

TABLE OF CONTENTS

SUMMARY i

I. TEXT MESSAGING IS AN INFORMATION SERVICE..... 2

 A. Text Messaging Meets the Statutory Test for an Information Service..... 2

 B. Text Messaging Is Not CMRS 8

II. THE COMMISSION COULD ONLY REQUIRE USF CONTRIBUTIONS BASED
ON TEXT MESSAGES REVENUES IN A PROSPECTIVE RULEMAKING, BUT
SHOULD NOT TAKE THAT ACTION 11

III. THE BUREAU LACKS THE AUTHORITY TO DETERMINE THE
REGULATORY CLASSIFICATION OF OR CONTRIBUTION OBLIGATIONS
FOR TEXT MESSAGING 14

IV. CONCLUSION..... 17

SUMMARY

Text messaging is an information service under the statutory definition. Like e-mail, text messaging provides integrated capabilities for information storage and retrieval, as well as protocol conversion. Text messages are stored by the system both pending and after delivery. Carriers use different text messaging protocols, but carriers and third-party vendors provide capabilities for converting messages among these disparate protocols so that customers can send messages between customers of different carriers and also to and from Internet e-mail addresses. Indeed, text messaging and e-mail have become increasingly intertwined such that text messaging is now simply a more mobile form of e-mail. In addition, text messaging provides users with the capability to interact with stored information by sending text messages to specific short codes in order to receive stock quotes, weather forecasts, and similar information.

Because text messaging is an information service, text messaging revenues are not subject to *mandatory* contribution obligations. The Commission might be able to (but should not) require text messaging providers to contribute pursuant to its *permissive* authority, but such a determination would “create new law” and “impose new duties.” It would also require a public interest determination, which could only be made on the basis of a factual record. Thus, the Commission could only exercise its permissive authority in a rulemaking proceeding, and any such rulemaking would have solely prospective effect.

In any event, the Bureau lacks authority to determine either the regulatory classification or the contribution obligations of text messaging. The regulatory classification of text messaging is a novel question outside the Bureau’s authority. Moreover, as noted above, the exercise of the Commission’s permissive contribution authority requires a rulemaking proceeding, and the Bureau lacks authority to conduct rulemakings.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Universal Service Contribution Methodology)	WC Docket No. 06-122
USAC Request for Guidance on Contribution Obligations for Text Messaging Revenues)	
)	

To: The Chief, Wireline Competition Bureau

COMMENTS OF VERIZON WIRELESS

Verizon Wireless responds to the Bureau’s public notice seeking comment on the Universal Service Administrative Company’s (“USAC”) request for clarification regarding the universal service reporting and contribution obligations for revenues from text messaging services.¹

Text messaging is an information service, equivalent to e-mail. Thus, it is not subject to mandatory contribution obligations under the statute. The Commission may have authority to require contributions based on text messaging revenues pursuant to its permissive authority, but could only (and should not in any event) exercise such authority in a rulemaking proceeding, which could by law only have prospective effect. Regardless, a USAC request for clarification is not the appropriate forum to resolve this question, because the Bureau lacks the authority to determine either the regulatory classification or the contribution obligations of text messaging service. A rulemaking initiated by the full Commission would be required.

¹ *Wireline Competition Bureau Seeks Comment on Request for Guidance Filed by the Universal Service Administrative Company*, WC Docket No. 06-122, Public Notice, DA 11-853 (rel. May 9, 2011) (the “Public Notice”). Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, WCB, FCC, WC Docket No. 06-122 (filed Apr. 26, 2011) (the “USAC Letter”).

I. TEXT MESSAGING IS AN INFORMATION SERVICE.

USAC’s letter and the Public Notice inquire “whether text messaging revenues should be reported as telecommunications or non-telecommunications revenues.”² Text messaging is an information service, not a telecommunications service, and therefore is not subject to mandatory universal service contribution obligations.

