

December 18, 2015  
Via ECFS  
Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington, D.C. 20554

Re: Petition of Public Knowledge et. al for Declaratory Ruling Stating Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules.  
WT Docket No. 08-7

Dear Ms. Dortch:

The Commission has been asked to consider Twilio's request that SMS (text messaging), and MMS (multi-media messaging) be reclassified under Title II. The request amounts to nothing more than a business opportunity for Twilio, leveraging the FCC to grow its business. Such shame faced rent seeking should not even garner a second glance.

#### **How Twilio operates**

Twilio is a company that provides back-end systems for companies to text customers. Twilio "allows software developers to programmatically make and receive phone calls and send and receive text messages using its web service APIs. Twilio's services are accessed over HTTP and are billed based on usage." What that means in practice is that Twilio is paid more as a greater number of automated texts or "robocalls" are made using its platform. The company's petition of the FCC is only an attempt to drive its bottom line, a classic case of rent seeking. That is, Twilio merely wants to use government as a means to bolster their business, to increase its wealth, without increasing its economic value.

So the company petitions the Commission to classify texts under Title II, despite such being a core information service, so that all texts must be delivered regardless of harm to the consumer. The harm that would result is significant.

#### **The Current Practice**

Currently, wireless operators, those whose systems are being used to deliver the text messages, have been able to deploy filtering technology, typically automated technology to screen out abusive, illegal or other unwanted content, so that texting has been essentially spam free. Are there exceptions? Of course, but again the norm is consumers not having to waste time and resources on unwanted messages, much less massively spammed unwanted messages.

As with email (another place where filters are routinely deployed at one level or another to decrease the spam intake) most spam messages are nothing more than scams, designed to prey upon the unwary or innocent. This service provided to consumers comes at no small cost to providers but is seen as

essential to protecting consumers, who benefit without having to do anything proactively themselves. But the wireless industry did not stop there, the Common Short Code program was put in place specifically so that consumers could be part of automated and high volume message trafficking where their interests were being served.

Because of these industry efforts text has become wildly successful. Data shows that nearly 90% of text messages are opened within 15 minutes. Compare that to email which is counted as successful if the open rate reaches the high teens or low twenty percent threshold within a full day. These results vividly demonstrate consumer trust in the product. Businesses have become increasingly reliant on text as a key means in communicating with customers, whether offering new services, bill pay reminders or even security alerts. All of this enhances the consumer experience.

Of course where consumers get comfortable those who would prey on the trusting eventually arrive. Because text has become a trusted platform those who want to engage in fraud, unwanted or malicious acts have started to try to find a means to infiltrate. Without a means to defend against the illegitimate and undesirable, consumers and service providers would be left defenseless, leading to the breaking of trust in the system and dramatically decreased use. Yet, this is essentially what Twilio wants.

Twilio refers to such consumer protection, and customer desire as throttling or blocking. That myopia is precisely what will drive the rampant abuse of texts if Twilio's petition were granted. One might also refer to laws against punching another person as throttling someone's will, but rational people immediately understand that such laws are there to protect the innocent from abuse.

### **Twilio's Desired Outcome**

Twilio wants all of its texts to be sent regardless of whether the consumer desires them so that it can maximize the amount of money it makes without having to take any responsibility. As it turns out, the texts the company is really concerned about are what might kindly be called "junk texts" or "text spam." Twilio, in effect, argues that the preservation of their profits is worth government intervention, reducing consumer safeguards, and forcing the wireless industry into spamming unsuspecting consumers with millions and millions of unasked for, harassing text messages.

Twilio argues that since voice is being regulated under Title II that text should be, because it makes sense that all the functions of a "phone" are subjected to the same kind of regulation. To say that the argument is devoid of technological understanding is an understatement. The argument is absurd.

What today we call a "mobile phone" bears little resemblance to a phone and truly is a small computer, a hardware platform that enables various functions. To follow the so called logic put forth would have Title II regulation even for information services, personal notes, video, games, GPS, music, photography and on and on. The proposal is nothing short of asking the FCC to seize control of something loosely defined as a phone but in which unrelated functions have been integrated over time. The result would also be predictable. The handy device carried religiously by most would again be dis-integrated back to a collection of various technology devices instead of one convenient device.

Title II regulation would jeopardize the best practices work that the industry has already undertaken, practices that has limited spam via text. Perhaps more dramatically, such a move would also hamper any other industry efforts to similarly protect consumers, their own customers. In turn, a world of never ending spam messages would result, annoying in itself, but worse in that millions would be exposed to fraudulent, illegal and otherwise dangerous messages. The rational response of the public? To turn away from what is now a useful, common and easy form of communications. One more consumer loved service would be destroyed because of a combination of bad actors and rent seeking actors.

But the public is not going to stop communicating of course. The relatively easy place to turn is to over the top services, messaging applications that would not presumably fall under the same regulatory restrictions. This shift is wholly predictable. The result is market distortion where texts are regulated because of their delivery by one type of technology, but the same messages are not regulated in another setting merely because of the technology used. For that matter, one should pause to consider why a text message would be regulate at all when email is not. In the end they are both merely messaging, written communications. Different treatment of written communications, at best, leads to mere arbitrary line drawing.

If consumers enjoy robocalls then they will really love Twilio's proposal, as then the robocall could morph into a robotext, flooding two communications channels. Given the substantial work and resources that providers have expended to make texting a trustworthy means of communications, it seems that Twilio's proposal is out of touch. But even more so, when a company is seeking to leverage government to pad its own bottom line, to enhance the wealth of its executives, without creating any new value, then government should pause, if not outright ignore, the proposal in the first place.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bartlett D. Cleland', written in a cursive style.

Bartlett D. Cleland