

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52
)	

REPLY COMMENTS OF THE MOBILE INTERNET CONTENT COALITION

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The Mobile Internet Content Coalition (“MICC”), through counsel, file the following reply comments in response to the Commission’s Notice of Proposed Rulemaking, *Preserving the Open Internet*, GN Docket No. 09-191 and *Broadband Industry Practices*, WC Docket No. 07-52 (rel. Oct. 22, 2009) (“NPRM”). The MICC’s reply comments primarily address Sections IV.C, IV.D and IV.H.3.b in the Notice of Proposed Rulemaking regarding consumers’ access to the content of their choosing without improper interference by wireless providers.

I. INTRODUCTION AND SUMMARY

The MICC consists of entrepreneurial technology and marketing companies that share a common vision of making access to the Internet from a Mobile Device (the “Mobile Internet”) to obtain lawful content, including text message based content, as convenient or even more convenient for consumers as is the traditional Internet. The companies that make up the MICC include businesses of all sizes that provide consumers content over the Mobile Internet, and include 4INFO, Inc. (“4INFO”), Myxer Inc. (“Myxer”), mobileStorm, Inc. (“mobileStorm”), and many others (collectively, “Mobile Content Providers”). Consumer desire for the content the companies of the MICC provide has increased exponentially and will only continue to increase. The success of these new, innovative companies depends in large measure on the leadership of this Commission in ensuring that consumers have an unfettered ability to transact with the mobile device of their choosing to access and obtain the content of their choosing without the influence or filtering of the Mobile Internet service provider. The Commission’s protection of consumer choice and support for this emerging market

segment will also foster economic growth and the creation of jobs. Indeed, it is widely recognized that innovative new companies are the engine of job creation.¹

The need to apply open Internet principles to wireless networks is paramount. Open Internet principles benefit consumers, companies, and the economy as a whole. And, as technology has evolved, the Internet is no longer relegated solely to a wired computer. Mobile commerce, whether over the mobile Internet, SMS, or other means, has experienced substantial growth, fueled by consumers' desire for new content, products, and services that are available on the growing line-up of mobile devices. The Commission should nurture this growth to benefit consumers and ensure that entrepreneurs can continue to innovate. However, consumers' access to the content of their choosing through the Mobile Internet faces considerable challenges that will only be exacerbated without application of open Internet principles to wireless networks.

A limited number of wireless carriers control the vast majority of the wireless market. Four carriers – Verizon Wireless, AT&T, Sprint-Nextel, and T-Mobile – control 90% of the U.S. wireless market, with Verizon and AT&T combined in control of 60% of the wireless market.² In conjunction with that consolidation, access to the Internet by a mobile phone is becoming increasingly common. Mobile Internet usage has escalated as wireless networks have been upgraded and mobile phones have included data features. For the year 2009, data traffic exceeded voice traffic and that will only increase

¹ Thomas Friedman, Op-Ed, *Start-Ups, Not Bailouts* (April 3, 2010), 2010 WLNR 6962167, available at <http://www.nytimes.com/2010/04/04/opinion/04friedman.html> (last visited April 5, 2010).

² Office of Senator Herb Kohl, Press Release, *Kohl Examines Causes of Rising Text Message Pricing*, June 16, 2009, available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2870 (last visited April 7, 2010).

in 2010.³ Some analysts predict mobile phones will eventually become the primary means of accessing the Internet by U.S. consumers. Text messaging and the Mobile Internet are driving growth in the wireless marketplace. The United States became the number one text messaging nation in the world with 592 text messages per subscriber per month, putting the United States past the Philippines.⁴ Text messages are increasingly becoming another means for consumers to access the Mobile Internet and the content there. Thus, text messages are a critical and growing part of the Mobile Internet.

