

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

In the matter of

Petition of Twilio, Inc., Seeking a
Declaratory Ruling Clarifying the
Regulatory Status of Mobile Messaging
Services

WT Docket No. 08-7

COMMENTS OF PUBLIC KNOWLEDGE, COMMON CAUSE, AND FREE PRESS

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I. Introduction and Summary

The Commission should grant Twilio’s petition and promptly clarify that text messaging (which includes SMS, MMS, and short codes) is a telecommunications service that benefits from the protections of Title II of the Communications Act. The status quo harms consumers, competition, and innovation by giving carriers free rein to abuse their gatekeeper position. Discriminatory text message blocking by the carriers not only raises competitive concerns, but also interferes with free speech rights. Even with the rise of over-the-top messaging services, text messaging remains a uniquely important communications mechanism, with particular significance owing to its universality, verifiability, importance to public safety and government functions, and its ubiquity as a fallback communications medium available to all mobile phone users. The Commission’s legal path is straightforward: text messaging fits the statutory definition of telecommunications, and recognizing it as such is consistent with precedent. Additionally, text messaging is a “commercial mobile radio service,” or CMRS, which means it must be treated as a common carriage service. Finally, text messaging is legally and factually distinct from newer over-the-top messaging services, whose regulatory status this petition would not affect.

II. The Commission Must Recognize That Text Messaging is a Telecommunications Service as a First Step Toward Preventing Continuing Examples of Discrimination

In 2007, Public Knowledge and other groups filed a petition asking the FCC to address the issue of text messaging classification.¹ The 2007 petition cited then-recent instances of wireless providers blocking both access to short codes, and text messages themselves, for activist

¹ Petition for Declaratory Ruling of Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, Educause, Media Access Project, New America Foundation, U.S. PIRG (Dec. 11, 2007), <https://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf> (2007 Petition).

groups and competitive communications providers. The carriers' behavior in exercising subjective judgment over users' text message content persists to this day, as Twilio explained in its petition. Carriers continue to utilize text message blocking to drive companies and consumers toward the revenue-generating short code system, leveraging their total control over access to end users to drive up prices and stifle innovation.

At the time of this writing, well in advance of the initial comment deadline, small businesses from a number of industries are already weighing in, taking this opportunity to share their frustrations and struggles in dealing with carriers. ShowingTime, a startup helping realtors manage multiple showings, wrote to share its experience that "this year, carriers have begun blocking more and more text message traffic, almost entirely due to volumes being sent, or the similar types of the messages,"² despite the fact that "ShowingTime sends no marketing or unsolicited text messages."³ ClearCare, a Chicago company that helps in-home healthcare providers communicate with their caregivers, shared its concern that uncertainty and an inability to rely on delivery of text messages raises concerns that patients "could miss critical care that they need."⁴ The common thread throughout these issues with the carriers' manipulation of text messaging, is that it introduces uncertainty and doubt into these companies and consumers' ability to rely upon this basic communications medium.

A. Carriers Continue to Abuse Their Position to Harm Competition and Innovation

As discussed in detail by Twilio, the carriers continue to leverage their control over access to customers, and to common short codes, to harm competition and innovation. The case of HeyWire is notable. HeyWire is a Boston company which provides services allowing sales

² Letter from ShowingTime, MB Docket No. 08-7 (Nov. 5, 2015).

³ Id.

⁴ Letter from ClearCare, MB Docket No. 08-7 (Nov. 9, 2015)

and support staff to communicate with customers via text messages addressed to 1-800 numbers. Early in 2014, Verizon simply ceased delivering messages from its paying customers to HeyWire, informing the company that no messages would be delivered until HeyWire worked out a deal with a new intermediary. Carrier services subject to Title II (such as voice and internet connectivity) cannot simply be shut off at the carrier's discretion in this manner. Yet due to the regulatory uncertainty surrounding text messaging, carriers are free to simply stop delivering text messages at any time, for any reason.

