

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

In the Matter of the Petition of	)	
	)	
Public Knowledge <i>et al.</i>	)	RM-_____
	)	
for Declaratory Ruling Stating that Text Messaging and Short	)	WT Docket No. 08-7
Codes are Title II Services or are Title I Services Subject to	)	
Section 202 Nondiscrimination Rules	)	

**COMMENTS  
OF  
PUBLIC KNOWLEDGE, FREE PRESS,  
CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, EDUCAUSE,  
MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION, U.S. PIRG,  
ASSEMBLYMAN RICHARD L. BRODSKY, CREDO MOBILE, INC.**

Jeffrey Pearlman  
Public Knowledge  
1875 Connecticut Ave. NW  
Suite 650  
Washington, DC 20009  
(202) 518-0020  
jef@publicknowledge.org

March 14, 2008

**TABLE OF CONTENTS**

I. Introduction.....2

II. Text Messages and Short Codes are Title II Common Carrier Services Subject to  
Nondiscrimination Rules .....3

III. Alternatively, Protection of Free Speech Requires the Commission to Prohibit Unjust and  
Unreasonable Discrimination in Text Messaging Through Title I or Title III .....6

    A. The Commission Has The Power To Regulate Text Messaging Services Through  
    Title I and Title III .....6

    B. Text Messaging is a Critical New Communications Medium Which Demands  
    Nondiscriminatory Access .....7

        1. The World is Going Mobile.....8

        2. Text Messaging Provides a Way for Small Speakers to Reach Large Audiences.....9

Conclusion .....10

## COMMENTS OF PUBLIC KNOWLEDGE *ET AL.*

Public Knowledge *et al.* applaud the Commission's decision to seek public comment on the December 11, 2007 Petition ("the Petition") filed by Public Knowledge and a coalition of concerned public interest organizations, short code service providers, and legislators, in which we described how mobile carriers are engaging in unjust and unreasonable discrimination in text messaging services, as well as how this discrimination violates both the law and Commission policy.<sup>1</sup>

Text messaging is a critical new medium for speech whose growth is far outpacing mobile voice calling. Mobile carriers cannot be allowed to leverage their license to use the public's airwaves in order to control who may say what to whom. These carriers have demonstrated that, given the chance, they will interfere with speech, and in fact continue to do exactly that to this day.

In these comments, we will briefly highlight the point that text messaging services that use short codes, like those that use traditional 10-digit phone numbers, are common carrier services governed by Title II, and further develop the policy justifications for applying nondiscrimination rules to text messaging through Title I and Title III. We also reiterate our request that the commission declare that text messaging services are subject to the section 202 prohibition against "unjust and unreasonable discrimination," regardless of whether they are addressed using 10-digit phone numbers or short codes.

---

<sup>1</sup> Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, Petition for Declaratory Ruling, WT Docket No. 08-7, Dec. 11, 2007, *available at* <http://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf> [hereinafter *Petition*]. These comments incorporate by reference the Petition and all of the arguments and facts therein. For a description of the parties, *see Petition* at 1-2; Addendum to Petition, Dec. 21, 2007, *available at* <http://www.publicknowledge.org/pdf/text-message-addendum-20071221.pdf>; Second Addendum to Petition, January 31, 2008, *available at* <http://www.publicknowledge.org/pdf/text-message-addendum-20080131.pdf>.

## I. INTRODUCTION

In September 2007, NARAL Pro-Choice America rented a short code—a 5-digit telephone number employed purely for text messaging—to be used in an opt-in text messaging campaign for its supporters. Verizon Wireless (“Verizon”), however, refused to connect its customers to NARAL, saying that it would refuse service to “any organization that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users.” After a front-page *New York Times* article, Verizon reversed its decision, allowing NARAL to communicate with Verizon customers. While it may appear at first glance that the problem has been solved, Verizon 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.<sup>2</sup>

And while NARAL is now connected to Verizon customers, three carriers—Alltel, T-Mobile, and Verizon—all continue to refuse connect a short code rented by Rebtel. Rebtel offers affordable long distance and international phone calls by having two customers call local numbers and connecting them seamlessly, behind the scenes, through the Internet. When the carriers first began blocking Rebtel last year, they specifically stated that they did so because Rebtel’s service “cannibalizes” the carriers’ international rates, and because those carriers do not, as a rule, allow their competitors to communicate to their customers via short codes.<sup>3</sup>

We are at a crossroads with regards to new communications networks: will the flow of speech be controlled by the citizens who use those networks, or by the companies who run them? Chairman Martin recently contrasted the issue here with the issue of Comcast blocking certain

---

<sup>2</sup> See *Petition* at 3-5 and sources cited therein. To our knowledge, no carrier has publicly disclosed the policies that govern their text messaging services and short code provisioning.

