

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

_____)	
In the Matter of)	
)	
Petition of Twilio Inc.)	
)	
For An Expedited Declaratory Ruling Stating)	WT Docket No. 08-7
That SMS/MMS Messaging And Short)	
Codes Are Title II Services)	
)	
In the Matter of)	
)	
Petition of Public Knowledge, et al.)	
)	
For A Declaratory Ruling Stating That Text)	
Messaging And Short Codes Are Title II)	
Services Or Are Title I Services Subject To)	
Section 202 Nondiscrimination Rules)	
_____)	

REPLY COMMENTS OF TWILIO INC.

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The record supports granting Twilio’s Petition¹ on an expedited basis. As CTIA itself notes, “[m]essaging has become today’s most popular way to communicate.”² Twilio and the commenters in support of Twilio’s Petition agree. Twilio and its supporters believe that this Commission – not the wireless carriers and their trade association – should referee “today’s most popular way to communicate” under the Communications Act. Indeed, Congress enacted the Communications Act and established the Commission to regulate communications by wire and radio in the public interest, which necessarily includes protecting consumers.

The Wireless Commenters³ oddly posit that expressly bringing messaging services⁴ into the Title II fold – and the Commission oversight this would entail – would *decrease* consumer protections. Stated differently, the Wireless Commenters argue that consumer welfare will be enhanced if the wireless carrier oligopoly and its trade association can continue to have unfettered discretion to block the most popular form of communication without any Commission oversight or recourse for consumers and innovators. This argument is not credible, and the Commission has rejected countless similar attempts to shield carrier gatekeeper activity from

¹ Petition for Expedited Declaratory Ruling of Twilio, Inc., WT Dkt. No. 08-7 (filed Aug. 28, 2015) (“Petition”).

² Opposition of CTIA – The Wireless Association at 8, WT Dkt. No. 08-7 (filed Nov. 20, 2015) (“CTIA Opposition”).

³ Both AT&T and Verizon filed comments in opposition to Twilio’s Petition, but their comments are primarily CliffsNotes versions of CTIA’s Opposition and do not set forth any unique arguments. Twilio will refer to CTIA, AT&T and Verizon collectively as the “Wireless Commenters,” unless indicated otherwise. Notably, however, neither T-Mobile nor Sprint have opposed Twilio’s Petition.

⁴ As used in the Petition and below, the term “messaging services” includes (1) Short Message Service (“SMS”), (2) Multimedia Messaging Service (“MMS”), and (3) short-code based services, that are sent from or received by devices connected to the public switched telephone network (“PSTN”) and/or utilize North American Number Plan (“NANP”) telephone numbers for routing purposes. To be clear, Twilio never contended that CTIA’s common short code system was itself a telecommunications service. But the communications forced into that system surely are.

meaningful Commission oversight.

Indeed, as Chairman Wheeler recently stated with the release of the *Open Internet Order*,⁵ “[w]e know from the history of previous networks that both human nature and economic opportunism act to encourage network owners to become gatekeepers that prioritize their interests above the interests of their users.”⁶ Commissioner Clyburn recognized that without rules of the road, service providers “would be free to block, throttle, favor or discriminate against traffic or extract tolls from any user for any reason or for no reason at all.”⁷ Similarly, Commissioner Rosenworcel stated “[w]e cannot have gatekeepers who tell us what we can and cannot do and where we can and cannot go... .”⁸

For messaging services, what’s past is prologue. Relying almost exclusively on the bogeyman argument of spam and the eight-year old legal arguments they made in response to Public Knowledge’s earlier petition, the Wireless Commenters ask the Commission to validate the gatekeeper powers CTIA and its wireless carrier members have conferred upon themselves. CTIA even counterfactually claims that granting Twilio’s Petition would “would effectively inhibit the ability of ... schools to announce closings or provide notice of emergency measures.”⁹ However, the record evidence shows that “**150,000 teacher/student interactions per day are**

⁵ *Protecting and Promoting the Open Internet*, GN Docket No. 14-29. Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (“*Open Internet Order*”).

⁶ Statement of Chairman Tom Wheeler, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 at 1 (“Chairman’s Statement”).

⁷ Statement of Commissioner Mignon L. Clyburn, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 at 1 (“Commissioner Clyburn Statement”).

⁸ Statement of Commissioner Jessica Rosenworcel, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 at 1.

⁹ CTIA Opposition at 8.

being disrupted” by CTIA’s and the wireless carriers’ gatekeeper policies.¹⁰ Indeed, the record is now replete with examples of the wireless carriers blocking lawful traffic that consumers expressly want to receive in order to force messaging services traffic into CTIA’s cash-cow common short code (“CSC”) numbering system, with all of its costs and functional limitations. Of course, Congress mandated by statute that the *Commission* “administer telecommunications numbering and to make such numbers available on an equitable basis” in order to ensure the ubiquity and seamlessness of the nation’s telephone network.¹¹ No one gave CTIA the authority to establish a shadow numbering system, nor the wireless carriers the authority to block NANPA numbers to force traffic to the CTIA monopoly CSC system.

