Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
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

COMMENTS OF T-MOBILE USA, INC.

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March 14, 2008

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T-Mobile USA, Inc. ("T-Mobile") hereby files its comments in opposition to the above-referenced Petition.

SUMMARY

The Commission should continue to let marketplace competition govern mobile wireless providers' text messaging services and common short code offerings. Competition has been a tremendous success in responding to consumer needs,[1] and Petitioners have provided no reason for the Commission to deviate from its well-founded faith in the mobile wireless market. Indeed, imposing common carrier-type regulation on this market would likely harm consumers by limiting the degree to which wireless companies could continue to protect their customers from unwanted and harmful content. If the Commission were to deem short code provisioning a common carrier service, one result would be to prohibit wireless companies from restricting the transmission of indecent materials on their networks. The ability of wireless companies to

[1] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 08-28 (rel. Feb. 4, 2008) ("*Twelfth CMRS Competition Report*").

protect their customers from a wide variety of other unwanted content and any related charges could also be seriously undermined. In addition, grant of the Petition could limit a provider's ability to combat distribution of worms, viruses, or other malware, threatening harm to users' devices and the network itself. This is much worse than the classic "if it ain't broke, don't fix it" situation; Petitioners have asked the Commission to break a system that is working well.

Policy considerations aside, under the Communications Act of 1934, as amended (the "Communications Act" or "Act"), both text messaging and short code provisioning are information services not telecommunications services, and both are therefore legally exempt from common carrier regulation. Nor is there any lawful basis for an exercise of the Commission's ancillary jurisdiction to apply common carriage requirements to these offerings.

For these and other reasons discussed below, the Commission should reject the Petition.

BACKGROUND

Two different services are at issue here, each offered to different customers. Short message service ("SMS," also known as "text messaging") is primarily offered to T-Mobile's voice subscribers. The provision of common short codes ("CSCs," also known as "short codes"), in contrast, is offered to content providers, which often use the CSCs to facilitate the sale of content (such as ringtones, games, and wallpaper) to T-Mobile subscribers or for other commercial purposes. In many of these cases, the content provider will use the wireless provider's billing and collection systems to charge the T-Mobile subscriber for the purchased content. Some content providers use CSCs for non-commercial purposes. For example, advocacy groups use CSCs to distribute messages to supporters who have asked to receive such

content, and television networks use CSCs to permit viewers to "vote" on preferred reality-show results.[2]

Text Messaging. SMS permits the exchange of messages between T-Mobile subscribers and (1) other T-Mobile subscribers, (2) subscribers of other mobile providers, (3) users of computer-based e-mail platforms, and (4) users of computer-based Instant Messaging ("IM") platforms.

SMS messages sent and received on mobile devices are addressed to the recipient's ten-digit telephone number. If a T-Mobile subscriber who is the intended recipient of an SMS message is out of range (*i.e.*, is in an area without coverage, has the mobile device turned off, or is in an area where T-Mobile's network is experiencing an outage), the message will be stored at T-Mobile's short message service center ("SMSC") for up to 72 hours, during which time the SMSC will periodically attempt to deliver the message to the recipient.

When users send SMS messages from their T-Mobile mobile devices to an e-mail or instant messaging account, the SMSC routes the message to an Internet gateway, which will translate the message into the appropriate protocol. SMS messages generally originate or terminate on the mobile device in short message peer-to-peer protocol ("SMPP"). However, e-mail messages are generally formatted in standard mail transfer protocol ("SMTP") and IMs are generally formatted in Transmission Control Protocol/Internet Protocol ("TCP/IP"). Therefore, in cases involving the exchange of messages between an SMS platform and an e-mail or IM platform, T-Mobile's network must translate the message from one protocol to another. After this protocol conversion occurs, messages bound for e-mail or IM accounts generally will

[2] The descriptions in this background section relate to how the services generally work; not every point necessarily applies in all circumstances.

be routed over the Internet. The flow will be the same, in reverse, for SMS-bound messages originating on an e-mail or IM account, and will involve translation from SMTP or TCP/IP into SMPP.

Short Code Provisioning. CSC provisioning is a service offered to content providers as part of a broader content gateway service. Among other things, a content provider whose short code is supported by T-Mobile is able to (1) receive messages from customers who use the five- or six-character short code rather than the ten-digit telephone number,[3] (2) send messages to consenting T-Mobile end users – either individually or in groups – through a direct or indirect interconnection between the content provider's computer system and T-Mobile's network, and (3) apply charges for content and services purchased by the end-user, which T-Mobile will bill and collect itself. Messages sent to T-Mobile subscribers by approved content providers are delivered in encrypted form over Internet facilities to T-Mobile's "Content Gateway," which converts them from TCP/IP into SMPP and transmits them to the SMSC for delivery to the end user. As above, messages will be stored in the SMSC for up to 72 hours while the SMSC attempts to deliver them. Messages sent by T-Mobile's subscribers to content providers will be handled in the reverse order.

A content provider wishing to use a CSC will generally register the specific short code with the U.S. Common Short Code Registry operated by Neustar. Some content providers will register short codes and then contract directly with wireless providers such as T-Mobile; others work through aggregators, which then contract with wireless providers.

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[3] Short codes are completely unrelated to the North American Numbering Plan.

In contracting with content providers (whether directly or through aggregators), T-Mobile requires commitment to content guidelines that are consistent with the Mobile Marketing Association's Mobile Advertising Guidelines.[4] T-Mobile's guidelines provide (among other things) that content providers given access to T-Mobile's Content Gateway and using CSCs must:

- Ensure that messages and content do not and will not contain any material that (a) is unlawful, obscene, or defamatory or violates any intellectual property rights or any other rights of any third party; (b) facilitates any illegal activity; (c) contains any sexually explicit content or images; (d) is false, misleading, or likely to mislead or deceive (including information relating to the source or the author of the message); or (e) promotes violence, discrimination, or illegal activities.