A. Text Messaging Meets the Statutory Test for an Information Service.

The Communications Act (“Act”) defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available information via telecommunications.”³ The Act defines telecommunications as “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.”⁴ Services categorized as information services cannot be telecommunications services because “‘information service’ and ‘telecommunications service’ are mutually exclusive categories.”⁵

Verizon Wireless’s text messaging service requires the “storing” and “retrieving” of information, both when delivering messages between individual consumer handsets and when allowing subscribers to retrieve information such as news, alerts, or reminders from a content provider’s central information database. Text messaging also involves “transforming” message content, by adding identifying information and undertaking net protocol conversion to transmit a message to other networks or the Internet. These characteristics are integral to the text

² Public Notice at 1; USAC Letter at 4.

³ 47 U.S.C. § 153(20).

⁴ 47 U.S.C. § 153(43).

⁵ *Vonage Holdings Corporation v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007).

messaging service and place text messaging squarely within the “information service” category as defined under Commission precedent.

Storage and Retrieval: The Commission has consistently cited computer-based storage and retrieval as the classic hallmarks of an “information service.” In the 1998 *Stevens Report*, for example, the Commission invoked storage and retrieval capabilities in concluding that e-mail constitutes an “information service”:

[E]lectronic mail utilizes data storage as a key feature of the service offering. The fact that an electronic mail message is stored on an Internet service provider’s computers in digital form offers the subscriber extensive capabilities for manipulation of the underlying data. The process begins when a sender uses a software interface to generate an electronic mail message (potentially including files in text, graphics, video or audio formats). The sender’s Internet service provider does not send that message directly to the recipient. Rather, it conveys it to a “mail server” computer owned by the recipient’s Internet service provider, which stores the message until the recipient chooses to access it.⁶

The Report noted that a user “may not exploit this feature of the service offering; indeed, two users with direct Internet connections can communicate via electronic mail in close to real-time. Nonetheless, 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.”⁷

Text messaging is effectively a more mobile form of e-mail – and the two services are functionally indistinguishable in most respects.⁸ Like e-mail, text messages are delivered over a system that uses storage and retrieval. Storage occurs not only for the time needed to locate the

⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11538-39 ¶ 78 (1998) (“*Stevens Report*”).

⁷ *Id.* at 11539 n.161.

⁸ Indeed, on some mobile devices, e-mail and text messages are displayed in the same “mailbox” screen and are virtually indistinguishable to the user.

recipient, but continues indefinitely for the benefit of the recipient for later review and response.

The network flow and storage of an incoming message is as follows:

- The message travels from one of two short message peer-to-peer protocol (“SMPP”) gateways to the short messaging service center (“SMSC”) server. The SMSC needs to find where the receiving handset is physically located and therefore stores the message while sending another message over the SS7 network to the Home Location Register (“HLR”), which tracks handsets.
- The HLR sends a message back to the SMSC identifying the customer location. If the phone is turned off or is out of the service area, the HLR informs the SMSC that the phone is not registered.
- Once the SMSC receives an acknowledgement from the HLR that the receiving unit is ready for delivery, it sends a message to the Mobile Switching Center (“MSC”) that covers the market where the receiving handset is located.
- If the message is very short, it is delivered over the “paging” channel (which is the same process used to send rings to a customer indicating an incoming call). If the message is longer, the voice channel is used to send the message.
- If the HLR cannot find the customer (for example, if the phone is turned off or out of the service area), the HLR replies to the SMSC and the message must be stored for a longer period. Depending on the error code, a retry algorithm is initiated. During the retry effort, the message is stored by the SMSC. The message will be stored for redelivery up to five days and then deleted if not successfully delivered. While most messages are delivered quickly, every message is stored for some period of time until the SMSC receives confirmation that the receiving handset is active and ready to retrieve the message. If the receiving mobile is not text messaging capable, the message is automatically deleted.
- Handset-to-Internet text messages are delivered to an Internet gateway and routed in the same manner as an e-mail message.
- Even after delivery, messages are stored on the server for up to ten days, during which they may be retrieved for purposes such as law enforcement.
- Messages can be stored indefinitely on a customer’s handset. The customer can edit the message, forward it to others, reply by text, or even reply by voice by clicking the associated phone number on the message.

