

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

In the Matter of the Petition of)
)
Public Knowledge *et al.*) RM-_____
)
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)

PETITION FOR DECLARATORY RULING

OF

**PUBLIC KNOWLEDGE, FREE PRESS,
CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, EDUCAUSE,
MEDIA ACCESS PROJECT, NEW AMERICA FOUNDATION, U.S. PIRG**

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Summary

Text messaging is rapidly becoming a major mode of speech in the United States, both as a replacement for and a complement to traditional voice communications.¹ As part of the text messaging infrastructure, short codes are developing into an important tool for political and social outreach. Mobile carriers currently can and do arbitrarily decide what customers to serve and which speech to allow on text messages, refusing to serve those that they find controversial or that compete with the mobile carriers' services. This type of discrimination would be unthinkable and illegal in the world of voice communications, and it should be so in the world of text messaging as well.

In September of 2007, Verizon refused to issue a short code to NARAL Pro-Choice America, an activist group which was seeking to keep its supporters up-to-date via text messages like similar organizations had done in the past. The incident was serious enough to prompt two United States Senators to send a letter to the Commission asking for a response to the incident² and a front-page article in the *New York Times*.³

Less publicized, but perhaps just as significant, several wireless carriers refuse to provision text messaging services to companies that offer Voice over Internet Protocol ("VoIP") phone calls in competition with the wireless carrier.⁴ Earlier this year, several carriers including Verizon and Alltel refused to carry short code messages for Rebtel, a telecommunications entrant offering service in over forty countries. Rebtel offers consumers the ability to make phone calls, including international calls, by using a local

¹ See, e.g., *SMS Boom in the United States*, Newsfox Press Distribution, June 13, 2005, available at <http://www.newsfox.com/pte.mc?pte=050613047>.

² Byron L. Dorgan and Olympia J. Snowe, Letter to FCC Chairman Kevin J. Martin, Oct. 16, 2007.

³ Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, New York Times, Sept. 27, 2007, available at <http://www.nytimes.com/2007/09/27/us/27verizon.html>.

⁴ Jeffrey Silva, *VoIP Provider Denied Short-Code Access*, RCR Wireless News, Nov. 2, 2007, available at <http://rcrnews.com/apps/pbcs.dll/article?AID=/20071102/FREE/71102007/1002/FREE>.

number and connecting to a VoIP network. The mobile carriers publicly admitted that they denied Rebtel's request because Rebtel's services competed with their own.

The wireless industry should not be permitted to make these discriminatory decisions. After the ensuing public outcry over its refusal to serve NARAL, Verizon Wireless reversed its decision as to NARAL, but retains a policy which has never been publicly detailed, and which may allow discrimination in providing text services. And while Verizon Wireless has sent a letter to Representative John Dingell stating that it will provide services to any group delivering legal content to those who have affirmatively requested it,⁵ it has the authority to change this policy at any time in the future. Furthermore, Verizon Wireless' spokesperson more recently admitted that it refuses text services to companies that offer VoIP services, and other attempts to obtain short code service have been arbitrarily denied.

Discrimination in providing mobile services is contrary to the principles which have governed both wired and wireless carriers for decades. These practices violate the Title II obligations held by all carriers and are also contrary to the public interest, which Title I mandates the FCC to protect. Such discrimination restricts free speech, is anticompetitive, stifles innovation, and even affects public health. The problem is not theoretical, but is real and imminent, as it has already been demonstrated that carriers can and will specifically target one of the most important categories of free speech – encouraging political action – and will stifle innovative competitors.

The FCC should act immediately to declare that text messaging services, including those sent to and from short-codes, are governed by the anti-discrimination

⁵ Letter from Lowell C. McAdam, Verizon Wireless President and Chief Executive Officer, to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce (September 28, 2007).

provisions of Title II of the Communications Act, and that discrimination is therefore prohibited in providing these services. If the Commission chooses not to find that text messaging services are governed by Title II, it should use its Title I ancillary jurisdiction to apply the nondiscrimination provisions of Title II to these services to ensure a robust and open communications infrastructure. In either case, the Commission should make it explicit that these discriminatory actions will not be tolerated in the future.

PETITION FOR DECLARATORY RULING

Public Knowledge,⁶ Free Press,⁷ Consumer Federation of America,⁸ Consumers Union,⁹ EDUCAUSE,¹⁰ Media Access Project,¹¹ New America Foundation,¹² and U.S. PIRG¹³ petition the Commission to clarify the regulatory status of text messaging services, including short-code based services sent from and received by mobile phones.

The Commission should declare that these services are “commercial mobile services”

⁶ Public Knowledge is a Washington, DC based public interest group working to defend citizens’ rights in the emerging digital culture. Public Knowledge’s primary mission is to promote innovation and the rights of consumers, while working to stop any bad legislation from passing that would slow technology innovation, unduly burden free speech, shrink the public domain, or prevent fair use.

⁷ Free Press is national, nonpartisan, nonprofit organization. Through education, organizing, and advocacy, Free Press works to increase informed public participation in crucial media policy debates. Free Press and its members have been involved on a wide range of media and telecommunications policy debates.

⁸ Consumer Federation of America is an advocacy, research, education, and service organization. As an advocacy group, it works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. Founded in 1968, its membership includes some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people.

