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February 23, 2017

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Filing,
Zipwhip, Inc., WC Docket No. 95-155; WT Docket No. 08-7

Dear Ms. Dortch:

Zipwhip, Inc. submits this letter to supplement the record and respond to the recent *ex parte* meetings by Somos, Inc. with the Federal Communications Commission ("Commission" or "FCC") discussing Somos' petition for declaratory ruling seeking new rules that require registration of text-enabled toll-free numbers.[1] Somos continues to make claims about the relief it seeks that are at odds with any sensible reading of the Commission's declaratory ruling authority and that ignore the vast difference between the existing toll-free rules adopted for voice services and the establishment of new rules relating to texting services. The fact is the relief sought by Somos is procedurally improper and would represent a significant expansion of the scope of the Commission's existing rules for the management of toll-free number assignment for voice services. Such a novel ruling could not be made by a bureau (and is unnecessary and unwise for other reasons).

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1 Petition of Somos, Inc. for a Declaratory Ruling Regarding Registration of Text-Enabled Toll-Free Numbers, WC Docket No. 95-155 (filed Oct. 28, 2016) (Petition). *See* Public Notice, Wireline Competition Bureau Seeks Comment on Somos, Inc. Petition for Declaratory Ruling Regarding Registration of Text-Enabled Toll-Free Numbers, DA 16-1259 (rel. Nov. 4, 2016).

In its January 26, 2017 *ex parte*, Somos asks the Wireline Competition Bureau (Bureau) to act on its petition because "the relief that Somos seeks constitutes a straightforward application of the Commission's existing numbering rules and policies."[2] Somos' claim glosses over the fact that there are no FCC rules relating to the text-enabling of toll-free numbers at this time.[3] Somos' Petition asks the Commission to establish two obligations that are not present in any existing FCC regulations — an obligation to obtain RespOrg authorization (rather than subscriber authorization) before text-enabling a toll-free number and an obligation to register all text-enabled toll-free numbers in a private database created by Somos called the Texting and Smart Services (TSS) Registry.[4]

Somos' requests are inconsistent with the purpose of a declaratory ruling. The Commission has the authority to issue a declaratory ruling on its own motion or in response to a petition.[5] However, this procedural tool is intended to be to be used for the specific purpose of "terminating a controversy or removing uncertainty."[6] Declaratory rulings "may not be used to substantively change a rule."[7] A rule that would "effectively amend" an earlier rule is a

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2 *See Ex parte* filing of Somos, Inc., WC Docket No. 95-155, WT Docket No. 08-7 (Jan. 26, 2017) (Somos Ex Parte); *see also Ex Parte* filing of Somos, Inc. (Feb. 15, 2017).

3 Opposition of Zipwhip, Inc., WC Docket 95-155, WT Docket 08-7 (filed Dec. 5, 2016). This point is also supported by filings of a number of key parties in the record for the Petition. *See e.g.,* Comments of AT&T Services, Inc., WC Docket 95-155, WT Docket 08-7 (filed Dec. 5, 2016); Comments of CTIA, WC Docket 95-155, WT Docket 08-7 (filed Dec. 5, 2016).

4 *See* Petition at 1-2.

5 47 C.F.R. § 1.2.

6 *Amendment of Part 15 of the Commission's Rules to Amend the Definition of Auditory Assistance Device in Support of Simultaneous Language Interpretation*, ET Docket No. 10-26, Order and Notice of Proposed Rulemaking, FCC 11-133 (rel. Sept. 16, 2011) ¶ 10 (Part 15 Amendment Order); *see City of Arlington, Texas v. FCC*, 668 F.3d 229, 241 (5th Cir. 2012) (explaining that Commission rule §1.2 granting the power for declaratory rulings derives from § 554(e) of the APA).

7 *See* Part 15 Amendment Order ¶ 2 (declining petitioner's statutory interpretation because it would expand the definition so significantly it would essentially be a rule change); *see also Petition of STi Prepaid, LLC for Declaratory Ruling, or in the Alternative, Petition for Waiver*, 28 FCC Rcd 00153 (2013) (denying a petition for declaratory ruling, but granting a waiver, because the existing rule was clear and "no controversy or uncertainty exists"); *Commnet Wireless, LLC Petition for Declaratory Ruling*, 27 FCC Rcd 4324

rulemaking and must therefore, comport with the proper notice-and comment requirements under the Administrative Procedure Act (APA).[8]

Somos maintains "[t]here is no obstacle to the Commission acting pursuant to informal adjudication – that is, by issuing a declaratory ruling – because the declaration that Somos seeks would not alter existing regulation adopted through notice-and-comment rulemaking."[9] Somos simply is wrong in this assertion. Somos does not – and certainly cannot – identify any rules that explicitly reference texting. Somos does not – and certainly cannot – identify any place where the Commission has previously stated that its toll-free rules apply to texting services. Somos' request would rewrite the current regulations, and would alter regulations that were adopted for voice services to apply to an entirely different context.

Moreover, the requested rulings clearly are prospective and prescriptive norms, which are hallmarks of rules adopted through the rulemaking process. This request is similar to the request addressed in Commnet, whereby the petitioner sought to establish a rule relating to pole attachments on a "prospective only" basis. In that case, the Commission explained:

> In its Petition, Commnet does not suggest that the requirement it has proposed is mandated by any statutory provision, rule or order, and Commnet does not point the Commission toward any such authority that it contends should be interpreted or clarified as inherently imposing this requirement. Rather, it requests that the Commission invoke "principles" of antitrust or telecommunications law to establish a new requirement that would extend to CMRS providers obligations similar to those that section 224 of the Act currently places on utility pole owners. Thus, the

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(WTB 2012) (dismissing petition and noting that the Commission uses the rulemaking process to promulgate new requirements); *North American Telecommunications Association*, 101 FCC 2d 349, 371 (1985) (classification of services under existing rule may be accomplished through declaratory ruling, but rule changes more appropriately handled in rulemaking).

8 *See U.S. Telecom Association v. FCC,* 400 F.3d 29, 34-35 (D.C. Cir. 2005) (explaining the difference between a declaratory ruling versus a rulemaking).

9 Somos Ex Parte at 1.

> relief requested cannot appropriately be imposed by a declaratory ruling.[10]

Similar to Commnet, Somos' request does not point to any statutory provision, rule or order that inherently imposes the requirements it seeks.

Contrary to Somos' suggestions, the result it seeks is novel. The Commission has never stated that its rules governing the assignment of toll-free numbers for voice services apply to texting or any other use of those numbers, nor has the FCC even contemplated this issue before the Somos petition. Somos has not yet identified the specific statutory provision or rule it believes governs this matter, not in the Petition and not in its brief *ex parte* filings. Instead, Somos seeks to invoke principles of Commission regulation, most notably, FCC authority under 47 U.S.C. § 251(e)(1), to justify extension of the Commission's voice regulations to toll-free texting. Somos' *ex parte*, similarly, cites only to Section 52.101(b) as alleged authority for the outcome it seeks. Section 52.101(b), however, is a definition section, and it only provides a definition of a Responsible Organizations (RespOrg). It does not impose any obligation or establish any requirement for any activity in relation to the toll-free database. It simply defines (for voice purposes) what a RespOrg is. Put simply, nowhere has the FCC previously adopted a rule or order that even arguably applies to text-enabled services.

Somos' second request – that text-enabled toll-free numbers be registered in Somos' Texting and Smart Services ("TSS") Registry – is even less grounded in Commission rules. Indeed, in the paragraph in Somos' January 26, 2017 *ex parte* that is devoted to this request, Somos does not cite to a single FCC rule that allegedly already governs such registration.[11] It asserts without any citation that SMS/800 is the "definitive registry" and that Somos is the administrator for all toll-free services. These are assertions that, if the matter were to be decided by declaratory ruling, require support to demonstrate that the Commission intended to apply its rules to non-voice services, but Somos offers no such evidence. Instead, Somos claims that the TSS Registry is an "extension of" the SMS/800 database used for voice services. One could hardly find a better admission that existing FCC rules do not govern this database. Whether extension of the rules to texting services is appropriate is a core policy question, one that has not been decided and can be decided only through a rulemaking process.

Furthermore, not only is the vehicle improper, but Somos' preferred driver also is wrong. It is clear that even if this matter were suitable for a declaratory ruling, the specific changes that Somos requests would represent a significant departure from the Commission's

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10 Commnet, 27 FCC Rcd 4324 at ¶ 3 (footnotes omitted).

11 Somos Ex Parte at 2.

current policies. The substance of Somos' request is novel and should not be acted on under delegated authority by the Bureau. Somos acknowledged the novelty of this matter in remarks at the March 2016 meeting of the North American Numbering Council by Gina Perini, Somos President. Ms. Perini explained:

> What happened was that the folks know messaging is not a regulated area. It's not regulated in the same way that we understand the process of using wireline numbers for voice. We are the administrator for that, for voice. There's definite processes around how numbers are being used on the voice side. In messaging, that doesn't exist in the same way.[12]

Ms. Perini also stated "[w]e then were asked to develop a solution to deal with the numbering issues around how do you assign these numbers that are used in voice now in messaging .... So we did and created the peer registry to the SMS/800 called the TSS Registry."[13] The SMS/800 database authorized by the Commission's rules is wholly distinct from Somos' TSS registry and the registry requirement Somos seeks cannot be simply shoehorned into the existing toll-free database rules. The changes Somos seeks would impose wholly new obligations on relevant stakeholders and upend the established principle of toll-free numbering, which is that the subscriber of record is the sole authority regarding use of the number.

Any effort by the Bureau to act on delegated authority to implement Somos' request would be inconsistent with the policy positions of the Commission under its new Chairman, Ajit Pai, and with the new Administration as a whole. On January 30, 2017, the White House issued an executive order which expresses the new Administration's policy that "it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations."[14] Yet, Somos' request would impose substantial new costs on an entirely new industry – the texting industry. The imposition of such costs based on the business preferences of one provider is doubly improper.

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12 *See* North American Numbering Council (NANC), Meeting Transcript (March 24, 2016) at 45.

13 *See id.*

14 *See* Presidential Executive Order on Reducing Regulations and Controlling Regulatory Costs, rel. Jan. 30, 2017, *available at* https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

Moreover, Somos' claims of market failure ring hollow. A month before being named Chairman, then-Commissioner Pai spoke to the Free State Foundation, cautioning, "[P]roof of market failure should guide the next Commission's considerations of new regulations. And the FCC should only adopt a regulation if it determines that its benefits outweigh its costs."[15] Using the Commission's *Open Internet Order* as his example, Chairman Pai expressed disagreement with the decision to regulate that market (a much larger and much more mature market than toll-free texting), noting that "'[o]ne could read the entire document . . . without finding anything more than **hypothesized harms**. Or in other words, public-utility regulation was a solution that wouldn't work for a problem didn't exist."[16]

The actions Somos seeks parallel those Chairman Pai identified as problematic. Somos' Petition does not identify any legitimate market failures and reference at most one anecdotal example of an attempt to improperly register a toll-free number, a situation Somos manufactured that ultimately resulted in no harms to consumers. In its reply comments, Zipwhip noted that claims by Somos and its RespOrgs are based only on theoretical harms because there is not, nor has there ever been, an epidemic of toll-free numbers being hijacked or text-enabled without the subscriber's authorization and intent.[17] In addition, RespOrgs are not any better positioned to verify the account subscriber. The true subscriber is the only individual that can provide clarity around the use and authorization of its number and this is a principle that Zipwhip respects and one that guides its processes for text-enabling toll-free numbers. Indeed, the urgent problem regarding the integrity of the toll-free numbering system and lack of confidence in the system that Somos is trying to convey does not exist.

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15 Remarks of FCC Commissioner Ajit Pai before the Free State Foundation's Tenth Anniversary Gala Luncheon, Dec. 7, 2016.

16 *Id.* (emphasis added). Furthermore, Chairman Pai has expressed serious concerns about the use of delegated authority by Commission bureaus to act on policy matters without the awareness and consideration of the full Commission. *See e.g.*, Statement of FCC Commissioner Ajit Pai on the FCC's Midnight Regulation of Free Data, Jan. 11, 2017 (complaining that Bureau-level report was "cutting corners on process, keeping fellow Commissioners in the dark"); Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on The Abandonment of Consensus-based Decision-making at the FCC, Dec. 18, 2014 ("FCC decisions issued on the Bureau level cut the Commissioners out of the decision-making process entirely"); Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on Protecting Noncommercial Educational Broadcasters from Needless Regulation, Jan. 4, 2017 ("it was wrong for the Bureau to bypass Commissioners").

17 *See* Reply Comments of Zipwhip, Inc., WC Docket 95-155, WT Docket 08-7 (filed Dec. 20, 2016).

Texting to toll-free numbers is a nascent technology with a thriving and ever-evolving marketplace. The texting on toll-free market has been empowered by Zipwhip's innovative routing infrastructure and is growing as a result of a healthy market of multiple service providers and major brands adopting texting as a consumer communication channel. Zipwhip has verification processes in place that allow for continuous assessment and responsive updating to deal with new challenges. The industry is doing a good job today of managing these issues with guidelines in place to ensure there is proper verification and to address any risks of harm to consumers, including the recent CTIA Messaging Principles and Best Practices. Zipwhip's verification processes and consumer protection efforts are compliant with the new CTIA messaging guidelines. It should also be noted that Somos' request would foreclose such industry-accepted approaches to managing the emerging text to toll-free marketplace.

Commission intervention at this stage is unnecessary and contradicts the regulatory philosophy of the new Chairman and new Presidential Administration. The nascence of this market demands the Commission act with caution and refrain from adopting regulatory measures where the costs outweigh any benefit and would hinder the industry before it fully developed.

The Commission should deny Somos' petition and encourage industry management of this issue which will facilitate protection of consumers as well as continued growth and innovation in the market for messaging on toll-free numbers.

Respectfully submitted,

Steven A. Augustino

Counsel to Zipwhip, Inc.

cc: Jay Schwarz, Office of Chairman Pai
Linda Oliver, Office of General Counsel
Terry Cavanaugh, Office of General Counsel