Allowing wireless network operators to avoid open Internet principles will harm consumers, will stunt growth in the marketplace, and will reduce competition. This is not a theoretical problem, but evidenced by numerous examples of wireless carriers blocking text messages based on ad hoc or unexplained reasons. The companies in the MICC face barriers to entry into the wireless marketplace and barriers to operation based on wireless carrier control. As described below, wireless carriers exert control over these companies and others that consumers wish to reach through text messages. Through pre-approval processes, the wireless carriers have the ability to block text messages for any reason (or no reason), and to audit the content provided by Mobile Content Providers. The wireless carriers also control the billing process in a way that would never apply to the traditional Internet. Given its growth and widespread use to access the Mobile Internet, text messaging must be considered as part of the debate on whether to treat the wireless networks any differently under open Internet principles.

³ Chetan Sharma Consulting, US Wireless Data Market Update - Q4 2009 and 2009, *available at* <http://www.chetansharma.com/usmarketupdate2009.htm>.

⁴ *Id.*

The Commission's stated goal is "promoting innovation, investment, research and development, competition and consumer choice, in order to support a thriving Internet and robust mobile wireless broadband networks." NPRM ¶ 157. This can only be achieved by applying open Internet principles to wireless networks, including the Mobile Internet and text messages.

II. WIRELESS CARRIER CONTROL OVER CONTENT ON THE MOBILE INTERNET IS UNNECESSARY, INAPPROPRIATE, AND STIFLING

Consumers benefit from an open Internet. Through the Internet, one good idea can reach millions of consumers. As noted in the NPRM:

As a platform for commerce, [the Internet] does not distinguish between a budding entrepreneur in a dorm room and a Fortune 500 company.... The Internet's accessibility has empowered individuals and companies at the edge of the network to develop and contribute an immense variety of content, applications, and services that have improved the lives of Americans.

NPRM ¶ 4. That openness should encompass the growing mobile marketplace on wireless networks, including text messages. Consumers and the public should have the same easy access to content, applications, and services through the Mobile Internet as easily as they do through the traditional Internet.

In earlier comments, 4INFO and Myxer described short codes and how they work in the mobile marketplace, as well as some of the problems that Mobile Content Providers faced.⁵ In brief, short code campaigns allow consumers to send a text message to a particular short code and the company that has the short code can then

⁵ See Comments of Myxer, Inc., *In the Matter of Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-157, and *A National Broadband Plan For Our Future*, GN Docket No. 09-51 (Sept. 30, 2009); Comments of 4INFO, Inc., *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52 (Jan. 14, 2009).

interact with the consumer through the text messages that are sent back and forth between the consumer and company. Short codes have been developed to make it even easier for consumers to obtain lawful content of their choosing through text messages that may also include links for easy access to the Mobile Internet. Indeed, many Mobile Content Providers are turning short codes into a simple and easy means to access the Internet from mobile phones to obtain content and information.

The innovative companies of the MICC have recognized the desire of consumers to access more and more content from their mobile phones. Along with this greater desire for mobile content is the increasing use of text messages by mobile phone users. Thus, companies like 4INFO give consumers the ability to access content and the Mobile Internet through text message alerts on subjects of their choosing, such as the latest news, sports scores, or the weather. Further, other companies with content to distribute, like the newspaper USA Today, use 4INFO's application to distribute text messages to their users with that content. Companies like Myxer provide consumers access to a full spectrum of mobile entertainment and personalization content through text messages and directly on the Mobile Internet, such as ringtones, wallpapers, videos, apps, and mobile games, much of which is free. In addition, Myxer also makes it easy for lesser known artists and content creators to participate in the mobile economy by providing a distribution platform in the mobile marketplace for those artists' content. All artists can use Myxer's mobile web site to reach a vast audience to distribute and monetize their content in the mobile marketplace. Consumers and artists who desire such content and services should not be faced with limitations imposed by the wireless carriers (limitations which are not found on the traditional Internet). Finally mobileStorm

provides businesses of any size with a web-based marketing platform, allowing the creation and launch of a mobile marketing service for consumers within minutes. On a short code shared by hundreds of companies, mobileStorm customers can immediately begin building an opt-in database of consumers who are eager to receive text messages from their favorite brands.

