

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

In the Matter of)
)
Universal Service Contribution)
Methodology)
) WC Docket No. 06-122
Wireline Competition Bureau seeks)
Comment on Request for Guidance Filed by)
the Universal Service Administrative)
Company)

To: Wireline Competition Bureau

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW
Suite 600
Washington, D.C. 20036
(202) 785-0081

Michael F. Altschul
Senior Vice President, General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Scott K. Bergmann
Assistant Vice President, Regulatory Affairs

Its Attorneys

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I. INTRODUCTION

CTIA respectfully responds to the Wireline Competition Bureau’s (“Bureau’s”) Public Notice requesting comment on a letter submitted by the Universal Service Administrative Company (“USAC”) on April 26, 2011 (“Letter”).¹ The Letter seeks guidance on the “proper reporting of text messaging revenues” for purposes of contributions to the universal service fund (“USF”),² which depends in turn on the regulatory classification of text messaging. The Letter recognizes that the most common form of text messaging is short message service (“SMS”).³ As CTIA explains in these comments, SMS is an integrated information service and, thus, there is

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

² Letter at 2.

³ See *id.*

no basis for finding that SMS is subject to the universal service contribution requirements.⁴ Moreover, even setting aside the requisite statutory analysis, the Bureau's Public Notice does not provide a legally sufficient procedural vehicle for imposition of such requirements on SMS providers, which would require a notice-and-comment rulemaking by the Commission.

As CTIA explains, proposals to classify SMS as an information service would be unsound public policy and would conflict with the intent of the Act. The unregulated status of SMS as an information service has had major public policy benefits that the Commission should not disturb. Imposing USF contribution burdens on text messaging services would reduce consumer demand for these innovative services and would disadvantage these services as compared to other similar information services, such as e-mail, instant messaging ("IM"), and even Twitter. For all these reasons, the revenue associated with SMS is not subject to USF contribution requirements and should remain so.⁵

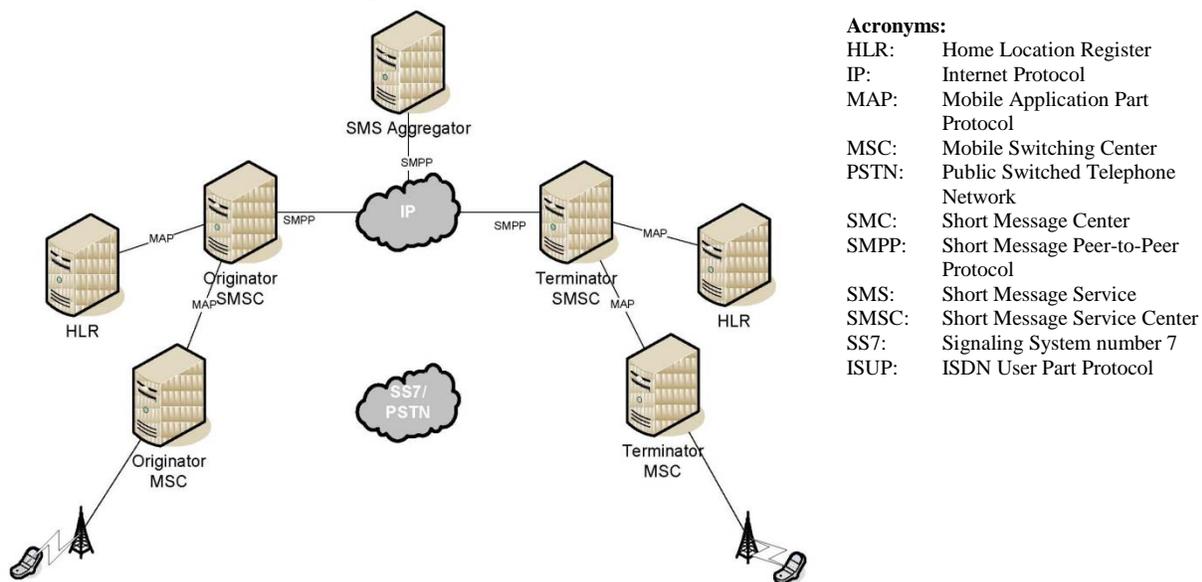
II. BACKGROUND AND SUMMARY

SMS, which is essentially a mobile version of e-mail, enables the sending and receiving of short (usually 160 characters or less) text messages to or from mobile phones, or to an email or instant messaging account. SMS also can be used to send pictures or ring tones, and to access data bases and web searches.

⁴ See 47 U.S.C. § 153(24) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service").

⁵ See *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9179, ¶ 788 (1997) ("*Universal Service First Report and Order*"), *aff'd sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (stating that "we agree with the Joint Board that information service providers (ISP) and enhanced service providers are not required to contribute to [USF] support mechanisms to the extent they provide such services."); see also Letter at 2-3.