⁹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

¹⁰ EDUCAUSE is a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology. Membership is open to institutions of higher education, corporations serving the higher education information technology market, and other related associations and organizations. The current membership comprises more than 2,200 colleges, universities, and educational organizations, including 250 corporations, with more than 17,000 active members.

¹¹ Media Access Project is a thirty five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public’s First Amendment right to hear and be heard on the electronic media of today and tomorrow.

¹² The New America Foundation is a nonprofit, post-partisan, public policy institute that was established through the collaborative work of a diverse and intergenerational group of public intellectuals, civic leaders and business executives. The purpose of New America Foundation is to bring exceptionally promising new voices and new ideas to the fore of our nation’s public discourse. Relying on a venture capital approach, the Foundation invests in outstanding individuals and policy solutions that transcend the conventional political spectrum. Through its fellowships and issue-specific programs, the Foundation sponsors a wide range of research, writing, conferences and public outreach on the most important global and domestic issues of our time.

¹³ U.S. PIRG, the federation of state Public Interest Research Groups (PIRGs), takes on powerful interests on behalf of the American public, working to win concrete results for our health and our well-being. With a strong network of researchers, advocates, organizers and students in state capitols across the country, U.S. PIRGs stand up to powerful special interests on issues where powerful special interests stand in the way of reform, like product safety, identity theft, political corruption, prescription drugs, and voting rights.

governed by Title II and subject to nondiscrimination, or, if the Commission declares that these services are “information services” subject to its Title I authority, it should exercise ancillary jurisdiction to apply the nondiscrimination portions of Title II to text messaging services.

In either case, the Commission should also declare that refusing to provision a short code or otherwise blocking text messages because of the type of speech which will be engaged in, or because the party seeking service is a competitor, is “unjust and unreasonable discrimination” that violates the law.¹⁴

I. FACTUAL BACKGROUND

A. Explanation of Text Messaging and Short Codes

Text messaging services allow for the transmission of short communications between a phone and another phone or between a phone and a text-based service. Typically, text messages are sent through the Short Message Service (“SMS”), which allows for messages up to 160 characters long to be sent. For the purposes of this petition, “SMS” and “text message” are interchangeable. A text message, like a voice call, can be sent to any existing mobile phone number, and when used in this way follows the North American Numbering Plan.

Currently, consumers can send and receive text messages through different devices. Most commonly, a consumer can send text messages from a mobile phone to another mobile phone. In addition, the consumer can send a text message to and from a mobile phone, landline phone, or computer; for example, one could send a text message

¹⁴ See 47 U.S.C. § 202(a).

from a computer to a mobile phone. At this time, it is not clear how text messaging will evolve, in terms of transmission, services, or devices using text messaging.

Short codes are special phone numbers which are shorter than North American Numbering Plan phone numbers. In the United States, short codes are typically five or six digits and are usually used for text-based services in much the same way that 411 is used for voice-based directory information and 511 provides transit information in the San Francisco Bay Area and elsewhere.¹⁵ Five- and six-digit codes are administered by the Common Short Code Administration (“CSCA”),¹⁶ which rents these “common short codes” to applicants for between \$500 and \$1,000 per month.¹⁷ Once the CSCA has assigned a short code to an applicant but before that short code will function, each mobile carrier must provision that code to the customer, usually through a third-party “aggregator” which handles the provisioning across multiple carriers. If a carrier does not provision the short code, then messages cannot be sent to or received from that short code by anyone who gets their mobile service from that carrier.

B. Carriers’ Refusal to Provision Short Codes

In September 2007, NARAL contracted with Mobile Commons to acquire and manage a short code through which people interested in NARAL’s core issues could sign up to receive alerts “once or twice a month on key issues at a time when your voice can make a critical difference.”¹⁸ Concerned citizens would be able to sign up by sending a message to the short code directly from their phones, and would later receive the requested alerts from that same short code.

¹⁵ <http://www.511.org/links/default.asp>.

¹⁶ <http://www.usshortcodes.com>.

¹⁷ See *Obtaining a CSC*, Common Short Code Administration, at http://www.usshortcodes.com/csc_obtain_a_csc.html.

¹⁸ See *Get Pro-Choice Text Alerts on Your Cell Phone*, NARAL Pro-Choice America, at <http://prochoiceaction.org/campaign/txt>.

Shortly thereafter, OpenMarket, acting as Mobile Commons' aggregator for the NARAL campaign, informed Mobile Commons that Verizon had refused to provision the short code because it "does not accept issue-oriented (abortion, war, etc) programs" and 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."¹⁹ Verizon's refusal, as one of the two largest mobile phone carriers in the U.S.,²⁰ wields enough market power to effectively stop NARAL's short-code based campaign.

On September 27, the *New York Times* ran a front-page article detailing Verizon's actions towards NARAL.²¹ Shortly thereafter, Verizon reversed its decision to deny NARAL access to its network.²² In doing so, Verizon stated that the policies in question were "dusty" and that the goal of these policies was to "ward against communications such as anonymous hate messaging and adult materials sent to children."²³

According to the *New York Times*, despite reversing its decision regarding NARAL as an individual organization, Verizon Wireless still maintains that it is entitled to decide what messages are acceptable and who will be allowed to receive messages from and send messages to Verizon customers.²⁴ Further, as of this filing, Verizon has not provided the public with a copy of the original policy or any updated policy, referring

¹⁹ See Declaration of Jed Alpert.