<sup>3</sup> *Id.* at 5, 21-22 and sources cited therein.

uses of its network, suggesting that because Verizon backed off in this one case, there is no longer a problem.<sup>4</sup> But the problem is not solved, and the discrimination described in the Petition is ongoing: three months later, speech is still being restricted and innovation is still being stifled. And because any carrier can change its policies at any time, the threat of new harms remains. The public interest rationale for acting quickly to avert further harm is clear, and so we ask the Commission to declare that carriers may not engage in unjust and unreasonable discrimination in text messaging.

## **II. TEXT MESSAGES AND SHORT CODES ARE TITLE II COMMON CARRIER SERVICES SUBJECT TO NONDISCRIMINATION RULES**

Text messaging services (also referred to as “SMS”), including SMS services using short codes, are common carrier services because they are offered to the public at large. As common carriers, the providers of these services are governed by Title II of the Communications Act, including section 202’s rule against “unjust and unreasonable discrimination.”<sup>5</sup>

In 1975, the D.C. Circuit laid out the standard for identifying common carriers.<sup>6</sup> For the purposes of the Communications Act, a common carrier is “any person engaged in rendering communication service for hire to the public.”<sup>7</sup> The “critical point [in invoking the common carrier concept] is the quasi-public character of the activity involved. . . . What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier undertakes to carry for all people indifferently.”<sup>8</sup>

Whether or not a carrier is common is determined by whether the service is offered to all, not whether it is actually usable by all: “This does not mean a given carrier’s services must

---

<sup>4</sup> See Ted Hearn, *Martin: Expect Comcast Broadband Ruling Before July*, Multichannel News (Mar. 7, 2008), available at <http://www.multichannel.com/article/CA6539635.html?nid=4262>.

<sup>5</sup> See 47 U.S.C. § 202(a).

<sup>6</sup> Nat’l Ass’n of Regulatory Comm’rs v. F.C.C., 525 F.2d 630 (D.C. Cir. 1975) [hereinafter *NARUC I*].

<sup>7</sup> *Id.* at 640 (citing 47 C.F.R. § 21.1 (1974)).

<sup>8</sup> *Id.* at 641 (internal quotation marks omitted).

practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. . . . But 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. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.”<sup>9</sup>

Text messaging, both phone-to-phone and through short codes, fits cleanly within these definitions of a common carrier. Phone-to-phone text messaging is available to anyone who has a mobile phone and the ability to pay for the service. In fact, like voice calls, phone-to-phone text messages are already subject to common carrier roaming requirements.<sup>10</sup>

While 10-digit phone numbers are obtained directly from the carriers, common short codes (which are 5 or 6 digits long) have been made available by those carriers through the Common Short Code Administration (“CSCA”), which is a part of the Cellular Telecommunications & Internet Association (“CTIA”).<sup>11</sup> The registry of Common Short Codes is maintained by Neustar, which also keeps the number portability database for 10-digit phone numbers.<sup>12</sup> The terms on which the CSCA rents short codes are standardized with a boilerplate contract, and not through individualized negotiations.<sup>13</sup>

Short codes are explicitly advertised to all: “The Common Short Code market in the United States represents an exciting opportunity for *anyone*, including media, entertainment, consumer packaged goods, advertising, or technology companies to connect nearly 200 million

---

<sup>9</sup> *Id.* at 641 (footnotes omitted).

<sup>10</sup> In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, 22 F.C.C.R. 15817, 15837 (2007) [hereinafter *Roaming Order*].

<sup>11</sup> See Common Short Code Administration, *About the CSCA*, at <http://www.usshortcodes.com/aboutCSCA.html>.

<sup>12</sup> See Neustar, *Backgrounder* at 4, available at <http://www.neustar.biz/info/backgrounder.pdf>.

<sup>13</sup> Common Short Code Administration, *Registrant Sublicense Agreement*, at [http://www.usshortcodes.com/csc\\_subLeaseAgree.html](http://www.usshortcodes.com/csc_subLeaseAgree.html).

wireless subscribers to their goods and services using interactive applications never before available in the wireless industry.”<sup>14</sup> In fact, Verizon sent a letter to the Chair of the House Energy and Commerce Committee shortly after the NARAL incident making exactly this point. In Verizon’s own words, it “will provide ‘short code’ text message services to any group that is delivering legal content to customers who affirmatively indicate they desire to receive that content.”<sup>15</sup> This is not language that contemplates “individualized decisions in particular cases whether and on what terms to serve,” but which holds short codes out as a service offered to the public as a whole.