- Send messages only to subscribers who have opted in to receiving such messages.

- Provide subscribers who have opted in with a simple mechanism for subsequently opting out of receiving the messages.

- Offer support information via a help button.

- Limit their messages to those directly related to the services approved by T-Mobile.

If T-Mobile does not provide short code service to a content provider, a T-Mobile subscriber will still have access to the provider's content through the Internet, and the content provider will still have access to the T-Mobile subscriber through ordinary SMS service (though not to the Content Gateway's distribution or billing functionality).

These limits are all contractual, not technical, in nature. As a technical matter, if T-Mobile were required to provide access to its Content Gateway and CSCs to all content providers, content providers could distribute messages to all T-Mobile subscribers whose mobile

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[4] *See* Mobile Advertising Guidelines (North America), December 2007, *available at* <http://www.mmaglobal.com/mobileadvertising.pdf>.

numbers they had, which could result in additional customer charges and create considerable billing issues for T-Mobile and its customers. In some cases, T-Mobile's network could fail.

DISCUSSION

I. REGULATION OF SMS AND SHORT CODE PROVISIONING IS NOT NEEDED AND WOULD LIKELY HARM CONSUMERS.

A. Petitioners Have Demonstrated No Widespread Problem and No Reason Why the Market Cannot Police Providers' Practices.

Petitioners have alleged only isolated instances of purported abuse, just one of which is documented in any detail. That alleged abuse – involving a short-term refusal by Verizon Wireless to provision a CSC for the National Abortion Rights Action League ("NARAL") – was remedied immediately after it was made known. Chairman Martin recently praised Verizon Wireless's behavior in reversing field so soon after receiving complaints.[5] The competitive market worked to resolve the alleged problem, as one would expect to occur in the face of competition. Nonetheless, the Petition is oddly bereft of any discussion of the role played by the market in policing provider behavior. As the Commission has explained time and again, competition is far superior to regulation in influencing behavior; it is more supple and faster to adapt to changing customer needs, and imposes far fewer administrative costs on consumers and providers.[6] For these reasons, the Commission has routinely declined invitations to regulate competitive markets.

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[5] Louis Trager, *Martin Seeks Q2 Network-Management Order Favoring Equal Treatment*, COMMUNICATIONS DAILY at 4 (Mar. 10, 2008).

[6] *See, e.g.*, *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, 8989 ¶ 64 (1995) ("[C]ompetition can be expected to carry out the purposes of the Communications Act more assuredly than regulation."), *aff'd sub nom. Bell Atl. Tels. Co. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996); *Access Charge Reform*, 12 FCC Rcd 15982, 16094 ¶ 263 (1997) ("Competitive markets are superior mechanisms for protecting consumers…."), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

The Commission has just reaffirmed the intensely competitive nature of the wireless market. More than 95 percent of the U.S. population lives in areas with at least three mobile wireless operators competing to offer service, 94 percent of Americans live in areas with four or more mobile wireless competitors, and more than half of the population (significantly more than just one year before) lives in areas with at least five competing operators.[7] Chairman Martin has observed that "[t]he wireless industry is the most competitive of all the sectors that [the Commission] regulate[s]."[8] The increasing competition in the mobile market is affecting the SMS market in a pro-consumer fashion; average per-unit text-messaging prices are declining.[9]

Given this increasingly fierce competition, the Commission can be confident that the market will force providers to respond to their customers' wishes, just as Verizon Wireless did in response to the NARAL incident. If a provider is withholding short code access from an entity whose content consumers demand, those consumers will change providers. In circumstances like these, T-Mobile and other providers act – and will continue to act – to ensure that their customers remain their customers. Petitioners have provided no reason to expect that this fundamental rule of economics is somehow inapplicable in the case of short code provisioning. In this regard, the Commission has made clear that it is inappropriate to impose common carrier obligations on providers that lack market power.[10]

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[7] *Twelfth CMRS Competition Report*, FCC 08-28 at ¶¶ 2, 44.

[8] Stephen Lawson, *FCC Chief: Wireless Key to Universal Service Access*, INFOWORLD, Mar. 27,2007, available at <http://www.infoworld.com/article/07/03/27/HNfccchief_1.html>.

[9] *See Twelfth CMRS Competition Report*, FCC 08-28 at ¶ 202.

[10] In determining whether a particular offering must be made available on a common carriage basis, "the Commission generally has focused on whether the [provider] has sufficient market power to warrant common carrier regulation." *AT&T Submarine Systems, Inc.*, 11 FCC Rcd 14885, 14893 ¶ 30 (IB 1996). *Accord AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589 ¶ 9 (1998); *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8522 ¶ 15 (1997). *See also Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 925
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Just as they neglect the role the market plays in policing providers' behavior today, so too Petitioners ignore the future benefits that the market can be expected to generate. Left unimpaired by excessive regulation, providers can be expected to develop and deploy new services responsive to consumer demands and to invest in new facilities, knowing that the market will compensate them for their prudent investments. As Petitioners acknowledge,[11] we cannot today know how these technologies will develop – one might not have imagined ten years ago that customers would desire the ability to send text-based messages over mobile phones, much less that Americans would send almost *19 billion* text messages in December 2006 alone.[12] Anticipatory regulation of these services would distort such development, prompting providers to design and deploy advanced services based on regulators' preferences rather than consumers' preferences – if they can deploy them at all in the face of such burdensome regulation.