²⁰ See, e.g., *Wireless Carriers (Mobile Operators): United States (U.S.A.)*, <http://www.mobilook.com/CarriersUSA.asp>.

²¹ Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, *New York Times*, Sept. 27, 2007, available at <http://www.nytimes.com/2007/09/27/us/27verizon.html>.

²² Adam Liptak, *Verizon Reverses Itself on Abortion Messages*, Sept. 27, 2007, available at <http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html>.

²³ *Id.*

²⁴ *Id.*

to a new policy only in general terms in a letter to Congress,²⁵ and the details of who might or might not be censored in the future remain largely secret.

On another occasion, three major carriers – Verizon Wireless, T-Mobile, and Alltel – all refused to issue short codes to Rebtel, a company started in May 2006 which provides VoIP services which compete with the services of those carriers.²⁶ Rebtel’s customers generate text messages to one another through the Rebtel website, but these text messages are being blocked from reaching customers on some carriers. To use Rebtel, a consumer goes to Rebtel’s website and inputs information, such as the name and phone number of a friend. Rebtel then generates a text message to that friend’s phone number, providing that friend with a local phone number at which the consumer can call his friend. The local phone number can connect nationally and internationally, and provides a cost-effective means for customers to make long-distance and international calls. Rebtel has had considerable success in other markets, such as the United Kingdom and other European countries, where it has not had to receive permission from mobile carriers for its consumers to send text messages to one another. Rebtel has targeted the United States as one of its biggest potential markets, but U.S. mobile carriers are stifling its innovative service.

Although Rebtel’s request was denied before the NARAL incident, Jeffrey Nelson, a Verizon Wireless spokesman, responded significantly after both the original incident and Verizon’s letter to Congress pledging nondiscrimination, saying that Verizon Wireless has a policy of rejecting short codes from companies that seek to

²⁵Letter from Lowell C. McAdam, Verizon Wireless President and Chief Executive Officer, to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce (September 28, 2007).

²⁶ Jeffrey Silva, *VoIP Provider Denied Short-Code Access*, RCR Wireless News, Nov. 2, 2007, available at <http://rcrnews.com/apps/pbcs.dll/article?AID=/20071102/FREE/71102007/1002/FREE>.

compete with it, whether it be Rebtel or its traditional cellular competitors,²⁷ and making it clear that carriers do not intend to cease discrimination in text messaging services.

II. ARGUMENT

The Commission should declare that mobile carriers are prohibited from discriminating in offering text messaging services, including short codes. Further, the Commission should remove the ambiguity surrounding the classification of text messaging services by either declaring them to be Title II services subject to common carrier nondiscrimination rules, or by applying those rules to them through Title I ancillary jurisdiction.

A. The Commission Must Clarify Whether Text Messaging is Governed by Title II or Title I

To date, the Commission has not made clear the regulatory status of text messaging services. In its declaratory ruling on wireless broadband, the Commission listed text messaging among the “mobile data applications” which were *not* broadband and did not utilize broadband, and were thereby outside the scope of that ruling.²⁸

The Commission addressed the issue of classification more directly in its recent order on roaming obligations.²⁹ In that order, the Commission held both that SMS was overall an interconnected feature of mobile services and that carriers were subject to common carrier obligations under section 202 in offering SMS via roaming.³⁰ The Commission did not, however, specifically state that carriers could not discriminate in

²⁷ *Id.*

²⁸ *In re Appropriate Regulatory Treatment for Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901, 5906 (2007).

²⁹ *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 F.C.C.R. 15817 (2007).

³⁰ *Id.* at 15835.

offering text messaging services to the public, and it has not issued a ruling focusing on the regulatory classification of text messaging.

Text messaging service are becoming increasingly popular, quadrupling in volume over the last two years. As consumers rely on this service for many purposes, they should know what rules apply to this service. Carriers have taken advantage of a perceived regulatory hole to discriminate against both political speakers, like NARAL, and competitors, like Rebtel. The Commission should act now to remove this ambiguity and protect consumers by classifying text messaging as a Title II service or by using its Title I ancillary authority to apply the nondiscrimination portions of Title II to those services.

B. Text Messaging Should Be Classified as a Title II Common Carrier Service to Which Nondiscrimination Applies

The FCC should classify text messaging as a common carrier service, which is by law subject to nondiscrimination regulations.

1. Text Messaging is an Interconnected Mobile Service Subject to Title II Common Carrier Regulations Including Nondiscrimination

Because text messaging services meet the requirements for classification as a commercial mobile radio service, the Commission should clarify that they are subject to all common carrier regulations including section 202 nondiscrimination rules. Title III of the Telecommunications Act states that “[a] person engaged in the provision of a . . . commercial mobile service shall . . . be treated as a common carrier for purposes of this chapter”³¹ In the statute, a “commercial mobile service” is a “service that is

³¹ 47 U.S.C. § 332(c)(1)(A).

interconnected with the public switched network.”³² The Commercial Mobile Radio Services (“CMRS”) section of the Commission’s rules then defines a “commercial mobile radio service” as a service

[t]hat is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; A mobile service offers interconnected service even if the service . . . provides general access to points on the public switched network but also restricts access in certain limited ways.³³

Finally, a “public switched network” is “[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.”³⁴

The Commission has chosen to include SMS in the common carrier roaming obligations.³⁵ In its order, the Commission recognized that SMS is an interconnected service:

[W]e find that it would serve the public interest to extend automatic roaming obligations to push-to-talk and SMS. We decline at this time, however, to adopt a rule extending the automatic roaming obligation beyond that to offerings that do not fall within the scope of the automatic roaming services’ definition, such as non-interconnected services or features.³⁶

The Commission went on to note that “push-to-talk and SMS are interconnected features or services in some instances, but non-interconnected in others, depending on the

³² 47 U.S.C. § 332(d)(2).

