

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

In the Matter of

Petition of Twilio Inc.

For An Expedited Declaratory Ruling Stating
That Messaging Services Are Title II Services

WT Docket No. 08-7

COMMENTS OF VERIZON

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Mobile messaging has grown dramatically from its inception — when it only enabled two customers of the same wireless provider to exchange short text messages — to today’s massively popular way to send text, pictures, audio, and video over a wide and robust variety of platforms. Users send tens of *billions* of messages daily, switching among their wireless providers’ messaging services and the many popular applications — such as WhatsApp, Snapchat, Facebook Messenger, and Skype — that provide messaging “over-the-top” of mobile broadband Internet access service. Because mobile messaging has developed free from the mandates of Title II common carrier regulation — and instead is subject to industry guidelines and best practices, which have enabled this massive growth and continued innovation — consumers see little, if any, messaging spam on their mobile devices. That stands in stark contrast to the overwhelming scourge of email spam, as well as the robocalling that still plagues telephone customers, notwithstanding Congress’s and the Commission’s best efforts to empower consumers to block unwanted calls.

Industry guidelines and best practices have developed over time as part of a collaborative process to meet the demands of users as well as the needs of businesses and organizations that have sought to communicate with their customers and members via mobile messaging. That

collaborative process continues today, as the wireless industry works with other companies in the messaging ecosystem to respond to new technical developments and business models, which bring both new opportunities and new challenges for protecting consumers from spam. This industry-led process has in particular benefited companies like Twilio, which as a result are able to use their application platforms to send and receive large volumes of messages to and from wireless providers' messaging customers, while those customers are still protected from spam. Like email spam, messaging spam runs the gamut from annoying to offensive to predatory.

Despite the successful growth of mobile messaging from a niche product to a massively popular means of nearly spam-free communication, Twilio wants to upend the status quo by subjecting wireless providers' messaging services and the industry-developed common short code system to Title II. That is a solution in search of a problem and would open the floodgates to spam, harming consumers that have come to depend on messaging services. Uprooting the collaborative, industry-led approach to messaging and replacing it with a Title II regime would curb providers' successful efforts to stop messaging spam and, as a result, wireless providers would face customers' ire at the new spam flooding into their mobile devices. Twilio does not identify any problems in the current messaging marketplace that could justify extending Title II to messaging for the first time, much less only to the small part of that marketplace that wireless providers serve. Although Twilio seeks to create an unequal playing field among messaging providers, with over-the-top providers exempt from Commission regulation and free to continue operating under the industry-generated guidelines to protect their users from spam, its arguments in favor of classifying wireless providers' messaging service as a common carrier service apply equally to over-the-top providers' services.

In all events, those arguments for classifying mobile messaging as a common carrier service fail as a matter of law. Twilio’s effort to extend Title II to mobile messaging is contrary to both the Communications Act and the *Open Internet Order*.¹ Mobile messaging — like email — is a store-and-forward service: messages are stored by the service while the recipient device is located and then forwarded. The Commission has long correctly classified email as an information service for that very reason; mobile messaging is therefore an information service as well. Furthermore, mobile messaging services, which are able to communicate only with other text-enabled devices on the public switched network, lack the quality of ubiquitous access that the Commission found in the *Open Internet Order* is emblematic of a commercial mobile service or its functional equivalent. Because messaging services are information services and private mobile services, they cannot be subject to Title II regulation. The common short code system also cannot be subject to Title II because it is not a communications service at all, but merely a means of addressing messages. Twilio’s arguments in favor of classifying mobile messaging as a common carrier service are based on a misreading of the D.C. Circuit’s decision in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), and Commission decisions.

I. MOBILE MESSAGING IS THRIVING AND IS VIRTUALLY SPAM FREE

A. Mobile Messaging and Spam

1. Consumers send tens of billions of messages each day across a wide range of messaging platforms. In addition to text and picture messaging services offered by wireless providers, many other popular messaging platforms allow consumers to send text and multimedia messages using their mobile devices and mobile broadband Internet service. Some

¹ See Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (“*Open Internet Order*”), *petitions for review pending sub nom. United States Telecom Ass’n v. FCC*, Nos. 15-1063 et al. (D.C. Cir. oral arg. Dec. 4, 2015).

of these “over-the-top” or “OTT” applications, such as Apple’s iMessage, WhatsApp, and GroupMe, use telephone numbers to send and receive messages, and many of those can default to the wireless provider’s messaging service, without any intervention by the user, if a number entered belongs to a person who does not use that OTT service. Other OTT services, such as Facebook Messenger and Snapchat, do not use telephone numbers to identify senders and recipients and, moreover, are closed systems that only send messages between and among users of the same service.

