

14 April 2008

The Honorable Kevin Martin, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Chairman:

This letter is in response to the Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules. (WT Docket No. 08-7)

About the Institute for Policy Innovation

The Institute for Policy Innovation (IPI) is a twenty year old free-market public policy research organization. IPI researches and promotes sound policy solutions that feature lower taxes, fewer regulations, and a smaller, less-intrusive government. IPI specializes in issues of economic and technology policy.

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We appreciate the opportunity to submit reply comments regarding the request for comments in connection with complaints filed about short codes.

Forbear as the Marketplace is Already Adjusting

The use of “short codes” is one of the most recent innovations in wireless communication and is an example of the gradual development of more complex services better devised to meet customer needs. This is a perfect example of the evolutionary development of emerging services.

As you know, the FCC current inquiry in connection with a request for a ruling “that test messages and short codes are Title II services or are Title I services subject to Section 202 non-discrimination rules” is the latest in a series of petitions, complaints and disputes in wireless service development.

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These five and six digit numbers through which a cell phone customer can interact with a variety of entertainment and informational sources, such as voting for an American Idol contestant, providing customer feedback on a candy bar, or even responding to direct marketing have unfortunately been included by the pro-regulatory crowd in their current effort to compel the FCC to take a much greater involvement in the regulation of the communications marketplace.

We urge the FCC not to engage in regulation of text messaging or short codes because, first, the complaints that have been leveled in the petition and by some consumers will likely to be resolved by the market place – a preferential place for resolution to regulation; and second, because such regulation will likely impede the development of these services and their deployment to the consumer.

The Current Complaint. A Market Solution Already Working.

Complaints of discrimination or abuse against service providers who have short code services are similar to complaints lodged in recent years against wireless providers on a variety of issues¹. They include complaints about limits on which handsets would be allowed by individual providers on their network; complaints as to whether consumers should be allowed to pay for their handsets over several months or if they were to be forced through regulation to pay all at once; and, complaints about message unit pricing for voice, text, video and web services.

The specific complaints that have been leveled in the petition at issue have already been resolved or will likely be resolved by the marketplace as companies adjust, or become more proficient in their usage policies. This is a far preferable situation to regulation. Most such complaints are being addressed by the private sector, including carrier announcements that they will open up their networks to other devices and flat rate pricing for calls, text messaging and Internet connections.

Appropriately, most service providers have had some limitation on content for the carriage of short code services on their wireless networks. And certain types of short code content may violate what a company feels is proper for public dissemination or that is appropriate for their public image. Concerns about pornography and questionable messages getting into the hands of children should inform individual company policies. Allowing a provider system discretion provides a hedge against illicit material being delivered, unwanted and unknowingly, directly into the hands of minors. But there have been instances where carriers who have previously refused certain content on their networks have relented and allowed their usage.²

In the late fall of 2007 and through the early months of 2008 virtually all of the major service providers of wireless services established new policies that now allow

¹ The FCC's current inquiry is in connection with a request for a ruling regarding "text messages and short codes." The complaint challenges whether companies, via disclosed guidelines, may continue to have a wide degree of freedom over who uses short codes, what sorts of messages are included, and what consumers might pay to receive them on their cell phones.

² NARAL Pro-Choice America challenged Verizon Wireless' decision to reject its application for a short code but later reversed its decision and provided the requested access to their network. Other examples exist.

consumers to use any instruments on their networks.³ To our knowledge there are few non-technical restrictions remaining that prohibit consumers from using any phone purchased at retail on any major service network.

Most service providers have always provided non-contract services to consumers for using their network wireless services. In fact there are some niche providers whose business model is exclusively built on short term or pre-paid wireless service availability. And contracts for wireless services are, frankly, no different than other long term contracts that require early termination fees or similar penalties. Airlines, hotels and other services have forfeitures, early termination fees and/or penalties tied to the sale of their services. Wireless services should not be held to any different standard, nor should these voluntary, private contracts be interfered with by the government.

Moreover, message unit pricing for voice, text, video and web services have now, in many cases, given way to flat rate pricing. In recent weeks many major service providers have begun offering flat rate pricing that cover a wide range of wireless services. These flat fees provide high volume usage consumers with a manageable alternative to message unit pricing.

The Nationwide Market Development of the Wireless Industry

But more importantly, regulation impedes the development of new products and services, and slows deployment to consumers. The history of regulatory forbearance on wireless service, at both the state and federal level, has been a primary factor in the rapid and affordable expansion of wireless service in the United States. Such forbearance has been and continues to be in the best interest of both consumers and providers.

Both at the state and federal levels regulators have allowed the natural development of the wireless industry. Whether with regard to economic regulation or service provision issues there has been a reluctance to impose regulatory authority over this industry. That forbearance has been and continues to be in the best interest of both the consumers and the providers.

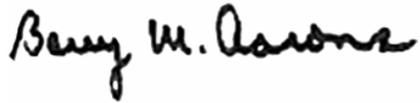
The FCC certainly may review actions when a consumer complaint is asserted. And in a situation where “bad behavior” has taken place, even a review by the Commission provides an incentive for a service provider to change business practices. In this case, a case of a mere human error, that is all that needs to be done – review the issues at hand but do not use it as an excuse to expand regulation to text messages.

Finally, the FCC should begin to distinguish between genuine consumer complaints and complaints filed by activist groups merely gaming the system in pursuit of a larger regulatory agenda. The question is whether there is any evidence or firsthand complaint that consumers are actually being harmed, or whether activists are simply using a convenient issue to advocate for dramatically increased regulation of the wireless industry.

³ While there certainly are exceptions, the obvious and current trend is for handset providers to allow phones to be used on various networks, and for network providers to provide the option to a consumer of not paying for the phone over a couple years via a couple year service contract but rather paying for the phone up front.

A thorough review of this issue by the Commission should result in a finding that no regulation needs to be applied to short code services.

Respectfully Submitted,

Handwritten signature of Barry M. Arons in black ink.

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