³³ 47 C.F.R. § 20.3.

³⁴ *Id.*

³⁵ *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 F.C.C.R. 15817 (2007).

³⁶ *Id.* at 15837.

technology and network configuration chosen by the carriers,”³⁷ but nonetheless chose to include both among the “interconnected features” subjected to automatic roaming.³⁸ The Commission proceeded to clarify that automatic roaming for both text and voice “is a common carrier obligation for commercial mobile radio service (CMRS) carriers, requiring them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act.”³⁹ Based on this classification of text messaging, the Commission should clarify that SMS is a common carrier service subject to section 202 in all contexts.

Even when examined outside the context of the roaming order, there are many reasons why text messages are a commercial mobile service: they use the North American Numbering Plan (“NANP”) for basic services, they are interconnected with the public switched network, and they give users the ability to communicate with others on that network. For mobile phones, any user can contact any user using their NANP phone number. And while land lines do not all have the capability to receive text messages directly, some U.S. wireless carriers, including Verizon Wireless⁴⁰ and Sprint,⁴¹ allow customers to send text messages to land lines which do not support any additional standards through the public switched network. When such a message is sent, the

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 15818.

⁴⁰ *Answers to FAQs, Text to Landline*, available at http://support.vzw.com/faqs/TXT%20messaging/faq_text%20to%20landline.html (“To send a Text to Landline message from your handset, enter the recipient’s 10-digit landline phone number in the TO field, as you would with a regular text message, then type your message and press SEND. It’s that easy!”).

⁴¹ *Text to Landline*, available at http://www2.sprint.com/mr/news_dtl.do?id=11540; *Sprint Text to Landline Lets Users Send Messages to Home Phones*, Press Release (Apr. 25, 2006), available at http://www2.sprint.com/mr/news_dtl.do?id=11540.

receiver's phone rings, and a voice reads the text message to them, without any further action on the part of the sender.

Further, text messaging is interconnected because each carrier must agree to receive incoming messages from a given short code and route outgoing messages to the entity renting the code, with no control over whether those messages are bound for or come from the public switched network, a computerized response system, or a mobile phone. As the carriers themselves have connected general text messaging services to the traditional telephone network, organizations that receive messages sent to short codes can do the same. And as discussed below, companies have created a number of other innovative ways to tie text messaging and voice communications together into a single service.

Finally, the European Telecommunications Standards Institute has published a standard for "Short Message Service (SMS) for PSTN/ISDN" which provides for both transmission to and receipt from a fixed land-based phone service, further demonstrating the interconnected nature of text messaging.⁴² Under this standard, messages sent to land lines can be displayed by any phone which supports Caller ID, and can be read by a synthesized voice for phones that do not.⁴³

Furthermore, text messaging does not fit within the Commission's previous orders classifying certain broadband Internet services as information services.⁴⁴ In those orders, the Commission held that because applications such as email, web hosting, and DNS

⁴² *ETSI ES 201 912 v1.2.1 (ETSI Standard)*, European Telecommunications Standards Institute (Aug. 2004), available through <http://www.etsi.org/>.

⁴³ *Sending SMS to Landline Phones*, The Tech Teapot, available at http://www.openxtra.co.uk/articles/alerts_using_sms.php.

⁴⁴ See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002); See also *In re Appropriate Regulatory Treatment for Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901 (2007) (classifying wireless broadband as an information service).

were commonly associated with Internet access service, and those services encompassed the capability of “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,”⁴⁵ the entirety should be treated as an information service.⁴⁶ The situation with text messages, however, is drastically different. Text messaging services do not rely on the Internet and simply relay the user’s communications from one place to another, without changing the form or content of the communications. For this reason, as in the roaming order, the Commission declined to declare text messaging to be a Title I service.

Text messages are not broadband, and moreover they do not provide access to the Internet; text messages are addressed by a phone number and carried over phone networks, and do not rely on any Internet technologies. Further, carriers that provide text messaging typically do not include any services riding on top of basic communications (*i.e.*, “via telecommunications”); their only purpose is to transmit the exact text sent by one person to the phone or service of another person. Much like a fax sent over a voice line, the carrier’s only job is to deliver the data to its destination unaltered. If anything, phone carriers provide fewer additional services with text messages than they do with voice communications, which often come bundled with products like voice mail, call waiting, and three-way calling. Therefore, text messaging is a CMRS rather than an information service.⁴⁷

⁴⁵ See 47 U.S.C. § 153(20) (definition of “information service”).

⁴⁶ *Id.* at 4822.

⁴⁷ We note that this petition encompasses only text messaging and short code based services, and makes no argument about the proper regulation of any other services which are or will be carried over phone networks or presented to consumers through their phones.

