

October 2, 2008

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Notice of Ex Parte Filing; WC Docket No. 08-7

Dear Secretary Dortch:

Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, Assemblyman Richard L. Brodsky, and CREDO Mobile, Inc. (Public Knowledge *et al.*¹) submit this *ex parte* filing to respond to several recent filings by wireless providers that mischaracterize several aspects of the Petition for Declaratory Ruling to prohibit discrimination in text messaging (“Text Messaging Petition” or “Petition”) filed by Public Knowledge and others earlier this year.

As described in our original Petition, wireless carriers offer text messaging services through short codes to the general public as “telecommunications services.”² In fact, from the perspective of a consumer, text messaging provided via short codes is no different than “phone to phone” text messaging that uses a longer code. There is no reason to distinguish the regulatory

¹ For descriptions of the parties, see Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, *Petition 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 1-2*, WT Docket No. 08-7, Dec. 11, 2007, available at <http://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf> [hereinafter *Petition*]; *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>. See also Public Knowledge *et al.*, *Comments* (Mar. 14, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867088 [hereinafter *Comments*]; Public Knowledge *et al.*, *Reply Comments* (Apr. 14, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519890105 [hereinafter *Reply Comments*].

² The Common Short Code Administration advertises the availability of short codes through a public web site (www.usshortcodes.com) and indicates that one short code will allow users to gain access to 245 million wireless subscribers. This is the essential condition of a “telecommunications service” (and thus common carriage) under the Communications Act. 47 U.S.C. 153(47). See also *Comments* 4-5.

treatment of “short code” text messaging and “phone-to-phone” text messaging simply because of the length of the address used to send the message. Yet, the carriers’ documents confirm that wireless carriers often discriminate against would-be providers of text messaging services via short codes based on the content of the information or the type of services they seek to offer. Indeed the reason for the paucity of news articles on this topic is *not* because the issue has been resolved – just the opposite. Wireless carriers *admit* that they pick and choose among providers of short code text messaging services. In fact, as will be described in more detail below, the wireless industry publishes an explicit set of guidelines that gives examples of the type of short code-based campaigns that are and are not “acceptable.” And for those parties that are harmed by carrier discrimination, it is risky to complain because of the very discretion that carriers can currently exercise against them.

Since they admit to engaging in discrimination, wireless providers should bear the burden of demonstrating why such discrimination is just and reasonable. Wireless providers’ principal defense of these discriminatory practices is that they must deny access to short codes to some parties in order to protect consumers from unsolicited e-mail, or “spam.”³ As we explain below, there is no evidence that applying non-discrimination principles, either through Title II or Title I, would have any effect on the amount of spam received by wireless consumers or the ability of wireless providers to block spam. If this Petition is granted in full, wireless providers would still

³ Providers make the secondary argument that their right to discriminate is essential for the providers to protect their business name and reputation. The logic of this argument is hard to follow and is difficult to take seriously. In fact, the opposite may be more accurate. If Verizon Wireless blocks messages from being sent to a user that affirmatively requests such service, the consumer is likely to think worse of Verizon and its service, as happened when Verizon denied NARAL the ability to communicate with Verizon’s customers. If, on the other hand, a user is able to receive messages from any short code provider that the subscriber chooses, the consumer is likely to find the Verizon service more valuable. Verizon’s reputation is thus likely to *benefit* from having an open policy with regard to short codes.

retain *all* of their current rights and capabilities to filter and block unsolicited e-mails from reaching consumers who do not wish to receive them.

Furthermore, as we discuss below, several recent developments make it even more important that the Commission grant the Petition as soon as possible. Text messaging via short codes is becoming an increasingly popular and valuable service – one that is quickly becoming a principal means of basic communications. Therefore, the wireless providers’ discriminatory practices are causing even greater harm, and will cause more harm in the future, than when the Petition was first filed. Therefore, Public Knowledge *et al.* urge the Commission to grant the Petition expeditiously.

1. Text messaging, whether via short codes or telephone numbers, is becoming an increasingly important means of basic communication for schools, for public safety authorities, for voter registration, and for many other uses.

Filings by the wireless providers often attempt to diminish the importance of short codes by alleging that short codes are simply a means of “advertising.”⁴ This misleading statement ignores the increasingly vital role that text messaging via short codes plays in our society and democracy. For example, as the NARAL controversy demonstrated, the service is also used for pure communication, including for political speech. In addition, the original petition provided several examples of the societally-beneficial uses of text messaging via short codes.⁵ Here are some additional examples that have been brought to light in the last few months:⁶

- The United Nations recently launched a new “text messaging for peace” campaign by asking cell phone users in the United States to send a peace message to a short code.

