
**Before the
Federal Communications Commission
Washington, DC 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)
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)
)

REPLY COMMENTS OF T-MOBILE USA, INC.

Thomas J. Sugrue
Kathleen O'Brien Ham
Sara F. Leibman
Amy R. Wolverton
T-MOBILE USA, INC.
401 Ninth Street, N.W., Suite 550
Washington, DC 20004
(202) 654-5900

David H. Solomon
Russell P. Hanser
WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, DC 20037
(202) 783-4141

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Attorneys for T-Mobile USA, Inc.

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T-Mobile USA, Inc. (“T-Mobile”) hereby files its reply comments in opposition to the above-referenced Petition.

INTRODUCTION AND SUMMARY

The result Petitioners seek would subject wireless subscribers to a deluge of spam, pornography, viruses, and other undesirable or unlawful messages, and would hamstring wireless providers’ ability to intercede on their subscribers’ behalf. Because the Petition would affirmatively harm consumers and would require the Commission to violate the express terms of the Communications Act of 1934, as amended (the “Act”), the Commission should deny it.

Supporters of the Petition apparently suffer from misunderstandings regarding the market, the services at issue, and the Commission’s long-standing approach to new and evolving advanced services. They presume that wireless carriers will circumscribe their customers’ access to content, ignoring the role the market plays in policing providers’ behavior and carriers’ consistent efforts to meet consumer demands. Commenters also mischaracterize short message service (“SMS”) and common short code (“CSC”) provisioning, wrongly suggesting that content providers and subscribers can only exchange messages using short codes. Further, the Petition’s

supporters suggest that SMS and CSC provisioning must be regulated precisely because they are new and fast-growing services – an argument that subverts nearly 30 years of Commission policy favoring a light regulatory touch for competitive new offerings. Nor does toll service provider Rebtel’s plea for access to short codes for use in connecting and billing its long-distance customers appropriately take into account the fact that Rebtel could rely on ten-digit SMS messaging or dial-around calling (just as other third-party toll providers selling service to wireless customers do), and that Congress has specifically exempted wireless carriers from any obligation to provide special treatment to long-distance competitors seeking access to the CMRS provider’s customers.

The legal arguments of Petitioners and their supporters likewise fail. They do not and cannot refute that SMS and CSC provisioning involve the storage, retrieval, transformation, processing, acquisition, and making available of information, and, therefore, constitute information services under the Act. Moreover, the judicial precedent cited by the Petition’s supporters regarding the nature of common carriage does nothing to alter this conclusion as it does not speak to services involving these enhanced functionalities. The Act and subsequent case law specify that telecommunications carriers may not be treated as common carriers in their provision of an information service. The Act similarly bars the application of common carriage requirements pursuant to section 303(r) or the Commission’s ancillary jurisdiction. Finally, the result Petitioners seek would impinge on the editorial function exercised by wireless providers with regard to their SMS and CSC-related offerings, and would therefore violate the First Amendment.

DISCUSSION

I. THE PETITION HAS NO BASIS IN PUBLIC POLICY.

In its opening comments, T-Mobile demonstrated that substantial harms would befall end users if the Commission were to grant the Petition. Petitioners and their supporters cite only a few isolated instances of purported abuse, and only detail one such instance, which was remedied in less than one day.¹ Despite the quick response to this incident, and notwithstanding intense competition in the mobile wireless market, Petitioners seek extensive common carrier regulation of SMS and CSC provisioning. Perversely, the regulation they seek would prevent mobile wireless providers from protecting their customers from spam, spyware, and viruses, from indecent messages, and from obscene or otherwise illegal content. This result would be directly contrary to the interests and demands of consumers, who rely on their mobile wireless providers to help minimize their receipt of such content.²

In addition to the direct harms that common carrier regulation of SMS and CSC provisioning would cause to consumers, the result Petitioners seek would also distort the currently well-functioning market for these services. “[R]egulation impose[s] significant costs on carriers and their customers,”³ preventing providers “from quickly introducing new services

¹ Verizon Wireless allegedly refused to support a CSC used by the National Abortion Rights Action League (“NARAL”). Verizon Wireless has stated that this refusal reflected an erroneous interpretation of its policies and was reversed less than a day after the problem was brought to its attention. *See* Comments of Verizon Wireless at 20-21 (filed March 14, 2008) (“Verizon Wireless Comments”).

