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**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
 )  
Universal Service Contribution Methodology ) WC Docket No. 06-122  
 )  
Universal Service Administrative Company )  
Request for Guidance on Treatment of SMS )  
Revenues )  
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**COMMENTS OF T-MOBILE USA, INC.**

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**INTRODUCTION AND SUMMARY**

T-Mobile USA, Inc. (“T-Mobile”) hereby files its comments in response to the letter submitted by the Universal Service Administrative Company (“USAC”) on April 26, 2011 (“Letter”) and the Wireline Competition Bureau’s (the “Bureau”) related Public Notice.<sup>1</sup> In its Letter, USAC seeks guidance as to the proper treatment of end user revenues associated with the provision of short message service (“SMS,” also known as “text messaging”). USAC asks whether text messaging is “an information service, not subject to USF contribution, or a telecommunications service, which is subject to USF contribution.”<sup>2</sup> For the reasons below, the Bureau should find that SMS is an information service, and SMS revenues are *not* properly subject to universal service fund (“USF”) contribution obligations under the Commission’s rules.

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

<sup>2</sup> Letter at 2.

SMS is an information service and, as such, not subject to USF contribution obligations for several related but distinct reasons. First, SMS involves protocol processing, sometimes called “net protocol conversion,” and relies on such processing to facilitate the exchange of messages between SMS users, on the one hand, and users of other platforms (such as e-mail and computer-based instant messaging (“IM”) systems), on the other. Second, SMS involves the temporary storage and subsequent delivery of messages that are sent to users who are located in areas that are out of range of a compatible wireless network, whose devices are turned off, or who are in an area where there is a network outage. Third, SMS facilitates user retrieval of stored data. Alone and collectively, these characteristics place SMS squarely within the “information service” definition found in the Communications Act of 1934, as amended (the “Act”),<sup>3</sup> precluding it from being classified as telecommunications and from being subjected to USF contribution obligations under existing rules. Moreover, these features are integral to the SMS functionality, rendering SMS an integrated information service with no distinct or severable telecommunications component. USAC’s comparison of SMS and paging is inapt for classification purposes and should be rejected. Finally, the fact that commercial mobile radio service (“CMRS”) revenues are subject to USF contribution obligations is irrelevant, because SMS is not properly deemed CMRS.

## **DISCUSSION**

### **I. SMS IS AN INFORMATION SERVICE.**

The question before the Bureau is whether SMS is properly classified as “telecommunications,” which is defined by the Act and the Form 499 Instructions as “the

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<sup>3</sup> 47 U.S.C. § 151 *et seq.* See *id.* § 153(24) (“information service” definition).

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,"<sup>4</sup> or as an "information service," which is defined to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...."<sup>5</sup> As USAC acknowledges, "information services ... are not included in the universal service or other fund contribution bases."<sup>6</sup>

For the reasons discussed below, SMS is an information service, and its revenues are not subject to assessment. SMS does *not* involve the transmission of information "without change in form or content" – the hallmark of "telecommunications."<sup>7</sup> Rather, SMS "offer[s] ... a capability for ... acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" – all hallmarks of an "information service," or of what before enactment of the Telecommunications Act of 1996<sup>8</sup> was referred to as an "enhanced service."<sup>9</sup> Specifically, SMS (1) involves protocol conversion, a capability invoked whenever a

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<sup>4</sup> *Id.* § 153 (50); Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, February 2008, at 4 ("2008 Instructions").

<sup>5</sup> The Commission has never addressed the regulatory classification of text messaging. *See Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 6562, 6571, ¶ 17 & n. 66.

<sup>6</sup> Letter at 3, quoting 2008 Instructions at 29.

<sup>7</sup> 47 U.S.C. § 153(50).

<sup>8</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>9</sup> 47 U.S.C. § 153(24). *See also* 47 C.F.R. § 64.702(a) (defining "enhanced service"). "Under the 1996 Act, any service with a communications component must be either a 'telecommunications service' or an 'information service' (but not both)." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 ¶ 34 n.50 (1998). The Commission has determined that "the differently-worded definitions of 'information services' and 'enhanced services' ... should be interpreted to extend to the same functions." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996) (subsequent (continued on next page))

message is sent to or received from an e-mail or IM account, for example; (2) provides for storage of messages when the intended recipient is out of range of a compatible wireless network, has her device turned off, or is in an area where there is a network outage; and (3) facilitates the retrieval of information stored in electronic databases. These features distinguish SMS from other telecommunications offerings.