⁴ “Short codes are abbreviated dialing codes that mobile content advertisers lease through an industry-wide system.” Letter from Howard Woolley, Senior Vice President, Policy & Government Affairs, to Congressman Peter DeFazio (April 22, 2008).

⁵ See *Petition* 19-24.

⁶ Many of the following stories are attached in Appendix C.

The short code messages were then compiled and delivered to world leaders on September 23, 2008.⁷

- An organization called Mobile Voter has used short codes to encourage citizens to register to vote.⁸
- A company called Qtags has rolled out a new service called “GuestAssist” that allows fans attending a concert or sports game to send a short code text message to stadium authorities in case of a medical problem, violent behavior in the stands, or any other customer need.⁹
- Boston police are now turning to text messaging to help stop crime. They have an anonymous program where you can text in a crime tip anonymously to help stop crime.¹⁰

There are numerous other uses of short codes.¹¹ Short codes can be used to make a donation to Red Cross, to select the right wine at a restaurant, or to acquire the latest news or sports updates.¹² These uses of short codes do not appear in the list of “Acceptable” uses in the Common Short Code Primer published by the Mobile Marketing Association (MMA).

This is not to deny that many short codes are used for advertising purposes, but even some advertising can provide a useful and environmentally-friendly service. For instance, some real estate agents now advertise short codes on “for sale” lawn signs, allowing potential buyers to

⁷ *UN Launches Campaign to Text Message for Peace* (Sept. 2, 2008), available at <http://www.un.org/apps/news/story.asp?NewsID=27901&Cr=peace&Cr1=campaign>.

⁸ See www.txtvoter.org. See also *New Campaign Focuses on Registering Student Voters* (Sept. 5, 2008), available at <http://www.whotv.com/Global/story.asp?S=8957972> (“Less than two months before the November presidential election, student groups have launched a new campaign to make sure their vote counts. The public interest group Iowa PIRG has found a way to connect with young voters on college campuses. It's called the ‘Text Out the Vote’ campaign. Students can text ‘studentvote’ to 41411. The student will then get a message telling them how to register to vote. On that message, they'll also be asked to forward it on to dozens of their friends.”).

⁹ See <http://www.guestassist.net/>.

¹⁰ Todd R. Weiss, *Boston Police Turn to Text Messages to Fight Crime: Crime Stoppers Callers Can Now Text in Their Tips*, *ComputerWorld* (June 18, 2007), available at <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9025159>.

¹¹ For even more examples of political speech, health care benefits, and other uses of short codes, see *Petition 14*, 19-24; *Comments 8-9*, *Reply Comments 7-9*, *Reply Comments Attachment A 1-44*.

¹² See <http://www.coolshortcodes.com/>.

send a message to the short code and instantly receive detailed information about the home. This practice saves the real estate agents the time, expense and waste of distributing paper flyers.

As these examples demonstrate, communication via text messages to short codes is increasing and often substitutes for existing forms of communications including telephone calls. Short codes thus provide an increasingly popular means of communication that is becoming vital to the exercise of free speech and the protection of our health, safety and welfare.

2. There is no evidence that granting the Petition would lead to uncontrolled spam.

Recent submissions by wireless providers create the false impression that granting the Petition would result in a dramatic increase in spam to wireless subscribers. CTIA's filing of July 18, 2008, describing the increase in complaints related to wireless spam messages, concludes by saying:

. . . wireless carriers must retain the ability to protect their customers from fraud, spam, and objectionable material. To ensure that carriers can continue these important efforts, the Commission should reject attempts to regulate SMS and Short Code services as Title II services, subject to the Commission's common carrier obligations.¹³

Verizon raised a similar concern in its letter to Congressman DeFazio, arguing that text messaging via short codes should not be regulated because Verizon has a responsibility to protect its customers from spam.¹⁴

Despite these assertions, the wireless carriers have not explained how granting this Petition would result in an increase in spam, and there is good evidence that it would not. Grant of this Petition would not enhance the ability of "spammers" to send unsolicited e-mail to mobile phones because they can already do so anonymously and without short codes. Furthermore,

¹³ CTIA – The Wireless Association, *Ex Parte* (Jul. 18, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034742.

