

**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 REBTEL INC.

Rebtel Inc. (“Rebtel”) by its counsel, hereby submits its reply comments in response to the Commission’s February 1, 2008 *Public Notice*¹ soliciting comment on the Petition for Declaratory Ruling (“Petition”) of Public Knowledge et al. (collectively, the “Petitioners”).² As an initial matter, the Commission must recognize the central policy question presented to the Commission by this proceeding is whether consumers should have the ability to choose the applications, services and content they would like to receive or browse via their mobile services and devices, or whether the wireless network providers should have the ability to restrict consumers’ access to applications, services and content? Rebtel submits that the Commission should allow consumers to use their devices and service plans in any manner they choose with few restrictions.

As explained below and in Rebtel’s initial Comments,³ commercial mobile radio service (“CMRS”) carriers are abusing their control over customers’ access to short message service (“SMS”) messages in order to stifle legitimate competition and possibly to shape political discourse. Verizon Wireless’ rejection of Rebtel’s short code campaign is nothing short of an anti-competitive abuse of power, much like their rejection of NARAL’s short code campaign was interference with political speech and activism. The Commission should therefore make clear that CMRS carriers are

¹ See *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Non-Discrimination Rules*, WT Docket No. 08-7, *Public Notice*, DA 08-78 (rel. Jan. 14, 2008); *Order* extending comment deadline, DA 08-282 (rel. Feb. 1, 2008).

² See Pet’n for Declaratory Ruling of Public Knowledge et al. Docket No. 08-7 (filed Dec. 11, 2007).

³ See Comments of Rebtel Inc., WT Docket No. 08-7 (filed March 14, 2007) (“Rebtel Comments”).

prohibited from unreasonably or unjustly discriminating against companies that want to use short codes on their networks.

I. CONSUMERS SHOULD HAVE THE FREEDOM TO CHOOSE THE APPLICATIONS, SERVICES AND CONTENT THEY DESIRE

Throughout a number of comments filed by those opposing what should be an uncontroversial position, wireless carriers attempt to confuse what is a very simple consumer argument: those that pay for the devices and service plans they utilize should be free to choose the applications, services and content they desire. The only legitimate restrictions on this choice would be illegal applications, services or content as well as any use that would technically harm the network. Outside of this small universe of prohibitions, consumers should self-select what they choose to use and view. The Commission has already adopted this policy in a variety of contexts and there is no reason for the Commission to reverse this policy in this proceeding.⁴

The largest providers in the United States of broadband access and telephone services are the same carriers arguing that they should have the ability to govern the applications, services and content that their users enjoy on the wireless platform. There are a number of arguments advanced in this proceeding that attempt to confuse the simple choice facing the Commission. Some argue that text messages are telecommunications services but short codes are not; others posit that it would be illegal for the Commission to attempt to regulate short codes;⁵ while still others allege that short codes are equivalent to “900” number telephone services implying that protection of such services is unwarranted.⁶

But what all of these parties fail to explain is why the Commission should allow wireless carriers to restrict consumers’ choice of applications, services and content in a manner that would never be allowed in the wireline world. Would the Commission allow a broadband Internet access

⁴ See, generally, *Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, Order, DA 05-543 (EB rel. March 3, 2005) (“*Madison River Communications Order*”); *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, Second Report and Order, FCC 07-132 (rel. Aug. 10, 2007).

⁵ See, generally, Comments of Sprint Nextel Corp., WT Docket No. 08-7 (filed March 14, 2007) (“Sprint Comments”); Comments of CTIA, WT Docket No. 08-7 (filed March 14, 2007) (“CTIA Comments”); Comments of Verizon Wireless, WT Docket No. 08-7 (filed March 14, 2007) (“Verizon Wireless Comments”).

⁶ See Verizon Comments at 24-25; CTIA Comments at 12.

provider to block the service of an interconnected VoIP provider because the application offered competes with the wireline provider's voice service? We already know that the answer to this question is "no."⁷ Yet wireless carriers argue that on the wireless platform they should not be required to allow a competitor like Rebtel to offer its application to consumers through short codes.⁸ Or in the case of NARAL, would the Commission countenance a provider that blocked NARAL's website because of the content of the speech made available to web users that typed in the URL? Would the Commission even accept an explanation where the wireline broadband provider explained that they made a mistake but reserved the right to block such websites in the future? Yet, this is Verizon's argument in this proceeding in blocking NARAL's short code campaign.⁹

As wireless networks and devices improve, more applications, content and service will be made available to consumers via a wireless platform. Consumers will not care whether they used a wireline or wireless device to access applications, services or content yet their ability to use any of these could depend on what network they are using. Certainly, the adoption of a policy that would allow this to be the case will stunt the development of innovative applications and services, resulting in decreased demand for broadband services. The Commission must act now to protect both consumer welfare and competition by ensuring that there is a vibrant marketplace for applications, services and content on wireless platforms. In so doing, the Commission will protect consumer welfare and advance the public interest.

