

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

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

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

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SUMMARY

In his statement on the Notice of Proposed Rulemaking, Commissioner O’Rielly expressed two concerns with this proceeding:

First, it is not clear, based on the present record, that there is a problem that requires regulatory intervention. The Notice points to a handful of instances where a number may have been text-enabled without a subscriber’s authorization, but those examples are contested. Therefore, the record generated in this proceeding will be valuable in assessing the *need* for Commission action.

Second, because the Commission has not classified text messaging, the Notice is forced to explain how the administration of text-enabled toll-free numbers does not prejudice the regulatory status of text messaging. ... It makes no sense to begin placing antiquated regulatory burdens on a legacy service when consumers are already shifting to new forms of messaging that we have no authority to regulate.¹

The comments in the record confirm Commissioner O’Rielly’s assessment of the proceeding: there is neither a need for nor suitable FCC authority for the Commission to adopt the rules proposed in the NPRM.

Regarding the need, businesses that use text messaging services expressed their satisfaction with the existing subscriber authorization processes. Others in the industry, including AT&T, TEN DIGIT Communications and CTIA similarly reported that the messaging industry is acting responsibly and that no market failures exist. By contrast, proponents of the rule continue to trot out the same tired assertions that the market is plagued by problems, yet they conspicuously don’t cite any examples where a third party improperly controlled a toll free number. The weight of the comments show that the market is performing appropriately and that there is no problem for FCC regulation to solve.

With respect to the wisdom of imposing regulatory burdens on text messaging, the record shows strong opposition to Commission intervention. The Free State Foundation opposed the proposal and urged the Commission to continue Chairman Pai’s efforts in “resisting efforts to expand or exercise its regulatory authority absent a clear demonstration of market failure.”² CTIA argued that the proposed rules are burdensome and are contrary to the

¹ *Text-Enabled Toll Free Numbers, Toll Free Service Access Codes*, WC Docket No. 18-28, CC Docket No. 95-155, FCC 18-77, Statement of Commissioner Michael O’Rielly (rel. June 12, 2018).

² Free State Foundation Comments at 4.

Commission’s approach for interstate information services.³ As Zipwhip noted in its initial comments, Chairman Pai’s recommendation of “regulatory humility” counsels that “One should not broadly regulate based solely on anticipation.”⁴ In particular, where text messaging services are properly classified as information services and where alternatives to SMS texting unquestionably are not regulated, it makes no sense to impose “antiquated regulatory burdens” on text-enabled toll free numbers simply or primarily because voice services are so-regulated.

For these reasons, the Commission should reject the NPRM and terminate this proceeding.

³ CTIA Comments at 8.

⁴ Zipwhip Comments at 16.

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Zipwhip, Inc. (“Zipwhip”), by and through undersigned counsel, submits its reply to the initial comments filed in this proceeding.⁵ The comments in the record confirm Commissioner O’Rielly’s assessment of the proceeding: there is neither a need for nor suitable FCC authority for the Commission to adopt the rules proposed in the NPRM.

The parties that actually use business texting services have clearly spoken. They are satisfied with the existing protections in the market and do not want any regulation of the text-enablement process. Even the proponents of the rule – principally, Somos and its advisory board members – confirm that they don’t have any real-world experiences with third parties improperly text-enabling toll free numbers. Instead, they trot out the same tired assertions that the market is plagued by problems, yet they conspicuously don’t cite any examples where a third

⁵ 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). Initial comments were filed on August 23, 2018. Unless otherwise noted, initial comments are cited herein as “[Party]” Comments.

party improperly gained control of a toll free number.⁶ Proponents have had multiple opportunities to demonstrate a market failure; the fact that they once again did not do so conclusively demonstrates that their premise is without merit.

Meanwhile, other commenters have shown that regulation contradicts the Commission's regulatory principles and is otherwise ill-conceived. The Free State Foundation opposed the proposal and urged the Commission to continue Chairman Pai's efforts in "resisting efforts to expand or exercise its regulatory authority absent a clear demonstration of market failure."⁷ CTIA argued that the proposed rules are burdensome and are contrary to the Commission's approach for interstate information services.⁸ Messaging providers TEN DIGIT Communications and AT&T noted that RespOrgs are poor choices for the role the proposal envisioned.⁹ These comments confirm Commissioner O'Rielly's concern that the Commission is proposing "antiquated regulatory burdens on a legacy service [SMS] when consumers are already shifting to new forms of messaging that we have no authority to regulate."¹⁰ For these reasons, the Commission should reject the proposed rules and close this docket.

