

Before the
Federal Communications Commission
Washington, DC 20544

In the Matter of

Petitions for Declaratory Ruling on Regulatory
Status of Wireless Messaging Service

WT Docket No. 08-7

**PETITION FOR RECONSIDERATION OF PUBLIC KNOWLEDGE, ACCESS HUMBOLDT,
APPALSHOP, BENTON FOUNDATION, CALIFORNIA CENTER FOR RURAL POLICY,
CENTER FOR DEMOCRACY AND TECHNOLOGY, CENTER FOR RURAL STRATEGIES,
COMMON CAUSE, CONSUMER FEDERATION OF AMERICA, THE GREENLINING
INSTITUTE, INSTITUTE FOR LOCAL SELF RELIANCE, KENTUCKY RESOURCES COUNCIL,
NATIONAL DIGITAL INCLUSION ALLIANCE, OPEN TECHNOLOGY INSTITUTE, THE
UTILITY REFORM NETWORK (TURN), AND X-LAB**

Pursuant to Section 1.429¹ of the Commission’s rules, petitioners request that the FCC reconsider and rescind its SMS Order,² after placing this petition out for public comment via the Federal Register.³

As Public Knowledge and others have explained in previous submissions, the SMS Order’s reasoning is fallacious and fails to support its outcome. This petition will not repeat those arguments, except as they are relevant to how the response in the final order to arguments presented in *ex partes* submitted after the circulation of the draft order are

¹ This pleading is timely under the guidance released by the Commission concerning the impact of a lapse of funding on Commission operations. *See* Public Notice, DA 19-10, Impact of Potential Lapse in Funding on Commission Operations (rel. Jan. 2, 2019). Further, the Commission sought comment on this matter “pursuant to sections 1.415 and 1.419 of the Commission’s rules,” which govern notice-and-comment rulemaking. Wireless Telecommunications Bureau Seeks Comment Regarding Petition Seeking Declaratory Ruling Clarifying the Regulatory Status of Mobile Messaging Services, Public Notice, WT Docket No. 08-7, 30 FCC Rcd 10973 (WTB 2015). Therefore this petition for reconsideration is governed by 47 C.F.R. § 1.429, concerning petitions for reconsideration of final orders in rulemaking proceedings. In the alternative, if the Commission now considers that a declaratory ruling issued in response to petitions a “rulemaking” matter, then this petition is submitted pursuant to section 1.106 of the Commission’s rules. In this case the Commission must explain its change of course.

² Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service, Declaratory Ruling, WT Docket No. 08-7 (rel. Dec. 13, 2018) (“SMS Order”).

³ 47 C.F.R. § 1.429.

peremptory and lacking in analysis. The public has lacked a previous opportunity to respond to these new points.

There are practical reasons, as well, for the Commission to reconsider the SMS Order. It creates potential legal uncertainty if the result in *Mozilla v. FCC*,⁴ challenging the *Restoring Internet Freedom* Order, is not what the current Commission expects, while in the meantime failing to advance its substantive agenda in a meaningful way. In short, the Order was imprudently issued, and this alone provides a basis for its reconsideration.

Finally, events since the order was issued confirm the need for the Commission to reconsider its action—specifically, controversies concerning the privacy of customer location data and whether carriers will hinder the ability of schools and teachers to use third-party tools to stay in touch with students and parents.

Therefore petitioners request that the Commission publish this petition for public comment. After such a period of comment the record will likely support the Commission's rescinding its order.

I. The Commission Should Reconsider the Order on Prudential Grounds

The SMS Order relies on much of the same reasoning as the *Restoring Internet Freedom* Order, which is currently being challenged in court. Clearly the FCC is confident in its chances of success. It writes, "We find that the Restoring Internet Freedom Order contains a thorough analysis of the telecommunications systems management exception and we decline to revisit that analysis in this proceeding."⁵ But so are petitioners in that case, such as Public Knowledge, a party to this petition. Objectively, any attorney will admit that all litigation carries risk, and especially with extremely technical and complex issues

⁴ *Mozilla Corporation et al., v. Federal Communications Commission*, DC Circuit No. 18-105.

⁵ SMS Order, ¶ 29, n. 85.

like those before the DC Circuit in this case, the outcome may be one that no party predicts. In the event that the *Restoring Internet Freedom* Order is struck down or remanded, in whole or in part, it is unclear what effect that may have on the SMS Order. In that scenario there may be differences of opinion as to whether the SMS Order maintains in full effect, given that SMS is a different service than broadband, or that it is by implication also vacated in whole or in part. Even if the Commission believes this is a small risk, it is still an avoidable one, and not worth taking.