Despite the significant and still growing consumer desire for the content that Mobile Content Providers have and can help distribute, the Mobile Content Providers have often faced barriers to entry and participation in the mobile marketplace caused by the considerable control that wireless carriers exert over the mobile marketplace. First, Mobile Content Providers must have any short code campaign approved by the mobile carriers before the wireless carriers will recognize and forward the short codes sent by their users. This approval process can take up to 12 weeks time, which is significantly longer than it would take to register a domain name on the Internet. Further, wireless carriers maintain the ability to refuse any campaign that fails some standard or guideline created by the wireless carrier. Sometimes those guidelines are explained, but more often than not, a campaign is denied without a clear explanation of what exactly was objectionable. Wireless carriers also maintain the authority to deny any campaign that may be competitively risky. For example, Verizon refused to approve the short code campaign of a company, Rebtel, which would have allowed Verizon subscribers to make cheaper international calls than the subscriber could through Verizon.⁶ Another

⁶ See Rebtel played by the rules. Now it's Verizon's turn, <http://blog.rebtel.com/2008/02/20/rebtel-played-by-the-rules-now-it%E2%80%99s-verizon%E2%80%99s-turn/> (last visited April 4, 2010); Bruce Meyerson, *Not on Our Network, You Don't*, BusinessWeek, Dec. 13, 2007, available at

important example was when Verizon refused to approve the short code campaign of NARAL Pro-Choice America because NARAL's pro-choice text messages were "controversial or unsavory."⁷ In the face of widespread criticism, Verizon allowed NARAL's campaign, but continues to block Rebtel's.

Approval by the wireless carriers does not end the potential issues that Mobile Content Providers may face in providing consumers with the choice and the content they desire. Even after a campaign is "approved" – we query whether and why network operators can claim "approval rights" – Mobile Content Providers may suddenly find their short codes blocked by wireless carriers or the aggregators that the Mobile Content Providers often use to link to the wireless carriers. Blocking occurs because the wireless carrier has unilaterally determined that, similar to the campaign approval process, some standard or guideline has been violated by the Mobile Content Provider. And, like the campaign approval process, the wireless carriers may or may not explain to the Mobile Content Provider exactly what standard has been violated. A recent example of blocking based on unclear standards involves Sprint threatening to block a charitable short code campaign set up by Catholic Relief Services ("CRS") in response to the

http://www.businessweek.com/magazine/content/07_52/b4064034911363.htm (last visited April 4, 2010).

Rebtel also claims that AT&T has converted Rebtel short code messages so that they are not stored in the user's mobile phone after the message is closed. AT&T: Please stop playing games, <http://blog.rebtel.com/2008/02/28/att-please-stop-playing-games/> (last visited April 4, 2010).

⁷ Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. Times, Sept. 27, 2007, at A1, 2007 WLNR 18960271, available at <http://www.nytimes.com/2007/09/27/us/27verizon.html> (last visited April 4, 2010).; Adam Liptak, *Verizon Reverses Itself on Abortion Messages*, N.Y. Times, Sept. 28, 2007, at A20, 2007 WLNR 18998680, available at <http://www.nytimes.com/2007/09/28/business/28verizon.html> (last visited April 4, 2010).

earthquake in Haiti because Sprint claimed it was unsure whether CRS was a legitimate charity.⁸ Sprint acted through the intermediary, the aggregator, who threatened to block the CRS text message charitable campaign.

Myxer and 4INFO have also both faced this unexplained blocking by major wireless carriers or aggregators as outlined in their prior comments. The aggregator is ultimately dependent on the wireless carriers, so the aggregator responded to the carrier's allegations without concern for whether or not Myxer and 4INFO had a prior opportunity to respond. Ultimately, but only after their services were interrupted, 4INFO and Myxer were able to resolve the concerns raised by the wireless carriers, but each company faced a crippling blow to their business when the millions of subscribers of a particular wireless carrier were unreachable for significant periods of time. mobileStorm has hundreds of companies as clients that share a single short code to reduce the expense to the individual company. If that one short code is blocked, consumers would not be able to reach mobileStorm's many clients and obtain the content those clients have to distribute.

