

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

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

**REPLY COMMENTS OF SETH COOPER  
DIRECTOR,  
TELECOMMUNICATIONS & INFORMATION TECHNOLOGY TASK FORCE  
AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC)**

The dynamic wireless market should be allowed to expand and improve, offering increasingly diverse service and price options to consumers. The Commission should not regulate text messaging or short messaging services (SMS). Nor should the Commission regulate common short codes (CSC). SMS and CSC are “information services” and the Commission should declare them as such. The Commission should *not* declare SMS or CSC to be commercial mobile radio services (CMRS) subject to common carrier regulations. Similarly, the Commission should *not* apply common carrier regulations through its ancillary jurisdiction. Such regulations are unnecessary. Wireless providers do *not* block text messages. Consumer welfare is best furthered by continued technological innovation, marketplace competition, and industry self-regulation. Regulation will needlessly disrupt such innovation, competition and self-regulation, to the detriment of consumers.

## STATEMENT OF INTEREST

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, individual membership organization of state legislators. ALEC's mission is to promote the Jeffersonian principles of individual liberty, limited government, federalism, and free markets.

To guide policymakers through the uncharted waters of the 21<sup>st</sup> Century economy, ALEC's Telecommunications and Information Technology Task Force brings together state legislators, industry representatives, and public policy experts. Working together, the Task Force seeks to develop state public policy that will preserve free-market principles, promote competitive federalism, uphold deregulation efforts, and keep the communications and technology industries free from new burdensome regulations.

ALEC's Telecommunications and Information Technology Task Force has consistently supported minimal regulations and strong marketplace competition in wireless voice and data. ALEC's "Resolution Supporting Pro Consumer Public Policy for Voice, Video, and Data Services" (2005) recognized that "a competitive marketplace, not multiple layers of regulation, will most efficiently provide consumers with voice, video and data choice in the marketplace today" and declared that "Government policies should encourage the private sector to provide competitive choices for voice, video and data." Additionally, in adopting "A Resolution Regarding the Regulation of Intrastate Telecommunications Services in Healthy and Sustainable Competitive Environments" (2004) ALEC resolved "its support of minimal, competitively neutral state and federal regulation of all telecommunications providers, including incumbent and competitive wireline carriers, wireless carriers and cable telephony providers."

## ANALYSIS

Careful analysis of the requests presented by the Petition of Public Knowledge et al (Petitioners) requires recognition of the distinction between Short Messaging Services (SMS) and Common Short Codes (CSC). As Comments point out, the Petitioners appear to blur the distinction.<sup>1</sup> Confusion exists as to just what the Petitioners would like to see regulated and how. The Commission is urged to keep clear the differences between SMS and CSC. In short, SMS allow users to send and receive short data messages. CSC are a particular SMS product (i.e., an information and billing service) operating across several wireless providers that allow advertisers and other third parties to reach customers.

For reasons that follow, the Commission is urged to *reject* the Petitioners' request that the Commission declare SMS and CSC to be commercial mobile services subject to Title II, and to also reject its alternative request that the Commission subject SMS and CSC to common carrier obligations via its ancillary jurisdiction.<sup>2</sup>

### **I. SHORT MESSAGING SERVICES AND COMMON SORT CODES ARE INFORMATION SERVICES, NOT TELECOMMUNICATIONS SERVICES SUBJECT TO COMMON CARRIER REGULATIONS.**

SMS and CSC embody “information service” capabilities. The statutory definition “information service” is “the offering of a capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available information via

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<sup>1</sup> See, e.g., *Comments of Verizon Wireless*, WT Docket No. 08-7, (March 14, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519866994](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519866994), at 6.

<sup>2</sup> See Petition of Public Knowledge et al. for Declaratory Ruling, WT Docket No. 08-7 (Dec 11, 2007), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519825917](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519825917).

telecommunications.”<sup>3</sup> Comments to the Commission aptly describe how SMS generate, acquire, store, transform, retrieve, utilize and make available information. For instance, many SMS providers allow incoming and outgoing text messages to be stored in their data centers for future forwarded delivery (i.e., “store and forward”).<sup>4</sup> Also, SMS providers typically allow users to edit, reply to, and forward text messages to other users.<sup>5</sup> Furthermore, SMS providers transform incoming and outgoing messages from text messages to speech communications and vice versa.<sup>6</sup>

“Information services” are by no means limited to the internet.<sup>7</sup> Comments note that CSC have significant similarities with websites, as both are designed to be easy to remember and to serve as a centralized portal for interaction with an entity or organization.<sup>8</sup> Like websites, CSC are “passive” and “require an interested person to actively engage them.”<sup>9</sup>

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<sup>3</sup> 47 U.S.C. § 153(20).

<sup>4</sup> See, e.g., *Comments of AT&T*, WT Docket No. 08-7 (March 14, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519867003](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867003), at 10-11.

<sup>5</sup> See, e.g., *Comments of CTIA – The Wireless Association*, WT Docket No. 08-7 (March 14, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519867094](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867094), at 35-36.