It was precisely because of the unfettered blocking of *lawful* messages that *consumers want* that Twilio filed its Petition. That is, Twilio is asking the Commission for “bright-line rules [to] assure the right of [users of messaging services to communicate with whom] they want, when they want, and the rights of innovators to introduce new products without asking anyone’s permission.”¹² In sum, granting Twilio’s Petition will simply “mean[] that there will be basic ground rules and a referee on the field to enforce them. If an action hurts consumers, competition, or innovation, the FCC will have the authority to throw the flag.”¹³

I. THERE IS NO DISPUTE THAT THE WIRELESS CARRIERS ENGAGE IN BLOCKING, THROTTLING AND CONTENT DISCRIMINATION TO FORCE MESSAGING SERVICES TRAFFIC INTO THE PREMIUM-PRICED SHORT CODE SYSTEM

In its Petition, Twilio demonstrated that the wireless carriers use blocking as a means to

¹⁰ Comments of Brett Kopf, CEO of Remind (filed Nov. 20, 2015) (emphasis added), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001312278> (“Remind Comments”).

¹¹ 47 U.S.C. § 251(e).

¹² Chairman’s Statement at 2.

¹³ *Id.*

force certain subscribers into an artificially high-cost service – CTIA’s proprietary common short code system. Wireless carrier blocking of lawful messaging services traffic sent using in-service NANP numbers is the primary vehicle for diverting traffic to the price-inflated CTIA system.¹⁴ In the shadow system established by the wireless carriers and their trade group, potential consumers must wait months to obtain the wireless carriers’ approval of their use cases, can only send content pre-approved by the wireless carriers, and can be blocked without notice for any reason, or no reason at all.¹⁵ The Wireless Commenters do not dispute any of these facts, nor do they challenge that the short code system they have forced on consumers is CTIA’s single largest source of revenue.¹⁶

The Wireless Commenters do not dispute that the wireless carriers routinely use ostensible “spam filters” to block lawful messaging services traffic. Far from identifying or blocking spam, these filters block traffic based on “thresholds for volume, throughput, number of recipients, and/or traffic balance,”¹⁷ not on whether the consumer wants the message. The definition of spam is that the message sent is unsolicited by the recipient, but the wireless carriers’ blocking system admittedly has nothing to do with evaluating a customer’s desire, or lack thereof, to receive a given message. They block to promote the CSC system and its monopoly rates. That is, traffic blocked from in-service NANP numbers by the wireless carriers will routinely flow once moved into the CSC system. CTIA’s “spam defense” is patently false and misleading.

As a result of these current blocking practices, commenters report all types of desirable

¹⁴ Petition at 18-23.

¹⁵ *Id.*

¹⁶ *See* Petition, Annex A.

¹⁷ CTIA Comments at 26.

messages requested by consumers – and even emergency messages – are being blocked based on the wireless carriers’ arbitrary filters:

- Trek Medics International is a nonprofit organization that uses messaging services to coordinate emergency medical care “in communities without reliable access to emergency care.” Using Trek’s service, “the nearest available emergency care providers [can] quickly locate, treat, and transport emergency victims to local hospitals.” Critically, however, “[a]rbitrary blocking of our messages means that sometimes paramedics will find out when somebody is dying, and sometimes they won’t, effectively negating the ‘just-in-time’ responses needed in life-threatening medical emergencies.”¹⁸
- CareMessage reports that health care providers attempting to engage disadvantaged populations and improve health care outcomes are being prevented from doing so by wireless carrier blocking. Further, forcing these health care providers into the common short code system is counterproductive because underserved populations are more likely to subscribe to lower-cost plans that restrict access to messages from common short codes.¹⁹
- Similarly, ClearCare attempts to connect home care agencies and their employees that provide medical care for senior citizens, in order to provide these employees critical information. ClearCare notes that if and when the wireless carriers block ClearCare’s messages, a “caregiver may miss their shift, which could mean that

¹⁸ Comments of Trek Medics International at 1 (filed Nov. 18, 2015) (emphasis added), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001311257>.

¹⁹ Comments of CareMessage at 1 (filed Nov. 17, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001311108>.

the senior citizen could miss critical care that they need.”²⁰

- Foursquare Labs, Inc. reports that wireless carriers are blocking identity verification texts it sends to its users, and “[t]here are periods where Foursquare has seen 100% of the messages being blocked by certain carriers.” To make matters worse, when these verification texts are being blocked, users are unable to use Foursquare’s services at all “because they cannot confirm their identity.”²¹ This is despite the fact that CTIA touts “two-factor authentication” as a favored messaging use case,²² but presumably this is the case only when the message sender is using a CTIA-leased common short code.
- IFTTT is a web-based service that allows its users to send text messages to *themselves*, such as health reminders, news alerts or interactions with physical products (Internet of Things), such as home security alerts.²³ Because the wireless carriers’ “message filtering blocks lawful messages that users are sending from themselves to themselves,” IFTTT was forced “onto the short code product” because unfettered carrier blocking was hampering its ability to innovate and giving consumers the impression that IFTTT’s service was unreliable.²⁴
- Polaris is a leading organization in the global fight to eradicate modern slavery and it uses messaging services to help victims of human trafficking and pursue

²⁰ Comments of ClearCare Inc. at 1 (filed Nov. 9, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001307254>.

