

ELECTRONIC EX PARTE FILING

June 11, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Preserving the Open Internet*, GN Docket No. 09-191;
Broadband Industry Practices, WC Docket No. 07-52.

Dear Ms. Dortch:

CTIA – The Wireless Association® (“CTIA”) responds to the Reply Comments of the Mobile Internet Content Coalition filed in these dockets on April 26, 2010 (“MICC Reply”).¹ The Commission should reject outright MICC’s request that “open Internet principles” be applied “to wireless networks.”² The record developed in this proceeding demonstrates that none of the six principles proposed as broadband network operator obligations in the Notice of Proposed Rulemaking (“NPRM”) should be applied to wireless broadband networks, let alone to the wireless non-broadband messaging and marketing services described in the MICC Reply.³

As CTIA pointed out in its comments, the U.S. wireless industry leads the world in innovation, investment, competitive choices and applications. U.S. consumers enjoy the lowest prices, the highest usage rates, and the newest handsets.⁴ Nothing in the record in this proceeding justifies impeding this vibrant market with a sudden reversal of the deregulatory policies that have been applied to wireless broadband. It would be particularly arbitrary to rely upon the speculative predictions of consumer harm that have been made repeatedly, but have never materialized, to support a change in course.⁵ In fact, the Department of Justice cautioned that Commission action intended to constrain broadband Internet access providers may have the unintended consequence of stifling infrastructure investment.⁶ The Commission should not

¹ Reply Comments of the Mobile Internet Content Coalition, *Preserving the Open Internet*, GN Docket No. 09-191 (Apr. 26, 2010) (“MICC Reply”).

² *Id.* at 2.

³ *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009) (“NPRM”).

⁴ See Comments of CTIA – The Wireless Association®, GN Docket No. 09-191 (Jan. 14, 2010).

⁵ See *id.* at 12-22 (contrasting predictions of consumer harm with current reality of vibrant competition).

⁶ Ex Parte Submission of the United States Department of Justice, GN Docket No. 09-51, at 28 (Jan. 4, 2010).

threaten the development of the wireless broadband market with the destabilizing rules proposed in the NPRM or those proposed by Public Knowledge.⁷

Similarly, MICC offers no viable legal rationale or plausible policy reasons for applying open Internet principles to SMS text messaging services and wireless carriers' review of content providers' marketing proposals. As the NPRM notes, SMS is "not [a] broadband Internet access service[] and thus [is] not included in the scope of the draft rules."⁸ Carrier participation in content provider common short code ("CSC") marketing arrangements is even farther afield from the scope of this proceeding. Marketing arrangements are not even communications services, broadband or otherwise. Moreover, MICC fails to make a case that carriers are thwarting subscribers' ability to send and receive SMS text messages.

I. COMMON SHORT CODE CAMPAIGNS AND SMS TEXT MESSAGES ARE NOT BROADBAND INTERNET ACCESS SERVICES

A. Wireless Carriers' Procedures To Support Content Providers' CSC Marketing Campaigns Work Efficiently and Fairly

Mobile marketers and content providers started using CSCs as a convenient way to elicit SMS text messages from wireless subscribers in the early 2000s. CSCs enable advertisers or other third party content providers to reach customers by promoting a single five or six digit wireless "short code" as part of a marketing campaign. When a CSC is provisioned onto the network of a participating wireless carrier, the network can deliver SMS text messages to the content provider by recognizing the short code and translating it to a routable address. CSCs thus provide an additional alternative to more traditional addresses (*e.g.*, ten-digit SMS messaging, dial-around calling, and Internet URLs). Wireless carriers have implemented thousands of CSCs for marketing, political and charitable campaigns.

