

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	WC Docket No. 18-28
)	
Text-Enabled Toll Free Numbers)	CC Docket No. 95-155
)	
)	

**COMMENTS OF
THE FREE STATE FOUNDATION***

These comments are submitted in response to the Commission’s request for comments regarding its proposed rulemaking for text-enabled toll free numbers.¹ The Commission’s proposed rulemaking would establish authorization and registry requirements for text messaging-enabled toll free numbers. These comments emphasize there has yet been no clear demonstration of a problem warranting new regulations.

In the absence of meaningful evidence indicating a market failure, and in the face of ongoing self-regulatory efforts, the Commission should not apply regulations initially intended for Title II toll free telephone services to text messaging and other messaging services that meet the definition of an “information service” under Title I. Indeed, the Commission should finally declare that texting and multi-media messaging services (MMS) are Title I “information

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

¹ Public Notice, Text-Enabled Toll Free Numbers, WC Docket No. 18-28, CC Docket No. 95-155, (released July 24, 2018).

services,” and consistent with that classification, the Commission should maintain a pro-market, non-regulatory approach to text messaging services.

In its *Twentieth Wireless Competition Report* (2017), the Commission found that the mobile wireless market is “effectively competitive.”² Consumers in today’s competitive marketplace have choices among text messaging or short messaging services (SMS), typically involving person-to-person transmission of texts up to 160 characters long, and MMS, person-to-person transmission of photos, video clips, or other images offered by wireless carriers. Their popularity is reflected in CTIA’s estimate that in 2017 American consumers sent a combined 1.77 billion SMS and MMS messages.³ Mobile broadband service plans bundled with unlimited texting have facilitated heavy-volume usage by consumers at low cost.

And consumers have choices among wirelessly accessible IP-based competitors to text messaging. Instant messaging, social media, and email options are widely available to consumers as mobile applications, providing popular alternative means for messaging. All of these competing services have thrived in a free market and effectively non-regulated environment.

Significantly, at this point, there does not appear that there is an existing or a likely problem requiring regulatory intervention. To date, instances of subscribers being harmed by unauthorized enabling of text messaging to toll free numbers appear to be at or near zero.

Moreover, text messaging service providers have incentives to prevent or remedy unauthorized

² Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 17-69, *Twentieth Report* (released September 27, 2017), at ¶ 4. *See also* Comments of the Free State Foundation, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 18-203 (July 26, 2018), at: <https://ecfsapi.fcc.gov/file/107262486903703/FSF%20Comments%20-%20Mobile%20Wireless%20Market%20Competition%20072618.pdf>.

³ CTIA, “The State of Wireless 2018” (July 2018) (“Annual Wireless Industry Survey”), at 7, at: https://api.ctia.org/wp-content/uploads/2018/07/CTIA_State-of-Wireless-2018_0710.pdf.

enabling of text messaging to toll free numbers held by their subscribers – typically, businesses that hold toll free numbers – or risk losing business to rival providers and technologies. And other parties do not appear to have anything to gain by authorizing text messaging to toll free numbers without subscriber approval. The Commission’s proposed rulemaking therefore appears to be directed more toward theoretical possibilities than likely future occurrences.

Nor is it apparent that requiring a “Responsible Organization” to verify a subscriber’s authorization of text messaging to toll free numbers would significantly improve service or accountability. Moreover, the Commission should not impose regulation unless it also determines less intrusive alternatives such as industry self-regulatory efforts (which are ongoing in this case) or civil litigation are inadequate.

It should be a matter of "first principles" that the Commission should not impose new regulation absent a clear showing of need. In this instance, the Commission should follow the counsel of Commissioner Michael O’Rielly in his statement accompanying the proposed rulemaking: “If this is a hypothetical concern or a limited problem that could be addressed through industry best practices, then I will be reluctant to want to expand or create number registries, which would impose new burdens on subscribers and costs on users.”⁴ And he added: “I would like to end the regulatory tap dancing and take the affirmative step of declaring text messaging to be an interstate, information service.” Competing providers in fast-changing markets with technological and market know-how are better positioned than the FCC or other outside entities to address subscribers’ concerns.

⁴ Text-Enabled Toll Free Numbers, WC Docket No. 18-28, Toll Free Access Codes, CC Docket No. 95-155, Declaratory Ruling and Proposed Notice of Rulemaking (released June 12, 2018), at 23 (Statement of Commissioner Michael O’Rielly).