These OTT applications are immensely popular and have broad user bases. As a result, wireless providers’ messaging services are now just a small part of the overall messaging volume. Indeed, OTT applications today handle far more messages than wireless providers. As of 2012, OTT applications were already in the lead, handling 19 billion messages each day, compared to 17.6 billion text messages.² And in 2014, WhatsApp *alone* carried more than 7 trillion messages.³ In April 2015, Facebook sent 45 billion messages *daily* through its various messaging platforms — Facebook’s website, Facebook Messenger, and WhatsApp.⁴ Last year, users sent 1.92 trillion text and 152 billion picture messages using wireless providers’ messaging

² *Chat app messaging overtakes SMS texts, Informa says*, BBC News (Apr. 29, 2013), <http://www.bbc.com/news/business-22334338>.

³ The Data Team, *Messaging apps: What’s Up?*, Economist (Mar. 25, 2015), <http://www.economist.com/blogs/graphicdetail/2015/03/messaging-apps>.

⁴ *The Telegram messenger users send 10 billion messages per day*, AppleApple.top (Aug. 17, 2015), <http://appleapple.top/the-telegram-messenger-users-send-10-billion-messages-per-day/>.

services, which is less than a third of the volume of messages that the most popular OTT messaging application — WhatsApp — carried over the same period.⁵

The exploding popularity of OTT applications is also apparent from the number of users they attract. WhatsApp today has 900 million monthly active users, up from 200 million in April 2013.⁶ Facebook Messenger has 700 million monthly active users,⁷ and reaches almost 60 percent of the 191 million Americans who own a smartphone — 114 million users.⁸ Skype has 300 million users,⁹ Instagram’s direct messaging service has 85 million users,¹⁰ and Twitter offers a similar and popular direct messaging service.

Valuations of these OTT applications show how successful they are now and are expected to be in the future. In 2014, Facebook acquired WhatsApp for \$16 billion.¹¹ Snapchat

⁵ CTIA – The Wireless Association[®], *Annual Wireless Industry Survey*, <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>; CTIA – The Wireless Association[®], *Annual Year-End 2014 Top-Line Survey Results*, at 7, http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2014_graphics.pdf.

⁶ David Cohen, *WhatsApp Tops 900 Million Monthly Active Users*, Adweek SocialTimes Blog (Sept. 4, 2015), <http://www.adweek.com/socialtimes/whatsapp-900-million-users/626212>.

⁷ *Most popular global mobile messenger apps as of August 2015, based on number of monthly active users (in millions)*, Statista (Aug. 2015), <http://www.statista.com/statistics/258749/most-popular-global-mobile-messenger-apps/>.

⁸ Kimberlee Morrison, *Facebook Messenger is the 2nd Most Popular App in the U.S.*, AdWeek SocialTimes (Sept. 8, 2015), <http://www.adweek.com/socialtimes/facebook-messenger-is-the-2nd-most-popular-app-in-the-u-s/626289>.

⁹ Statista, *supra* n.7.

¹⁰ Ariha Setalvad, *Instagram Direct gets a huge update focused on messaging your friends*, The Verge (Sept. 1, 2015), <http://www.theverge.com/2015/9/1/9236553/Instagram-direct-messaging-update>.

¹¹ Press Release, *Facebook to Acquire WhatsApp*, Facebook Newsroom (Feb. 19, 2014), <http://newsroom.fb.com/news/2014/02/facebook-to-acquire-whatsapp/>.

has been valued at up to \$20 billion.¹² Even a messaging application that sends messages that contain only the word “Yo” was valued at up to \$10 million.¹³

2. Mobile messaging is immensely popular in substantial part because spam is virtually non-existent on wireless providers’ messaging services, particularly in comparison to email and voice telephony. Twilio’s petition seeks to change that dynamic. Spam still makes up nearly 50 percent of email traffic, despite the best efforts of email providers to combat spam and the availability to businesses and consumers of third-party spam filters.¹⁴ The Commission has made combatting robocalls a priority, but, despite the Telephone Consumer Protection Act and the Do Not Call List, unwanted telephone calls are still a major source of frustration for consumers.¹⁵ In contrast, in September 2014, Verizon’s network identified only 15 million unsolicited — that is, spam — messages that it prevented from reaching customers, and in September 2015 that number had fallen to only 8 million.

This is not because spammers are uninterested in targeting messaging users. Messaging spam was once far more prevalent than it is today. For example, in the fall of 2007, Verizon’s network alone was receiving about 140 million unsolicited messages monthly, which Verizon

¹² Ingrid Lunden & Alexia Tsotsis, *Snapchat Has Raised \$485 Million More From 23 Investors, At Valuation Of Up To \$20B*, TechCrunch (Dec. 31, 2014), <http://techcrunch.com/2014/12/31/snapchat-485m/>.