II. UNLIKE SPAM, CUSTOMERS MUST FIRST OPT-IN TO RECEIVE SMS MESSAGES SENT VIA SHORT CODES

Consistent with the attempt to confuse the basic issues confronting the Commission in this proceeding, the major CMRS carriers take the position that they should not be required to provide short codes to entities "with which they do not choose to do business"¹⁰ and that the CMRS carriers have "the right to reject Common Short Codes of competitors."¹¹ They claim that this "right"

⁷ See *Madison River Communications Order*.

⁸ See Verizon Comments at 21-22; Comments of AT&T, Inc., WT Docket No. 08-7, at 20 (filed March 14, 2007) ("AT&T Comments").

⁹ See Verizon Comments at 20-21.

¹⁰ Sprint Comments at 2.

¹¹ CTIA Comments at 4

ensures that their customers are protected from unwanted spam or other “misleading, fraudulent and illegal content.”¹² Aside from the incongruity of this position with what is accepted as the norm in the wireline marketplace, like the CMRS carriers, Rebtel also opposes the distribution of unwanted spam to CMRS customers. That is why customers seeking to receive SMS messages from Rebtel must first opt-in to Rebtel’s service. Notably however, the CMRS carriers fail to distinguish between unsolicited spam and SMS messages sent via short codes in which the customer has opted-in to receive. As Rebtel made crystal clear in its Comments:

[U]nlike purveyors of spam, users desiring to take advantage of Rebtel’s service must first opt-in and then send a text message to Rebtel’s short code before the user can begin receiving text messages and other content from Rebtel. Furthermore, unlike other content providers who use short code campaigns, Rebtel does not send unsolicited SMS messages to its customers even after the customer has opted-in. Put another way, only customers who affirmatively send an SMS to Rebtel’s short code would receive an SMS from Rebtel. Rebtel does not send SMS messages without first receiving an SMS from a customer requesting a return SMS from Rebtel.¹³

Clearly, the CMRS carriers fail to comprehend the difference between unsolicited spam and opted-in SMS sent via short codes. Thus, when shorn of their doomsday rhetoric that CMRS customers will be overwhelmed with spam, at least in the context of short codes, these apocalyptic predictions ignore the fact that CMRS customers desiring to receive content sent via a short code must affirmatively opt-in. Moreover, even were the Commission apply its Title II common carrier regulations to SMS, the Commission can still implement regulations to prevent spam. The comments by the CMRS carriers suggesting otherwise are simply spurious to a cogent argument regarding the relationship between spam and SMS messages sent via a short code. In truth, since SMS messages sent using short codes have these safeguards, the Commission should reject these arguments as nothing more than a false alarm and apply the non-discrimination provisions of the Act to opted-in SMS sent using short codes.

To clear up any confusion, the Commission should therefore require that all short code

¹² Verizon Wireless Comments at 22-29.

¹³ Rebtel Comments at 6.

campaigns implement a strict opt-in before any CMRS customer can receive an SMS via that short code.¹⁴ This approach is also consistent with the Mobile Marketing Association's Mobile Advertising Guidelines. But more importantly, this argument fails to explain why a provider like Rebtel that requires opt-in consent should still be prohibited from offering its service on a wireless platform? If the concern truly were SPAM, Rebtel would already be providing service via short codes today.

III. VERIZON WIRELESS'S REJECTION OF REBTEL'S SHORT CODE CAMPAIGN

Verizon Wireless is simply flat-out wrong in suggesting that Rebtel is free to implement its campaign using long codes (*i.e.*, 11-digit numbers) and suggesting that Rebtel "can - and does - communicate with Verizon Wireless customers via text messaging services, internet-to-phone transmissions, or any other service that does not involve provisioning a short code."¹⁵ Verizon Wireless cites to Rebtel's website to support this claim.¹⁶ Verizon Wireless is indeed correct insofar as one method for a Rebtel customer to generate an SMS from Rebtel is for that customer to input their friend's contact details (*i.e.*, an international telephone number) on the Rebtel website. The Rebtel system will then provide 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 from Rebtel's website to both the customer and the friend through an SMS (*i.e.*, two separate SMS communications are generated by the customer using the Rebtel web site). What Verizon Wireless conveniently ignores is that this service cannot work if a CMRS carrier has not accepted Rebtel's short code campaign. As Rebtel established in its Comments, if the Rebtel customer's friend is a Verizon Wireless subscriber, when Rebtel generates the local number and sends it via a text message to the friend, Verizon Wireless' system will block the message from being delivered. Likewise, if Rebtel's customer is a Verizon Wireless subscriber, the subscriber will never receive the SMS generated using Rebtel's website.

