

December 5, 2018

Chairman Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WT Docket No. 08-7; WC Docket No. 06-122

Dear Chairman Pai:

We write to express our opposition to the proposed Declaratory Ruling classifying SMS text messaging and short codes as an “information service” rather than a “telecommunications service” subject to Title II. The proposed classification will deprive the Universal Service Fund – which funds both Lifeline and the Connect America Fund (CAF) – of billions of dollars in contribution-eligible revenue at a time when the existing contribution pool continues to decline alarmingly. We therefore urge the Commission to classify SMS and short code texting as Title II services subject to USF contribution. In the alternative, we ask you to defer classification of text messaging and that you issue a new Public Notice in the above captioned proceedings to resolve the question of appropriate treatment of SMS revenues, including whether SMS revenues could be included in USF under an “information services” classification.

Under the Communications Act, only Title II telecommunications services automatically contribute to the funding of Universal Service Fund programs such as Lifeline and CAF.¹ According to the Universal Service Administration Company (USAC), an undisclosed number of carriers have traditionally treated text revenues as telecommunications service revenue subject to USF contribution, while others have not.² Definitively classifying texting as an information service removes these revenues from the potential contribution pool. This classification order will not only miss an important and desperately needed opportunity to expand USF funding, it will actually reduce funding by some unknown amount. Given the enormous importance you as Chairman have placed on closing the digital divide for all Americans, we urge you to rethink the decision to eliminate this important source of USF funding.

In 2011, the Commission sought comment on the appropriate treatment of texting revenue for USF in WC Docket No. 06-122. At the least, we urge you to defer a decision on classification of text messaging and short codes until the implications for Lifeline and other USF-supported programs are considered and addressed in Docket 06-122. We would also urge that, before proceeding on either classification or appropriate treatment of texting revenues, the Commission should issue a further Public Notice to update the record to ascertain the financial impact of excluding texting revenue from contribution – both in terms of loss of existing contributions and the loss of potential future revenue if carriers included texting revenue as

¹ 47 U.S.C. §254(d).

² Letter of Richard Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief, Wireline Competition Bureau, filed in WC Docket No. 06-122 (April 22, 2011).

eligible for contribution. Given the vital importance of both Lifeline and CAF, it would be arbitrary and potentially reckless to classify texting as an information service without considering the impact of the decision on these programs.

In addition, based on numerous incidents in the past, we fear that permitting carriers to block messages without any oversight will result in censoring time-critical speech, hamper efforts to organize political engagement and severely restrict the ability of civil rights organizations, religious organizations, and other non-commercial organizations to use texting platforms to their full capability. Finally, we fear that classifying text messaging as an entirely unregulated “information service” eliminates the important consumer protections afforded by Title II such as Truth-In-Billing, prohibitions on price gouging, and strong privacy protections under the Commission’s CPNI rules.

This proceeding began after Verizon blocked NARAL from using a short code for political action messages in 2007, on the grounds that reproductive rights were too “controversial” and in violation of Verizon’s policy. While Verizon quickly reversed course, other incidents over the years have demonstrated that without clear rules against blocking text messages or for universal interconnection and recognition of short codes, important and time sensitive speech remains at risk. As shown in the record, organizations such as Catholic Relief Services have had their texting programs threatened with blocking for experimenting with new donation programs.³ Immigration rights activists have been unable to reach important constituencies because certain carriers would not honor their short codes. Advocates for legalizing marijuana have had their text programs to find legal medical marijuana dispensaries blocked.⁴ In addition, companies that directly support and manage texting campaigns, such as Twilio, have experienced blocking of desired texts on an increasing basis.⁵

While we all support the goal of reducing spam and robocalls, the Commission has repeatedly made clear in the past that Title II classification does not prevent carriers from using technological means to block unwanted texts or robocalls.⁶ To the extent classifying SMS and short code texting as Title II deters carriers from continuing to use technological means of filtering and blocking spam and robocalls, the Commission could simply do as it did in 2015 and

³ See Letter of Public Knowledge and Free Press to Chairman Julius Genachowski, filed in WT Docket No. 08-7 (March 25, 2010) and accompanying Declaration of Jed Alpert, Chief Strategy Officer, Mobile Commons.

⁴ See Letter of Alex Nogales, President, National Hispanic Media Coalition, and 30 Civil Rights Organizations in Support of Public Knowledge Petition to Chairman Genachowski, filed in WT Docket No. 08-7 (October 29, 2010); Letter of 10 Non-Profit Organizations in Support of Public Knowledge Petition to Chairman Genachowski, filed in WT Docket No. 08-7 (August 30, 2010).

⁵ See Letter of Emily Emory, Twilio Government Relations to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in WT Docket No. 08-7 (February 22, 2018).

⁶ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd 7961, ¶¶ 152-163 (2015); Public Notice, Consumer and Governmental Affairs Bureau Clarification On Blocking Unwanted Robocalls, 31 FCC Rcd 10961 (2016).

2016 and clarify that nothing in the Title II classification prevents carriers from continuing practices that block unwanted messages, while protecting the right of subscribers to receive text messages they actively desire. Ironically, the definitive classification of texting as an information service could even make the problem of blocking spam worse. By classifying texting as being the same as email, the proposed classification order could actually be interpreted to **remove** texting from the anti-robocalling statute, the Telephone Consumer Protection Act of 1991 (TCPA). Although the Commission affirmed that text messages were “calls” for purposes of the TCPA in 2003, definitively classifying texting as an information service gives spammers and robocallers a second bite at the apple to challenge this ruling. In light of the D.C. Circuit’s restrictive interpretation of the statute in 2017,⁷ it is not clear that the Commission’s simple assertion that an information service such as SMS can still be classified as a “telephone call” under the TCPA is sufficient to survive a new challenge brought by robotexters.

For all these reasons, we ask that you classify SMS text messaging and short codes as a Title II service clearly eligible for USF contribution, and subject to all other privacy and consumer protections applicable to mobile telephone calls. Or, at the least, we ask that you withdraw the proposed Order until these issues can be properly addressed on a refreshed record.

Sincerely,

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⁷ See *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017).

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