



March 25, 2010

Julius Genachowski
Chairman, Federal Communication Commission
445 12th St. SW
Washington, DC 20554

RE: WT Docket 08-7

Dear Chairman Genachowski:

In response to the tragedy in Haiti, Catholic Relief Services (CRS) sought to leverage the power of text messaging to go beyond the carrier-approved “text to donate” program. The text to donate program grants carriers control of all aspects of the relationship with the subscriber and limits contributions to \$10/text message. Instead, CRS chose to implement a “text to call” program. With text to call, those who texted the CRS program could request an immediate call-back from CRS. After hearing a brief, impassioned plea by CRS’ president, the caller was connected with a human operator who directly solicited a contribution. That operator could also answer questions and provide the opportunity for the caller to become involved with CRS or to volunteer in connection with CRS’ Haitian relief efforts. The CRS text to call program generated an average donation substantially greater than \$10 to help victims of the earthquake.

For reasons it has failed to disclose, Sprint has refused to permit CRS to continue its text to call relief program. Sprint insists that it will only permit a text to donate plan that guarantees it control over all aspects of the campaign and the relationship with the customer. Sprint has threatened to terminate access to its system for the CRS campaign short code unless CRS ends its text to call campaign by March 29. Doing so would impact not only CRS, but Mobile Commons, the company that holds the short code and implemented the CRS text to call Haitian relief campaign. Sprint’s arbitrary discrimination against a donation campaign it does not control and approve in every detail forces Mobile Commons to make a stark choice: either break its contract with CRS and cease any future efforts to develop innovative text message-based donation campaigns, or lose access to Sprint’s entire mobile network for this short code.

Unless the Commission acts to grant the pending *Petition for Declaratory Ruling of Public Knowledge, et al.*¹ to declare text messaging subject to Commission authority and prohibit such arbitrary conduct, neither Mobile Commons, CRS, nor those dependent on its relief efforts will have any recourse against this arbitrary action. Further, this will chill the efforts of non-profits and commercial enterprises alike to experiment with innovative text message-based campaigns. The experience of Mobile Commons is far from unique. As the record shows, the

¹ Public Knowledge, *et al.*, WT Docket No. 08-7, Dec. 11, 2007, available at <http://www.publicknowledge.org/issues/text-message-petition>.

wireless industry uses its unconstrained discretion over short codes and SMS text messaging to stifle new services and impose arbitrary costs.

Public Knowledge and Free Press therefore call on the Commission to resolve the pending *Petition for Declaratory Ruling* in this docket before the March 28 deadline imposed by Sprint to end CRS' "text to call" Haiti relief campaign or lose access for Mobile Commons' short code. Once the Commission clarifies the regulatory status of text messaging, Mobile Commons and/or CRS may properly challenge this unjust and unreasonable discrimination by Sprint, and may ask the Commission to direct Sprint to continue supporting the program while the challenge is pending. This will finally allow other non-profits and commercial enterprises to hold wireless providers accountable for the unjust and unreasonable rates and practices that have so long stymied the potential for text-based services and frustrated users and producers of such services.

BACKGROUND

As set forth in the attached Declaration by Jed Alpert, founder of Mobile Commons, CRS is the international humanitarian agency for the U.S. Catholic Community. Because of the difficulty and expense associated with obtaining and using a short code (simply applying for a short code and seeking approval for use of the short code on the carrier systems can cost tens of thousands of dollars), CRS works with Mobile Commons – a company dedicated to providing "easy-to-use technology for scalable mobile marketing campaign management."² Again, because of the expense and lack of transparency in the short code market, Mobile Commons itself relies upon an "aggregator"³ called OpenMarket to manage its relationships with wireless carriers and negotiate the short code approval process.