While text messaging and e-mail may have originated as distinct services, they have become increasingly intertwined as both technologies have evolved. It is now possible to send e-mail to mobile devices regardless of whether they are e-mail-capable, and those e-mails can be

received as text messages.⁹ By the same token, it is possible for mobile customers to send text messages to Internet e-mail addresses in the same way they send text messages to other mobile users, and the message is received as e-mail. Thus, the two services have become effectively conjoined and inseverable from one another.

Text messaging is very different from basic telecommunications service, such as voice or facsimile transmission. When a sender initiates a telephone call or fax transmission, the sending device transmits only signaling information to confirm that a circuit may be opened to the recipient. Once the circuit is opened, the sender's content is then transmitted from sender directly to recipient. In contrast, a text message is always stored for at least a short period of time – and sometimes for hours or even days – before it is transmitted to its ultimate destination, and subscribers rely upon this storage capability when out of range, traveling by airplane, or otherwise unavailable to receive the message. Even where the receiving handset is active and users can communicate in “close-to-real-time,” the essential service is “store-and-forward, and hence asynchronous.” Because “one can send a message to another person ... without any need for the other person to be available to receive it at that time,”¹⁰ text messaging constitutes an information service under existing Commission precedent.

Verizon Wireless's text messaging services also allow subscribers to “retrieve” data in another sense, by querying certain electronic databases. When used in this way, the subscriber sends a text message to retrieve information that has been pre-loaded into a central database, such as automatic alerts, sports scores, weather updates, and other information. In *Talking Yellow Pages*, the Commission found that a similar service involving “customer interaction with

⁹ Most providers recognize an addressing convention for such e-mails similar to “NPA-NXX-XXXX@carriername.com”.

¹⁰ *Stevens Report*, 13 FCC Rcd at 11539 n.161.

stored information” should be classified as enhanced rather than basic service, and therefore not subject to Title II common carrier regulation, even though the Talking Yellow Pages provider was a common carrier for other basic services.¹¹ Because text messaging similarly allows subscribers to retrieve or make available information via telecommunications, it is properly classified as an information service.

Protocol Conversion: The Commission also has repeatedly held that services involving “net protocol conversion” are “enhanced services.”¹² Describing its *Computer Inquiry* framework, the Commission has explained that “generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services.”¹³ Since 1996, the Commission has made clear that services involving net protocol conversion also constitute “information services” under the Act, because such conversion involves the “transforming” of information.¹⁴ And in the *Stevens Report*, the

¹¹ *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988 ¶¶ 19-20 (1987) (“*Talking Yellow Pages*”) (citing 47 C.F.R. § 64.702), *vacated as moot*, 7 FCC Rcd 5644 (1992).

¹² *See, e.g., Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 421-22 ¶ 99 (1980) (“*Computer II Order*”). *See also generally* 47 C.F.R. § 64.702 (noting that enhanced services “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information”).

¹³ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7459 ¶ 4 (2004).

¹⁴ *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996) (“*Non-Accounting Safeguards Order*”) (concluding that “the differently-worded definitions of ‘information services’ and ‘enhanced services’ ... should be interpreted to extend to the same functions”); *id.* at 21956-57 ¶¶ 104-105 (finding that protocol processing services that had qualified as “enhanced” under the *Computer Inquiry* framework should be treated as “information services” under the 1996 Act framework).

Commission confirmed that an “information service” designation might depend, among other things, on whether the service under review involves a “net change in form or content.”¹⁵

The transmission of text messages often involves net protocol conversion. The Commission has defined “protocol conversion” to refer to “the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks.”¹⁶ Different wireless carriers use different text messaging protocols. For this reason, when wireless carriers first deployed text messaging capabilities, customers could send messages only to other customers of the same carrier. Later, carriers and third-party vendors developed techniques to convert messages among the disparate text messaging protocols.