²¹ Comments of FourSquare Lab Inc. at 1 (filed Nov. 16, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001337506>.

²² CTIA Opposition at 11.

²³ See <https://ifttt.com/recipes/255918-arm-scout-alarm-when-you-leave-home>.

²⁴ Comments of IFTTT Inc. at 1-2 (filed Nov. 20, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001339964>.

traffickers where they operate, including in the United States. As Polaris notes, “[a]rbitrary message filtering on public service applications such as ours can have profound negative impacts on the individual and on our communities.”²⁵

- And as noted above, Remind provides a service that “helps teachers communicate instantly with students and parents with quick, simple messages to any device.”

As Remind accurately describes, however, the “current carrier practices of contextually filtering messages, applying arbitrary rules on traffic balance, volumetric filtering, and blacklisting telephone numbers are causing irreparable harm to teachers and students. These practices are executed at the sole and arbitrary discretion of the carriers, without notice or recourse to applications like Remind. Because of this, more than **150,000** teacher/student interactions per day are being disrupted.”²⁶

The Wireless Commenters make no effort to dispute or even question this record evidence. The CSC system incents the carriers to divert as much traffic as possible to the CSC system, where wireless carriers can charge for message termination at rates exponentially higher than voice traffic, and CTIA effectively gets to sell telephone numbers outside of the Congressionally-mandated, Commission-regulated NANP numbering system designated for all telecommunications interconnected with the PSTN. Thus, when CTIA states that “[s]o long as the messages described here are lawful and delivered with the customer’s consent, they both reflect the benefits of, and further promote, the utility of the unpolluted mobile messaging

²⁵ Comments of Polaris at 1 (filed Nov. 20, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001312356>.

²⁶ Remind Comments at 1.

environment,”²⁷ what CTIA really means is that so long as it can extract its toll charges by forcing the traffic into the CSC system, only then can the messages reach their intended recipients.

In fact, Twilio analyzed the messaging services traffic transmitted through its service over the last six months, and whenever blocked text messages are moved to a CSC, they go through. That is, the messages caught in the wireless carriers’ fictitious “spam filters” are *not* spam. Rather, lawful messages are caught in CSC filters. This translates into millions of messages that consumers want to receive that are being arbitrarily blocked by the wireless carriers in order to force the traffic into the CSC system, where the traffic would not be blocked after the sender pays CTIA’s premium rates.²⁸

But as the record further reflects, paying CTIA’s exorbitant charges does not always mean an innovator can introduce a new product or service that incorporates messaging services because the wireless carriers believe they can choose to “discriminate against traffic ... for any reason or for no reason at all.”²⁹ As HeyWire notes, it has

engaged at various times the mobile carriers of the oligopoly regarding innovative programs that enterprises and consumers have expressed interest in providing to the market only to be told that the mobile carrier was interested in providing similar or same services *themselves in the future* and would not authorize HeyWire to provide such services to its customers, effectively violating common carrier tenets.³⁰

Similarly, NexGen Global Technologies, LLC has been awaiting wireless carrier

²⁷ CTIA Opposition at 11-12.

²⁸ Neither the Wireless Commenters or their few supports present even an anecdote of evidence suggesting that either the CSC system or the wireless carriers’ blocking filters do anything at all to mitigate or even identify spam.

²⁹ Commissioner Clyburn Statement at 1.

³⁰ Comments of HeyWire at 2 (filed Nov. 20, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001311627> (“HeyWire Comments”).

approval of its Next Generation 911 messaging application, which the wireless carriers have failed to approve for more than 18 months.³¹ NexGen’s messaging application would allow members of the public and PSAPs to more effectively communicate with each other through messaging services during emergencies, such as allowing parents to text a picture of a missing child to 911 so that first responders have this information when seconds count.³² To add insult to injury, NexGen is “obligated to pay \$1,500 per month” in fees to CTIA – or \$27,000 to date – “to ‘hold’ the short code number while the wireless provider(s) sit on [NexGen’s] application.”³³ In short, innovators like NexGen not only have to ask permission “to introduce new products,”³⁴ they have to pay the wireless carriers’ trade group tens of thousands of dollars for the “privilege” of seeking to introduce a new service – here a NG911 application – that could literally save lives.

There is no other form of communication for which the Commission has allowed such unrestrained gatekeeper power to be exercised. But just as the Commission found with respect to broadband Internet access service providers, the record demonstrates that wireless carriers “have the economic incentives and technical ability to engage in practices that pose a threat to [messaging services] openness by harming other [messaging services] providers, edge provider, and end users.”³⁵ Indeed, based on the record, the wireless carriers’ unfettered message blocking poses a threat to more than just openness. The wireless carriers are arbitrarily blocking text messages about life-threatening medical emergencies to first responders, potentially critical health care alerts and host of other vital communications that consumers expect to receive.

³¹ Reply Comments of NexGen Global Technologies, LLC at 5 (filed Oct. 29, 2015), available at <http://apps.fcc.gov/ecfs/comment/view?id=60001305536>.