Significantly, as insinuated by Verizon Wireless and others, Rebtel cannot simply use long

¹⁴ See Rebtel Comments at 7.

¹⁵ Verizon Wireless Comments at 22.

¹⁶ *Id.*

codes for its services since long codes do not have the technical or billing capabilities that short codes possess. As Rebtel explained, unlike in other parts of the world, short codes in the U.S. are eventually routed to an application hosted by an Application Provider who supply the platform necessary for the end user to interact with the short code content. “Application Providers *do not and cannot use long codes* since long codes connect directly to the end user.”¹⁷ Therefore, without 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. Wireless carriers have structured the network for short codes in this manner and should not now be able to hide behind this structure and claim that short codes are outside of the Commission’s jurisdiction. Additionally, since mobile SMS recipients pay for the incoming message, a charge can be applied to the wireless subscriber’s phone bill when the SMS is received from the mobile subscriber (“SMS-received”) or when the SMS is sent from the short code and received by the wireless customer (“SMS-sent”). In the U.S., only SMS-received billing is accepted, while in Europe both SMS-received and SMS-sent billing is possible.¹⁸

At bottom, Verizon Wireless and other CMRS carriers are abusing and will continue to abuse their control over customers’ access in order to stifle legitimate competition and possibly to shape political discourse. Contrary to AT&T’s claims that Verizon Wireless’ rejection of Rebtel’s and NARAL’s short code campaigns “hardly demonstrate the kind of systematic market failure that could warrant regulating an entire industry,”¹⁹ Verizon Wireless’ rejection of Rebtel’s short code campaign is, in fact, nothing short of an anti-competitive abuse of power, much like their rejection of NARAL’s short code campaign was interference with political speech and activism. Declaring that SMS is subject to Title II non-discrimination provisions would be favorable not only for Rebtel but for every company trying to develop Internet-era services and for every consumer wanting freedom of choice and lower prices. Rebtel is determined to bring better-value mobile calls, text messaging and other innovative services to mobile phone users, and it is right that Rebtel should not

¹⁷ Rebtel Comments at 3 (emphasis added).

¹⁸ See Mobile Marketing Association, “Academic Review: Developing an Understanding of Mobile Commerce: A Review Billed to Phone Payment Methods,” (March 12, 2006).

¹⁹ AT&T Comments at 6-7.

be prevented from doing so. CMRS carriers' admitted practice of discrimination only serves to stifle innovation and discourage third-party development of SMS-based services that will be advantageous to U.S. consumers.

Moreover, the fact that any CMRS carrier is able to reject or block politically controversial messages, whether or not it does, should by itself merit Commission action. Although Verizon Wireless claimed that it was a technical glitch that caused the rejection of NARAL's short code, the Commission should remain skeptical since Verizon Wireless maintains that it can still decide what messages are acceptable and who will be allowed to receive messages from and send messages to Verizon Wireless customers.²⁰ As Public Knowledge *et al.* pointed out, "[w]hile it may appear at first glance that the problem has been solved, Verizon Wireless still maintains that it is entitled to decide who its customers could speak to, and about what, and while it claims to have a new, less discriminatory short code policy, no policy, new or old, has been released to the public as of this filing."²¹ Verizon Wireless' and the other CMRS carriers' comments to these incidents underlie the need for the Commission to intervene and ensure that CMRS providers cannot make these arbitrary choices about who their customers are allowed to contact.

IV. THE COMMISSION SHOULD ALLOW FOR NON-DISCRIMINATION IN THE PROVISIONING OF SHORT CODES AND TEXT MESSAGES SENT VIA SHORT CODES

Rebtel does not advocate any particular formula or path for the Commission to follow to implement the non-discrimination provisions of Section 202 of the Act, so long as these provisions are applied to the provisioning of short codes and to the text messages sent via short codes. Rebtel was hardly alone in noting that there are many tools the Commission can use to create the appropriate regulatory environment. For example, as pointed out by commenters in this proceeding, the Commission has ample authority to declare that SMS is a Title II common carrier service subject to common carrier regulations including no unjust or unreasonable discrimination.²²

²⁰ Verizon Wireless Comments at 20-21.

²¹ Comments of Public Knowledge *et al.*, WT Docket No. 08-7, at 2 (filed March 14, 2007) ("Public Knowledge *et al.* Comments").

²² See Public Knowledge *et al.* Comments at 3-5; ACLU Comments at 5; Open Internet Coalition at 4-6.

