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December 19, 2018

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Text-Enabled Toll Free Numbers
WC Docket No. 18-28; CC Docket No. 95-155

Dear Ms. Dortch:

Chairman Pai has made a centerpiece of his term as Chairman the idea that the Commission should cautiously and judiciously exercise its authority over communications markets. The Chairman has repeatedly cautioned that, absent clear evidence of market failure, the Commission should exercise “regulatory humility” and refrain from micromanaging functioning markets. Not only has Chairman Pai taken the unusual step of populating his FCC bio with his core “Regulatory Philosophy”¹ but the Chairman has advocated this approach repeatedly in his public speeches. Earlier this month, at the International Institute of Communications Technology and Media Forum, the Chairman, praising the late President George H.W. Bush’s legacy, evoked one of his most well-known qualities:

In my view, regulators in the communications space would be well-served by President Bush’s prudence. That means being

¹ <https://www.fcc.gov/about/leadership/ajit-pai#bio>; see Zipwhip Comments, Docket 18-28, at 10-11 (filed August 23, 2018); Free State Foundation Comments, Docket 18-28, at 4 (filed August 23, 2018) (praising the Pai-led FCC’s efforts in “resisting efforts to expand or exercise its regulatory authority absent a clear demonstration of market failure”).

Ms. Marlene H. Dortch
December 19, 2018
Page 2

skeptical toward preemptive regulation of new technologies – rules that try to predict market failures before they occur.²

At the FCC’s Forum on Artificial Intelligence and Machine Learning on November 30th, Chairman Pai further explained what regulatory humility means in practice:

[This Forum] is not about the FCC dipping its toes in the regulatory waters. These are emerging technologies. And when dealing with emerging technologies, I believe that one of the foundational principles for government should be regulatory humility. History tells us that new technologies will evolve in ways that people don’t anticipate and that early intervention can forestall or even foreclose certain paths to innovation. This makes it foolish and counterproductive for government to micromanage—or more accurately, try to micromanage—the evolution of these technologies.³

² Remarks of FCC Chairman Ajit Pai at the International Institute of Communications Telecommunications and Media Forum, at 1 (Dec. 4, 2018) (available at <https://www.fcc.gov/document/chairman-pai-remarks-international-telecom-media-forum>); *see also* Remarks of FCC Chairman Ajit Pai at the Federalist Society 2018 National Lawyers Convention “The Current Landscape of Telecommunications Law,” at 1 (Nov. 16, 2018) (“I deeply believe in the importance of regulatory humility. History has shown us, without a doubt, that a competitive free market is the most powerful force we have for driving technological innovation and producing value for consumers. I also believe we should be skeptical toward preemptive regulation of new technologies – rules that try to predict market failures before they occur.”) (available at <https://www.fcc.gov/document/chairman-pai-remarks-current-landscape-telecom-law>); Remarks of FCC Chairman Ajit Pai at the 18th Global Symposium for Regulators, Geneva, Switzerland, at 2 (July 10, 2018) (“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.”) (available at <https://www.fcc.gov/document/chairman-pai-remarks-global-symposium-regulators-geneva>).

³ Remarks of FCC Chairman Ajit Pai at the FCC Forum on Artificial Intelligence and Machine Learning, at 1 (Nov. 30, 2018) (available at <https://www.fcc.gov/document/chairman-pai-remarks-fccs-artificial-intelligence-forum>).

Ms. Marlene H. Dortch
December 19, 2018
Page 3

As Zipwhip, Inc. (“Zipwhip”) explained in its comments and reply comments in this proceeding, fealty to regulatory humility counsels the Commission to reject efforts to micromanage the way in which messaging providers perform validation of subscriber authorizations in the text-messaging market.⁴ Zipwhip noted that, despite many opportunities, proponents of regulation failed to submit any evidence of market failure prior to the NPRM or in the comment period.⁵ Belatedly, two parties submitted alleged examples of improper text-enablement during the reply round of comments. Zipwhip submits this letter to supplement the record to address and rebut this belated attempt to overcome the Commission’s regulatory humility principles. As shown below, the claimed examples prove the opposite point: that messaging providers already have adequate processes in place to validate the subscriber’s authorization and to address errors promptly.