That of course is the very definition of irreparable harm – a consumer blocked yesterday cannot go back in time and access the content of their choosing. For the period of blocking, the “bell cannot be unrung.” Moreover, even once blocking ceases, the harm may continue as some consumers continue to believe that they cannot transact with these companies. Any period of disruption may cause a consumer to

⁸ See Letter from Public Knowledge and Free Press to Chairman Genachowski, Mar. 25, 2010, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020397339>; John Schwartz, *Catholic Charity and Sprint Tangle Over Texting*, N.Y. Times, Mar. 24, 2010, 2010 WLNR 6163633, available at <http://www.nytimes.com/2010/03/25/technology/25texting.html> (last visited on April 4, 2010).

abandon a service permanently. 4INFO and Myxer have experienced the steep drop of consumer usage during blocking followed by a slow (but not necessarily full) recovery to prior usage levels. These problems are serious, real, and continuing.

Finally, the wireless carriers also maintain a unilateral, standardless authority to audit the Mobile Content Provider campaigns for content that the wireless carriers disapprove of. In other words, the wireless carriers maintain that they have a right to police the content offered by Mobile Content Providers. These audits are ultimately duplicative of existing regimes such as the Digital Millennium Copyright Act of 1998 (the “DMCA”), which protect copyright holders from unauthorized use. The audits are also duplicative of the industry guidelines on operation and content created by the Mobile Marketing Association (“MMA”). The MMA guidelines are developed by major wireless carriers and Mobile Content Providers to benefit the consumer and are designed to be followed by wireless carriers and content and application providers in developing mobile marketing campaigns. The audits become yet another method by which wireless carriers assert control over Mobile Content Providers.

Thus, Mobile Content Providers face considerable barriers to entry into and operation in the mobile marketplace. A Mobile Content Provider never knows when it might face a blocking challenge or an audit of its content and/or practices by a wireless carrier. And, any Mobile Content Provider that offers content or a product that competes with the wireless carrier is at risk that it will face some kind of challenge by a wireless carrier. Consumers suffer because a means of accessing the Mobile Internet may be closed without warning. Applying open Internet principles to wireless networks and the short code campaigns would prevent many of these overreaching practices by the

wireless carriers. Principles of nondiscrimination and encouraging increased competition will allow consumers to access more lawful content and encourage more Mobile Content Providers to enter the market. Consumers benefit from choice, and choice is what Mobile Content Providers give consumers. A consumer should not be limited by the wireless carrier for open and easy access to the content of their choosing.

III. COMMERCE ON THE MOBILE INTERNET SHOULD BE AS FREE AND OPEN AS COMMERCE ON THE WIRED INTERNET

Mobile Content Providers also often face challenges in obtaining compensation from consumers for the content provided by the Mobile Content Providers. As part of the wireless carriers' requirements for supporting a short code campaign and in order to sell content, a Mobile Content Provider is required to exclusively use the billing systems set up by the wireless carrier, so that any charge for content must appear on the wireless subscriber's bill. While this billing system has its advantages, it prevents a Mobile Content Provider from obtaining compensation for mobile content outside of the wireless carrier's billing regime. A Mobile Content Provider has no choice but to use the wireless carrier's billing system if they want the carrier to support their short code campaign. Mobile Content Providers also face a significant wait to receive the payout from the wireless carrier of the money a consumer has paid for the Mobile Content Provider's content – as long as 90 days from when the consumer purchases the content. There would be no wait if the consumer could purchase content directly, of course. And, a consumer has no other method to pay for content except through the wireless carrier's bill.

Further, wireless carriers often demand a substantial portion of the compensation paid for the content, a percentage that is out of line with fees charged for

similar transactions conducted on the traditional, wired Internet. In fact, in an open Internet environment, the Internet service provider typically does not dictate payment methods nor take any percentage of the sales conducted over their network. On the other hand, wireless carriers sometimes receive as much as a 50% cut of the compensation paid by the consumer for the Mobile Content Provider's content. This is the equivalent of broadband provider requiring a 50% of any content purchased on a website. This substantial cut is demanded by the wireless carrier for the benefit of being on the wireless carrier's bill, which the wireless carrier requires anyway. A Mobile Content Provider could decide that the cut required by the wireless carrier was economically reasonable for the convenience of being on the wireless carrier's bill. However, a Mobile Content Provider currently does not have that choice as there is no alternative if they want their campaign to be supported. Consumers also have no choice in the matter. Thus, Mobile Content Providers and consumers alike are subject to the billing practices of the wireless carrier and the wireless carrier is able to obtain a substantial premium from the Mobile Content Provider for the privilege of appearing on the wireless carrier's bill. Consumers potentially pay more for content because Mobile Content Providers, who must also pay the content owners/distributors, must cover the cut that wireless carriers require to appear on the wireless carrier's bill.