Of course, FCC Chairman Ajit Pai, to his credit, thus far has led the agency in resisting efforts to expand or exercise its regulatory authority absent a clear demonstration of market failure requiring regulatory intervention. In a speech before the Free State Foundation on December 7, 2016, Chairman Pai presaged the coming turnabout from the “regulate first” mentality of the Obama Administration FCC. In no uncertain terms, he declared: “Indeed, proof of market failure should guide the next Commission's consideration of new regulations.”⁵ And, to the same effect, in remarks delivered this month at the Resurgent Conference, Chairman Pai said this:

Whenever a technological innovation creates uncertainty, some will always have the knee-jerk reaction to presume it's bad.... But we should resist that temptation. “Guilty until proven innocent” is not a recipe for innovation, and it doesn't make consumers better off. History tells us that it is not preemptive regulation, but permissionless innovation made possible by competitive free markets that best guarantees consumer welfare. A future enabled by the next generation of technology can be bright, if only we choose to let the light in.⁶

We have previously urged the Commission to reject legally dubious and unwise calls for classifying texting and MMS as Title II services.⁷ Title II is a vestige of the analog-era monopoly telephone service regime. Extending Title II-based regulation to text messaging could saddle those services with unnecessary burdens and costs that put them at a competitive disadvantage with rival messaging services and technologies. Potentially, such costs could be passed on to toll free number subscribers and ultimately to consumers in the form of higher prices.

The Commission especially should be wary of applying regulations initially intended for Title II toll free telephone services to text messaging and MMS services that, in our view, meet

⁵ Remarks of FCC Commissioner Ajit Pai before the Free State Foundation's Tenth Anniversary Gala Luncheon (December 7, 2016), at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1207/DOC-342497A1.pdf.

⁶ Remarks of FCC Chairman Ajit Pai at the Resurgent Conference (August 3, 2018), at: <https://docs.fcc.gov/public/attachments/DOC-353259A1.pdf>.

⁷ See Reply Comments of the Free State Foundation, Petition of Twilio Inc. For An Expedited Declaratory Ruling Clarifying the Regulatory Status of Mobile Messaging Services, WT Docket No. 08-7 (December 16, 2015), at: <https://ecfsapi.fcc.gov/file/60001380510.pdf>.

the definition of an “information service” under Title I. In the Telecommunications Act of 1996, Congress codified the distinction between lightly or non-regulated “information services” and “telecommunications services” that are typically subject to common carrier and other regulation. The Commission reaffirmed this federal policy of keeping “information services” free from burdensome Title II regulation through its *Restoring Internet Freedom Order* (2017). There the Commission restored the Title I classification of mobile broadband Internet access services primarily because they fit with the statutory definition of “information services.”⁸ That result was bolstered by federal policy favoring a commercial public Internet unfettered by federal and state regulation.⁹ In its Order, the Commission recognized that Title II regulation is poorly suited for advanced information services and similarly recognized the adverse consequences of such regulatory expansion on innovation and investment. Unintended consequences of Title II regulation recognized in the *Restoring Internet Freedom Order*, and the potential for replication of these unintended consequences in the text messaging context, should remain foremost in mind in this proceeding.

Importantly, text messaging services meet the statutory definition of “information services” because they involve “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.”¹⁰ That is, texting involves store and forward as well as other information processing functionalities, and they do not require live communication between parties. For those reasons, texting and MMS are also similar to voicemail and email services, which the Commission has regarded as “information services” for

⁸ Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order (“*Restoring Internet Freedom Order*”) (released January 4, 2018), at ¶ 65, *et seq.*

⁹ *Restoring Internet Freedom Order*, at ¶ 86, *et seq.*

¹⁰ 47 U.S.C. § 153(24).

more than three decades. Further, texting services can include “electronic publishing” capabilities, which are statutorily defined as “the dissemination, provision, publication, or sale to an unaffiliated entity or person” of news, entertainment, consumer materials, ads, photos, or other information.¹¹

Clarifying that text messaging services are “information services” – which we believe they are – is a necessary first step in deciding whether, or to what extent, the Commission even has authority for its proposed rulemaking. In any event, given the Commission’s admittedly questionable legal authority to regulate text messaging services, the lack of evidence of a market failure or consumer harm requiring regulatory intervention at this time, and ongoing self-regulatory efforts, the Commission should refrain from imposing any new regulatory mandates in this proceeding.

Respectfully submitted,

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¹¹ 47 U.S.C. § 274(h)(1).