**A. SMS Involves Protocol Conversion.**

SMS offers the user a capability for relying on protocol processing functionality – in effect, message translation – not associated with “telecommunications.” In statutory terms, SMS “offer[s] ... a capability for ... transforming [and] processing” messages, and such transformation and processing, when invoked, “change[s]” the messages’ “form or content.”<sup>10</sup> Specifically, T-Mobile’s SMS offering permits users to exchange messages not only with other mobile subscribers but also with users of e-mail services and of computer-based instant messaging accounts. This functionality is important to end users, who rely on the ability to interact with their friends and relatives irrespective of the platform those friends and relatives use themselves.

Such interoperability, however, requires significant protocol processing: When users send SMS messages from their T-Mobile mobile devices to an e-mail or instant messaging account, the short message service center (“SMSC”) routes the message to an Internet gateway, which translates the message into the appropriate protocol. SMS messages generally originate or terminate on the mobile device in short message peer-to-peer protocol (“SMPP”) or MM7 (a

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history omitted) (“*Non-Accounting Safeguards Order*”). See also *id.* at 21956-58 ¶¶ 104-07; *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11527 ¶ 51 (1998) (“*Report to Congress*”).

<sup>10</sup> 47 U.S.C. § 153(24), (50).

protocol associated with medial messaging service (“MMS”).<sup>11</sup> E-mail messages are generally formatted in simple mail transfer protocol (“SMTP”) and IMs are generally formatted in Transmission Control Protocol/Internet Protocol (“TCP/IP”). Therefore, messages exchanged between an SMS platform and an e-mail or IM platform must be translated from one protocol to another.<sup>12</sup>

SMTP, TCP/IP and MM7 differ in important ways from SMPP. Among other things, e-mail and instant-messaging protocols use different fields and formats than SMS messages. For example, an e-mail message contains a “Subject” line that is absent from an SMS message. To render the two systems compatible, T-Mobile’s SMS platform must strip this information from an e-mail message as it converts the message into SMPP. Likewise, text messages often contain headers and information designed for wireless use, such as callback numbers, which must be modified or stripped when the message is sent to an e-mail or instant-messaging platform. In addition, wireless text messages are subject to significant length limitations, and incoming messages exceeding those limits must be truncated. Thus, SMS involves significant processing and conversion of the protocols used by the messages sent and received.

Commission precedent makes clear – and has made clear for decades – that services offering protocol conversion are information services (or, before 1996, “enhanced” services):<sup>13</sup>

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<sup>11</sup> In many cases, emails sent to T-Mobile SMS customers are now delivered to the end user in MM7 protocol rather than in SMPP.

<sup>12</sup> In the case of e-mail/SMS messages, the translation is performed by the T-Mobile network. In the case of IM/SMS messages, the translation is typically conducted by the IM network.

<sup>13</sup> In 1996, the Commission determined that services involving protocol conversion, which previously had been classified as “enhanced services,” would be deemed “information services” under the 1996 Act, because such conversion involves the “transforming” of information. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956-58 ¶¶ 104-07 (finding that protocol processing services that had qualified as “enhanced” under the *Computer Inquiry* framework

(continued on next page)

“[S]ervices 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.”<sup>14</sup> Indeed, the sort of protocol conversion involved in translating an SMS message is precisely the sort contemplated by the Commission in defining an information service: “Protocol conversion” refers specifically to “the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks.”<sup>15</sup> Thus, USAC’s suggestion that, in an SMS message, “[p]lain text is sent and plain text is received,” and that therefore “there is no change in the form or content of customer’s information,”<sup>16</sup> reflects a misunderstanding: The fact that an SMS message begins and ends as text says nothing about whether it has undergone a net change in form along the way.