On January 16, four days after the earthquake devastated Haiti, CRS contacted Mobile Commons to develop and implement a text to call donation campaign. Rather than use the standard text to donate system approved by carriers, under which carriers insert themselves between donors and recipient organizations while limiting donations to \$10/message, CRS sought to reach out directly to interested donors. Subscribers to CRS' short code received a text message instructing those who wished to donate to CRS' Haitian relief efforts to "Text RELIEF to 30644 and follow the instructions." Those who followed this instruction received a follow up message: "People of Haiti desperately need your help. To make a donation please reply with the word CALL or dial 866-596-7030." Replying CALL prompted an automatic call back to the respondent by CRS, which connected the potential donor to CRS. The potential donor then heard a brief pre-recorded message from CRS' president, followed immediately by a connection

² <http://www.mobilecommons.com/about-us/our-company/>

³ "Aggregators" exist as a result of the incredible complexity and arbitrary nature of the short code market. Because each wireless carrier may decide whether or not to "recognize" a short code (*i.e.*, allow the short code to operate on its system) with no limits on its discretion, businesses need expert intermediaries that can guide them through the process, help them draft the lengthy applications for review, shape descriptions of proposed business plans in ways that do not offend a carrier's unwritten rules or standards, and otherwise help those wishing to use a short code navigate this confusing and expensive process. In addition, because wireless carriers may demand "audits" of a short code holder, or may change the rules without notice, users must maintain relationships with aggregators to act as intermediaries with the wireless carriers on their behalf. Since the aggregators are themselves dependent on maintaining the good will of the carriers, however, aggregators have limited ability to persuade carriers in the face of arbitrary or discriminatory actions that impact their clients.

to a live operator. Mobile Commons developed and implemented the campaign as requested by CRS, using a short code held by Mobile Commons and employed by them previously to implement text-based campaigns for non-profits.

This campaign has two advantages over the standard text to give program. First, it allows CRS to establish a personal relationship with the donor. Such relationships are critical to non-profit organizations, both for the immediate campaign and over the long term. Second, it permits CRS to solicit contributions in excess of the \$10/message permitted by carriers in the standard text to give program.

On January 19, a mere three days after Mobile Commons implemented CRS' Haiti relief campaign, Mobile Commons received word from OpenMarket – the aggregator used by Mobile Commons – that Sprint wanted Mobile Commons to discontinue the CRS campaign. When Mobile Commons asked for notification from Sprint in writing, OpenMarket refused. Instead, on January 22, OpenMarket responded with a form letter addressed “Dear OpenMarket Customer” in which OpenMarket stated it wanted to “take the opportunity to remind you” that “operator approval of a charitable giving program regardless of the vehicle used to solicit donations must be received for each program and is at the operator’s sole discretion.” OpenMarket informed Mobile Commons that Mobile Commons would need to file a new “program brief” for the CRS campaign to Sprint, providing a detailed description of the campaign and in all its particulars. Sprint would then consider Mobile Commons’ program brief and determine whether to give permission for the CRS Haiti relief campaign.

As explained by Mr. Alpert, although agreements with carriers give carriers the right to demand a new program brief for each new use of a short code, no carrier in his experience has ever required a company operating on shared short codes to file a new program brief for each new campaign. That Sprint took such action here has a strong chilling effect on his willingness to implement future campaigns similar to the CRS text to call campaign, or any other campaign that deviates from the standard text to donate model controlled by the carriers. Further, Sprint gave no indication why it deviated from the standard industry practice and insisted that Mobile Commons file a new program brief for the CRS campaign. Nevertheless, Mobile Commons created a new, detailed program brief describing the CRS text to call Haiti relief campaign and provided it to OpenMarket on January 26.

On February 17, OpenMarket notified Mobile Commons that Sprint had rejected the CRS program brief. Sprint required Mobile Commons to terminate the CRS Haiti relief text to call campaign within 40 days or Sprint would terminate Mobile Commons’ access to Sprint’s mobile network via the short code used for the CRS Campaign. Once rejected from Sprint, Mobile Commons would be unable to use the relevant short code for *any* campaign on Sprint’s network. Mobile Commons would need to seek general approval from Sprint for access via the short code, as well as specific approval for any future individual campaign. Such action would deprive Mobile Commons of the ability to reach Sprint mobile subscribers, and significantly impede the ability of Mobile Commons to offer services to its clients.