A content provider wishing to receive SMS text messages from mobile subscribers for its marketing campaign first registers with the Common Short Code Administration to lease a CSC. The content provider then submits an application with each carrier for approval of the CSC campaign and provisioning of the CSC to enable the carrier's subscribers to send messages to the provider's CSC. Content providers often work with Mobile Application Service Providers ("MASPs") or aggregators in submitting applications to the carriers. Sometimes, the MASP also acts as the CSC lessee. The carrier approval process time varies, depending on the number of carriers involved, the nature of the campaign, the amount of the information needed from the

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

⁸ NPRM at 13118.

content provider to enable the carriers' customer care representatives to be responsive to inquiries, and the billing required.⁹

Mobile marketers and content providers that belong to the Mobile Marketing Association ("MMA") have developed "Consumer Best Practices Guidelines" ("Guidelines") for CSC campaigns. Carriers have embraced the MMA Guidelines and review each CSC campaign for compliance with the MMA Guidelines to ultimately protect consumers by ensuring against objectionable content, misleading offers, excessive charges for premium content, and other legal compliance requirements (including Children's Online Privacy Protection Act compliance). Although the Guidelines list 4INFO, Inc. -- a member of MICC -- as a member of the MMA's U.S. Consumer Best Practices Committee, the practical effect of MICC's request would be to abandon industry enforcement of this process and require that wireless carriers support any CSC marketing campaign demanded by a content provider.¹⁰

B. Neither The Approval And Oversight Of A CSC Campaign Nor The Transmission Of SMS Messages Constitutes A Broadband Internet Access Service

MICC's description of the relevant services as "mobile Internet" services is erroneous and thus misleading because neither a CSC campaign nor the delivery of SMS messages constitute broadband Internet access services and thus they have nothing to do with these proceedings. As the Commission's own NPRM notes, SMS is "not [a] broadband Internet access service[] and thus [is] not included in the scope of the draft rules."¹¹ It follows that, as CTIA pointed out in its Reply Comments, SMS messages sent to CSCs also do not constitute broadband Internet access traffic. In fact, although CSCs enable content providers to receive text messages conveniently, a wireless carrier's review of, and decision to support, a CSC campaign involves no transmission of communications at all, broadband or otherwise, and constitutes only a marketing arrangement.

The Public Knowledge Petition, supported by MICC member 4INFO, similarly acknowledges that "[t]ext messages are not broadband, and moreover they do not provide access

⁹ Billing issues include whether the campaign will be a "standard" or "premium" rate service and how the message flows comply with the MMA Guidelines for the selected service; how the campaign is described by the carrier on customer bills; and negotiation of the billing arrangements and responsibilities among and between MASPs, carriers, and brands.

¹⁰ Mobile Marketing Association, U.S. Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs at 7 (V5.0 Apr. 22, 2010) ("Guidelines") (listing members of the MMA's "US Consumer Best Practices Committee").

¹¹ NPRM, 24 FCC Rcd at 13118.

to the Internet.”¹² 4INFO inadvertently makes the same point in arguing that “4INFO’s short code should be as open to any wireless subscriber as 4INFO’s webpage or 4INFO’s partners’ web pages are to any Internet user.”¹³ Rebtel also makes it clear that it does not regard SMS access to its international long distance service as an Internet access service, contrasting its “intertwined” “telecommunications service” offering of SMS and common carrier CMRS with the very different combined “information service” offering of electronic mail and other functions in Internet access service.¹⁴ Thus, the messaging and marketing services addressed by MICC do not involve “access to the Internet from a Mobile Device,” as it asserts, and would not be covered by the proposed net neutrality rules, which would be limited to broadband Internet access services.¹⁵

Although some content providers include an Internet address in their reply message responding to a text message sent by a wireless customer using a CSC address, that does not make the approval and oversight of CSC campaigns or even the transmission of messages to a CSC a broadband Internet access service. CSCs can be accessed by any mobile handset on a participating carrier’s network, whether or not the handset is broadband-capable. The NPRM notes that the same device may be used for Internet access and non-Internet services, such as SMS.¹⁶ In fact, wireless subscribers send SMS messages to a content provider’s CSC without any related Internet routing.

C. Neither The Approval And Oversight Of A CSC Campaign Nor The Delivery Of SMS Messages Is Subject To The Commission’s Ancillary Jurisdiction

Because the approval and oversight of a CSC campaign involves no transmission service, it is not a communications service subject to the Communications Act of 1934 (“the Act”). No provision of the Act offers the Commission any basis for exercising authority over a carrier’s discretion to enter into a marketing arrangement. Moreover, two of the three bases cited for ancillary jurisdiction in the NPRM relate only to Internet and other interactive computer services (relevant to Section 230(b) of the Act), and broadband services (relevant to Section 706(a) of the 1996 Act), and thus cannot authorize the exercise of regulatory authority over SMS or carrier

¹² Petition for Declaratory Ruling of Public Knowledge, *et al.*, at 11, *Petition of Public Knowledge et al. for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules*, WT Docket No. 08-7 (Dec. 11, 2007) (“Public Knowledge Petition”).