Critically, customers do not have alternative options. Text messages are tightly connected with a carrier's network, unlike over-the-top messages or emails which can be accessed over any Internet connection. A carrier who blocks customers from reaching a particular number via text, or who blocks texts from reaching their customers, puts a barrier between two parties who wish to communicate; the customer cannot receive those messages on another network. This level of interference with customer communications would be unlawful if text messaging were recognized as a telecommunications service.

B. Text Message Blocking and Discrimination Threatens Free Expression

Common carriers are obligated not to interfere with the content or delivery of lawful communications they convey. While important for competitive and antidiscrimination reasons, these limitations on blocking complement the free speech rights of individuals. The First Amendment guarantees individuals the right to communicate their ideas, free from censorship. Wireless carriers can frustrate the exercise of those rights, however, by blocking millions of text messages each month. Citizens use text messaging, like other communications mediums, to communicate everything from social plans to political calls to action. The 2007 Petition argued, "commercial and noncommercial interests alike are using text messaging as a new and powerful

way to engage citizens in political action and public discourse on important issues.”⁵ The petition cited examples ranging from political campaigns to environmental impact monitoring, to international human rights.⁶ These examples remain relevant today.

The role of text messaging in politics has grown significantly over the intervening years, particularly in the area of campaign engagement. During his 2008 Presidential campaign, then-Senator Barack Obama chose text messaging as the best means to communicate his selection of Joe Biden as running mate. An estimated 2.9 million subscribers across the country were the first to learn of his choice, and they learned of it via text message. Starting in 2012, the text-to-donate model which had been so successful in raising money for disaster relief and other causes, entered the political arena. It did so, however, with some caveats. At the behest of CTIA, the Federal Elections Commission released an Advisory Opinion in 2012 clarifying that, while carriers could process donations via text message, they retained the right to refuse service to some, or all, political candidates or campaigns, based on “commercial considerations” which were left up to the carriers to define.⁷

Public Knowledge expressed concern at this caveat, which would allow carriers to decide, based on “their own established business requirements,” whether or not to provide service to particular political parties or campaigns.⁸ The carriers may, in other words, refuse to provide equal access to this powerful donation tool, based on the political views of candidates or parties and the impact that might have on the carriers’ “commercial considerations.” While the

⁵ See 2007 Petition at 20.

⁶ Id.

⁷ Federal Election Commission, Advisory Opinion 2012-28, Committees Responsible For Text Message Contribution Compliance, at 9 (Aug. 14, 2012), *available at* <http://saos.fec.gov/aodocs/AO%202012-28.pdf>.

⁸ Id. at 3.

FEC did reject CTIA's original request that carriers be given discretion to refuse service to any candidate or party whose political views might damage the carriers' brand, based solely on the carriers' business judgment,⁹ these election law concerns fall well short of the robust protection Title II provides to political speech. Right now, carriers still have the power to veto their subscribers' political donations by selectively blocking access to some candidates.

According to the stated policy position of the wireless industry, carriers believe they should be able to block some kinds of text messaging. Not only could this drive economic benefits to themselves and discourage competition, but it could limit free speech and affect the political process. Such power must be kept in check, by holding wireless providers to the same common carrier obligations which protect the free speech rights of Americans who use telephones and broadband.

C. Text Messaging is an Important Communications Medium

Text messaging remains an important service in the always-connected mobile age. While the text-based messaging space has grown more crowded over the past few years, particularly with the rapid proliferation of smartphones, carrier-provided text messaging retains several unique characteristics which cannot be replicated by over-the-top messaging services like Facebook Messenger or WhatsApp.

1. Text messages are universal

One of those unique characteristics stems from the universality of text messaging. Users do not have to install an app to send or receive a text message. They do not need to sign up for a new user account. They do not need a data plan, and they do not need to first know which of

⁹ Michael Weinberg, *Will Text Message Donations Help Carriers Influence Policy?*, Public Knowledge Blog (Aug. 23, 2012), <https://www.publicknowledge.org/news-blog/blogs/text-message-carrier-policy>.

their friends and family are using what service. Text messaging is built-in, simple, universal, and always on.