THE COMMISSION MUST ACT IMMEDIATELY TO ASSERT AUTHORITY OVER SPRINT'S UNREASONABLE CONDUCT

More than two years ago, Public Knowledge, Free Press and a number of other non-profit organizations filed a *Petition for Declaratory Ruling* asking the Commission to clarify the regulatory status of text messaging and prohibit unreasonable discrimination in the provisioning of text messaging and short codes.⁴ That *Petition* followed a similar act of arbitrary discrimination against a short code applicant by a carrier. There, Verizon Wireless rejected an application from NARAL Pro-Choice America because of the “controversial” nature of NARAL’s message.⁵ After a front page story in the *New York Times*, Verizon reversed course, announced with great fanfare that it would “update” its policy, and declared the problem “solved.”

In the *Petition*, Public Knowledge, *et al.*, warned that without a clear assertion of Commission authority, either by classifying SMS text messaging as Title II or under some other theory of authority, that wireless carriers would continue their discriminatory practices.⁶ This prediction has proven sadly accurate. In the absence of even the threat of regulatory oversight, carriers have continued to impose new fees, new requirements, and new restrictions on both non-profits and commercial enterprises attempting to utilize this increasingly popular means of communication.⁷

As this most recent case of Mobile Commons and CRS illustrates, it is not only the short code applicant that suffers. In the first instance, Haitians dependent upon CRS’ charitable efforts – and on the generosity of donors willing to pay more than \$10/msg when prompted by CRS’ text-based campaign – will suffer from the reduced ability of CRS to solicit donations. Never has the constant refrain from carriers that blocked parties can find some “other means” somehow, somewhere to reach willing listeners been so starkly proven hollow. In a humanitarian crisis such as this, where every dollar collected may mean a life saved, and every minute wasted may mean a life lost, the suggestion that there is “no harm” in forcing CRS to select a less effective campaign or forgo access to Sprint’s mobile subscribers should ring hollow – particularly since Sprint has not offered even as bad a reason as Verizon offered when it blocked NARAL.

⁴ 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>; 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>. [hereinafter *Petition*].

⁵ *Id.* at 3-5.

⁶ *Id.* at 6.

⁷ See generally *Comments of 4INFO, Inc.*, GN Docket No. 09-191, WC Docket No. 07-52, Jan. 14, 2010, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020376883>; *Letter of Nathan Martin*, WC Docket No. 08-7, Oct. 30, 2008, available at <http://fjallfoss.fcc.gov/ecfs/comment/view?id=5515330097>.

Further, until the Commission resolves this *Petition*, neither Mobile Commons nor CRS – nor any other similarly situated non-profit or commercial enterprise – has a clear path to seek redress from Sprint’s arbitrary and unconscionable conduct. It may be that Sprint, stirred by some pang of conscience or fear of negative publicity, may voluntarily lift its ban on CRS’ specific campaign here. But Sprint will still have sent a clear message to every non-profit and every business such as Mobile Commons utterly dependent on the good will of carriers like Sprint: “you innovate at your peril.” Every business now knows that deviating even slightly from a process the carriers control from beginning to end risks discriminatory treatment, punishment in the form of new reporting requirements, and possible loss of access.

The implications of this case go well beyond the growing number of “anecdotal cases,” so far documented in the record. The Commission has an opportunity to establish the rule of law with regard to text messaging and short codes. It can require that carriers deal fairly, and that non-profits and commercial enterprises have the necessary stability and legal protection from unjust and unreasonable discrimination to innovate and explore new ways to use this communications technology. But if the Commission once again turns a blind eye to carrier discrimination by letting the *Petition* continue to languish, this too will send a message to both carriers and to the users of short codes, and we can expect such arbitrary discrimination to continue to increase.

CONCLUSION

Rather than impose a rule of law to govern text messaging, the Commission has allowed carriers to act like medieval barons exercising high and low justice over their serfs – exacting whatever fees they desire and expecting businesses and non-profits to beg for the privilege to innovate as an act of grace rather than expect to make plans as a matter of right. As a result, the industry remains essentially mired in the Dark Ages. Non-profits and business must wend their way through a Byzantine process, always subject to the threat of arbitrary treatment, and therefore constantly censoring themselves and stifling innovation that might offend the carriers who may cut off access without even troubling to explain themselves – let alone deal fairly and consistently.

Respectfully Submitted,

/s/

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