Because text messaging services meet the definition of CMRS, they should be treated as common carriers governed by Title II of the Telecommunications Act.⁴⁸ Under Title II, common carriers must “furnish such communication service upon reasonable request therefor.”⁴⁹ In providing these services,

[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.⁵⁰

While the Commission may exempt mobile carriers from some Title II requirements, it is forbidden by law from removing their obligations under section 202, which covers discrimination.⁵¹ We also note that requirements for forbearance under 47 U.S.C. § 160 would be inappropriate. Under that section, the Commission shall forbear from applying portions of the Act to telecommunications carriers only if

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁵²

None of the prongs of the forbearance test is met here. (1) Verizon’s refusal to serve NARAL, and the wireless carriers’ refusal to carry Rebtel’s text messaging demonstrates

⁴⁸ See Telecommunications Act of 1996, 47 U.S.C. § 201 *et seq.* (“Common Carriers”).

⁴⁹ 47 U.S.C. § 201(a).

⁵⁰ 47 U.S.C. § 202(a).

⁵¹ 47 U.S.C. § 332(c)(1)(A).

⁵² 47 U.S.C. § 160(a).

that enforcement *is* necessary to prevent unjust and unreasonable discrimination.⁵³ (2) Text messaging is used by consumers to transmit and receive messages, making enforcement necessary for their protection. Regulation is necessary to protect consumers from suffering because of the whims of individual carriers. (3) As discussed in more detail below, text messaging is used for speech-related activities and for the provision of competitive services, both of which qualify as important public interests. In sum, the mobile carriers' discrimination has demonstrated that regulation is necessary to prevent unreasonable discrimination.

2. Text Messages and Voice Communications Are Intertwined Forms of Speech and Should Be Regulated the Same

Because text services are intertwined with voice services, and are viewed as equivalent by the public, the Commission should regulate them in the same way. Text messages are not only growing in popularity, but text services are growing harder to distinguish from voice services. On the lowest level, most phones will recognize a phone number when it is received inside of a text message, and will allow the owner to easily call that number or add it to his or her address book. Carriers and non-carriers are working to integrate text and voice services to improve both. Consumers attempting to find a phone number now have multiple options. Not only can they get free directory assistance by sending a text message,⁵⁴ if a Verizon Wireless customer calls 411 on their mobile phone, he or she has the option to receive a text message to that phone with the number he or she requested, saving him or her from having to write the number down or memorize it before calling.

⁵³ While Verizon reversed its decision as to NARAL, it still has not released any new versions of its policy which would prevent discrimination, and even if it releases such an update, could again reverse its stance without reason or warning.

⁵⁴ See *Google Mobile*, http://www.google.com/intl/en_us/mobile/sms/.

Third parties are also taking advantage of the synergy between voice and text to offer new services that combine the two. One service, Jott, allows a user to call a phone number (from a mobile phone or a land line) and speak a message which will be sent via text message to any mobile phone.⁵⁵ Another service, Raketu, allows a user to send a text message and have a low-cost international voice call automatically set up between the user and the person of his or her choice.⁵⁶ Allowing carriers to discriminate in providing text messaging services would not only slow the development of new and useful services like these, but will enable the carrier to stifle competition in text- and voice-based services.

When innovators are allowed to combine these services without fear of arbitrary discrimination on the part of the carriers, innovation will occur and speech will flourish. This is exemplified by Mobile Commons' mConnect service, which was used by the Working Assets campaign, described below. This service allows groups using their short code platform to take people who have chosen to receive text alerts, and directly connect them, via voice, to the number of their choice after playing a pre-recorded message to prepare them.⁵⁷ For example, if a House of Representatives vote is coming up which is important to a group's members, that group can send a text-based alert to everyone who had signed up for their service. Anyone receiving the alert could then reply to the text message, which would automatically set up a direct voice call between the constituent and their representative's office after providing a helpful introductory message; the user need do nothing more than answer the phone. Services like this – which put citizens in

⁵⁵ See *How to Use Jott: Jott to Someone Else*, <http://www.jott.com/how-to/jott-to-someone-else>.

⁵⁶ See *RakSMS calling*, <http://www.raketu.com/en/RakSMS calling.php>.

⁵⁷ Mobile Commons, *Overview*, <http://mcommons.com/overview.pdf>.

contact with their representatives when their voices are needed the most – can only be effective if carriers cannot pick and choose which voices will be heard.

The Commission has recognized both the interconnected nature of voice and text services and the public’s interest in ubiquitous access to text messaging:

We are also aware that consumers consider push-to-talk and SMS as features that are typically offered as adjuncts to basic voice services, and expect the same seamless connectivity with respect to these features and capabilities as they travel outside their home network service areas. For these reasons, we find that it is in the public interest to impose an automatic roaming obligation on push-to-talk and SMS offerings

The same reasoning applies here. Consumers expect text messages to be seamlessly interoperable with numbers on other networks and short codes provisioned to third parties; they do not expect that their carrier might choose not to deliver short codes to some parties because they are perceived as controversial or as a competitor. Thus, it is also in the public interest to impose nondiscrimination obligations on SMS offerings.

Verizon’s actions illustrate exactly why carriers should not be allowed to make decisions about what types of speech will and will not be permitted on our nation’s telecommunications networks. Verizon first explained that it did not want to allow “controversial or unsavory” speech on its network.⁵⁸ Political speech is by its nature controversial, and is perhaps the most important and protected form of speech. Verizon would never be allowed to refuse phone service to an organization that engaged in controversial political speech. Nor should carriers be permitted to refuse access to text messaging via short codes to such organizations.

