

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

To: Wireline Competition Bureau

**REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

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**I. INTRODUCTION AND SUMMARY**

CTIA – The Wireless Association® (“CTIA”) replies to comments filed in response to the Public Notice issued by the Wireline Competition Bureau (“Bureau”) regarding the April 26, 2011 letter of the Universal Service Administrative Company (“USAC”) seeking guidance on the reporting of text messaging revenues for purposes of universal service fund (“USF”) contributions.<sup>1</sup> The record demonstrates that revenue associated with short message service (“SMS”), the most common form of text messaging, is not subject to USF contribution requirements because SMS constitutes an integrated information service.

As the record demonstrates, SMS is an information service because it includes protocol conversion, computer processing, data storage, and information retrieval functionalities. The record also confirms that SMS is not a commercial mobile radio service (“CMRS”) because it is

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<sup>1</sup> 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”).

not interconnected to the public switched network (“PSTN”). The small minority of commenters that argue that SMS is, or should be, subject to USF contribution requirements show a fundamental misunderstanding of the technical and operational characteristics of the service, and of applicable Commission precedent.

Moreover, those advocating that SMS providers should be required to contribute to USF ignore that the Bureau-level Public Notice is not a legally adequate procedural vehicle for imposing USF contribution requirements on SMS, which would require a notice-and-comment rulemaking by the Commission. In fact, any attempt to classify SMS as a “telecommunications service” for regulatory purposes in response to the Public Notice would violate the Administrative Procedure Act (“APA”) and Commission rules.

Finally, no sound policy reasons support imposing USF contribution requirements on SMS. Treating SMS as an unregulated information service has resulted in tremendous public policy benefits and there is no basis in this record for reversing course. Imposing USF contribution burdens on text messaging services would have far-reaching negative consequences. Not only would such requirements potentially increase consumer rates for SMS, they also would disadvantage these services as compared to other similar information services, such as e-mail, instant messaging, other online messaging services like Twitter and Facebook, and the new messaging services mentioned above. Therefore, SMS revenue should remain classified as an information service and free of the burden of USF contribution requirements.

## **II. SMS IS AN INTEGRATED INFORMATION SERVICE AND IS NOT SUBJECT TO USF CONTRIBUTION OBLIGATIONS**

The assertions of Public Knowledge and the National Hispanic Media Coalition (collectively, “Public Knowledge”) and the National Telecommunications Cooperative Association (“NTCA”) that SMS is a telecommunications service and/or CMRS show a

fundamental misunderstanding of the technical and operational characteristics of SMS and of applicable Commission precedent. A majority of the commenters demonstrate that SMS is an integrated information service. As such, SMS is not subject to the USF contribution requirements of Section 254.

**A. SMS is an Integrated Information Service**

Commenters generally agree that SMS fits squarely within the definition of an information service and thus is not subject to USF contribution requirements.<sup>2</sup> NTCA and Public Knowledge, the only parties to take the opposite view, inaccurately portray or otherwise ignore key SMS functionalities and characteristics in an unpersuasive attempt to argue that SMS is a basic transmission service similar to traditional voice services or fax transmissions.<sup>3</sup> Public Knowledge's attempts to distinguish SMS from e-mail services, a well-established information service, are equally unavailing.<sup>4</sup> As multiple commenters explain, SMS includes data storage, protocol conversion and changes to content and form, and supports information retrieval, all of which are hallmarks of an information service.<sup>5</sup> To the extent that SMS includes a transmission component, that component is thoroughly integrated with the protocol conversion, computer

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<sup>2</sup> See Comments of AT&T Inc. ("AT&T Comments") at 2; Comments of Nidus Group LLC d/b/a Atomic Mobile at 2; CTIA Comments at 7-15; Comments of Sprint Nextel Corporation ("Sprint Comments") at 2; Comments of Verizon Wireless ("Verizon Wireless Comments") at 2-11. Unless otherwise indicated, all comments cited herein were filed in WC Docket No. 06-122 on or around June 6, 2011.

<sup>3</sup> See Comments of the National Telecommunications Cooperative Association ("NTCA Comments") at 2-6; Comments of Public Knowledge and National Hispanic Media Coalition ("Public Knowledge Comments") at 4-10.

<sup>4</sup> See Public Knowledge Comments at 11-15.