Diagram 1: Peer-to-Peer Inter-Carrier SMS



As illustrated above in Diagram 1, a typical SMS message routed between two different SMS providers travels from a user’s mobile device through an originator short message service center (“SMSC”) and the Internet to a terminator SMSC, and ultimately to the terminating mobile device. The SMSCs are servers that control, store, and route SMS messages. SMS messages use a network separate from the public switched telephone network (“PSTN”),⁶ and SMS does not provide the ability to reach all users of the PSTN – specifically, the vast majority of wireline customers neither send nor receive SMS messages via their wireline phones.⁷ Even

⁶ As the Commission noted in 2010:

Most facilities-based providers currently offer circuit-switched mobile voice services that are interconnected with the public switched telephone network (PSTN). **Many of the data and messaging services offered by facilities-based providers rely only on IP-based, packet-switched networks**, while other services may continue to connect to the PSTN.

Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, 25 FCC Rcd 11407, 11438, ¶ 26 (2010) (“Fourteenth CMRS Competition Report”) (emphasis added).

⁷ Some SMS providers offer subscribers the ability to send text messages to wireline phones, such as through a protocol conversion that translates text into voice. However, such traffic is a

though SMS allows customers to use their phone numbers as an address for SMS, those messages are typically carried via private data links to an ENUM⁸ address associated with the consumer's phone number.⁹

In contrast to the routing of a typical SMS message, a mobile voice call between two different carriers, illustrated below in Diagram 2, is routed through the PSTN using the SS7 network.¹⁰ The voice call is carried from the calling party's device to the originating carrier's mobile switching center ("MSC"), through the PSTN, to the terminating carrier's MSC to the called party's device.

miniscule portion of SMS messaging. A traditional wireline phone cannot support SMS messaging as utilized by the typical user.

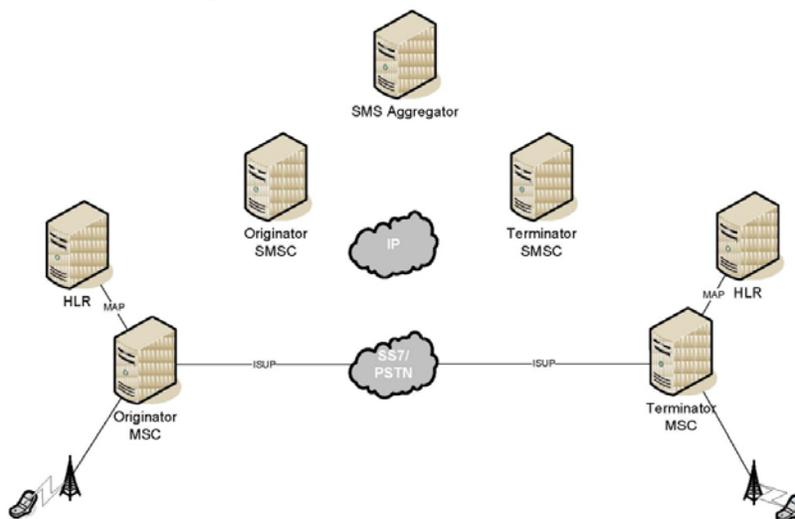
⁸ The Electronic Number Mapping System (ENUM) translates a NANP telephone number into an IP address that can be used in Internet communications. See <http://www.itu.int/osg/spu/enum/>

⁹ See, e.g., Comments of CTIA, WC Docket No. 08-7, at 5-6, 37-39 (filed Mar. 14, 2008) ("CTIA Comments"); Reply Comments of CTIA, WC Docket No. 08-7, at 3-5 (filed Apr. 14, 2008) ("CTIA Reply Comments"). All comments or reply comments filed in WC Docket 08-7 referred to hereinafter are short-cited.

Other explanations of SMS are available at: Puneet Gupta, *Short Message Service: What, How and Where*, Wireless Developer Network, <http://www.wirelessdevnet.com/channels/sms/features/sms.html> (last visited June 2, 2011); Jennifer Hord, *How SMS Works*, How Stuff Works, <http://communication.howstuffworks.com/sms.htm> (last visited June 2, 2011).

¹⁰ See *High-Cost Universal Service Support et al*, 24 FCC Rcd 6475, 6642, ¶ 327 n.848 (2008) (stating that "SS7 is an out-of-band signaling system that is separate from, but runs parallel to, the public switched telephone network (PSTN) and is used to set up call paths between calling and called parties").

Diagram 2: Inter-Carrier Voice Call



In addition to network differences, SMS offers different capabilities from traditional telecommunications services. Thus, the USAC Letter’s description of text messaging does not give a full picture of the nature of text messaging services. It describes text messaging far too narrowly as “the sending of messages in plain text to various wired or wireless devices.”¹¹ Although SMS is commonly associated with person-to-person texting, SMS supports a host of other applications, all of which are “information services,” such as the download or transfer of ringtones, pictures, other graphics and information, and animations.¹² Because SMS features net protocol conversion, information processing and data retrieval, and stores information as part of the service, it is a classic information service, like e-mail and voicemail.¹³

Accordingly, and as described in Section III, SMS is an information service and the statutory authority that allows a service to be identified for USF contribution requirements does

¹¹ See Letter at 2.

¹² See *Short Message Service/SMS Tutorial*, Developer’s Home, <http://www.developershome.com/sms/smsIntro.asp> (last visited June 2, 2011) (“Besides text, SMS messages can also carry binary data. It is possible to send ringtones, pictures, operator logos, wallpapers, animations, business cards (e.g. VCards) and WAP [Wireless Application Protocol] configurations to a mobile phone with SMS messages.”).