B. Common Carrier Regulation of SMS and/or CSC Provisioning Would Likely Harm Consumers.

In addition to the general harms posed by unnecessary regulation, the result sought by Petitioners could seriously harm consumers. As described above, in addition to spam filters, T-Mobile employs a variety of contractual provisions that preclude third parties from sending T-Mobile's subscribers unwanted, unlawful, harassing, or harmful content, or from assessing unwarranted charges. An order defining SMS and CSC provisioning as common carrier services

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(D.C. Cir. 1999) (describing FCC "market power" test for assessing propriety of common carrier treatment).

[11] *See* Petition of Public Knowledge et al. for Declaratory Ruling, WT Docket No. 08-78, at 3 (filed Dec. 11, 2007) ("Petition") ("At this time, it is not clear how text messaging will evolve, in terms of transmission, services, or devices using text messaging.").

[12] *Twelfth CMRS Competition Report*, FCC 08-28 at ¶ 2 (Executive Summary).

would likely rob providers of their ability to use such contractual mechanisms to protect consumers, with disastrous results.

If CSC provisioning were subjected to common carriage requirements, wireless providers would have a statutory duty to open their networks and provide short codes to all content providers making a "reasonable request" for such service, as required by section 201(a) of the Act.[13] While T-Mobile certainly believes that it would be reasonable under this standard to deny service on the basis of most of its current contractual guidelines,[14] there is no guarantee that the Commission or a court would agree. Indeed, as discussed below, some of T-Mobile's contractual guidelines (*e.g.*, those restricting sexually explicit or other legal but objectionable material) would not be legally sustained if applied to a common carrier service. Also, a carrier-imposed opt-in requirement may not be legal in a common carrier regime except where specifically permitted or required by statute (*e.g.*, by the Telephone Consumer Protection Act ("TCPA")[15] or the CAN-SPAM Act of 2003[16]); outside such statutory contexts, a telephony provider certainly cannot limit a subscriber's calling options on that basis today.

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[13] 47 U.S.C. § 201(a).

[14] To the extent the Commission were to conclude that short code provisioning is a common carrier service, T-Mobile urges the Commission to rule – to the maximum extent permissible by law – that the kind of pro-consumer conditions T-Mobile imposes are "reasonable" under sections 201 and 202(a) of the Communications Act, particularly in light of the competitive nature of the market. *See generally Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd 8987 (2002), *aff'd sub nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003); *Kenneth Kiefer, Complainant v. Paging Network, Inc.*, 16 FCC Rcd 19129, 19132 ¶¶ 6-7 (2001). *See also* Comments of T-Mobile USA, Inc., *Skype Communications S.A.R.L. Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks*, RM-11361 at 19-25 (filed Apr. 30, 2007); Comments of CTIA – The Wireless Association®, *Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators; Free Press, et al., Petition for Declaratory Ruling Regarding Broadband Industry Practices*, WC Docket No. 07-52 at 6-11 (filed Feb. 13, 2008) (both explaining that wireless networks require a significant degree of management to ensure that legitimate messages reach their intended recipients without undue congestion).

[15] 47 U.S.C. § 227.

[16] Pub. L. No. 108-187, 117 Stat. 2699 (2003).

In short, without such contractual protections, network providers could be severely hampered in their efforts to constrain the flood of messages containing spam, viruses, and other objectionable or illegal content that likely would be directed at their end users. Such messages could also lead to the imposition of unexpected charges by shady content providers. In many such cases, customers might well blame the network providers for the deluge of unwanted content and the imposition of charges, even though network providers lacked any control over content providers' use of CSCs.

Spam. If providers were required to provision short codes to all comers on a common carrier basis, customers would likely receive substantial amounts of SMS spam. Although the prospect for abuse of CSCs is today limited by contractual provisions – for example, provisions requiring customer opt-in before a content provider may send messages – a grant of the Petition could well render application of such provisions unlawful, undermining T-Mobile's ability to limit the volume of messages sent to its end users. Significantly, even if contractual provisions were deemed permissible in a common carrier regime, once a wireless provider were required to provide service to all content providers that purported to agree to these conditions, it could quickly lose its practical ability to administer and enforce such limitations in an effective manner. Similarly, a common carrier designation could preclude use of spam filters to block the transmission of unwanted content.

Worms and Viruses. A mandate for open wireless networks could also permit a proliferation of worms designed to destroy, disable, or otherwise harm software residing on the end-user's device or on the network. As with e-mail viruses, the results of such malware could be severe and wide-ranging. For example, absent the contractual controls now in place or the ability to apply and enforce them effectively, a content provider could use the carriers' networks to transmit messages instructing recipients to click on an embedded link and use that link to

download software directly to the trusting user's device. The software, in turn, could spy on the user's activities, download additional unwanted content, or simply destroy the mobile device's operating system software.

Inappropriate or Illegal Content. Under a common carrier regime, T-Mobile and other CMRS providers could not legally control the transmission of sexual or violent content, which is of particular concern to many consumers. The Commission has squarely held that a common carrier providing video content from programmers to its subscribers cannot lawfully limit the degree to which programmers can provide legal programming that is sexually explicit. Specifically, the Commission concluded that a programming agreement between a Multipoint Distribution Service common carrier licensee and a program supplier that prohibited the programmer's use of the carrier's facilities for transmission of X-rated (now NC-17) movies violated the carrier's statutory common carrier duty to provide service to all.[17]

Indeed, even a common carrier that refuses to carry content on the basis that the content is *illegal* (*e.g.*, obscene or fraudulent) would risk liability if a court or other relevant decision-maker subsequently were to disagree with its assessment. The Commission has indicated that "the proper course of action a common carrier must take when confronted with what appears to be illicit use of its facilities by its customers is to 'petition the affected jurisdictions for a determination as to whether the exhibition or promotion is, or would be, in violation of state

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[17] *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2819 (1987) at ¶ 11-12 ("*MDS Order*"). Because not all material in X-rated movies is "obscene," the agreement "appear[ed] to prevent more than the transmission of obscene movies." Thus, "such a prohibition would be inconsistent with a common carrier's general obligation … to offer service without substantial involvement in influencing the content of material transmitted over its facilities." *Id.*

law.'"[18] Obtaining governmental pre-approval for all potentially suspect content would be impractical and would likely lead to carriage of such material in many cases.

