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September 30, 2010

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: **EX PARTE NOTICE**

Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services, WT Docket No. 08-7; Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52

Dear Ms. Dortch:

T-Mobile USA, Inc. (“T-Mobile”) is filing this letter to address inaccuracies and misimpressions evident in the ex parte letter filed in WT Docket No. 08-7 by the Mobile Internet Content Coalition (“MICC”).¹ MICC is both factually and legally incorrect in alleging that T-Mobile is “blocking text messages from its customers based on content” and “discriminating against certain customers with additional, uncalled for fees that are not being levied against other select customers,” in violation of its purported common carrier obligations.²

Alleged Content-Based Blocking. MICC bases its allegation of blocking on the *EZ Texting* litigation in federal court in New York.³ As T-Mobile demonstrated in the attached opposition to EZ Texting’s motion for preliminary injunction (“T-Mobile Opposition”), T-Mobile is not

¹ Letter from Michael B. Hazzard, Counsel to Mobile Internet Content Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Dkt. No. 08-7 (Sept. 20, 2010) (“MICC Letter”).

² *Id.* at 1.

³ *Club Texting, Inc. d/b/a EZ Texting, Inc. v. T-Mobile USA, Inc.*, Case No. 10-CIV-7205 (PKC) (S.D.N.Y. filed Sept. 17, 2010) (“*EZ Texting*”). The court denied plaintiff EZ Texting’s request for a Temporary Restraining Order on September 17.

“blocking text messages from its customers based on content.” T-Mobile terminated access to EZ Texting’s short code because EZ Texting failed to follow the proper processes, including industry guidelines, and obtain T-Mobile’s approval before running a new program on an existing short code.⁴

EZ Texting applied for approval of its short code for a program designed to alert consumers about upcoming events at bars and clubs in 2009, and T-Mobile approved the use of the short code for that program. Under the guidelines adopted by content providers and wireless carriers, acting through the Mobile Marketing Association (“MMA”), prior approval for any new short code campaign or modification thereof is required before a carrier will provision a content provider’s short code. The mobile content industry – *i.e.*, MICC’s members – and mobile carriers adopted those MMA guidelines to address consumer concerns about objectionable content, fraud, and unauthorized charges. Earlier this month, T-Mobile learned that EZ Texting was using its approved short code for a “shadow program” that had nothing to do with the original program that EZ Texting had submitted for T-Mobile’s approval. T-Mobile accordingly terminated access to its network for EZ Texting’s short code under procedures applied by all wireless carriers, as set forth in the MMA guidelines. (T-Mobile subsequently learned that EZ Texting was running several other unauthorized shadow programs on the same short code.)

Therefore, contrary to EZ Texting’s rhetoric, T-Mobile is not blocking text messages based on content. T-Mobile’s subscribers may continue to send text messages to any recipient on any subject, and EZ Texting may still send text messages to T-Mobile’s subscribers. Rather, T-Mobile has simply terminated access to a short code that EZ Texting was using for programs that had not been approved by T-Mobile under MMA guidelines.

Alleged Mobile Marketing Company Fee Increase. MICC also mischaracterizes the circumstances around T-Mobile’s short code-related rate changes. T-Mobile does not “charge a per-message fee to mobile marketing companies that use aggregators,” such as EZ-Texting. In fact, T-Mobile does not have contractual or direct business relationships with such mobile marketing companies. T-Mobile contracts with, and charges fees to, content aggregators, which then contract with sub-aggregators and content providers. Furthermore, T-Mobile did not impose new short code fees – it restructured and simplified its aggregator fee system already in place.⁵

⁴ Defendant T-Mobile USA, Inc.’s Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunction, *Club Texting, Inc. d/b/a EZ Texting, Inc. v. T-Mobile USA, Inc.*, Case No. 10-CIV-7205 (PKC) (S.D.N.Y. Sept. 22, 2010) (“T-Mobile Opposition”).

⁵ We note that MICC’s reference to Twitter and Facebook, *see* MICC Letter at 2, is also misleading as those entities are not charged aggregator fees as they are not aggregators. T-Mobile has separate business contracts with Twitter and Facebook addressing their respective obligations.

Alleged Common Carrier Status and Obligations. In spite of MICC’s repeated incantations of T-Mobile’s “common carrier obligations,” T-Mobile and other parties have demonstrated that neither text messaging nor the provisioning of short codes constitutes a common carrier service subject to Title II regulation or commercial mobile radio service (“CMRS”) under Section 332(c) of the Communications Act of 1934 (“the Act”).⁶ Text messaging and short code provisioning are information services because they involve protocol processing, storage, and retrieval of messages, and retrieval of information from external databases. Therefore, those services cannot be common carrier telecommunications services or CMRS.⁷ Moreover, as noted by both Public Knowledge (in its petition that initiated WT Docket No. 08-7) and the Commission (in its *Open Internet* Notice of Proposed Rulemaking), text messaging does not constitute broadband Internet access service.⁸ Thus, sending text messages to a short code also is not a broadband Internet access service.⁹

Furthermore, the approval and oversight of a short code campaign, the function addressed by MICC, is a marketing service that involves no transmission and thus is not subject to the Act at all.¹⁰ The Commission accordingly has no jurisdictional basis to regulate either text messaging in connection with a short code program or a carrier’s approval and oversight of a short code campaign, whether under Title II or III, or under its Title I ancillary jurisdiction, or even under the proposed “net neutrality” rules.¹¹ The Commission should thus reject MICC’s insistence that it interfere in T-Mobile’s contractual relationships regarding marketing services, override the MMA guidelines, and regulate the rates charged to short code aggregators.

⁶ See, e.g., Comments of T-Mobile USA, Inc. at 13-22, WT Dkt. No. 08-7 (Mar. 14, 2008) (“T-Mobile Comments”); Comments of CTIA – the Wireless Association® at 31-44, WT Dkt. No. 08-7 (Mar. 14, 2008) (“CTIA Comments”).

⁷ See, e.g., T-Mobile Comments at 13-22.

⁸ *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13118 ¶ 156 (2009); 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 at 11, WT Dkt. No. 08-7 (filed Dec. 11, 2007).

⁹ See Letter from David J. Redl, Director, Regulatory Affairs, CTIA – The Wireless Association® at 3, GN Dkt. No. 09-191 (June 11, 2010) (“CTIA Letter”).

¹⁰ *Id.* at 3-4. See also CTIA Comments at 45-48 (short codes are a billing and marketing tool).

¹¹ T-Mobile Comments at 22-26; CTIA Letter at 3-5.

Please feel free to contact us with any further questions. T-Mobile is filing an electronic copy of this letter in the above-captioned dockets pursuant to section 1.1206(b) of the Commission's rules.

Sincerely,

/s/ Kathleen O'Brien Ham
Kathleen O'Brien Ham
Vice President, Federal Regulatory Affairs

cc: James Schlichting
John Leibovitz
Nese Guendelsberger

Attachment