² *See generally* Comments of T-Mobile USA, Inc. at 8-13 (filed March 14, 2008) (“T-Mobile Comments”); Verizon Wireless Comments at 15-20; Comments of AT&T, Inc. at 21-22 (filed March 14, 2008) (“AT&T Comments”); Comments of Sprint Nextel Corporation at 16 (filed March 14, 2008) (“Sprint Nextel Comments”).

³ *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C. 2d 1, 6 ¶ 14 (1980), *rev’d on other grounds sub nom. MCI v. FCC*, 765 F.2d 1186, 1195-96 (D.C. Cir. 1985); *AT&T v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992).

in response to customer demands and opportunities created by technological developments.”⁴

For this reason, the Commission has concluded that “competition can be expected to carry out the purposes of the Communications Act more assuredly than regulation.”⁵

Petitioners and their supporters make no serious attempt to address the various harms that grant of the Petition would impose on consumers and the market; in fact, at least one prominent supporter of the Petition, content provider Rebtel, acknowledges that “other content providers ... send unsolicited SMS messages to [their] customers.”⁶ Thus, the Petition’s supporters are left with a series of flimsy and/or inaccurate policy rationales for regulation, each of which can rapidly be dismissed.

The market will police providers’ behavior. Commenters’ extravagant claims about what an SMS/CSC provider might or will do in the absence of common carriage regulation simply ignore the central, proven role of the market in ensuring that consumers’ interests are served. Providers’ behavior is driven by the user’s own propensity to abandon any provider that imposes arbitrary limitations in favor of one that will permit access to the desired content. Indeed, as explained in the opening comments, wireless providers decline to support some short codes precisely because they would *harm* consumers.⁷ As MetroPCS states, “[i]t is not in the

⁴ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2002). See generally AT&T Comments at 7.

⁵ *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, 8989 ¶ 64 (1995), *aff’d sub nom. Bell Atl. Tel. Co. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996).

⁶ Comments of Rebtel Inc. at 6 (filed March 14, 2008) (“Rebtel Comments”). Rebtel’s recognition that some content providers behave in this manner is difficult to square with its assertion that wireless providers’ “doomsday rhetoric of spam overwhelming carriers’ networks ... is simply ‘crying wolf.’” *Id.*

⁷ See *supra* note 2. For this reason, the Open Internet Coalition’s (“OIC’s”) assertion that this proceeding pits wireless operators against their customers is misguided. See Comments of the Open Internet Coalition at 2 (filed March 14, 2008) (“OIC Comments”). T-Mobile opposes common carrier regulation of SMS and CSC provisioning precisely because of the interests of its consumers – such requirements (continued on next page)

best interests of wireless carriers to unnecessarily discriminate against short code providers – however, it is in the best interests of wireless carriers to protect consumers from unneeded and unwanted services.”⁸

The Commission should reject unsupported allegations that “the CMRS provider’s possession of market power in the CMRS marketplace requires application of Title II”⁹ As the Commission has repeatedly held, the mobile wireless market is intensely competitive. More than 95 percent of the U.S. population lives in areas with at least three mobile wireless operators competing to offer service, 94 percent of Americans live in areas with four or more mobile wireless competitors, and more than half of the population lives in areas with at least five competing operators.¹⁰ Rebtel attempts to overcome these facts by asserting that “only ... CMRS providers possess the network facilities necessary to reach wireless consumers.”¹¹ This tautological claim, of course, could be made of *any* industry: Only dairy farmers have the facilities necessary to produce milk, only hotel operators have the facilities necessary to lodge guests, and only restaurateurs have the facilities necessary to serve diners, but these markets are still among the most competitive in existence. The wireless industry, too, is indisputably

could subject its customers to a cavalcade of spam, pornography, viruses, and other unwanted or unlawful content.

⁸ Comments of MetroPCS Communications, Inc. at 15 (filed March 14, 2008) (“MetroPCS Comments”).

⁹ Rebtel Comments at 12.

¹⁰ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 08-28 at ¶¶ 2, 44 (rel. Feb. 4, 2008).

¹¹ Rebtel Comments at 12.

competitive. Indeed, just two weeks ago Chairman Martin referred to this industry as “the poster child for competition.”¹²

The Petition’s supporters misunderstand SMS and short codes. Some Petition supporters rely on an inadequate understanding of the relevant technologies. Rebtel, for example, erroneously states that “[a]pplication Providers do not and cannot use long codes since long codes connect directly to the end user.” Its related claim that “[w]ithout the use of short codes, any entity seeking to provide mobile consumers in the United States with innovative services or content will be shut out”¹³ is also incorrect. As T-Mobile and others explained, when a provider declines to provide short code service to a content provider, the subscriber will retain access to the provider’s content through the Internet, and the content provider remains able to contact the subscriber directly through ordinary SMS service.¹⁴ Thus, the issue here is not whether content providers will have access to wireless subscribers and vice versa, but only whether wireless providers should be required to surrender all control over which content providers will have access to their “content gateways” and often their billing and collection services.