While CMRS carriers may argue that SMS messages fail the first prong of the *NARUC* test because they do not offer short codes indiscriminately to the public, this does not square with the CMRS carriers' proclamations that short codes are "widely available to wireless subscribers."²³ Indeed, Verizon Wireless notes that it has only rejected two short code campaigns "[o]ut of more than 3,200 short codes that Verizon Wireless has implemented."²⁴ Verizon Wireless cannot have it both ways. It first touts the number of short code campaigns its has allowed, while at the same time arguing that short codes indeed are more akin to private carrier services. In *NARUC I* and *II*,²⁵ the D.C. Circuit deemed that the "critical point" is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all people indifferently."²⁶ Given the numbers provided by Verizon Wireless, it is clear that it does not generally make individualized decisions whether and on what terms to deal with their customers. The second prong of the test, that customers "transmit intelligence of their own design and choosing," is axiomatic with SMS. As with a wireless voice call, the customer chooses what message to send and who will receive that message.

Alternatively, the Commission can exercise its ancillary jurisdiction under Title I to apply the same Title II non-discrimination provisions to text messages utilizing short codes.²⁷ As Public Knowledge *et al.* makes clear, "the FCC has the power under Title I to regulate text messages and short codes because it has subject matter jurisdiction over them, and because ensuring nondiscriminatory access to a new, important communications medium is reasonably ancillary to the Commission's mandate under Section I of the Communications Act."²⁸

The first prong of the ancillary jurisdiction test is easily satisfied since text messages pertain to the provisioning of "interstate and foreign commerce in communication by wire and radio." Moreover, as discussed in its Rebtel's Comments, the Commission has previously regulated text

²³ Verizon Wireless Comments at 2, 11.

²⁴ *Id.* Succumbing to public pressure, Verizon Wireless eventually reinstated NARAL's short code campaign. Thus, out of "more than 3,200 short code" campaigns, Verizon Wireless has only rejected one, Rebtel's.

²⁵ *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

²⁶ *NARUC I*, 525 F.2d at 641.

²⁷ See Public Knowledge *et al.* Comments at 6-7; ACLU Comments at 5; Open Internet Coalition at 6.

²⁸ See Public Knowledge *et al.* Comments at 6-7.

messages in the roaming context.²⁹ Second, the analysis requires the Commission to evaluate whether imposing the non-discrimination requirements is reasonably ancillary to the effective performance of the Commission's various responsibilities. The requisite nexus exists here as it cannot seriously be disputed that prohibiting CMRS providers from arbitrarily restricting who its customers may communicate with is not sufficiently necessary to carry out the provisions and intent of the 1996 Act to promote competition and consumer choice.

Confirming the Commission's commitment to non-discriminatory network operation will also provide regulatory certainty which encourages continued innovation and investment in new applications. As Chairman Martin aptly noted, "consumers should be able to continue to have unfettered access" to the network "and they shouldn't be blocked by underlying network operators."³⁰ Indeed, discrimination will reduce content developers' incentives to innovate,³¹ but even of greater concern, Verizon Wireless' policy shows that the cultural consequences of untrammelled carrier control over content may be far worse than its potential to stifle the types of efficiency and innovation economists usually measure.

Verizon Wireless and AT&T make much of the fact that the two reported incidents of CMRS carriers rejecting short code campaigns does not justify Commission action.³² While there may only be two reported public incidents today, the more powerful and concentrated the U.S.'s CMRS carriers become, the more the CMRS carriers have the ability, and perhaps even the incentive, to close off access to their networks. Moreover, there could be many other instances where short code campaigns have been denied but those pursuing the campaign have decided not to anger the powerful wireless carriers in the hopes that they may someday be granted access to their networks. Rebtel is not suggesting that this is a part of the CMRS providers' business plans today; however the power to inflict such harms comes at great risk to consumers, innovation and the country's global competitive posture. Because, in practice, such stratagems that mean filtering text

²⁹ See Rebtel Comments at 9-10.

³⁰ Jeffrey Silva, "Short codes, text messages under scrutiny," RCNWIRELESS NEWS (Jan. 21, 2008).

³¹ See, e.g., Public Knowledge *et al.* Comments at 3 ("the discrimination described in the Petition is ongoing: three months later, speech is still being restricted and innovation is still being stifled.")

³² See Verizon Wireless Comments at 11; AT&T Comments at 6.

messages in order to restrict use of Internet-calling services today, could mean filtering of other applications, services and content in the future.

V. CONCLUSION

In sum, Rebtel reiterates its support for the Petition and respectfully requests that the Commission take immediate action towards applying the non-discrimination provisions of Title II to text messages as recommended above, and in Rebtel's initial Comments in this proceeding.

Respectfully submitted,

By: /s/_____

Ronald W. Del Sesto, Jr.
Troy F. Tanner
Nguyen T. Vu
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000 (Tel)
(202) 373-6001 (Fax)

Counsel for Rebtel Inc.

April 14, 2008