⁶ Instead, they cross-cite to each other for support for the claim. *Compare* Somos Comments at 10, n.40 (citing to Bandwidth Comments) *with* Bandwidth Comments at 3, n.7 (citing to a Somos filing).

⁷ Free State Foundation Comments at 4.

⁸ CTIA Comments at 8.

⁹ AT&T Comments at 6 ("RespOrgs are no better positioned than messaging providers to improve subscriber authorization process"); TEN DIGIT Comments at 3. ("Requiring the involvement of the RespOrg or Somos is the quintessential solution looking for a problem").

¹⁰ Statement of Commissioner Michael O'Rielly, FCC 18-77.

I. ENTITIES THAT ACTUALLY USE OR PROVIDE BUSINESS TEXTING SERVICES ARE SATISFIED WITH THE EXISTING PROTECTIONS.

The entities that this proceeding is intended to protect do not support the Commission's proposal.

A. The Record Reflects Growth of the Toll Free Texting Market Due to Satisfaction with the Current Authorization Procedures.

When considering a regulation that affects a particular industry segment, it is wise to listen to those entities that actively participate in the market. The record overwhelmingly shows that the entities that provide, or are affiliated with providers of, business text messaging services express satisfaction with the current state of the toll free texting market.¹¹ AT&T explains that the market is “thriving and rapidly evolving” and “[t]he substantial growth in the texting market demonstrates that merchants have confidence in the current process.”¹² CTIA further validates this point by observing that “[t]he record in late 2016 reflected that businesses, recognizing the value of messaging, were already increasingly embracing messaging as a new way to communicate with consumers, including by text-enabling businesses’ toll-free numbers.”¹³ TEN DIGIT Communications, a provider of an SMS text messaging platform for contact centers and enterprise customers, reports that the technology that enables business texting “is flexible, seamless and enjoyed by millions of individuals and businesses throughout

¹¹ See e.g., Comments of TEN DIGIT Comments at 2 (“[T]here is absolutely no empirical evidence that the toll-free texting marketplace is exposed to fraud or failing in any way.”); AT&T Comments; CTIA Comments.

¹² AT&T Comments at 5.

¹³ CTIA Comments at 3-4. CTIA notes that analysts expect the market to grow by another 20% in the next five years. *Id.* at 4 (citing Jack Loechner, *Automated SMS Messages Projected > 2.7 Trillion By 2022*, MEDIAPOST (Dec. 8, 2017) <https://www.mediapost.com/publications/article/311016/automatedsms-messages-projected-27-trillion-by.html>).

the world.”¹⁴ It states unequivocally that “[T]here is absolutely no empirical evidence that the toll-free texting marketplace is exposed to fraud or failing in any way.”¹⁵

B. Toll Free Subscribers Who Have Text-Enabled Their Numbers Support the Existing Process.

In response to the Commission’s request, individuals representing companies and organizations that have adopted toll free texting services shared their experiences with the current process. These individuals run small businesses that increasingly are adopting business texting solutions. In stark contrast to the self-interested comments by RespOrgs and their supporters, these comments show that individuals who have adopted the service and experienced the use of toll free numbers for business texting are not only happy with the service but appreciate the ease and simplicity of the current mechanism for text-enabling their toll free, landline and VoIP business numbers.

As of the date of this reply, nearly a dozen business texting customers have shared their experiences in this docket. Below is a highlight of the statements of some of these individuals:

- **W. John Fabrega:** “Having been involved in providing OTT telecommunications services for the past 27 years I shudder to imagine the disruption that would be caused by requiring toll free subscribers to inform the ultimate RespOrg of their desire to enable their number for text messaging.”¹⁶
- **Yuval Madar:** “The existing process for text enabling numbers is easy and effective. The process enables us to confirm our control over the number in a

¹⁴ TEN DIGIT Comments at 2.

¹⁵ *Id.*

¹⁶ Comments of W. John Fabrega, WC Docket No. 18-28 (filed Aug. 22, 2018).

simple and quick manner. The FCC should not burden our authority by inserting another entity into the process.”¹⁷

- **Patrick Londino:** “Once a business or organization is allocated a toll-free number, it should not have to report to the RespOrg about how it will use the number. This requirement only adds costs without protecting us, the subscriber, in any way.”¹⁸
- **Justin Idiart:** “About one year ago our law firm's ability to communicate with our clients was enhanced incredibly by being able to receive and send texts from our toll-free number. ... Texting has been a boon for our ability to communicate with [our clients] using one number. Access to justice is a real concern already, and this FCC move would make it more difficult for our clients to get effective representation.”¹⁹
- **George Cagel:** “The proposal would unnecessarily impose regulatory costs and additional burdens on business toll-free subscribers. It is opposite to the FCC’s de-regulatory agenda.”²⁰