¹³ See 47 U.S.C. § 153(24) (defining “information service”).

not apply to SMS. Section 254(d) of the Communications Act of 1934, as amended (the “Act”) establishes a mandatory contribution obligation for “interstate telecommunications service.”¹⁴ Because an information service cannot be a telecommunications service, SMS as an information service is not subject to the Act’s mandatory contribution obligation. Nor is SMS a commercial mobile radio service (“CMRS”) subject to a contribution requirement. Because SMS does not interconnect to the PSTN, it does not make “interconnected service” available to the PSTN and does not satisfy the CMRS definition in Section 332(d) of the Act.

Section 254(d) also provides the Commission with permissive authority to require “any other provider of interstate telecommunications” to contribute to universal service, “if the public interest so requires.”¹⁵ To date, the Commission has not undertaken such an analysis and, as CTIA describes in these comments, the Public Notice and Letter provide no basis for imposing such a requirement. Indeed, requiring SMS to contribute to the USF would not be in the public interest.

There are strong public policy reasons for maintaining SMS as an unregulated service. In fact, SMS’s unregulated status as an information service has major public policy benefits. Development of this service on an unregulated basis has provided great benefits to consumers. SMS providers are meeting rapidly-growing consumer demand for peer-to-peer texting, and are continually developing new and innovative text messaging services. A contribution requirement

¹⁴ See *id.* § 254(d). The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.” *Id.* § 153(53). “Telecommunications,” in turn, means “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.” *Id.* § 153(50).

¹⁵ *Id.* § 254(d); see also *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538-41, ¶¶ 38-45 (2006) (“*VoIP USF Order*”), *pet. rev. denied sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) (“*Vonage*”).

imposed on SMS providers would inequitably discriminate against them and ultimately end users of the service, because no such requirement applies to e-mail, another almost identical information service, and similar services like instant messaging or Twitter. Also, SMS does not benefit substantially from the PSTN because it is not interconnected, and (unlike, for example, interconnected VoIP) does not compete directly with other services that are required to contribute. Instead, the Commission should encourage the development of information services by keeping SMS free of such contribution requirements.

Finally, CTIA explains that neither the cases nor the instructions for completing Form 499-A cited in the Letter provide any support for a finding that SMS is subject to universal service contribution requirements.¹⁶ Nor do they provide any basis for classifying SMS as anything other than an information service.

III. SMS IS AN INFORMATION SERVICE AND IS NOT SUBJECT TO USF CONTRIBUTION REQUIREMENTS

As explained below, SMS fits squarely within the definition of an “information service” within the meaning of the Act¹⁷ and, as such, is exempt from the contribution requirements of Section 254. CTIA details, below, how the characteristics of SMS match the elements of both information services and the pre-Act definition of “enhanced services.” As a result, there is no basis for USAC’s suggestion that SMS revenues may be subject to USF contribution obligations.

As USAC’s Letter acknowledges, the classification of SMS is directly relevant to the USF contribution obligations associated with the service.¹⁸ Specifically, Section 254 of the Act requires USF contributions from “telecommunications carriers” that provide “interstate

¹⁶ See Letter at 2-4.

¹⁷ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); see also 47 U.S.C. §153(24) (defining “information service”); *id.* §153(53) (defining “telecommunications service”); and *id.* § 153(50) (defining “telecommunications”).

¹⁸ See Letter at 2-3.

telecommunications services.”¹⁹ In devising this framework, Congress drew a significant distinction between “information services” and “telecommunications services.”²⁰ The Commission has recognized this distinction for USF contributions since 1997.²¹ Indeed, this difference stems from Congress’s 1996 amendments to Section 3 of the Act that define an unregulated category of service, “information service,” distinct from “telecommunications service,” which is subject to regulation under Title II of the Act.

The Act defines an information service, in relevant part, as providing a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.”²² This definition is essentially identical to the definition of information service in the “Modification of Final Judgment” or “MFJ,” the 1984 consent decree that resolved the government’s antitrust case against AT&T.²³ It also is consistent with the Commission’s even earlier definition of “enhanced services” in Section 64.702(a) of its Rules.²⁴ The Commission has confirmed that all services previously considered “enhanced services” are “information services” under the Act.²⁵ As a result, the precedents developed from the MFJ and the enhanced service definition apply as well to information services.

¹⁹ 47 U.S.C. § 254(d).

²⁰ As discussed in Section VI, the Act also permits the Commission to act affirmatively to assess USF contributions on certain “other providers of telecommunications,” which the Commission has not done with respect to SMS.

²¹ See *Universal Service First Report and Order*, 12 FCC Rcd at 9179, ¶ 788 (1997).

²² 47 U.S.C. § 153(24).

²³ See *United States v. AT&T*, 552 F. Supp. 131, 179 (D.D.C. 1982) (subsequent history omitted).

²⁴ See 47 C.F.R. § 64.702(a) (defining “enhanced service”).

²⁵ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21956-58, ¶¶ 102, 104-107 (1996) (subsequent history omitted) (“*Non-Accounting Safeguards Order*”). See also *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11527, ¶ 51 (1998) (“*Stevens Report*”).