The fact that it is primarily organizations who sign up for short codes provides no shelter from common carriage: “It is not an obstacle to common carrier status that [companies] offer a service that may be of practical use to only a fraction of the population, . . . . The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use.”<sup>16</sup> The carriers’ disclaimers reserving the right not to serve someone<sup>17</sup> likewise do not alter the fact that these services are being offered to the public at large; as a practical matter, they are being offered to everyone save the select few who have been singled out for discrimination. And finally, no available evidence suggests that the market demands and technical challenges of providing these services are unique to text messaging or short codes, or that they in any way negate the common carrier nature of those services.

---

<sup>14</sup> Common Short Code Administration, *About the CSCA*, at <http://www.usshortcodes.com/aboutCSCA.html> (emphasis added).

<sup>15</sup> Letter from Lowell C. McAdam, Verizon Wireless President and Chief Executive Officer, to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce (Sept. 28, 2007).

<sup>16</sup> *NARUC I* at 642.

<sup>17</sup> Common Short Code Administration, *Registrant Sublicense Agreement*, at [http://www.usshortcodes.com/csc\\_subLeaseAgree.html](http://www.usshortcodes.com/csc_subLeaseAgree.html) (“The Participating Carriers and other participating members of the wireless telecommunications industry have appointed the CTIA – The Wireless Association® (formerly Cellular Telecommunications & Internet Association) (‘CTIA’) to serve as their Common Short Code Administrator and CTIA, acting in that capacity, has granted Registry a license to assign CSCs in the manner described in this Agreement.”).

### **III. ALTERNATIVELY, PROTECTION OF FREE SPEECH REQUIRES THE COMMISSION TO PROHIBIT UNJUST AND UNREASONABLE DISCRIMINATION IN TEXT MESSAGING THROUGH TITLE I OR TITLE III**

The Commission has been mandated by Congress to “make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.”<sup>18</sup> This mandate provides both the jurisdiction and the justification for applying nondiscrimination rules to text messages and short codes.

The thread that binds all of these mandates and their justifications together is speech. As Chairman Martin once observed, “Protecting free and unfettered political and religious speech is critical to our democracy.”<sup>19</sup> All text messages are speech, and should be afforded the maximum protection possible, regardless of content. Speech in the United States is only as free as the media on which it travels; in 2008, this means text messaging.

#### *A. The Commission Has The Power To Regulate Text Messaging Services Through Title I and Title III*

As discussed in the Petition,<sup>20</sup> 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 1 of the Communications Act.<sup>21</sup> It also has the authority under Title III to issue “such rules and regulations and prescribe such restrictions

---

<sup>18</sup> See 47 U.S.C. § 151.

<sup>19</sup> *In re Rules and Regulations Implementing Telephone Consumer Protection Act of 1991*, Separate Statement of Commissioner Kevin J. Martin, 17 F.C.C.R. 17459, 17508 (2002).

<sup>20</sup> *Petition* at 16-18.

<sup>21</sup> 47 U.S.C. § 151. See *id.* at 16 (citing *In re IP-Enabled Services Implementation of Sections 255 and 251(A)(2) of the Communications Act of 1934*, 22 F.C.C.R. 11275, 11286 (2007) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968))).

and conditions, not inconsistent with the law,’ as ‘public convenience, interest, or necessity require.’”<sup>22</sup>

The Commission has already demonstrated this jurisdiction by extending roaming obligations to text messaging services,<sup>23</sup> and in fact suggested that roaming, including text messaging roaming, was a common carrier obligation subject to section 202.<sup>24</sup> More importantly, the Commission’s regulation of text message roaming demonstrates that it has subject matter jurisdiction. Finally, the Commission’s decision reflects the importance of ensuring nationwide access to text services; regulations which promote such access are therefore both in the public interest and ancillary to the effective performance of the Commission’s responsibilities.

*B. Text Messaging is a Critical New Communications Medium Which Demands Nondiscriminatory Access*

In the Petition, Public Knowledge *et al.* described how unreasonable discrimination in text messaging services harms speech, is anticompetitive, causes monetary harm, stifles innovation, affects the public health, and visits especially powerful harm on deaf and disabled users.<sup>25</sup> The avoidance of these harms provides both the “public interest” mandate to regulate<sup>26</sup> and the “ancillary” link to the Commission’s goal of a nationwide, efficient, nondiscriminatory

---

<sup>22</sup> *Id.* at 16 (citing *Southwestern Cable Co.*, 392 U.S. at 178 (quoting 47 U.S.C. § 303(r))).

<sup>23</sup> *Roaming Order* at 15837. *See also Petition* at 8-9.

<sup>24</sup> *See Roaming Order* at 15818; *Petition* at 8-9.

<sup>25</sup> *See Petition* at 18-24. For example, in the absence of a pronouncement that text messaging is a Title II service or is otherwise subject to accessibility rules, it is unclear whether carriers are subject to 47 U.S.C. § 255 and its requirements that such a service is 1) "accessible to and usable by individuals with disabilities, . . ."; and 2) "compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities. . . ." applies to SMS. 47 U.S.C. § 255(c) & (d). Thus, a blind person could not ensure that she would receive access to text messages through audio output or through software that can be accessed by screen readers.