The fact that SMS and CSC provisioning are relatively new and quickly evolving services militates against additional regulation, not in its favor. Contrary to Petitioners’ claims,¹⁵ the vibrancy of the nascent SMS/CSC market underscores just how inappropriate

¹² Remarks of FCC Chairman Kevin J. Martin, CTIA Wireless 2008, Las Vegas, NV (April 1, 2008), available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281259A1.pdf>.

¹³ Rebtel Comments at 3.

¹⁴ T-Mobile Comments at 5. See also Verizon Wireless Comments at 10; Comments of CTIA – The Wireless Association at 8-9 (filed March 14, 2008) (“CTIA Comments”).

¹⁵ Comments of Public Knowledge, et al. at 7 (filed March 14, 2008) (“Petitioners Comments”); see also *id.* at 7-9; Rebtel Comments at 11.

common carrier regulation would be. Such regulation can distort development of new offerings, prompting providers to design and deploy services based on regulators' preferences rather than consumers' preferences, if providers are able to deploy the services at all.¹⁶ Common carriage requirements are especially suspect with respect to information services because "[t]ailored private contractual agreements ... provide service providers more flexibility in developing a new technology and more incentives to do so."¹⁷ Departing from the Commission's long-standing and successful policy of non-regulation of information services would be both unwarranted and unwise.¹⁸

Rebtel's plea for special treatment is contrary to Congressional and Commission policy. Rebtel's argument that wireless providers should be forced to facilitate its particular business plan should be rejected.¹⁹ In essence, Rebtel asks the Commission to require CMRS providers to aid it in efforts to cannibalize long-distance service offerings in a market that is *already competitive*. While Rebtel could operate its business without short codes – it could

¹⁶ See T-Mobile Comments at 8. See also AT&T Comments at 18-20.

¹⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14891 ¶ 72 (2005) (subsequent history omitted) (“*Wireline Broadband Order*”).

¹⁸ As far back as 1980, the Commission recognized that transmission and processing capabilities “are becoming more and more interwoven,” that “this trend will become even more pronounced in the future,” and that the result would be a growing class of deregulated information services. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 422 ¶ 100 (1980) (subsequent history omitted). Congress agreed when it adopted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), putting in place “a regime in which information service providers are not subject to Title II regulations as common carriers.” *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5916 ¶ 41 (2007) (“*Wireless Broadband Order*”).

¹⁹ Rebtel describes its business as follows: A wireless subscriber uses a Rebtel short code to send Rebtel the telephone number to which it wishes to make an international call. Rebtel subsequently sends the caller and the called party messages containing local numbers that they then dial to talk with one another. Rebtel connects the two calls, and uses the originating CMRS provider's billing platform to charge the end user for the service. See Rebtel Comments at 2-4.

require its customers to use an ordinary ten-digit number to contact the company, or could rely on dial-around calling, just as other third-party interexchange carriers do – it apparently, wishes instead to force the CMRS provider to act as Rebtel’s chosen advertising platform and billing agent. Access to consumers is available without use of short codes, and Rebtel has failed to make any showing that a wireless carrier should be required to play a key role in advertising, billing, and collecting payment for its competitor’s long-distance offering. A requirement this intrusive has no place in a competitive market, particularly in light of Commission precedent stating that third-party billing is not a common carrier service.²⁰

In addition, the “equal access” outcome Rebtel seeks would be directly contrary to the Congressional policy codified in section 332(c)(8) of the Act:

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers’ choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers’ choice through the use of a carrier identification code assigned to such provider or other mechanism.²¹

Here, consumers are *not* being denied access to third-party toll service providers, as they can reach Rebtel’s services using standard SMS messaging and other means.²²

²⁰ See T-Mobile Comments at 18 and accompanying citations.

²¹ 47 U.S.C. § 332(c)(8).