These comments speak directly to the core issues raised by the Commission in the NPRM. In particular, at paragraph 25 of the NPRM, the Commission asks for the pros and cons of maintaining the status quo regarding text-enablement of toll free numbers. These commenters affirmatively support that status quo as “easy and effective” at protecting their interests.²¹ They uniformly express the view that additional regulations are unnecessary at this time.²² As the only

¹⁷ Comments of Yuval Madar, WC Docket No. 18-28 (filed Aug. 28, 2018).

¹⁸ Comments of Patrick Londino, WC Docket No. 18-28 (filed Aug. 21, 2018).

¹⁹ Comments of Justin Idiart, WC Docket No. 18-28 (filed Aug. 31, 2018).

²⁰ Comments of George Cagel, WC Docket No. 18-28 (filed Sept. 4, 2018).

²¹ *NPRM* at ¶ 25; *see also, id.* at ¶ 14 (positing that additional rules are necessary to “protect the integrity of our toll free system”). None of the commenters with experience in business texting express concern about the integrity of their toll free numbers.

²² *See e.g.*, Comments of Lance Rodela & Kim Rodela, WC Docket No. 18-28 (filed Aug. 16, 2018) (“Less regulation is more.”); Comments of Eric Boxer, WC Docket No. 18-28 (filed Aug. 22, 2018) (“If passed, and SOMOS is allowed to get their private agenda passed thru (sic) the FCC, all business owners, especially small ones will be penalized. Passing this law will have no tangible benefit to fighting fraud, will enrich a private

commenters with actual experience with business texting, their preferences should carry significant weight.

Even a prospective customer commented in opposition to the proposal:

As a small business owner, and part of a significant segment of the [A]merican economic backbone, it is imperative that simple and economical means of communication with our customers be carefully guarded. As large corporations continue to implement new technologies to quickly and effectively communicate with their customers, for example T-Mobile Expert Teams, we as small businesses need access to these same tools. If implemented this proposed rule would add unnecessary cost and regulatory burden not merited by the small increase in fraud reduction.²³

Zipwhip recognizes that the Ad Hoc Telecom Users Committee supported additional regulation.²⁴ But Ad Hoc represents a narrow constituency of telecommunications users, namely “the nation’s largest and most sophisticated corporate buyers of information technology (“IT”) and communications services.”²⁵ The needs and concerns of large, corporate customers understandably can differ significantly from ordinary small and medium sized businesses. For example, Ad Hoc reports that its members “establish internal processes and designate personnel who are responsible for – and knowledgeable regarding – their RespOrg, the RespOrg’s procedures for contacting them, and their company procedures for responding when issues arise regarding their toll-free numbers.”²⁶ An SMB, by contrast, typically has an easy-to-

company to the tune of tens of millions per year, and will place an unfair burden on business both large and small.”).

²³ Comments of Carlan Wray, WC Docket No. 18-28 (filed Aug. 24, 2018).

²⁴ Ad Hoc Telecommunications Users Committee Comments, at 1.

²⁵ Ad Hoc Comments at 1-2.

²⁶ Ad Hoc Comments at 4.

determine hierarchy, and often vests decisions in a President, CEO or the like. SMBs are less likely to need sophisticated “internal processes” that rely upon the RespOrg as a stop-gap for supporting the organization’s internal decision-making procedures. Thus, while Zipwhip can understand that a large enterprise member of Ad Hoc might wish for a RespOrg to perform a stop-gap role for the organization, it does not follow that this role would be appropriate as a public policy matter. Put simply, Ad Hoc’s concerns more accurately reflect the private internal control concerns of a large enterprise business rather than a question of fraud protection for the public generally.²⁷

Moreover, Ad Hoc’s comments indicate that its members don’t really have direct experience with toll free texting (despite the fact that some large organizations are Zipwhip customers, like Butterball and Hawaii Airlines). Ad Hoc states in its comments that its members were “surprised” by the process currently being used in the industry, suggesting an unfamiliarity

²⁷ To illustrate, suppose a large organization assigns the responsibility over management of toll free numbers to its accounting department, as a means of overseeing and controlling outside costs. If that large organization also has a customer care organization, and the VP of Customer Care authorizes the inbound toll free numbers to be text-enabled to better serve the company’s customers, it would not be appropriate to claim that the text-enablement was not authorized by the company. It may be true that the accounting department did not sign off on the VP of Customer Care’s decision, but, by any standard the Commission has used to identify “authorized subscribers” in other contexts, this hypothetical scenario is authorized. *See, e.g.*, 47 CFR § 64.1100(h) (defining “subscriber” as any one of the following: (1) “the party identified in the account records of a common carrier as responsible for payment of the telephone bill;” (2) “any adult person authorized by” such party; or (3) “any person contractually or otherwise lawfully authorized to represent” such party).

Moreover, Zipwhip notes that its processes will sometimes require a customer to produce a telephone bill or other proof of control over the telephone number to be text-enabled. *See* Zipwhip Comments at 7-9. This step is likely to bring in the accounting department in the hypothetical above, so the Ad Hoc Committee’s concerns very well could be accommodated by existing industry procedures, without imposing the RespOrg into an authorization process.

with the process through direct experience.²⁸ Not coincidentally, Ad Hoc discusses many “concerns” and expresses the view that certain risks might “increase,” but it doesn’t report any actual failures that its members have experienced.²⁹ Notably, the one example Ad Hoc references in its comments already has been debunked. Ad Hoc Telecom expresses concern that someone could “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.”³⁰ Not only has this situation never happened, but Zipwhip demonstrated that it is not possible for a third party to text-enable a number in this situation.³¹

Accordingly, the Commission should give weight to the small and medium sized business customers who have experience with text-enabling toll free numbers. The narrow concerns of large enterprise customers like Ad Hoc address only whether the desired person within the organization has authorized text-enablement, a concern that should be addressed primarily by the enterprise’s own internal controls and procedures. They do not present any credible risk – nor any actual evidence – of third parties obtaining control over a toll free number via improper means. In short, the experiences of business customers show that the market is performing appropriately and that no market failure exists at this time.

²⁸ Ad Hoc Comments at 3.

²⁹ *See, e.g.*, Ad Hoc Comments at 4 (asserting “substantial risks for enterprise customers,” and claiming that the risk of “misuse” “greatly increases”). Ad Hoc does not present any real-world examples where these asserted risks have come to fruition.

³⁰ Ad Hoc Comments at 4-5.

³¹ *See* Zipwhip Comments at 7.

C. A Recent Zipwhip Survey Supports a Hands-Off Approach to Text-Enablement.

As a provider of two-way business texting services, Zipwhip periodically surveys customers and small businesses to obtain insight into their preferences for the texting market. Zipwhip's most recent survey lends further support for the proposition that the Commission should not regulate the business texting market.

Working with a leading consumer survey firm, Zipwhip polled over 500 consumers and 250 small business owners to gain a deeper insight into attitudes and practices relating to two-way texting in the business market. The findings revealed that consumers and small businesses not only find value in two-way texting, but that they want to engage in the practice more frequently. 56 percent of the consumers responding to Zipwhip's survey and 53 percent of the small business owners expressed a desire to text with each other more often.³² The use of texting was even more pronounced for younger consumers: 71 percent of consumers 30-44 years old stated that they would text with businesses more frequently if they had the opportunity, while 69 percent of consumers 18-29 years old expressed the same desire.³³

However, when asked about the proposals in the NPRM, small business owners expressed concern with the potential implications of the proposed rules. Nearly two-thirds of small business owners (63 percent) stated that they would be unlikely to text-enable their business numbers if it involved additional costs, such as \$100 annually.³⁴ Almost half (42

³² Zipwhip Press Release, "Zipwhip Finds 56 Percent of Consumers Want to Text with Businesses," rel. Aug. 30, 2018, available at <https://www.zipwhip.com/blog/zipwhip-finds-56-percent-of-consumers-want-to-text-with-businesses/>.

³³ *Id.*

³⁴ *Id.*

percent) stated that they would be unlikely to text-enable their number if it required more than two steps to complete, such as would be the case if a messaging provider had to consult a central database or seek confirmation from a RespOrg.³⁵ These concerns counsel against complicating the process for text-enabling toll free numbers, particularly where, as here, the record does not establish any failings in the current workings of the market.

D. RespOrgs and Those Affiliated with Them Are Supportive of New Rules Primarily Due to Self-Interest.

The principal support for the NPRM's proposal comes from RespOrgs and entities affiliated with RespOrgs.³⁶ These entities have a vested, financial interest in the Commission adopting rules that would give them a regulation-backed favored position in the process around subscriber authorization for text-enablement of a toll free number. In fact, some commenters ask the FCC to adopt rules that go beyond the NPRM and assign RespOrgs with the decision-making authority in the text-enablement process, contrary to the *Declaratory Ruling*.³⁷

The self-interest of these organizations is apparent even in the claims of harm that they make. First, virtually all of the supporters of the proposal sit on Somos' Advisory Council.³⁸ For example, Bandwidth, Inc., which describes itself as “a leading provider of RespOrg services,” asserts that “RespOrgs” (though not necessarily itself) “have found that

³⁵ *Id.*

³⁶ See CSF HOLD Co. Comments; Somos, Inc., Comments; Twilio, Inc. Comments; Bandwidth, Inc. Comments; MessageComm Comments.

³⁷ See Somos Comments at 7 (explaining how that with the TSS Registry – the registry Somos recommends the FCC mandate for use – a request for text-enablement is sent to the RespOrg, which then has the authority to authenticate the request).

³⁸ Twilio, Bandwidth, and TSG Global all sit on the Somos Advisory Council. See <https://www.somos.com/about-us>. MessageComm is the “brainchild” of TSG’s CEO, who sits on the Somos Council. See <https://www.messagecomm.io/about-us.html>.

many of the toll-free numbers that they manage were [text]-enabled without their knowledge.”³⁹ Conspicuously missing from this assertion is a claim that the subscriber – the only entity the Declaratory Ruling concludes has authority to text-enable a toll free number – did not know or approve the text-enablement of the number. Instead, the claim only is that the RespOrg didn’t know of the text-enablement, not that the subscriber didn’t authorize it. Even weakened as it is, it also is notable that Bandwidth doesn’t claim it has experienced text-enablement without its (or the subscriber’s) knowledge. The sole citation for the assertion made by Bandwidth is to an ex parte letter filed by Somos, Inc. in July 2016.⁴⁰

II. NPRM PROPONENTS PROVIDE NO EVIDENCE TO SUPPORT CLAIMS THAT THIRD PARTIES TEXT-ENABLE NUMBERS WITHOUT THE SUBSCRIBER’S AUTHORIZATION.

As Zipwhip explained in its initial comments, any exercise of authority by the Commission must satisfy the Administrative Procedure Act. The Commission has a responsibility to provide a “reasoned explanation between the facts found and the choices made” by the agency.⁴¹ In this proceeding, the Commission simply doesn’t have any facts demonstrating that third parties have text-enabled numbers without the subscriber’s authorization. Lacking these basic facts, the Commission cannot adopt the rules proposed in the NPRM. As the Free State Foundation cautioned, “FCC Chairman Ajit Pai, to his credit, thus far

³⁹ Bandwidth Comments at 6.

⁴⁰ Bandwidth Comments at 6, n.16.

⁴¹ Zipwhip Comments at 22-23; *see Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (D.C. Cir. 2010).

has led the agency in resisting efforts to expand or exercise its regulatory authority absent a clear demonstration of market failure.”⁴² It should continue to follow that policy here.

A. Assertions by Supporters of the Rule are not Backed with Any Evidence

None of the proponents of new rules provided a single identifiable example of a toll free number being text-enabled without the subscriber’s authorization. Somos, the party that instigated this inquiry, offers no examples of actual instances of improper text-enablement in its comments. Instead, it vaguely asserts “significant problems” allegedly caused by not using Somos’ proprietary TSS Registry, and claims it is possible to text-enable a toll free number “without the knowledge of the subscriber or the Resp Org.”⁴³ The only support for this assertion is a white paper Somos commissioned back in 2016 (which Zipwhip will address momentarily). Notably, Somos does not present any statements by toll free subscribers that their numbers were text-enabled without their authority, does not identify any toll free numbers that were text-enabled by a third party, and does not back its assertion with any verifiable details.

Similarly, Bandwidth, as noted above, claims only that “many” numbers managed by RespOrgs were text-enabled without the RespOrg’s knowledge.⁴⁴ Twilio, which advocates to make the TSS Registry mandatory,⁴⁵ asserts only that unspecified “time-consuming, customer disrupting problems” occur when others don’t use the registry. Twilio fails to explain what these “problems” are, let alone to provide any evidence (a) that they occur or (b) that they are “time-

⁴² Free State Foundation Comments at 4.

⁴³ Somos Comments at 6-7.

⁴⁴ Bandwidth Comments at 6. Bandwidth does not claim that it has experienced any problems; only that “RespOrgs” have. *See, supra* at 9.

⁴⁵ Twilio Comments at 3 (urging the Commission to “adopt the TSS Registry” for text-enablement).

consuming” or “customer disrupting.” Moreover, nothing in Twilio’s assertion of “problems” goes to the objectives the Commission outlines in the NPRM: protecting against fraudulent text-enablement of toll free numbers. MessageComm does not claim any improper text-enablement occurred, asserting only that “bad players” have been “opportunistic” for “nefarious purposes.”⁴⁶ This single statement, without any explanation, is the sum of MessageComm’s evidence of any market failures or improper behavior in the text-enablement market.

The remaining supporters of a new rule don’t offer any evidence of fraud or improper text-enablement by third parties. Ad Hoc, as noted previously, speaks only of concerns that such risks exist.⁴⁷ ATIS’s SNAC claims without support a “very real *possibility* that toll free numbers *could be* text-enabled without the express authorization of the Subscriber and the validation by their Resp Org.”⁴⁸ ATIS’s comments fall short of demonstrating that any text-enablement by third parties is more than a theoretical possibility. Moreover, ATIS cites to its December 2016 comments, without acknowledging that (a) the Commission has now clarified in the Declaratory Ruling that the subscriber must provide authorization and (b) the Declaratory Ruling does not require “validation by their Resp Org” to text-enable a number (nor does the NPRM propose it). Nothing in ATIS’s comments provide a factual basis for the FCC to adopt the rules proposed in the NPRM.

⁴⁶ MessageComm Comments at 1 (“The bad players have identified an opportunistic moment to take advantage of the success of the good players for their own nefarious purposes.”). MessageComm does not identify any of its members, and its comments are unsigned.

⁴⁷ *See supra*, at 8.

⁴⁸ ATIS SNAC Comments at 2-3 (emphasis added).

This leaves CSF HOLD CO, which describes itself as serving “over 100 carrier and independent RespOrg customers.”⁴⁹ CSF does not even address the improper text-enablement of toll free numbers. Its sole complaint – offered without evidence or support – is that it has “many examples of subscribers having toll free number rightly text enabled for years, but then suddenly disconnected, without the subscriber’s authority.”⁵⁰ Even if this claim could be supported, it appears to relate to a provisioning problem – “rightly” text-enabled numbers that become disconnected. Nothing in its comments relates to third parties text-enabling numbers without subscriber authorization, and nothing in its claim would be addressed by rules proposed in this proceeding. CSF, like its other RespOrg brethren, fails to provide the FCC with any facts on which to act.

Somos and Bandwidth cite to a 2016 white paper commissioned by Somos for the claim that improper text-enablement has occurred.⁵¹ According to Bandwidth, the QSI White Paper “thoroughly demonstrated, market failures abound in the current TTF ecosystem.”⁵² However, as Zipwhip has previously explained:

Analysts working on behalf of Somos used social engineering that caused an employee at one company, a reseller, to activate three numbers without sufficient validation. The matter was resolved with no consumers impacted and there is no evidence that consumers have ever been impacted by Somos’ ploy. Zipwhip

⁴⁹ CSF HOLD CO Comments at 1.

⁵⁰ *Id.* at 2.

⁵¹ See Bandwidth Comments at 6; Somos Comments at 10, n. 42 (citing QSI White Paper, “Texting With Toll Free Numbers,” filed by Somos in Dockets 08-7 and 95-155, Sept. 29, 2016)..

⁵² Bandwidth Comments at 3.

ensured the procedural gaps were quickly identified and appropriate action to resolve those issues have been taken.⁵³

In other words, the single piece of factual evidence was manufactured by an interested party in order to support its petition for regulatory favors. That single incident took advantage of a failure by a reseller (not any failure by Zipwhip) to follow proper validation procedures. The matter was quickly corrected without any harm, and proper steps were implemented to ensure that error didn't recur. Indeed, to Zipwhip's knowledge, no additional incidents have occurred in the more than two years since QSI's actions.

B. Other Statements About Zipwhip are Unfounded and, in Any Event, Irrelevant To This Proceeding.

One commenter raised claims beyond the scope of this proceeding, expressing disagreement with Zipwhip's dual roles of providing the routing for business texting and also offering business texting services.⁵⁴ At the outset, Zipwhip emphasizes that these matters are unrelated to the substance of this proceeding and the rule that have been proposed. Moreover, as Zipwhip has stated in the past, criticisms being levied against it regarding its role as an infrastructure provider are incorrect.⁵⁵

Zipwhip's position as an aggregator for most major carriers is merely a result of it being a technological innovator and first mover in this industry. Zipwhip's contractual

⁵³ Reply in Opposition to Somos, Inc. Petition for Declaratory Ruling of Zipwhip, Inc., CC Docket No. 95-155, WC Docket No. 08-7, at 5-6 (filed Dec. 20, 2016) ("Zipwhip Petition Reply"); *see also* ex parte filing of Zipwhip, Inc., Attachment – The Truth About Texting on Toll-Free, WT Docket No. 08-7 (Nov. 18, 2016).