<sup>26</sup> *See* 47 U.S.C. § 303(f) (“[T]he Commission from time to time, as public convenience, interest, or necessity requires shall . . . [m]ake such regulations not inconsistent with law as it may deem necessary to . . . carry out the provisions of [the] Act.”).

network.<sup>27</sup> And beyond avoiding harms, making text messages and short codes nondiscriminatory provides affirmative public benefits which serve these roles as well. As the Commission and the Supreme Court have observed, “[i]t has long been a basic tenet of national communications policy that the ‘widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’”<sup>28</sup> Only by providing nondiscriminatory access to short codes can this goal be achieved.

### **1. The World is Going Mobile**

More and more, people are using their mobile devices as their primary method to keep connected.<sup>29</sup> Mobile phones are becoming the device of choice for keeping in touch with others, via voice, text, and Internet.<sup>30</sup> One recent study showed that the number of people using mobile broadband connections jumped from 854,000 to 2.16 million—an increase of over 150%—between the end of 2006 and the end of 2007.<sup>31</sup> SMS in the U.S. continues to grow, and SMS-over-Internet services are allowing the growth of mobile Internet to reinforce SMS growth rather than slow it.<sup>32</sup> The world—and the U.S.—is going mobile, and if mobile comes to mean discriminatory, then that is what U.S. communications will come to mean as well.

---

<sup>27</sup> See 47 U.S.C. § 151.

<sup>28</sup> *In re Comcast Corp.*, 17 F.C.C.R. 23246, ¶ 27 (2002) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

<sup>29</sup> See, e.g., Barry Welford, *The Whole Is Going Mobile* (describing studies showing mobile phone and internet use rising compared to fixed services).

<sup>30</sup> See, e.g., iPhone Features, <http://www.apple.com/iphone/features/>.

<sup>31</sup> See *US Internet Users Going Mobile: Study* (Mar. 4, 2008), at <http://www.physorg.com/news123871003.html>.

<sup>32</sup> See Om Malik, *All Hail the SMS* (Aug. 26, 2007), at <http://gigaom.com/2007/08/26/all-hail-the-sms/>, and references cited therein.

## 2. Text Messaging Provides a Way for Small Speakers to Reach Large Audiences

Right now, any organization which can afford \$500/month can obtain a short code,<sup>33</sup> although it may still be subject to carrier discrimination. Big campaigns often start small. But without the ability to start those small campaigns—at least not without the approval of a part of the wireless oligopoly—some speakers will never get their voices heard. Much as the Internet has provided a method for small groups to broadcast to large audiences as a whole, text messaging provides a method whereby small organizations, who cannot afford armies of phone workers, can still reach out directly to their constituents. Organizations large and small, and from across the social and political spectrum are using short codes to reach their supporters.<sup>34</sup> A nondiscrimination rule in short codes will ensure that speakers of all types—not just those sanctioned by the carriers—will be able to have their voices heard.

---

<sup>33</sup> Common Short Code Administration, *Obtaining a CSC*, at [http://www.usshortcodes.com/csc\\_obtain\\_a\\_csc.html](http://www.usshortcodes.com/csc_obtain_a_csc.html).

<sup>34</sup> See, e.g., *Republican National Committee SMS Signup*, at <http://www.gop.com/Secure/smssignup.aspx>; *Democratic Congressional Campaign Committee Mobile Action Campaign*, at <http://www.dccc.org/#feature-2>; *Focus on the Family*, at <https://www.dsofttechhosting.net/mobilephone/>; *Human Campaign*, at <http://www.hrcactioncenter.org/actioncenter/txtsignup.html>; *Humane Society*, at [https://community.hsus.org/campaign/text\\_signup](https://community.hsus.org/campaign/text_signup). See also *Mobile Commons Customers*, at <http://mcommons.com/customers.html>; *Mobile Accord Clients*, at <http://mobileaccord.com/Clients.aspx>.

**Conclusion**

For the above reasons and the reasons described in the Petition, the Commission should declare that mobile carriers are prohibited from engaging in unjust and unreasonable discrimination in providing text messaging services, including services utilizing short codes.

Respectfully Submitted,

Public Knowledge  
Free Press  
Consumer Federation of America  
Consumers Union  
EDUCAUSE  
Media Access Project  
New America Foundation  
U.S. PIRG  
Assemblyman Richard L. Brodsky  
CREDO Mobile, Inc.

BY: 

Jeffrey Pearlman  
Public Knowledge  
1875 Connecticut Ave. NW  
Suite 650  
Washington, DC 20009  
(202) 518-0020  
jef@publicknowledge.org

March 14, 2008