On the reply round, two entities that stand to gain from regulation of the text-enablement of toll free numbers, Somos and CSF Hold Co. (“CSF”), presented alleged incidents of improper text-enablement that they claim justify regulation.⁶ Zipwhip has reviewed the information and made a reasonable effort to analyze the data provided by the parties in order to provide complete information and context to the Commission.

First, in its reply comments, Somos appended a message from one of its RespOrgs that it said was representative of Zipwhip ignoring requests by a RespOrg to disable texting capabilities on toll free numbers that they determined had not been authorized for text-enablement.⁷ Specifically, Somos stated “as demonstrated in the email chain attached to these comments in Exhibit A, Zipwhip has recently ignored request by one Resp Org to disable texting capabilities for 78 TFNs whose subscribers had not authorized text-enablement – and in fact, has

⁴ See Zipwhip Comments, WC Docket No. 18-28, at 14-16 (filed Aug. 23, 2018) (explaining that the proposed regulations run counter to the Commission’s regulatory principles); Zipwhip Reply Comments, WC Docket No. 18-28, at 21 (filed Sept. 7, 2018) (“The [business texting] technology and marketplace ... are still young and should be allowed the regulatory flexibility to quickly respond and adapt to market changes, including unforeseen threats, without prescriptive rules”).

⁵ See, e.g. Zipwhip Reply Comments, at 11-15.

⁶ See Reply Comments of CSF HOLD CO., WC Docket No. 18-28, CC Docket No. 95-155 (filed Sep. 7, 2018) (“CSF Reply Comments”); Reply Comments of Somos, Inc., WC Docket No. 18-28, CC Docket No. 95-155 (filed Sep. 7, 2018) (“Somos Reply Comments”).

⁷ See Somos Reply Comments at 5-6, Exhibit A.

Ms. Marlene H. Dortch
December 19, 2018
Page 4

done so since the Commission used the *2018 Declaratory Ruling and NPRM*.⁸ Somos is incorrect in its assertion that Zipwhip ignored the RespOrg's claim. To the contrary, Zipwhip promptly followed up with the reseller responsible for text-enabling the numbers and de-provisioned all but one of the numbers for failure to provide valid proof of authorization.

Somos ignores that Zipwhip has an established process for verifying subscriber authorization of any business number (not just toll free numbers).⁹ Zipwhip requires its resellers to follow comparable procedures, and, in the instance of a challenge, requires its resellers to provide proof of authorization upon request. In the rare instances where Zipwhip is presented with a challenge to the text-enablement of a number by a reseller, Zipwhip will immediately initiate an audit of the relevant numbers. During the audit process, Zipwhip will determine which messaging service provider enabled the number then inform them and request proof of authorization in the form of a letter of authorization ("LOA") from the toll free subscriber. Then, following a short allowance for the third party reseller to respond, Zipwhip will either maintain the service or turn it off depending on whether it receives a valid LOA.

These procedures were followed in the case of the RespOrg cited by Somos. Zipwhip conducted the audit consistent with its process and, after evaluating the response from the reseller, turned off all numbers except one, for which it received an LOA from the reseller. Zipwhip's audit procedures worked properly in this instance.¹⁰

Second, CSF claimed that RespOrgs regularly face customer disruption issues where "a third-party provider deactivates an in-service toll free text number."¹¹ CSF does not allege faulty initial text-enablement of the numbers, but instead appears to have concerns that a number, once properly enabled, has been deactivated. Zipwhip notes that this concern is not related to the process that is the subject of the NPRM, nor would its allegation be addressed by the proposed notification procedures contemplated by the NPRM. Nevertheless, Zipwhip has investigated the claim.

CSF redacted key parts of the phone number information for the subscriber data it provided which made it more difficult for Zipwhip to accurately investigate what occurred. However, Zipwhip took all the toll free code and prefixes that were listed and compared with the

⁸ *Id.*

⁹ See Zipwhip Comments at 6-9.

¹⁰ Subsequently, based on further investigation, Zipwhip terminated the reseller's contract for failure to follow required procedures.

¹¹ CSF Hold Co. Reply Comments at 1.

Ms. Marlene H. Dortch
December 19, 2018
Page 5

numbers in its records that relate either to a CSF or Aerialink account (the two companies have recently merged). Zipwhip's search identified a match for two of the five accounts cited by CSF and determined that both numbers were requested by another large messaging provider with an LOA. As a result, Zipwhip had transferred the number and promptly notified Aerialink about the request when it occurred.¹² Because the new service provider had a valid LOA, there was nothing improper about the transfer of the number. Instead, this appears to be a simple dispute between two service providers as to which entity is serving the subscriber.

