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REPLY COMMENT

REPLY COMMENT ON WIRELESS CARRIERS' SPEECH AND FCC REGULATION OF TEXT MESSAGING

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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

Agency: Federal Communications Commission

Proposed: October 13, 2015

Reply comment period closes: December 21, 2015

Submitted: December 21, 2015

WT Docket No.: 08-7

INTRODUCTION

The Technology Policy Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts independent analyses to assess agency rulemakings and proposals from the perspective of the public interest and consumers. Therefore, this reply comment does not represent the views of any particular affected party but is designed to assist the agency as it explores these issues.

We appreciate the opportunity to submit reply comments on the proceeding of the Federal Communication Commission (FCC) regarding Public Knowledge et al.'s Petition for a Declaratory Ruling about the regulation of text messaging and short codes.¹

1. Public Knowledge et al., Petition for Declaratory Ruling, WT Dkt. No. 08-7 (December 11, 2007). Short codes allow organizations to simultaneously message large numbers of people with abbreviated phone numbers to transmit information about TV program voting, charity donations, policy advocacy, and other value-added services.

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SUMMARY

Contrary to Title II proponents' claims, wireless carriers do not infringe free speech rights when they filter text messaging content they believe their customers do not wish to receive. Title II regulation of text messaging and short code service would not protect free speech. In fact, because mobile carriers exercise editorial discretion over mass messages they transmit, regulation would impermissibly chill wireless carriers' exercise of speech. Further, since wireless carriers transmit short codes and other messaging based on individual arrangements and exercise control over the content of certain messages, messaging does not resemble telecommunications. For these reasons, regulating short code and similar messaging services under Title II of the Communications Act would likely be unconstitutional and contrary to law.

DISCUSSION

1. Wireless Carriers Exercise Editorial Control over Unwanted Messaging Content on Behalf of Consumers and That Filtering Is Protected by the First Amendment.

Wireless carriers are protected by the First Amendment because they exercise editorial control over text messaging services like short codes. As one industry group points out, Title II classification would chill First Amendment–protected activity, like protecting subscribers from unwanted messages, because it would subject carriers' editorial decisions to FCC review and penalty.² When a party—whether a cable company or search engine or mass-messaging service—filters content that it believes its users don't wish to see and communicates that filtering to users, it is protected by the First Amendment for those editorial decisions.³ Even Public Knowledge et al. concede that premium short code text messages “are . . . protected speech,” but they fail to explain why “standard rate” common short codes are not likewise protected speech.⁴

The purpose of this proceeding is to use Title II regulations to deter carriers from exercising editorial discretion over the messaging services they offer and transmit⁵—that is, to use law to chill the exercise of speech. Further, the motivations for Title II regulation of short code messaging services are content-based and Title II classification would require the FCC to wade into reviewing the content-based editorial decisions of the carriers. For example, the FCC might have to rule whether transmitting or failing to transmit messages from abortion rights groups, unions, or music ringtone providers is permissible.⁶ For these reasons, Title II classification and enforcement may be subject to strict scrutiny if challenged in court. As the Supreme Court has concluded, “Laws that compel speakers to utter or distribute speech bearing a particular message are subject to” strict scrutiny.⁷ Title II rules may represent unconstitutional

2. Comments of CTIA, WT Dkt. No. 08-7, at ii (November 20, 2015); noting that Title II rules “could also chill wireless provider filtering and curating efforts by threatening to subject providers to intensive inquiries as to whether a choice to transmit one message but not another constituted unreasonable discrimination.”

3. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

4. Reply Comments of Public Knowledge et al., WT Dkt. No. 08-7, at 6 (April 14, 2008).

5. *Ibid.*, at 15–17.

6. *Ibid.*, at 17–18.

7. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994).

restraint on speech because they would limit the editorial discretion carriers currently enjoy and threaten punishment for exercising editorial discretion.

Telecommunications law professor Stuart Minor Benjamin summarizes Supreme Court jurisprudence as holding that “protecting users from receiving material that upsets them is substantive editing.”⁸ When carriers communicate that editing to subscribers, that editing is protected speech.⁹

No one disputes that carriers transmit and omit messages based on subjective notions of what consumers wish to receive—this discretion is precisely what petitioners are attempting to eliminate with Title II classification. Public Knowledge et al., who support Title II regulation, note outright that “carriers’ behavior in exercising subjective judgment over users’ text message content persists to this day.”¹⁰ Similarly, the CTIA compares its “rigorous screening process” of mass text messages to the “TSA Pre” program for frequent fliers,¹¹ and its best practices include screening out what carriers deem “inappropriate content” like profanity, hate speech, and harassing messages.¹²