¹³ Alyson Shontell, *An App That Just Says ‘Yo’ Has Raised \$1.5 Million At A \$5-10 Million Valuation*, Business Insider (July 18, 2014), <http://www.businessinsider.com/yo-raises-15-million-at-a-5-10-million-valuation-2014-7>.

¹⁴ *Spam email levels at 12-year low*, BBC News (July 17, 2015), <http://www.bbc.com/news/technology-33564016>.

¹⁵ Chairman Tom Wheeler, *Another Win for Consumers*, FCC (May 27, 2015), <https://www.fcc.gov/print/node/80676>; Howard Buskirk, *FCC Determined To Clamp Down on Robocalls, Robotexts, Wheeler Says*, Comm. Daily (Sept. 17, 2015), <http://www.communicationsdaily.com/article/print?id=475975>.

prevented from reaching its customers.¹⁶ The substantial efforts that Verizon and other wireless providers invested in developing industry best practices to detect and block spam¹⁷ have thus proven successful and — it appears — convinced spammers to devote their resources elsewhere. The flexibility of the guidelines allow wireless providers to adapt and respond quickly to new threats, such as those that arise from new uses of mobile messaging to meet consumer demand, and to vet the users and uses of short code campaigns. The Commission has previously said it was “encouraged by carrier efforts to implement protections against unwanted text messages.”¹⁸ These robust anti-spam efforts have developed without the strictures of Title II having ever applied to mobile messaging. And there is every reason to expect that spammers would refocus their efforts on mobile messaging if providers were handicapped in their ability to prevent spam messages from reaching consumers.

Although very little spam reaches wireless providers’ customers today, spam still costs money for those consumers with messaging plans that charge per message. And even if there is no additional monetary cost, spam triggers mobile phone notifications that annoy consumers at home or intrude into other private moments. Spam messages — like spam emails and robocalls — can be a vehicle for scammers. As the West Virginia Attorney General has warned, “[s]cammers . . . are typically able to reach millions of customers with computer programs that

¹⁶ See Comments of Verizon Wireless at 27 (Mar. 14, 2008).

¹⁷ See, e.g., CTIA – The Wireless Association®, *SMS Interoperability Guideline*, § 4.1.6 (v. 3.2.2, eff. Jan. 2015), http://www.ctia.org/docs/default-source/default-document-library/sms_interoperability_guidelines_v3-2-2_jan_2015-as-posted.pdf.

¹⁸ Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961, ¶ 119 (2015).

send bulk messages using a few simple keystrokes.”¹⁹ Indeed, there are spam phishing schemes (sometimes known as “smishing”²⁰), such as a recent spam messaging campaign that promised subscribers a \$200 Amazon gift card if they downloaded a file.²¹ That file, however, contained malware that “harvest[ed] all [of the user’s] contacts and sen[t] a spam message to each of them” that further spreads the malware.²² Other spam messages encourage consumers to call expensive, international pay-per-call numbers.²³

3. Wireless providers have greatly expanded the capabilities of their messaging services since they were first developed, while still protecting consumers from spam. Text messaging — also known as short message service or SMS — and picture messaging — also known as multimedia message service or MMS — were originally limited to communication between two customers of the same wireless provider. In response to consumer interest in exchanging messages with other providers’ customers, wireless providers developed industry guidelines to enable cross-provider messaging.²⁴ Consistent with these industry guidelines, wireless providers use interconnection vendors to handle SMS and MMS messages that travel between providers’ customers.

¹⁹ Press Release, *Attorney General Patrick Morrissey Warns Students of Texting Scam From Unknown Numbers*, Office of the WV Attorney General (Aug. 9, 2015), <http://www.ago.wv.gov/pressroom/2015/Pages/Attorney-General-Patrick-Morrissey-Warns-Students-of-Texting-Scam-From-Unknown-Numbers.aspx>.

²⁰ See, e.g., *Smishing and Vishing*, FBI – Cyber Scams (Nov. 24, 2010), https://www.fbi.gov/news/stories/2010/november/cyber_112410/cyber_112410.

²¹ See Yicheng Zhou, *Worm.Gazon: Want Gift Card? Get Malware*, AdaptiveMobile (Mar. 2, 2015), <http://www.adaptivemobile.com/blog/worm-gazon-want-gift-card-get-malware>.

²² *Id.*

²³ *Fraud and Scam Alerts*, Verizon, <https://www.verizon.com/pages/securityalerts/>.

²⁴ *SMS Interoperability Guidelines*; CTIA – The Wireless Association[®], *MMS Interoperability Guidelines* (rev. 3.0.2, Jan. 1, 2015), <http://www.ctia.org/docs/default-source/default-document-library/mms-interoperability-guidelines-v3-0-2jan2015-as-posted.pdf>.

After AT&T Wireless subscribers in 2003 embraced the ability to vote for their favorite American Idol contestants using a short code, wireless providers and business groups worked together to establish the cross-provider Common Short Code system that has enabled a new and vibrant use of messaging. The short code system allows an entity to lease a five- or six-digit code from the system administrator, CTIA, and its current registry, Neustar, and to use that code — rather than a ten-digit telephone number — when sending and receiving messages. This system was the first way businesses and organizations could send messages in bulk to providers’ customers by using application interfaces; such messages are known as “application-to-peer” or A2P messaging. As with cross-provider messaging, wireless providers rely on interconnection vendors to handle the exchange of messages.

Opening messaging services, previously limited to “peer-to-peer” or P2P messages, to bulk messaging from businesses and organizations using applications created the possibility that providers’ customers would receive spam and other types of unwanted messages. Wireless providers therefore took steps to balance the interests of businesses and organizations in sending bulk messages with the interests of customers in being protected from spam by carefully reviewing short code campaigns before activating the code on their networks. As part of this review, wireless providers require short code campaigns to comply with best practices — identified over time by working groups representing the wireless industry and bulk messaging users — such as providing opt-in and opt-out protocols.²⁵

Recently, businesses and other organizations that use toll-free numbers to receive calls have expressed interest in exchanging messages using the same toll-free number. Wireless

²⁵ See Mobile Marketing Ass’n, *U.S. Consumer Best Practices for Messaging* § 1.5-6 (v. 7.0, Oct. 16, 2012), http://www.mmaglobal.com/files/Best_Practices_for_Messaging_Version_7.0%5B1%5D.pdf.

providers have taken steps to enable this type of messaging as well; providers rely on the same, successful practices of using interconnection vendors (as well as the Somos toll-free number database) and requiring opt-in/opt-out protocols.²⁶

The wireless industry's responsiveness to the developing needs of businesses and organizations that want to send bulk messages is reflected in Twilio's own success. Twilio has received \$240 million in funding²⁷ and is now valued at \$1.1 billion.²⁸ The wireless industry, moreover, continues to work with numerous partners — including Twilio — to develop guidelines in response to emerging technologies and new demands for reaching messaging users that balance consumer protection with the interests of businesses and organizations that wish to communicate with messaging users.

B. Twilio's Petition Would Upend a Successful Regime and Harm Consumers Without Justification

1. Twilio admits that, if the Commission were to grant its petition, any provider subject to Title II would be prevented from proactively identifying and blocking spam, and taking other steps to ensure that spammers do not get unfettered access to consumers' mobile phones. *See* Pet. at 4, 10, 37-39. Without the industry's current anti-spam efforts — both spam filters and application of best practices to short code campaigns — the spam floodgates would open. Although Twilio asks the Commission to regulate only wireless providers, its arguments for classifying mobile messaging as a common carrier service apply equally to OTT messaging

²⁶ *SMS Interoperability Guidelines*, § 4.2.

²⁷ Jonathan Vanian, *Twilio lands \$130 million to make it easier to communicate via software*, *Fortune* (July 29, 2015), <http://fortune.com/2015/07/29/twilio-lands-million-communicate-software/>.

²⁸ Alex Konrad, *Twilio Has Joined The Unicorn Ranks With Stealthy \$100 Million Raise*, *Forbes Tech* (May 4, 2015), <http://www.forbes.com/sites/alexkonrad/2015/05/04/twilio-joins-unicorn-ranks/>.

providers, particularly those that use telephone numbers to send and receive text and multimedia messages.

Indeed, as the Commission has recognized, consumers treat OTT messaging applications as substitutes for wireless providers' messaging services. In the text-to-911 context, for example, the Commission relied on customer use of OTT applications to hold that “any service that allows a mobile device to send information consisting of text to other mobile devices by using domestic telephone numbers” — whether offered by a wireless or OTT provider — is a “text messaging” service.²⁹ And the Commission is considering whether to apply its text-to-911 rules to OTT applications that do not exchange messages using telephone numbers.³⁰ The Commission's decisions in the text-to-911 context properly recognize that wireless providers are only one part — and, as shown above, a small part — of the broader messaging marketplace.

2. Twilio, however, claims that granting its Petition would not open the spam floodgates because consumers could be given tools to block spam. *See* Pet. at 7 n.13. While consumers may be able to take some steps to protect themselves from unwanted messages, it would be a major step backwards to jettison the systems that the industry already has in place and that have been so successful that spammers seem largely to have stopped trying to reach messaging customers. Wireless customers today have limited ability to block spam. For example, they can wait to receive a spam message, block the number, and then repeat that process each time spam arrives from a different number, often from the same source. Such an approach is much less consumer-friendly than today's industry-led approach to preventing

²⁹ Second Report and Order and Third Further Notice of Proposed Rulemaking, *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications*, 29 FCC Rcd 9846, ¶ 2 n.1 (2014) (emphasis added).