³² *Id.* at 2.

³³ *Id.*

³⁴ Chairman’s Statement at 2.

³⁵ *Open Internet Order*, 30 FCC Rcd. at 5628, ¶ 78.

These facts are not disputed. The Commission should grant Twilio’s petition on an expedited basis.

II. THE WIRELESS CARRIERS DECEIVE THEIR OWN SUBSCRIBERS ABOUT THEIR BLOCKING PRACTICES

As Twilio established,³⁶ and as HeyWire confirmed,³⁷ the wireless carriers – without any notice to affected service providers or their customers – began routing toll-free text messaging traffic to an alternative messaging aggregator that held the traffic hostage until Twilio (and others) entered into a contract requiring Twilio to pay for this traffic to be released. As Twilio detailed, the only reason it discovered that there was any issue was that “one day Twilio’s customers just stopped receiving text messages from their customers for no apparent reason.”³⁸ The wireless carriers – in concert – deliberately routed *their* customers traffic to a black hole so that this third-party aggregator could force service providers like Twilio, HeyWire and others, to pay a ransom for the traffic’s release, and this third-party aggregator in turn kicked a portion of the payment back to the wireless carriers themselves.

Verizon disputes none of this. Indeed, Verizon goes so far as to admit that “[f]or 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.”³⁹ In other words, Verizon unilaterally and without notice re-routed traffic to its kick-back vendor, knowing Twilio and others would have to connect with this entity if Twilio wanted to restore traffic flows, after it figured out what was happening.

³⁶ Petition at 8-9.

³⁷ HeyWire Comments at 1-2.

³⁸ Petition at 8.

³⁹ Comments of Verizon at 13 (emphasis added).

Verizon disingenuously implies that it was Twilio’s customers’ calls that could not be completed, when in fact it was *Verizon’s* customers that were sending – or attempting to send – text messages to Twilio’s users’ 1-800 numbers⁴⁰ *from* Verizon’s network and could not do so. Again, Twilio only discovered there was a problem when Twilio’s customers suddenly stopped receiving any messages. Thus, Verizon was effectively blocking its own subscribers from using the messaging services they were paying for by routing its subscribers’ messages to a third-party aggregator that lacked the ability to complete the calls made by Verizon’s subscribers until downstream providers, like Twilio, paid the aggregator. Once the ransom was paid, Verizon got its share, and the traffic flowed once more.

It is important to note that Verizon never warns its subscribers that Verizon may block, misdirect or otherwise limit their text messages while Verizon and its business partner are attempting to leverage a better revenue-sharing arrangement based on Verizon’s monopoly power over its subscribers. In fact, Verizon never warns its subscribers that their messaging services can be limited in any way. Rather, Verizon advertises that its “MORE Everything Plan” provides subscribers “**Unlimited** domestic and international messaging while in the US.”⁴¹ Similarly, its new “Verizon Plan” expressly and unequivocally offers “**unlimited** talk and text.”⁴² As Verizon makes clear in this docket, however, the messages Verizon subscribers can actually expect to send and receive are in fact limited to only those Verizon itself chooses to

⁴⁰ Although the wireless carriers’ decision to choke their customers’ messaging traffic as negotiating tool for their business partner has so far been limited to toll-free messaging traffic, in the absence of bringing messaging services into the Title II fold, there is no conceptual barrier for the wireless carriers to hold all messages sent from the 202 area code hostage tomorrow.

⁴¹ See <https://www.verizonwireless.com/support/more-everything-plan-faqs/> (emphasis added).

⁴² See <http://www.verizonwireless.com/landingpages/verizon-plan/> (emphasis added). AT&T similarly advertises that its customers will get “**unlimited** talk and text on all phones.” See <https://www.att.com/shop/wireless/plans/planconfigurator.html> (emphasis added).

allow through. But Twilio does not mean to single out Verizon. All the wireless carriers block any message they want to for any reason, or none at all.

In analogous circumstances, both this Commission and the Federal Trade Commission have sought substantial penalties against carriers that misrepresent their services as “unlimited” when they are anything but.⁴³ As the Commission stated in the *AT&T NAL*, AT&T’s practice of characterizing its data plan as “unlimited” when it was in fact subject to throttling by AT&T “deprived consumers of sufficient information to make informed choices about their broadband service and thereby impeded competition in the marketplace for such services.”⁴⁴ Consumers are similarly misled by the wireless carriers in the marketplace for messaging services by patently false assertions that their messaging plans will be unlimited.

Expressly folding messaging services into the Title II framework will therefore not only prevent unilateral message blocking without notice, but it should also constrain the wireless carriers’ ability to mislead their own subscribers.

III. THE COMMUNICATIONS ACT AND THE COMMISSION PROTECT CONSUMERS FROM SPAM, NOT THE CARRIERS

As Twilio established in its Petition and as detailed above, the essence of Twilio’s Petition is about giving *consumers* the choice to decide who they communicate with, and not the wireless carriers.⁴⁵ Because messaging services can only be treated as telecommunications

⁴³ See, e.g., In the Matter of AT&T Mobility, LLC, Notice of Apparent Liability for Forfeiture and Order (rel. June 17, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-63A1.pdf (“*AT&T NAL*”).