<sup>5</sup> See AT&T Comments at 2-4; CTIA Comments at 9-13; Sprint Comments at 2-4; Verizon Wireless Comments at 2-8.

processing, data storage, and information retrieval functionalities to make one single, integrated information service, as has been defined in the Supreme Court's *Brand X Decision*.<sup>6</sup>

### 1. Data Storage is an Integral Element of SMS

As CTIA detailed in its comments, SMS messages are routed through one or more short message service centers ("SMSCs"), which store, process and transform the messages.<sup>7</sup> SMS messages are similar to e-mail and "telemessaging" services like voicemail and voice storage and retrieval services, which incorporate storage capabilities and have long been recognized as information services.<sup>8</sup> Messages can be stored for hours and even days before they are deleted from the SMSC.

NTCA and Public Knowledge, however, mistakenly claim that data storage as a characteristic of an information service is not a feature of SMS because SMS messages are stored only for a limited period and for less time than an e-mail server typically stores messages.<sup>9</sup> SMS messages may be stored by the SMSC, typically for up to three days but may

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<sup>6</sup> See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821, ¶ 36, 4824, ¶ 41 (2002), *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 ..."). Such integration distinguishes SMS from facsimile service, in which parties attach customer premises equipment (facsimile machines) to the PSTN and use a telecommunications service to communicate between them.

<sup>7</sup> See CTIA Comments at 2-5.

<sup>8</sup> See *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11538-11539, ¶ 78 (1998) ("*Stevens Report*") (concluding that e-mail is an information service); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, at 21975-76, ¶¶ 143-145 (1996) ("*Non-Accounting Safeguards Order*") (concluding that voicemail is an information service); *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).

<sup>9</sup> See Public Knowledge Comments at 11-14; see e.g. NTCA Comments at 3.

be stored for as many as ten days.<sup>10</sup> It is irrelevant whether this is to be considered a “short” or “long” period, or more or less time than e-mails may be stored on a server. The storage functionality renders SMS far different from basic telecommunications transmissions, which, as has been established at least since the *Second Computer Inquiry*, are subject only to delays caused by network congestion or transmission priorities given by the originator.<sup>11</sup> NTCA and Public Knowledge fail to cite any case in which the Commission has defined the storage capabilities of an information service by the potential length of the storage interval. In fact, as Verizon Wireless notes, SMS messages are not only stored by SMSCs, but they also are stored on consumer handsets, where they can be forwarded, edited and kept indefinitely.<sup>12</sup> It also is immaterial that messages are deleted automatically from the SMSC.<sup>13</sup> Some voicemail systems are configured to automatically delete messages after a certain period of time, none of which affects the status of voicemail as an information service.<sup>14</sup> The crux of the inquiry in this case is simply whether SMS includes data storage, and commenters have shown overwhelmingly that it does.

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<sup>10</sup> Some operators store SMS messages for longer periods of time. For example, Verizon Wireless keeps messages on its servers for ten days. *See* Verizon Wireless Comments at 4.

<sup>11</sup> *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*”).

<sup>12</sup> *See* Verizon Wireless Comments at 4; *see also* AT&T Comments at 2; CTIA comments at 10.

<sup>13</sup> *See* Public Knowledge Comments at 12-13; *see e.g.* NTCA Comments at 3.

<sup>14</sup> *See, e.g.*, Sprint.com Support, Discussions, <http://community.sprint.com/baw/thread/33973> (last visited June 15, 2011) (noting that voicemails are automatically deleted after 30 days); Verizon Wireless, Basic Voice Mail, [http://support.vzw.com/clc/features/calling\\_features/basic\\_voice\\_mail.html](http://support.vzw.com/clc/features/calling_features/basic_voice_mail.html) (last visited June 15, 2011) (noting that voicemails are retained for 21 days).

## 2. SMS Involves Protocol Conversion and Changes to the Content and Form of Messages

The record shows that SMS messages routinely involve net protocol conversion,<sup>15</sup> a classic characteristic of an information service. NTCA fails to substantiate its assertion to the contrary.<sup>16</sup> In fact, any time a SMS moves from one carrier to another, a protocol conversion is highly likely to occur. Different wireless carriers utilize different SMS platforms with varying SMS protocols, thus necessitating a net protocol conversion to send an SMS message to another network.<sup>17</sup> Net protocol conversions also occur when an SMS message terminates to an e-mail or instant messaging account. These types of conversions between different networks or devices are exactly what the Commission considered in designating net protocol conversion as an information service.<sup>18</sup>

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<sup>15</sup> See AT&T Comments at 4; CTIA Comments at 10-12; Sprint Comments at 3; Verizon Wireless Comments at 6-8. 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.” *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, ¶ 104.

<sup>16</sup> See NTCA Comments at 3 & n.7. NTCA incorrectly asserts that “even if such a protocol conversion were deemed relevant ... this does not render *every* text message or the fundamental service provided to the customer ‘enhanced’ in nature.” *Id.* at n.7 (emphasis in original). As CTIA explained in its comments, “the fact that all text messages may not actually undergo a net protocol conversion is irrelevant to whether SMS is considered an information service.” The important factor is that SMS offers the *capability* for a net protocol conversion. See CTIA Comments at 13 & n.43.

<sup>17</sup> See AT&T Comments at 4; CTIA Comments at 11; Verizon Wireless Comments at 7-8.

<sup>18</sup> See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956-58, ¶¶ 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.

Moreover, the record refutes NTCA’s claim that SMS messages do not undergo changes in format or content.<sup>19</sup> As commenters previously described, SMS includes the capability to modify the form and content of messages and that such messages are subject to substantial computer processing and conversion.<sup>20</sup> 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 as time, date and call-back numbers. Moreover, subscribers can set time limits on the delivery of the messages.<sup>21</sup>

### **3. End Users May Retrieve Information Through SMS**

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.<sup>22</sup> Specifically, end users 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. As CTIA explained in its comments, the ability to retrieve information in this manner 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.<sup>23</sup>

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<sup>19</sup> See NTCA Comments at 4.

<sup>20</sup> See CTIA Comments at 12; Verizon Wireless Comments at 8.

<sup>21</sup> See CTIA Comments at 11-12.

<sup>22</sup> See *Computer II*, 77 FCC 2d at 421, ¶ 97.

<sup>23</sup> See CTIA Comments at 12; AT&T Comments at 3-4. See also 47 U.S.C. § 153(24); *U. S. WEST Communications, Inc. Petition for Computer III Waiver*, 11 FCC Rcd 7997, 8003, ¶ 12

## **B. SMS is Neither CMRS Nor Functionally Equivalent to CMRS**

Public Knowledge erroneously claims that SMS is CMRS and therefore a telecommunications service subject to USF contribution requirements.<sup>24</sup> Public Knowledge and NTCA seem to assume that simply because SMS is offered via wireless handsets over which PSTN-connected CMRS voice services are provided, SMS also must be a telecommunications service.<sup>25</sup> SMS and voice services, however, are designed to operate independently, although they may originate or terminate on the same devices. The mere fact that SMS, an information service, is provided over a mobile device that also can be used for CMRS does not turn SMS into a telecommunications service. If that logic held, than anything that was done on a handset would qualify. That expansive authority was clearly not contemplated by Congress. Under such flawed logic, wireless broadband Internet access service, which also is available on wireless handsets, would be CMRS. The Commission has previously recognized the fallacy of this argument, and there is no reason to reverse course – or precedent – here.

The 2007 *Wireless Broadband Order* found that (i) wireless broadband Internet access service is an information service, and (ii) as an information service, wireless broadband is not CMRS.<sup>26</sup> The Commission explained in that decision that Section 332(c)(1)(A) of the Act specifies that a provider will be treated as a common carrier only insofar as it provides CMRS.<sup>27</sup>

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(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”).

<sup>24</sup> See Public Knowledge Comments at 6-8.

<sup>25</sup> See, e.g., Public Knowledge Comments at 6; NTCA Comments at 5.

<sup>26</sup> See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5917-18, ¶ 45 (2007) (“*Wireless Broadband Order*”).

<sup>27</sup> 47 U.S.C. § 332(c)(1)(A).

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 ....”<sup>28</sup>

Because an information service cannot also be a telecommunications service, a telecommunications carrier cannot be treated as a common carrier when it provides an information service.<sup>29</sup> The Commission therefore held that an information service – wireless broadband Internet access service – cannot also be CMRS.<sup>30</sup> The same reasoning applies to SMS, another wireless information service. The *Wireless Broadband Order* thus precludes treating SMS as CMRS.