Carriers also communicate these filtering decisions to consumers, which makes their filtering decisions communicative and protected by the First Amendment.¹³ A cursory web search reveals that providers communicate their filtering decisions to subscribers. AT&T, for instance, has a webpage for its customers devoted to helping users prevent unsolicited messages. AT&T notes that it actively works to minimize spam and has procedures to allow subscribers to report unsolicited text messages to carriers.¹⁴ Other major carriers likewise publicize their programs for reducing unwanted texts.¹⁵

Some commenters pressure the agency to adopt their peculiar view of the First Amendment. Commenters in support of Twilio’s petition for an expedited declaratory ruling state that FCC regulation is necessary because message filtering by wireless carriers “interferes with free speech rights.”¹⁶ Revealingly, in their entire section making this argument,¹⁷ commenters do not provide a single citation to a court decision that would support the assertion that the First Amendment requires government intervention to restrain private editorial discretion. This curious omission results because recent Supreme Court jurisprudence stands for the reverse conclusion:

8. Stuart Minor Benjamin, “Common Sense and Key Questions,” *Harvard Law Review* 127, Forum (2014): 346, 348.

9. *Ibid.* “If the transmitter communicates such substantive blocking to its users, that would seem to satisfy the requirements for communication and thus for the freedom of speech.”

10. Comments of Public Knowledge et al., WT Dkt. No. 08-7, at 2 (November 20, 2015).

11. Comments of CTIA, at 21, n.53.

12. *Ibid.*, at 22-23.

13. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. at 494; explaining that “by exercising editorial discretion” and transmitting only certain content from third parties, cable companies communicate messages that implicate First Amendment interests.

14. “AT&T Spam Controls for Wireless,” AT&T website, accessed December 1, 2015.

15. “Spam Controls,” Verizon Wireless website, accessed December 1, 2015; “Spam FAQs,” T-Mobile website, accessed December 1, 2015; “SMS and Mobile Ad Controls,” Sprint website, accessed December 1, 2015.

16. Comments of Public Knowledge et al., at 1.

17. *Ibid.*, at 3-5. See also Reply Comments of Public Knowledge et al., at 29-30.

That “Congress shall make no law . . . abridging the freedom of speech, or of the press” is a restraint on government action, not that of private persons.¹⁸

Quite simply, as communications law scholar Christopher Yoo notes, “under current law, the First Amendment only restricts the actions of state actors and does not restrict the actions of private actors.”¹⁹

Along those lines, Public Knowledge et al. ask outright that the FCC favor the First Amendment rights of consumers over the First Amendment rights of the carriers.²⁰ Should the FCC accept that reasoning, the Title II rules will likely be overturned on First Amendment grounds. As the Supreme Court said in *Buckley v. Valeo*, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”²¹ Petitioners’ free speech arguments, if accepted, “would stand the First Amendment on its head.”²² The FCC should discount any argument that suggests that Title II regulation permissibly enhances speech activity by restricting carriers’ editorial discretion.

2. Messaging Services Are Not Common Carrier Telecommunications Services Because Messaging Services Fail Both Prongs of the NARUC Tests.

The request from petitioners suffers from an additional legal problem: Wireless carriers offering short code messaging services do not resemble common carriers and therefore are not “telecommunications carriers” under the Communications Act.²³ When evaluating the legality of an FCC decision that classifies a service provider as a common carrier, courts look at what the providers *do*, not at what dissatisfied customers or advocates *want* providers to do.²⁴

The evidence that messaging services are not telecommunications is made plain by inconsistency from commenters who advocate for regulation. Title II proponents like Public Knowledge et al. and Twilio proffer two contradictory claims:

1. Wireless carriers that offer messaging services currently “exercis[e] subjective judgment” in filtering out messages that they dislike,²⁵ and

18. *CBS v. Democratic Nat’l Committee*, 412 U.S. 94, 114 (1973) (citing *Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 461 (1952)).

19. Christopher Yoo, “Free Speech and the Myth of the Internet as an Unintermediated Experience,” *George Washington Law Review* 78, no. 4 (2010): 697, 699.

20. Reply Comments of Public Knowledge et al., at ii. “It is the First Amendment rights of users, not of the carriers, which should determine the direction in which our communications networks are developed.” Similarly, groups assert that “carrier [editorial] control is a poor substitute for actual free speech.” *Ibid.*, at 15. They offer no legal justification for why the FCC can elevate some speech activity over others speech activity.

21. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

22. Christopher Yoo, “Free Speech and the Myth of the Internet,” 697, 700.

23. 47 U.S.C. § 153(51).

24. *Nat. Ass’n of Regulatory Utility Com’rs v. FCC*, 525 F. 2d 630, 644 (DC Cir. 1976). “A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”

25. Comments of Public Knowledge et al., at 2.

2. Wireless carriers' messaging services "are undeniably telecommunications services" subject to common carrier obligations.²⁶

Both claims cannot be true. If (1) is true (and no one disputes that wireless carriers filter messaging content), then (2) cannot be true.

