

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

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

**COMMENTS OF ZIPWHIP, INC. ON NOTICE OF PROPOSED RULEMAKING**

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## SUMMARY

Thanks in large part to Zipwhip's ground-breaking investments, the market for business texting is thriving. Zipwhip's software allows businesses to use any of their numbers – a landline, a VoIP number or a toll free number – as the customer-facing entry point for the public to communicate by text with them. Companies like Nestle (owners of the Butterball brand) allow consumers to text turkey questions to their 800-BUTTERBALL number. Insurance companies use Zipwhip to receive claims via text message, often to a 10-digit business number. Automobile dealerships use Zipwhip to engage with consumers searching for a new or used vehicle to purchase. Overall, nearly two million toll free numbers are utilizing text capabilities enabled by Zipwhip, and millions more landline and VoIP numbers have the capability to receive texts.

These capabilities are available to all types of business numbers, not just toll-free numbers. Moreover, these developments are occurring without any FCC regulation at all. Businesses can use their numbers as they see fit, including text-enabling them, subject only to the generally applicable obligations governing all commerce. Businesses are reporting satisfaction with this process, and adoption of business texting continues to grow.

While Zipwhip has no issue with the Declaratory Ruling in this proceeding that the toll free subscriber – and only the authorized subscriber – has the authority to determine whether to text-enable a number, we submit that this ruling hardly was controversial. The industry has long agreed that the subscriber is the one who determines how the business desires to use its numbers. In this docket, the Commission seeks information to determine if any procedures should be mandated to protect the integrity of the subscriber authorization process. Zipwhip respectfully submits that there is neither a need for such rules nor a clear enough authorization for the Commission to engage in such regulation.

First, as to the need, even prior to the Declaratory Ruling, the industry developed practices designed to ensure that the subscriber is identified, that proper authorization is confirmed and that authorization procedures are reliable. Zipwhip, for example, employs multi-factored tests to confirm subscriber authorization and control. One key element of that verification is a dual-factor authentication procedure commonly used in many contexts: Zipwhip sends a confirmation code by calling the voice number and requires the subscriber to return that confirmation code to the company. This factor, alone, would prevent, for example, the type of fraud some speculated could happen by text-enabling a toll free number appearing on a credit card. No scammer would have sufficient access to the voice number to return the confirmation code Zipwhip sends. (In addition, other Zipwhip authentication methods also would likely stop such a scam before it could take place.) These practices are adequate today and, if a deficiency should arise, can quickly be improved by the industry.

Proponents of Commission intervention have not presented any evidence that current verification procedures are inadequate. They have conjured a few theoretical concerns that the procedures might be defeated, but they've presented no evidence that these theoretical harms are occurring or even are likely to occur. There are no, specific, verifiable instances of a subscriber's toll free number being used by a person other than the subscriber. Zipwhip does not have any such complaints. As far as we can tell, the FCC complaint database does not have any

either. The proposed regulation thus would be preemptive regulation of theoretical harms, which is not the predicate that Commissioners have indicated is sufficient to justify action in a competitive market.

Further, the proposed regulation runs counter to other regulatory principles that the Commissioners have stated would guide their actions. The *NPRM* proposes asymmetrical regulation of competing services. Not only are toll free services singled out for more regulation that texting on traditional PSTN and VoIP business services, but the regulation also would apply to SMS texting only, not to OTT messaging services or other transmission technologies (e.g., RCS) that may use numbers as an addressing mechanism. In addition, the regulation appears to disproportionately benefit one entrenched provider through regulatory arbitrage. It also places the Commission's thumb down in a rapidly changing marketplace, freezing authentication procedures that would prevent the industry from evolving to better procedures in the future.

All of this, moreover, would be done with respect to a service that the FCC has not formally classified, but which, under its rules and precedent is an unregulated information service. The *NPRM* provides no justification for why such regulation is appropriate, let alone lawful.

Second, as to the FCC's authority, proponents have not clearly established that the FCC has authority to regulate in this area. The sole proposed authority cited in the *NPRM* is Section 251(e)(1). Section 251(e)(1) provides the FCC with exclusive jurisdiction over the portions of the North American Numbering Plan that pertain to the United States. That authority historically has been utilized only in connection with the allocation and distribution of numbers for voice services, however. This proceeding involves an ancillary use of a number – as an addressing mechanism for an information service. Congress has not provided the Commission with a mandate to regulate that service. Indeed, the North American Numbering Plan makes no reference whatsoever to texting using telephone numbers (whether wireless, toll free or landline/VoIP). It is hard to see how the Commission's authority over the administration of the Plan thus reaches a service not mentioned in the Plan itself (which, as noted, is an information service).

When Section 251(e)(1) is the sole authority cited for such a radical step into an unregulated, competitive market, that fact should give the Commission pause. SMS texting does not implicate the objectives of the NANP. There will be no impact on potential number exhaust or availability of numbering resources, regardless of what, if any action the FCC takes in this docket. There will be no impact on the administration of the Plan, which, as noted, doesn't even mention SMS texting as a service. Nor would action here impact the attractiveness of toll free service for voice usage. And, the *NPRM* doesn't show any rational connection between the proposed rules and the stated regulatory purpose of ensuring subscriber authorization to enable texting on toll free numbers. As a result, even if the Commission were to have theoretical jurisdiction in some instance, any action here would be arbitrary and capricious.

Finally, Zipwhip agrees with Commissioner O'Rielly that the Commission should decide the regulatory classification of SMS texting services. In the sound exercise of its regulatory mission, it should take this action first, before deciding what, if any actions are available to it with respect to the *NPRM*. Whether SMS texting is a Title II service has been

pending before the FCC since at least 2008. The issues are ripe for decision. The Commission owes the industry an answer, one way or another, to this critical question. “Regulatory tap dancing,” as Commissioner O’Rielly put it, should end on this fundamental question.