For example, Verizon Wireless may truncate an intercarrier text message if it arrives in 7-bit rather than 8-bit coding, and also must process it through a message aggregator to adjust for different formats used by different wireless operators (such as the use of foreign language accents or other special characters). When sending to or receiving from the Internet, Verizon Wireless must translate the message between the RFC-822 Internet e-mail protocol and a format or protocol used for text message transmission over wireless networks. As a result, a text message originating from or sent to a non-Verizon Wireless destination could look very different

¹⁵ See *Stevens Report*, 13 FCC Rcd at 11543-44 ¶ 88; *id.* at 11527 ¶ 51 (noting that “services employing protocol processing were treated as information services under the MFJ”).

¹⁶ The Commission first enunciated this definition in the 1995 *Frame Relay Order*. See *Independent Data Communications Manufacturers Ass’n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13717-18 n.5 (1995). The Commission has since employed that definition in several orders. See, e.g., *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 n.229; *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket No. 96-115, CC Docket No. 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14435 n.134 (1999).

between sending and receipt. These various changes and translations constitute net protocol conversion under Commission precedent.¹⁷

Even for text messages that stay within the Verizon Wireless network, the company changes the form or content of messages between sending and delivery. For example, Verizon Wireless adds headers, callback numbers, dates, and other information to the message the sender typed before delivering it to the receiving handset. If the sender is listed with a nickname in the recipient's address book, the system will automatically display that nickname as well. As a result, even text messages within the same wireless network nonetheless experience a "change in the form or content of the information as sent and received," again meaning a text messaging service cannot be a telecommunications service under the Act.

For these reasons, USAC is simply incorrect in stating that text messaging involves "no change in the form or content of customers' information."¹⁸

B. Text Messaging Is Not CMRS.

The USAC Letter attempts to analogize text messaging to a variety of Commercial Mobile Radio Service ("CMRS") services that the Commission previously has determined are subject to contribution obligations,¹⁹ but text messaging is not CMRS. As the Commission noted in its *Wireless Broadband Ruling*, a CMRS service must give the end user the capability "to communicate to or receive communications from all other users on the public switched network."²⁰ Text messaging does not provide this interconnected capability. Standing alone,

¹⁷ See *supra* notes 15-16.

¹⁸ USAC Letter at 2.

¹⁹ *Id.* at 3.

²⁰ *Appropriate Regulatory Treatment of Broadband Access to the Internet over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5916 (2007)

text messaging only gives a subscriber the capability to interact via text messaging with the customers of other carriers that are capable of receiving and processing text messages, and that have text messaging-enabled devices, as well as with Internet e-mail addresses and other online content. Without reliance on some other service,²¹ the subscriber has no capability to reach wireline telephones. In terms of “interconnecting” users to the public switched network, a text messaging service is not equivalent to either mobile or wireline telephone service. As a result, text messaging cannot be deemed CMRS.

The classification of text messaging as an information service also precludes its classification as CMRS. In the *Wireless Broadband Order*, the Commission determined that, even if a service is interconnected, it is “not included in the commercial mobile service definition” if it constitutes a mobile information service. The ruling explained that this “exclusion is consistent with and furthers the Act’s overall intent to allow information services to develop free from common carrier regulations.”²²

The Commission’s 2007 *Automatic Roaming Order* did not conclude otherwise.²³ The Commission did not find that text messaging is an interconnected service, but rather is an “interconnected feature[] or service[] in some instances, but non-interconnected in others,

(“*Wireless Broadband Order*”) (quoting definition of “interconnected service” in 47 C.F.R. § 20.3).

²¹ Some carriers offer a capability to send or receive text messages as voice messages on wireline telephones, but these involve the use of text-to-speech processors to convert between text messages and voice messages. Carriers generally charge extra for these services, and they do not actually involve the transmission of text messages to or from wireline telephones. Similar services exist that allow e-mail messages to be “read” by telephone as voice messages, but these do not transform e-mail into a telecommunications service.

²² *Wireless Broadband Order*, 22 FCC Rcd at 5920 ¶52.