Billing Abuse. The imposition of common carrier requirements on CSC provisioning could also enable content providers to engage in inappropriate billing practices. Under a common carrier regime, even if providers retained flexibility to apply contractual restrictions, the sheer volume of content providers seeking access could, as a practical matter, prevent any effective application of such contractual restrictions. Indeed, in a common carrier/mandatory access world, unsavory content providers might have no incentive whatsoever to make their billing practices clear, resulting in significant abuse of consumers, who could be billed for content they did not realize came with a price tag, or for sums far in excess of what they had expected. Additionally, if billing itself were treated as a common carrier service, T-Mobile and other carriers would be asked to participate in such providers' scams by billing and collecting the associated charges. Forcing T-Mobile to associate its brand with objectionable content and dishonest providers not only would be contrary to the wishes of T-Mobile's customer base, but also would undermine T-Mobile's central mission of providing the best customer service in the industry.[19]

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[18] *Id. at* 2819 ¶ 5, quoting *Humane Society v. Western Union International, Inc.*, 30 F.C.C. 2d 711, 713 (1971). *See also MDS Order*, 2 FCC Rcd at 2819 ¶¶ 6-7 (stating that carriers that do not first "petition the appropriate state, local or federal authority (*e.g.*, United States Attorney) for a ruling … may later be subject to legal action if the transmissions in question are found to be lawful").

[19] T-Mobile has earned the highest ranking in the annual J.D. Power and Associates Wireless Customer Care Performance Study for seven reporting periods in a row. This study measures consumer experiences with T-Mobile customer care representatives on the phone, at T-Mobile retail stores, and online. The most recent study, released in January 2008, found that T-Mobile ranked highest among all wireless providers in overall customer-care performance, and surpassed all of its competitors and the industry average by significant margins. *See generally* Press Release, *T-Mobile Continues to Receive Top Recognition for Quality Customer Care* (Jan. 31, 2008), available at < http://www.t-mobile.com/company/PressReleases_Article.aspx?assetName=Prs_Prs_20080131&title=T-
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In short, grant of the Petition could subject consumers to a flood of unwanted, objectionable and illegal messages.[20] Therefore, the Commission should preserve providers' ability to take appropriate action in the interests of their customers, just as it did in the closely analogous context of e-mail spam.[21]

II. NEITHER SMS NOR SHORT CODE PROVISIONING ARE COMMON CARRIER SERVICES OR CMRS.

A. SMS and Short Code Provisioning Are Information Services, Not Telecommunications Services, Under the Communications Act.

SMS messaging generally, and the messaging relating to CSCs in particular, do *not* entail the transmission of information "without change in form or content" – the hallmark of a "telecommunications service."[22] Rather, these services "offer … a capability for … acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" – all hallmarks of an "information service" (or of what before the Telecommunications Act of 1996 (the "1996 Act")[23] was referred to as an "enhanced service").[24]

Mobile%20Continues%20to%20Receive%20Top%20Recognition%20for%20Quality%20Customer%20Care>.

[20] The result Petitioners seek also would likely drag the Commission into a host of unnecessary disputes over the applicability of other common carrier regulatory obligations. *See, e.g.*, 47 U.S.C. §§ 201(b), 202(a) (rates and practices must be reasonable and not unreasonably discriminatory).

[21] *See Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 15927, 15942 ¶ 39 (2004) ("We believe that it is the industry itself that can help give consumers additional protections and abilities to avoid unwanted electronic mail from sources other than legitimate businesses.").

[22] 47 U.S.C. § 153(43), (46).

[23] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[24] *Id.* § 153(20). *See also* 47 C.F.R. § 64.702(a) (defining "enhanced service"). "Under the 1996 Act, any service with a communications component must be either a 'telecommunications service' or an 'information service' (but not both)." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 ¶ 34 n.50 (1998). The Commission has determined that "the differently-worded definitions of 'information services' and 'enhanced services' … should be interpreted to extend to the same functions." *Implementation of the Non-Accounting*
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Moreover, these processing capabilities are inextricably intertwined with the underlying transmission and are not used in the provision of a basic telephone service, refuting any suggestion that these offerings are adjunct to basic services.

1. SMS and Short Code Provisioning Offer the Capability for Acquiring, Storing, Transforming, Retrieving, Utilizing, or Making Available Information via Telecommunications.

SMS and CSC Provisioning Offer Protocol Processing To Facilitate Inter-Platform Operability. SMS and CSC provisioning both offer the user "a capability for" relying on protocol processing functionality – in effect, message translation – not associated with a telecommunications service.[25] In statutory terms, SMS and CSC messaging "transform" messages, and in doing so "change" their "form or content." Specifically, as noted above, T-Mobile's SMS offering permits users to exchange messages with users of e-mail and IM services, which requires significant protocol processing. SMS messages generally originate and terminate in SMPP protocol, which differs from the SMTP or TCP/IP protocols used to provision e-mail or instant-messaging communications. Among other things, e-mail and IM protocols use different fields and formats than SMS messages. To render the two systems compatible, T-Mobile's SMS platform must strip certain information, add other information, truncate

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Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996) (subsequent history omitted) ("*Non-Accounting Safeguards Order*"). *See also id.* at 21956-58 ¶¶ 104-07; *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11527 ¶ 51 (1998) ("*Report to Congress*").