Verizon’s fallback position, that the policy was designed to stop “anonymous hate messaging and adult materials sent to children” is also without merit. Sending adult

⁵⁸ See Declaration of Jed Alpert.

materials to children is already illegal, and text messages are no more anonymous than phone calls. In fact, because organizations must register for short codes, speech sent and received from such codes is even less anonymous. Finally, NARAL’s program would only send message to people who had asked to receive them by contacting NARAL first; unsolicited messages would never be sent.

Given the intertwined nature of text messaging and voice, both in the minds of the public and in the services being offered, the Commission should treat both equally, and declare that text messaging is a Title II service subject to section 202 nondiscrimination rules.

C. If The Commission Determines That Text Messaging is Classified as an Information Service, Discrimination Should Be Prohibited Under Title I

If the Commission finds that text messaging is not governed directly by Title II common carrier obligations, it should apply the nondiscrimination provisions of Title II of the Communications Act under its Title I ancillary jurisdiction.

1. The Commission Can Apply Nondiscrimination to Text Messaging Under Title I

The Commission shall, for the purpose of effectively performing its responsibilities, “issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law,’ as ‘public convenience, interest, or necessity require.’”⁵⁹ The Supreme Court has held that “[a]ncillary jurisdiction may be employed, in the Commission's discretion, when Title I of the Act gives the agency subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is

⁵⁹ *Southwestern Cable Co.*, 392 U.S. at 178 (quoting 47 U.S.C. § 303(r)). *See also* 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.”).

‘reasonably ancillary to the effective performance of its various responsibilities.’⁶⁰ The Court has also recognized that “[t]he Commission need not immediately apply the policy reasoning in [one] Declaratory Ruling to all types of information-service providers,”⁶¹ and so the Commission is free to independently evaluate the justifications for protecting text messaging from discrimination.

a. The FCC Has Subject Matter Jurisdiction Over Text Messaging

As the Communications Act applies to “all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States,”⁶² text messaging is within the scope of the Commission’s subject matter jurisdiction. In addition, the Commission has previously regulated SMS services in other contexts.⁶³

b. Imposing Nondiscrimination is Reasonably Ancillary to the Effective Performance of the Commission’s Responsibilities

When using Title I ancillary jurisdiction, the Commission can choose to import requirements from Title II of the Act and apply those requirements to information services, and may base this jurisdiction on being “reasonably ancillary” to the policies embodied by those requirements. For example, in choosing to enforce section 255 requirements for hearing- and speech-impaired individuals on VoIP providers, the Commission found that “the disability access obligations adopted here are ‘reasonably ancillary’ to the Commission’s responsibility to implement section 255 and to give full

⁶⁰ *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)).

⁶¹ *Nat’l Cable and Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1002 (2005).

⁶² 47 U.S.C. § 152.

⁶³ *See, e.g., In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 F.C.C.R. 15817 (2007).

effect to the accessibility policies embodied in section 255.”⁶⁴ Here, the Commission has an obligation to implement the nondiscrimination policies embedded in section 202, and can do so best by imposing those policies directly on mobile carriers.

Additionally, the Commission has found ancillary jurisdiction to impose requirements based on its broader mandate 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,”⁶⁵ Providing nondiscriminatory text messaging services will result in increased usage by those who would otherwise be blocked, provide access to hearing impaired, and further the goal of a discrimination-free communications service, all of which justify the Commission exercising its ancillary jurisdiction based on section 151. Given the Commission’s mandate, exercising jurisdiction over text messaging is not merely ancillary to, but necessary to, the maintenance of a nationwide communications medium.

2. The Public Interest Requires FCC Action

The public interest will be best served by the Commission applying nondiscrimination rules to text messaging. “[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.”⁶⁶ Discrimination by carriers in providing text messaging services restricts free speech, is anticompetitive, and harms innovation by introducing financial uncertainty into

⁶⁴ *In re IP-Enabled Services*, 22 F.C.C.R. at 11288; see also *In re Telephone Number Requirements for IP-Enabled Service Providers*, 2007 WL 3306343, *4 (2007) (listing other cases where the Commission extended Title II obligations using Title I ancillary jurisdiction).

⁶⁵ 47 U.S.C. § 151; see *In re IP-Enabled Services*, 22 F.C.C.R. at 11276 (basing ancillary jurisdiction on section 151).

⁶⁶ 47 U.S.C. § 303(f).

the market. The public interest requires that, in order to prevent these harms, discrimination in an important, growing communications medium be prohibited.

Although text messaging does not provide Internet access, the reasoning behind the Commission's four consumer principles in its Broadband Policy Statement apply to SMS as well.⁶⁷ Like the Internet, text messaging is a growing mode of communication and will be of most benefit when connectivity is universal and nondiscriminatory. And by imposing a nondiscrimination rule on carriers, the Commission can achieve the goals of freedom and competition which are embodied in the Broadband Policy Statement.

a. Discrimination Harms Free Speech

Consumers are adopting new modes of communication at an incredibly high rate, and citizens are using these new avenues to communicate everything from social plans to political calls to action. Carriers such as Verizon Wireless, are not and should not be the gatekeepers that determine what speech is allowed and what speech is not, and allowing them to do so will harm these new modes of speech.