²³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15837 (2007).

depending on the technology and network configuration chosen by the carriers.”²⁴ The order neither classified text messaging as CMRS nor otherwise found it was a common carrier service.²⁵

USAC also quotes the Form 499-A instructions at length for the proposition that “paging and messaging” services are required to contribute,²⁶ but texting is not paging. The Commission has long held that paging services are telecommunications services within the CMRS regulatory classification.²⁷ By contrast, although the Commission has never categorized text messaging,²⁸ text messaging is an information service, not a telecommunications service.²⁹ While USAC is correct that the Commission has compared text messaging service to paging service in the E-rate distribution context,³⁰ the Commission has explicit authority under section 254(h) to provide support for information services for schools and libraries.³¹ Thus, as the

²⁴ *Id.*

²⁵ *See id.*

²⁶ USAC Letter at 2-3.

²⁷ *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1454 ¶¶ 101-102 (1994) (paging service is common carriage and CMRS); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9175 ¶ 780 (1997) (“*First Universal Service Order*”) (paging services in the class of mandatory USF contributors as providers of telecommunications), *aff’d in pertinent part and rev’d in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (“*Texas Counsel*”).

²⁸ *See infra* Section III.A.

²⁹ *See supra* Section I.A.

³⁰ USAC Letter at 2 & n.5 (citing *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 6562, 6571 ¶ 17 (2009)) (“*2010 ESL Order*”).

³¹ 47 U.S.C. § 254(h). *See also First Universal Service Order*, 12 FCC Rcd at 9084 ¶ 589; *Texas Counsel*, 183 F.3d at 441-443.

Commission itself concluded, in that context it could have provided support for text messaging whether it was a telecommunications service or an information service.³²

In sum, text messaging includes storage, retrieval, and protocol conversion; thus, it qualifies as an information service. It is not CMRS service and is not equivalent to paging service.

II. THE COMMISSION COULD ONLY REQUIRE USF CONTRIBUTIONS BASED ON TEXT MESSAGING REVENUES IN A PROSPECTIVE RULEMAKING, BUT SHOULD NOT TAKE THAT ACTION.

As explained above, text messaging is an information service,³³ and “‘information service’ and ‘telecommunications service’ are mutually exclusive categories.”³⁴ The Commission’s mandatory universal service contribution authority applies only to “telecommunications services.”³⁵ Thus, text messaging is not subject to mandatory contribution obligations. The Commission also has permissive authority to require contributions from “[a]ny other provider of telecommunications.”³⁶ This permissive authority, however, may only be exercised in a rulemaking proceeding.

First, the exercise of permissive authority would constitute a new “legislative rule” because it would “*expand[] the base of contributors*”³⁷ and “*extend universal service*

³² *2010 ESL Order*, 25 FCC Rcd at 6571 n.66 (“we find that we have the authority to designate text messaging as a service eligible for E-rate support under either categorization”).

³³ *See supra* Section I.

³⁴ *Vonage*, 489 F.3d at 1232.

³⁵ 7 U.S.C. § 254(d).

³⁶ 47 U.S.C. § 254(d).

³⁷ *Universal Service Contribution Methodology*, WC Docket No. 06-121, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7544 ¶ 50 (2006) (“*2006 Interim Contribution Methodology Order*”) (emphasis added); 47 U.S.C. § 254(d).

obligations”³⁸ to non-telecommunications carriers. As such, it would “create[] new law or impose[] new rights or duties.”³⁹ Legislative rules can only be adopted in the context of a notice-and-comment rulemaking proceeding.⁴⁰

Second, the exercise of permissive authority requires the Commission to make an affirmative public interest finding.⁴¹ This would require a fact-driven analysis that can only be performed based on a thorough record developed in a notice-and-comment rulemaking proceeding.

Consistent with the language of the statute, the Commission has invoked its permissive authority uniformly in notice-and-comment rulemaking proceedings. In 2006, for example, the Commission concluded, after notice and comment, that voice over Internet protocol (“VoIP”) services should contribute to the Universal Service Fund (“USF”) on an interim basis pursuant to the Commission’s permissive authority in Section 254(d) without deciding whether VoIP is a telecommunications or information service.⁴² The Commission found based on the factual record that requiring such contributions was in the public interest because the rapid substitution of non-contributing VoIP services for other traditional (contributing) voice services was eroding

³⁸ *2006 Interim Contribution Methodology Order*, 21 FCC Rcd at 7540 ¶ 43 (emphasis added).