¹³ *Ex Parte* of 4INFO, Inc. at 19, WT Docket No. 08-7 (Mar. 9, 2010).

¹⁴ Comments of Rebtel Inc. at 10-11, WT Docket No. 08-7 (Mar. 14, 2008).

¹⁵ MICC Reply at 1.

¹⁶ NPRM, 24 FCC Rcd at 13120, 13123.

review of and participation in CSC campaigns.¹⁷ In any event, both of those bases for action were held inadequate for the exercise of ancillary authority over broadband services in *Comcast*.¹⁸

The NPRM also cites Title III as another possible basis for ancillary jurisdiction over wireless broadband networks, but the Commission may not use its ancillary authority to impose requirements forbidden by law.¹⁹ The delivery of SMS text messages to CSCs is an information service because SMS messaging involves store-and-forward and protocol processing features. MICC, however, would essentially impose “a kind of common-carrier” non-discrimination rule on SMS.²⁰ Because the Act prohibits subjecting providers to common carrier rules in their provision of information services, the Commission’s ancillary jurisdiction also cannot be extended to provide the authority MICC asserts.²¹

II. CARRIERS’ REVIEW AND OVERSIGHT OF SHORT CODE CAMPAIGNS IS REQUIRED TO PROTECT CONSUMERS

The procedures and guidelines adopted by wireless carriers and the MMA for the common short code program are consistent with federal and state guidance on consumer protection and have even been required by Florida Attorney General to protect consumers.

A. Carriers And Content Providers Developed The Mobile Marketing Association Guidelines And Code Of Conduct In Response To Consumer Complaints

The use of SMS messaging in conjunction with short codes originated in Europe and was accompanied by significant abuses. When content providers began using short codes in the U.S. in the early 2000s, customer complaints spiked. Wireless carriers bore the brunt of these complaints, both in terms of increases in expensive customer care call volumes and millions of dollars of refunds to consumers. Consumers complained about objectionable content and fraudulent offers in short code messaging campaigns and unexpected, unauthorized overcharges

¹⁷ *Id.* at 13099.

¹⁸ *Comcast Corp. v. FCC*, No. 08-1291, slip op. at 17-32 (D.C. Cir. Apr. 6, 2010) (“*Comcast*”).

¹⁹ *See* NPRM, 24 FCC Rcd at 13099.

²⁰ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979) (requiring cable companies to hold out dedicated channels on a nondiscriminatory basis “compel[led] the cable system to provide a kind of common-carrier service”).

²¹ *See id.* at 700-02 (imposing nondiscrimination obligation on cable companies is antithetical to a provision in the Communications Act); 47 U.S.C. § 153(44) (a carrier “shall be treated as a common carrier . . . only to the extent it is engaged in providing telecommunications services”). *See also* Reply Comments of CTIA – The Wireless Association® at 54-62, GN Docket No. 09-191 (Apr. 26, 2010).

for content. Moreover, because content providers often failed to provide to carriers any details about their campaigns, carriers' customer care representatives often were unable to respond to customers' inquiries regarding charges appearing on their wireless bills. Directing these customers to the content provider quickly proved to be unsatisfactory for all involved, particularly the customers.

In order to address these problems, and to prevent the abuses experienced in Europe from afflicting American consumers, the mobile content industry and mobile carriers, acting through the MMA, developed a "Common Short Code Primer" and the U.S. Consumer Best Practice Guidelines, which explain how to establish a CSC campaign and the acceptable CSC campaign practices, including required "opt-in" and "opt-out" procedures for subscriber acceptance of charges and subscription termination. The oversight to which MICC objects, including premium charge limits and carrier billing and auditing requirements, is supported by the Guidelines.²² The wireless industry spends more than \$4 million annually to monitor CSC campaigns for compliance with the Mobile Marketing Association's industry best practices. The success and exponential growth in the use of CSCs for marketing, political and charitable campaigns, and thus the success of the content providers, is due in no small part to the consumer safeguards endorsed and enforced by the wireless carriers.