Additionally, while mobile broadband and smartphone adoption are continuing to soar, there remain millions of Americans who rely on “feature phones” for their communications. Those devices have been able to utilize text messaging for over a decade, long before over-the-top services entered the marketplace and attempted to serve as substitutes. Text messages remain the only messaging service universally available to mobile phone users.

2. Text messaging has security-related applications

Text messaging carries with it a level of verifiability unmatched by over-the-top services. Because text messaging service is tied directly to an interconnected phone number and a single unique user, text messages can be used as a factor in verifying a user’s identity. For example, text messaging is often used as the second factor in two-factor authentication systems, where a user must supply not only a username and a password, but also a one-time code sent via text message, before logging into a secure service such as online banking. The universality and verifiability of text messaging thus gives it cybersecurity applications which make it all the more important that users be protected by Title II of the Communications Act.

A letter filed in this docket underscores the importance of text messaging to security of online applications. Foursquare explained that it uses text messages as a means of authenticating user identities for access to its services. Over the past year, Foursquare noted, carrier blocking of these security-related authentication text messages has accelerated to the point that “there are periods where Foursquare has seen 100% of the messages being blocked by certain carriers.”¹⁰ This sort of blocking has the result of completely preventing users from utilizing their services,

¹⁰ Letter from Foursquare Labs, Inc., MB Docket No. 08-7 (Nov. 16, 2015).

as the individual verification provided via text messaging is an integral component of account security. Foursquare notes that “This same behavior would be a direct violation of Title II if applied to Internet access, voice or IP messaging.”¹¹

3. Text messaging is a necessary component of emergency communications

Text messaging is critically important to emergency services and during times of crisis. The FCC is moving forward with text-to-911, allowing people to reach emergency services via text message, and FCC rules ensure that even a device with no active service plan is able to connect to a network to place 911 calls. A data connection, however, is not available; no over-the-top texting service would be able to connect to a PSAP, whereas texting could.

In times of crisis, wireless networks can suffer from severe service degradation due to the combination of increased demand and infrastructure damage reducing capacity. Because text messages are delivered differently from over-the-top messages, however, they are often reliable, and recommended by emergency management personnel. When even the simple act of placing a voice call is more than a mobile network can handle, to say nothing of providing a stable data connection to support an over-the-top messaging service, text messages still go through. This vital link can provide disaster victims with critical information and the ability to call for help, while giving loved ones outside the danger zone the ability to keep in touch with affected persons. The FCC itself, in fact, recommends this practice, noting that “In many cases, text messages to other wireless devices will go through when your call may not.”¹²

¹¹ Id.

¹² FCC/FEMA Tips for Communicating During an Emergency, FCC.gov (last accessed Nov. 18, 2015), <https://www.fcc.gov/emergency-communications-tips>.

4. Text messaging is used by government authorities for important public communication

Federal, state, and local authorities also make use of text messaging to provide services to their constituents. The IRS has used text messaging as a means of connecting with younger taxpayers, who are more difficult to reach via traditional mail or phone. At the state level, New York State provides critical public safety and emergency alert information to more than 2.3 million subscribers. These alerts cover 160 different categories, ranging from emergency alerts to routine road and school closure notifications.¹³ No single over-the-top service has the same universal reach as text messaging, which spans more than a decade of devices from a plethora of manufacturers, and is available on every mobile network nationwide.

In addition to these attributes, in a world of proliferating private messaging services it is all the more important that there continue to be an open, nondiscriminatory fallback service. There is no guarantee that political activists, public safety services, or any other entity will have access to private messaging networks like Google Hangouts, Facebook Messenger, or WhatsApp. An open, universal, reliable text messaging service provides certainty that vital communications can take place amongst all users of the nation's mobile networks.

III. The Commission is Compelled by the Statute and Its Precedent to Recognize That Text Messaging is a Telecommunications Service

Twilio's analysis of the proper regulatory status of text messaging is correct. As Twilio demonstrates, text messaging fits the statutory definition of "telecommunications" and a "telecommunications service" and therefore falls under Title II of the Communications Act.

¹³ Neustar, *mGovernment: How Government Agencies Can Use SMS*, 6 (2010), available at <https://www.neustar.biz/corporate/docs/how-government-agencies-can-use-sms.pdf>.

Additionally, as Twilio argues in its Petition, and as the 2007 Petition argued, text messaging fits the statutory definition of Commercial Mobile Radio Service (CMRS), and must therefore be treated as a common carrier service.

The 2007 Petition argued that Title I could provide an alternative grounds to Title II classification to protect text messaging users.¹⁴ This approach may no longer be as certain, given the DC Circuit’s decision in *Verizon v. FCC*.¹⁵ In that case, the court held that services that are not classified as “telecommunications” cannot be held to common carrier-like obligations, due to its interpretation of a provision of the Communications Act which reads that “A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.”¹⁶ While the DC Circuit’s opinion does not foreclose actions to protect text messaging users under Title I, the legal uncertainty that this path would bring, when compared with the straightforward nature of Title II strongly counsels that, as with broadband, Title II is the better source of legal authority to protect text messaging users.

A. Text Messaging is a Telecommunications Service

Text messaging fits the statutory definition of telecommunications. Wireless carriers offer, and perform, a service that transmits short messages from one user of a public switched network to another.

Whether a service is telecommunications depends both on the nature of the “offer” and the nature of the service performed. With text messaging, wireless carriers provide a telecommunications service because they offer “telecommunications for a fee directly to the public.” As the Commission has stated, “the critical distinction between a telecommunications

¹⁴ 2007 Petition at 16-17.

¹⁵ 740 F. 3d 623 (DC Cir. 2014).

¹⁶ 47 U.S.C. § 153(51).

and an information service turns on what the provider is ‘offering.’¹⁷ Twilio has amply documented the nature of the carriers’ offers.¹⁸ For example, T-Mobile states that “You can use your phone to send and receive short text and email messages. Text messaging allows you to send messages to T-Mobile and non-T-Mobile customers who have text-capable devices.”¹⁹

A visit to any major carrier’s web site shows that they typically offer three telecommunications services—voice, text, and data—as part of a bundle, to any member of the public.²⁰ Thus, in offering text messaging, wireless carriers meet an “essential element” of common carriage by “holding [themselves] out to serve indiscriminately.”²¹

The service the carriers are offering is telecommunications. Text messaging is, among other things, 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.”²² When composing a text message, a user chooses a recipient with a phone number or a short code. The user composes the message and sends it, to be transmitted to its destination by the user’s carrier. The user’s carrier either delivers the message itself to its recipient, unchanged, or passes it off to another common carrier to perform that function. Since this “offering meets the statutory definition of telecommunications service, ... the service is also necessarily a common carrier service.”²³

¹⁷ Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, ¶ 355 (2015) [*Open Internet Order*].

¹⁸ Twilio Petition 31-33.

¹⁹ Twilio Petition 33 (citing T-Mobile, Text Messaging (SMS), <https://support.t-mobile.com/docs/DOC-3309>).

²⁰ See, e.g., T-Mobile, <https://www.t-mobile.com/cell-phone-plans/individual.html>.

²¹ *Nat. Ass’n of Regulatory Utility Com’rs v. FCC*, 525 F. 2d 630, 642 (DC Cir. 1976).

²² 47 U.S.C. § 153(50).

²³ Open Internet Order ¶ 355.

As the FCC and Ninth Circuit have found, a text message is already considered equivalent to a telephone call under the Telephone Consumer Protection Act (TCPA).²⁴ Since the TCPA, which is codified in Title II of the Communications Act²⁵ already applies to text messaging, it is logical for text messages to be afforded the same regulatory status as voice calls in other respects, as well. Indeed, the fact that text messaging is typically bundled with voice and data, services which are undeniably telecommunications under current FCC rules, is probative as to the services' regulatory status. It would be anomalous and contradictory if voice and data, but not text messaging, were considered telecommunications.

B. Text messaging is a Commercial Mobile Radio Service, and Therefore is a Common Carriage Service

Under the statutory schema, mobile radio services are either private or commercial. Private mobile radio services (PMRS) may not be treated as common carriers; commercial mobile radio services (CMRS) must be.²⁶ Because text messaging fits the definition of CMRS, it must be treated as a common carrier service.

A PRMS is any mobile radio service that is not a CMRS, or the functional equivalent of a CMRS.²⁷ A CMRS is “any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the

²⁴ *Satterfield v. Simon & Schuster*, 569 F. 3d 946, 952 (2009) “we hold that a text message is a “call” within the meaning of the [Telephone Consumer Protection Act].” (citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 18 FCC Rcd. 14014, 14115 (July 3, 2003) (statute “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls.”)

²⁵ 47 U.S.C. § 227.

²⁶ 47 U.S.C. § 332(c)(1)(A); (c)(2).

²⁷ 47 U.S.C. § 332(d)(3).

Commission.”²⁸ Further, “interconnected service” is defined in part as “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission).”²⁹ Finally, the Commission has defined “public switched network” as “The network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.”³⁰

Text messaging is offered to the public on a for-profit basis. The most relevant legal question therefore is whether text messaging is “interconnected.” The Commission recently revisited its earlier determination that mobile broadband was not an interconnected service and a CMRS, finding that updating its earlier conclusions was warranted “to reflect current technology.”³¹ But such a reexamination is not even necessary in the case of text messaging, since the Commission has already concluded that it is an interconnected service. It has noted that “With respect to push-to-talk and SMS, we note that such offerings are typically bundled as a feature on the handset with other CMRS services, such as real-time, two-way switched mobile voice or data, that are interconnected with the public switched network.”³² It is apparent why the Commission would reach such a conclusion.

²⁸ 47 U.S.C. § 332(d)(1).

²⁹ 47 U.S.C. § 332(d)(2).

³⁰ 47 CFR § 20.3; *see also* Open Internet Order § 391.

³¹ Open Internet Order § 391.

³² *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 ¶ 55 (2007). The Commission noted that “push-to-talk and SMS are interconnected features or services in some instances, but non-interconnected in others, depending on the technology and network configuration chosen by the carriers.” However, it cited an earlier discussion of push-to-talk services and it is unclear on what basis SMS would be

In another legal context, the Commission has found that a service is “interconnected” when it “can be used to receive telephone calls that originate on the [Public Switched Telephone Network (PSTN)] and can be used to terminate calls to the PSTN.”³³ (As discussed *supra*, text messages are considered “calls” from some legal purposes.) Text messaging would meet this test: users send and receive messages on mobile telephones, using the telephone network, and telephone numbers as addresses.³⁴ As a legal matter there is no way to consistently conclude that voice calling is an interconnected service and text messaging is not.

The PSTN and interconnected services are not limited to voice. In a landmark application of its Title II authority, for instance, the FCC has held that PSTN users can attach any non-harmful device to the network.³⁵ This means that customers can use fax machines, modems, credit card readers, security systems, and other non-voice services on the “telephone” network. The Communications Act also requires that carriers give hearing-impaired and speech-impaired individuals access to telecommunications relay services.³⁶ Like those services, text messaging is a way for network subscribers to communicate with each other using telecommunications.

Because text messaging is interconnected, it is a commercial mobile radio service, and because it is a CMRS, the Commission must regulate it as a Title II telecommunications service.

at some times interconnected and other times not. Further, as Twilio notes, “The messaging services relevant to the Petition, however, are necessarily interconnected to the PSTN because they are sent or received using NANP ten-digit numbers.” Twilio Petition 35.

³³ IP-Enabled Services, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 10245, § 24 (2005).

³⁴ Some carriers offer the ability to send text messages to users via email gateways, or allow their users to send text messages to email addresses. As long as such services can originate or terminate a message on a public switched network, they are interconnected, as well.

³⁵ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

³⁶ 47 U.S.C. § 225.

Just as the FCC protects users' rights to use telephony without unreasonable discrimination, it must protect text messaging users, as well.

C. Numbers and Technical Facilities Associated with Text Messaging Are Also Subject to Title II

The Title II status of telephony requires, not just that carriers connect calls without unreasonable or unjust discrimination, but that they reasonably interconnect with other carriers and services, and that numbers be administered in a nondiscriminatory way subject to Commission supervision. Similarly, the status of text messaging as a common carrier service requires that short codes and interconnection be available without unreasonable discrimination. Short codes are interconnected with NANP numbers—subscribers can send messages to, and receive messages from short codes just as they can any other telephone number. The Commission has the authority to ensure that short codes are made available fairly and transparently.³⁷

Because text messaging is a common carrier service, carriers may not make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device....³⁸

This means that carriers are not only obligated to deliver one-to-one text messages without undue discrimination, but to generally conduct their text messaging business in a nondiscriminatory

³⁷ 47 U.S.C. § 251 (“The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.”)

³⁸ 47 U.S.C. § 202.

way. This may include, for example, permitting third parties to access the text message system to offer innovative products, or facilitating the delivery of one-to-many messages.³⁹

By recognizing that text messaging is a Title II service, the Commission will not only ensure that wireless subscribers can communicate with each other without being subject to unreasonable discrimination. It will ensure that political organizations can communicate with their supporters, business can communicate with their customers, and many other things.

Achieving this goals implies that the Commission must prevent unreasonable discrimination in technical features and numbering associated with text messaging as well as with the messages themselves.

D. Over-the-Top Messaging Services Such as WhatsApp and iMessage are Not Title II Services

As the FCC recently noted, “The Commission has been unequivocal in declaring that it has no intent to regulate edge providers.”⁴⁰ When it reclassified broadband Internet access service as a Title II telecommunications service, the Commission stated that it was not “regulating the Internet, *per se*, or any Internet applications or content.”⁴¹ Classifying text messaging as a Title II service does not require the Commission to revisit this determination. In particular, the FCC can readily distinguish over-the-top messaging services such as WhatsApp and iMessage from text messaging. Text messaging meets all the tests for a telecommunications service; over-the-top services meet none of them.

³⁹ Indeed, the Commission has the authority to require that wireless carriers make available the “network elements” associated with text messaging to eligible parties. 47 U.S.C. §§ 153(35), 251.

⁴⁰ Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor ‘Do Not Track’ Requests, RM-11757, *Order* (rel. Nov. 6, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1106/DA-15-1266A1.pdf.

⁴¹ Open Internet Order § 382.

First, over-the-top messaging services do not offer “telecommunications” to users since they do not offer “transmission.” Services like this hold themselves out as online services that, like other online services, are accessed via telecommunications but are not telecommunications themselves. Users of these services are expected to provide their own “transmission” service, in the form of a fixed or mobile broadband Internet access service.⁴² It is not possible to use a service like WhatsApp without already having obtained telecommunications in some way, nor do any over-the-top services claim otherwise. By contrast, though text messaging is typically offered in a bundle, it is possible to purchase text messaging on a standalone basis—no further service is needed.⁴³

Of course, it is not necessary for a telecommunications service to own the last-mile infrastructure over which users access it. For example, mobile virtual network operators (MVNOs) and calling card providers are Title II carriers because they resell access to, but do not own, telecommunications facilities. Thus, when MVNOs offer text messaging service, these are Title II services just as much as text messaging services provided by facilities-based carriers. Additionally, services that offer users text messaging functionality via a web portal or email

⁴² This is similar to how dial-up Internet access services are not telecommunications, since they require users to provide their own transmission capacity (a telephone connection), but broadband Internet access services, which are provided by and linked with the transmission capacity, are telecommunications. There are common carrier services that users must access first by using other common carrier services—for example, a user first connects to a long distance provider via a local exchange provider. However, over-the-top text messaging services still cannot be “telecommunications” if envisioned in this way because such services change the “form or content” of the communication the user first sent via her ISP by subjecting it to further processing. *See* 47 U.S.C. §§ 153 (24), (50).