³⁹ *Sorenson Comm’s v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009) (internal citations and quotations omitted).

⁴⁰ 5 U.S.C. § 553; *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2004) (“The Administrative Procedure Act imposes notice-and-comment requirements ... that must be followed before a rule may be issued.... This court and many commentators have generally referred to the category of rules to which the notice-and-comment requirements do apply as ‘legislative rules.’”) (internal citations omitted). *See also USTA v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005) (“[T]he Supreme Court has said that if an agency adopts ‘a new position inconsistent with’ an existing regulation, or effects ‘a substantive change in the regulation,’ notice and comment are required.”) (quoting *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995)).

⁴¹ 47 U.S.C. § 254(d).

⁴² *2006 Interim Contribution Methodology Order*, 21 FCC Rcd at 7536 ¶ 34.

the universal service contribution base.⁴³ In other cases in which the Commission has relied on its permissive authority, the Commission has likewise engaged in notice and comment rulemaking before imposing a new contribution obligation.⁴⁴

A rulemaking proceeding also would be the only practical way to address the substantial implementation issues that would be raised if text messaging revenues were subject to contribution obligations. In fact those same issues counsel against any such rulemaking. The Commission would have to craft guidelines for allocating text messaging revenues among the interstate, intrastate, and international jurisdictions. Past experience has demonstrated that this would be exceedingly complex. As the Bureau and the Commission are well aware, because of mobility and the greater prevalence of bundling in the mobile services marketplace, mobile carriers have struggled since the inception of the current contribution methodology to allocate even their telecommunications service revenues among the jurisdictions.⁴⁵ The Commission faced similar problems when it required contributions from interconnected VoIP providers, particularly where nomadic VoIP is involved.⁴⁶ A requirement to report text messaging revenues for universal service purposes would compound the reporting difficulties from both of these services, because text messages can be sent from and to mobile devices as well as the public

⁴³ *Id.*

⁴⁴ *See, e.g., First Universal Service Order*, 12 FCC Rcd at 9183-85 ¶¶ 794-98 (1997) (requiring private carriers and payphone aggregators to contribute to the USF).

⁴⁵ *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252 (1998) (establishing the wireless “safe harbor” in response to concerns about CMRS carriers’ ability to allocate their revenues among the jurisdictions); *Universal Service Contribution Methodology*, WC Docket No. 06-122, Declaratory Order, 23 FCC Rcd 1411 (2008) (clarifying CMRS carriers’ obligations regarding reporting of “toll” revenues).

⁴⁶ *See 2006 Interim Contribution Methodology Order*, 21 FCC Rcd at 7546 ¶ 56.

Internet.⁴⁷ Moreover, as discussed above, given that text messaging and e-mail are virtually indistinguishable, the Commission would have to resolve how to treat assessment of e-mail in any proceeding where it addressed text messaging.

For these reasons, the Commission could require contributions based on text messaging only in a rulemaking, and “a rulemaking can affect the conduct of parties only prospectively; it does not determine the legality of past conduct.”⁴⁸ However, the rulemaking would need to grapple with the implementation issues identified above as well as with e-mail. As a result, should the full Commission determine that text messaging providers must contribute to USF, it could only implement that requirement prospectively.

III. THE BUREAU LACKS THE AUTHORITY TO DETERMINE THE REGULATORY CLASSIFICATION OF OR CONTRIBUTION OBLIGATIONS FOR TEXT MESSAGING.

The Public Notice seeks comment on USAC’s request for Bureau guidance regarding the regulatory classification and contribution obligations of text messaging services.⁴⁹ In this instance, the Bureau lacks the authority to respond to USAC’s request.

Under the Commission’s rules, the Bureau is not permitted to “act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.”⁵⁰ USAC’s request for guidance presents the type of novel question of law and fact that may not be decided at the Bureau level.