¹⁴ "Under the common carrier regime for text messaging and provisioning short codes, advocated by the Petition, wireless operators would also be unable to take the same steps to safeguard against wireless spam that they take today." Letter from Verizon Wireless to Congressman Peter DeFazio 3 (Apr. 22, 2008, *ex parte* filed May 2, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520007657.

wireless providers would retain the same rights and capabilities to block/filter/limit unsolicited e-mail even if text messaging via short codes operates under a common carriage regime.

To understand why grant of the Petition is unlikely to affect spam, it is first necessary to review how short codes are used. Short code addresses are given to a content provider primarily so that the content provider can receive, not send, text messages. The principal value of short codes is that it makes it easier for a wireless subscriber to send a short message *to* a content provider via a 5 or 6-digit set of numbers. In sending this message, some consumers may ask the content provider to send them information on a regular basis. But whether or not they do so, short code “campaigns” operate on an “opt-in” basis only.¹⁵ While the content provider may advertise the availability of the short code in newspapers, radio or television ads, or other media, it is the subscriber that initiates the text message, not the content provider. This means that content providers using short codes only send messages to wireless subscribers that have chosen to receive messages from the content provider.¹⁶ By definition, these are “solicited,” not “unsolicited,” communications.

Making short codes available to parties does not give spammers any more access to wireless phones than they already have. Unfortunately, spammers are already capable of sending unsolicited text messages to wireless subscribers’ telephone numbers even without short codes. This is partly because the blocks of cell phone numbers available to each wireless carrier are publicly available and text messages can be sent to phone numbers through Internet email, which

¹⁵ Although the opt-in policy is voluntarily enforced by the CSCA and the MMA Guidelines, it is not currently a part of the FCC’s rules. To ensure that this “opt-in” policy continues, the Commission may want to clarify that requiring that users of short codes only send messages to those who request them is reasonable or otherwise mandate that users of short codes shall only communicate with consumers that have affirmatively chosen to receive such messages.

¹⁶ Also subscribers can opt out after that, so if they start to receive spam, they consumer can put a stop to this him/herself. Mobile Marketing Association, *Common Short Code Primer* 13, at <http://www.mmaglobal.com/shortcodeprimer.pdf> [hereinafter *MMA Common Short Code Primer*]. The Primer is also attached as Appendix B.

makes it relatively easy for spammers to generate wireless spam.¹⁷ Fortunately, wireless carriers block or filter such spam on a regular basis, which means that only a small amount of text messaging spam reaches consumers today. There is no reason to believe that granting the Petition will lead to an increase in spam. More likely, granting the Petition and broadening the use of short codes will allow consumers to enjoy new services and applications, obtain e-government services, and participate more often in the democratic process.

Furthermore, granting the Petition would not require the providers to change their practice of filtering out spam.¹⁸ As Verizon correctly notes, sending unsolicited e-mail and text messages is often illegal under either the CAN-SPAM Act or the Telephone Consumer Protection Act (TCPA).¹⁹ Wireless providers are permitted to block spam even under a Title II regime, just as landline telephone companies are permitted to disconnect callers who abuse their use of their telephone.²⁰

Furthermore, consumers have access to a variety of customer-activated software applications that can filter out spam for them. For instance, a company called “Spam-Free-Text” currently offers wireless subscribers free software to filter out unsolicited text messages.²¹ The

¹⁷ Cara Garretson, *They Welcome Wireless Spam?*, Network World (June 27, 2005), available at <http://www.networkworld.com/news/2005/062705-wireless-spam.html>.

¹⁸ We also note that the vast majority of spam messages are delivered (and filtered) from Internet email rather than other phones or short code addresses. See, e.g., Pogue’s Posts, *How to Block Cellphone Spam* (June 12, 2006), available at <http://pogue.blogs.nytimes.com/2008/06/12/how-to-block-cellphone-spam/> (also in Appendix C).

¹⁹ Verizon recently sued a company that allegedly was sending unsolicited text messages under the TCPA and state laws. See *Verizon Clamps Down on Wireless Spam* (June 4, 2007), available at <http://www.cellular-news.com/story/24131.php>.

²⁰ Verizon’s web site describes its policies governing the provision of basic residential telephone service under the heading “DISCONNECTED SERVICE” as follows: “Other reasons telephone service could be disconnected include:

- . . .
- Failure to stop abuse or misuse of telephone service, such as calls made in profane, obscene, or frightening manner, after receiving written notice.

