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A Petition for Declaratory Ruling filed by eight parties in late 2007 could evolve into one of the most hotly debated issues facing the FCC in 2008, and could have a serious impact on a communications medium that is experiencing massive increases in popularity every month.

A joint petition was filed requesting that the Commission clarify the regulatory status of text messaging services, including short-code based services sent to and from mobile phones. The Petitioners (Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, and U.S. PIRG) asked the Commission to find that text messaging falls under the definition of “commercial mobile services.” Such a determination would place text messaging under the purview of Title II of the Telecommunications Act of 1996, which includes common carrier nondiscrimination rules.

Alternatively, the Petitioners have argued that if the Commission finds that text messaging falls outside Title II, it should apply non-discrimination rules via its ancillary jurisdiction, applying the non-discrimination rules to protect the public interest.

Text messaging is exploding into the communications landscape as a viable replacement for voice communications and a primary means of communication for many mobile phone users. The Petitioners have become increasingly concerned at the actions of many mobile carriers, such as Verizon, which have engaged in discriminatory behavior through refusing to issue “short codes” to certain parties based on the messages they intend to send via the service.

“Short codes” are five or six-digit codes administered by the Common Short Code Administration (“CSCA”), which rents out the codes to applicants for between \$500-1,000 per month. Upon the assignment of a short code from the CSCA to an applicant, each mobile carrier must provision that code to the customer, typically through a third party “aggregator” which provisions the code for multiple carriers. If a particular mobile

carrier fails to provision the short code, subscribers to that carrier will not be able to send or receive messages from that short code.

There have been documented instances of discrimination amongst mobile carriers over the past couple of years, including two high profile cases involving Verizon. In September, 2007, Verizon refused to issue a short code to an activist group called NARAL Pro-Choice America, saying it “does not accept issue-oriented (abortion, war, etc.) programs” and it would refuse service to “any organization 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.”

After a front page article was published in the *New York Times* on September 27, 2007, Verizon reversed its decision, but has maintained that it is entitled to prevent the assignment of short codes based on the content of messages being sent through its service.

Similarly, Verizon, T-Mobile and Alltel all admittedly refused to carry short code messages for a service called Rebtel because the company was attempting to provide competitive Voice over Internet Protocol services which potentially take business away from the mobile carriers. In this instance, the mobile carriers did not have a change of heart. In fact, a spokesman for Verizon confirmed that the company does not intend to cease discrimination in text messaging services.

In a *Public Notice* issued on January 14, 2008, the Commission opened up a Comment window to seek a full record on the issue and move towards making a determination on how text messaging should be classified. The Commission granted a request from CTIA to extend the Comment deadline one month, with Comments now due on March 14, 2008, and Reply Comments due 30 days later.

Similar to the landmark *Brand X* case in 2005 in which the Supreme Court determined that a cable internet provider is an “information service” and not a “telecommunications service,” the Commission’s answer to this Petition for Declaratory Ruling could have significant impact on how a primary means of communication is classified and regulated. It is quite possible that the Commission’s decision, regardless of the outcome, will be challenged and eventually determined by the Supreme Court as well.

FHH clients with questions regarding this proceeding or wishing to participate should contact their FHH attorney immediately, as the deadline to file Comments is looming and the consequences of the outcome are significant.