

December 15, 2008

Chairman Kevin Martin
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: WC Docket No. 08-7, *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*

Dear Chairman Martin:

Public Knowledge urges the Commission to clarify that text messaging, including the offering of short codes to the public, is a Title II common carrier service subject to all of the protections of Title II, including § 202's nondiscrimination protections¹ and § 255's accessibility requirements.² Text messaging services fall squarely within the definition of telecommunications (common carrier) services. The provisioning of short codes is an integral component of common carrier text messaging services in the same way that the provisioning of phone numbers is integral to voice services. Therefore, in order to promote innovation and uphold the law while protecting consumers, the Commission must act to halt the open discrimination in which carriers currently engage.

I. Content-Based Discrimination By Wireless Carriers is an Ongoing Practice Which Threatens an Important Public Service

As discussed in our recent filing in this docket, discrimination in text messaging and short code provisioning remains a serious, ongoing problem.³ Text messaging addressed to and from short codes is being used for public safety, restaurant reservations, voter registration, one-

¹ See 47 U.S.C. § 202.

² See 47 U.S.C. § 255.

³ Public Knowledge *et al.*, *Letter to Secretary Dortch* at 8-15, WT Docket No. 08-7 (Oct. 2, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520173383 [hereinafter *Public Knowledge Oct. 2 Letter*].

to-one communications, and an enormous variety of other valuable purposes.⁴ In the words of the Common Short Code Administration (“CSCA”): “The possibilities are endless: voting and polling, contests, surveys, direct marketing, chat, games, and the like all can benefit from CSCs.”⁵

Despite these public benefits, wireless carriers continue to deny consumers and businesses alike the right to send and receive lawful text messages. In fact, carriers have gone so far as to make explicit their intent to ensure that the lawful speech that travels across these systems matches their “corporate values,” is “in good taste,” does not “disparage” them or their affiliates, and is otherwise subject to their discretion.⁶ Services like Rebtel still are unable to compete on a level playing field.⁷ Just over a month ago, Nathan Martin, CEO and President of a company which offers SMS services, filed a letter explaining how

the confusing and arbitrary restrictions employed by wireless carriers in the SMS services market restrict [his] company's ability to reach users and to develop creative solutions in a timely and cost-effective manner--or sometimes, at all.⁸

The problem has not gone away, and carrier promises that it will have been repudiated by their own publicly-disseminated policies.⁹

⁴ See *id.* at 3-5.

⁵ Common Short Code Administration, *Home Page*, at <http://www.usshortcodes.com/> (last visited Nov. 5, 2008).

⁶ *Id.* at 10-13. See also Verizon, *Verizon Content Policy*, at <http://responsibility.verizon.com/contentpolicy/> (last visited Nov. 5, 2008); Mobile Marketing Association, *Common Short Code Primer*, at <http://www.mmaglobal.com/shortcodeprimer.pdf> (last visited Nov. 5, 2008).

⁷ See, e.g., Rebtel, *Blog Posts on Common Short Code Administration*, at <http://blog.rebtel.com/category/common-short-code-administration/> (last visited Nov. 5, 2008).

⁸ Nathan Martin, President and CEO, DeepLocal, Inc., *Letter to Secretary Dortch* at 1, WT Docket No. 08-7 (Oct. 30, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520183246. In his filing, Mr. Martin also included his testimony on the issue from the July 21, 2008 F.C.C. hearing in Pittsburgh.

⁹ See *Public Knowledge Oct. 2 Letter* at 12. See also Lowell C. McAdam, President and Chief Executive Officer, Verizon Wireless, *Letter to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce* (Sept. 28, 2007).

II. Text Messaging, Including Provisioning of Short Codes, Is a Title II Common Carrier Telecommunications Service

Text messaging services meet all of the traditional and legal indicia of common carrier telecommunications services.¹⁰ According to the D.C. Circuit’s formulation, a common carrier is “any person engaged in rendering communication service for hire to the public.”¹¹ Additionally, a common carrier system must “be such that customers transmit intelligence of their own design and choosing.”¹² Finally, “[a] common carrier does not ‘make individualized decisions, in particular cases, whether and on what terms to deal.’”¹³ Text messaging – including both the delivery of text messages and the provisioning of short codes – is a communications service for hire to the public, allowing customers to choose what to transmit, and without individualized dealings regarding pricing or terms. It is therefore a Title II common carrier service.