The risk that the Commission would create by allowing this order to remain in effect is not only avoidable, but avoiding it would not harm the current Commission's policy objectives in any way. SMS was not classified as a Title II service. It was not classified at all. The various legal impediments and shortcomings the Commission has listed with respect to Title II were not in place. It is doubtful that any carrier, in the absence of SMS classification as Title I, could believe that this Commission, with its clear policy preferences, would begin imposing various new regulatory requirements on carriers. While petitioners believe that SMS properly is classified as a Title II service, and should be subject to its various legal requirements, setting aside the current order would not by itself bring about that outcome.⁶ Indeed, setting aside this order would likely have no policy or legal repercussions for carriers or for FCC activity. By contrast, in the event of the DC Circuit setting aside the *Restoring Internet Freedom* Order in a way that brings broadband back under Title II, there would be a good case to be made that SMS would thereby be considered a Title II service as well—exactly the outcome the Commission wishes to avoid.

⁶ Nor would setting it aside make it easier, or harder, for a future Commission to pursue its own policy objectives.

In short, the FCC has disturbed a hornet's nest for no discernible reason. Of course Title II advocates are opposed to the Order on the merits. But the Order does not materially advance the Commission's deregulatory policy agenda relative to the status quo—instead, it simply creates potential future legal complications, the resolution of which may benefit outside counsel, but will simply be a drain on the resources of the Commission, and on the nonprofits filing this petition.

II. The Final Order Introduces New Legal Errors Not Present in the Draft

Neither of the public notices concerning this issue provided notice that the Commission would take the actions it did with respect to SMS messaging. Although petitioners disagree with the analysis of these issues in the *Restoring Internet Freedom* Order, that Order did at least provide the public an opportunity to comment on the issues at stake. This proceeding has lacked that, and putting out this petition for public comment could in part remedy that procedural deficiency. Even those parties who did substantively comment in the record lacked an opportunity to address all the issues. In the final order, in responding to *ex partes* filed after the circulation of the draft order, the Commission has committed new legal errors. Petitioners therefore lacked the opportunity to respond to these errors in the record prior to this petition.⁷ A few of these will be discussed below.

In responding to the argument of Public Knowledge *et al.* that SMS is primarily a real-time service, the Commission focuses on implementation details of how nearly all modern communications services function, that do not bear on customer expectations or perceptions. If any communications service that has a buffer, or uses IP packets, or similar modern technologies instead of simply using a direct, dedicated line for a simple two-way

⁷ See 47 C.F.R. § 1.429(b)(1), (2).

communication is now to be considered a “store-and-forward” service, then the Commission has simply written telecommunications services out of the law. Many voice services, for example, use similar techniques. If this is the Commission’s goal it must say so, explain what gives it the authority to excise major parts of the Communications Act, and why it believes the broad, technologically-neutral definition of “telecommunications” Congress provided it has such a short shelf life.

The Order also fails to substantively address the arguments provided by Free Press and Public Knowledge *et al.* that Title II classification does not hamper filtering robo-calls and texts. It merely relies on the same industry advocates and says, with respect to the new arguments provided against them, “we disagree.”⁸ The Commission, as commenters have pointed out, has repeatedly encouraged and assisted carriers in blocking robo-calls, and telephony is a Title II service. The Commission unreasonably fails to explain why Title II is not an obstacle to blocking unwanted communications for one service but is for another, and its capricious dismissal of arguments to this effect magnifies the error.

Again, in responding to the arguments of Free Press and Public Knowledge *et. al* that the Commission’s analysis turns any telecommunications service that accesses an information service into an information service itself, the Commission simply repeats its argument without any substantive response.⁹ Does the Commission believe that accessing an information service via telephone makes the telephone service an information service? Permanently or just for the duration of that use? Or does it deny this claim? These questions, raised clearly in the record already, deserve answers. Thus, the Commission’s initial line of argument is already clear error that ignores the statutory division of services

⁸ SMS Order ¶ 43 n. 140.

⁹ SMS Order ¶ 21 n. 62.

into telecommunications and information services. The Commission cannot simply adopt a policy whereby information services change the classification of any service they touch. But compounding this error, as in other areas, is its dismissive non-response to commenters pointing this out.