In many markets, text messaging is rapidly becoming a replacement for voice calls. In the U.S., the number of text messages sent per month quadrupled between June, 2005 and June, 2007 while voice minutes used increased only 55%.⁶⁸ The medium has experienced a domestic boom over the last several years, and is now being used heavily for both personal and commercial purposes, especially among those aged 18 to 27.⁶⁹ In

⁶⁷ See Federal Communications Commission, *Policy Statement*, Aug. 5, 2005, http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

⁶⁸ *Wireless Quick Facts*, CTIA – The Wireless Association, at <http://www.ctia.org/media/index.cfm/AID/10323>.

⁶⁹ See Yuki Noguchi, *Life and Romance in 160 Characters or Less: Brevity Gains New Meaning as Popularity of Cell Phone Text Messaging Soars*, Washington Post, Dec. 29, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/28/AR2005122801430.html>; *SMS Boom in the United States*, Newsfox Press Distribution, June 13, 2005, available at <http://www.newsfox.com/pte.mc?pte=050613047>.

fact, a recent study showed that text-based reminders to vote were far more effective than other methods at increasing voter turnout, especially among the young.⁷⁰ And a J.D. Power and Associates study showed that this year, for the first time, the number of mobile phone calls made by the average U.K. consumer dropped while the number of text messages sent continued to rise.⁷¹

Commercial and noncommercial interests alike are using text messaging as a new and powerful way to engage citizens in political action and public discourse on important issues. Examples abound:⁷² Climate Counts allows citizens to use SMS to find out how environmentally friendly a company is. John Edwards took live questions via SMS during a town hall meeting. Aveda convinced thousands of people to sign a petition via SMS to ask the UN to declare access to clean water to be a human right. An Amnesty International SMS campaign was the subject of a full-page ad in the *New York Times*. The National Alliance for Hispanic Health allows users to receive pollution reports for their area via SMS. And Working Assets ran a campaign to help pass important legislation by using text messaging to alert citizens, as well initiate calls where those citizens had the issues explained to them, and were automatically connected to the Congressional switchboard to contact their representatives directly.

The harm to speech is compounded in the case of customers who are deaf or hearing impaired. The Commission has recognized that “the deaf and hard of hearing have embraced text messaging as an instant and direct form of communication accessible

⁷⁰ See Nick Mokey, *Text Messaging Prods Youth Voters to Action*, Digital Trend News, Sept. 13, 2007, available at http://news.digitaltrends.com/news/story/14168/text_messaging_prods_youth_voters_to_action.

⁷¹ Ryan Haynes, *Text Takes Over Talk: Mobile Phones are No Longer Used for Calls*, Pocket-lint, May 4, 2007, available at, <http://www.pocket-lint.co.uk/news/news.phtml/7619/8643/Phones-Mobiles-Research-Survey-Cost.phtml>.

⁷² See Mobile Commons, *Case Studies*, http://www.mcommons.com/case_studies.

to them and any potential contacts.”⁷³ In addition to allowing “the deaf to communicate when in transit or otherwise away from a fixed text telephone (TTY) system” and enabling “private communication within the presence of other deaf people,”⁷⁴ text messaging provides a mode of communication which is used by an enormous community of non-deaf citizens. In the Commission’s words, “Digital wireless telecommunications provide convenience and efficiency for the hearing population, but for the deaf and hard of hearing, they open a new way of life. Today, modern text and wireless video communication technology fills a void by providing much needed mobility and freedom for the deaf and hard of hearing community.”⁷⁵ Text messaging provides an entire system by which the deaf and non-deaf can communicate, and allows the deaf to participate in telephone-based campaigns which would otherwise be unavailable to them. Allowing discrimination in providing these services imposes an even greater hardship on those who rely on it most.

Because of the rapid expansion and importance of text-based communications, both for political and commercial discourse, as well as its importance to hearing-impaired users, speech engaged in through text should be protected to the same extent as speech engaged in through voice.

b. Discrimination is Anticompetitive

Allowing carriers to arbitrarily determine who can send and receive text messages to their customers will allow those carriers to deliberately target competitors by refusing to allow their customers to communicate with them. Carriers have already openly

⁷³ *In re Section 68.4(A) of the Commission Rules Governing Hearing Aid-Compatible Telephones*, 22 F.C.C.R. 17709, 17734 (2007).

⁷⁴ *Id.*

⁷⁵ *Id.* at 17733-34.

engaged in such anticompetitive discrimination in providing text messaging and short code services. By refusing to provision a short code to Rebtel, a VoIP provider who competes with traditional carriers, Verizon, T-Mobile, and Alltel demonstrated a willingness to use their power to discriminate as an anticompetitive tool. Rebtel was told that Alltel had opted out because Rebtel's campaign "cannibalizes" Alltel's international rates,⁷⁶ and Verizon's response was explicit about its use of control over short codes to exclude competition.⁷⁷

AT&T would not be allowed to prohibit Sprint from receiving calls on its 1-800 number or from making calls to AT&T's network. Madison River was not allowed to use its technical ability to block VoIP traffic on its DSL lines to interfere with services that competed with its own.⁷⁸ Likewise, carriers should not be allowed to use this new communications medium as leverage to stifle the competition. Yet even in the wake of the NARAL controversy, carriers have openly admitted that they intend to continue doing so.⁷⁹

c. Discrimination Causes Monetary Harm and Stifles Innovation

Carrier discrimination in providing text services harms businesses who rely on those services or who are attempting to innovate and create new text-based services. For example, Mobile Commons has built its business on acquiring short-codes for customers and providing services and technology to allow those customers to manage their short-code based communications. When a single carrier with immense market power refuses

⁷⁶ Monica Allevan, *Rebtel Fights for Short Codes*, *Wireless Week*, Nov. 5, 2007, available at <http://www.wirelessweek.com/Rebtel-Short-Codes.aspx>.