<sup>6</sup> See, e.g., *Comments of T-Mobile*, WT Docket No. 08-7 (March 14, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519867018](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867018), at 14-15.

<sup>7</sup> See *Comments of CTIA*, at 31-32 (discussing “information services” in light of the Commission’s *Computer II* ruling, the Modified Final Judgment, the Stevens Report, and the Communications Act of 1934)(internal cites omitted).

<sup>8</sup> See, e.g., *Comments of Sprint Nextel*, WT Docket No. 08-7 (March 14, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519867022](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519867022), at 6.

<sup>9</sup> *Id.*

By contrast, SMS and CSC are *not* commercial mobile radio services (CMRS) subject to Title II Common Carrier Regulations.<sup>10</sup> The statute defines a “commercial mobile service” as a “service that is interconnected with the public switched network.”<sup>11</sup> The Commission’s rules further define CMRS.<sup>12</sup> That definition requires a CMRS be interconnected with the public switched telephone network (PSTN).<sup>13</sup>

As other comments indicate, SMS and CSC are not interconnected to the PSTN.<sup>14</sup> Typically, SMS text messages are routed through internet protocol systems to data transfer centers where they are rerouted to designated recipients. While SMS text messages can be sent through the PSTN, such text messages do *not* give subscribers “the capability to communicate to or receive communication from all other users on the public switched network” under the Commission’s definition of an “Interconnected Service.”<sup>15</sup>

Even if a system is “interconnected” it still cannot be deemed a CMRS if the system is an information service. The Commission has previously recognized that the definitions of “information service” and “commercial mobile services” are exclusive.<sup>16</sup> Under the Commission’s *Wireless Broadband Order*, a service can be an information service *or* a CMRS—but it cannot be both.

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<sup>10</sup> See 47 U.S.C. § 332(c)(1)(A) (“A person engaged in the provision of a...commercial mobile service shall...be treated as a common carrier for purposes of this chapter...”).

<sup>11</sup> 47 U.S.C. § 332(d)(2).

<sup>12</sup> 47 C.F.R. § 20.3.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *Comments of AT&T*, at 12-13; *Comments of CTIA*, at 33-34;

<sup>15</sup> 47 C.F.R. § 20.3. See also *Appropriate Regulatory Treatment of Broadband Access to the Internet over Wireless Networks*, 22 FCCR 5901, 5916 (2007) (“Wireless Broadband Order”)(quoting 47 C.F.R. § 20.3).

<sup>16</sup> *Wireless Broadband Order*, 22 FCCR at 5920 (2007).

## **II. THE COMMISSION DOES NOT HAVE STATUTORY AUTHORITY TO REGULATE SHORT MESSAGING SERVICES AND COMMON SHORT CODES AS COMMON CARRIERS UNDER ITS TITLE I ANCILLARY JURISDICTION.**

The Commission should not apply Title II common carrier requirements to SMS and CSCs through its Title I ancillary jurisdiction. Although the Commission may exercise ancillary jurisdiction where such exercise is “not inconsistent with” the Telecommunications Act,<sup>17</sup> here there is an inconsistency between regulations sought by the petitioners and current law. The Act prohibits the Commission from imposing common carrier regulations on information services.<sup>18</sup> In its *Wireless Broadband Order* the Commission has itself recognized “Congressional intent to maintain a regime in which information service providers are not subject to Title II regulations as common carriers.”<sup>19</sup> As the U.S. Supreme Court noted in *National Cable & Television Assoc. v. Brand X Internet Services*, “The Act regulates telecommunications carriers, but not information-service providers, as common carriers.”<sup>20</sup> The Commission’s Title I ancillary jurisdiction does not trump the law’s prohibition of common carrier regulation being imposed on information services.

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<sup>17</sup> 47 U.S.C. § 154(i) (“limiting the Commission’s authority to making “such rules and regulations and issu[ing] such orders, not inconsistent with this act, as may be necessary in the execution of its functions”).

<sup>18</sup> 47 U.S.C. § 153(44) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services...”).

<sup>19</sup> 22 FCCR at 5916.

<sup>20</sup> 545 U.S. 967, 975, 125 S.Ct. 2688 (2005).

The ability of the Commission to exercise its ancillary jurisdiction in this proceeding should be closely analyzed in light of the Supreme Court’s recognition of the limits of that jurisdiction in *FCC v. Midwest Video Corp.*<sup>21</sup> In that case, the Supreme Court’s held the Commission could not treat broadcasters as a kind of common carrier service.<sup>22</sup> The Supreme Court ruled that the regulations at issue were not “reasonably ancillary” to a Commission objective because those regulations were contrary to an express statutory prohibition.<sup>23</sup> Under *Midwest Video*, there is ample reason for concluding that treating SMS and CSCs as common carriers is not reasonably ancillary to the Commission’s commitment to “maintain a regime in which information service providers are not subject to Title II regulation as common carriers.”<sup>24</sup>

As a factual matter, it is not reasonable for the Commission to impose common carrier regulations on SMS and CSC via its Title I ancillary jurisdiction. Imposing regulations in this manner is not “necessary in the execution of [the Commission’s] functions.”<sup>25</sup>

Comments to the Commission have astutely observed that ancillary jurisdiction cannot be invoked where there is intense competition, as there is in the wireless marketplace.<sup>26</sup> Indeed, the Petitioners cited no evidence of market failure.<sup>27</sup> Nor have

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<sup>21</sup> 440 U.S. 689, 92 S.Ct. 1860 (1979).