In contrast to an information service, a “telecommunications service” is “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public,”²⁶ while “telecommunications” is a simple transmission function, “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.”²⁷ As described below, SMS clearly is not a telecommunications service.

A. Because SMS is an Information Service, It is Not Subject to the Mandatory USF Contribution Requirement of Section 254(d).

As described in this section, because SMS involves data storage, protocol conversion, changes to content and form, and supports information retrieval, SMS fits squarely within the definition of an “information service” and the precedent interpreting that term. As an information service, SMS cannot be considered a telecommunications service.²⁸ Therefore, it is not subject to Section 254(d)’s mandatory USF contribution obligation for “interstate telecommunications services.”²⁹

Data Storage Routinely Occurs in SMS: In contrast to telecommunications services like voice service, SMS does not send messages directly to the recipient. Rather, SMS messages are routed through one or more SMSCs, described above in Section II, which store, process, and transform the messages. In fact, data storage is a key feature of SMS, as it is with email. An SMSC will store an SMS message (if necessary, for hours) until the recipient’s device is ready to

²⁶ 47 U.S.C. § 153(53).

²⁷ *Id.* §153(50).

²⁸ *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24029 n.50 (1998) (“[A]ny service with a communications component must be either a ‘telecommunications service’ or ‘information service’ (but not both).”).

²⁹ *See* 47 U.S.C. § 254(d).

receive it, and then forward the message to that device. Once a message is received, it generally is stored until the recipient chooses to delete it.

Data storage thus is an integral part of SMS, and SMS in this regard is similar to services like e-mail³⁰ and the so-called “telemessaging services” – specifically voicemail and voice storage and retrieval services – that the Commission has long held to be information services.³¹ In contrast, basic telecommunications transmissions are subject only to delays caused by network congestion or transmission priorities given by the originator.³² Because SMS so closely resembles e-mail, the Commission’s findings that e-mail is an information service, not telecommunications, are especially instructive:

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.³³

For SMS, the equivalent of the “mail server” computer is the SMSC. Like e-mail and voicemail, SMS is an information service.

Protocol Conversion and Changes to Message Form and Content Occur in SMS: SMS

messages routinely involve net protocol conversion, which is a hallmark of an information

³⁰ See *Stevens Report*, 13 FCC Rcd at 11538-11539, ¶ 78.

³¹ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21975, ¶¶ 143-145. See also *United States v. Western Electric Co., Inc.*, 627 F. Supp. 1090, 1110 n.89 (D.D.C. 1986) (subsequent history omitted) (noting that voice storage services are features that allow subscribers to store, retrieve, and send messages).

³² See *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 419-20, ¶ 95 (1980) (subsequent history omitted) (“*Computer II*”).

³³ *Stevens Report*, 13 FCC Rcd at 11538-39, ¶ 78. SMS, like e-mail, thus is an example of an “asynchronous” service. Services that permit “asynchronous” communications offer “more than a simple transmission path” and are information services. *Id.* at 11539, ¶ 78 & n.161.

service.³⁴ A “net protocol conversion” occurs when “an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol.”³⁵ Different wireless carriers utilize different SMS platforms with varying SMS protocols. In the early days of SMS messaging it was only possible to send messages to other customers of the same wireless carrier; today, however, wireless carriers offer protocol conversion as part of their SMS services such that customers can send text messages to the customers of virtually any other wireless carrier. Net protocol conversions also occur, for example, when an SMS message terminates to an email or instant messaging (“IM”) account.³⁶ These types of conversions between different networks or devices are exactly what the Commission considered in designating net protocol conversion as an indicia of an information service.³⁷

The form and content of SMS messages also are subject to substantial computer processing and conversion. For example, because different wireless technologies accommodate different-sized text messages, computers must reformat and even divide messages that exceed the number of characters the recipient’s network or device is able to accept. Similarly, providers alter the information transmitted in an SMS message by adding to the message such information

³⁴ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-58, ¶¶ 104-07 (stating that services involving protocol conversion are “information services,” because they perform the transforming and processing of information); see also *Stevens Report*, 13 FCC Rcd at 11527, ¶ 51 (noting that “services employing protocol processing were treated as information services under the MFJ”).

³⁵ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, ¶ 104.

³⁶ See, e.g., T-Mobile Comments at 14-15 (describing conversions between SMPP protocol, generally used for SMS messages and SMTP or TCP/IP protocols used by e-mail and IM, respectively).

³⁷ See *Independent Data Communications Manufacturers Association, Inc.; Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Service Is a Basic Service*, 10 FCC Rcd 13717, 13718, ¶ 4 n.5 (CCB 1995) (noting that protocol conversion refers to “the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks”), cited in *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955, ¶ 101 n.229.

as time, date and call-back numbers. Moreover, subscribers can set time limits on the delivery of the messages.

SMS Supports Information Retrieval: In addition to providing person-to-person text messaging, SMS users can engage in “subscriber interaction with stored information,” another characteristic of an information service.³⁸ Subscribers may use SMS to request and receive content, including weather and sports information and even simple web searches from third parties that have stored such information on their servers.

Such information retrieval has long been considered an enhanced or information service, because subscribers gain an ability for “acquiring” or “retrieving” information at the same time that information providers are “making available information” to them.³⁹ In 1987, the Commission held a “Talking Yellow Pages” offering to be an enhanced service.⁴⁰ The service permitted users to interact with stored information by placing a call and accessing recorded advertisements. Similarly, in 1985, the Commission classified voicemail as an enhanced service because of its “subscriber interactions with stored information for the purpose of providing a service which is not a basic transmission channel.”⁴¹ In the same way, SMS is an information service.

³⁸ See *Computer II*, 77 FCC 2d at 421, ¶ 97.

³⁹ See 47 U.S.C. § 153(24). See also *U. S. WEST Communications, Inc. Petition for Computer III Waiver*, 11 FCC Rcd 7997, 8003, ¶ 12 (CCB 1996) (finding that providing “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”).

⁴⁰ *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5988, ¶ 20 (1987).

⁴¹ *North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 FCC 2d 349, 361, ¶ 27 (1985).

SMS is an Integrated Information Service: The protocol conversion, computer processing, data storage, and information retrieval functions involved in SMS cannot be separated from its transmission functionality, for purposes of USF contributions or otherwise. The Commission has found, and the Supreme Court has upheld, that a service involving both transmission and processing is an information service if offered as “a single, integrated service.”⁴²

SMS is such an integrated information service. A user cannot purchase or even use the transmission capabilities of SMS without also having access to the capabilities for acquiring, storing, transforming, retrieving, utilizing, or making available information previously discussed. SMS offers these capabilities even if a consumer does not use them. The fact that all text messages may not undergo the conversion, processing, storage, and retrieval functionalities described above is irrelevant to whether SMS is considered an information service.⁴³

B. Because SMS Is Not CMRS, SMS Providers Are Not Subject To Contributions As CMRS Carriers.

Although CMRS carriers are subject to USF contributions based on their interstate telecommunications service revenues,⁴⁴ SMS cannot be classified as CMRS. First, SMS does not fall within the statutory definition of CMRS. Section 332(d) provides that “commercial

⁴² See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821, ¶ 36, 4824, ¶ 41 (2002) (“*Cable Broadband Order*”), *aff’d Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“*Brand X Decision*”); see *Brand X Decision*, 545 U.S. at 990 (holding that “[i]t 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”).

⁴³ See *Cable Broadband Order*, 17 FCC Rcd at 4822-24, ¶¶ 38-41; *Appropriate Framework For Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14864-65, ¶¶ 15-16 (2005); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3314, ¶ 12 (2004) (holding that a service is not removed from the information service classification if the provider only plays a role in the exchange of information).

⁴⁴ See *Universal Service First Report and Order*, 12 FCC Rcd at 9259, ¶ 981.

mobile service” or CMRS is a “mobile service . . . that is provided for profit and makes interconnected service available”⁴⁵ The term “interconnected service” means a service “that gives subscribers the capability to communicate to or receive communication from *all other users* on the public switched network.”⁴⁶ SMS cannot provide “interconnected service.” As discussed above, SMS messages, unlike voice messages, typically are not transmitted on the PSTN. Nor does SMS allow end users to transmit messages to, or receive messages from, “all other users” with wireline phone numbers. Although a few SMS providers offer the capability to send SMS messages to wireline phones, this messaging continues to represent an insignificant portion of SMS messaging.⁴⁷ Moreover, most wireline users cannot send SMS messages at all. SMS thus does not fall within the statutory definition of CMRS.

In addition, as an information service, SMS cannot be classified as CMRS. When considering the regulatory status of wireless broadband Internet access in 2007, the Commission held that a service cannot be both an information service and CMRS.⁴⁸ It acknowledged that Section 332(c)(1)(A) specifies that a provider will be treated as a common carrier only insofar as it provides CMRS.⁴⁹ In addition, the Act states that “[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services”⁵⁰ Because an information service cannot also be a

⁴⁵ 47 U.S.C. § 332(d)(1).

⁴⁶ 47 C.F.R. § 20.3 (emphasis added). *See also Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5917-18, ¶ 45 (2007) (“*Wireless Broadband Order*”).

⁴⁷ *See* CTIA Comments at 42. Moreover, any such messaging requires additional computer processing, often performed by a third-party provider. Such processing is itself an attribute of an information service. *See id.*

⁴⁸ *See Wireless Broadband Order*, 22 FCC Rcd at 5919-20, ¶¶ 48-51.

⁴⁹ 47 U.S.C. § 332(c)(1)(A).

⁵⁰ *Id.* § 153(51).

telecommunications service, a telecommunications carrier cannot be treated as a common carrier when it provides an information service.⁵¹ Thus, the Commission held that an information service – wireless broadband Internet access service – cannot also be CMRS.⁵² The same reasoning applies to SMS, another wireless information service.

IV. NEITHER THE CASES CITED BY USAC NOR THE INSTRUCTIONS FOR FORM 499-A SUPPORT CLASSIFICATION OF SMS AS A TELECOMMUNICATIONS SERVICE

The cases cited by USAC fail to support the proposition that SMS is a telecommunications service. Also entirely unavailing are the Letter's attempts to selectively cite from early *CMRS Competition Reports*, Commission websites, and other cases for the proposition that SMS is comparable to paging service,⁵³ some forms of which are required to contribute to USF.⁵⁴ In fact, none of the cited material actually analyzes the functionalities of SMS, let alone its regulatory classification. Instead, much of the cited material merely lumps together information services and other services (including paging services) in discussing industry activities and other topics – discussions which are entirely unrelated to USF contribution obligations. In sum, and as discussed below, the citations in the USAC Letter provide no support whatsoever for the errant proposition that SMS is a telecommunications service.

⁵¹ *See id.*

⁵² *See Wireless Broadband Order*, 22 FCC Rcd at 5919-21, ¶¶ 48-51, 54-56.

⁵³ *See Letter at 2 n.4, citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Second Report*, 12 FCC Rcd 11266, 11321 (1997) (“*Second CMRS Competition Report*”) and *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fifth Report*, 15 FCC Rcd 17760, 17714 (2000) (“*Fifth CMRS Competition Report*”); *see also Letter at 2 n.5; id. at 3 nn.6-8.*

⁵⁴ *See id.* at 2 n.2.

For example, the cited *CMRS Competition Reports* discuss generally the development of various types of messaging services available in the wireless marketplace, including information services. The *Second CMRS Competition Report* notes that messaging services include “such things as digital voice paging, two-way and acknowledgement paging, *e-mail*, and various *value-added information services* such as stock market quotes and sports scores.”⁵⁵ The *Fifth CMRS Competition Report* similarly notes that:

[P]aging/messaging companies began offering *advanced services* between 1995 and 1998. These advanced services included text-to-speech messaging, 1.5-way guaranteed messaging, two-way messaging, and some customized information updates. The paging industry expanded these advanced services during 1999 and early 2000 to include *Internet-based offerings*, such as *e-mail* and *customized Web content*.⁵⁶

These reports, and USAC’s other cited references, show only that various forms of text-based messaging, including “paging/messaging service” are offered by a variety of providers, including paging providers. They do not attempt to classify SMS. The fact that *some* wireless “messaging services” – *e.g.*, certain traditional paging services or certain messaging services provided via narrowband PCS – might be classified as telecommunications or as telecommunications services does not demonstrate that *all* of types of messaging services would be classified as such.

Most recently, the *Fourteenth CMRS Competition Report*, which the Letter failed to discuss, described paging services in a significantly narrower manner:

Narrowband data and paging services comprise a specialized market segment of mobile wireless industry. These services include two-way messaging, and machine-to-machine and other telemetry communications, and are consumed primarily by businesses, government users, and other institutions.⁵⁷

⁵⁵ *Second CMRS Competition Report*, 12 FCC Rcd at 11321 (emphasis added).

⁵⁶ *Fifth CMRS Competition Report*, 15 FCC Rcd at 17717 (emphasis added, citations omitted).

⁵⁷ See *Fourteenth CMRS Competition Report*, 25 FCC Rcd at 11443, ¶ 35.

The *Fourteenth CMRS Competition Report* discussed text messaging separately,⁵⁸ noting that “[a]ccording to comScore, 63.1 percent of U.S. mobile subscribers used text messaging on their mobile devices in December 2009”⁵⁹

As the Letter acknowledges, the Commission held in the *2009 E-Rate NPRM* that text messaging is similar to “*e-mail* and paging services” as a communications service for which E-Rate recipients such as schools and libraries can receive support.⁶⁰ The USAC Letter fails to mention that e-mail has long been held to be an information service.⁶¹ Moreover, although the Letter mentions the *2009 E-Rate NPRM*, it fails to mention that SMS was included as an E-Rate-eligible service *expressly* without determining its regulatory classification.⁶² The Commission permits E-Rate recipients to receive support for numerous services and products that are not telecommunications or telecommunications service, such as Internet access and e-mail.⁶³

Finally, the Letter’s citations to the Form 499-A instructions only demonstrate that these instructions warrant clarification. In the Letter, USAC notes that audits of some contributors’ 2008 Form 499-A revealed that some contributors are making USF contributions based on text messaging revenue.⁶⁴ If some contributors are erroneously reporting SMS revenue on their Form 499-A filings, their errors may be attributed to the failure of the Form 499-A instructions to

⁵⁸ See, e.g., *id.* at 11438, ¶ 26, 11524, ¶ 178.

⁵⁹ *Id.* at 11597, ¶ 324.

⁶⁰ See Letter at 2-3 n.5, citing *2009 E-Rate NPRM*, 25 FCC Rcd at 6571, ¶ 17 (emphasis added).

⁶¹ See *Stevens Report*, 13 FCC Rcd at 11538-39, ¶ 78 (stating that e-mail “offers users the ‘capability for . . . acquiring, storing, transforming, processing, retrieving, utilizing, or making available information through telecommunications’”).

⁶² See *2009 E-Rate NPRM*, 25 FCC Rcd at 6571, ¶ 17 n.66.

⁶³ See USAC, *Eligible Services List Schools and Libraries Support Mechanism for Funding Year 2011*, at 6-8 (Sept. 23, 2010), available at http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_110910.pdf.

⁶⁴ See Letter at 1.

provide precise and effective guidelines to contributors. As CTIA has explained in the past, completing the Form 499-A has become an increasingly complex process.⁶⁵ Form 499-A itself and its instructions are very complicated, which can lead to reporting errors. The 2008 Form 499-A instructions refer generally to “messaging” services multiple times, but do not define or even refer to text messaging or SMS. The only conclusion to be drawn from the Letter’s observation that “carriers are reporting this revenue in two different ways” is that the Form 499-A instructions would benefit from clarification. By clarifying, consistent with abundant precedent, that SMS is an information service, the Commission readily could prevent any disparate reporting practices and incorrect charges passed through to consumers.

V. NEITHER THE USAC LETTER NOR THE PUBLIC NOTICE PROVIDE A VALID LEGAL BASIS FOR ASSERTING AUTHORITY OVER SMS REVENUES FOR USF CONTRIBUTION PURPOSES

In addition to the statutory barriers noted above, any Bureau action that requires SMS providers to make USF contributions would be procedurally invalid under the Administrative Procedure Act (“APA”)⁶⁶ and the Commission’s rules.⁶⁷ The Commission has acknowledged that it has not determined the regulatory classification of text messaging.⁶⁸ Thus, any substantive decision on the regulatory classification of SMS and its effect on USF contribution requirements would constitute a new legislative rule – that is, a rule that “create[s] new law, rights, or

⁶⁵ See, e.g., Letter from Jonathan Banks, Senior Vice President and General Counsel, United States Telecom Association, and Paul Garnett, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45 (filed Dec. 12, 2007).

⁶⁶ See 5 U.S.C. §§ 553(b), (c).

⁶⁷ See 47 C.F.R. §§ 0.291(a)(2), (e).

⁶⁸ *Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 6562, 6571, ¶ 17 n.66 (2009) (“2009 E-Rate NPRM”).

duties.”⁶⁹ More specifically, a requirement that SMS providers contribute to USF would constitute a legislative rule, as it would impose new obligations on the regulated parties, SMS providers.⁷⁰ Accordingly, any such finding – and, again, CTIA believes there is no basis for such a finding – could be prospective only and must comply with the APA. Specifically, Section 553 of the APA requires the Commission to provide substantive notice and an opportunity for public comment before adopting and applying a new legislative rule.⁷¹ APA procedures for notice-and-comment rulemaking therefore must be followed if the Commission were to seek to require SMS providers to contribute to USF.

The Bureau’s process in issuing the Public Notice does not satisfy APA requirements. First, the Commission’s rules prohibit the Bureau from issuing notices of proposed rulemaking.⁷² Therefore, the Public Notice cannot be construed as a notice of proposed rulemaking under the APA, and the Bureau cannot issue new rules based on the record gathered in response to the Public Notice.⁷³ In addition, the Bureau did not publish the Public Notice in the Federal Register as required by the APA.⁷⁴ As a result, the Bureau cannot validly impose a contribution requirement on SMS providers based on the current process.⁷⁵

⁶⁹ *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) (internal quotation omitted).

⁷⁰ *See Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003) (“*Chao*”); *see also Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“*Sprint*”).

⁷¹ *See Chao*, 327 F.3d at 227.

⁷² *See* 47 C.F.R. § 0.291(e). Moreover, the Bureau is not authorized to act on “any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents or guidelines.” *Id.* § 0.291(a)(2).

⁷³ *See* 5 U.S.C. § 553(c).

⁷⁴ *See id.* § 553(b).

⁷⁵ *See Sprint*, 315 F.3d at 376. The Commission addressed the USF contribution requirements for providers of interconnected VoIP service using notice-and-comment rulemaking. *See generally VoIP USF Order*, 21 FCC Rcd at 7525, ¶ 13.

VI. NEITHER THE USAC LETTER NOR THE PUBLIC NOTICE PERMIT THE EXERCISE OF PERMISSIVE AUTHORITY PURSUANT TO SECTION 254(D)

The USAC Letter appears to rest its analysis of contribution obligations on the regulatory classification of SMS as either an information service or a telecommunications services. The Letter does not address the Commission’s “permissive” contribution authority under Section 254(d); and correctly so, as there is no basis to conclude that the Commission has undertaken the requisite analysis for such an action.

The D.C. Circuit, in describing the USF contribution framework, explained that:

The USF receives its funding from business in the telecommunications sector; some businesses are required by statute to contribute, while others must contribute only when the Commission has, in its discretion, required them to do so.⁷⁶

In this case, there can be no doubt that the Commission has not undertaken an analysis of its permissive authority, let alone already acted to exercise that authority with respect to SMS. Thus, there would be no basis for a finding that SMS is subject to contribution obligations pursuant to the Commission’s permissive authority.

Moreover, it is not within the Bureau’s delegated authority to assert permissive jurisdiction over SMS for purposes of requiring USF contributions. The Commission’s rules prohibit the Bureau from acting on any “applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.”⁷⁷ Assertion of permissive authority over a non-interconnected information service like SMS certainly poses “novel questions of fact, law or policy.” Any such action must be subject to notice-and-comment rulemaking by the Commission.⁷⁸

⁷⁶ *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) (“*Vonage*”).

⁷⁷ 47 C.F.R. § 0.291(a)(2).

⁷⁸ *See supra* Section II.

The Public Notice neither specifically invites, nor does CTIA attempt to provide here, a full analysis of the Commission’s Section 254(d) permissive authority. Nonetheless, CTIA notes that the assertion of permissive authority requires a finding that requiring contributions would be in the public interest.⁷⁹ As described in the following section, imposing USF contribution obligations on SMS revenues would disserve the public interest. In fact, as discussed in Section VII below, the public interest strongly supports keeping text messaging free of USF contribution requirements.

VII. CLASSIFYING SMS AS A TELECOMMUNICATIONS SERVICE AND REQUIRING USF CONTRIBUTIONS WOULD BE UNSOUND POLICY AND CONFLICT WITH THE INTENT OF THE ACT

The unregulated status of SMS as an information service has had major public policy benefits that the Commission should not disturb. Development of this service on an unregulated basis has provided great benefits to consumers. In addition to providing a versatile messaging and data retrieval service used by millions of mobile customers, SMS providers are meeting consumer demands by facilitating peer-to-peer texting and are developing new and innovative text messaging services.⁸⁰ As the Commission has noted, “the Act’s overall intent [is] to allow information services to develop free from common carrier regulation.”⁸¹ Indeed, Section 230 of the Act states that it is the “policy of the United States” to preserve a market for information services “unfettered by Federal or State regulation.”⁸² A finding that SMS is a

⁷⁹ 47 U.S.C. § 254(d).

⁸⁰ Such new services include animated messaging and video search, as well as new forms of international messaging.

⁸¹ See *Wireless Broadband Order*, 22 FCC Rcd at 5920, ¶ 54.

⁸² 47 U.S.C. § 230(b)(2).

telecommunications service potentially would subject the service to the panoply of common carrier regulation under applicable provisions of Title II, contrary to the intent of the Act.⁸³

For similar reasons, the Commission should decline to impose universal service contribution burdens on SMS and similar text messaging services. The universal service contribution burden has steadily increased to about 15 percent of interstate end-user telecommunications revenues.⁸⁴ Imposing USF contribution burdens on text messaging services will only reduce consumer demand for these innovative services. Moreover, imposing contribution burdens on text messaging services would disadvantage these services as compared to other similar information services, such as e-mail, IM, and even Twitter. Indeed, requiring contributions on SMS would likely be a pyrrhic victory, as consumers would be incited to shift their messaging activities to other information services outside the contribution base.⁸⁵

SMS differs, in this respect, from the case of interconnected VoIP services. In requiring USF contributions from interconnected VoIP providers, the Commission noted that interconnected VoIP provides voice transmission that is increasingly replacing traditional telephone service.⁸⁶ The equities are reversed here. *SMS is not voice service at all, but is a mobile form of e-mail*, which has never been subject to USF contributions under Section 254(d)'s permissive authority.

⁸³ Because SMS is not CMRS, if classified as a telecommunications service it conceivably could be subject to more common carrier regulation than CMRS voice services.

⁸⁴ See *Proposed Second Quarter 2011 Universal Service Contribution Factor*, Public Notice, CC Docket No. 96-45, DA 11-473 (rel. March 10, 2011) (proposing second quarter 2011 contribution factor of 14.9%).

⁸⁵ Users, for example, could simply migrate their mobile messaging to email by selecting an Internet address rather than a phone number for the address field – since mobile customers can receive messages using their mobile number or the mobile number @ carrier.domain as their address.

⁸⁶ See *VoIP USF Order*, 21 FCC Rcd at 7541, ¶ 44.

In addition, consumers routinely send messages that undergo a protocol conversion from SMS text messages to e-mail or IM. Applying USF contribution obligations solely on text messaging services would raise a host of administrative and compliance questions for SMS providers. Such additional burdens are completely unwarranted.

Finally, and more broadly, a new contribution requirement would shift onto mobile providers and their customers even more of the obligation to contribute to USF, an obligation that now constitutes 43 percent of all universal service contributions. Rather than overreaching to impose competitively-disparate contribution burdens on innovative services, CTIA urges the Commission to focus on broad reform of the universal service support mechanisms.

VIII. CONCLUSION

SMS text messaging services are information services not subject to USF contribution requirements. Moreover, the Public Notice does not provide a legally sufficient procedural vehicle for imposition of such requirements on SMS providers, which would require a notice-and-comment rulemaking by the Commission. As CTIA explains, proposals to classify SMS as an information service would be unsound public policy and would conflict with the intent of the Act. For all these reasons, the revenue associated with SMS is not subject to USF contribution requirements and should remain so.

Respectfully submitted,

CTIA – The Wireless Association®

By: /s/ Christopher Guttman-McCabe
Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Michael F. Altschul
Senior Vice President, General Counsel

Scott K. Bergmann
Assistant Vice President, Regulatory Affairs

CTIA – The Wireless Association®
1400 16th Street, NW
Suite 600
Washington, D.C. 20036
(202) 785-0081

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