Thus, far from being an instance of market failure, the example CSF cites appears to be evidence of a normal competitive market. Nothing suggests that the numbers were provisioned without the subscriber's authorization and the RespOrg's mere assertion to the contrary cannot overcome the evidence of valid subscriber authorization that Zipwhip's messaging provider obtained. In competitive markets, service providers compete with each other – and sometimes disagree with each other – to serve end users. Moreover, the RespOrg cites only to five telephone numbers, out of 3.4 million total numbers that Zipwhip has provisioned to date, of which over 2 million are toll free. This hardly constitutes market failure, even if CSF were given the benefit of the doubt as to all of the cited numbers.

Put simply, the examples provided by Somos and CSF demonstrate that valid processes are in place today to obtain subscriber authorization and to test that authorization should a challenge occur. Those processes are working adequately and, significantly, can be improved by the industry through the ordinary evolution of a functioning market. It is naïve to think that the types of incidents Somos and CSF have alleged could not occur were the Commission to adopt the proposals in the NPRM. Instead, some small level of disputes are ordinary and expected.¹³

¹² For the remaining three numbers, Zipwhip was able to identify a set of numbers that appeared to match the prefix and area code that was unredacted but none of those numbers appeared to have any issues with changing routing within Zipwhip's network. As far as Zipwhip can tell, the numbers were not deactivated or moved to another provider.

¹³ Even Somos, in arguing for use of its registry, acknowledged that it would have to "police" bad behavior by RespOrgs. *See* Somos Reply Comments at 5. Moreover, a recent report by a working group of the North American Numbering Council noted in particular that RespOrgs may sometimes themselves be Subscribers and that "conflicts of interest between RespOrgs and their customers can arise when the RespOrg has its own financial interest in acquiring and warehousing high value numbers." Report to the NANC of the Toll Free Assignment Modernization (TFAM) Working Group, May 18, 2018, at Appendix A-12 (TFAM Working Group Report) (filed August 27, 2018 in WC

Ms. Marlene H. Dortch
December 19, 2018
Page 6

The question is the same one that Chairman Pai implicitly raises in his speeches: Should the FCC adopt preemptive regulation of a new technology in order to try to predict market failures before they occur? Chairman Pai's words and actions repeatedly confirm that, for him at least, the answer is an emphatic "no."

Finally, Zipwhip notes that, contrary to Somos' claims, use of the TSS Registry (or any central registry) would not produce better results than the industry currently produces. Somos has made the claim that the RespOrg has unique knowledge of the subscriber to a toll free number, and that it is the only entity able to "authoritatively identify the actual subscriber."¹⁴ However, Somos itself has acknowledged in other filings with the FCC that Somos cannot verify the actual subscriber.¹⁵ Further, the Toll Free Assignment Modernization Working Group of the North American Numbering Council explained that, under current rules, RespOrgs would not necessarily know the true subscriber of a number:

Currently the only way to know if a Subscriber has sold the rights to a toll free number to another entity is to include Subscriber information in the SMS/800 database. However, suggestions to include this information in the SMS/800 database have been highly resisted by RespOrgs because it would be very costly and time consuming to develop. Additionally, many if not all RespOrgs consider their Subscriber information to be proprietary information and to disclose that information to other RespOrgs would be financially harmful. As a result, a Subscriber can sell a toll free

Docket No. 17-192 and CC Docket No. 95-155) (available at <https://www.fcc.gov/ecfs/filing/10827446011359>). These conflicts undermine any claim that RespOrgs are disinterested agents for subscribers. They are, quite often, self-interested service providers competing in a market to win the subscriber's business.

¹⁴ Somos Reply Comments at 7-8. Notably, AT&T strongly disputes this claim. AT&T Comments, WC Docket No. 18-28, CC Docket No. 95-155, at 6 (filed Aug. 23, 2018) (RespOrgs are no better positioned than messaging providers to improve the subscriber authorization process or to otherwise reduce the chance of fraud. They have no unique relationship to the toll free subscriber. And, RespOrgs have no access to information about the subscriber that is unavailable to messaging providers, as subscriber contact and other information is not recorded in the SMS Database.").

