Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

CTIA OPPOSITION TO PETITION FOR RECONSIDERATION

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March 25, 2019

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Pursuant to Section 1.106(g) of the rules of the Federal Communications Commission (Commission) and the Public Notice issued on February 5, 2019 in this proceeding,[1] CTIA hereby opposes the Petition for Reconsideration[2] of the *Declaratory Ruling*.[3]

I. INTRODUCTION.

With its adoption of the *Declaratory Ruling*, the Commission took an important stand on behalf of millions of wireless consumers in the battle to safeguard messaging from robotexters aiming to send unwanted, malicious, and unlawful mobile messages. The Commission's affirmation that wireless messaging is an information service enables wireless providers to continue to deliver a trusted and convenient medium for consumers that remains virtually spam-free, in contrast to voice calls and email. Consumers, for their part, overwhelmingly wish

[1] *Petition for Reconsideration of Action in Rulemaking Proceeding*, Public Notice, Rep. No. 3111, (rel. Feb. 5, 2019). Public Notice of the Petition of Reconsideration was published in the Federal Register on March 8, 2019, 84 Fed. Reg. 8497.

[2] Petition for Reconsideration of Public Knowledge, et al., WT Docket No. 08-7 (filed Jan. 28, 2019) ("Petition").

[3] *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling, FCC 18-178 (rel. Dec. 13, 2018) ("*Declaratory Ruling*").

to keep mobile messaging free from robotexts and other unwanted or unlawful traffic.[4] For these reasons and those described herein, the Commission should reject the Petition.

Specifically, the Petition fails to provide any valid basis for reconsideration of the *Declaratory Ruling*. It attempts to resuscitate arguments that the Commission has already considered and rejected. The Commission's rules make clear that such arguments are inappropriate bases for reconsideration and must be dismissed or denied.[5] Furthermore, the Petition's remaining arguments are misguided, as the *Declaratory Ruling* had no impact on the federal Universal Service Fund (USF) and the pending challenges to the *Restoring Internet Freedom (RIF) Order* provide no basis for the Commission to reconsider its well-reasoned decision. The *Declaratory Ruling* placed the Commission firmly on the side of consumers in the battle against unwanted robotexts. The Commission accordingly should reject the Petition.

II. THE COMMISSION CORRECTLY AFFIRMED THAT WIRELESS MESSAGING IS AN INFORMATION SERVICE, AND THE PETITION SHOULD BE REJECTED.

A. The *Declaratory Ruling* Was the Right Decision to Protect Consumers from Unwanted Robotexts.

Petitioners take issue, as a matter of policy, with the Commission's decision to affirm that wireless messaging is an information service.[6] But the Commission correctly found that providing regulatory clarity now is imperative to preserve wireless providers' ability to maintain messaging's status as a trusted and convenient communications medium.[7]

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[4] According to a November 2018 Morning Consult survey, 91 percent of surveyed consumers support wireless providers' efforts to identify and block spam. *See* Letter from Matthew Gerst, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-7, at 1-2, (filed Dec. 6, 2018) ("CTIA Ex Parte Letter").

[5] *See* 47 C.F.R. § 1.106(p)(3). *See also id*. § 1.429(b).

[6] *See* Petition at 3.

[7] *See Declaratory Ruling* ¶ 44.

Since the inception of mobile messaging, wireless providers have built upon the utility and popularity of messaging offerings while protecting consumers from unlawful and unwanted traffic. As the *Declaratory Ruling* notes, wireless providers continue to work hard to shield consumers from unwanted messages, such as pay-day lending schemes and fraudulent bank notifications that prey upon the nation's most vulnerable consumers.[8] The unfortunate truth, however, is that bad actors will continue to exploit new capabilities to perpetuate scams and other harmful practices.[9] The *Declaratory Ruling* helps to ensure that wireless providers retain the ability to fight back against this malicious traffic and maintain consumers' trust in the reliability and convenience of messaging.

Further, the Commission's decision helps to avoid wireless messaging services "becom[ing] plagued by unwanted messages in the same way that voice service is flooded with unwanted robocalls."[10] To be sure, messaging's status as a trustworthy service stands in stark contrast with Americans' views on voice calls, where consumers have been overwhelmed with billions of unwanted robocalls. According to a recent survey, nearly 90 percent of consumers said they receive most unwanted communications via voice or email, whereas just 9 percent cited mobile messaging.[11] The *Declaratory Ruling* follows the strong encouragement of state

[8] *Id*.

[9] *See, e.g.*, Mckenna Eubank, *'SMShing,' is becoming a more common tool for hackers*, KTUL (Feb. 20, 2019), https://ktul.com/news/local/smshing-is-becoming-a-more-common-tool-for-hackers.

[10] *Declaratory Ruling* ¶ 45.

[11] *See* CTIA Ex Parte Letter at 1-2. *See also Declaratory Ruling* ¶ 12.

attorneys general,[12] including recent support from the Colorado Office of Attorney General, which calls for a regulatory framework that protects messaging consumers.[13]

B. The Commission Fully Considered and Rejected Petitioners' Key Arguments.

The Commission properly concluded that wireless messaging is an information service as a legal matter, based on the text of the Communications Act of 1934, as amended (Act),[14] and Commission precedent. The Commission thoroughly considered the extensive record in this proceeding, including technical information about how wireless messaging services are provided to consumers. Based on that record, the Commission found that mobile messaging involves storage and retrieval of information,[15] acquisition and utilization of information,[16] and transformation and processing of information[17] – all hallmarks of an information service.[18] Petitioners raise arguments that the *Declaratory Ruling* already addressed, and they fail to provide any facts or arguments demonstrating why that decision should be reconsidered. Instead, they rely on several mischaracterizations of the *Declaratory Ruling.*

First, Petitioners incorrectly claim that the Commission has "written telecommunications services out of the law" by concluding that "any communications service that has a buffer, or uses IP packets . . . instead of . . . using a direct, dedicated line for a simple two-way

[12] *See Declaratory Ruling* ¶ 45.

[13] *See* Letter from Daniel Rauch, Counsel to the Colorado Attorney General, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-59, at 2 (filed Mar. 5, 2019).

[14] 47 U.S.C. § 151 *et seq.*

[15] *Declaratory Ruling* ¶¶ 19-20.

[16] *Id.* ¶ 21.

[17] *Id.* ¶ 22.

[18] *See* 47 U.S.C. § 153(24) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," with exceptions not pertinent here).

communication" constitutes a "store-and-forward" service.[19] But the Commission did no such thing, and these sweeping statements do not undermine the straightforward classification analysis the Commission conducted. The *Declaratory Ruling* correctly found that the storage and retrieval capability of messaging is analogous to email service, which has been recognized since the *Stevens Report* to be an information service,[20] and that this capability is an essential component of messaging service.[21] As such, the Commission fully considered and rejected Petitioners' claims that the store and forward capability of messaging did not render it an information service.

Second, Petitioners are incorrect in claiming that the Commission failed to address whether the agency's analysis "turns any telecommunications service that accesses an information service into an information service itself."[22] To the contrary, the *Declaratory Ruling* noted the Commission's prior findings on this issue – namely, that "services that provide th[e] ability for subscribers to utilize and interact with stored information, even information provided by third parties, are information services," citing both the *Stevens Report* and the *RIF Order* for this proposition.[23] Indeed, the Commission specifically cited the arguments that the Petitioners assert in the Petition, and explained why the use of facilities to acquire information placed an

[19] Petition at 4-5.

[20] *See Declaratory Ruling* ¶ 19 & n.58; *see also Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) ("*Stevens Report*").

[21] *Declaratory Ruling* ¶ 20. *See also id*. ¶ 19 n.58 ("[T]he storage function is a critical part of a functionally integrated service provided to the customer, from the point of view of both what the provider is offering and what the customer is expecting.").

[22] Petition at 5.

[23] *Declaratory Ruling* ¶ 21 & n.64.

offering within the "information service" category.[24] In light of this analysis, there is no basis for reconsideration.

Finally, Petitioners are mistaken in asserting that the Commission did not respond to arguments that "Title II classification does not hamper filtering robo-calls and texts."[25] In fact, the *Declaratory Ruling* detailed extensive record evidence that Title II classification would hamper efforts to filter unwanted robotexts and explained its reasoning at length.[26]

In sum, the Commission properly considered and rejected Petitioners' arguments in the *Declaratory Ruling*, and it should do so again.

C. The *Declaratory Ruling* Had No Impact on the Federal Universal Service Fund.

Petitioners are mistaken to suggest that the *Declaratory Ruling* should be reconsidered because it will affect federal USF contributions.[27] As the *Declaratory Ruling* observes, the Commission has never found text messaging revenues to be subject to federal USF contribution requirements.[28] Further, CTIA has consistently explained that text messaging service revenues have unquestionably been outside of the scope of the universal service contribution base and the *Declaratory Ruling* did not alter the status quo.[29] Thus, contrary to the Petitioners' arguments,

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[24] *See id*. ¶ 21 n.62 (citing, among others, Letter from Public Knowledge, *et al.*, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-7 (filed Dec. 4, 2018); Letter from Matthew F. Wood, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-7 (filed Dec. 6, 2018)).

[25] Petition at 5.

[26] *See Declaratory Ruling* ¶¶ 42-45.

[27] *See* Petition at 6.

[28] *See Declaratory Ruling* ¶ 48 n.162 ("[W]e reject the argument that classifying wireless messaging services as information services will have a 'devastating' impact on the financial stability of the Universal Service Fund, given that the Commission has not required text messaging revenues to be subject to federal universal service contribution requirements.").

[29] *See* Comments of CTIA, WC Docket 06-122, at 22-26 (July 9, 2012) (noting that SMS is an integrated information service that is not subject to federal USF contribution obligations under the Commission's contribution methodology).

the Petition should be dismissed because the *Declaratory Ruling* had no impact on the federal USF.

III. THE PENDING *RIF ORDER* LITIGATION DOES NOT WARRANT RECONSIDERATION OF THE *DECLARATORY RULING.*

Contrary to Petitioners' claims,[30] the *Declaratory Ruling* and the *RIF Order* do not necessarily rise and fall together, and the pendency of the *RIF Order* appeal provides no basis for the Commission to reconsider its well-reasoned decision, for several reasons.

First, any suggestion that the outcome of the *RIF Order* litigation will directly implicate the *Declaratory Ruling* is wrong. Although the Commission has correctly classified broadband Internet access service (BIAS) and messaging as information services, it does not follow that messaging traffic is equivalent to BIAS for regulatory purposes or vice versa. Wireless messaging is a store-and-forward technology and any assessment of its regulatory status must be based on the characteristics of *that* service offering.

Second, the approach the Petitioners seek would preclude an administrative agency from relying on any precedent subject to a pending appeal and would hamstring the agency, which would be unable to act on a wide variety of matters in a manner consistent with recent decisions for months or years on end. Agencies and courts do not operate this way. Rather, parties seeking to challenge a decision must seek judicial review of *that decision*. Unless and until the court vacates the decision, it is – like the *RIF Order* today – the precedential law of the land. A *potential* court decision that *might or might not* affect the Commission's reasoning is no justification for a preemptive, prophylactic reconsideration.

[30] Petition at 3.

Finally, any suggestion that the *RIF Order* litigation somehow constitutes a new development that Petitioners could not have raised for the Commission's consideration before adopting the *Declaratory Ruling* is also mistaken. Parties challenging the *RIF Order* (including the Petitioners here) filed their principal brief on August 20, 2018 (almost four months before the *Declaratory Ruling*'s adoption)[31] and their reply brief on November 16, 2018 (nearly a month before).[32] Even as Petitioners inaccurately suggest that the *RIF Order* raises the same classification analysis issues as the instant proceeding, Petitioners did not once cite the pending litigation as a basis for delaying the adoption of the *Declaratory Ruling* despite many opportunities to do so.[33] To be sure, the argument that the *RIF Order* litigation is a new development that was relevant to the Commission's decision would have been misguided, but the Petitioners' failure to raise the argument before the Commission adopted the *Declaratory Ruling* invalidates their request for reconsideration on that basis.[34]

[31] *See* Joint Brief of Petitioners, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. Aug. 20, 2018).

[32] *See* Joint Reply Brief of Petitioners, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. Nov. 16, 2018).

[33] The first D.C. Circuit Petition for Review in what became *Mozilla v. FCC* was filed in February 2018, about ten months before the Commission adopted the *Declaratory Ruling* (and long *after* the instant docket had been opened). *See* Mozilla, Petition for Review, No. 18-1051 (D.C. Cir. Feb. 22, 2018). *See also Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules*, Public Notice, 23 FCC Rcd 262 (2008). Public Knowledge filed its docketing statement on April 30, 2018, nearly eight months before the *Declaratory Ruling*. *See* Public Knowledge, Docketing Statement and Certificate as to Parties, Rulings, and Related Cases, No. 18-1053 (D.C. Cir. Apr. 30, 2018). *See also* FCC Fact Sheet, Wireless Messaging Service Declaratory Ruling (Nov. 21, 2018), https://docs.fcc.gov/public/attachments/DOC-355214A1.pdf (which contained numerous citations to the *RIF Order*).

[34] *See* 47 C.F.R. § 1.429(b).

IV. CONCLUSION.

The *Declaratory Ruling* is firmly grounded in the Act and will advance the Commission's goal of protecting consumers from unwanted robotexts. Petitioners' reconsideration request raises no arguments of merit and should be dismissed and/or denied.

Respectfully submitted,

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