<sup>22</sup> 440 U.S., at 700.

<sup>23</sup> 440 U.S., at 702.

<sup>24</sup> *Wireless Broadband Ruling*, 22 FCCR, at 5916. See also *Comments of Verizon Wireless*, at 42-44.

<sup>25</sup> 47 U.S.C. § 154(i).

<sup>26</sup> See, e.g., *Comments of AT&T*, at 15-16.

<sup>27</sup> See, e.g., *Comments of CTIA*, at 51; *Comments of Verizon Wireless*, at 52-53.

the Petitioners presented evidence of any significant, continuing problem with SMS and CSCs that requires common carrier regulations be imposed.<sup>28</sup> The Petitioners have not cited any evidence of persistent discrimination.<sup>29</sup>

In light of the (thousands/hundreds of thousands) of requests for CSC that are granted by SMS, Petitioners' highlighting of two episodes of CSC being rejected by an SMS provider hardly suggests a problem. SMS providers do not block text messages. Moreover, an incident involving one organization's initially rejected short code was quickly resolved by the SMS provider, and the short code was subsequently activated.<sup>30</sup> (No text messages sent to or from that organization was ever blocked.) Similarly, an SMS provider rejected a CSC request from one of its competitors in the marketplace.<sup>31</sup> As a general matter, businesses do not have an enforceable right to advertise through their competitors in order to take away their competitors' customers.

By imposing common carrier regulations on SMS and CSC through its ancillary jurisdiction, the Commission would undermine sophisticated self-regulatory efforts by the wireless industry. Other Comments in this proceeding have detailed the efforts achieved by competing wireless companies to establish and maintain a common set of standards for approving and facilitating CSC.<sup>32</sup> For instance, through the Mobile Marketing Association (MMA), the wireless industry has established best practices for

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<sup>28</sup> See, e.g., *Comments of CTIA*, at 51.

<sup>29</sup> See, e.g., *id.*

<sup>30</sup> See *Comments of Verizon Wireless*, at 20-22 (explaining Verizon Wireless's 2007 initial decline of a CSC campaign by NARAL and Verizon Wireless's subsequent activation of NARAL's CSC).

<sup>31</sup> See *id.* at 20-22 (explaining Verizon Wireless's denial of CSC campaign offered by competitor RebTel).

<sup>32</sup> See, e.g., *id.* at 15-20.



CSC.<sup>33</sup> Also, CTIA facilitates CSC compatibility between competing wireless providers, assuming the role of CSC Administrator.<sup>34</sup> Such self-regulated standards serve to protect consumers in myriad ways. This self-regulated process for CSC approval provides safeguards against improper billing.<sup>35</sup> That process also effectively filters out spam, worms, and viruses.<sup>36</sup> It similarly screens out inappropriate and illegal content.<sup>37</sup> This collaborative effort by companies uniquely familiar with their own evolving technologies and strategies would be seriously threatened by a top-down, regulatory regime. If common carrier regulation were to be imposed here, companies would have reduced incentive for developing new technologies to protect consumers from such harms.<sup>38</sup>

Particularly important is the First Amendment's protection of the editorial discretion necessary to the wireless industry's self-regulation of CSC. Courts of law have recognized that editorial decision-making by broadcasters and other media receive First Amendment protection.<sup>39</sup> In this context, wireless providers exercise editorial discretion when considering CSC, in order to protect customers from unwanted, fraudulent, inappropriate, and illegal content. Common carrier requirement would eliminate wireless providers' ability to provide such important editorial services to protect and benefit consumers.

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<sup>33</sup> See <http://mmaglobal.com/>

<sup>34</sup> See <http://www.usshortcodes.com/>

<sup>35</sup> See, e.g., *Comments of Sprint Nextel*, at 16.

<sup>36</sup> See, e.g., *Comments of T-Mobile*, at 10-11.

<sup>37</sup> See, e.g., *id.* at 11-12.

<sup>38</sup> See, e.g., *Comments of AT&T*, at 21-22; *Comments of Verizon Wireless*, at 22-29.

<sup>39</sup> See, e.g., *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674, 118 S.Ct. 1633 (1998); *Denver Area Educ. Telecomm. Consortium*, 518 U.S. 727, 740-743, 116 S.Ct. 2374 (1996).

## CONCLUSION

The Commission should respect the consumer welfare benefits flowing from the wireless industry's self-regulation of SMS and CSC. It should *not* declare SMS or CSC to be CMRS subject to common carrier regulations. Similarly, the Commission should *not* apply common carrier rules to them through its Title I ancillary jurisdiction. Rather, the Commission should declare SMS and CSC to be information services. The Commission should allow consumers to enjoy the increasing benefits that continued marketplace competition and technological innovation will bring.

Respectfully submitted,

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