²² See also *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 12456, 12458 ¶ 3 (1996) (“In light of the [1996] amendments to the Communications Act, we no longer have the authority to require CMRS providers to offer equal access. We do have the authority to require CMRS providers to afford subscribers unblocked access to the telephone toll services provider (continued on next page)

II. THE PETITION HAS NO BASIS IN LAW.

A. Title II Does Not Permit the Result Sought by Petitioners.

Both SMS and CSC provisioning are information services, to the extent the latter is a communications-related service at all. SMS and CSC provisioning both offer the user “a capability for” relying on protocol processing functionality to translate messages between short message peer-to-peer messaging protocol (“SMPP”) and other protocols,²³ a capability for storage and retrieval of initially undeliverable messages,²⁴ and a capability for acquiring, retrieving and making available information from external databases.²⁵ These features are integral to SMS and CSC provisioning,²⁶ and place SMS and CSC provisioning squarely within the statutory definition of information service.²⁷ Petitioners and their few supporters fail to refute these points. The Act clearly bars treatment of SMS and CSC provisioning as common carrier services. Moreover, SMS and CSC-related messages sent on T-Mobile’s network cannot be delivered to wireline phone numbers. Therefore, under recent and unambiguous Commission precedent, SMS and CSC provisioning cannot be deemed CMRS offerings.²⁸

of their choice if we determine that subscribers are denied such access and that such denial is contrary to the public interest, convenience, and necessity.”).

²³ T-Mobile Comments at 14-15. *See also* Verizon Wireless Comments at 34-35; CTIA Comments at 36-37; AT&T Comments at 11-12.

²⁴ T-Mobile Comments at 16-17. *See also* Verizon Wireless Comments at 31-34; CTIA Comments at 35; AT&T Comments at 9-11.

²⁵ T-Mobile Comments at 16-17.

²⁶ *See id.* at 18-19 and accompanying citations.

²⁷ *See* 47 U.S.C. § 153(20). *See also* T-Mobile Comments at 14-18 and accompanying citations.

²⁸ Nothing herein is meant to suggest that the Commission may never impose regulatory requirements of any sort on non-telecommunications services. T-Mobile argues only that the SMS and CSC provisioning services at issue here are information services, and that the Act prohibits the application of core common carriage requirements to such services.

1. SMS and CSC Provisioning Are Information Services, Not Telecommunications Services.

Parties supporting the Petition rely on misstatements of the relevant facts or misunderstandings of the relevant law to support their position that SMS and CSC provisioning are telecommunications services. They assert that text messaging services merely relay the user's communications without changing the form or content of the communications²⁹ when, in fact, SMS messaging offers (and CSC-related messages will almost *always* involve) protocol conversion because messages are exchanged between a user's handset and a content provider's computer system.³⁰ CSC provisioning also makes available third-party billing functions that clearly are *not* merely relaying communications or common carriage.³¹

Supporters of the Petition also misinterpret Commission precedent regarding regulatory treatment of integrated offerings involving both transmission and enhanced functionality.³² First, the fact that two products are sold together and even used through the same device does not justify identical regulation. “[M]erely packaging two services together does not create a single integrated service,” and where there is “simply ... no functional integration between the

²⁹ MetroPCS Comments at 6, *quoting* Petition at 11. OIC suggests that short codes are “merely technical means for enabling communications.” OIC Comments at 4.

³⁰ *See* T-Mobile Comments at 14-15. *See also* Sprint Nextel Comments at 5.

³¹ *See* T-Mobile Comments at 18; *see also* CTIA Comments at 14. Indeed, Rebtel emphasizes that this non-common-carrier billing functionality is the primary reason why it relies on short codes rather than 10-digit messages. *See* Rebtel Comments at 6.

³² For example, Rebtel suggests that “the customer perceives their SMS and CMRS voice service as a ‘finished, functionally integrated service,’” and that therefore the service should be treated as a combined telecommunications service. Rebtel Comments at 11. *See also id.* at 10 (“[B]ecause text services are intertwined with voice services, and are viewed as equivalent by the public, the Commission should regulate them the same way.”); OIC Comments at 3 (noting that “[f]rom the perspective of consumers, the various forms of communications ... are merging together”); *id.* at 5 (“From the consumer’s perspective, text messaging is an integral part of wireless service.”); MetroPCS Comments at 6 (stating that common carrier regulation of SMS is warranted because “consumers view SMS service as part of the integrated package of services provided by CMRS providers.”).

information service features and the use of the telephone calling capability,” the offering is not “‘sufficiently integrated’ to merit treatment as a single service.”³³ For example, millions of customers buy wireless plans that combine CMRS service and broadband Internet access service, all accessed over the same device, and yet the Commission has made clear that the broadband offerings are “information services” subject to less regulation than the associated voice service.³⁴ So too, SMS and CSC provisioning are information services, notwithstanding the regulatory classification of CMRS voice service as a telecommunications service.