¹⁵ See Zipwhip Comments at 12-13 (citing Somos comments regarding the introduction of the 833 toll free code).

Ms. Marlene H. Dortch
December 19, 2018
Page 7

number despite the FCC's anti-broking regulations *undetected by the RespOrgs and/or Somos*.¹⁶

As AT&T noted in its comments opposing rules in this proceeding, the SMS/800 Database does not contain subscriber information.¹⁷ Somos would not, therefore, be in any position to adjudicate disputes over who is the authorized subscriber or an authorized representative of a subscriber.¹⁸

Zipwhip has experienced erroneous rejections resulting from the RespOrg's lack of visibility into use of a toll free number. In October, for example, Zipwhip provisioned a toll free number used by a pest control company. The company had been the subscriber to the toll free number for ten years. However, because the company did not obtain the number directly from a RespOrg, but instead obtained it through a voice service provider that resells toll free services, Zipwhip received a rejection of the text-enablement after it shared data noting the fact of the text-enablement with other participants in the toll free messaging ecosystem.¹⁹ Zipwhip had a signed LOA from the subscriber, yet the RespOrg had no visibility to the ultimate subscriber and therefore rejected the number. Ironically, if the pest control company had used a ten-digit local number instead of a toll free number, Zipwhip would have been able to text-enable the number without any incident or delay. It is only because a RespOrg sought to interject itself into the toll free process that the subscriber's choice was impeded.

Zipwhip's experience underscores the folly of the Commission attempting to regulate subscriber authorization issues relating to texting on toll free numbers. Whether it is the limited notification that the NPRM proposes, or a more burdensome "Mother May I?" process that Somos apparently seeks, micromanagement by the Commission is bad policy. The texting

¹⁶ TFAM Working Group Report, *supra*, at Appendix B-3 (emphasis added).

¹⁷ See AT&T Comments at 6.

¹⁸ Under Commission rules, the "subscriber" can be any one of multiple people. See 47 C.F.R. § 64.1100(h) (definition of "subscriber"). Thus, it is entirely possible in a competitive market that two service providers might each be dealing with a person who qualifies as a "subscriber" for the number. These types of disputes are best resolved by the two service providers and the customer being served, and not through a Commission-mandated rule.

¹⁹ Zipwhip's customer is a subsidiary of a larger corporation. The parent corporation obtained its toll free numbers from a voice reseller, who, in turn obtained the numbers from the SMS/800 database through a RespOrg. As a result, the RespOrg apparently saw the voice reseller as the subscriber, and had no visibility into the actual use of the number by the real subscriber.

Ms. Marlene H. Dortch
December 19, 2018
Page 8

market is functioning well – a fact that the FCC recently acknowledged in classifying SMS and MMS text messaging services as information services.²⁰ The market is functioning well for ordinary business numbers (VoIP and landline), without any calls for Commission regulation. There is no market failure in toll free numbers to correct, and the industry is better suited to ensuring proper subscriber authorization procedures for text-enabling numbers. Industry processes can adapt to new threats and change much more easily than can a Commission-mandated notification procedure.

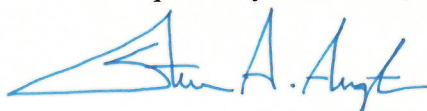
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In summary, it is evident that there is no widespread problem of entities text-enabling toll free numbers without authorization. Like every process in the telecommunications marketplace, including the current and long-used process to assign and reassign toll free numbers,²¹ there are areas where parties may try to take advantage of the system and engage in fraudulent conduct. There also will always be disputes among competing service providers. However, the industry is able to address these problems, and the threshold for overcoming “regulatory humility” has not been satisfied. For these reasons, the Commission should reject the proposals in the NPRM and close this docket without adopting new rules.

Respectfully submitted,



Steven A. Augustino

Counsel to Zipwhip, Inc.

²⁰ *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Services*, Declaratory Ruling, at ¶¶ 46-47, WT Docket No. 08-7, FCC 18-178 (rel. Dec. 13, 2018) (finding sufficient competition in wireless messaging services to protect consumers from harmful blocking practices and to protect against anticompetitive conduct).

²¹ *See Numbering Resource Optimization*, Second Report and Order et al., CC Docket No. 99-200 (rel. Dec. 29, 2000) ¶ 80 (discussing the “self-serving behavior” by carriers and adopting measures to deter such conduct).