The Commission declined to address various arguments relating to the effect of its action on USF as “outside the scope” of this proceeding.¹⁰ But the legal and logical implications of the Commission’s actions, that were raised by commenters in the record and noted by the Commission, are fully within the scope of the proceeding, and the Commission cannot simply declare it otherwise. The Commission’s initial failure to consider these issues was clearly erroneous, though perhaps inadvertent. But the Commission’s new error is to *deliberately* avoid addressing the financial implications of its actions.

III. Events Since the Order Was Issued Confirm the Need for Reconsideration

Reporting since the order was issued has demonstrated that major wireless carriers have continued¹¹ to sell real-time location information about customers to third-party data brokers, violating previous promises to stop such behavior.¹² Carriers have also been lax in their protection of SMS records, resulting in one carrier providing outside access to SMS Text records.¹³ Given that a typical mobile phone contains (at least) a service now

¹⁰ SMS Order ¶ 48 n. 162.

¹¹ Joseph Cox, *I Gave a Bounty Hunter \$300. Then He Located Our Phone*, Motherboard, Jan. 8, 2019, https://motherboard.vice.com/en_us/article/nepxbz/i-gave-a-bounty-hunter-300-dollars-located-phone-microbilt-zumigo-tmobile.

¹² Lily Hay Newman, *Carriers Swore They'd Stop Selling Location Data. Will They Ever?*, WIRED, Jan. 9, 2019, <https://www.wired.com/story/carriers-sell-location-data-third-parties-privacy>.

¹³ Zack Whittaker, *Another Huge Database Exposed Millions of Call Logs and SMS Text Messages*, TECHCRUNCH, Jan. 16, 2019, <https://techcrunch.com/2019/01/15/another-huge-database-exposed-millions-of-call-logs-and-sms-text-messages>.

considered by the Commission to be Title II (telephony) and a service it considers Title I (SMS), it is unclear what if any legal regime carrier sale of such information would even come under. The Commission has failed to consider the effect of its classification decision on consumer privacy, and putting this petition out for comment would permit it to collect comment on this topic.

Additionally, one of the first effects of the Commission's new legal regime appears to be to potentially limit the ability of schools and teachers to stay in touch with students and parents.¹⁴ The educational community depends on carrier-neutral third-party services like Remind, which in turn depend on nondiscriminatory access to telecommunications services.¹⁵ Services like Remind provide a way to convey important information regardless of whether its users have smartphones or featurephones, what carrier they subscribe to, home broadband, or even wireless data coverage. But in the guise of fighting spam, network management, and similar rationales, major carriers may be poised to make third-party services like Remind untenable, or to attempt to replicate some of their functionality in a carrier-specific and more limited way. While Remind has been able to resolve its high-profile dispute with Verizon for the moment,¹⁶ this ad hoc approach does not scale to all apps, and all carriers. The Commission should therefore grant this petition and seek comment on whether the classification of SMS as a Title I service would harm the education

¹⁴ Sarah Barry James, Analysis: Text message services fear new fees after recent FCC vote, S&P Global Market Intelligence, Jan. 22, 2019, <https://www.spglobal.com/marketintelligence/en/news-insights/trending/BuoWfr96h3JEp0TC4gH3gA2>.

¹⁵ Jon Brodtkin, *Verizon Charges New "Spam" Fee For Texts Sent From Teachers To Students*, ARS TECHNICA, Jan. 14 2019, <https://arstechnica.com/tech-policy/2019/01/verizon-price-hike-could-kill-free-texting-service-for-teachers-and-students>.

¹⁶ Jon Brodtkin, *Verizon Caves, Won't Charge "Spam" Fee for Texts from Teachers to Students*, Ars Technica, Jan. 25, 2019, <https://arstechnica.com/information-technology/2019/01/verizon-caves-wont-charge-spam-fee-for-texts-from-teachers-to-students>.

and nonprofit community, negatively affect digital equity, and hamper entrepreneurial activity among third-party communications service providers.

Conclusion

The SMS Order was imprudently issued, and creates legal uncertainty. As was explained in filings in the record, its legal analysis was flawed, and its policy justifications shaky. The Commission's response to arguments filed in the record after the circulation of its draft order contained new legal errors, which the public and affected parties lacked the opportunity to comment on. Finally, events since the SMS Order was issued underscore the need for the Commission to reconsider its action. For these reasons, the Commission should put out this Petition for Reconsideration for public comment and then grant its request that the Commission rescind the SMS Order.

Respectfully submitted,
/s/
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PUBLIC KNOWLEDGE

January 28, 2019