Moreover, the Commission has repeatedly found that functionally integrated services that inextricably intertwine information-processing capabilities with transmission are to be treated as integrated information services, not telecommunications services.³⁵ This analysis is determinative with respect to SMS and CSC provisioning, which inextricably joins transmission and processing.³⁶ Thus, even if SMS/CSC offerings were best viewed as part of a single integrated package with CMRS, the result would be that the *entire integrated offering* would properly be classified an information service on account of the processing inherent in SMS, not that the package would properly be classified a telecommunications service on account of the CMRS offering’s “telecommunications features.”³⁷

³³ *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7295-96 ¶¶ 14-15 (2006) (subsequent history omitted).

³⁴ *Wireless Broadband Order*, 22 FCC Rcd at 5901-02 ¶ 1.

³⁵ See, e.g., *Wireline Broadband Order*, 20 FCC Rcd at 14860 ¶ 9; *id.* at 14863 ¶ 14; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4821 ¶ 36 (2002) (subsequent history omitted) (“*Cable Modem Order*”); *Wireless Broadband Order*, 22 FCC Rcd at 5908-09 ¶ 18. The Supreme Court affirmed this approach. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005).

³⁶ See T-Mobile Comments at 18-19; AT&T Comments at 14-15; CTIA Comments at 39-40.

³⁷ See Rebtel Comments at 11.

2. The D.C. Circuit’s *NARUC* Cases Do Not Support Classification of SMS and CSC Provisioning as Common Carrier Services.

There is no basis for the argument raised by Petitioners and Rebtel that SMS and short-code offerings should be subjected to sections 201 and 202 of the Act because they allegedly satisfy the criteria for “common carriage” set forth in the D.C. Circuit’s *NARUC I* and *NARUC II* decisions (the “*NARUC* test”).³⁸ That test, which looks to whether a carrier “holds [itself] out to serve indifferently all potential users,”³⁹ does not speak to the Act’s telecommunications service definition’s “without change in form or content” prong, which is not satisfied here. Moreover, even if the *NARUC* test were determinative, CSC provisioning would not satisfy that test.

First, as information services, SMS and CSC provisioning may not be subjected to common carriage requirements, even if they would otherwise satisfy the *NARUC* test. As discussed above, SMS and CSC provisioning are information services, not telecommunications services.⁴⁰ Under the Act, an offering cannot be both an information service and a telecommunications service.⁴¹ Consequently, section 3(44) prohibits the application of common carrier requirements on a telecommunications carrier in its provision of these offerings.⁴²

³⁸ *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (“*NARUC I*”); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (“*NARUC II*”).

³⁹ *NARUC I*, 525 F.2d at 642; *NARUC II*, 533 F.2d at 608.

⁴⁰ See *supra* Part II.A.1; 47 U.S.C. § 153(20) (defining “information service”). See also T-Mobile Comments at 14-18; Verizon Wireless Comments at 29-36; AT&T Comments at 9-12.

⁴¹ “Under the 1996 Act, any service with a communications component must be either a ‘telecommunications service’ or an ‘information service’ (but not both).” *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 ¶ 34 n.50 (1998).

⁴² 47 U.S.C. § 153(44) (“A telecommunications carrier shall be treated as a common carrier ... only to the extent that it is engaged in providing telecommunications service.”).

The *NARUC* test does not alter this conclusion in any way. That test is pertinent to whether a particular offering is made available “directly to the public, or to such classes of users as to be effectively available directly to the public,”⁴³ but it does not address the other criteria for designation as a telecommunications service. In addition to being made widely available, a telecommunications service must also involve transmission of information “without change in the form or content of the information as sent and received.”⁴⁴ A service such as SMS or CSC provisioning that involves the processing associated with an information service will be deemed an information service, not a telecommunications service, even if it is offered indiscriminately to all comers.⁴⁵

⁴³ The Commission has held that the *NARUC* framework survived the 1996 Act. See *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998). This holding, however, did not address the treatment of services involving storage, retrieval, processing, translation, or other enhanced functionalities. The Commission has simply held that the *NARUC* test’s focus on whether the provider “holds [itself] out to serve indifferently all potential users” was meant to inform the Commission’s analysis under section 3(46) of the Act of whether an offering was made available “directly to the public, or to such classes of users as to be effectively available directly to the public.” See *id.* at 21587-89 ¶¶ 5-9. The D.C. Circuit affirmed this ruling. See *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). See also *Compass Global, Inc.*, FCC 08-97, File No. EB-06-IH-3060 ¶ 15 (rel. Apr. 9, 2008). These post-Act decisions addressing the *NARUC* cases did *not* purport to write the “without change in form or content” requirement out of the statutory “telecommunications service” definition, nor did they countermand section 3(44)’s prohibition against treating a telecommunications carrier as a common carrier in its provision of an information service. Needless to say, neither the court nor the Commission would have been authorized to revise the statute in that manner.