[25] Whether the user makes use of a particular capability in every communication is immaterial; what matters for classification purpose is whether the service "offer[s]" any of the enhanced "capabilit[ies]" listed in the statute. *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4822-23 ¶ 38 (2002) (subsequent history omitted) ("*Cable Modem Order*"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, 20 FCC Rcd 14853, 14864 ¶ 15 (2005) (subsequent history omitted) ("*Wireline Broadband Order*").

messages too long for SMPP, and so forth.[26] Processing is particularly central for CSC-related messages because these messages are almost always converted from SMPP to TCP/IP (or vice versa) at the T-Mobile Content Gateway to facilitate communication between the end user's device and the content provider's computer system.

Commission precedent is clear that services offering protocol conversion are enhanced services: "[G]enerally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services."[27] Moreover, the sort of protocol conversion involved in translating an SMS message is precisely the sort contemplated by the Commission in defining an information service. In this context, "protocol conversion" refers to "the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks."[28] Such conversion is fundamentally unlike the "translation" that permits telephone calls to traverse disparate voice networks, which has been deemed "adjunct-to-basic" because it facilitates the provision of a *basic voice call*.[29]

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[26] For example, an e-mail message contains a "Subject" line that is absent from an SMS message, and text messages often contain headers and information designed for wireless use, such as callback numbers, which must be modified or stripped when the message is sent to an e-mail or instant-messaging platform.

[27] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, 7459 ¶ 4 (2004). *See also Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420-21 ¶ 97 (1980) (subsequent history omitted) ("*Computer II Order*").

[28] *Independent Data Communications Manufacturers Association, Inc.; Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, 10 FCC Rcd 13717, 13717-18 ¶ 4 n.5 (CCB 1995). *See also Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 ¶ 101 n.229; *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 14 FCC Rcd 14409, 14435 ¶ 47 & n.134 (1999).

[29] As explained in detail below, offerings that are *not* used to facilitate basic voice calls cannot be deemed adjunct-to-basic. *See infra* Part II.A.3. Indeed, the Commission expressly rejected calls to treat protocol processing as though it were the equivalent to such phone-to phone translation because that approach would lead to excessive regulation. *See Amendment to Sections 64.702 of the Commission's Rules and*

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SMS and CSC Provisioning Offer Storage and Retrieval of Initially Undeliverable Messages. SMS and CSC provisioning also offer the user the capability of "storing" and "retrieving" messages when a recipient is out of range. The T-Mobile SMS network used for both SMS and CSC messages is configured such that a message sent to an out-of-range user will be stored at the SMSC for up to 72 hours while the system attempts to contact the recipient and deliver the content. Since the very inception of the basic/enhanced dichotomy, the Commission has recognized that such storage is a hallmark of an enhanced (or information) service. While telecommunications services might involve incidental momentary storage, any longer storage is incompatible with a basic or telecommunications service classification: "[I]n a basic service, once information is given to the communication facility, its progress towards the destination is subject to *only those delays caused by congestion within the network or transmission priorities given by the originator*."[30] In contrast, services that permit what the Commission has called "asynchronous" communications offer "more than a simple transmission path," and are information services.[31] This description applies to SMS and CSC provisioning, both of which offer the capability of sending messages that will reside on the SMSC for up to 72 hours until they can be delivered.

SMS and CSC Provisioning Offer the Capability of Acquiring, Retrieving and Making Available Information from External Databases. SMS offers the ability to query electronic

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Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof; Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations, 2 FCC Rcd 3072, 3078 ¶ 46 (1987) (subsequent history omitted).

[30] *Computer II Order*, 77 F.C.C.2d at 420 ¶ 95 (emphasis added). *See also North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 F.C.C.2d 349, 363 ¶ 33 (1985) ("*NATA Centrex Order*").

[31] *Report to Congress*, 13 FCC Rcd at 11539 ¶ 78 & n.161.

databases and receive responses in text-message form using CSCs. For example, a user can send an SMS message containing search terms to "GOOGL," and will receive in response an SMS from Google containing the top hits for the search. A user might also query databases to "acquire" or "retrieve" sports scores, weather reports, movie times, or other information using short codes. In addition, content providers often rely on short codes to sell mobile content to users, and those sales are facilitated by SMS messaging. Thus, for example, SMS and short codes often play an integral role in the sale and downloading of ring tones, games, animation, or other digital content from providers' databases. As the Commission and its bureaus have held for decades, this sort of user interaction with stored data is one *sine qua non* of an information service.[32] To the end user, this functionality offers the capability for "acquiring" or "retrieving" information;[33] to the content provider, it offers the capability for "making available information."[34]

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[32] *See, e.g.*, *NATA Centrex Order*, 101 F.C.C.2d at 361 ¶ 27 (voice mail). *See also Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5988 ¶ 20 (1987) ("Talking Yellow Pages" service); *BellSouth Petition for Waiver of the Computer III Comparably Efficient Interconnection Requirements; Petition of the Verizon Telephone Companies for Waiver of Comparably Efficient Interconnection Requirements to Provide Reverse Directory Assistance*, 17 FCC Rcd 13881, 13884 ¶ 5 (WCB 2002) (electronic and operator-assisted reverse directory services). Because, in the case of SMS and CSC messaging, the user seeks the interaction with stored information, and does so for its own sake, not as a means of enabling a basic communication, this case is different than *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826 (2005) (subsequent history omitted), where the Commission found that an AT&T calling-card service that played users an advertising message before completing a phone call was a telecommunications service.