⁵⁴ *See* Bandwidth Comments at 3 (claiming there is an inherent conflict with Zipwhip's role as an aggregator responsible for routing traffic and that as a competitor providing toll free texting services.)

⁵⁵ *See* Zipwhip Petition Reply at 9-10.

arrangements with the carriers contain no exclusivity provisions and the carriers are free to consider other messaging providers. Zipwhip has achieved strong buy-in to its services from major wireless carriers due to its own diligent efforts and the quality of the services it offers to these carriers. The commenter's complaints about those relationships have nothing to do with this proceeding.

III. THE PROCESS PROPOSED IN THE *NPRM* UNDERMINES THE FCC'S DEDICATION TO A "LIGHT-TOUCH" REGULATORY APPROACH.

A. There Is No Market Failure Necessitating Regulation.

The Commission, particularly under its current leadership, has espoused a general theory of regulation that recognizes prescriptive rules are appropriate only in the event of a market failure that requires government intervention to limit harm to consumers and further the public interest.⁵⁶ Indeed, in remarks outlining his plans for the future of the Commission, Chairman Pai stated unequivocally that "proof of market failure should guide . . . consideration of new regulations."⁵⁷

This market failure simply doesn't exist in the wireless and texting markets. As the Free State Foundation explains in its comments:

In its Twentieth Wireless Competition Report (2017), the Commission found that the mobile wireless market is "effectively competitive." 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

⁵⁶ See e.g., *Deregulation of Radio*, FCC 81-17 (filed Feb. 24, 1981) (stating the agency's preferred option to be "reliance on market forces, with government intervention only in the event of market failure. Thus, a petitioner would have to make out a showing of market failure before the Commission would intervene in this area.").

⁵⁷ Remarks of Commissioner Ajit Pai before the Free State Foundation.

American consumers sent a combined 1.77 billion SMS and MMS messages. Mobile broadband service plans bundled with unlimited texting have facilitated heavy-volume usage by consumers at low cost.⁵⁸

Additionally, OTT applications and services like “instant messaging, social media, and email options are widely available to consumers as mobile applications, providing popular alternative means for messaging.”⁵⁹ The fact is that consumers in the traditional SMS marketplace and those who subscribe to toll free texting have choices.

The existence of healthy competition in the business texting market is further illustrated by the comments of TEN DIGIT which, like Zipwhip, provides landline and toll free texting services. In its comments, TEN DIGIT states “[a] quick search on the Internet demonstrates that there are numerous providers offering wireline and toll-free texting services,” from well-known communications providers to small companies, including some RespOrgs.⁶⁰ Additionally, the company identifies the lack of any complaints as another signifier that there is no market failure present and thus this effort is “the quintessential solution looking for a problem.”⁶¹

⁵⁸ Free State Foundation Comments at 2 (citing 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)).

⁵⁹ Free State Foundation Comments at 2.

⁶⁰ See TEN DIGIT Comments at 2.

⁶¹ See *id.*

B. None of the Commenters Supportive of the Proposed Rules Address the Regulatory Asymmetry that the NPRM Process Would Create.

Inherent in the *NPRM* proposal is a level of regulatory asymmetry that would result from the unequal treatment similarly situated services are likely to receive with respect to the new rule. Currently, messaging providers that offer texting to toll free services generally do so as part of a broader business texting service offering that can be used to enable texting on all non-wireless business phone numbers. As a result, to facilitate ease of use, toll free text subscribers use the same process to give authorization and enable texting on all of their business lines. With the proposed rule change, toll free subscribers would need to pursue a separate process to enable their toll free numbers versus their wireline or VoIP numbers. The proposed process would require much more for toll free texting service than the FCC currently requires for certain uses of traditional wireline services.⁶² Such an approach would undoubtedly encumber the process, and potentially make toll free texting a less appealing service (due to the additional layers and cost).⁶³

In addition, if the Commission adopted the proposed rule it would only implicate the process for text messaging using SMS (and likely MMS) technology. However, there are alternate technologies with similar capabilities to SMS, including one well established in the marketplace and another relatively new, that would likely not be subject to the new process requirement. Apple's iMessage is a service that is used by most iOS mobile device users as the standard built-in text message service and while there are protocols in place for it to be

⁶² See *id.* at 3 (explaining that “For ordinary telephone numbers, subscriber authority for certain uses and number porting via a letter of authorization/agency (“LOA”) is sufficient to protect the interests of the subscriber.”).