See

<http://www22.verizon.com/ResidentialHelp/Phone/My%20Verizon/Reconnect%20Service/Questions%20and%20Answers/95311.htm>.

²¹ See <http://www.spamfreetext.com/>.

Federal Government sponsors a site called “OnGuardOnline.gov” that provides practical tips from the federal government and the technology industry to help consumers guard against Internet fraud, and other computer scams including spam. As described in a column in the New York Times, each of the major wireless providers allows consumers to activate anti-spam measures through the wireless providers’ web sites.²²

3. Granting the Petition is necessary to stop wireless providers from engaging in content-based discrimination.

The wireless providers admit that they engage in content-based discrimination. Rather than denying that they block short codes, both Verizon Wireless²³ and CTIA assert that wireless providers have a right to block short code campaigns that do not meet their content-based standards. Verizon has recently adopted a Wireless Content Policy²⁴ that specifically identifies the type of speech that Verizon does and does not accept.²⁵ The Mobile Marketing Association’s Common Short Code Primer explicitly identifies those short codes uses that are and are not “acceptable.”²⁶ CTIA states in its comments that short code applicants are expected to adhere to

²² See Pogue’s Posts, *How to Block Cellphone Spam* (June 12, 2006), available at <http://pogue.blogs.nytimes.com/2008/06/12/how-to-block-cellphone-spam/> (also in Appendix C).

²³ While Verizon Wireless is often discussed in these comments because of its Congressional letters and its new Wireless Content Policy, there is no reason to believe that its practices are unique among wireless providers, and the example of Rebtel shows us that other carriers are actively discriminating based on content. The filings by CTIA also create the presumption that all CTIA members (including the nations largest wireless carriers) are engaged in the practices discussed herein.

²⁴ See *Verizon Wireless Content Policy*. This policy is attached as Appendix A and the latest version is available at <http://responsibility.verizon.com/contentpolicy/>. We note that the document actually contains policies for several Verizon networks, but use the phrase “Verizon Wireless Content Policy” to refer to the portions of the document which apply to Verizon Wireless and text messaging.

²⁵ It is interesting to note that this Wireless Content Policy departs from the policy that Verizon announced in its letter to Rep. John Dingell earlier this year. The Wireless Content Policy says that its commitment to provide short codes to any group that is delivering legal content does not apply to campaigns to distribute content, to advertise, or to allow users to post their own content. See *Verizon Wireless Content Policy* 11.

²⁶ To be clear, Public Knowledge *et al.* do not object to the entire list of “Unacceptable” uses of short codes identified on page 14 of the *MMA Common Short Code Primer*. The uses listed on that page (in particularly, content promoting the use of illegal drugs, violence, or other illegal behavior) are clearly illegal and do not need to be carried. This Petition does not seek to require wireless carriers to provide short codes to those using them illegally. Rather, the Petition objects to the extremely limited list of “Acceptable” content which is far narrower than what is legal and protected speech. For the same reason, we also object to the restrictions on page 10 of the Common Short Code Primer that ban “nudity” and “activities that are restricted by law to those 18 years of age and older, such as

the best practices guidelines and the provisions of the Common Short Code Primer on “restricted content.”²⁷

The carriers’ discriminatory practices allow the wireless providers to use their position as short code “gatekeepers” to gain an unfair advantage in and thereby distort the marketplace. For instance, it has been alleged that some banks were unable to obtain approval to use short codes at the same time that the wireless carriers were rolling out their own banking services.²⁸ And Rebtel continues to be unable to obtain approval to use short codes on some carriers because Rebtel provides a service (international phone calls) that competes with the wireless carriers.

What is perhaps most remarkable about these policies is that the wireless industry intentionally blocks subscribers from gaining access to certain content and services even when the subscriber has affirmatively chosen to receive that information. As described above, short code content is only made available on an “opt-in” basis; subscribers must send a message to a short code provider asking to receive the content before it is sent to them. Furthermore, as we explain in more detail below, the wireless industry does not restrict itself to blocking illegal content; its control extends to information that the wireless provider regards as not “appropriate” and, according to the wireless provider, is not in “good taste.” This is the essence of unjust and unreasonable content-based discrimination that the Commission should prohibit.