³⁰ *See id.* ¶ 128.

messaging spam.³¹ Nor is the Telephone Consumer Protection Act, which the Commission has already applied to text messaging, a panacea, as spammers are still sending 8 million messages to Verizon’s customers each month.

Robocalling similarly remains a significant problem despite the Telephone Consumer Protection Act and the Commission’s actions to implement that legislation. The Commission recently confirmed that telephone service providers may offer user-initiated call-blocking software to combat robocalls.³² But, as Chairman Wheeler noted, such tools will not prevent robocalls from reaching consumers: “sometimes this is like whack-a-mole. The networks are complex. There are all kinds of new ways that people work to get in and . . . we’ll need to have structures in place to block them.”³³ Moreover, such software-based tools only work for customers that are aware of them and have sufficient technological savvy to implement them. For example, many email services include spam filters that rely on users to train them to recognize spam. Those types of filters require constant attention, because spammers quickly learn to tweak their messages to get through the filters.³⁴

In short, granting Twilio’s Petition will necessarily increase the volume of spam messages that consumers receive. Faced with that flood of spam, consumers will likely blame their messaging providers. The added costs of dealing with those understandably irate

³¹ Customers can also report spam text messages to their provider by sending a free text message to 7726 (SPAM) and CTIA has assembled a list of third-party applications that claim to block unwanted calls and text messages. See CTIA – The Wireless Association®, *Blocking Robocalls*, <http://www.ctia.org/your-wireless-life/consumer-tips/blocking-robocalls>.

³² Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961 (2015).

³³ Buskirk, *supra* n.15.

³⁴ *Troubleshoot Spam that Gets Through*, Google Postini Services, https://www.google.com/support/enterprise/static/postini/docs/admin/en/admin_ee_cu/spam_get_through.html.

consumers and the accompanying loss of good will impose real harms on messaging providers. And, if those harms were imposed only on wireless providers — as Twilio proposes — the Commission would substantially distort the messaging marketplace, advantaging those messaging providers that could continue to protect their customers from spam.

3. As shown above, Twilio — valued at more than \$1 billion — has been enormously successful under the current regime, belying its claims that the absence of Title II regulation has been a barrier to the needs of businesses and organizations seeking to send bulk messages. Indeed, Twilio points to only *two* recent supposed “incidents” that it claims show the need for Title II regulation. *See* Pet. at 7-9. To bolster that scant basis for classifying mobile messaging as a common carrier service, Twilio repeats the same claims that Public Knowledge highlighted in its petition almost *eight years ago*, to which Verizon responded long ago.³⁵ The sheer absence of “incidents” to report since that Public Knowledge petition itself confirms that Twilio proposes a solution in search of a problem. Moreover, neither of Twilio’s examples provides any justification for regulation.

First, Twilio complains about the supposed “blocking” of messages that appeared to be sent from 800 numbers. *See* Pet. at 8-9, 15-16. No such “blocking” occurred. As explained above, wireless providers use interconnection vendors to handle 800-number messaging. For a short time, Twilio (and HeyWire) did not have a routing relationship with that vendor, so their 800-number messages could not enter wireless providers’ networks. Twilio and HeyWire now have routing relationships with that vendor, and their messages are flowing.

Second, Twilio also asserts that one of its customers, Ryan Leslie, had messages blocked, though it provides few details about what actually occurred. *See* Pet. at 7-8. Unmentioned by

³⁵ *See* Pet. at 16-17; Comments of Verizon Wireless at 20-22; Reply Comments of Verizon Wireless at 9-13 (Apr. 14, 2008).

Twilio is that Mr. Leslie’s business, Disruptive Media, offers a commercial messaging service that gives customers “10-digit SuperPhone” numbers that can be used to message “thousands of fans simultaneously,” in an effort to sell products to and track these “customers.”³⁶ Indeed, Mr. Leslie claims his application has already sent at least 1.25 million messages.³⁷ Such bulk messaging designed to sell products raises precisely the kind of spam concerns that the industry guidelines exist to prevent. In all events, Twilio can only recount Mr. Leslie’s experience through multiple layers of hearsay: Twilio reports what Mr. Leslie says that Twilio told him about what an unnamed wireless provider told Twilio’s customer support.³⁸

In short, Twilio has provided no justification for the Commission to impose Title II regulation on any messaging service. Mobile messaging is a thriving, growing marketplace that serves the needs of both consumers and the businesses and organizations that seek to reach those consumers — evidenced by the success of Twilio itself — while maintaining a relatively spam-free environment. Moreover, as they have done since wireless providers first offered messaging services, providers are working with companies like Twilio to adapt the existing industry guidelines to better accommodate the new business models without sacrificing consumer protection. Twilio provides no justification for upending that marketplace, exposing consumers to a flood of spam messaging, and leaving consumers to fend for themselves.