Finally, the wireless carriers often offer competing content to the Mobile Content Providers. If a Mobile Content Provider offers a free alternative to the wireless carrier's paid content, the wireless carrier has an incentive to preference their own content in order to collect fees. By avoiding the wireless carrier's billing system by offering free content, the Mobile Content Provider may face greater scrutiny by the

wireless carrier, because the wireless carrier does not get any sort of cut in that instance. The requirement by wireless carriers that Mobile Content Providers operating with short code programs use the wireless carriers' billing systems should be opened so that consumers have more choice in how to purchase lawful content on the mobile Internet. For example, an iPhone user can access iTunes and buy a song over the Mobile Internet outside of the wireless carriers' billing system, but a mobile phone user buying the same song through a short code would find that charge on their wireless bill. The only difference is the use of a short code and the wireless carriers' requirement that short code transactions appear on the wireless carriers' bill.

Consumers should be able to avoid the wireless carrier's billing regime if they want to. This would open up competition and Mobile Content Providers would potentially be able to lower the cost of paid content because they would not have to provide an unreasonable percentage of sales as a cut to wireless carriers.

IV. CONCLUSION

“As the Commission has observed, ‘[s]o far in the Internet’s history,’ the basic standards underlying the operation of the Internet ‘have created “the equivalent of perfect competition . . . among applications and content . . . *with a minimum [of] interference by the network or platform owner.*”’” NPRM ¶ 52 (emphasis added) (citations omitted). Thus, companies such as Amazon.com can operate freely on the Internet and can sell books and music with minimal, if any, interference by the broadband provider. Amazon does not need to get approval from the broadband provider to set up its website. The broadband provider cannot block Amazon’s website if the broadband provider has a website that sells books and music in competition with Amazon. The broadband provider cannot monitor the music that Amazon sells for copyright violations

or for “controversial or unsavory” content and demand that Amazon cease selling anything the broadband provider disagrees with. The broadband provider cannot block Amazon emails if it thinks Amazon is sending unsolicited messages to the broadband provider’s subscribers. The broadband provider cannot demand that Amazon only charge its customers through the broadband provider’s bill and cannot demand that 50% of the sale price of a book sold by Amazon be paid to the broadband provider.

In stark contrast, wireless carriers can do and have done all of these practices to Mobile Content Providers. As described above, wireless carriers exert control over the wireless network in such a way that has already and will continue to harm competition and reduce consumer choice.

Consumers will only benefit from applying open Internet principles to wireless networks. Consumers will have access to more content and the marketplace will benefit from increased competition. Currently, there is much more than a minimum of interference by the wireless network owners in the mobile Internet and consumers suffer due to the lack of competition that is a result of this interference. This is not a theoretical problem – numerous Mobile Content Providers have faced challenges caused by the control wireless carriers exert over the wireless networks. Text messages are an increasingly common means to access mobile content and the mobile Internet, and should be unrestricted. Nondiscrimination principles as applied to the wireless networks will benefit consumers and the marketplace. From a business’s and consumer’s point of view, the Internet is the same whether it is accessed from a desktop computer or a mobile device. In fact, consumers are demanding to have easy and open access to the information and content they want from the Internet from multiple devices. Similarly,

the open Internet principles supported by the Commission should apply to all providers of broadband access, whether wired or wireless.

For all these reasons, the Commission should encourage open access to wireless networks, including the receipt of text messages.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jason A. Koslofsky, hereby certify that on this 26th day of April 2010, the foregoing Reply Comments of the Mobile Internet Content Coalition were served on the following persons via ECFS and electronic mail:

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