⁴⁴ *Id.* ¶ 2.

⁴⁵ NOBEL Women and others appear misinformed concerning the intent behind Twilio’s Petition. Twilio and its Petition are against spam. Twilio wants spam prevented by the mechanism established by Congress and implemented by the Commission, as well as through *consumer* choice. What Twilio is against are CTIA and the wireless carriers’ enrichment efforts that are cloaked as consumer protection measures.

services subject to Title II in light of recent developments, CTIA's apparent strategy is to attempt to scare the Commission into inaction by threatening "a tidal wave of malicious traffic" unless the wireless carriers can keep forcing traffic into the CSC system.⁴⁶ But ample legal protections already exist to prevent this dystopian future.

As an initial matter, CTIA's CSC system and its attendant preapproval process do not prevent alleged spam text messages from reaching wireless consumers. One need only lightly scan the raft of recent Telephone Consumer Protection Act ("TCPA") cases predicated on text messages sent using CSCs.⁴⁷ Indeed, CTIA highlights that in 2013, "the FTC charged 29 defendants with sending more than 180 million unwanted text messages to consumers in schemes promising free gifts or prizes."⁴⁸ Based on the wireless carriers' volumetric filtering practices, these 180 million messages presumably could have only originated from common short codes. CTIA's CSC system **is the source** of nearly all alleged text messaging spam. The facts show that the CSC system is ineffective at its purported reason for being, yet very effective at financing CTIA.

⁴⁶ CTIA Opposition at 7.

⁴⁷ See, e.g., *Soular v. N. Tier Energy LP*, No. 15-CV-556, 2015 WL 5024786 (D. Minn. Aug. 25, 2015); *Charkchyan v. EZ Capital, Inc.*, No. 2:14-CV-03564, 2015 WL 3660315 (C.D. Cal. June 11, 2015); *Mogadam v. Fast Eviction Serv.*, No. SACV 14-01912, 2015 WL 1534450 (C.D. Cal. Mar. 30, 2015); *Haghayeghi v. Guess?, Inc.*, No. 14CV00020, 2015 WL 1345302 (S.D. Cal. Mar. 24, 2015); *Harnish v. Frankly Co.*, No. 5:14-CV-02321, 2015 WL 1064442 (N.D. Cal. Mar. 11, 2015); *Legg v. Voice Media Grp., Inc.*, 990 F. Supp. 2d 1351, 1353 (S.D. Fla. 2014); *Maier v. J.C. Penney Corp.*, No. 13CV0163, 2013 WL 3006415 (S.D. Cal. June 13, 2013); *In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253 (S.D. Cal. 2012); *Smith v. Microsoft Corp.*, No. 11-CV-1958 JLS, 2012 WL 2975712 (S.D. Cal. July 20, 2012); *Buslepp v. Improv Miami, Inc.*, No. 12-60171-CIV, 2012 WL 1560408 (S.D. Fla. May 4, 2012); *Emanuel v. NFL Enterprises, LLC*, No. 11CV1781, 2012 WL 177421 (S.D. Cal. Jan. 20, 2012); *Kaffko v. Quepasa Corp.*, No. 2:11-CV-01253, 2011 WL 4442654 (D. Nev. Sept. 22, 2011); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165 (N.D. Cal. 2010); *Kazemi v. Payless Shoesource Inc.*, No. C 09-5142, 2010 WL 963225 (N.D. Cal. Mar. 16, 2010); *Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009).

⁴⁸ CTIA Opposition at 7.

But as a matter of policy, when CTIA states that the FCC recently “commended ‘carrier efforts to implement protections against unwanted text messages,’”⁴⁹ CTIA ignores the Commission’s actual holding in the *2015 TCPA Declaratory Ruling*. That is, carriers can only block unsolicited calls – which include text messages – “**as long as the consumer makes the choice to do so.**”⁵⁰ Thus, the Commission has expressly ruled that unsolicited text messages can only be blocked at the direction of the consumer, and not unilaterally by the wireless carriers.

Moreover, CTIA’s fear mongering that messaging will have as much spam as email if the Commission brings messaging services into the Title II fold is based on ignoring the relevant laws. The TCPA is a bounty statute that provides a private right of action to any individual and the promise of \$500 per unsolicited message sent in violation of the TCPA.⁵¹ As AT&T itself can attest, this remedy, combined with class certification, serves as an incredibly effective deterrent against spammers.⁵² On top of aggressive private enforcement, as CTIA itself concedes, both the Commission and the FTC have jurisdiction over senders of unsolicited text messages and have increasingly cracked down on alleged text spammers (which again, were

⁴⁹ *Id.* at 15 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶ 119 (rel. Jul. 10, 2015) (emphasis added), *available at*, https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1_Rcd.pdf (“*2015 TCPA Declaratory Ruling*”).

⁵⁰ *Id.* at ¶ 156 (emphasis added).