If a carrier is subjectively filtering the messages for a transmission service it offers, logically, that service cannot be deemed telecommunications. This conclusion follows from application of the National Association of Regulatory Utility Commissioners (NARUC) tests,²⁷ which courts use to determine which services are common carriers. Under NARUC, common carriers are carriers that undertake to carry all messages indifferently and transmit intelligence of customers' own design and choosing.²⁸

Wireless carriers plainly do not "hold themselves out to serve indifferently."²⁹ *The entire basis for this petition is that carriers discriminate based on the content transmitted and who originated the message.*³⁰ CTIA notes that messaging campaigns that misuse short codes risk having service rescinded by the carriers.³¹ As Twilio, the petitioner for an expedited declaratory ruling, says, wireless carriers "created and enforce content restrictions on . . . messaging."³² Likewise, the Mobile Internet Content Coalition complains of a "pattern of arbitrary and discriminatory practices" from the major wireless carriers and "price increase[s] to some companies, but not others."³³ It is the failure, in other words, of wireless carriers to meet the "essential element" of common carriage—indiscriminate service—that stimulated and fuels this proceeding.

Wireless carriers also fail the second part of the NARUC test because they do not passively transmit intelligence of customers' own design and choosing. Customers like Twilio complain that the exact opposite occurs and that

wireless carriers have developed content . . . standards that a business must follow to continue sending and receiving text messages. Each wireless carrier has its own set of content standards, which . . . result in a [short code messaging] shut down if allegedly violated.³⁴

The Mobile Internet Coalition similarly notes that the wireless carriers "perform thousands of audits on a monthly basis, searching for supposed violations" of content guidelines and then "dictat[e] the content these text messages can or cannot contain."³⁵ In other words, as Twilio says, wireless carriers "assert content control over [short code] text messages"³⁶ and do not passively transmit customers' intelligence. CTIA estimates that wireless providers will screen out over 1 billion messages in 2015 to prevent messages they believe their customers do not wish to receive.³⁷

26. Petition for Expedited Declaratory Ruling of Twilio, WT Dkt. No. 08-7, at 31 (August 28, 2015); Comments of Public Knowledge et al., at 10.

27. Nat. Ass'n of Regulatory Utility Com'rs v. FCC, 533 F. 2d 601, 608–09 (DC Cir. 1976); Nat. Ass'n of Regulatory Utility Com'rs v. FCC, 525 F. 2d 630, 642.

28. Nat. Ass'n of Regulatory Utility Com'rs v. FCC, 533 F. 2d 601, 608–09.

29. Nat. Ass'n of Regulatory Utility Com'rs v. FCC, 525 F. 2d 630, 642.

30. Petition for Expedited Declaratory Ruling of Twilio, at 24. "A wireless carrier can essentially justify any CSC shut down by pointing to a 'content violation' in either their own unpublished standards or other guidelines."

31. Comments of CTIA, at 22.

32. Petition for Expedited Declaratory Ruling of Twilio, at 24.

33. Comments of Mobile Internet Content Coalition, WT Dkt. No. 08-7, at 1–2 (March 31, 2011).

34. Petition for Expedited Declaratory Ruling of Twilio, at 24.

35. Comments of Mobile Internet Content Coalition, at 2–3.

36. Petition for Expedited Declaratory Ruling of Twilio, at 24.

37. Comments of CTIA, at 20.

Petitioners seeking Title II regulation cannot have it both ways. A carrier cannot simultaneously curate messaging content and “offer telecommunications.” Since it is stipulated by all relevant parties that wireless carriers screen messaging content and assert control over content according to subjective determinations, they cannot possibly be offering common carriage telecommunications. Carriers’ messaging service fails both prongs of the NARUC tests because carriers do not hold messaging services out to serve all indiscriminately and do not passively transmit customers’ content. Therefore, mobile messaging cannot be classified as a telecommunications service, and classifying messaging as a Title II service risks reversal in the courts.

CONCLUSION

The First Amendment is designed to serve as a protection against government infringement of speech, not to limit the scope of private editorial decisions. Carriers reasonably screen messages that may offend, annoy, or defraud their customers. That is why carriers filter out short code and other messages that contain nudity, profanity, extreme controversy, and spam. This filtering represents expressive behavior on behalf of carriers (not to mention a welcome service to consumers) and therefore is protected by the First Amendment. Title II regulation would place under FCC oversight and penalty these carriers’ subjective determinations about what content consumers wish to receive. The FCC should refrain from regulation lest it engage in impermissible chilling of speech.

The FCC should also disregard commenters’ arguments that short code and similar messaging services are telecommunications under the Communications Act. The FCC can look at Title II advocates’ comments alone to see the legal impossibility of declaring these messaging services a common carrier service. The record is full of pointed allegations that carriers do not hold themselves out to serve indiscriminately and do not passively transmit the messages of their customers. In other words, short code and similar messaging services fail both prongs of the NARUC tests and wireless firms here are not offering a common carrier or telecommunications service.