A. Text Messaging, Including Text Messaging Addressed To or From a Short Code, is a Communication Service

Text messaging is a “communication service” within the meaning of the law. It is self-evident that the actual sending of a text message is a communication service, as it enables people to communicate with each other wirelessly. That fact that the short code itself is not itself a communication matters no more for short codes than it does for long codes (10-digit telephone numbers). As discussed in our earlier filings, “short codes are an indispensable input to the provision of a communications service” and are subject to the same regulatory classification.¹⁴

¹⁰ See Public Knowledge et al., *Comments* at 3-5, WT Docket No. 08-7 (Mar. 14, 2008) [hereinafter *Public Knowledge et al. Comments*].

¹¹ *Nat’l Ass’n of Regulatory Comm’rs v. F.C.C.*, 525 F.2d 630, 640 (D.C. Cir. 1975) [hereinafter *NARUC I*].

¹² *Nat’l Ass’n of Regulatory Comm’rs v. F.C.C.*, 533 F.2d 601, 609 (D.C. Cir. 1976) [hereinafter *NARUC II*].

¹³ *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (citing *NARUC I*).

¹⁴ *Public Knowledge Oct. 2 Letter* at 16. See also Public Knowledge et al., *Reply Comments* at 27-28, WT Docket No. 08-7 (Apr. 14, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519890105.

In the same way that provisioning phone numbers is simply part of the underlying Title II voice service, provisioning short codes is part of the underlying Title II text messaging service.

Wireless carriers have repeatedly agreed that short codes are equivalent to phone numbers. The Mobile Marketing Association’s “Common Short Code Primer” – which CTIA states that carriers refer to and short code applications must adhere to¹⁵ – opens its executive summary by stating that “Common Short Codes (CSCs) *are phone numbers*, usually four to six digits, that mobile phone users utilize to send Short Message Service (SMS) messages.”¹⁶ In his testimony before the Commission at its meeting in Cambridge in February 2008, Verizon’s Executive Vice President Tom Tauke opened by stating that “[s]hort codes are abbreviated telephone numbers that mobile-content advertisers lease through an industry-wide system.”¹⁷ AT&T explains that “[t]ext messages are typically addressed to a recipient’s 10-digit telephone number or an email address. ‘Common short codes’ (or ‘CSCs’) are simply 5 or 6 digit numbers that may be used as a shorthand address for text messages.”¹⁸

MetroPCS likewise recognizes that short codes are “telephone numbers,” arguing only the irrelevant fact that, being less than 10 digits, they “do not conform to the [North American Numbering Plan].”¹⁹ Even CTIA, in denying that short codes are phone numbers, recognizes their equivalence by stating that “CSCs are simply short 5- to 6-digit numeric addresses that direct a one-way message to a third-party marketer or advertiser,” but on the same page pointing

¹⁵ CTIA – The Wireless Association, *Comments* at 45-46, 52, WT Docket No. 08-7 (Mar. 14, 2008), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867094.

¹⁶ Mobile Marketing Association, *Common Short Code Primer* at 4, *at* <http://www.mmaglobal.com/shortcodeprimer.pdf> (emphasis added).

¹⁷ Tom Tauke, Verizon Communications Executive Vice President of Public Affairs, *Testimony* at 3, WT Docket No. 08-7 (Feb. 24, 2008), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519843224.

¹⁸ AT&T, Inc., *Comments* at 3, WT Docket No. 08-7 (Mar. 14, 2008), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867003.

¹⁹ MetroPCS Communications, Inc., *Comments* at 8, WT Docket No. 08-7, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866969.

out that “[a] wireless customer’s phone number is their address for SMS messages.”²⁰

It does not appear that Commission has ever felt it necessary to point out that provisioning phone numbers is a part of the underlying Title II service, and opponents of the Petition have given no legal justification for separating the two. But because carriers have begun discriminating in text messaging, the Commission must now make it explicit that short codes, like phone numbers, are part and parcel of a Title II service. To say otherwise is to say that while § 202 prohibits carriers from discriminating in connecting customers’ phone calls, they can discriminate all they want in actually offering those customers phone service.

Even if the Commission should find that short codes are somehow a separate service from text messaging – which they are not – the provisioning of short codes would still be “adjunct” to those text messaging services and therefore subject to the same Title II regulatory structure. The Commission has summarized the principle as follows: “Offerings are incidental to communications and therefore are communications themselves, if they are an integral part of, or inseparable from, transmission of communications.”²¹ These “adjunct-to-basic services are services that are ‘incidental’ to an underlying telecommunications service and do not ‘alter[] their fundamental character’ even if they may meet the literal definition of an information service or enhanced service.”²² Provisioning a short code for text communications, like provisioning a phone number for voice communications, is an “integral part” of those communications – without the provisioning, no actual communications can occur. They are also “incidental” to the

²⁰ CTIA – The Wireless Association, *Reply Comments* at 3, WT Docket No. 08-7 (Apr. 14, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519889845.

²¹ *Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 F.C.C.R. 18730 ¶ 20, FCC 97-208 (June 13, 1997).

²² *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 4826 ¶ 16, FCC 05-41 (Feb. 16, 2005) (quoting

actual voice calls or text messaging – the goal is not the provisioning or the possession of a number, but the communications which utilize that number.

All “adjunct-to-basic services are . . . treated as telecommunications services under the 1996 Act.”²³ Such adjunct services “will be treated and regulated as basic transmission services if their purpose is to facilitate the use of the basic network without changing the nature of basic telephone service.”²⁴ Provisioning of phone numbers and short codes does not “alter the fundamental character” of text or voice services – instead, they facilitate, and are necessary to offering those services. Types of services found to be adjunct-to-basic have included “central office space for collocation, certain billing and collection services, . . . validation and screening services,” and local number portability.²⁵ None of these services is as basic and necessary as the actual provisioning of a number for addressing communications, but all are regulated as common carrier telecommunications services. Therefore, even if the Commission concludes that the provisioning of short codes is not part of the underlying text messaging service, it must be nonetheless “treated as telecommunications services” and “regulated as basic transmission services” under the law.

Additionally, in the same way that a carrier cannot avoid § 202 and discriminate in voice services by refusing to give someone a phone number, it cannot do so in the context of Title II text messaging services. The statutory language of § 202 makes clear that its nondiscrimination protections cannot be so easily evaded: “It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities,

²³ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 21905 ¶ 107, FCC 96-489 (Dec. 24, 1996) (quotation omitted).

²⁴ *Beehive Telephone, Inc. v. Bell Operating Companies*, Memorandum Opinion and Order, 10 F.C.C.R. 10562 ¶ 21, FCC 95-358 (Aug. 14, 1995) (quotation omitted).

²⁵ See *Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, Memorandum Opinion and Order, 23 F.C.C.R. 10704 ¶ 31, FCC 08-159 and cases cited therein (June 23, 2008),

or services for *or in connection with like communication service, directly or indirectly, by any means or device, . . .*²⁶ Under the terms of the Communications Act, text messaging, including the provisioning of short codes, is a communications service and is subject to the nondiscrimination requirements of Title II.

B. Text Messaging, Including Short Code Rental, is Offered to the Public

Text messaging is a “service for hire to the public.” Text messaging service now comes with nearly every wireless phone service, and could hardly be more available to the public. Like phone numbers, short codes are, as a matter of practice and fact, offered for hire to the public by the CSCA, which is part of the CTIA – The Wireless Association. The CSCA advertises this feature precisely:

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 wireless subscribers to their goods and services using interactive applications never before available in the wireless industry.²⁷

The entire thrust of the CSCA’s web site is that short codes provide opportunities for everyone; even the actual registration of a code can be done online through a standard form accessible to the public.²⁸

C. Customers of All Text Messaging Services Choose What to Transmit

Customers of text messaging services – whether or not those messages are addressed to or from short codes – “transmit intelligence of their own design and choosing.” When a wireless customer sends a text message, he or she decides exactly what will be transmitted, and that message is exactly what will be received. The same is true whether the message is sent to or

²⁶ 47 U.S.C. § 202(a) (emphasis added).

²⁷ Common Short Code Administration, *About CSCs – The Market for Common Short Codes*, at http://www.usshortcodes.com/csc_about.html (last visited Nov. 5, 2008) (emphasis added).