⁵¹ *See* 47 U.S.C. § 227; *see also Palm Beach Golf Center-Boca, Inc. v. Sarris, D.D.S., P.A.*, 771 F.3d 1274, 1282 (“the TCPA functions as a congressionally created ‘bounty’”). Indeed, CTIA’s counterfactual cheap shot against Twilio – that Twilio allegedly serves “as the conduit for spam” by referring to the fact that Twilio “had previously been sued for transmitting unsolicited long-code text messages from GroupMe, CTIA Opposition at 6-7 – only demonstrates that TCPA plaintiffs’ attorneys are (sometimes overly) aggressive in attempting to collect on this bounty. In fact, Twilio was voluntarily dismissed and GroupMe was held not to have violated the TCPA. *See Glauser v. GroupMe, Inc.*, No. C 11-2584 PJH, 2015 WL 475111, at *6 (N.D. Cal. Feb. 4, 2015). CTIA identifies no other TCPA case involving long codes.

⁵² *See* <http://pdfserver.amlaw.com/nlj/AT&T%20settlement.pdf>. AT&T Mobility voluntarily agreed to settle this TCPA suit for \$45 million.

using the common short code system).⁵³

By contrast, there is no private right of action to seek redress for email spam messages, as only ISPs can seek to deter spammers through litigation.⁵⁴ Nor do there appear to be any government agencies that are filling this void by aggressively pursuing email spammers. In fact, the Department of Justice’s website states that “[w]hile people don’t always like getting spam, much of it has a legitimate business purpose.”⁵⁵

Such a statement would be unimaginable in the context of the TCPA or unsolicited text messages given the aggressive private litigation and government enforcement actions against text-message spam. As a result, CTIA’s Opposition to Twilio’s Petition is largely a 50-page attempt to stoke incorrect and unsupportable fears of an increase in text message spam if Twilio’s Petition is granted. At the same time, CTIA presents a demonstrably false view of the efficacy of the CSC system’s actual ability to prevent spam. The effectiveness of the CSC system does not lie in preventing spam, but in reducing consumer choice, decreasing competition, and financing CTIA. Bringing messaging services into the Title II framework and allowing the Commission to establish “basic ground rules and a referee on the field to enforce them” can only be an improvement over the status quo.⁵⁶

IV. MESSAGING SERVICES ARE COMMON CARRIER SERVICES SUBJECT TO TITLE II

Twilio previously demonstrated that messaging services are telecommunications services

⁵³ See <https://www.ftc.gov/news-events/press-releases/2013/03/ftc-cracks-down-senders-spam-text-messages-promoting-free-gift>.

⁵⁴ See, e.g., *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040 (9th Cir. 2009) (holding that only providers of Internet access service have standing under the CAN-SPAM Act, and not the recipients of the alleged spam emails).

⁵⁵ See <http://www.justice.gov/doj/spam>.

⁵⁶ Chairman’s Statement at 2.

and CMRS subject to Title II for three independent reasons.⁵⁷

First, under *Verizon*,⁵⁸ the Commission cannot subject messaging services to Title II in certain respects without classifying messaging services as telecommunications services. The Commission has been subjecting messaging services to certain Title II requirements since 2003, and thus the Commission must classify messaging services as Title II services as a whole.

Second, messaging services are undeniably telecommunications services subject to Title II under the Communications Act and the Commission's *Open Internet* framework. Indeed, the *only* offering the wireless carriers make to the public with respect to messaging services is the ability of consumers to send and receive messages of the consumers' design and choosing. Refusing to classify messaging services as Title II services would therefore create an untenable contradiction in the statutory framework.

Third, messaging services are also undeniably commercial mobile services because they are interconnected with the public switched telephone network, as the Commission has already concluded. All the messages that Twilio discusses utilize NANP numbers to be sent or received, the touchstone of the PSTN. Congress mandated that CMRS services be regulated as common carrier services under Title II. It therefore must follow that messaging services are subject to Title II on this independent basis.

CTIA ignores that the legal landscape has evolved since 2008 when it first made the same arguments it advances here. Indeed, CTIA ignores the messaging services its wireless carrier members actually *offer* to their subscribers: the "unlimited" ability to "send and receive

⁵⁷ Petition at 25-35.

⁵⁸ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) ("*Verizon*").

messages using their phone number.”⁵⁹ Finally, CTIA ignores – because it must – its own arguments before the D.C. Circuit in its appeal of the *Open Internet Order* that clearly demonstrate that messaging services are interconnected to the PSTN and must therefore be treated as CMRS. In short, CTIA cannot have it both ways. Messaging services must be treated as Title II common carrier services.

A. PSTN Messaging Services Must Be Treated As Title II Services For All Purposes Under *Verizon*

As Twilio previously demonstrated, the D.C. Circuit held in *Verizon* that if a communications service is regulated as a telecommunications service subject to common carrier obligations in part, it has to be regulated as a Title II common carrier service as a whole.⁶⁰ Indeed, as CTIA, AT&T and others submitted to the D.C. Circuit in their appeal of the *Open Internet Order*, “[t]he FCC’s extension of Title II’s common-carriage requirements to that service without classifying it as a telecommunications service is thus an ‘obvious’ violation of the statute.”⁶¹ Accordingly, the Commission cannot treat messaging services as common carrier services subject to Title II’s TCPA provisions, but then ignore the rest of Title II’s requirements.