³⁶ *Your entire audience in your address book*, Disruptive Media (archived July 10, 2015), <https://web.archive.org/web/20150710081102/https://www.dmm.fm/>; *DMM Dashboard*, Vimeo, <https://vimeo.com/98298172>.

³⁷ *See Your entire audience in your address book*, Disruptive Media (archived July 10, 2015), <https://web.archive.org/web/20150710081102/https://www.dmm.fm/>.

³⁸ Given that Mr. Leslie’s source of information was allegedly Twilio support, *see* Pet. at 7-8, the fact that Twilio does not even report directly what its own support staff was supposedly told is quite telling.

II. MESSAGING IS NEITHER A TELECOMMUNICATIONS SERVICE NOR COMMERCIAL MOBILE SERVICE AND CANNOT BE SUBJECT TO COMMON CARRIER REGULATION UNDER TITLE II

Putting aside the lack of any policy rationale, Twilio’s Petition fails as a matter of law. Mobile messaging is an information service, and, as the courts and the Commission have recognized, an information service cannot be subject to common carrier regulation.³⁹ Mobile messaging is also private mobile service, because it lacks the quality of ubiquitous access that is emblematic of commercial mobile service and its functional equivalent, and so is statutorily immune twice over from Title II regulation.⁴⁰

A. Mobile Messaging Is an Information Service, Just Like Email

Like email, mobile messaging is a store-and-forward service. For example, every text and picture message sent by or to a Verizon customer is stored in a server at a messaging service center for at least some time while Verizon’s cellular network attempts to determine the location of the recipient device. Once the recipient device is located, the message is forwarded to the right geographic market or interconnection vendor. Verizon’s messaging server stores these messages for up to five days if necessary for delivery.

The Commission has always held that email is an information service because it “utilizes data storage as a key feature of the service offering.”⁴¹ It therefore offers the capability of “storing” and “retrieving” information.⁴² Although email may appear to be transmitted

³⁹ See *Verizon*, 740 F.3d at 650; Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, ¶ 50 (2007) (“*Wireless Broadband Internet Access Order*”).

⁴⁰ See 47 U.S.C. § 332(c)(2), (d)(3); *Cellco P’ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

⁴¹ Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 78 (1998) (“*Stevens Report*”).

⁴² 47 U.S.C. § 153(24) (defining “information service”).

instantaneously, when both sender and recipient are online, “it is central to the service offering that electronic mail is store-and-forward, and hence asynchronous; one can send a message to another person, via electronic mail, without any need for the other person to be available to receive it at that time.”⁴³ Indeed, in the *Open Internet Order*, the Commission repeatedly confirmed that email remains an information service, even when offered with the broadband Internet access service that the Commission reclassified in that order.⁴⁴

Mobile messaging is therefore also an information service due to its store-and-forward capabilities. As with email, sending and receiving a text message can seem instantaneous to consumers – if and when both devices are on and connected to their respective cellular networks. However, the store-and-forward nature of messaging is critical to the service offered to customers. Without the store-and-forward capability, messages could only be exchanged if both the sending and receiving devices were connected to the cellular network at the time the message was sent. That is not the service Verizon and other wireless providers offer, which promises to deliver messages even if the receiving device is not immediately available to take delivery.

Even aside from the fact that text messaging is a store-and-forward information service like email, messaging services are also information services because they transform the information that customers send. Messaging providers may alter a message before it is delivered for a variety of reasons. If a recipient device is not capable of receiving certain types of media, the media will be removed from the message before delivery. The provider may also truncate a message, or break it into parts, depending on its length. Without these capabilities, some messages sent could not be delivered to their recipients. These capabilities thus alter “the packet payload (*i.e.*, the content requested or sent by the user),” which the Commission has long

⁴³ *Stevens Report* ¶ 78 n.161.

⁴⁴ See *Open Internet Order* ¶¶ 356, 376, 377, 378, 385.

recognized — and reaffirmed in the *Open Internet Order* — means that a service transforms information and, therefore, is an information service.⁴⁵

B. Wireless Providers’ Messaging Service Is Also Private Mobile Service, Not Commercial Mobile Service or Its Functional Equivalent

1. As successful as wireless providers have been in expanding the capabilities of mobile messaging, their mobile messaging offering is still a circumscribed service. Wireless providers’ mobile messaging services allow users to exchange messages with text-enabled handsets and certain application platforms, such as Twilio’s. But mobile messaging subscribers cannot send text or picture messages to landline phones – without an intermediary service – or to any of the billions of IP addresses that the Commission held in the *Open Internet Order* are part of the public switched network.⁴⁶

Mobile messaging is therefore not an “interconnected service,” because it lacks what the Commission, in the *Open Internet Order*, described as the hallmark of an “interconnected service”: the “quality of ‘ubiquitous access,’” which “‘allow[s] the public to send or receive messages to or from anywhere in the nation.’”⁴⁷ Mobile messaging lacks this quality of ubiquitous access and, therefore, cannot be a commercial mobile service.⁴⁸

⁴⁵ *Id.* ¶ 362.