[33] In some cases, the functionality will offer the SMS *user* the capability of "making available information." For example, the social-networking service Twitter uses short codes to facilitate "micro-blogging" by SMS subscribers. A user will send a "micro-blog" (essentially, an SMS-sized report on a subject of the sender's choosing) to the relevant Twitter short code, and the message will be sent to the Content Gateway, which in turn will send the micro-blog to a list of recipients previously established by the sender. In this case, the CSC provisioning function allows the user not only to "acquire" or "retrieve" information but also to "make available" information.

[34] 47 U.S.C. § 153(20) (defining "information service"). "[T]he provision of access to a database for purposes other than to obtain the information *necessary to place a call* will generally be found to be an enhanced service." *U S WEST Communications, Inc. Petition for Computer III Waiver*, 11 FCC Rcd

(continued on next page)

The Billing and Collection Function Further Undermines Any Claim that CSC Provisioning Is a Telecommunications Service. CSC provisioning may also incorporate a third-party billing and collection function. In many cases, the content provider's agreement with T-Mobile generally obliges T-Mobile to bill and collect from the user all charges associated with the content provider's offerings. The Commission has long held that such third-party billing and collection "is not subject to common carrier regulation under Title II…,"[35] and that holding applies here.

2. The Enhanced Functionalities Associated With SMS and Short Code Provisioning Are Integral to the Offerings.

T-Mobile offers SMS and CSC provisioning only with the functionalities described above. A user cannot make use of the underlying transmission associated with SMS and CSC provisioning without also having access to the capabilities for acquiring, storing, transforming, retrieving, utilizing, or making available information discussed above. The transmission and processing involved in each offering together constitute a single, integrated information service, and they must be treated as such.

In rejecting arguments that broadband Internet access service constituted separate information service and telecommunications service offerings, the Commission found that a service involving both transmission and processing will be deemed an information service in its

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7997, 8003 ¶ 12 (CCB 1996) (emphasis added). *See also NATA Centrex Order*, 101 F.C.C.2d at 360 ¶ 26.

[35] *The Public Service Commission of Maryland and Maryland People's Counsel Applications for Review of a Memorandum Opinion and Order By the Chief, Common Carrier Bureau Denying The Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services; The Public Utilities Commission of New Hampshire Petition for Rule Making Regarding Billing and Collection Services*, 4 FCC Rcd 4000 ¶ 6 (1989), *aff'd sub nom. Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990). *See also Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, 1152 ¶ 1 n.2, 1168-69 ¶¶ 32-33 (1986).

entirety if it is offered to the subscriber as "a single, integrated service."[36] Like broadband Internet access users, T-Mobile's SMS and content-provider customers are only offered transmission capacity in conjunction with the applicable "capability for … acquiring, storing, transforming, retrieving, processing, utilizing, or making available information via telecommunications."[37] These services therefore must be deemed integrated information services.

3. SMS and Short Code Provisioning Are Not "Adjunct to Basic" Services.

Finally, SMS and CSC provisioning are not encompassed in the pre-1996 "adjunct-to-basic" category. The Commission has held that "services the Commission ha[d] classified as 'adjunct-to-basic'" under the pre-1996 regime should, following the 1996 Act, "be classified as telecommunications services, rather than information services."[38] This class, though, only comprises services that are "used in conjunction with 'voice' service," to "help telephone

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[36] *Cable Modem Order*, 17 FCC Rcd at 4821 ¶ 36. *See also id* at 4824 ¶ 41 ("The cable operator providing cable modem service over its own facilities, as described in the record, is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service."); *see also Wireline Broadband Order*, 20 FCC Rcd at 14863-64 ¶¶ 14-15. The Supreme Court affirmed this approach. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) ("*Brand X*") ("It is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product….").

[37] 47 U.S.C. § 153(20). In this sense, the information and transmission aspects of SMS services are one integrated service in a manner that is fundamentally unlike menu-driven calling-card that permit users separately to use information-retrieval functionalities, which the Commission found to be telecommunications service *when used to complete a call*: "[M]erely packaging two services together does not create a single integrated service," and where there is "simply … no functional integration between the information service features and the use of the telephone calling capability," the offering is not "'sufficiently integrated' to merit treatment as a single service." *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7295-96 ¶¶ 14-15 (2006) (subsequent history omitted). SMS users do not choose between transmission and processing/retrieval; rather, they use the transmission *to engage in* the processing/retrieval, and vice versa.

[38] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958 ¶ 107.

companies provide or manage basic telephone services."[39] Indeed, the adjunct-to-basic category was devised in order to permit the Bell Operating Companies to continue to provide certain enhanced functionalities that are "necessary to provide regulated telecommunications service."[40] There can be no claim that the protocol processing, storage and retrieval, and interaction with stored data made available by SMS and CSC provisioning serve the purpose of facilitating basic voice calls, much less that this is their *sole* purpose. Hence, these offerings cannot be deemed adjunct-to-basic.[41]

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[39] *North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 3 FCC Rcd 4385, 4389 ¶ 30 (1988). *See also Implementation of Section 255 of the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities*, 13 FCC Rcd 20391, 20411 ¶ 39 (1998); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958 ¶ 107.

[40] *NATA Centrex Order*, 101 F.C.C.2d at 356 ¶ 17. *See also id.* at 356 ¶ 18. Thus, the inquiry governing whether a given offering is "adjunct to basic" is *not* whether the service's enhanced characteristics are somehow "incidental" to the overall service – *i.e.*, whether they constitute an insignificant part of what otherwise is a ("basic") telecommunications service. Rather, the sole issue is whether "the purpose served by [the offering] is to facilitate the use of the basic network." *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16286 ¶ 61 (1999). *See also NATA Centrex Order*, 101 F.C.C.2d at 358 ¶ 23; *id.* at 359 ¶ 24 (adjunct-to-basic services involve processing but "are clearly 'basic' in purpose").