Moreover, because SMS is not an interconnected service, it is not CMRS and thus not a telecommunications service subject to USF contribution requirements. Specifically, Section 332(d) of the Act provides that “commercial mobile service,” or CMRS, is a “mobile service ... that is provided for profit and makes *interconnected service* available ....”<sup>31</sup> 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.”<sup>32</sup>

SMS does not allow end users to transmit messages to, or receive messages from, “all other users” with wireline phone numbers.<sup>33</sup> Although a few SMS providers offer the capability

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<sup>28</sup> *Id.* § 153(51).

<sup>29</sup> *See id.*

<sup>30</sup> *See Wireless Broadband Order*, 22 FCC Rcd at 5919-21, ¶¶ 48-51, 54-56.

<sup>31</sup> 47 U.S.C. § 332(d)(1) (emphasis added).

<sup>32</sup> 47 C.F.R. § 20.3 (emphasis added); *see also Wireless Broadband Order*, 22 FCC Rcd at 5917-18, ¶ 45.

<sup>33</sup> CTIA included in its comments detailed descriptions and network diagrams showing that SMS messages do not even travel over the PSTN like voice calls. *See CTIA Comments* at 2-6. In fact, Public Knowledge’s basic description of a SMS transmission path notably excludes the PSTN.

to send SMS messages to wireline phones, this messaging continues to represent an insignificant portion of SMS messaging, and a traditional wireline phone cannot support SMS messaging as utilized by the typical user. In fact, as Sprint points out, converting text messages into voice messages involves a “transformation” (*i.e.*, protocol conversion that can occur only through additional computer processing) of the information into voice,<sup>34</sup> further supporting the fact that SMS is a quintessential information service.

Public Knowledge also incorrectly claims that the Commission concluded in the *Roaming Reexamination Order* that SMS is an interconnected service subject to Title II common carrier regulation.<sup>35</sup> The Commission undertook no analysis of whether SMS is an interconnected service, nor did it cite a single comment to suggest that it was. In fact, as Public Knowledge admits, the Commission explicitly stated in the *Roaming Reexamination Order* that it was not addressing the regulatory classification of SMS.<sup>36</sup> Accordingly, Public Knowledge’s suggestion that the *Roaming Reexamination Order* somehow compels a finding that SMS is a CMRS lacks any support.

In addition, the use of telephone numbers to send SMS messages to other users does not, in and of itself, make SMS an interconnected service.<sup>37</sup> Telephone numbers are used in this case

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According to Public Knowledge, SMS transmissions involve “the wireless transmit/receive antennas and mobile switching centers [“MSCs”] that are used for all other wireless communications.” Public Knowledge Comments at 10. But, as shown in CTIA’s comments, antennas and MSCs do not constitute the PSTN. *See* CTIA Comments at 2-6.

<sup>34</sup> Sprint Comments at 3.

<sup>35</sup> *See* Public Knowledge Comments at 4, citing *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007) (“*Roaming Reexamination Order*”).

<sup>36</sup> *See* Public Knowledge at 4; *Roaming Reexamination Order*, 22 FCC Rcd at 15837 n.134.

<sup>37</sup> *See* Public Knowledge Comments at 5; NTCA Comments at 3, 5.

merely as an expeditious way to identify and facilitate sending SMS messages to the appropriate wireless devices. They are not used to transmit SMS messages on the PSTN or otherwise allow SMS providers to benefit from the PSTN.<sup>38</sup>

**C. Commission Precedent Supposedly Comparing SMS to Paging and Other Messaging Services Has No Bearing on the Regulatory Classification of SMS**

Repeating the same case citations that USAC noted in its Letter, NTCA argues that the Commission has previously compared text messaging to paging and other messaging services and jumps to the erroneous conclusion that text messaging must therefore be telecommunications.<sup>39</sup> Neither the cases nor the Form 499-A Instructions support the proposition that SMS is a telecommunications service or telecommunications. As CTIA explained in its comments, none of the cited material analyzes the functionalities of SMS, let alone its regulatory classification.<sup>40</sup> Rather, much of the cited material merely lumps together information services and other services (including paging services) in discussing industry activities and other topics – discussions *entirely unrelated* to regulatory classifications or USF contribution obligations. Moreover, the letter neglects to cite several prominent examples of when the Commission discussed SMS together with information services.<sup>41</sup> Accordingly, the case citations noted in USAC’s Letter, and repeated by NTCA, are irrelevant to the regulatory classification of SMS.