B. Governmental Enforcement Agencies Have Encouraged And, In Some Cases, Required, Carriers To Exercise Supervision Over Short Code Campaigns

In establishing and implementing the Guidelines, the industry has been in step with federal and state authorities. In 2005, the Wireless Telecommunications Bureau commended CTIA for its efforts to supervise mobile content and recommended additional steps to guard against third party providers' objectionable content "[t]hrough responsible action on the part of wireless carriers" so that "this important social goal can be achieved without government intervention."²³ In 2008 and 2009, the Florida Attorney General terminated investigations of fraudulent mobile content practices through the release of Assurance of Voluntary Compliance settlement agreements with carriers, in which the carriers agreed to impose and enforce consumer disclosure and billing requirements in their contracts with mobile content providers.²⁴

²² See, e.g., Guidelines at §§ 1.5-1 – 1.7-17, 2.1-1 – 2.1-6, 3.1-1 – 3.2-11, 3.10-1 – 3.10-6, 3.11.3-1 – 3.11.3-9 (opt-in and opt-out procedures and charge limits).

²³ Letter from John Muleta, Chief, Wireless Telecommunications Bureau, FCC, to Steve Largent, President, CTIA, at 1 (Feb. 14, 2005).

²⁴ See, e.g., Assurance of Voluntary Compliance, *Cingular Wireless LLC*, Case No. L03-3-1219 (Florida Office of Attorney General Feb. 28, 2008).

The Attorney General stated that these requirements, which parallel the Guidelines,²⁵ were necessary to guard against unauthorized charges on consumers' wireless bills.²⁶

Moreover, even if one hypothetically accepted MICC's faulty premise that CSCs should fall under the Commission's highly-regulatory Title II authority, carriers would still be required to provide oversight. Section 64.1513 of the Commission's rules requires that carriers "shall obtain verification that the entity or individual for whom contributions are solicited has been granted tax exempt status by the Internal Revenue Service" for pay-per-call services engaged in charitable donations.²⁷ This requirement imposed on providers of common carrier voice PSTN services underscores the reasonableness of the wireless carriers' CSC application process for charitable campaigns and their vetting process for such campaigns. Thus, a wide range of the practices followed by the wireless carriers in reviewing CSC campaign requests are mandated, encouraged by, or consistent with, federal and state consumer protection requirements.

C. Many Other Outlets Exist For Marketing Campaigns

MICC incorrectly asserts that wireless carriers exercise control over the mobile market and that their approval procedures create barriers to entry into the provision of mobile content. The mobile wireless market, especially the mobile wireless text messaging market, remains intensely competitive. The price of text messaging services has plummeted, while usage has skyrocketed. Content providers also have many other alternatives for mobile marketing and charitable campaigns, and access to wireless subscribers, including 10-digit SMS messaging and dial-around calling, and use of Internet DNS addresses for wireless customers who can access the public Internet using their wireless devices' web browser.

Wireless carriers exercise no control over subscribers' ability to contact any legal content provider through SMS or any other service. A content provider whose proposed CSC marketing campaign has been rejected by a carrier for violation of the MMA guidelines may still send text messages to and receive text messages from wireless subscribers using other numbers.

The wide variety of options open to marketers and charitable organizations is illustrated by the recent Network for Teaching Entrepreneurship ("NFTE") charitable "Dare to Dream" campaign. NFTE used a 10-digit mobile phone number, rather than a CSC, for contributors to

²⁵ See, e.g., Guidelines at §§ 1.3-2, 1.3-4, 1.3-5, 1.3-10, 1.6-1, 1.7-1, 3.1.1-1, 3.4-3 (restrictions on use of the term "free," disclosure as to charges on subscriber's bill, cancellation procedures, prohibition on pre-checked choices, and securing approval of subscriber before sending advertising material).

²⁶ Attorney General Bill McCollum News Release, "McCollum Retrieves Millions for Florida AT&T Wireless Customers Billed for 'Free' Ringtones" (Feb. 29, 2008).

²⁷ 47 C.F.R. § 64.1513.

text pledges.²⁸ This approach, which does not require carrier review of the campaign or a fee to lease a CSC, makes it a practical alternative for local, one-time or many other campaigns. Thus, there is no basis for any reasonable concern that wireless carriers are foreclosing any communications options for their subscribers or content providers wishing to contact those subscribers.