First, the full Commission has explicitly acknowledged that this question is novel. Specifically, the full Commission has stated that it “has not determined the regulatory

⁴⁷ See generally *supra* Section I.

⁴⁸ *AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992).

⁴⁹ See generally USAC Letter.

⁵⁰ 47 C.F.R. § 0.291(a)(2).

classification of text messaging.”⁵¹ Thus, this is an open legal question that must be addressed in the first instance by the full Commission.

Indeed, the question is pending before the full Commission in at least one open proceeding. In January 2008, the Commission released a Public Notice seeking comment on a petition for a declaratory ruling that text messaging and short codes should be treated as telecommunications services under Title II, or subject to comparable restrictions.⁵² Because this issue is pending before the full Commission in an ongoing proceeding, it is not properly a topic for resolution by the Bureau.

In addition, although the Commission has delegated to the Bureau the authority to modify contributor *reporting* requirements,⁵³ the Bureau has no authority itself to modify substantive contribution obligations.⁵⁴ The Commission itself has recognized previously that “this delegation extends *only* to making changes to the *administrative aspects* of the reporting requirements, *not to the substance of the underlying programs.*”⁵⁵

⁵¹ 2010 *ESL Order*, 25 FCC Rcd at 6571 & n.66.

⁵² See *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules*, WT Docket No. 08-7, Public Notice, 23 FCC Rcd 262 (2008).

⁵³ 47 C.F.R. § 54.711(c).

⁵⁴ See *id.* The plain language of the rule indicates that the scope of the delegation is limited to reporting requirements; no mention is made of authority to modify substantive contribution obligations: “The Bureau may waive, reduce, modify, or eliminate contributor *reporting requirements* . . . and require additional *reporting requirements.*” *Id.* (emphasis added).

⁵⁵ 1998 *Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, 14 FCC Rcd 16602, 16621 ¶ 39 (1999) (emphasis added). See also *Universal Service Contribution Methodology; Petition of Alexicon Telecommunications Consulting to Change FCC Form 499-A Reporting Deadline*, WC Docket No. 06-122, Order, 25 FCC Rcd 13084, 13084 n.2 (WCB 2010) (acknowledging that “[t]he Wireline Competition Bureau has delegated authority to waive, reduce, or eliminate the contributor reporting

USAC’s question goes to the substance of providers’ contribution obligations, and not merely to reporting requirements. As the USAC Letter itself states, the issue is “a matter of Universal Service Fund (USF) policy concerning a telecommunications carrier’s USF reporting *and contribution obligations*.”⁵⁶ Responding to USAC’s request is not simply a matter of identifying the correct line on FCC Form 499-A where text messaging revenues should be reported. Rather, as discussed above, because text messaging is an information service, contributions could be required, if at all, only through exercise of the Commission’s permissive contribution authority, which requires a rulemaking proceeding.⁵⁷ The Bureau lacks authority to conduct rulemakings.⁵⁸

requirements associated with the universal service support mechanisms” and that “[t]his delegation includes making changes to the administrative aspect of universal service contribution reporting requirements, such as where and when Forms 499 are filed”) (emphasis added).”

⁵⁶ See USAC Letter at 1 (emphasis added).

⁵⁷ See *supra* Section II.

⁵⁸ 47 C.F.R. § 0.291(e).

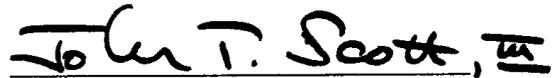
CONCLUSION

Text messaging is an information service under the statutory definition. Thus, text messaging revenues are not subject to mandatory contribution obligations. The Commission might be able to (but should not) require text messaging providers to contribute pursuant to its permissive authority, but could only do so in a rulemaking proceeding, which would have solely prospective effect. In any event, the Bureau lacks jurisdiction to determine either the regulatory classification or the contribution obligations of text messaging.

Respectfully submitted,

VERIZON WIRELESS

By:

Handwritten signature of John T. Scott, III in black ink, underlined.

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