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<sup>38</sup> As a general matter, these are mobile telephone numbers, not wireline numbers. Moreover, the same number may be used as the CMRS customers’ Internet address by adding the carrier’s domain name, *i.e.*, (NXX) NXX-XXXX@carrier.com.

<sup>39</sup> *See* Letter at 2-3; NTCA Comments at 5.

<sup>40</sup> *See* CTIA Comments at 15-18.

<sup>41</sup> *See id.* at 20-21.

### **III. THE BUREAU’S PUBLIC NOTICE CANNOT PROVIDE A LEGAL BASIS FOR IMPOSING USF CONTRIBUTIONS ON SMS**

In addition to the fact that SMS does not fit under the statutory definition of a telecommunications service, even if the Commission wanted to consider the reporting of text message revenues for the purposes of universal service fund contributions, it could not do that under the procedural vehicle chosen by the FCC.

#### **A. Attempts to Classify SMS in Reliance on the Bureau’s Public Notice Would Violate the Administrative Procedure Act and FCC Rules**

The Public Knowledge and NTCA proposals to classify SMS as a “telecommunications service” or “telecommunications” cannot be implemented legally in response to the Public Notice.<sup>42</sup> If the Commission seeks to rule on the regulatory status of SMS for USF purposes, it must conduct a notice-and-comment rulemaking proceeding under the APA – as it did when it addressed interconnected Voice-over-Internet-Protocol (“VoIP”) service.<sup>43</sup>

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.<sup>44</sup> Any substantive decision on the regulatory classification of SMS and whether SMS providers should be subject to new USF contribution obligations would constitute a new legislative rule – that is, a rule that “create[s] new law, rights, or duties.”<sup>45</sup> Public Knowledge

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<sup>42</sup> See Public Knowledge Comments at 4-10; NTCA Comments at 2-6.

<sup>43</sup> See 5 U.S.C. § 553. Any determination regarding the use of the Commission’s ancillary Title I jurisdiction to subject SMS to USF contribution obligations, as NTCA proposes, similarly must first comply with the APA’s notice-and-comment requirements. See NTCA Comments at 7-8.

<sup>44</sup> See 5 U.S.C. §§ 553(b), (c); see also AT&T Comments at 5-6; CTIA Comments at 18-19; Sprint Comments at 4-5; Verizon Wireless Comments at 11-14.

<sup>45</sup> *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) (internal quotation omitted); see also *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003); *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“*Sprint*”).

acknowledges that the Commission has not yet determined the regulatory classification of text messaging.<sup>46</sup> Thus, Public Knowledge tacitly concedes the Public Notice presents a novel issue of law.

Because subjecting SMS to USF contributions would create a new legislative rule, the APA's notice-and-comment rulemaking requirements apply, but for multiple reasons cannot be satisfied.<sup>47</sup> First, the Public Notice does not constitute a valid notice of proposed rulemaking because it was not published in the Federal Register as required by the APA.<sup>48</sup> Moreover, the Bureau lacks delegated authority to rule on the regulatory classification of SMS.<sup>49</sup> Commission rules prohibit the Bureau from issuing notices of proposed rulemaking.<sup>50</sup> In addition, 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," as is the case with SMS.<sup>51</sup> Thus, the Public Notice cannot be construed as a notice of proposed rulemaking under the APA, and the Bureau cannot issue new rules imposing a contribution requirement on SMS providers based on the record gathered in response to the Public Notice.<sup>52</sup>

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<sup>46</sup> See Public Knowledge Comments at 3-4; see also *Schools and Libraries Universal Service Support Mechanism*, 25 FCC Rcd 6562, 6571, ¶ 17 n.66 (2009) (acknowledging that the Commission has not yet determined the regulatory classification of text messaging).

<sup>47</sup> As a legislative rule pursuant to the APA, any finding that SMS is a telecommunications service or telecommunications, or that SMS should be subject to USF contribution requirements, also must be prospective only.

<sup>48</sup> See 5 U.S.C. §§ 553(b); see also *Sprint*, 315 F.3d at 374.

<sup>49</sup> See CTIA Comments at 19-20; Sprint Comments at 4-5; Verizon Wireless Comments at 14-16.

<sup>50</sup> See 47 C.F.R. § 0.291(e).

<sup>51</sup> *Id.* § 0.291(a)(2).

<sup>52</sup> See 5 U.S.C. § 553(c).