D. Cases Cited By The Content Providers Were Properly Handled By The Carriers And Do Not Justify Regulation Of CSC Campaigns

The few cases of alleged wireless carrier abuse repeatedly recycled by a handful of content providers and MICC, out of the thousands of approved CSC campaigns supported by the carriers, only serve to prove the reasonableness of the carriers' practices. The lack of evidence of abuse is underscored by the content providers' heavy reliance on Verizon's brief delay *almost three years ago* in approving the pro-choice advocacy CSC campaign requested by NARAL Pro-Choice America ("NARAL").²⁹ Verizon reversed its initial decision declining to enable the NARAL short code campaign within 24 hours of NARAL's request to reconsider the initial decision and confirmed, two days later, in a letter to Rep. John D. Dingell, Chairman of the House Energy and Commerce Committee, that Verizon will accept any political and advocacy short code campaigns that are delivering legal content to customers who affirmatively indicate their desire to receive such content.³⁰

More recently, in the case of the Catholic Relief Services ("CRS") campaign for Haiti relief, following the earthquake this past January, Sprint has continued to carry subscribers' messages to the CRS CSC while attempting to bring the campaign into compliance with its practices for charitable campaigns. Sprint has been dealing with an uncooperative sub-aggregator, with whom Sprint has no contractual relationship, who has refused to provide the standard information that Sprint requires for any charitable CSC campaign.³¹ Contrary to MICC's and other critics' assertions, Sprint has never declined to carry the CRS campaign or threatened to do so, but Sprint has requested that the campaign be brought into compliance while Sprint continues to deliver its subscribers' messages to the CRS CSC.³²

²⁸ Dan Butcher, "Nonprofit NFTE drives text donations via ten-digit number," *Mobile Commerce Daily* (Apr. 30, 2010).

²⁹ See Public Knowledge Petition at 3-5; MICC Reply at 7.

³⁰ Comments of Verizon Wireless at 21, WT Docket No. 08-7 (Mar. 14, 2008).

³¹ Letter from Charles W. McKee, Vice President, Sprint Nextel, to Chairman Julius Genachowski, FCC, WT Docket No. 08-7 (Apr. 2, 2010).

³² See *id.* at 1; MICC Reply at 7-8.

The one case of an actual rejection of a CSC campaign that the content providers have cited involves an entirely proper refusal by Verizon to approve Rebtel's request for a CSC to provide a competitive international long distance service.

Rebtel, which is essentially a "VoIP in the middle" international service designed to avoid standard termination costs, did not comply with the MMA Guidelines. Under Rebtel's service, a wireless user sends a message to either a Rebtel CSC or a telephone number that in turn sends out two text messages, one to the original sender and one to the third party that the original sender wishes to call through the Rebtel service.³³ The third party in this example receives (and potentially pays for) an unrequested text message advertising the Rebtel service, without ever opting into the service or receiving the protection of any of the CSC campaign Guidelines. The Guidelines are designed to ensure that a customer chooses whether to receive messages from the content provider based on the required disclosures, but the third party contacted by Rebtel never has the opportunity to make that choice. Rebtel also provides an excellent example of the availability of the alternative outlets for marketing campaigns discussed above. Moreover, under Section 332(c)(8) of the Act, wireless carriers are not required to provide equal access to competing toll services. A wireless carrier also has no obligation to provide a platform for competitors to advertise their services.

Accordingly, nothing in the record suggests any market failure or consumer or competitive harm resulting from the wireless industry's good faith efforts to insure that content providers' marketing to wireless subscribers complies with the MMA Guidelines.

If there are any questions concerning this matter, please do not hesitate to contact the undersigned. Pursuant to Section 1.1206(b)(1) of the Commission's rules, an electronic copy of this letter is submitted for filing in the public docket of the above-referenced proceeding.

Sincerely,

/s/ David J. Redl
David J. Redl
Director, Regulatory Affairs

³³ During the pendency of this FCC proceeding, Rebtel has altered the operation of its service to remove the use of SMS as part of its service. Rather, Rebtel now relies on voice telephony through its "Double Dial" service to complete international calls. See <http://www.rebtel.com>