If SMS texting is a Title II service, then the Commission may have additional sources of authority and additional options available to it to address perceived harms in text-enabling a toll free number. If SMS texting is not a Title II service, it falls in an unregulated category with RCS, OTT services and, potentially, chat and other forms of asymmetrical communication. If that is the case, the public interest would best be served with a proceeding that addresses all of these forms of communication, rather than one that piecemeal selects one service for regulation while leaving competing services unfettered.

For all of these reasons, Zipwhip respectfully submits that the FCC should deny the *NPRM* and terminate this proceeding.

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**COMMENTS OF ZIPWHIP, INC. ON DECLARATORY RULING AND NOTICE OF  
PROPOSED RULEMAKING**

Zipwhip, Inc. (“Zipwhip”), by and through undersigned counsel, hereby files comments in response to the notice of proposed rulemaking issued by the Federal Communications Commission (“FCC” or the “Commission”) regarding the process for authorizing the text-enablement of a toll-free number.<sup>1</sup>

**I. INTRODUCTION**

On June 7, 2018, the FCC adopted a *Declaratory Ruling* and *NPRM* in this docket with the stated purpose of “modern[izing] administration of toll free numbers by promoting the innovative use of these valuable numbering resources for text messaging, or texting, purposes.”<sup>2</sup> This proceeding is an outgrowth of a Petition for Declaratory Ruling from Somos, Inc. that asked the Commission to clarify that the process for authorizing a number for use with texting should incorporate the RespOrg and other administrative processes currently used with voice toll free

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<sup>1</sup> See *Text-Enabled Toll Free Numbers, Toll Free Service Access Codes*, WC Docket No. 18-28, CC Docket No. 95-155, FCC 18-77, Declaratory Ruling and Notice of Proposed Rulemaking (rel. June 12, 2018) (“*Declaratory Ruling*” or “*NPRM*”, as applicable).

<sup>2</sup> *Id.* ¶ 1.

services.<sup>3</sup> Specifically, in its Petition, Somos asked the FCC to clarify that a provider may text-enable a toll free number only if it has sought appropriate authorization from the Responsible Organization (RespOrg); and that any text-enabled toll free numbers must be registered with Somos' TSS Registry<sup>4</sup>

With the *Declaratory Ruling*, the Commission clarified that only the toll free subscriber has the authority to approve text-enablement of its number and that a messaging provider must disable texting capability if requested by the subscriber.<sup>5</sup> The Commission also clarified that toll free numbers that are not currently assigned to a subscriber may not be text-enabled. In the *NPRM*, the FCC seeks input regarding the matter of how a toll free subscriber should make clear that it has authorized its number to be used with text messaging services. The FCC specifically proposes a requirement that any toll free subscriber that authorizes its number for texting “to inform its RespOrg of that authorization and for the RespOrg to update the appropriate records in the toll free SMS Database.”<sup>6</sup> The Commission, alternatively, asks whether the status quo process should be maintained and the advantages to such an approach.

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<sup>3</sup> See *id.* ¶ 4.

<sup>4</sup> See 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) (“Somos 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).

<sup>5</sup> See *Declaratory Ruling* ¶ 11. The Commission also clarified that it was holding consideration of Somos’ Petition in abeyance.

<sup>6</sup> *NPRM* ¶ 13. Zipwhip notes that the Commission, in one of the introductory paragraphs to the *Declaratory Ruling* and *NPRM*, describes the content of its procedural proposal in a way that differs substantively from what the Commission actually proposes in the body of the *NPRM* and thus, may create confusion about the scope of the actual rules being proposed. See ¶ 3 (explaining that the *NPRM* proposes “to require messaging providers to obtain a subscriber’s authorization through the subscriber’s designated Responsible Organization (RespOrg)”).

Further, the FCC raises questions about what role if any the Commission should play in this area. Zipwhip hereby provides its comments on the questions raised in the *NPRM*.

## **II. THE BUSINESS TEXTING MARKET IS THRIVING.**

The ability to text to a toll free number is a recent development that was empowered by Zipwhip's innovative routing infrastructure. Business texting includes any form of consumer-to-business text messaging exchanged with a landline, VoIP, or toll free number. Prior to Zipwhip's entry in the market, there was no high-volume texting solution available for businesses. Ordinary SMS texting is a peer-to-peer (P2P) system, designed primarily for individual texts between two subscribers. Short codes were put into place for higher volume business uses, but some found short codes inconvenient, and they did not allow a business to use a single addressing mechanism for their voice and non-voice communications. To address the need for commercial grade business texting solutions, Zipwhip built the infrastructure that allows high-volume texting with existing business phone numbers through application-to-person ("A2P") protocols, which operate differently than traditional consumer-oriented, person-to-person ("P2P") text messaging protocols.

In 2014, Zipwhip began to introduce its alternative for the exchange of commercial text messages using toll free or any other 10-digit business phone number. Zipwhip introduced cross-carrier support for business texting in August 2015, allowing the market to grow with the overall wireless market, rather than an individual carrier. This support ran across Zipwhip's infrastructure, which provides individual service level agreements ("SLAs") for wireless carriers to enable support of toll free texts on those networks. The SLAs limit the risk of spam, spoofing and other anti-consumer practices that could otherwise result from the high-volume A2P connection.



Today, Zipwhip's software allows businesses to use any of their numbers – a landline, a VoIP number or a toll free number – as the customer-facing entry point for the public to communicate by text with them. Companies like Butterball allow consumers to text turkey questions to their 800-BUTTERBALL number.<sup>7</sup> Hawaiian Airlines receives customer questions on its toll free number.<sup>8</sup> Insurance companies use Zipwhip to receive claims via text message, often to a 10-digit business number. Automobile dealerships use Zipwhip to engage with consumers searching for a new or used vehicle to purchase.

Critical to the success of the market was Zipwhip's creation of an easy to use, uniform interface by which businesses can activate texting across their different non-mobile, phone lines. Zipwhip's combined system allows for no distinctions in process regardless of the type of phone number a business decides to enable for texting. The simplicity of the process for businesses is a key feature that fuels the continued adoption of this new technology by major companies. Nearly two million toll free numbers have been text-enabled and millions more landline and VoIP numbers have texting capability as well.

### **III. THE DECLARATORY RULING ELIMINATES ANY POTENTIAL DISPUTE AS TO THE AUTHORITY TO TEXT-ENABLE A NUMBER.**

#### **A. The Declaratory Ruling Affirms The Industry-Accepted Principle That Only The Subscriber Has Control Of Its Toll Free Number And Any Uses Of Such Number**

In the *Declaratory Ruling*, the Commission confirms the principle Zipwhip and the industry have long followed as key to any effective text-enablement process: that the

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<sup>7</sup> See Zipwhip White Paper, The Truth About Texting on Toll Free (filed in WC Docket Nos. 08-7 and 95-155, Nov. 18, 2016).

<sup>8</sup> See Justin Bachman, *A New Way to Tell Your Airline You Hate It*, Bloomberg (Aug. 10, 2017), <https://www.bloomberg.com/news/articles/2017-08-10/furious-about-delays-and-lost-luggage-text-your-airline>.

subscriber is the only entity that controls the toll free number and any decisions about its use.<sup>9</sup> Zipwhip commends the Commission's decision to confirm the subscriber's authority over its own number. We submit that this ruling, though beneficial, hardly was controversial. The industry has long agreed that the subscriber is the one who determines how the business desires to use its numbers. The *Declaratory Ruling* puts an end to any potential dispute as to this point and ends any lingering risk of hijacking of toll free numbers by a third party.<sup>10</sup>

Notably, the *Declaratory Ruling*'s conclusion is contrary to the solution that Somos proposed. In its Petition in dockets 08-7 and 95-155, Somos asked the Commission to mandate that text messaging providers need to seek authorization from the RespOrg.<sup>11</sup> This solution would have placed the authority to text-enable a toll free number with the RespOrg, not the subscriber. As Zipwhip noted in its response to that proposal, Somos "seeks to undercut subscriber control and insert RespOrgs . . . in a controlling position in the market."<sup>12</sup> With the *Declaratory Ruling*, the Commission makes clear that this aspect of the Somos Petition is not viable. Zipwhip thanks the Commission for affirming the industry-accepted approach instead.

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<sup>9</sup> See generally *Declaratory Ruling* ¶¶10, 11 (clarifying that only the toll free subscriber may authorize text-enablement); see also *Opposition of Zipwhip, Inc.*, WC Docket 95-155, WT Docket 08-7 at 9 (filed Dec. 5, 2016) (explaining that "the industry has developed around the core principle that the subscriber . . . controls the use of its toll-free or landline number.").

<sup>10</sup> The *Declaratory Ruling* also prohibits the text-enablement of a toll free number that has not been assigned to a voice subscriber. Zipwhip followed this principle prior to the *Declaratory Ruling*, having established procedures that dipped the SMS/800 database to confirm assignment of the number. Thus, Zipwhip has no issue with the substance of this ruling either.

<sup>11</sup> See Somos Petition at 2.

<sup>12</sup> Zipwhip Opposition at ii.

**B. The Industry Has Instituted Processes that are Working to Enable Effective Verification and Consumer Protections While Also Encouraging Market Growth**

Even prior to the *Declaratory Ruling*, the industry pursued procedures to confirm the subscriber's authorization to text-enable a toll free number. These industry guidelines are in place today and are working to protect consumers from third party control of texting services on the number. The fact is, contrary to allegations cited in the *NPRM*,<sup>13</sup> the status quo operations of the marketplace are working effectively.

Industry self-regulation has coalesced around the core principle of subscriber control that enables proper subscriber verification. A primary leader of this industry effort has been CTIA. CTIA's stakeholder groups have brought various members of the ecosystem together to develop guidelines. Originally adopted in 2015, CTIA's SMS Interoperability Guidelines recognized that the toll-free number subscriber has the right to add services to its own phone number.<sup>14</sup> On January 19, 2017, CTIA issued a new guidance document developed by industry stakeholders. This new guidance provided voluntary best practices for businesses that participate in the wireless messaging ecosystem that, inter alia, acknowledges A2P messaging services and focuses on best practices to ensure the successful transmission of *wanted* messages between consumers and businesses.<sup>15</sup>

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<sup>13</sup> See *NPRM* ¶ 40 (citing other commenters that claim that without rules mandating a centralized toll free texting registry the toll free industry would be at risk of having its reputation or branding damaged).

<sup>14</sup> See SMS Interoperability Guidelines, available at [http://www.ctia.org/docs/default-source/default-document-library/sms\\_interoperability\\_guidelines\\_v3-2-2\\_jan\\_2015-as-posted.pdf?sfvrsn=2](http://www.ctia.org/docs/default-source/default-document-library/sms_interoperability_guidelines_v3-2-2_jan_2015-as-posted.pdf?sfvrsn=2).

<sup>15</sup> See CTIA Messaging Principles and Best Practices, available at <https://api.ctia.org/docs/default-source/default-document-library/170119-ctia-messaging-principles-and-best-practices.pdf>.

Zipwhip, for example, employs multi-factored tests to confirm subscriber authorization and control.<sup>16</sup> Zipwhip's multi-step verification process includes:

- A phone call with voice verification;
- Online research of the business, the requesting individual, and the phone number to be text-enabled; and
- Confirmation that payment information is tied to the requesting business.

If approved, the business's phone number is published to the industry de-facto database (NetNumber) indicating it has text enabled.

One key element of that verification is a dual-factor authentication procedure commonly used in many contexts: Zipwhip sends a confirmation code by calling the voice number, and requires the subscriber to return that confirmation code to the company. The customer must demonstrate its control over the voice number by returning the confirmation code correctly. This factor, alone, would prevent, for example, the type of fraud some speculated could happen by text-enabling a toll free number appearing on a credit card.<sup>17</sup> No scammer would have sufficient access to the voice number to return the confirmation code Zipwhip

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<sup>16</sup> Zipwhip employs the described authentication methods for text-enablement of any number (landline, VoIP or toll free), not just toll free numbers. Therefore, its comments apply to all text-enablement situations, even though the *NPRM* focuses specifically on toll free numbers.

<sup>17</sup> See e.g., *Declaratory Ruling* ¶ 9 ("The lack of safeguards and controls in the text-enabling process can harm both the toll free subscriber and any consumer that calls or texts the toll free number. For example, . . . 'an individual or company could, for example, text-enable the toll free customer service number on the back of a credit card and ask consumers to text via that number sensitive personal and/or financial information associated with their card account.'"); see also *Declaratory Ruling* and *NPRM*, Statement of Chairman Pai ("If a scofflaw can text-enable a phone number without the knowledge or permission of the person who holds that number, the scofflaw could use that texting capability to perpetuate fraud, undermining public confidence in toll free texting.").

sends.<sup>18</sup> Thus, no FCC intervention is needed to “prohibit toll free numbers from being used by two unrelated entities-one for voice and the other for the texting.”<sup>19</sup>

Further, Zipwhip’s verification process is more extensive than just the confirmation code step. As Zipwhip explained in response to previous filings in other dockets, Zipwhip rigorously vets the company and the number, checking multiple sources to ensure that the company is legitimate and that it controls the number in question. For example, Zipwhip will check for advertising of the number by the business and third party directory listings that connect the customer to the number. In some instances where subscriber identity is still in doubt, Zipwhip may also consult a registry such as the Somos TSS Registry to facilitate the verification process.

In addition, Zipwhip verifies the authority of the individual to make decisions for the business in question. Zipwhip will examine contact information for the individual (business cards, email address, LinkedIn, etc.) to confirm the individual’s identity and position within the company. Sometimes, the individual’s title will be sufficient to confirm authority to make decisions regarding the business’ toll free numbers. Where there is doubt, however, Zipwhip may require a letter of authorization be signed by the customer, affirming authority to act on behalf of the business.

In other instances, Zipwhip may request a copy of the business’ telephone bill, confirming that the business is being billed for the number in question. This step also has the benefit of confirming that the individual involved has sufficient authority within the company to

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<sup>18</sup> Other Zipwhip authentication methods also would likely stop such a scam before it could take place. For example, the hypothetical scammer would not survive Zipwhip’s online research processes, nor would the payment information for the account match the subscriber’s company addresses.

<sup>19</sup> *Declaratory Ruling* ¶11.

obtain such documentation and alerts the person managing telephone bills, if that person is different, of the intention to text-enable a number. Finally, activation of more sensitive numbers, such as official government toll-free numbers or shared numbers, are more rigorously vetted.

Zipwhip continues to refine its processes, as one would expect in a functioning, competitive market. The objective of those refinements is to establish strict protocols to ensure there is integrity to the enrollment process and that technical controls are employed to maintain consumer security and protection.

#### **IV. PROPONENTS OF ADDITIONAL RULES HAVE NOT SHOWN ANY ACTUAL HARMS FROM TODAY'S VERIFICATION PROCEDURES.**

Commissioner O'Rielly rightly noted in his statement on the *NPRM*, "it is not clear, based on the present record, that there is a problem that requires regulatory intervention."<sup>20</sup> Zipwhip agrees with this assessment of the foundation for this proceeding. Zipwhip respectfully submits not only that there is no need for regulation of the text-enablement process for toll free numbers, but that such regulation would affirmatively harm the natural development of the business texting market.

##### **A. There is No Evidence of Third Parties Gaining Control over Toll Free Numbers**

For all the expressions of concern or "potential harms"<sup>21</sup> by some commenters, there have been no demonstrated instances of a third party gaining control over a toll free number. The parties themselves have not come forward with specific instances of errors or intentional wrongdoing. (If they had, Zipwhip would have been able to investigate and respond

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<sup>20</sup> *Declaratory Ruling* and *NPRM*, Statement of Commissioner O'Rielly.

<sup>21</sup> *See id.* ¶ 7 (referencing comments from entities that claim "toll free numbers could potentially be text-enabled without the toll free subscriber's approval, or even knowledge.").

to the claims). Zipwhip has not received any complaints alleging that a third party text-enabled a toll free number. Nor are there any instances, as far as we can tell, of any complaints to the FCC's Consumer Complaint Center. Zipwhip's counsel accessed the FCC's Consumer Complaint Database, looking for complaints in 2017 or 2018 addressing text-enablement of toll free numbers. The database does not contain an "issue" category for any of the following areas: "toll free," "texting," "unauthorized use" or any other grouping that suggested improper control over a telephone number. The database contains only 201 complaints categorized as "phone" and 325 categorized as "other," but the database does not provide further content of the complaints to determine their subject. Nothing in the database suggests that improper control over a toll free number is an issue.

The Commission should avoid falling prey to unsubstantiated claims of potential market failure. As Chairman Pai warns in the "Regulatory Philosophy" section of his Commission bio, "the FCC should do everything it can to ensure that its rules reflect the realities of the current marketplace."<sup>22</sup> Part of that obligation is to ensure that the Commission collects and heeds information about the actual workings of the market, not hypothetical harms or theoretical concerns. As Chairman Pai told the Free State Foundation in remarks shortly before he assumed leadership of the FCC, regulations adopted without evidence of a market failure should be disfavored. Using the Commission's *Open Internet Order* (now replaced by the *Restoring Internet Freedom Order*) as his example, Chairman Pai expressed disagreement with the decision to regulate broadband Internet access services (a much larger and much more mature market than toll free texting), noting that "[o]ne could read the entire document . . . without

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<sup>22</sup> See <https://www.fcc.gov/about/leadership/ajit-pai#bio> (last accessed August 23, 2018).

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."<sup>23</sup>

The Chairman has consistently espoused a regulatory approach that recognizes that regulations can hinder innovation and that outdated rules often do not effectively account for the modern communications landscape.<sup>24</sup> Just this month, Chairman Pai warned:

Instead of viewing innovation as a problem to be regulated based on rules from the past, government should see innovation's potential, guided by markets that embrace the future. Government can best serve the public interest through regulatory humility. . . History tells us that it is not preemptive regulation, but permissionless innovation made possible by competitive free markets that best guarantee consumer welfare.<sup>25</sup>

In this case, it is a voice of the past – literally voice communications regulation – which proponents of new rules wish to impose on a new and thriving market. Zipwhip brought new capabilities to the business services market, enabling businesses to communicate in effective, two-way communications with their customers using a technology that particularly younger consumers prefer. Zipwhip's entry was a hallmark of the permissionless innovation that Chairman Pai lauded. Now, some view that innovation as a “problem” and propose to “fix” that problem using rules from the past. The Commission should not yield to those claims.

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<sup>23</sup> FCC Commissioner Ajit Pai, Remarks before the Free State Foundation's Tenth Anniversary Gala Luncheon (Dec. 7, 2016).

<sup>24</sup> See e.g., Chairman Pai Testimony to House Energy and Commerce Communications Subcommittee, October 2017) (“In most cases, [old rules that have been on the books for a while] simply don’t reflect the marketplace of today; and in some, they affirmatively harm consumers and competition by diverting investment and impeding innovation.”).

<sup>25</sup> Chairman Pai, Remarks at The Resurgent Conference (Aug. 3, 2018).



**B. Regulation Would Unnecessarily Burden the Text-Enablement Process Without Producing Any Benefits**

The *NPRM* proposes to require the toll free subscriber, after it has authorized a number to be text-enabled, to notify its RespOrg, so that the RespOrg can add a notation of the action, presumably in the SMS/800 database. This proposal, if adopted, would burden toll free subscribers without providing any further protection against third parties improperly text-enabling a number.

At the outset, Zipwhip notes that the primary burdens of the proposal would fall on the entities the rule purports to benefit – the toll free subscribers. It is the subscriber that the Commission would task with a reporting obligation: under the *NPRM*, the subscriber would be required to report its actions to a RespOrg, telling the RespOrg that it has chosen to text-enable the number. This proposal, however, gets the agency relationship backwards. The RespOrg exists as the subscriber’s agent, to carry out the subscriber’s instructions relating to the routing and carriage of its voice calls. The RespOrg is not the principal, to whom the subscriber must report its use of the number it has been assigned. While this is one step removed from a “Mother, May I?” approval process, the proposal does not embrace permissionless innovation either.

This proposal also fails to account for the fact that a RespOrg may serve multiple roles and that the RespOrg would not necessarily be neutral in matters relating to text-enablement of numbers. Somos makes much of the claim that *it* (*Somos*) must be a neutral entity, but a RespOrg can be a carrier, an independent entity, or can be the subscriber itself. Even Somos concedes that it cannot determine the RespOrg’s role – and, by extension, its true motivations. In the 833 proceeding, Somos explained that “a significant number and growing use of TFNs is for ad tracking and marketing. Here, the RespOrg may be the end user. Somos

would have no way to know whether or not the RespOrg is the legitimate end user, or if the RespOrg is warehousing the number by claiming to be the end user.”<sup>26</sup> If the RespOrg might be operating in its own self-interest in the reservation process, what protection from RespOrg self-dealing exists in the text-enablement process? A RespOrg, for example, might offer a competing business texting solution and seek to favor its own services in recording (or verifying) a subscriber’s text-enablement activity. Even if protections against this outcome could be added to the proposed regulations, these additional elements would come at a cost, which ultimately would be passed on to the subscriber.

Moreover, the proposal would impose some undetermined procedural and administrative costs on subscribers. First, the subscribers would have to develop processes to ensure that they identify text usage of a toll free number, and report that behavior to the RespOrg. And, if/when the subscriber terminates a text usage of the toll free number, the subscriber would have to have procedures to inform the RespOrg of that decision as well. All of this happens, notably, while the subscriber has no such obligations with respect to its landline or VoIP business numbers. Only the toll free text enablement process would bear these burdens. Thus, for example, if the subscriber decides to text enable a toll free number and its primary ten-digit business number at the same time, it would follow two separate processes to accomplish that result.

Second, it is unclear how much more it would cost to run the SMS/800 database with toll-free text enablement information included. At this point, we know only that adding a text-enablement field and accessing that information will not come without at least some cost. Zipwhip is concerned that the proposal would allow Somos to convert some (or perhaps most) of

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<sup>26</sup> Reply Comments of Somos, Inc., WC Docket 95-155, (filed June 21, 2016).

the costs of its unregulated TSS registry into the Commission-mandated SMS/800 database, shifting what currently are competitive costs into a government-regulated cost recovery mechanism.

Finally, the proposal is silent as to the enforcement burdens that subscribers might face. If a subscriber fails to notify the RespOrg of the text-enablement, or significantly delays in doing so, would the subscriber be subject to potential forfeiture liability for its failure to comply with a Commission rule? It is hard to see what purpose such enforcement would serve, but the presence of the rule and the obligation placed on the subscriber suggests that enforcement against toll free end users is a by-product of the proposed regulatory regime.

**C. Regulation Would Run Counter to the Commissioners' Regulatory Principles**

The proposed regulation would not exist in a vacuum. As noted, Zipwhip offers the ability to text-enable many business numbers, including 10-digit landline and VoIP numbers, in addition to toll free numbers. Yet, proponents of toll free texting rules have not raised any concerns regarding traditional landline or VoIP numbers, which would in theory be subject to the same hypothetical risks. The result of this would be asymmetrical regulation of competing services. Text-enablement of toll free numbers would have one set of regulations, but the business' landline or VoIP numbers would have a different, lesser regulation. (And text-enablement of wireless numbers has yet another regulatory regime).

Moreover, the asymmetry would not end with the type of number. The proposal also creates an asymmetry between SMS texting (of toll free numbers) and OTT messaging services, RCS messaging, VoIP chat and any other messaging technology that may exist. As Commissioner O'Rielly urged in a June 2018 post on the Commission's blog, "it should be impossible for policymakers to ignore [the immense popularity of app-based services], the

substitutability of services with those offered by Commission regulatees, and the disruptive force non-regulated services are having with regards to the Commission's activities.”<sup>27</sup> Ultimately, Commissioner O’Rielly argues, the only logical conclusion is to support greater deregulation of the services within the FCC’s purview. The *NPRM* runs counter to that approach, burdening a previously unregulated service with new obligations in order to perpetuate a legacy service.

Of course, some might argue for a more expansive rule, burdening all text-enablement of numbers, whether or not they are toll free numbers. This outcome would be the epitome of “regulation by analogy.”<sup>28</sup> Regulation by analogy, as Commissioner O’Rielly noted, often leads to “the worst of both worlds: all the burdens and none of the clarity.”<sup>29</sup>

Similarly, Commissioner Carr has warned of a “tendency to pile on regulations” that burden regulated entities.<sup>30</sup> The Commission already imposes a number of paperwork requirements on carriers and other regulated entities. The “cumulative burdens” of these regulations, Commissioner Carr notes, is “staggering,” particularly on small businesses.<sup>31</sup> Commissioner Carr suggested that eliminating (or, in this case, avoiding) wasteful regulations would free small businesses to concentrate on other objectives, namely “serving their customers and creating jobs.”<sup>32</sup>

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<sup>27</sup> Blog of Commissioner Michael O’Rielly, *FCC Regulatory Free Arena*, FCC Blog, June 1, 2018.

<sup>28</sup> See Commissioner Michael O’Rielly, Remarks at Cloud Communications Summit, 2 (June 26, 2018).

<sup>29</sup> *Id.*

<sup>30</sup> Commissioner Brendan Carr, Remarks before U.S. Chamber of Commerce (Jan. 25, 2018).

<sup>31</sup> *Id.* at 1.

<sup>32</sup> *Id.* at 2.

These sentiments match those of Chairman Pai, who has espoused “regulatory humility” in dealing with new technologies, stating:

History tells us that emerging technologies will evolve in ways that people don’t anticipate. This makes it foolish and counterproductive for government to micromanage—or more accurately, try to micromanage—their future. There is often a strong temptation to regulate new technologies, especially by forcing them into old frameworks. But my strong belief is that government should resist pre-emptive regulation when there is no market failure or consumer harm. One should not broadly regulate based solely on anticipation.

These broad statements of regulatory philosophy are particularly pertinent here.

The Commission should not “pile on regulations” and impose recordkeeping obligations on toll free end users and/or their agents (i.e., the RespOrgs). The Commission should be duly skeptical of the cost of such regulations, the waste involved and the unintended consequences they might impose. Moreover, when the core underpinning of the rules is an analogy between voice service uses of toll free numbers and SMS texting, the Commission risks “the worst of both worlds” in moving forward. Zipwhip therefore respectfully suggests that the Chairman’s urging of “regulatory humility” is appropriate with regard to texting using toll free numbers.

**V. THE COMMISSION SHOULD BE CAUTIOUS IN RELYING UPON ITS AUTHORITY OVER NUMBER ADMINISTRATION AS THE SOLE BASIS FOR ACTION IN THIS PROCEEDING.**

In the *Declaratory Ruling*, the Commission asserts that section 251(e)(1) of the Communications Act of 1934, as amended by the 1996 Act, gives it the authority, independent of the still unresolved regulatory status of text messaging services, to “clarify the role of the toll free subscriber to authorize the text-enabling of a number.”<sup>33</sup> The Commission has often

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<sup>33</sup> See *Declaratory Ruling* ¶ 12; see also 47 U.S.C. § 251(e)(1).

characterized its authority under this section as “plenary authority” over the administration of numbering resources,<sup>34</sup> and it suggests that this authority is itself sufficient to justify the proposed action in this proceeding.

When Section 251(e)(1) is the sole authority cited for such a radical step into an unregulated, competitive market, that fact should give the Commission pause. Section 251(e)(1) explicitly deals only with the administration of the North American Numbering Plan. It says nothing about use of numbers as an addressing mechanism for non-PSTN functions, and it does not speak to non-telecommunications services. The Commission therefore should cautiously consider whether Section 251(e)(1) presents a sound foundation for its authority, and, even if it could theoretically be employed, whether there is a sound basis for connecting texting to number administration.

**A. Section 251(e)(1) Addresses Number Allocation and Distribution, Which Are Not Implicated in This Proceeding**

Section 251(e)(1) is included in a section entitled “Interconnection” in the Telecommunications Act of 1996. Section 251, generally, sets forth graduated obligations of telecommunications carriers for the purpose of introducing competition in local services. It is for this purpose that Section 251(e)(1) grants the FCC exclusive authority over numbering policies and numbering administration. The provision therefore, begins with a clear command that does not apply to the subject matter the Commission proposes here: “The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to

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<sup>34</sup> See e.g., *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, Sixth Report and Order, ¶ 23 (rel. March 14, 2005); *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, ¶ 33 (rel. June 3, 2005) (“We rely on the plenary numbering authority over U.S. NANP numbers Congress granted this Commission in section 251(e) of the Act.”) (“*VoIP Numbering Order*”).

make such numbers available on an equitable basis.”<sup>35</sup> The next sentence contains the language the Commission frequently cites, including in the *NPRM*: “The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.”<sup>36</sup> Although this sentence makes clear that the Commission has jurisdiction over the North American Numbering Plan (“NANP”), it does not describe the scope of that authority.

That authority historically has been utilized only in connection with the allocation and distribution of numbers for voice services.<sup>37</sup> It has, for example, overseen the introduction of new toll free codes and new area codes, selecting between area code splits and area code overlays as appropriate.<sup>38</sup> It has, further, overseen policies to prevent the premature exhaust of numbers, including number utilization measures.<sup>39</sup> It has also determined which entities would

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<sup>35</sup> 47 U.S.C. § 251(e)(1).

<sup>36</sup> *Id.* The third sentence relates to delegations of this authority to the states, and is not relevant here.

<sup>37</sup> See *Numbering Resource Optimization, Petition for Declaratory Ruling and Request for Expedited Action on the July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215, and 717*, CC Docket Nos. 96-98, 99-200, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd 306, 310 ¶ 3 (2000) (“*Numbering Resource Optimization Order*”) (“In discharging our authority over numbering resources, we seek to balance two competing goals. We must ensure that carriers have the numbering resources that they need to compete and bring new innovative services to the consumer marketplace. At the same time, we must ensure that, to the extent possible, numbering resources are used efficiently.”); see also *Toll Free Assignment Modernization, Toll Free Service Access Codes*, CC Docket No. 95-155, WC Docket No. 17-192, Notice of Proposed Rulemaking, 32 FCC Rcd 7885, 7888 ¶ 7 (2017) (explaining that the FCC has implemented its duties under section 251(e)(1) by adopting rules to facilitate numbers being available on an equitable basis).

<sup>38</sup> See *Toll Free Service Access Codes*, CC Docket No. 95-155, Order, 32 FCC Rcd 3153 (2017); *Petition of the California Public Utilities Commission for Delegated Authority to Implement Specialized Transitional Overlays*, CC Docket 99-200, Order, DA 05-2349 (rel. Sept. 9, 2005).

<sup>39</sup> See *Toll-Free Service Access Codes*, CC Docket No. 95-155, Order on Reconsideration, FCC 07-224 (rel. Dec. 21, 2007); see also *Numbering Resource Optimization Order*.

be entitled to obtain numbers from the North American Numbering Plan administrator, and clarified policies relating to the transfer of numbers from one subscriber to another.<sup>40</sup> However, the FCC has never applied this section to non-voice services prior to this proceeding.

This proceeding involves an entirely novel situation. Texting on toll free numbers involves an ancillary use of a number – as an addressing mechanism for a service that many contend is an information service. Congress has not provided the Commission with a mandate in this area. Indeed, the North American Numbering Plan makes no reference whatsoever to texting using telephone numbers (whether wireless, toll free or landline/VoIP).<sup>41</sup> The North American Numbering Plan Administration’s homepage contains a link to FCC number resource optimization orders, which contains five FCC orders, none of which discuss policies for SMS texting.<sup>42</sup> It is hard to see how the Commission’s authority over a numbering plan thus reaches a service not mentioned in the plan itself.

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<sup>40</sup> See *VoIP Numbering Order; Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC, Regarding FCC Jurisdiction and RespOrg Responsibilities to Comply with Part 52 of the FCC’s Rules and the SMS/800 Tariff Requirements*, CC Docket No. 95-155, Declaratory Ruling, DA 11-355 (rel. Feb. 24, 2011)

<sup>41</sup> See North American Numbering Plan Administration Homepage, [www.nationalnanpa.com](http://www.nationalnanpa.com) (last visited August 20, 2018).

<sup>42</sup> See [https://www.nationalnanpa.com/number\\_resource\\_info/fcc\\_nro\\_orders.html](https://www.nationalnanpa.com/number_resource_info/fcc_nro_orders.html) (last visited August 20, 2018). The only mention of SMS texting in any of the orders comes in Commissioner O’Rielly’s statement regarding access to numbers by interconnected VoIP providers. That statement, however, laments the “anachronistic” nature of the FCC’s actions. See *Numbering Policies for Modern Communications et. al*, WC Docket No. 13-97, Report and Order, FCC 15-70 (rel. June 22, 2015) (“*VoIP Numbering Order*”), Statement of Commissioner Michael O’Rielly (“I find the entire debate rooted in a technology and a system that is fading, and fading fast. Consumers, especially younger consumers, do not care about their specific telephone number, care even less about a specific area code, have little fondness for voice communications and are considering a breakup with traditional SMS texting.”).



**B. The Stated Connection to Numbering is Attenuated and Unsupported**

The *NPRM* makes what appears to be an assertion of ancillary authority to regulate text-enablement of toll free numbers. Wisely, the *NPRM* does not assert authority over SMS texting itself, nor does it claim that Section 251(e)(1) regulates texting. Instead, it claims that the steps proposed in the *NPRM* will “help safeguard the toll free number assignment process in general” and the text-enablement process “in particular.”<sup>43</sup> However, the impact on toll free number assignment for voice services is attenuated at best, and is unsupported in any event.

The Commission does not explain how safeguarding text-enablement by business customers will safeguard to toll free assignment process “in general.” Regardless of how the FCC resolves the questions posed in the *NPRM*, SMS texting does not impact any objectives of the NANP. Numbers will continue to be administered by a neutral NANP administrator, and presumably, those numbers will continue to be made available on an equitable basis. There will be no impact on potential number exhaust or availability of numbering resources. There will be no impact on the administration of the Plan, which, as noted, doesn’t even mention SMS texting as a service. Nor would action here impact the attractiveness of toll free service for voice usage.

If anything, the Commission has assured that there will be no impact on these principles by the action it took in the *Declaratory Ruling*. In that portion of the Commission’s order, the FCC clarified that a non-assigned toll free number may not be text-enabled. Although Zipwhip already incorporated this policy in its verification procedures (verifying assignment and verifying the subscriber’s control over the voice communications), the idea that numbers should first be used for voice services is understandable. Once that principle is in place, however, voice

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<sup>43</sup> *NPRM* ¶ 27.

services drive the number allocation and assignment process, and the FCC's established policies overseeing the NANP would control. Because texting is established as a secondary use, the fact that a toll free number is or is not text-enabled would not have any impact on those policies. Thus, no action (or inaction) in this proceeding will impact the toll free assignment process "in general."

This leaves the assertion that the rules will address toll free text-enablement "in particular." This assertion of authority, however, is a tautology. An impact on toll free text enablement (even if it were true) cannot establish that Section 251(e)(1) allows the FCC to regulate text-enablement in the first place. Thus, this assertion cannot be the basis for invoking Section 251(e)(1).

Notably, the Commission has always recognized that its exercise of jurisdiction over toll free numbers was limited. There are a number of areas that involve in some way the use of telephone numbers but which the FCC does not regulate. For example, in connection with trademark claims relating to the use of vanity toll free numbers, the FCC explicitly found that while there are legitimate concerns surrounding trademark infringement of vanity numbers, the issues "properly should be addressed by the courts rather than by the Commission."<sup>44</sup> In addition, the FCC does not regulate the use of a number as a person's Facebook name, Twitter handle or email address. No rule or regulation stops a person from selecting 888-888-8888 as a name in any of these services, even if such a use might theoretically involve a "use" of such a

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<sup>44</sup> See *Toll Free Service Access Codes*, CC Docket No. 95-155, Fourth Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 9058, 9068 ¶¶ 22 (rel. March 31, 1998); see also *id.* ¶ 27 (explaining that subscribers can protect their investment in toll free numbers through trademark protection laws).

number.<sup>45</sup> Put simply, mere use of a number in some context has never conferred jurisdiction on the FCC. It should not here, either.

Moreover, it is extremely hard to determine how the specific rules proposed would achieve the purposes identified in the *NPRM*, namely “alleviating confusion about the status of a toll free number,” and preventing potential spoofing and fraud.<sup>46</sup> Nothing in the *NPRM* explains how requiring the toll free subscriber to inform its RespOrg of its actions will lessen “confusion” in the market, nor is it even clear (a) what confusion is being alleviated or (b) what market is being protected. Nor does this requirement protect against spoofing in any way or prevent fraud from being perpetrated. Theoretical jurisdiction in some instance does not absolve the FCC of its obligation to ensure that its actions are the product of reasoned decision-making.<sup>47</sup>

The Commission’s experience in the 1-800-SUICIDE case is illustrative. In that case, the FCC purported to exercise its authority pursuant to Section 251(e)(1) (as implemented through FCC rules) to override the “first come, first served” method of toll free number assignment. However, on appeal, the U.S. Court of Appeals for the D.C. Circuit found the FCC’s decision to be arbitrary and capricious. In particular, the court concluded that the FCC failed to provide a reasonable explanation for its exercise of Section 251(e)(1) authority to reassign the number from its original subscriber. It found the FCC’s extrapolation from the subscriber’s past financial difficulties to be “quite a leap” and cautioned that “fear may have

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<sup>45</sup> The subscriber to 888-888-8888 may be able to stop someone from using such a name, but if it could, it would be able to do so through trademark law, not FCC rules or regulations.

<sup>46</sup> *NPRM* ¶ 27.

<sup>47</sup> See, e.g., *Kristin Brooks Hope Center v. FCC*, 626 F3d 586 (D.C. Cir 2010) (Commission exercise of Section 251(e)(1) jurisdiction over 1-800-SUICIDE and other suicide hotlines exercised in an arbitrary and capricious manner).

supplanted reason” in the FCC’s exercise of its authority.<sup>48</sup> The court also recognized that the FCC faced a “challenging line-drawing problem” in the case but concluded that the Commission’s justifications for its choice “were inadequately explained.”<sup>49</sup>

Like in the 1-800-SUICIDE case, the FCC in this proceeding has not demonstrated sufficient facts connecting the *NPRM*’s proposal to any real impact on numbering or the NANP. Proponents may try to incite the FCC through hyperbolic allegations of potential harm, but, in the end, fear cannot supplant reason. Moreover, on the current record, the connection between the facts and the proposed action is lacking. Zipwhip respectfully submits that, whatever the theoretical reach of the Commission’s jurisdiction may be, it does not reach this set of facts and circumstances.

**VI. THE COMMISSION SHOULD DECIDE THE CLASSIFICATION OF SMS TEXTING BEFORE IMPOSING ANY REGULATIONS ON THE TEXT-ENABLEMENT PROCESS.**

Zipwhip agrees with Commissioner O’Rielly that the Commission should decide the regulatory classification of SMS texting services. Whether SMS texting is a Title II service has been pending before the FCC since at least 2008.<sup>50</sup> The issues are ripe for decision. The Commission owes the industry an answer, one way or another, to this critical question. “Regulatory tap dancing,” as Commissioner O’Rielly put it, should end on this fundamental question.

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<sup>48</sup> See *Kristin Brooks*, 626 F.3d at 589 (D.C. Cir. 2010).

<sup>49</sup> *Id.* at 589-90.

<sup>50</sup> See Petition of Public Knowledge et. al. for Declaratory Ruling Stating Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, WT Docket 08-7 (filed Dec. 11, 2007); Universal Service Administrative Company, Request for Guidance on Universal Service Fund Contributor Matter, Docket WC 06-122 (filed April 22, 2011); Petition of Twilio Inc. for an Expedited Declaratory Ruling Stating That Messaging Services Are Title II Services, WT Docket 08-7 (filed Aug. 28, 2015).

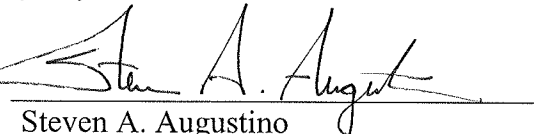
In the sound exercise of its regulatory mission, it should take this action first, before deciding what, if any actions are available to it with respect to the *NPRM*. If SMS texting is a Title II service, then the Commission may have additional sources of authority and additional options available to it to address perceived harms in text-enabling a toll free number. If SMS texting is not a Title II service, it falls in an unregulated category with RCS, OTT services and, potentially, chat and other forms of asymmetrical communication. If that is the case, the public interest would best be served with a proceeding that addresses all of these forms of communication, rather than one that piecemeal selects one service for regulation while leaving competing services unfettered.

## VII. CONCLUSION

For all of the above reasons, Zipwhip respectfully submits that the FCC should deny the *NPRM* and terminate this proceeding.

Respectfully submitted,

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