**B. No Basis Exists to Subject SMS to Universal Service Contribution Obligations Pursuant to the Permissive Authority of Section 254(d)**

NTCA erroneously suggests that the Commission can apply USF contribution requirements to SMS pursuant to the “permissive” authority set forth in Section 254(d) of the Act.<sup>53</sup> Section 254(d) provides in relevant part that the Commission can require “[a]ny other provider of interstate telecommunications ... to contribute to the preservation and advancement of universal service *if the public interest so requires.*”<sup>54</sup>

For the reasons discussed above, a valid notice-and-comment rulemaking under the APA would be needed to even consider this issue, and this Bureau-level proceeding based on the Public Notice is not such a rulemaking. In any event, and as discussed in Section IV below, the public interest would not be served by the application of permissive jurisdiction in this case. Rather, the public interest is best served by affirming that SMS is an information service, free of discriminatory contribution burdens.

**IV. SUBJECTING SMS TO USF CONTRIBUTION OBLIGATIONS DOES NOT SERVE THE PUBLIC INTEREST**

CTIA explained in its comments that treating SMS as an unregulated information service has resulted in tremendous public policy benefits.<sup>55</sup> 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. In fact, the success of SMS in the marketplace has spurred major unregulated providers such as Apple and Google to develop competing unregulated

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<sup>53</sup> See NTCA Comments at 4-6.

<sup>54</sup> 47 U.S.C. § 254(d) (emphasis added).

<sup>55</sup> See *id.* at 21-23.

messaging services.<sup>56</sup> There is no need for the Commission to insert itself into this vibrantly competitive marketplace.

As the Commission has noted, “the Act’s overall intent [is] to allow information services to develop free from common carrier regulations,”<sup>57</sup> and 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.”<sup>58</sup> Thus, classifying SMS as a telecommunications service for purposes of increasing the contribution base for USF 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.

Imposing USF contribution burdens on text messaging services also would have far-reaching negative consequences. Not only would such requirements potentially increase consumer rates for SMS, they also would disadvantage these services as compared to other similar information services, such as e-mail, instant messaging, other online messaging services like Twitter and Facebook, and the new messaging services mentioned above. Indeed, requiring contributions by SMS providers would likely cause consumers to shift their messaging activities to other unregulated services outside the contribution base. In addition, applying USF contribution obligations solely on SMS would raise a wide range of administrative and

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<sup>56</sup> See, e.g., Anton Troianovski, *Carriers Sweat as Texting Cools Off – New Messaging Apps from Apple, Others May Hit Fees*, Wall St. J., June 9, 2011, at B1; Kevin Fitchard, *Apple isn’t going to kill SMS, but maybe Google can*, Connected Planet (June 10, 2011), available at <http://connectedplanetonline.com/mobile-apps/news/apple-isnt-going-to-kill-sms-but-maybe-google-can-0610/>.

<sup>57</sup> *Wireless Broadband Order*, 22 FCC Rcd at 5920, ¶ 54.

<sup>58</sup> 47 U.S.C. § 230(b)(2).

compliance questions for SMS providers, and exacerbate the already confusing and burdensome USF reporting procedures.

Claims by Public Knowledge and NTCA that not subjecting SMS to contribution obligations would undermine the stability of the USF are unsubstantiated.<sup>59</sup> In fact, applying a new contribution requirement on SMS providers would shift onto mobile operators and their customers even more of the obligation to contribute to the USF, an obligation that now constitutes 43 percent of all USF contributions. Public Knowledge and NTCA would aggravate USF's already competitively-disparate treatment of mobile services. Rather than seeking to increase USF contributions in the *ad hoc* manner contemplated by these parties, the Commission should focus on broad reform of the universal service support mechanism.<sup>60</sup> The issue of whether SMS should be subject to USF requirements only should be considered, if at all, in a holistic way as part of the USF reform rulemaking proceedings.

## **V. CONCLUSION**

The record in response to the Public Notice demonstrates that SMS is an integrated information service not subject to USF contribution requirements. The small number of commenters that disagree fail to provide any sound factual, legal, or policy support for subjecting SMS and potentially similar information services, such as e-mail, instant messaging, other online messaging services like Twitter and Facebook, to USF contribution requirements. Additionally,

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<sup>59</sup> See Public Knowledge Comments at 2-3; NTCA Comments at 5-6.

<sup>60</sup> See USTA Comments at 2-3.

the Bureau's Public Notice is not the proper procedural vehicle for deciding the regulatory status of SMS.

Respectfully submitted,

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