²⁸ *See id.*

from a short code or a long code. Short code lessees choose exactly what text to send, and – unless blocked by a wireless carrier – their intelligence is transmitted unaltered. As the CSCA points out, “[t]he possibilities are endless.”²⁹

D. Text Messaging and Short Codes Are Offered on Standard, Non-Negotiable, Terms on a First-Come, First-Served Basis

In providing text messaging services and when renting short codes, wireless carriers and the CSCA do not “make individualized decisions, in particular cases, whether and on what terms to deal” apart from their unlawful content-based discrimination. Much like wireless carriers’ fixed text messaging and voice offerings to wireless phone customers, the CSCA has standardized pricing and contract terms, and offers short codes on a first-come, first-served basis. Prices for renting short codes are fixed, and are not negotiated: “Registering and leasing a CSC costs \$1,000 per month for each ‘Select CSC’ and \$500 per month for each ‘Random CSC.’”³⁰ Lease terms are fixed at 3, 6, or 12 months.³¹

Even the contract terms of the short code rental are fixed rather than negotiated by the parties. The entirety of the contract is available on the CSCA web site for the public to examine before even starting the registration process.³² In fact, it states:

IF YOU DO NOT AGREE WITH ALL OF THESE TERMS AND
CONDITIONS, YOU ARE NOT AUTHORIZED TO USE THE SERVICE AND
YOU MUST DISCONTINUE ANY FURTHER USE.”³³

Any updated terms are automatically applied upon renewal.³⁴

²⁹ Common Short Code Administration, *Home Page*, at <http://www.usshortcodes.com/> (last visited Nov. 5, 2008).

³⁰ Common Short Code Administration, *Obtaining a CSC...*, at http://www.usshortcodes.com/csc_obtain_a_csc.html (last visited Nov. 5, 2008).

³¹ Common Short Code Administration, *Payment Information – How Dowow I Lease a Common Short Code?*, at http://www.usshortcodes.com/csc_obtain_pay.html (last visited Nov. 5, 2008).

³² Common Short Code Administration, *Registrant Sublicense Agreement (Version 4.0)*, at http://www.usshortcodes.com/csc_subLeaseAgree.html (last visited Nov. 5, 2008)

³³ *See id.*

³⁴ *See id.* § 5(j)(I)(iii) (“Any renewal of the CSC is subject to the Registry’s then-current terms and conditions.”).

Finally, the standard contract specifically states that “[a]ll applications for CSCs are accepted by Registry on a first-come, first-served basis,” which is a hallmark of common carrier service.³⁵ In fact, the only aspect of text messaging that does not behave as a common carrier is the open willingness to discriminate in provisioning short codes based on the speech being carried.

If the single fact that a provider of telecommunications services chose to discriminate took the service out of Title II, then § 202’s nondiscrimination requirements would be meaningless. Such behavior is actually unlawful discrimination in a common carrier service, which the Commission must act to stop.

III. Recognizing Text Messaging as a Title II Service Will Not Affect Carriers’ Ability to Deal With Spam

As we have detailed, carriers’ claims that nondiscrimination in text messaging services will result in a flood of spam are unfounded.³⁶ The vast majority of wireless text spam comes not from short code lessees but from the Internet, where carrier email-to-text gateways allow spammers to send anonymous messages which are delivered to phones.³⁷ Carriers currently filter a large portion of this spam, and there is no reason to believe they could not or would not continue to do so if text messaging is recognized as a Title II service. Further, spam is far less likely to originate from the lessee of a short code than from the Internet for two reasons:

1. The sender is not anonymous.
2. Sending the message costs the sender money.

³⁵ See *id.* § 5(b).

³⁶ See, e.g., *Public Knowledge Oct. 2 Letter* at 5-8.

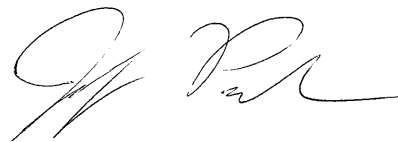
³⁷ See, *id.* at 6-8.

And even if a short code lessee were to attempt to send spam, carriers could continue to offer services that allow *the customer* to pick and choose which messages to receive or block.³⁸ And perhaps most importantly, just as voice carriers are still permitted to disconnect callers who abuse the service, text messaging carriers would retain the legal ability to stop abusive use of their services.³⁹

IV. Conclusion

Text messaging services, including short code rentals, are offered to the public at large on standardized terms. Text services, whether addressed by short code or long code, all communicate messages of the customers' choosing. The provisioning of short codes for the purpose of offering text message delivery is integral to providing those services, and is therefore either part of the basic service itself or is adjunct to that basic service. The Commission should declare that text messaging services, including the provisioning of short codes, are Title II common carrier services subject to all of Title II's provisions including nondiscrimination and accessibility.

Respectfully submitted,



Jef Pearlman
Equal Justice Works Fellow and Staff Attorney
Public Knowledge
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
(202) 518-0020
jef@publicknowledge.org

³⁸ See *id.* at 7-8

³⁹ See *id.* at 7.

cc: Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Deborah Taylor Tate