⁴⁶ *Id.* ¶ 391.

⁴⁷ *Id.* (quoting Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, ¶¶ 59-60 (1994)).

⁴⁸ See 47 U.S.C. § 332(d)(1) (defining commercial mobile service, in part, as “interconnected service”). Wireless providers’ messaging services even more clearly did not qualify as commercial mobile service under the rules implementing § 332 prior to the *Open Internet Order*. Those rules required that interconnected services enable communication with “all other users” of the public switched network, defined as the telephone network. 47 C.F.R. § 20.3(a) (2014). As explained above, messaging users cannot send text or picture messages to landline telephones, therefore messaging services do not enable communication with “all other users” of the public switched network.

2. Text messaging is also not the functional equivalent of commercial mobile service. The Commission's regulations set forth the showing required of a petitioner, like Twilio, that seeks to have a mobile service classified as the functional equivalent of commercial mobile service.⁴⁹ Those regulations require a petitioner to show that the mobile service is closely substitutable, in the antitrust sense, for commercial mobile service.⁵⁰ Twilio makes no effort to make that showing. Nor could it.

Text messaging would also fail even the new functional equivalence test announced for the first time in the *Open Internet Order*, if the Commission were to expand that test beyond mobile broadband Internet access. There, the Commission reasoned that wireless telephone service and mobile broadband Internet access were functional equivalents because "both . . . provide their users with a service that enables ubiquitous access to the vast majority of the public."⁵¹ As shown above, this is not the case with messaging. Wireless providers' messaging services only offer communication with other messaging-enabled mobile devices, not to all phones connected to the public switched telephone network, let alone to all IP addresses connected to the public Internet.

3. Because mobile messaging is not commercial mobile service or its functional equivalent, it is therefore private mobile service and exempt from common carrier regulation.⁵² Even if this question were a close call, the fact that mobile messaging is an information service should lead the Commission to conclude that it is also private mobile service. Twice before the Commission has relied on its classification of a service as a telecommunications or information

⁴⁹ See 47 C.F.R. § 20.9(a)(14)(ii)(A)-(C).

⁵⁰ See *id.*

⁵¹ *Open Internet Order* ¶ 407.

⁵² 47 U.S.C. § 332(c)(2), (d)(3); *Verizon*, 740 F.3d at 650; *Cellco*, 700 F.3d at 538.

service in deciding whether to classify it as commercial or private mobile service. In 2007, the Commission held that, having classified mobile broadband as an information service, “it would be unreasonable” also to classify it a commercial mobile service.⁵³ The Commission engaged in similar reasoning in the *Open Internet Order*, relying on its reclassification of mobile broadband as a telecommunications service to justify its reclassification of that service as commercial mobile service.⁵⁴

C. The Common Short Code System Is Not a Communications Service

A short code is merely an identification number that is used to identify messages sent or received over wireless providers’ messaging services. The short code itself is not the message; it is merely an abbreviated address. Short codes, therefore, cannot be regulated as telecommunications services because the codes themselves do not offer “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁵⁵ Obtaining a short code is no different from leasing a post office box — it provides the address for the message.⁵⁶

Although the Commission has regulated the 800 telephone number database as a common carrier service, it did so because the database was necessary to provide a well-established Title II service — voice telephony using 800 numbers.⁵⁷ Because wireless providers’ messaging

⁵³ *Wireless Broadband Internet Access Order* ¶¶ 41, 50-51.

⁵⁴ *Open Internet Order* ¶ 403.

⁵⁵ 47 U.S.C. § 153(50), (53).

⁵⁶ Short codes are also not a mobile service and, therefore, cannot be CMRS or its functional equivalent. *See id.* § 153(33) (defining “mobile service” as “a radio communication service”).

⁵⁷ *Order, Provision of Access for 800 Service*, 8 FCC Rcd 1423, ¶ 27 (1993).

services are information services, the fact that the short code system is used in conjunction with messaging services provides no basis for bringing the short code system within Title II.

