

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

In the Matter of the Petition of

Public Knowledge *et al.*

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

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WT Docket No.  
08-7

**COMMENTS  
  
OF  
  
THE AMERICAN CIVIL LIBERTIES UNION**

American Civil Liberties Union  
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## **SUMMARY**

The American Civil Liberties Union (“ACLU”) supports the underlying petition of Public Knowledge et al., and urges the Commission to find in favor of Petitioners and uphold concepts of accessibility and non-discrimination in the provision of text messaging and short code services.

## COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

In late 2007, Verizon Wireless committed one of the most egregious examples of discrimination in telecommunications services documented to date. Claiming it had the right to block what it determined to be contentious text messages, the company cut off NARAL Pro-Choice America's access to a text-messaging program that the right-to-choose group uses to communicate messages to its supporters. Verizon Wireless stated it would not service programs from any group "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."<sup>1</sup> Verizon claimed that it had the right to ban NARAL's messages because current laws that prohibit carriers from blocking voice transmissions do not apply to text messages. In addition, Verizon argued that the Communications Act, which requires that commercial cellular providers must be nondiscriminatory for commercial mobile services, does not apply to non-traditional uses of phone services such as text-messaging.

In response to Verizon's censorship, a group of consumer advocacy organizations including Public Knowledge, Consumers Union, the New America Foundation and Free Press, filed a petition with the FCC in November 2007 ("the Petition")<sup>2</sup>. The Petition asks the FCC to forbid wireless carriers from preventing the transmission of text messages from any group, regardless of their political convictions. The groups also urged the Commission to create rules regulating the level of control cell phone providers have over communications sent using their networks. As the groups explained in their

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<sup>1</sup> Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, [http://www.nytimes.com/2007/09/27/us/27verizon.html?\\_r=1&oref=login](http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=1&oref=login).

<sup>2</sup> Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, U.S. PIRG, Petition for Declaratory Ruling, WT Docket No. 08-7, Dec. 11, 2007, available at <http://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf> [hereinafter *Petition*].

petition, “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.”<sup>3</sup>

Verizon Wireless reversed its censorship of NARAL only after widespread public outrage. Verizon’s spokesperson Jeffrey Nelson claimed the company’s initial resistance to NARAL’s messages was merely “an incorrect interpretation of a dusty internal policy” that was implemented before text messaging technology could ensure that customers would not receive unwanted messages.<sup>4</sup> However, according to Congressman John Dingell, “[Verizon’s] latest statement does not identify any substantive change in policy. I ask Verizon to decisively state that it will no longer discriminate against any legal content its customers request from any organization.”<sup>5</sup> Verizon Wireless’ readiness to exercise unfettered discretion to censor groups or content with which it disagrees, such as NARAL Pro Choice America, provides a stark example of the kinds of discrimination that can take place in the absence of definitive rules to the contrary.

The American Civil Liberties Union (“ACLU”) endorses the underlying petition including its request that the FCC “act immediately to declare that text messaging services, including those sent to and from short-codes, are governed by the anti-

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<sup>3</sup> Kim Hart, *Groups to Press FCC to Prohibit Blocking of Text Messages*, N.Y. TIMES, Dec. 11, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/10/AR2007121001634.html?hpid=sec-tech>.

<sup>4</sup> Adam Liptak, *Verizon Reverses Itself on Abortion Message*, N.Y. TIMES, Sept. 27, 2007, [http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/09/27/business/27cnd-verizon.html?_r=1&oref=slogin).

<sup>5</sup> House Energy and Commerce Committee. Statement on the Public Record, Statement of Chairman John Dingell, Sept. 27, 2007, [http://energycommerce.house.gov/Press\\_110/110st93.shtml](http://energycommerce.house.gov/Press_110/110st93.shtml).

discrimination provisions of Title II of the Communications Act, and that discrimination is therefore prohibited in providing these services.”<sup>6</sup> We also support Petitioners’ request that “[i]f 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.”<sup>7</sup> We also endorse the facts and legal analysis set forth in Petitioners’ comments. Notwithstanding the foregoing, we are also open to alternative analyses that would achieve the same result. ACLU is concerned primarily that the outcome of the petition and the resulting regulatory framework, in whatever form, should establish an accessible, non-discriminatory, and content-neutral text messaging and short code regimen.

Neutrality rules to address growing censorship in various forms of communications should do the following:

- Uphold concepts of content neutrality, non-discrimination, equality of access, and non-exclusivity
- Provide for enforcement mechanisms that are readily available to all users
- Not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their telecommunications services for lawful purposes

Meaningful neutrality rules in the text messaging and short code context should simply bar providers from picking and choosing which users can access what lawful content through their phones. Otherwise, this form of communication will be

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<sup>6</sup>Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access project, New America Foundation, US PIRG, Petition for Declaratory Ruling, WT Docket No. 08-7, Dec. 11, 2007, available at <http://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf>, at ii-iii.

<sup>7</sup> *Id.* at iii.

transformed from a protected preserve of free speech to a desert of discrimination that serves to promote only the providers' private interests.

## CONCLUSION

Meaningful rules protecting electronic communications users from corporate censorship are vital to the future of free speech – whether in text messaging devices, on the internet, or in more traditional telephone services. Free speech should not depend upon the technology used. Neutrality rules should prohibit those who control these services, or control access to them, from picking and choosing which users can access what lawful content. Meaningful rules and decisions of this Commission should seek compliance with the spirit of the “Four Freedoms” established by the FCC in its 2005 policy statement, including access to lawful content, and should seek penalties for violations of those freedoms<sup>8</sup>. We urge the Commission to act favorably on the underlying Petition, which seeks a result consistent with these principles.

AMERICAN CIVIL LIBERTIES UNION



March 14, 2008

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March 14, 2008

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<sup>8</sup> See [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260435A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf)