Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service	)	WT Docket No. 08-7

OPPOSITION OF AT&T TO PETITION FOR RECONSIDERATION

James P. Young
Christopher T. Shenk
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8689

Alex Starr
Michael P. Goggin
Gary L. Phillips
AT&T Services, Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2044

March 25, 2019

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Pursuant to the Commission's Public Notice[1] as published in the Federal Register,[2] AT&T Services, Inc., on behalf of itself and its affiliates (collectively, "AT&T"), hereby submits its opposition to the Petition for Reconsideration of Public Knowledge *et al.* ("Petition") filed on January 28, 2019.[3]

INTRODUCTION

The Commission's ruling that text messaging services (SMS and MMS) are "information services" under the Communications Act is clearly correct and, indeed, compelled by the statutory

[1] Public Notice, *Petition for Reconsideration of Action In Proceeding*, Report No. 3111, WT Docket No. 08-7 (February 5, 2019).

[2] *See* Petition for Reconsideration of a Declaratory Ruling on Regulatory Status of Wireless Messaging Service, 84 Fed. Reg. 8497 (March 8, 2019).

[3] Petition For Reconsideration Of Public Knowledge, Access Humboldt, Appalshop, Benton Foundation, California Center For Rural Policy, Center For Democracy And Technology, Center For Rural Strategies, Common Cause, Consumer Federation Of America, The Greenlining Institute, Institute For Local Self Reliance, Kentucky Resources Council, National Digital Inclusion Alliance, Open Technology Institute, The Utility Reform Network (TURN), and X-Lab, *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, WT Docket No. 08-7 (filed January 28, 2019).

definition.[4] Virtually all parties to this proceeding now agree with the Commission on this point,[5] including apparently Twilio, which originally opposed this classification.[6] That leaves only a collection of advocacy groups, led by Public Knowledge, who now seek reconsideration of that ruling.

Public Knowledge advances three claims, none of which is a valid basis for reconsideration. *First*, Public Knowledge argues that the Commission should immediately rescind the *SMS/MMS Order* in its entirety because that there is a possibility that the D.C. Circuit's decision in its pending net neutrality case may affect the Commission's analysis here. As explained below, such speculation is not a cognizable ground for reconsideration, and in this case is expressly prohibited by the Commission's rules that bar parties from raising arguments on reconsideration that the parties could have raised earlier in the proceeding. *Second*, Public Knowledge purports to raise a "notice" argument. But it really just repeats four arguments it already made, which the Commission correctly rejected in the *SMS/MMS Order*. *Third*, Public

[4] 47 U.S.C. § 153(24). Declaratory Ruling, *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, WT Docket No. 08-7, FCC 18-178 (rel. Dec. 13, 2018) ("*SMS/MMS Order*").

[5] *See, e.g.*, Letter from Celia Nogales, AT&T, to Marlene H. Dortch, FCC, WT Docket No. 08-7, at 1 (December 6, 2018); Letter from Matthew Gerst, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 08-7, at 1-2 (December 6, 2018); Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, FCC, WT Docket No. 08-7, at 1-2 (December 6, 2018); Letter from Cathleen Massey, T-Mobile, to Marlene H. Dortch, FCC, WT Docket No. 08-7, at 1 (December 6, 2018); Letter from Steven Augustino, Counsel for Zipwhip, Inc., to Marlene H. Dortch, FCC, WT Docket No. 08-7, at 2-3 (December 6, 2018).

[6] *Compare* Petition for Expedited Declaratory Ruling of Twilio, Inc., *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, WT Docket No. 08-7, at 26-36 (filed August 28, 2015) (arguing that wireless text messages are both telecommunications services and commercial mobile radio services subject to Title II) *with* Letter from Rebecca Murphy Thompson, Twilio, to Marlene H. Dortch, FCC, WT Docket No. 08-7 (December 6, 2018) (taking no issue with the draft order finding that wireless text messages are information services subject only to Title I, and seeking merely to correct certain factual descriptions of its business).

Knowledge claims that events since the issuance of the *SMS/MMS Order* undermine the Commission's analysis, but those "events" either have nothing to do with text messaging or have already been resolved in ways that confirm no common carriage regulation of text messaging is necessary or appropriate.

ARGUMENT

I. THE PENDENCY OF THE *MOZILLA* APPEAL PROVIDES NO "PRUDENTIAL" BASIS TO RESCIND THE *ORDER*.

In the *Internet Freedom Order*, the Commission correctly classified broadband internet access service as an information service.[7] Public Knowledge argues that, if the D.C. Circuit overturns the *Internet Freedom Order*, there is a possibility that the court's opinion may call aspects of the Commission's reasoning in the *SMS/MMS Order* into question. Based solely on this possibility, Public Knowledge asks the Commission to immediately rescind the *SMS/MMS Order* in its entirety to avoid this "risk."[8] This argument fails on every level.

First, there is no overlap between the two cases. Broadband internet access service and text messaging are very different services, and the legal and technical arguments for why they each meet the statutory definition of an "information service" are also very different. Public Knowledge

[7] Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018) ("*Internet Freedom Order*"), *pets. for review pending*, *Mozilla, et al.* v. *FCC*, Nos. 18-1051 *et al*. (D.C. Cir., argued Feb. 1, 2019) ("*Mozilla*").

[8] Pet. at 2-3. At times, Public Knowledge appears to suggest that a D.C Circuit decision vacating the *Internet Freedom Order* would also of its own force vacate the *SMS/MMS Order*. *Id.* at 2-3 (stating that the *SMS/MMS Order* may not remain "in effect," and may be "by implication also vacated in whole or part"). That is absurd. Under the Hobbs Act, the D.C. Circuit's decision in the *Mozilla* case could not vacate an order that is not before the court, including the *SMS/MMS Order*. 47 U.S.C. § 402(c) (granting the appellate court jurisdiction only over the order that is appealed). A court of appeals could vacate the *SMS/MMS Order* only in response to a separate petition for review challenging that order. Moreover, for the reasons stated in the text above, a vacatur of the *Internet Freedom Order* is very unlikely to have any material "implication" regarding the validity of the *SMS/MMS Order*.

does not identify any specific issue in *Mozilla* that could potentially require the Commission to revisit its analysis of text messaging, nor does it attempt to explain how any such issue might affect the ultimate ruling.[9] To the contrary, even Public Knowledge admits that "there may be differences of opinion" about whether the *Mozilla* decision, when it issues, will have implications for the classification of text messaging, and that the possible effect of *Mozilla* is "unclear."[10]

Even accepting Public Knowledge's argument that a *Mozilla* decision may ultimately have some bearing on the merits of the *SMS/MMS Order*, the Commission is entitled to follow its own precedents in deciding the issues before it. There is no principle of law or "prudence" that requires or even advises the Commission to postpone resolving pressing questions affecting the telecommunications industry until parties exhaust appeals of earlier orders in separate proceedings addressing different topics. The Commission's *SMS/MMS Order* has provided much-needed regulatory clarity about issues that parties raised in petitions that have been pending for years. Once the D.C. Circuit decides *Mozilla*, if Public Knowledge believes the court's opinion gives it a new argument for classifying text messaging as a telecommunications service, Public Knowledge can file a petition for declaratory ruling asking for that classification at that time. Rescinding the *SMS/MMS Order* now, based purely on such a speculative and poorly articulated possibility, would be wholly improper.[11]

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[9] Public Knowledge quotes the Commission's statement that it is relying on its prior interpretation of the "telecommunications systems management" exception, *see* Pet. at 2 (quoting *SMS/MMS Order* ¶ 29 n.85), but it does so only in passing. Public Knowledge never tries to explain how the D.C. Circuit's decision on this point might affect the analysis here, and it does not identify any other potentially overlapping issue.

[10] Pet. at 3.

[11] Indeed, granting the petition on such a basis would set a harmful precedent that could substantially undermine the Commission's ability to carry out its responsibilities. At any given time, there are multiple appeals of Commission orders pending before courts that could potentially affect the way the Commission might analyze issues in subsequent orders and proceedings (and as explained above, the *Mozilla* appeal does not even fit that description here). Granting Public

In all events, the Commission's rules preclude this argument. The Commission's rules provide that "[a] petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission will be granted only" if they were not previously available or were unknown to the petitioners.[12] The *Internet Freedom Order* and the subsequent appeal of that order occurred well before the Commission issued the *SMS/MMS Order*. Accordingly, Public Knowledge could have made these arguments before the release of the *SMS/MMS Order*, but did not—and therefore it cannot make them now.

The Commission can make an exception to this rule if "required in the public interest."[13] But Public Knowledge's purported justification—that there is "risk" that a D.C. Circuit decision concerning the *Internet Freedom Order* could affect the analysis here—does not remotely satisfy this standard. The *SMS/MMS Order* has promoted the public interest by providing helpful regulatory clarity, and rescinding it would sacrifice that clarity based on nothing but an ill-articulated "risk" that is extremely unlikely to occur. Even in the unlikely event that the D.C. Circuit's decision requires the Commission to revisit its analysis in the *SMS/MMS Order*, that would have to be done regardless of whether the *Order* were rescinded now, and the Commission may very well reach the same conclusion about the regulatory classification on different grounds. Granting the petition thus could only harm the public interest relative to the status quo.

Knowledge's Petition could only invite similar petitions in numerous other proceedings, which would ultimately bring many proceedings to a grinding halt. For this reason, the Commission does not appear to have granted a petition for reconsideration based on the types of arguments Public Knowledge raises here. AT&T is aware of no such case, and Public Knowledge cites none.

[12] 47 C.F.R. § 1.429(b)(1)-(2); *accord id.* § 1.106(b).

[13] *Id.* § 1.429(b)(3).

II. THE COMMISSION'S RULING ALREADY ADDRESSES THE ARGUMENTS PUBLIC KNOWLEDGE MADE AFTER THE RELEASE OF THE DRAFT ORDER.

Public Knowledge also claims that the Commission's ruling does not adequately respond to some of its arguments.[14] Public Knowledge mistakenly characterizes this as lack of "notice."[15] In reality, Public Knowledge merely complains about four arguments that it not only had the opportunity to make, but that it actually made and which the Commission explicitly and correctly rejected in the final *SMS/MMS Order*.

The Commission clearly considered and rejected each of the arguments Public Knowledge repeats here. Public Knowledge's main argument is that the Commission should have classified SMS as a telecommunications service because, in its view, SMS is "primarily a real-time service."[16] The Commission, however, explained in detail that SMS/MMS are store-and-forward services that "provide the capability for 'storing' and 'retrieving' information" within the meaning of the information service definition, and this "storage and retrieval functionality of [SMS/MMS] is an essential component of the services."[17] Public Knowledge's suggestion that classic

[14] Pet. at 4-6.

[15] Public Knowledge focuses on four arguments that it made in a December 4, 2018 *ex parte* letter, in which it disputed certain points the Commission made in its draft order released on November 21, 2018. Pet. at 4-6; *see* Letter from Public Knowledge, *et al*., to Marlene H. Dortch, FCC, WT Docket No. 08-7 (December 4, 2018) ("Public Knowledge 12/4/18 *Ex Parte*"). But Public Knowledge's focus is askew. First, the Commission is under no administrative law obligation to publish a draft order at all, and the Commission generally never did so before 2017. By publishing a draft order—*and* responding in the final order to the arguments in Public Knowledge's subsequent letter—the Commission gave Public Knowledge far greater notice of the agency's final conclusions and analysis than the Administrative Procedure Act ("APA") requires. 5 U.S.C. §§ 551 *et seq*. Second, the petitions that led to the Commission's ruling gave all parties adequate notice about the subjects discussed in its ruling, and Public Knowledge does not seriously argue otherwise. *Cf*. Pet. at 4. But even if that were not so, the Commission's decision to seek comment on Public Knowledge's petition for reconsideration would solve any possible "notice" issue.

[16] Pet. at 4-5.

