requirements to provide special access services to competing carriers violated the carriers’ First Amendment rights to affiliate with whoever they choose.

Carriers also mistakenly assert that the PK Petition would prohibit wireless carriers from refusing to provide short codes to “entities seeking to promote the sale of

²¹ *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570-77 (1995).

²² This is not to suggest that there are no instances in which a wireless carrier might be thought of as being affiliated or associated with a particular message. For example, a wireless carrier certainly would retain editorial discretion over its own marketing messages and any joint marketing or branding efforts it chose to enter into.

pornography, or to spread racist messages, or to defraud their customers.”²³ This apparent scare tactic misunderstands both the nature of the proposed rules and the relevant First Amendment analysis.

A rule prohibiting unreasonable discrimination by network operators would not prohibit network operators from engaging in the very “reasonable discrimination” directed at pornography, hate speech groups, fraud, spam, and other unsavory entities or illegal content. Moreover, while the carriers should not be able to engage in discriminatory behavior under the guise of “editorial discretion,” nothing in the regulatory approach suggested by the PK Petition and supported by the OIC would turn wireless carriers into state actors for the purposes of the First Amendment and prevent them from blocking or discriminating against pornographers, thieves, and racists.²⁴

IV. THE FCC SHOULD EVALUATE COMPLAINTS OF DISCRIMINATION ON A CASE-BY-CASE BASIS

Too often, proposed nondiscrimination rules are attacked as introducing the heavy hand of regulation in a market that carriers claim is more competitive than in the days of the Bell System monopoly. However, as it demonstrated in its recent 700 MHz

²³ CTIA Comments at 56.

²⁴ *Cf. Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (private action does not amount to state action when the government fails to act to prevent the private action in question). The carriers’ discussion of the history of regulation of pay-per-call services and attempts to regulate dial-a-porn are similarly off the mark. The PK Petition does not seek regulation of the content of text messages – regulation that may trigger First Amendment scrutiny. Instead, the PK Petition simply seeks regulation that ensures nondiscriminatory treatment of text messages and provisioning of short codes. Wireless carriers would remain free to protect consumers from fraud, spam, and other objectionable material, as well as take any measures necessary to prevent “harm to the network.”

Auction Order, the Commission need not adopt detailed and burdensome rules to address unreasonably discriminatory conduct by wireless carriers. Instead, a simple nondiscrimination rule analogous to the Commission's 700 MHz C Block open platform rules would ensure the appropriate treatment of text messaging services and provisioning of short codes.²⁵ A simple nondiscrimination rule would put carriers on notice while providing consumers and mobile application developers the fundamental assurance that their communications and applications will not be blocked unreasonably.

The Commission should evaluate allegations of discrimination using a case-by-case approach modeled after its approach in the recent 700 MHz Order.²⁶ Carriers would preserve the right to engage in reasonable network management, preserve network security, and block illegal, obscene or other objectionable content. Once a complainant sets forth a *prima facie* case that a wireless network operator has violated the Commission's basic nondiscrimination rule as it applies to text messaging or the provision of short codes, the network operator shall have the burden of proof to demonstrate that it has adopted reasonable standards and reasonably applied those

²⁵ As discussed herein, the OIC urges the Commission to declare that text messages and the provisioning of short codes are subject to Title II, including specifically the nondiscrimination provisions of Section 202. Section 202 prohibits unreasonable discrimination, and the Commission has a long history of addressing Section 202 complaints on a case-by-case basis. The OIC urges the Commission to follow a similar approach with respect to text messaging and short codes, irrespective of their ultimate regulatory classification. However, as described herein, the OIC further urges the Commission to follow several provisions similar to those found in the 700 MHz C-Block open platform rules, thereby providing greater clarity to all interested parties, including network operators.

²⁶ 700 MHz Order, ¶¶ 229-30.

standards in the complainant's case. To the extent a network operator provider relies on standards established by an independent standards-setting body which is open to participation by representatives of service providers, equipment manufacturers, application developers, consumer organizations, and other interested parties, the standards will carry a presumption of reasonableness.

While such a process will provide mobile content providers, applications developers, and consumers with greater certainty and will protect consumers' speech interests, the practical impact of the proposed rules on wireless carriers should be minimal. To the extent that carriers follow industry-established standards and procedures in the provisioning of short codes, their actions will be presumed reasonable – although the entities setting industry-wide standards and procedures would need to be transparent and open to non-carrier entities.

Finally, a case-by-case approach to handling any complaints that arise under the proposed nondiscrimination rules appropriately balances the need to protect consumers with the reality that wireless carrier practices with respect to the growing text messaging market and the provisioning of short codes for new, innovative services are continuing to evolve.

* * *

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