- a. *Verizon’s Wireless Content Policy prohibits the use of short codes for many legal purposes.*

gambling and lotteries,” which are not illegal per se and yet are barred even if the content provider only permits such access to adults.

²⁷ CTIA – The Wireless Association, *Comments* 46, Docket No. 08-7 (Mar. 14, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867094.

²⁸ See Bruce Meyerson, *Why Wireless Isn’t Wide Open; AT&T, Verizon Wireless, and other big cellular carriers are dragging their feet on approving services that could compete with their own.*, Business Week (Dec. 11, 2007), available at http://www.businessweek.com/technology/content/dec2007/tc20071210_625653.htm?campaign_id=rss_daily

In its letter to Rep. DeFazio, Verizon Wireless says that it has denied access to campaigns involving the promotion of alcohol, drugs, tobacco or gambling, or excessively violent or sexual conduct. In fact, Verizon’s content guidelines go much further and limit legal content that Verizon considers “inappropriate” based on its “corporate values.”

Verizon Wireless’ “Content Policy for Verizon Networks” sets out its guidelines for determining what content is permissible for those employing short codes.²⁹ Reviewing this document demonstrates the extent of the control that Verizon exercises over third-party content. The document begins by noting that content distributors must adhere to Verizon’s “corporate values:”

Verizon distributes, produces and facilitates access to content in a manner consistent with its corporate values.³⁰

Verizon purports to support the ability of its consumers to make their own content-based choices:

Verizon is committed to empowering its customers to make informed choices about the services and content they want to access over its network.³¹

But later on the same page, Verizon undermines this consumer choice by reasserting its right to determine the content on behalf of its customers:

4. Verizon exercises broad discretion over its choice of brands and companies that advertise on its platforms. Verizon’s selection of advertising partners and content takes into account our corporate values as well as those of our business partners and customers.³²

Admirably, Verizon’s Policy claims to be content neutral when it comes to Internet traffic.³³ Unfortunately, short code-based messaging campaigns are not considered “Internet”

²⁹ See *Verizon Wireless Content Policy*.

³⁰ *Verizon Wireless Content Policy* 3.

³¹ *Id.*

³² *Id.*

³³ “The Internet is a free marketplace of ideas. Currently, no industry standards apply to content on the Internet. However, Verizon Online offers content management tools to help customers establish appropriate controls regarding the content that is accessible through their computer, and, in the process, Verizon Online helps parents and

traffic. Instead, short-code usage is treated the same as content distributed on a Verizon Wireless-branded distribution platform.³⁴ For this type of traffic, Verizon imposes several explicit content controls. First, it requires short code content providers to adhere to certain content standards adopted by industry associations (discussed in more detail below).³⁵ Second, Verizon refuses to allow short code content providers to “disparage” Verizon:

Content distributed through Verizon Wireless-branded distribution platforms cannot disparage Verizon Wireless or its affiliates.³⁶

Third, Verizon retains the right to exercise its “discretion” to determine what content may be offered³⁷ and asserts that short code content (even content generated by unaffiliated third parties) must comply with the same policies as content that Verizon itself generates.³⁸ In other words, Verizon enforces the same corporate “values” that it follows for its own content on independent, third-party content producers and speakers. In essence, Verizon is extending the corporate values that it applies to its *production* of content to its provisioning of *telecommunications* services.

Later in the document, Verizon also sets forth its policies on acceptable advertising, including advertising by short code content providers. Verizon retains for itself the right to

other users control the types of content that they and their families can access online.” Verizon Wireless Content Policy 8.

³⁴ “Third-Party Content Verizon Wireless Distributes On A Verizon Wireless-Branded Distribution Platform: This content category covers content distributed through Verizon Wireless-branded distribution platforms such as Get It Now, V CAST Mobile TV, V CAST Music, V CAST Video and short code-based messaging campaigns.” Verizon Content Policy 9.

³⁵ “This content must be lawful and comply with applicable industry standards (e.g. Mobile Marketing Association’s Best Practices, CTIA’s Wireless Content Guidelines, etc.)” Verizon Content Policy 10. CTIA announced the formation of its Wireless Content Guidelines on November 8, 2005. *See* <http://www.ctia.org/media/press/body.cfm/prid/1565>. These guidelines appear to be under review, however, as the web site for this document is “under construction” at this time. *See* <http://www.ctia.org/content/index.cfm/AID/300>.

³⁶ Verizon Wireless Content Policy 10.