Here, however, CTIA asserts that “numerous other Title II provisions apply to entities

⁵⁹ CTIA SMS Interoperability Guidelines, Version 3.2.2, § 1.1 at 4 (Effective Date: Jan. 1, 2015) (emphasis added), available at http://www.ctia.org/docs/default-source/default-document-library/sms_interoperability_guidelines_v3-2-2_jan_2015-as-posted.pdf?sfvrsn=2; CTIA MMS Interoperability Guidelines, Version 3.0.2, § 1.1 at 7 (Effective Date: Jan. 1, 2015) (emphasis added), available at <http://www.ctia.org/docs/default-source/default-document-library/mms-interoperability-guidelines-v3-0-2jan2015-as-posted.pdf?sfvrsn=2>.

⁶⁰ *Verizon*, 740 F.3d at 650-59.

⁶¹ Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and CenturyLink at 75, *U.S. Telecom Ass’n v. FCC*, No. 15-1063 (D.C. Cir. July 30, 2015), ECF No. 1565510 (citing *Verizon*, 740 F.3d at 650) (“CTIA Brief”), available at <http://www.ustelecom.org/sites/default/files/documents/Joint%20Brief%20of%20Petitioners%20073015.pdf>. See also *id.* at 28 (“The *Order*’s conclusion that the FCC may subject those arrangements to Title II without classifying this service as a telecommunications service directly contravenes *Verizon*.”).

that do not provision telecommunications services” and specifically points to Section 255, which “imposes disability-related requirements on manufacturers.”⁶² This, according to CTIA, “doesn’t make manufacturers providers of telecommunications services under Title II.”⁶³

CTIA misses the point. Section 255 does not make Apple or Samsung a telecommunications service provider, but they are subject to Title II because consumers use their equipment to send and receive telecommunications services subject to Title II, including messaging services. Stated differently, the FCC has Title II jurisdiction over equipment manufacturers under Section 255(b), because without telephone equipment manufacturers, consumers could not use common carrier services. But “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,”⁶⁴ is provided by common carriers subject to Section 255(c).⁶⁵

Likewise, Verizon misses the point when it states that the TCPA “does not regulate messaging providers *at all*. Section 227 instead prohibits *users* of telephone and messaging services from making certain types of ‘call[s].’”⁶⁶ The users of messaging services are using a

⁶² CTIA Opposition at 46-47.

⁶³ *Id.*

⁶⁴ 47 U.S.C. § 153(50) (emphasis added).

⁶⁵ 47 U.S.C. § 255(c) (“A **provider of telecommunications service** shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.”) (emphasis added).

⁶⁶ Comments of Verizon at 20 (emphasis in original). Verizon is also incorrect in asserting that the TCPA does not apply to common carriers *at all*. Rather, as the Commission previously ruled, “if a common carrier is merely providing the network over which a subscriber (a fax broadcaster or other individual, business, or entity) sends an unsolicited facsimile message, that common carrier will not be liable for the facsimile.” *Rules and Regulations Implementing the TCPA of 1991*, 68 F.R. 44144-01, 44169 (2003) (“*TCPA Rules 2003*”). Thus, only absent a “high degree of involvement” or “actual notice” would the common carrier not be liable for its subscribers fax broadcasts sent in violation of the TCPA. *Id.* In the context of messaging

common carrier service that subjects them to Title II restrictions, including the TCPA. But the users can only be subject to Title II if the messaging service providers are providing a common carrier service subject to Title II. Indeed, the Commission’s regulations implementing the TCPA, Rule 64.1200,⁶⁷ is in Subchapter B – “**Common Carrier Services**” and Part 64 – “Miscellaneous Rules Relating To **Common Carriers**.”

Accordingly, the Commission has been subjecting messaging services to Title II regulation for over a decade. Under the D.C. Circuit’s *Verizon* decision, the Commission can no longer subject messaging services to selective treatment under Title II, but instead must bring messaging services fully into the Title II fold.

B. Messaging Services Are Indisputably An Offering By The Wireless Carriers To Provide Telecommunications Services

Twilio previously demonstrated that under the Communications Act and the Commission’s *Open Internet Order*, the wireless carriers’ messaging services offering could only be a common carrier service because they are *offering* telecommunications to the public for a fee.⁶⁸ As the Commission previously ruled, “**the critical distinction between a telecommunications and an information service turns on what the provider is “offering.” If the offering meets the statutory definition of telecommunications service, then the service is also necessarily a common carrier service.**”⁶⁹ Twilio thoroughly detailed each and every major wireless carrier’s offering to the public – in the wireless carriers’ own words – and without fail, each offering made by the wireless carriers described a pure telecommunications service.

services and the common short code system, it is hard to see how the wireless carriers are *not* highly involved in the text messages they transmit to their subscribers given that they must pre-approve every use case.

⁶⁷ 47 C.F.R. §64.1200

⁶⁸ Petition 31-34.

⁶⁹ *Open Internet Order*, 30 FCC Rcd. at 5757, ¶ 355 (emphasis added).