[17] *SMS/MMS Order* ¶¶ 19-20; *see id.* ¶¶ 21-26.

telecommunications services all have such store-and-forward functionality, and that the Commission has therefore "written telecommunications services out of the law,"[18] is absurd on its face. Contrary to Public Knowledge's hyperbole, the Commission explained that the "asynchronous," store-and-forward functionality of SMS/MMS make them essentially indistinguishable from email services, which have always been understood to be information services and different from classic telephone services.[19]

Public Knowledge also challenges the Commission's separate conclusion that text messaging provides the capability of "acquiring" and "utilizing" information within the statutory definition.[20] But, again, the Commission specifically addressed this argument, explaining that it is well established that services like SMS and MMS that allow the customer to access and interact with stored information are information services.[21]

The Commission also specifically refuted Public Knowledge's other two claims, neither of which deals directly with the Commission's statutory classification analysis and thus would not change the outcome of the ruling. First, Public Knowledge argues that Title II classification would not "hamper filtering robo-calls and texts,"[22] but that clearly is not so. As the *SMS/MMS Order* explains, the Commission has previously found certain call blocking to be an unjust and unreasonable practice, and therefore "applying Title II regulation" would "curb[] wireless

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[18] *See* Pet. at 5.

[19] *SMS/MMS Order* ¶ 19 & n.58 (responding specifically to Public Knowledge 12/4/18 *Ex Parte* at 2-3).

[20] Pet. at 5-6.

[21] *See SMS/MMS Order* ¶ 21 & n.62 (contrary to Public Knowledge 12/4/18 *Ex Parte* at 4, "[w]hen messaging providers offer consumer access to content developed by third parties (as through a weather app), it is still the messaging provider that is offering the 'capability' for users to 'acquire' and 'utilize' that third-party content via text").

[22] Pet. at 5.

providers' ability to use anti-spam and other protections," hurting wireless providers' ability to "protect consumers from spam and other unwanted messages."[23] Second, Public Knowledge claims that the Commission did not adequately deal with the implications of its decision on universal service. That is not so: the portion of the ruling Public Knowledge cites explains that the Commission's ruling could not possibly have a "devastating" impact on the universal service fund "given that the Commission has not required text messaging revenues to be subject to federal universal service contribution requirements."[24]

III. THERE ARE NO EVENTS SINCE THE *ORDER* WAS ISSUED THAT REQUIRE RECONSIDERATION.

Public Knowledge's claim that events since the issuance of the *SMS/MMS Order* have undermined the Commission's classification decision do not withstand even the most cursory scrutiny. Public Knowledge's principal example consists of two trade press articles suggesting that carriers have sold real-time location information to third parties.[25] The sale of location data has nothing to do with text messaging, and the classification of text messaging would thus have no impact on what rules might apply.[26] Accordingly, Public Knowledge's claim that the Commission failed to consider the impact of its decision on "consumer privacy" is baseless.[27]

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[23] *SMS/MMS Order* ¶¶ 43-47 & n.140 (responding specifically to Public Knowledge 12/4/18 *Ex Parte* at 6-7).

[24] *Id.* ¶ 48 n.162 (responding specifically to Public Knowledge 12/4/18 *Ex Parte* at 7).

[25] *See* Pet. at 6-7 (citing Joseph Cox, "I Gave a Bounty Hunter $300. Then He Located Our Phone," Motherboard.vice.com (Jan. 8, 2019), and Lily Hay Newman, "Carriers Swore They'd Stop Selling Location Data. Will They Ever?", Wired.com (Jan. 9, 2019)).

[26] In addition, as the articles make clear, there is no allegation that the *carriers* violated any rule in selling the data to third parties; rather, the allegation is that the third parties improperly used the data or made the data available.

[27] Public Knowledge also claims the Commission's decision threatens "the ability of schools and teachers to stay in touch with students and parents" through text-based services like Remind, Pet. at 7 (citation omitted), but then it acknowledges that "Remind has been able to resolve its high-

CONCLUSION

For the foregoing reasons, the Commission should deny the petition for reconsideration.

Respectfully submitted,

/s/ Alex Starr

Alex Starr
Michael P. Goggin
Gary L. Phillips
AT&T Services, Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2044

James P. Young
Christopher T. Shenk
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8689

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profile dispute with Verizon"—thus reaffirming that common carrier regulation is not necessary. *Id.*