**B. SMS Involves The Storage of Messages.**

SMS also offers the capability of storing messages when the party to whom a message is sent cannot immediately receive the message. If a T-Mobile subscriber who is the intended

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would be treated as “information services” under the 1996 Act framework and stating that a service “that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information” for statutory purposes). And in its 1998 *Report to Congress* on universal service issues, the Commission explained that an “information service” designation would depend, among other things, on whether the service under review involves a “net change in form or content.” *See Report to Congress*, 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”).

<sup>14</sup> *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, 7459 ¶ 4 (2004). *See also Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420-21 ¶ 97 (1980) (subsequent history omitted) (“*Computer II Order*”).

<sup>15</sup> *Independent Data Communications Manufacturers Association, Inc.*, 10 FCC Rcd 13717, 13717-18 ¶ 4 n.5 (CCB 1995). *See also Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 ¶ 101 n.229, 21956, ¶ 104; *Implementation of the Telecommunications Act of 1996*, 14 FCC Rcd 14409, 14435 ¶ 47 & n.134 (1999).

<sup>16</sup> Letter at 2.

recipient of an SMS message is out of range (*i.e.*, is in an area without coverage, has the mobile device turned off, or is in an area where T-Mobile's network is experiencing an outage), the message will be stored at T-Mobile's SMSC for up to 72 hours, during which time the SMSC will periodically attempt to deliver the message to the recipient.

Since the very inception of the basic/enhanced service dichotomy, the Commission has recognized that such storage is a hallmark of an enhanced (or, after the 1996 Act, information) service. While telecommunications offerings might involve *incidental* momentary storage, any longer storage is incompatible with a "basic" or "telecommunications" classification: "[I]n a basic service, once information is given to the communication facility, its progress towards the destination is subject to *only those delays caused by congestion within the network or transmission priorities given by the originator.*"<sup>17</sup> In contrast, services that permit what the Commission has called "asynchronous" communications offer "more than a simple transmission path," and are information services.<sup>18</sup> Thus, for example, the Commission rejected claims that e-mail was properly deemed "telecommunications": "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.... The service thus provides more than a simple transmission path."<sup>19</sup> The same is true of SMS, which offers the capability of sending messages that will reside on the SMSC for up to 72 hours until they can be delivered.

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<sup>17</sup> *Computer II Order*, 77 F.C.C.2d at 420 ¶ 95 (emphasis added). See also *North American Telecommunications Association*, 101 F.C.C.2d 349, 363 ¶ 33 (1985) ("*NATA Centrex Order*").

<sup>18</sup> *Report to Congress*, 13 FCC Rcd at 11539 ¶ 78 & n.161.

<sup>19</sup> *Id.* at 11538-39 ¶ 78.

### C. SMS Facilitates the Retrieval of Stored Information.

SMS also offers the user the ability to query electronic databases and receive responses in text-message form. For example, a user can send an SMS message containing search terms to “GOOGL” and will receive in response an SMS from Google containing the top hits for the search. A user might also query databases to acquire or retrieve sports scores, weather reports, movie times, or other information using five- or six-digit short codes, receiving in return a standard text message containing information from the queried database.

As the Commission has held for decades, this sort of user interaction with stored data is one *sine qua non* of an information service. To the end user, this functionality offers the capability for acquiring or retrieving information; to the content provider, it offers the capability for “making available information.”<sup>20</sup> Thus, for example, the Commission has deemed voice mail an enhanced service “because it employs subscriber interactions with stored information for the purpose of providing a service which is not a basic transmission channel.”<sup>21</sup> The Commission has similarly found that a “Talking Yellow Pages” service that permitted users to place a call and hear a recorded advertisement “involves ‘subscriber interaction with stored information,’ and falls squarely within the definition of ‘enhanced service’ . . . .”<sup>22</sup> And the Bureau has long held that reverse-lookup functionality, which allows callers to learn the identity

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<sup>20</sup> 47 U.S.C. § 153(24) (defining “information service”). “[T]he provision of access to a database for purposes other than to obtain the information *necessary to place a call* will generally be found to be an enhanced service.” *U S WEST Communications, Inc. Petition for Computer III Waiver*, 11 FCC Rcd 7997, 8003 ¶ 12 (CCB 1996) (emphasis added). *See also NATA Centrex Order*, 101 F.C.C.2d at 360 ¶ 26.

<sup>21</sup> *NATA Centrex Order*, 101 F.C.C.2d at 361 ¶ 27.

<sup>22</sup> *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5988 ¶ 20 (1987).

of the subscriber associated with a telephone number, is an enhanced (information) service.<sup>23</sup>

For the same reasons, SMS is also an information service.

**D. SMS’s Protocol Processing, Storage, and Retrieval Components Are Integral to Its Functionality.**

Finally, there can be no claim that the information-processing functionalities discussed above are somehow incidental to SMS, such that the service can be deemed to include a severable telecommunications component. The Commission has held that a service involving both transmission and processing will be deemed an information service *in its entirety* if it is offered to the subscriber as “a single, integrated service.”<sup>24</sup> This is the case with respect to SMS. Like other integrated information services, T-Mobile’s SMS product packages transmission capacity that is inherently intertwined with “the offering of a capability for ... acquiring, storing, transforming, retrieving, processing, utilizing, or making available information via telecommunications.”<sup>25</sup> While a user might choose not to exchange messages that require conversion – just as a broadband Internet access customer may not rely on the specific storage

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<sup>23</sup> See, e.g., *BellSouth Petition for Waiver of the Computer III Comparably Efficient Interconnection Requirements*, 17 FCC Rcd 13881, 13884 ¶ 5 (WCB 2002) (“Electronic and operator-assisted reverse directory services are enhanced services that permit a customer to dial the carrier’s database and retrieve subscriber name and address information by providing a telephone number.”); *US West Communications, Inc. Petition for Computer III Waiver*, 11 FCC Rcd 1195, 1199 ¶ 26 (CCB 1995).

<sup>24</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821 ¶ 36 (2002). See also *id* at 4824 ¶ 41 (“The cable operator providing cable modem service over its own facilities, as described in the record, is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service.”); see also *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14863-64 ¶¶ 14-15 (2005). The Supreme Court affirmed this approach. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (“*Brand X*”) (“It is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product....”).

<sup>25</sup> 47 U.S.C. § 153(24).

and retrieval and processing that render that offering an integrated information service – T-Mobile offers its text messaging service as a single product that includes the *capability* for acquiring, storing, transforming, retrieving, utilizing, or making available information previously discussed. SMS is therefore an integrated information service with no separate telecommunications component.

## **II. USAC’S COMPARISON OF SMS AND PAGING IS INAPT AND SHOULD BE REJECTED.**

In its Letter, USAC suggests that SMS might properly be likened to paging service, revenues from which have historically been subject to USF contribution obligations. The Bureau should reject this comparison. As shown above, SMS is clearly an integrated information service with no distinct “telecommunications” component. While analogies to other offerings may be instructive, even apparently minor differences can undercut their usefulness. The fact that a service involves the transmission of text-based messages is not determinative with respect to its classification.

Consistent with the above, the Commission has *never* indicated that SMS is equivalent to paging for purposes of statutory classification. The decisions and Commission websites cited by USAC indicate only that SMS offers a functionality – *i.e.*, text-based messaging – also offered by a certain type of paging/messaging service.<sup>26</sup> As an initial matter, it is not clear that this variety of paging service is properly deemed telecommunications. The Commission has

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<sup>26</sup> See Letter at 2 n.4 (citing Commission website indicating that paging and messaging providers offer some text-based services); *id.* n.5 (citing FCC decisions noting that SMS is “a paging-like service” and that “SMS is essentially short paging style messaging”); *id.* at 3 n. 6 (citing Commission website indicating that pages might include transmission of “a short message”); *id.* n.7 (citing decision describing alphanumeric paging); *id.* n. 8 (citing Commission website indicating that narrowband PCS providers offer “two-way paging and other text-based services”).

indicated that “paging/messaging” services, which share more of SMS’s advanced capabilities,<sup>27</sup> are properly classified as information services instead.<sup>28</sup> In any event, the decisions USAC cites in support of its alternate treatment of paging services do not even purport to address SMS’s statutory classification, much less whether SMS also offers storage, retrieval, or protocol-processing functionalities that render it an information service. Indeed, one of the decisions quoted by USAC states expressly that “text messaging is similar to . . . e-mail” – an offering long recognized to be an *information service*.<sup>29</sup>

Thus, to the extent USAC suggests that SMS is equivalent to paging and that paging is, in all its forms, a telecommunications offering subject to USF assessment, these claims are both incorrect.

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<sup>27</sup> See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 13 FCC Rcd 19746, 19800 (1998) (“One way in which paging companies are attempting to differentiate their paging products is by providing enhanced and complementary services such as voice mail, email forwarding, and information services such as news updates, sports scores, and stock quotes.”).

<sup>28</sup> *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 16 FCC Rcd 596, 603 ¶ 15 (2001) (referring to “paging/messaging” as an “information service”).

<sup>29</sup> See *Report to Congress*, 13 FCC Rcd at 11538-39 ¶ 78 (concluding that e-mail “offers users the ‘capability for . . . acquiring, storing, transforming, processing, retrieving, utilizing, or making available information through telecommunications.’”). The Commission’s rationale in finding e-mail to be an information service is highly relevant to the instant inquiry into SMS: “The [e-mail] 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. . . . The service thus provides more than a simple transmission path.” *Id.* The same is, of course, true of SMS.

### III. SMS IS NOT COMMERCIAL MOBILE RADIO SERVICE.

The fact that CMRS revenues have been subjected to USF assessment obligations<sup>30</sup> is irrelevant to the instant inquiry, because SMS messaging cannot be labeled CMRS. First, SMS cannot be CMRS because, as explained above, it is an information service. In its 2007 *Wireless Broadband Order*,<sup>31</sup> the Commission recognized that the Act precludes a service's simultaneous classification as an information service and as CMRS. Section 3(44) of the Act provides that “[a] telecommunications carrier shall be treated as a common carrier ... only to the extent that it is engaged in providing telecommunications services.”<sup>32</sup> An information service cannot also be a telecommunications service,<sup>33</sup> and so a telecommunications carrier cannot be treated as a common carrier in its provision of an information service. Section 332(c)(1)(A) specifies that a provider *will* be treated as a common carrier insofar as it provides CMRS.<sup>34</sup> The Commission has, therefore, rightly concluded that an information service cannot also be CMRS.<sup>35</sup>

SMS also fails to satisfy the statutory requirement that a service must be interconnected in order to constitute CMRS. Section 332(d) defines a “commercial mobile service” as a “mobile service ... that is provided for profit and makes interconnected service available.”<sup>36</sup> As used in this definition, the term “interconnected service” refers to a service “that gives

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<sup>30</sup> See, e.g., *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179, 9259 ¶¶ 787, 981 (1997).

<sup>31</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Order*”).

<sup>32</sup> 47 U.S.C. § 153(51). See generally *Wireless Broadband Order*, 22 FCC Rcd at 5919-20 ¶¶ 48-51.

<sup>33</sup> See *supra* note 9.

<sup>34</sup> See 47 U.S.C. § 332(c)(1)(A).

<sup>35</sup> See *Wireless Broadband Order*, 22 FCC Rcd at 5919-20 ¶ 51; *id.* at 5920-21 ¶¶ 54-56.

<sup>36</sup> 47 U.S.C. § 332(d)(1).

subscribers the capability to communicate to or receive communication from *all other users on the public switched network.*”<sup>37</sup> T-Mobile’s SMS offering does not, however, permit end users to transmit messages to users with landline phone numbers. Those users, of course, constitute an extremely large portion of “users of the public switched telephone network[.]” Thus, just as SMS is not “telecommunications,” it cannot properly be considered CMRS.

### CONCLUSION

For the reasons described above, the Bureau should hold that SMS is an integrated information service, not a telecommunications offering (or CMRS), and that revenues associated with SMS are therefore not subject to USF contribution obligations.

Respectfully submitted,

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<sup>37</sup> 47 C.F.R. § 20.3 (emphasis added). *See also Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1434 ¶¶ 54-55 (1994) (subsequent history omitted); *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45.