That is, the ability – for a fee – to transmit messages of “the user’s design and choosing, without change in the form or content of the information as sent and received.”⁷⁰

In response, CTIA does not even address its wireless carrier members’ offerings to the public, but states – predictably, without any support – “[i]n many cases, messaging customers specifically seek the storage and retrieval that render messaging ‘asynchronous.’”⁷¹ Even if CTIA could find one person that walked into a wireless carrier’s store and specifically told a sales associate “I’d really like to get my hands on some asynchronous messaging capabilities,” this is not the service the wireless carriers are *offering*. Indeed, as Twilio previously established, Sprint even informs its customers “**we don't store any text message content**, which is the actual text of the message sent between you and someone else.”⁷²

Equally unavailing is Verizon’s related argument that “mobile messaging is a store-and-forward service” because “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.”⁷³ Verizon has to locate the recipient device for every voice call too, but that does not mean mobile voice service is an information service. Instead, as the Commission addressed in the *Open Internet Order*, what CTIA and the wireless carriers are describing is the adjunct-to-basic process used to “determine how to route the [message] properly, and there is no doubt that the inclusion of that functionality does not somehow convert the basic telecommunications service offering into an information

⁷⁰ 47 U.S.C. § 153(50), (53).

⁷¹ CTIA Opposition at 40.

⁷² See *Get Text Message Details*, Sprint.com, available at <http://support.sprint.com/support/article/Get-text-message-details/case-wh164052-20100429-155822#!/>.

⁷³ Comments of Verizon at 15.

service.”⁷⁴

In any event, the wireless carriers are *only* advertising a basic transmission service, that is, the ability to send and receive messages. Because this fact is not dispute, that should end the analysis under the Commission’s holding in the *Open Internet Order*. Messaging services are telecommunications services subject to Title II on this ground alone.

C. Messaging Services Are Indisputably CMRS

Twilio previously demonstrated that messaging services are services “interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communications from all other users on the public switched network.”⁷⁵ As a result, messaging services must be treated as CMRS subject to Title II. Indeed, to paraphrase the Commission’s recent arguments before the D.C. Circuit, messaging “today is a ‘virtually universal’ service used by ‘hundreds of millions of consumers’ ‘to send and receive communications,’ not a ‘private’ service to a limited set of users.”⁷⁶

Even though CTIA itself admitted more than 6 years ago that messaging services are fully interconnected “between wireless and wireline, converged and next-generation IP Multimedia Subsystem (IMS) networks,”⁷⁷ CTIA and the wireless carriers are persisting with the self-serving fantasy that messaging services are a “private mobile service” like a taxi company’s

⁷⁴ *Open Internet Order*, ¶ 367.

⁷⁵ Petition at 35-36 (citing 47 C.F.R. § 20.3 (defining “Interconnected Service”).

⁷⁶ Brief for Respondents at 39-40, *U.S. Telecom Ass’n v. FCC*, No. 15-1063, Dkt. No. 1573000 (filed Sep. 14, 2015).

⁷⁷ Petition at 14.

wireless dispatch service.⁷⁸ Indeed, Verizon argues that “mobile messaging subscribers cannot send text or picture message to landline phones – without an intermediary service.”⁷⁹

But even if this is true, it still satisfies the test used in the *Open Internet Order*, in which the Commission found that mobile broadband Internet access service “meets the definition of interconnected service for a wholly independent reason: because – even under our existing definition of ‘public switched network’ adopted in 1994 – users have the ‘**capability**’ as provided in section 20.3 of our rules, **to communicate with NANP numbers** using their broadband connection **through the use of VoIP applications.**”⁸⁰ Simply Googling “text enabled landline” reveals that a host of companies offering applications that offer the capability to “text enable your *existing* Landline number.”⁸¹

Of course, messaging services are designed to communicate with NANP numbers. That is, communicating with NANP numbers is indisputably the essence of messaging services, not merely a capability. It therefore *must* follow – Section 332(c)(1)(A) mandates that a person engaged in providing CMRS be treated as a common carrier, 47 U.S.C. § 332(c)(1)(A) – that messaging services are a common carrier service subject to Title II on this independent basis.

V. CONCLUSION

In sum, the record fully supports Twilio’s request that the Commission resolve any remaining uncertainty surrounding the regulatory status of messaging services. The Commission

⁷⁸ See, e.g., Comments of Verizon at 17. Tellingly, the Wireless Commenters never attempt to explain how they could represent to the D.C. Circuit that a “a paging system that connects to the telephone network and uses the North American Number Plan” is an interconnected service, Petition at 36, but somehow messaging services that connect to the telephone network and use the NANP are not.

⁷⁹ *Id.*

⁸⁰ *Open Internet Order*, ¶ 400 (emphasis added).

⁸¹ See, e.g., <https://www.zipwhip.com/product/landline> (emphasis in original); see also <http://www.onereach.com/text800>; <http://phonewire.com/services/textbox>.

should declare that these messaging services are governed by Title II, which is the only result that can be consistent with the D.C. Circuit's *Verizon* decision and the Commission's *Open Internet Order*.

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