⁶³ See, *supra*, at 9.

interoperable with SMS, they are not the same. Rich communications service, or RCS, is a newer messaging technology that is being used to replace SMS on some devices. There is an open question about how the rule would apply in practice to these different services, particularly as the technology landscape is continuously evolving. As CTIA states, “the lack of clarity regarding whether the *NPRM* proposes to impose new regulations on all messaging platforms that enable toll-free numbers, including edge providers’ messaging platforms, or specifically on wireless providers’ SMS platforms ... cautions against further Commission action.”

The proposed rule would create new problems for the Commission as it would result in inconsistent treatment of similar technologies and require the agency to engage in line-drawing about which things are within the scope of the rule and which services can continue to operate free of regulation. As Zipwhip notes in its comments, similar to the 1-800-SUICIDE case, the Commission would face a “challenging line-drawing problem.”⁶⁴ In this matter, just like in that case, the connection between this action and the stated goals is tenuous.⁶⁵ Therefore, the FCC should forgo any further action in this proceeding beyond the *Declaratory Ruling* because the facts do not support it.

C. The FCC Should Maintain the Current Hands Off Regulatory Approach For Information Services, Including the Toll Free Text-Enablement Process.

In the *Restoring Internet Freedom Order*, the Commission emphasized the longstanding United States government policy that “to preserve the vibrant and competitive free

⁶⁴ *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586, 589-90 (D.C. Cir 2010).

⁶⁵ *See id.* at 590.

market that presently exists for the Internet ... unfettered by Federal or State regulation.”⁶⁶ In that order, the Commission reinstated the classification of broadband Internet access service as a Title I service that would be subject to “the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth.” These same considerations should be made for the rapidly growing text messaging marketplace, including texting to toll free numbers. As Zipwhip states in its comments, the issue of proper regulatory treatment for text messaging is ripe for consideration and the Commission should end the “regulatory tap dancing” and give providers clarity and certainty on this matter.⁶⁷ A number of entities opposed to the proposed rule raise similar concerns regarding the regulatory classification of texting.

In its comments, the Free State Foundation asks the FCC to “not apply regulations intended for Title II toll free telephone services to text messaging and other messaging services that meet the definition of ‘information service’ under Title I [and instead] declare that texting and multi-media messaging services (MMS) are Title I ‘information services’.”⁶⁸ CTIA also notes that “the *NPRM*’s regulatory approach is not consistent with the Commission’s policy of promoting a competitive, innovative marketplace for interstate information services.”⁶⁹ Like the

⁶⁶ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 312 ¶ 1 (2018) (“*Restoring Internet Freedom Order*”) (citations omitted).

⁶⁷ See Zipwhip Comments at 23.

⁶⁸ Free State Foundation Comments at 1.

⁶⁹ CTIA Comments at 10.

Free State Foundation and CTIA, Zipwhip believes the characteristics of text messaging service are consistent with those of an information service.⁷⁰

Text messaging services generally, and toll free text messaging in particular, should continue to be accorded the hands-off regulatory treatment that has allowed the market to flourish. Texting to toll free and texting on other business lines are seeing significant growth and adoption under the current authorization processes. The technology and marketplace, however, are still young and should be allowed the regulatory flexibility to quickly respond and adapt to market changes, including unforeseen threats, without prescriptive rules. As one toll free texting commenter explains “[i]f implemented this proposed rule would add unnecessary cost and regulatory burden not merited by the small increase in fraud reduction.”⁷¹ Zipwhip agrees with CTIA that the Commission should “maintain a light-tough regulatory framework for messaging services, avoiding intervention in the absence of evidence of market failure and weighing costs and benefits to innovation and competition before adopting requirements beyond the *Declaratory Ruling*.”⁷²

⁷⁰ See *id.* (“CTIA has established in previous filings that text messaging is an interstate information service, operating in a dynamic marketplace characterized by innovation.”)

⁷¹ Fabrega Comments.

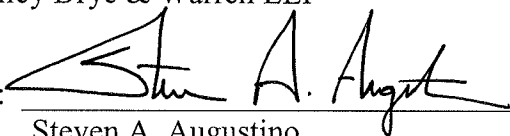
⁷² CTIA Comments at 12.

CONCLUSION

For the foregoing reasons, Zipwhip respectfully requests that the Commission reject the *NPRM* and terminate this proceeding.

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