D. Twilio’s Arguments That Text Messaging Is Subject to Title II Regulation Lack Merit

1. Twilio first argues that, because the Commission has applied § 227 to text messages, the D.C. Circuit’s decision in *Verizon* compels the conclusion that text messaging is a telecommunications service. *See Pet.* at 26-28. Twilio is wrong for two reasons.

First, Twilio has *Verizon* exactly backwards. In *Verizon*, the D.C. Circuit held that a service classified as an information service cannot be subjected to common carrier duties, such as those in §§ 201 and 202.⁵⁸ The court did not hold that, if even one provision within Title II applies to a service, that service must necessarily be a telecommunications service subject to the full panoply of common carrier regulations. In fact, the court explained that the Commission *can* regulate a service classified as an information service in some ways that are consistent with common carriage as long as it does not transform that service into a common carrier service by imposing *per se* common carriage requirements.⁵⁹

Second, Twilio misunderstands § 227. That section does not regulate messaging providers *at all*. Section 227 instead prohibits *users* of telephone and messaging services from making certain types of “call[s].”⁶⁰ Therefore, even on Twilio’s misreading of *Verizon*, the Commission’s conclusion that the word “call” in § 227 prohibits *users* from sending certain text

⁵⁸ 740 F.3d at 652, 655-56.

⁵⁹ *Id.* at 652; *see also Cellco*, 700 F.3d at 547-49.

⁶⁰ 47 U.S.C. § 227(b)(1).

messages does not advance Twilio’s effort to extend common carrier regulation to messaging services and providers.⁶¹

2. Twilio next relies on a consent decree involving billing for third-party services ordered through text messaging. *See* Pet. at 28-29. Even aside from the fact that the consent decrees expressly states that it is not precedent,⁶² the Enforcement Bureau’s claimed basis of authority was that the charges in question appeared on subscribers’ bills for their wireless voice telephone service — which unlike messaging is a common carrier service.⁶³

3. Twilio’s remaining arguments similarly fail. Twilio asserts that wireless providers’ promotional materials promise a telecommunications service — the sending and receiving of messages. *See* Pet. at 31-33. However, Twilio fails to come to terms with the fact that the messaging service that providers offer is a store-and-forward service — just like email — and therefore is an information service. Email on mobile devices, too, could be and is similarly described as a way to send a message to another user instantly, but that does not mean email providers offer a telecommunications service.⁶⁴

⁶¹ Moreover, § 227 expressly includes “call[s]” to “paging service[s]” among its prohibitions. *Id.* § 227(b)(1)(A)(iii). As the Ninth Circuit has held, it was thus reasonable for the Commission to conclude that a “call” to a “telephone number assigned to a . . . cellular telephone service,” *id.*, also included text messages directed to such a number. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953-54 (9th Cir. 2009). But that fact has no relevance to Twilio’s Petition because “call” is not used in any of the relevant definitions distinguishing telecommunications and information services, or commercial and private mobile services.

⁶² *See, e.g.*, Order and Consent Decree, *AT&T Mobility LLC Unauthorized Third-Party Billing Charges*, 29 FCC Rcd 11803, ¶ 11 (2014) (“It is the intent of the Parties that this Consent Decree shall not be used as evidence or precedent in any action or proceeding, except an action to enforce this Consent Decree.”).

⁶³ *Id.* ¶ 4 (“The Commission has held that the inclusion of unauthorized charges and fees on consumers’ telephone bills is an ‘unjust and unreasonable’ practice under Section 201(b).”).

⁶⁴ *See, e.g.*, *Get Gmail for your mobile device*, Google, <https://www.gmail.com/intl/en/mail/help/mobile.html> (advertising “[r]eal-time notifications so you don’t miss important emails”).

Twilio’s argument that the Commission has already held that text messaging is interconnected to the public switched network is based on a misreading of the Commission’s mobile voice telephony roaming order. *See* Pet. at 35-36. The Commission clearly stated that “nothing in this order should be construed as addressing regulatory classifications of push-to-talk, SMS or other data features/services.”⁶⁵ The Commission has never classified mobile messaging as a Title II service and should not do so now.

CONCLUSION

Mobile messaging is wildly successful with many comparable messaging platforms. Wireless providers like Verizon have worked hard to protect their subscribers from spam and robotexting, and have succeeded. CTIA and participants in the messaging ecosystem continue to expand and improve upon the ability of all messaging providers to interconnect with consumers whether they use mobile providers’ messaging services and/or OTT messaging services.

Twilio provides no basis to upend that successful system — in which Twilio itself is flourishing — to advance its own, narrow interests or to impose common carrier regulation on one small part of the messaging space. In all events, Twilio’s proposal is foreclosed by the Communications Act and the Commission’s precedent, including the *Open Internet Order*. Twilio’s Petition should be denied.

⁶⁵ Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, ¶ 54 n.134 (2007) (emphasis added).

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