⁷⁷ Jeffrey Silva, *VoIP Provider Denied Short-Code Access*, *RCR Wireless News*, Nov. 2, 2007, available at <http://rcrnews.com/apps/pbcs.dll/article?AID=/20071102/FREE/71102007/1002/FREE>.

⁷⁸ Madison River Communications, LLC, *Consent Decree*, March 4, 2005, available at <http://www.fcc.gov/eb/Orders/2005/DA-05-543A2.html>.

⁷⁹ See Allevan, *supra* note 76; Silva, *supra* note 77.

to provide service after an organization has contracted for service through Mobile Commons, acquired a code from the CSCA, and had that code provisioned by every other carrier, it directly impacts Mobile Commons' ability to sell and provide services. And while Mobile Commons cannot require payment for services it cannot render, it must pay fees for leasing short codes up front and those fees "are non-refundable regardless of whether any wireless carrier agrees to activate [the short code]."⁸⁰ As a result, Mobile Commons will incur the cost of leasing the short code even if its customers are denied service.

In addition to direct monetary consequences, the uncertainty inherent in dealing with carriers that can arbitrarily decide who to serve impedes Mobile Commons' ability to function. Despite Verizon's claims that it did not provide service to issue-based organizations, Mobile Commons had already provided services (including connectivity to Verizon) to a number of such organizations, meaning that even a carrier's assurances as to who they would not serve could not be relied upon. Further, since Verizon has not released its old or new policies, and other carriers' policies remain unstated, Mobile Commons must operate under the constant threat that a carrier can shut down any and all of its business without reason or explanation.

d. Discrimination Affects Public Health

One of the rapidly expanding areas of text-based speech is health information, and allowing discrimination in text messaging services will harm the public's ability to get these critical services. New programs which communicate public health information to citizens are being continually offered; access to local pollution information is just the

⁸⁰ *Obtaining a CSC*, Common Short Code Administration, at http://www.usshortcodes.com/csc_obtain_a_csc.html.

beginning.⁸¹ One service allows a nanny to ensure that the fish she is buying is free of toxic substances, based on government advisories and scientific studies.⁸² Another, run by the San Francisco Department of Public Health, provides answers to commonly asked health questions and detailed information on locally available health services.⁸³ A program in Australia send reminders to people to help maintain their complicated HIV medication regimen, and one in Scotland allows diabetics to contact their doctor for advice on correctly taking insulin after eating certain foods.⁸⁴ According to Jonathan Linkous, executive director of the American Telemedicine Association, health texting in the United States "is just starting up."⁸⁵ In order to protect the United States public health and keep new services from being stifled for being controversial or otherwise suffering at the whim of mobile carriers, access to these text-based services must be nondiscriminatory.

⁸¹ See Mobile Commons, *Case Studies*, http://www.mcommons.com/case_studies.

⁸² Rachel Zimmerman, *New Services Use Cellphones to Quickly Send Information; Deciding What's Appropriate*, Wall Street Journal, Nov. 20, 2007, available at <http://online.wsj.com/article/SB119551720462598532.html>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

Conclusion

The Commission should declare that mobile carriers are prohibited from engaging in unjust and unreasonable discrimination in providing text messaging services, either because text messaging falls within Title II or because it is subject to section 202 through the Commission's ancillary jurisdiction under Title I of the Communications Act.

Respectfully Submitted,

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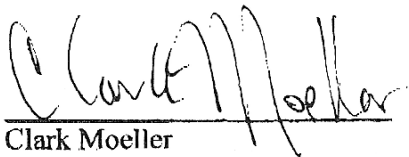
Declaration of Clark Moeller

My name is Clark Moeller. I live at 30 Thoreau Way, Sudbury, MA 1776. I am retired. Currently, I am on the Board of Directors of ACLU of Massachusetts and previously was on the Board of Directors of ACLU of Pennsylvania (2002-2006). Before that I was the President of the Pennsylvania Alliance for Democracy, a state-wide coalition of citizens and organizations promoting the protection of our Constitutional rights.

My wife is a past President of the Planned Parenthood of Pennsylvania. We both are supporters of NARAL. As of November 2006, we are residents of Sudbury, Massachusetts, and now get our telephone, fax, cell phones' service, internet, and TV via Verizon, Inc.

Verizon's decision this September to deny NARAL the right to use text messaging was a potential violation of our constitutionally protected civil rights. If we had tried to get text messages from Naral, we would have been blocked from doing so. Freedom of speech, assembly, the right to petition are protected by the First Amendment of the Constitution of the United States. Exercising these rights is dependent on being able to freely do so. Today, most, or at least a large proportion, of those rights to communicate are exercised by phone, email, text messaging, other internet features, and fax. In our case, Verizon manages these communication systems.

Verizon's censorship of NARAL cut the heart out of what it means to be an American, a citizen with freedom of speech. Will Verizon next decide to censor the freedom of speech of political candidates they disagree with by blocking those candidates' access to the public communication systems that Verizon manages?



Clark Moeller