⁴⁴ See 47 U.S.C. § 153(46) (defining “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used”); *id.* § 153(43) (defining “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in form or content of the information as sent and received”). A service must also be offered “for a fee” if it is to be deemed a telecommunication service. *Id.* § 153(46).

⁴⁵ The *Pulver.com Order*, for example, evaluated Pulver.com’s peer-to-peer voice over Internet protocol service, Free World Dialup (“FWD”). FWD was offered indiscriminately to all broadband consumers, without any individualized negotiation. See Petition of Pulver.com for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45 at 3 (filed Feb. 5, 2003) (describing registration process). The Commission nevertheless recognized that the service was an information service, because it “offer[ed] ‘a capability for
(continued on next page)

In any case, CSC provisioning does *not* satisfy the *NARUC* test for common carriage. As Petitioners recognize, “a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”⁴⁶ As noted above, under the *NARUC* framework, the key question in determining common carrier status is whether a carrier “holds [itself] out to serve indifferently all potential users,”⁴⁷ or whether, in contrast, “its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”⁴⁸ With regard to CSC provisioning, the record makes clear that providers make individualized decisions based on content providers’ willingness to adhere to specific contractual guidelines governing the specific content sent to users and the terms on which that content is sent.

In contracting with content providers (either directly or through aggregators), T-Mobile requires commitment to content guidelines that are consistent with the Mobile Marketing Association’s Mobile Advertising Guidelines and sometimes will deny short code service to a

generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”” *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3313 ¶ 11 (2004). Similarly, the Commission has classified retail broadband Internet access and voice mail as information services, even though these offerings generally are offered to users on an indiscriminate basis subject to no individualized dealing. *See Wireline Broadband Order; Wireless Broadband Order; Cable Modem Order; North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 F.C.C.2d 349, 361 ¶ 27 (1985).

⁴⁶ Petitioners Comments at 4, quoting *NARUC I* at 641. *See also* Rebtel Comments at 8-9.

⁴⁷ *NARUC I*, 525 F.2d at 642; *NARUC II*, 533 F.2d at 608.

⁴⁸ *NARUC I*, 525 F.2d at 641. *See also Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9177-78 ¶¶ 785-86 (1997) (subsequent history omitted).

content provider.⁴⁹ The comments highlight the case-by-case decisions other providers make as well with respect to whether or not they will support a given CSC.

Verizon Wireless, for example, explains how it “screens requests for short codes from advertisers to ensure they meet its standards for content on its network.”⁵⁰ As Verizon Wireless states, “[o]nce an advertiser or other third party has acquired a short code, it must request that the code be enabled for service on each wireless network with subscribers that the organization wishes to reach.”⁵¹ In evaluating these requests, “Verizon Wireless asks a common short code applicant to assign a rating” to the content⁵² and makes clear that it will decline content that “promotes the use of alcohol, tobacco products, guns or other weapons, and illegal drugs,” includes “profanity, depictions of sexual activities, and violence,” or violates state or federal laws regarding gambling.”⁵³ Sprint Nextel likewise notes that “[w]ireless carriers share in the responsibility of monitoring the use of common short codes,” and states that it “is often forced to de-provision common short codes that do not follow the MMA guidelines.”⁵⁴ MetroPCS similarly states that “[s]hort code services are provisioned by each mobile carrier on an individualized basis,” and “[c]ompanies wanting to use short codes make arrangements, including financial arrangements, with each wireless carrier separately.”⁵⁵ Collectively, these

⁴⁹ See T-Mobile Comments at 5.

⁵⁰ Verizon Wireless Comments at 3.

⁵¹ *Id.* at 12.

⁵² *Id.* at 16.

⁵³ *Id.* at 17-18

⁵⁴ Sprint Nextel Comments at 16.

⁵⁵ MetroPCS Comments at 11. CTIA confirms these descriptions. See CTIA Comments at 52 (“A Short Code applicant must typically inform the carrier how they intend to use the code, what the subscriber experience/message flow will be; what type of advertising or marketing the messaging will include; and (continued on next page)

comments make clear that with regard to short code applicants, wireless providers “make individualized decisions, in particular cases, whether and on what terms to deal.”⁵⁶

Finally, Petitioners’ suggestion that “[a]s common carriers, the providers of [SMS and CSC provisioning] are governed by Title II of the Communications Act” with respect to all of their services is simply wrong.⁵⁷ As the Commission has made clear, “[a] service provider may be a common carrier for some purposes and not for others.”⁵⁸ The D.C. Circuit has agreed.⁵⁹

3. SMS and CSC Provisioning Are Not CMRS.

As demonstrated in opening comments, SMS and CSC provisioning are not CMRS offerings.⁶⁰ SMS and CSC provisioning are information services, and the statute does not permit information services simultaneously to be regulated as CMRS.⁶¹ Moreover, these offerings do not satisfy section 332(d)(1)’s requirement that a “commercial mobile service” must “make[]

what the call-to-action and associated keywords are. Short Code applicants are expected to demonstrate compliance with the industry and Mobile Marketing Association ... consumer best practices guidelines. These guidelines restrict campaigns that contain any of the following: intense profanity or violence; graphic depiction of sexual activity; nudity; hate speech; graphic depiction of illegal drug use; or activities that are restricted by law to those over 18, such as gambling or lotteries.”).

⁵⁶ *NARUC I*, 525 F.2d at 641. See also Rebtel Comments at 8-9.

⁵⁷ Petitioners Comments at 3.

⁵⁸ *Wireline Broadband Order*, 20 FCC Rcd at 14918 ¶ 117 n.369 citing *NARUC II*, 533 F.2d at 608; see also 47 U.S.C. § 153(44).

⁵⁹ See *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994), quoting *NARUC II*, 533 F.2d at 608 (“[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others.”); *id.* at 1481 (noting that “[t]he mere fact that [parties] are common carriers with respect to some forms of telecommunication” does not render them common carriers with respect to all of their offerings). If Congress had meant for a telecommunications carrier to be treated as a common carrier with respect to all of its offerings, it surely would never have adopted the section 3(44) language cited above, the only point of which is to ensure that such providers remain free from common carriage regulation in their provision of non-telecommunications services.

⁶⁰ See T-Mobile Comments at 21-22; AT&T Comments at 8-15; Verizon Wireless Comments at 36-37; Sprint Nextel Comments at 12-14; CTIA Comments at 31-48.

⁶¹ See *Wireless Broadband Order*, 22 FCC Rcd at 5919-21 ¶¶ 48-56.

interconnected service available.”⁶² With regard to this latter point, the Commission’s rules, define “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*.”⁶³ Because T-Mobile’s SMS offering does not give subscribers the ability to communicate with the more than 163 million wireline numbers in service,⁶⁴ it does not offer “interconnected service” under the relevant definition.⁶⁵

B. Section 303(r) Does Not Permit the Result Sought by Petitioners.

Quoting section 303(r) of the Act, Petitioners suggest that the Commission “has the authority under Title III to issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law,’ as ‘public convenience, interest, or necessity require.’”⁶⁶ As explained above, section 3(44) of the Act states that “[a] telecommunications carrier shall be treated as a common carrier ... only to the extent that it is engaged in providing telecommunications service.”⁶⁷ Thus, the application of common carrier regulation to T-Mobile and other CMRS providers, which are telecommunications carriers under the Act, would be contrary to section 3(44) and impermissible under section 303(r).

⁶² 47 U.S.C. § 332(d)(1).

⁶³ 47 C.F.R. § 20.3 (emphasis added).

⁶⁴ See Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2007* at Table 1 (March 2008).

⁶⁵ Some providers mention offerings that will translate a text message into synthesized voice for delivery to a wireline phone. See Verizon Wireless Comments at 6; Sprint Nextel Comments at 11-12. T-Mobile does not currently offer such a service. In any event, though, such an offering would by definition rely on a conversion of the message’s contents from SMPP into synthesized voice – a net protocol conversion. It would thus comprise an information service, and for reasons described above could not be CMRS. See, e.g., CTIA Comments at 42.

⁶⁶ Petitioners Comments at 6-7, quoting 47 U.S.C. § 303(r).

⁶⁷ 47 U.S.C. § 153(44).

C. The Commission’s “Ancillary Jurisdiction” Provides No Basis for the Result Sought by Petitioners.

In its opening comments, T-Mobile demonstrated that the Commission lacks ancillary jurisdiction under Title I to apply common carrier-like requirements to information services such as SMS and CSC provisioning. The Commission may not exercise jurisdiction to undertake actions that are forbidden by statute, and, as discussed above, section 3(44) expressly precludes the Commission from treating a telecommunications carrier as a common carrier with respect to its provision of information service.⁶⁸ In a closely analogous case, the Supreme Court has rejected the Commission’s attempt to apply common carriage requirements to a non-common-carrier offering.⁶⁹

In any event, the result Petitioners seek is not “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁷⁰ Petitioners ask for regulation of SMS and CSC provisioning *not* because such regulation will assist in the exercise of the Commission’s responsibilities with respect to regulated services, but rather because they believe that regulation could enhance the SMS/short code provisioning market. Clearly, then, the exercise of ancillary jurisdiction is not appropriate here, particularly given the Commission’s long-standing policy against regulating information services.

Contrary to Rebtel’s suggestion, Commission decisions imposing E911 and universal service contribution obligations on providers of interconnected VoIP on the basis of ancillary jurisdiction are not analogous to the application of core common carrier obligations. Rebtel’s

⁶⁸ See 47 U.S.C. § 153(44); T-Mobile Comments at 22-24 and accompanying citations.

⁶⁹ See *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). See also T-Mobile Comments at 23-24.

⁷⁰ *American Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). See also T-Mobile Comments at 24-25.

argument overlooks section 3(44)'s proscription against treating telecommunications carriers as common carriers in the provision of information services. E911 and USF payment obligations may be placed on common carriers, but to apply those obligations to a provider is not to “treat[] [it] as a common carrier.”⁷¹ In contrast, the obligations set forth in sections 201 and 202 (as sought here) constitute the “sine qua non” of common carriage, as the Commission and the courts have recognized.⁷² Thus, section 3(44) bars application of these obligations with regard to information service providers, even where the Commission’s ancillary jurisdiction might permit application of other requirements.

D. The First Amendment Forbids the Result Sought by Petitioners.

The First Amendment also bars the outcome Petitioners seek.⁷³ Because this Amendment prohibits the government from intruding on private parties’ rights of expression except in carefully limited circumstances, guarding “both the right to speak freely *and the right to refrain from speaking at all*,”⁷⁴ the Supreme Court has rejected governmental efforts to conscript private parties in the delivery of messages they would not otherwise have delivered. For example, the Court has struck down state laws requiring passenger vehicles to bear license plates with an

⁷¹ 47 U.S.C. § 153(44).

⁷² See *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 210 n.5 (D.C. Cir. 2007), quoting *NARUC I*, 533 F.2d at 608.

⁷³ Parties supporting the Petition appear to presume that the First Amendment somehow limits private parties rather than the government itself. See, e.g., Petitioners Comments at 6 (“All text messages are speech, and should be afforded the maximum protection possible, regardless of content.”); OIC Comments at 6 (citing “[t]he viewpoint-based discrimination endured by NARAL”).

⁷⁴ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). “[T]he difference between compelled speech and compelled silence “is without constitutional significance.” *Riley v. National Federation of the Blind*, 487 U.S. 781, 796 (1988).

inscribed political slogan;⁷⁵ requiring public utilities to include bill inserts expressing the views of third parties;⁷⁶ and requiring newspapers to print and circulate opinions contrary to their own.⁷⁷ These decisions protect private parties' rights to exercise "[t]he editorial function," itself "an aspect of speech," with respect to which messages they will carry or endorse.⁷⁸ Thus, Petitioners are right when they say that "speech" interests lie at the heart of this dispute.⁷⁹ Those interests, however, necessitate rejection, not grant, of the Petition.⁸⁰

CONCLUSION

For the reasons described above and in T-Mobile's opening comments, the Commission should deny the Petition in full.

Respectfully submitted,

Thomas J. Sugrue
Kathleen O'Brien Ham
Sara F. Leibman
Amy R. Wolverton
T-MOBILE USA, INC.
401 Ninth Street, N.W., Suite 550
Washington, DC 20004
(202) 654-5900

By: /s/ David H. Solomon
David H. Solomon
Russell P. Hanser
WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, DC 20037
(202) 783-4141

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Attorneys for T-Mobile USA, Inc.

⁷⁵ See *Wooley*, 430 U.S. 705 (invalidating mandate requiring New Hampshire drivers to display license plates bearing slogan "Live Free or Die").

⁷⁶ See *Pacific Gas & Electric Co. v. PUC of California*, 475 U.S. 1 (1986).

⁷⁷ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁷⁸ *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (plurality op.).

⁷⁹ See, e.g., Petitioners Comments at 6. See also OIC Comments at 2.

⁸⁰ See generally Verizon Wireless Comments at 45-58.