[41] In its recent *Roaming Order*, the Commission suggested that "consumers consider … SMS as features that are typically offered as adjuncts to basic voice services." *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, 15837 ¶ 55 (2007) ("*Roaming Order*"). Putting aside the question of how relevant the user's perception is to this particular inquiry, the fact is that SMS services are not adjunct to basic offerings in the formal sense, for reasons just described. To the extent the Commission meant only that users view SMS offerings as being related (and thus in that sense "adjuncts") to their mobile voice services, that may be true, but that is not, as described above, the long-established test for whether a service involving enhanced functionality will nevertheless be treated as a "basic" offering for purposes of determining whether it is a common carrier service. In any event, as Petitioners recognize, *see* Petition at 6-7, the Commission did not rule in the *Roaming Order* that SMS was a common carrier service, and, as discussed here, it may not do so consistent with the law.

B. Neither SMS Nor CSC Provisioning Are CMRS.

SMS messaging cannot be labeled CMRS because it is an information service. In its 2007 *Wireless Broadband Order*,[42] the Commission recognized that the Act precludes a service's simultaneous classification as an information service and as CMRS. Section 3(44) of the Act provides that "[a] telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications service."[43] However, an information service cannot also be a telecommunications service,[44] and so a telecommunications carrier cannot be treated as a common carrier in its provision of an information service. But section 332(c)(1)(A) specifies that a provider *will* be treated as a common carrier insofar as it provides CMRS. The Commission has, therefore, rightly concluded that an information service cannot also be CMRS.[45]

SMS also fails to satisfy the statutory requirement that a service must be "interconnected" in order to constitute CMRS. Section 332(d) defines a "commercial mobile service" as a "mobile service … that is provided for profit and makes interconnected service available."[46] As used in this definition, the term "interconnected service" refers to a service "that gives subscribers the capability to communicate to or receive communication from *all other users on*

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[42] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) ("*Wireless Broadband Order*").

[43] 47 U.S.C. §§ 332(d), 153(44). *See generally Wireless Broadband Order*, 22 FCC Rcd at 5919-20 ¶¶ 48-51.

[44] *See supra* note 24.

[45] *See Wireless Broadband Order*, 22 FCC Rcd at 5920 ¶ 51; *id.* at 5920-21 ¶¶ 54-56.

[46] 47 U.S.C. § 332(d)(1).

the public switched network."[47] T-Mobile's SMS offering does not, however, permit end users to transmit messages to users with landline phone numbers.[48] Those users, of course, constitute an extremely large portion of "users of the public switched telephone network[.]"[49]

III. THE COMMISSION LACKS ANCILLARY JURISDICTION TO APPLY COMMON CARRIER REGULATIONS TO SMS OR SHORT CODE PROVISIONING.

A. Section 3(44) of the Act Prohibits Common Carrier Regulation of a Common Carrier's Information Services.

The Commission's ancillary jurisdiction under Title I of the Act derives in part from section 4(i) of the Act, which limits such authority to actions that are "not inconsistent with" the Act itself.[50] Accordingly, "at the outset, it is appropriate to inquire, as did the Supreme Court in *Southwestern*, whether any statutory commandments are directly contravened by the assert[ion]" of ancillary jurisdiction.[51] The answer here is yes.

Section 3(44) of the Act explicitly prohibits the Commission from subjecting information services to common carrier regulation: "A telecommunications carrier shall be treated as a

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[47] 47 C.F.R. § 20.3 (emphasis added). *See also Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1434 ¶¶ 54-55 (1994) (subsequent history omitted); *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45.

[48] Petitioners assert that "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." Petition at 10. Whether or not a foreign standards-setting body has issued such a standard is irrelevant to the instant inquiry. What matters is whether SMS messages may be sent to all users on the PSTN in the United States. The answer to this question is no.

[49] According to the Commission's most recent statistics, there were over 175 million wireline access lines in service as of 2005. *See* Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service at Table 7.1 (rel. Feb. 2007).

[50] *American Library Ass'n v. FCC*, 406 F. 3d 689, 692 n.4 (D.C. Cir. 2005), quoting 47 U.S.C. § 154(i). *See also id.* at 700, quoting 47 U.S.C. § 303(r) (ancillary jurisdiction may be exercised only if the regulations are "not inconsistent with law").

[51] *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (footnote omitted) ("*NARUC*"), citing *United States v. Southwestern Cable Company*, 392 U.S. 157, 169 n.29 (1968).

common carrier under this Act only to the extent that it is engaged in providing telecommunications service…."[52] As Petitioners recognize,[53] if the Commission imposed non-discriminatory access requirements – which the courts have called the "*sine qua non*" of common carrier regulation[54] – on SMS and short code provisioning, it would be treating CMRS providers as common carriers with respect to their information services. Applying such core common carriage regulation to a non-common carrier service is therefore precisely what the statute prohibits.

In an analogous situation, the Supreme Court held that the Commission lacked ancillary jurisdiction to require cable systems to provide public access channels in a non-discriminatory fashion on the basis of its authority over broadcasting because the Act prohibited treating broadcasters as common carriers.[55] Significantly, the Court rejected the argument (raised by the dissent) that the cable leased access provisions were permissible because they only "imposed [a] requirement [that] might be termed a 'common carrier obligation[,]'" as opposed to deeming cable operators to be common carriers under Title II.[56] Rather, the court concluded that the

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[52] 47 U.S.C. § 153(44). *See also Brand X*, 545 U.S. at 975 ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers."). The fact that the Court referred in *dicta* to the Commission's ancillary jurisdiction over information service providers, *id.* at 996, does not speak to the issue of whether the Commission has ancillary jurisdiction to regulate an information service provider as a common carrier. *See also Wireless Broadband Order*, 22 FCC Rcd at 5916 ¶ 41.