³⁷ “Verizon Wireless may, in its discretion, elect not to carry certain types of content based on, among other things, ratings and prevailing industry practices.” *Id.* 10.

³⁸ “If, however, the content is not rated, Verizon Wireless will not distribute any such content unless it complies with the requirements contained in Category 1 above.” *Id.* 10.

determine which advertising is in “good taste.”³⁹ Verizon asserts the right not to accept many forms of advertising:

As part of Verizon’s commitment to provide the highest quality services and experience to its customers, Verizon will not accept certain types of advertising.⁴⁰

Verizon then identifies a long list of prohibited uses, including individuals that seek to adopt children, certain hunting trips, organ transplant services, and many others.⁴¹ Verizon makes clear that this list is not an exclusive one, and Verizon retains the right to deny other forms of advertising that it does not like:

If Advertisements contain statements or illustrations that are not deemed acceptable and that Verizon thinks should be changed or eliminated, Verizon may, at its election, notify the advertiser. Verizon may attempt to negotiate changes to the Advertisements with the advertiser, but is not obligated to do so.⁴²

Verizon concludes by saying it prohibits advertising by competitors:

Verizon reserves the right to reject Advertisements that promote competitors of Verizon and Advertisements that harm Verizon’s brand or public image.⁴³

Finally, it is important to note that the Content Policy creates several exceptions to the promise made by Verizon to Rep. John Dingell, Chairman of the House Energy and Commerce Committee, earlier this year. In a letter from Lowell C. McAdam, President and Chief Executive Officer of Verizon Wireless, to Chairman Dingell dated September 28, 2007, Verizon Wireless promised to “provide ‘short code’ text messaging services to any group that is delivering legal content to customers who affirmatively indicate they desire to receive such content.”⁴⁴ Verizon’s Wireless’ Content Policy, however, creates three categories of exceptions to the commitment it

³⁹ “Additionally, Verizon may reject Advertisements which fail to comply with Verizon’s standards of decency and good taste.” *Id.* 14.

⁴⁰ *Id.* 14.

⁴¹ *Id.* 14-15.

⁴² *Id.* 15.

⁴³ *Id.* 15.

⁴⁴ 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).

made to Chairman Dingell. The Content Policy recognizes three different categories of short code “campaigns”:

Campaigns used to distribute content;

Campaigns used to advertise, promote, or market companies, products or services;
and

Campaigns used to provide services that enable posting or transmission of user-created content.⁴⁵

The Content Policy then says that “All other campaigns, including campaigns of political and advocacy groups, will be governed by the policy set forth in the letter from Mr. McAdam.”⁴⁶ In other words, Verizon reserves the right to discriminate against providers of three of the most common uses of short codes.

In sum, Verizon exercises enormous control over uses of short codes, determining which uses are “appropriate” and “in good taste.”⁴⁷ In stark contrast, Verizon’s Internet policy contains no such restrictions.

b. The MMA’s Common Short Code Primer acknowledges that wireless providers discriminate against certain content, including religious content.

As noted above, Verizon Wireless and CTIA both cite to the Mobile Marketing Association’s “Common Short Code Primer” as an industry standard.⁴⁸ This document is illuminating in several respects. It clearly sets forth the proper opt-in and opt-out requirements for short code providers. It also ensures that short code providers comply with FTC-enforced advertising restrictions. These measures are vitally important to ensuring that consumers retain

⁴⁵ Verizon Wireless Content Policy 11.

⁴⁶ *Id.* 11.

⁴⁷ To the extent that Verizon analogizes short code advertising campaigns to its cable television service, the analogy fails. Even when this short code communication is intended solely to advertise a commercial product, Verizon still cannot assert the same level of control/discretion as it can with respect to advertising over its FIOS television service, which is regulated as a subscription cable content service and not as a telecom service.

⁴⁸ See *MMA Common Short Code Primer*.

control over their text messaging traffic, and Public Knowledge *et al.* support the retention of those particular practices.

Unfortunately, the “Primer” goes much further. It claims that wireless providers are legally entitled to determine what short code content may be carried on their networks. In other words, it endorses the carriers’ practice of content-based discrimination against short code providers.

The document notes that “Carriers have the right to accept or deny *any* campaign, hence the importance of clearly defining your campaign in detail.”⁴⁹ Later in the document, it specifies a list of “Acceptable” and “Unacceptable” short-code campaigns. The list of “Unacceptable” campaigns is populated largely with illegal activities that deserve to be restricted. But there is no reason for the document to contain a list of “Acceptable” campaigns. As noted above, the list of “Acceptable” campaigns does not include many useful services that enhance democracy and the public safety and welfare. The Commission should grant this Petition if for no other reason than to make sure that wireless providers do *not* make the judgment as to what legal uses are “Acceptable”. In other words, “Acceptable” uses by law include everything other than that material that is illegal or promotes illegal behavior.

Further evidence of the perniciousness of wireless carrier control is found at the very end of the document:

Q: What is acceptable content and what is not?

A: Each wireless carrier has their own specifications regarding content. Your MASP/aggregator knows these specifications and is alerted by the carrier when changes are made. The account manager will be able to share this information with you. Some examples of what is not acceptable by some carriers are pornography, the use of firearms and tobacco and *some religious content*.⁵⁰

⁴⁹ *Id.* 6 (emphasis added).

⁵⁰ *Id.* 18 (emphasis added).

The tacit endorsement that wireless providers may discriminate based on religious content is perhaps the most egregious example of content-based discrimination. The freedom to exercise one's religious beliefs is one of the most fundamental rights of American society and democracy. Permitting wireless providers to pick and choose which religious groups may or may not acquire short codes is fundamentally at odds with this basic American principle.

4. Text Messaging via short codes is clearly a Title II service.

Verizon makes the rather nonsensical implication that short codes should not be regulated because they are different from text messaging that involves "one-on-one" communications. ("Short code campaigns use text messages as the communication path, but they are not the same as text messaging, that is, they are not one-on-one communications.")⁵¹ This statement is misleading on several accounts.

First, the Petition does not argue that short codes are "the same as" text messaging any more than a phone number is "the same as" phone service. The short code is simply an address to which the text message is sent. Text messages can be sent to a short code address, an e-mail address, or a mobile phone number address. Wireless providers do not prohibit users from obtaining e-mail addresses or mobile phone numbers. However, wireless providers do prohibit certain entities from obtaining a short code. There is no logical explanation for treating a mobile phone number as part and parcel of a common carriage service but not treating short codes as part and parcel of a common carriage service when they perform the same function.

Second, it is not at all meaningful that messages sent from short codes are not "one-on-one" communications. The regulatory status does not depend on whether the communication is one-on-one or one-to-many. Telephone conference calls or calls to automated response systems

⁵¹ Letter from Verizon Wireless to Congressman Peter DeFazio 1-2 (Apr. 22, 2008, *ex parte* filed May 2, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520007657.

are not one-on-one communications, yet such telephone calls are considered common carriage just as one-on-one person-to-person telephone calls are.

The Common Short Code Primer also contradicts the wireless carriers' position that short codes are a separate, stand-alone service (separate from text messaging). The very first sentence in the MMA guidelines says 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..."⁵² As with telephone numbers, short codes are an indispensable input to the provision of a communications service. There is no "value" to a telephone number or a short code other than its use to engage in telecommunications. Allowing telephone companies to deny short codes under the argument that they are a stand-alone service would be similar to allowing them to deny telephone numbers for landline telephone service.

5. Conclusion.

Wireless carriers admit that they engage in content-based discrimination. Therefore, the wireless carriers should bear the burden of demonstrating why refusing to grant short codes is necessary, just, and reasonable. Their primary argument – that refusing to grant short codes is necessary to protect wireless subscribers from unsolicited e-mail – is not supported by any evidence in this proceeding. In fact, the provision of short codes is likely to have no effect at all on spam, in part because the provisioning of short codes does not grant any content provider any greater access to wireless consumers than they have today, and in fact adds *more* accountability than other methods of delivering text messages. Furthermore, wireless carriers would retain the authority to filter and screen unsolicited e-mail under either a Title II or a Title I approach, just as wireline carriers retain the right to disconnect telephone services of abusive callers under Title II today.

⁵² *Id.* 4.

The arguments for refusing to provision short codes to providers of certain legal content simply cannot be justified. The Commission should not stand by while the wireless providers pick and choose among speakers and content providers. Providers of wireline telephone service and broadband Internet services are not allowed to determine what services and communications consumers should or should not be entitled to receive. Nor should wireless providers be entitled to dictate the content that consumers should be able to send or obtain via short codes.

Respectfully Submitted,

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