⁴³ *See, e.g.*, U.S.Cellular, Messaging-Only Plans, <http://www.uscellular.com/plans/text-only.html> (“these messaging-only plans are designed for the deaf or hard of hearing, as well as those who want to use messaging as their primary way to communicate. Voice minutes are not included, so you only pay for the minutes you use.”)

gateway are providing a service that is more analogous to calling cards than to over-the-top messaging, since they are merely providing access to an underlying telecommunications service.

Additionally, over-the-top messaging services do not interconnect with a public switched network. Such services are content that may be carried by a public switched network, such as broadband. This means that they have the same legal status as a phone call, not a phone network. These services are not tied to particular IP addresses or phone numbers—an iPhone user can move from a WiFi network to an LTE network to another WiFi network, each time being assigned a new IP address, and still receive iMessages. By contrast, a mobile subscriber can receive text messages sent to a telephone number only while she has that particular number assigned to her. Text messaging is part of a *network*—over-the-top services merely ride on top of a network.⁴⁴

Because over-the-top services are not “mobile services” as defined by the Communications Act,⁴⁵ the CMRS/PMRS legal distinction does not apply to them. However, many of the same policy issues are germane, because the Commission has identified interconnection as a relevant regulatory factor in other contexts. For example, while the

⁴⁴ For convenience to users, some over-the-top messaging services use PSTN numbers as a form of identifier. But this does not mean they interconnect with the PSTN. Typically, these services will verify that a user controls the number in question (e.g., with a code sent via text message) before allowing the user to use that number string as an identifier in their systems. This is analogous to how various online services allow (or require) users to use their email addresses as usernames on their systems—among other benefits, using a pre-existing unique string as an identifier is a way to keep users from having to remember yet one more thing, and minimize situations where users can select conflicting identifiers. Thus, when an iMessage user sends an iMessage to (202) 555-1212, she is not sending a text message, nor is (202) 555-1212 truly being used as a “phone number,” but rather as a user ID within the iMessage system. By contrast, if the user sends a text message to that same number (perhaps even using the same user-facing application, as would be the case with iMessage), that number is being used as part of the North American Numbering Plan—and is not merely an arbitrary unique string, but is a form of addressing.

⁴⁵ 47 U.S.C. § 153(33).

Commission chose not to decide whether interconnected VoIP was a Title II service, it identified interconnected services as requiring heightened regulatory treatment.⁴⁶ Thus, even outside of the CMRS/PMRS context the Commission has identified interconnectedness as a relevant criterion as to the proper treatment of a communications service. In this case, because over-the-top messaging services are not interconnected, there is good reason to treat them differently from interconnected services such as text messaging.

Finally, the fact that over-the-top messages may compete with text messaging has no bearing on the proper regulatory treatment of text messaging. First, over-the-top services only compete with text messaging for some use cases—many functions, whether they require verifiability or universality—require text messaging specifically. For those uses, wireless carriers do have significant market power and bottleneck control. But more fundamentally, whether a service is telecommunications is unrelated to whether the carrier has market power in any market, or is a monopoly. The Commission has considered and rejected a mode of analysis where market power “would replace the traditional test for communications common carriage.”⁴⁷ It recently reaffirmed that it “need not conclude that any specific market power exists in the hands of one or more [carrier] in order to create and enforce these [common carriage] rules. Thus, these rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential.” Similarly, with text messaging, whether or not the service is “telecommunications” is a separate question from how that service might be analyzed under a framework derived from competition law.

⁴⁶ IP-Enabled Services, 20 FCC Rcd. 10245, ¶¶ 23, 24.

⁴⁷ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Second Report & Order*, 91 F.C.C.2d 59 (1982).

IV. Conclusion

For the above reasons, the Commission should grant Twilio's petition and clarify that text messaging (including SMS, MMS, and short codes) is a telecommunications service.

Respectfully submitted,

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