[53] Petition at 2 & n.14, citing section 202(a) (if the Commission concludes that SMS and short code provision are *not* common carrier services, it should nevertheless "apply the non-discrimination provision of Title II"); *see also id.* at 7, 16.

[54] *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 210 n.5 (D.C. Cir. 2007), quoting *NARUC*, 533 F.2d at 608 ("[T]he *sine qua non* of common carrier status is that the entity has taken on a quasi public character, which arises out of the undertaking to carry for all people indifferently."). *See also* 47 U.S.C. §§ 201(a) ("It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."); 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination").

[55] *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

[56] *Id.* at 705 n.15 (emphasis in original).

provision's "mandatory wording" (along with its purpose) "preclude[d] Commission discretion to compel broadcasters to act as common carriers, *even with respect to a portion of their total services.*"[57] Where the Commission lacked authority to treat broadcasting as common carriage, it could not rely on its power over broadcasting to apply common carrier regulation to cable. The mandatory language of section 3(44) similarly precludes Commission discretion to compel CMRS providers to act as common carriers with respect to information services such as SMS and short code provisioning. The statute thus affirmatively denies the Commission authority to impose common carrier regulation on an information service; absent such authority, the Commission simply "may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance."[58]

B. Common Carrier Regulation of SMS and Short Code Provisioning Is Not Reasonably Ancillary to the Commission's Jurisdiction.

Even if section 3(44) did not bar common carrier treatment of an information service, the Commission would still lack ancillary jurisdiction in this context. For the Commission to assert ancillary jurisdiction, among other things, the regulations must be "reasonably ancillary to the Commission's effective performance of its *statutorily mandated responsibilities*."[59] Here, adopting a forced access/non-discrimination obligation with respect to SMS and short code provisioning would not be ancillary to any other statutory responsibilities. Imposing such regulation does not assist the Commission with respect to its statutorily authorized regulation of

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[57] *Id.* (emphasis added).

[58] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

[59] *American Library Ass'n*, 406 F.3d at 692 (emphasis added). *See also Southwestern Cable*, 392 U.S. at 177-78.

CMRS providers' common carrier services.[60] Indeed, Petitioners do not even make such a claim. Rather, they simply assert (without foundation) that SMS and short code provisioning regulation would be good for the *SMS/short code provisioning* market.[61]

Such assertions about the benefits of regulation of the information services themselves cannot serve as a basis for the exercise of ancillary jurisdiction. Rather, ancillary jurisdiction over non-common carrier activities of common carriers must be necessary to further effective regulation of *the underlying common carrier services*.[62] Ancillary jurisdiction in the telephone context cannot be sustained where regulation is not needed to avoid "threaten[ing] telephone service to the public."[63] Lack of regulation of SMS and short code provisioning does not threaten CMRS voice service to the public – or facilitate FCC regulation of CMRS voice services – in any way, shape or form, and therefore an assertion of ancillary jurisdiction is not legally permissible. Moreover, exercise of ancillary jurisdiction in these circumstances would undercut well-established Commission policy that "enhanced services should not be regulated

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[60] Notably, the Commission did not explicitly assert any ancillary jurisdiction to require SMS roaming. *See Roaming Order*, 22 FCC Rcd at 15837.

[61] For example, the claim that imposing non-discriminatory access to SMS and short code provisioning would "result in increased usage by those who otherwise would be blocked," Petition at 18, says nothing about how imposing such a requirement would further Commission goals regarding its Title II regulation of common carrier CMRS services. The same is true with respect to Petitioners' assertions that the absence of regulation "restricts free speech, is anticompetitive, and harms innovation by introducing financial uncertainty into the market." *Id.* at 18-19. All of this relates to the SMS/short code provisioning market, not the Title II common carrier CMRS market. Just as with other non-regulated markets, it is not for the Government to order the provision of content, force provision of assistance to competitors, or ensure financial certainty.

[62] *See, e.g., North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1293 (7th Cir. 1985) (ancillary jurisdiction upheld to ensure that subsidiaries do not become a "drain" on regulated telephone company revenues); *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 213 (D.C. Cir.), *cert. denied*, 461 U.S. 938 (1982) (ancillary jurisdiction upheld to avoid "higher rates for [the carrier's] monopoly services"); *GTE Service Corp. v. FCC*, 474 F.2d 724, 733 (2d Cir. 1973) (upholding ancillary jurisdiction to vindicate the Commission's "concern that its regulated carriers continue to provide the public with efficient and economic telephone service").

[63] *GTE Service Corp.*, 474 F.2d at 733, 734.

under the Act."[64] Indeed, the Commission found that even if there would in some specific cases be plausible grounds for regulating some enhanced services, the benefits of "regulating only [basic services] far outweigh any regulatory scheme that attempts to regulate some enhanced services and not others."[65]

The regulation sought by Petitioners would distort the market and potentially stymie its growth, forcing providers to respond to regulatory mandates reflecting a view of the market and of the relevant technology that is fixed in time, rather than being able to respond to ever-changing consumer needs. The Commission should reject such an outcome because it would serve neither consumers nor competition.

CONCLUSION

For the reasons described above, the Commission should deny the Petition in full.

Respectfully submitted,

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March 14, 2008

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[64] *Computer II Order*, 77 F.C.C.2d at 428 ¶ 114.

[65] *Id.* at 428-29 ¶ 115. *See also id.* at 422-23 ¶¶ 100-01 (stating that the basic/enhanced distinction "remove[d] the threat of regulation from markets which were unheard of in 1934 and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency").