December 4, 2018

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Wireless Messaging Service Declaratory Ruling (Draft Order), WT Dkt. No. 08-7, FCC-CIRC1812-04

Dear Ms. Dortch:

This Commission's quest to read "telecommunications" out of the Communications Act continues apace in this order. Its broad view of what constitutes an "information service" fails for many reasons.

The Draft Order Rewrites the Communications Act

Most fundamentally, it fails because it establishes a framework where essentially no service can qualify as a telecommunications service, exceeding its authority by rewriting the Communications Act. One error is to confuse the use or application of a telecommunications network, with the network itself. For example, the Order states that "SMS and MMS wireless messaging services also involve the capability for 'acquiring' and 'utilizing' information" because "a wireless subscriber can 'ask for and receive content, such as weather, sports, or stock information, from a third party.'"[1] But in this scenario the weather or sports service would be an information service, providing information at a user's request via telecommunications—the SMS service. By collapsing the distinction between SMS and services that use SMS, the Commission has effectively made it impossible for a telecommunications service to exist at all. Presumably a dial-a-joke number or a weather information hotline would, under this analysis, transform the entire PSTN into an information service—even when it was just being used for person-to-person communications. The Commission further errs by claiming that the routing, formatting, and processing capabilities of SMS transform it into an information service, but this contradicts

[1] Draft Order ¶ 21 (citing CTIA Comments).

both the statutory definition of "information service"[2] and longstanding Commission precedent.[3]

The Commission's flawed method of analysis seems to proceed as follows. First, it gives the broadest possible reading to the definition of "information service," such that any conceivable method of electronic communication qualifies. It then simply dismisses the need to analyze whether a given service might also meet the definition of "telecommunications," and indeed refuses to even engage in the traditional analysis of whether a service meets that definition.[4] While the statute compels it to acknowledge that an information service is offered "via telecommunications," under the Commission's schema there need never actually be any "telecommunications service" that is offered to consumers—the only "telecommunications" that actually exists is subsumed as part of an "integrated finished product" that is an information service. The Commission has taken the discretion it was given in *Brand X*,[5] and run with it over a cliff. Congress established a framework where both telecommunications and information services could be offered to consumers, and *Brand X* affirms that the Commission has the discretion to give meaning to ambiguous terms, like "offer," when categorizing individual services. But it is beyond the Commission's discretion to adopt a strict test that appears to simply rewrite the Act and which, if applied in good faith, would find that the PSTN, directory assistance, and other long-established telecommunications services are actually information services. Yet the Commission's analysis of the issues with respect to SMS would appear to do just that.

The Draft Order's Logic Would Apply to Voice Calling, As Well

In the order, the Commission does not convincingly distinguish text messaging from voice calling. Both are services offered by carriers, integrated with the PSTN, that provide basic, real-time communications between users of the telecommunications network. In attempting to do so it has two primary lines of argument. It observes that a carrier will temporarily store a message before sending it under some circumstances, such as if the receiving handset is offline. Thus while SMS is primarily a real-time service, there is still

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[2] 47 U.S.C. §153(24) (excluding systems for managing communications networks).
[3] *See* Computer II, Final Decision, 77 F.C.C.2d 384, ¶ 95 ("Use internal to the carrier's facility of companding techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. that facilitate economical, reliable movement of information does not alter the nature of the basic service. In the provision of a basic transmission service, memory or storage within the network is used only to facilitate the transmission of the information from the origination to its destination, and the carrier's basic transmission network is not used as an information storage system.").
[4] Draft Order ¶ 32 n.101.
[5] *National Cable & Telecommunications Assn. v. Brand X Internet Svcs.*, 545 US 967 (2005).

provision for circumstances when this is impossible—similar to how voice calling uses voicemail. But this is far from transforming it into an asynchronous storage and retrieval service, as the Commission alleges.[6] The prototypical such service is email. Among other things, an email server maintains an interactive database of past communications the user can return to. By contrast in SMS messages are only stored temporarily, if at all, as part of their initial transmission, and a customer can only access them again if they are saved to a handset. But what features a user's handset may offer has no bearing on the nature of the actual service. Additionally, as the Commission acknowledges,[7] to the extent that SMS uses store and forward technology, this is only to ensure delivery to a receiving handset that is not connected to the cellular network. This again distinguishes SMS from a store-and-forward *service* like email, where it is "central" to the service that it is asynchronous.[8] The Commission also points to various technical functions that a carrier may perform on a message to ensure its compatibility with the receiving handset. But these changes—such as changing the resolution of an image[9]—are not different in kind than a voice call being initiated on a CDMA network, and completed on a GSM network. These sorts of technical functions do not change the "form...of information" or the "content" of a message;[10] they merely ensure that the chosen information can be accessed by the receiving party. While the Commission continues to assert that it does not see the difference between the kinds of database access, information processing, and computational functions envisioned by the "information services" definition, and the kinds of routine format and protocol changes that are a typical part of modern electronic communications, it could at least explain why those same kinds of functions in the voice context are not enough it into an information service "integrated finished product," as well.

The Draft's Orders Focus on Customer Equipment is Irrelevant

The Order also claims that the nature of the equipment a consumer uses bears on the classification of the underlying service; specifically, whether or not the service is "interconnected."[11] This is simply bizarre. Of course to use SMS, a consumer must use a

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[6] Draft Order ¶ 20.
[7] *Id*.
[8] Draft Order ¶ 6 ("it is central to the service offering that electronic mail is store-and-forward, and hence asynchronous" (citing Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, ¶ 78 & n.161 (1998) (*Stevens Report*)); Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311, ¶ 44 (2018) (discussing the distinction between basic services that use store and forward technology, and store and forward services).
[9] Draft Order ¶ 22.
[10] 47 U.S.C. § 153(24).
[11] Draft Order ¶ 35.

device capable of sending and receiving SMS. Similarly to place or receive a voice call the use must have a device capable of doing that, or to send a fax the sender and recipient must both have a fax machine. The fact that not all users of the PSTN may employ voice- or text-capable handsets does not mean that the underlying *service* is not "interconnected with the public switched network[.]"[12] By the Commission's logic, simply attaching a credit card reader to a landline telephone transforms the underlying PSTN into an information service for the purpose of that device's use.

The Draft Order Would Conflict with Current Roaming Policies

The Commission also purports to determine how customers perceive SMS service, based primarily on carrier submissions.[13] It concludes that they perceive it as an information processing service. It does not square this with its previous determination, concerning roaming obligations for SMS, that "consumers consider push-to-talk and SMS as features that are typically offered as adjuncts to basic voice services."[14] It also somehow asserts that the new determination that SMS is not interconnected does not conflict with its previous determination that it can be, writing that while it had previously found that "some SMS services were provided on an interconnected basis, the Commission did not address the question of whether SMS services were interconnected for purposes of addressing the regulatory classification of such services."[15] While it may be true that in 2007 the Commission failed to make a final regulatory determination of the classification of SMS, that does not permit the current Commission to simply wave away the previous finding that at least some forms of SMS are interconnected. At a minimum the Commission must explain how "interconnected" for classification is different in meaning for purposes of Section 201(b) (the basis for the Commission's authority to order carriers to offer SMS roaming on just and reasonable rates).

Additionally, the Commission must address how it can continue to enforce its roaming policies in light of its new factual determinations and the D.C. Circuit's decision in *Celleco Partnership, LLC v. FCC.*[16] If text messaging is definitively an information service, than the "common carrier prohibition" prevents the FCC from imposing an obligation to offer service on "just and reasonable" rates.[17] Whatever authority the FCC may have believed it had pursuant to ancillary authority to impose a mandatory roaming obligation

[12] 47 U.S.C. § 332(d)(2).
[13] Draft Order ¶¶ 25-27.
[14] Reexamination of Roaming Obligations of Commer. Mobile Radio Serv. Providers, *Opinion*, 22 FCC Rcd 15817, ¶ 55 (2007).
[15] Draft Order ¶ 36.
[16] 700 F.3d 534 (D.C. Cir. 2012).
[17] *See also Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

on SMS texting in 2007, subsequent judicial opinions have made that position untenable in 2018.

The Draft Order's Analysis of the Telecommunications Management Exception is Flawed

In this order the Commission repeats an error from the Restoring Internet Freedom order, claiming that a service which is primarily designed to benefit end users cannot fall within the telecommunications systems management exception. It concludes that the information processing and routing components of SMS are therefore information services. The sole source for this supposed rule is an unpublished, two-page MFJ order which does not even say what the Commission says it does. The language in question states that "exception was directed at internal operations, not at services for customers or end users."[18] In context, this was intended to distinguish between services that relate to the basic use of the network, such as directory assistance, and the service in question, TDD relay service, which employed operators to translate from speech to TDD and vice versa. But the Commission reads this to imply that "even where functionalities were useful in some way to providers in managing their networks, where those functionalities were designed primarily to be essential for end users, they would not fall within the telecommunications systems management exception."[19] The Commission has claimed that its precedents finding that carrier-provided speed-dialing, directory assistance, and call forwarding fall within the exception support its position.[20] But they do not—those services, like DNS and the information processing and routing capabilities of SMS, benefit users by allowing them to complete a communication using the network. The routing capabilities of SMS and DNS are directly analogous to such telecommunications services as directory assistance and speed-dialing; the Commission's claims to the contrary are simply bare assertions. In fact, because the entire purpose of the network is to benefit users, the Commission's current contention would essentially make it impossible for *any* information service to fall within the exception—a result this Commission may desire but one not supported by the statute. Indeed, leaving aside the exegesis of one phrase from an unpublished MFJ order from 29 years ago, the DC Circuit has already held that the Commission's past analysis that DNS qualified for the exception was reasonable because it "facilitate[d] use of the network without altering the fundamental character of the telecommunications service[.]"[21] This, not the new "primary benefit" test, is the traditional

[18] *Western Elec. Co., Inc.,* 1989 WL 119060, at *1.
[19] Draft Order ¶ 27.
[20] *Restoring Internet Freedom*, 33 FCC Rcd. 311, ¶ 138 n.135.
[21] *US Telecom Association v. FCC*, 825 F. 3d 674, 705 (2016).

formulation of the telecommunications systems management exception.[22] Applying this test, since any of the information processing and routing capabilities of SMS merely facilitate the normal use of the network, they fall within the telecommunications management exception.

Title II Classification Does Not Interfere with a Carrier's Ability to Control Unwanted Communications

The Commission asserts that Title II classification of SMS would interfere with carriers' ability to control robotexts or spam. (One could also claim, equally baselessly, that the current Title II classification of POTS itself interferes with carriers' ability to control robocalls. Yet T-Mobile has recently boasted that it has blocked one billion spam calls in the past 18 months.[23]) But this tired argument was refuted by the previous Commission, which found that "the blocking of harmful or unwanted traffic remains a legitimate network management purpose, and is permissible when pursued through reasonable network management practices."[24] While carriers have repeatedly asserted that Title II's prohibition on "unjust or unreasonable" practices,[25] there is no prohibition on their behaving justly and reasonably, nor is any Commission, regardless of its composition, likely to find that spam-blocking is an unreasonable practice.[26]

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[22] *See* North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, *Memorandum Opinion & Order*, 101 F.C.C.2d 349, ¶¶ 24-27.

[23] Andy Meek, *T-Mobile Has Blocked One Billion Spam Calls in the Last 18 Months*, BGR (Nov. 9, 2018), https://bgr.com/2018/11/09/t-mobile-spam-calls-1b-blocked-18-months.

[24] Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, ¶ 118 (2015).

[25] 47 U.S.C. § 202.

[26] The Commission's reference to call-blocking precedent, which itself notes that users have the absolute right "to choose to block incoming calls from unwanted callers," see Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers, 22 FCC Rcd 11629, ¶ 7 n.21 (2007) is inapposite. A carrier's desire to block certain calls had typically been motivated by a desire to limit what it perceived as regulatory arbitrage, and the Commission has often taken a dim view of such self-help—particularly as the user would often want to complete the call. This is an entirely different circumstance from blocking abusive or unwanted communications. *See also infra,* note 25.

More importantly, the Commission has directly addressed this concern in 2015, as part of the omnibus declaratory ruling on the TCPA.[27] The Wireless Bureau further emphasized that carriers are not merely permitted, but actively encouraged to find means of blocking unwanted robotexts in 2016.[28] In light of these explicit findings by the Commission that the TCPA and Section 201 give carriers freedom to block unwanted calls, the Draft Order's conclusion that only classifying text messaging and short codes as Title I will preserve the ability of carriers to continue their existing filtering practices (at least with regard to unwanted SMS texts) is inexplicable. To the extent that the Commission feels the need to further reassure carriers that they may continue blocking unwanted text messages, it can do so consistent with Title II classification. Indeed, Chairman Pai's recent statement chastising carriers for their failure to adopt technological means of blocking unwanted telephone calls (which, at least at present, are still classified as Title II) and threatening regulatory action to ***compel*** carriers to adopt such technological measures, [29] appears to directly contradict both the draft order and the Chairman's defense of the draft order that carriers can only adopt such technological measures if classified as Title I.

The Draft Order Further Undermines the Financial Stability of the Universal Service Fund

Finally, the Commission must consider the impact of its classification decision on USF. In April 2011, the Universal Service Administrative Company (USAC) informed the FCC that carriers had no consistent practice with regard to treatment of revenue of text services. Some carriers treated SMS revenue as "telecommunications service" revenue subject to contribution, whereas others did not. USAC asked the Commission to provide guidance to ensure consistent practice.[30] The Commission sought comment on the letter in Docket 06-122, and Public Knowledge filed timely comments in support of treating text messaging as a Title II service subject to USF contribution.[31] A copy of these comments is attached for inclusion in the record in this proceeding.

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[27] *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd 7961, ¶¶ 152-163 (2015).
[28] *See* Public Notice, Consumer and Governmental Affairs Bureau Clarification on Blocking Unwanted Robocalls, 31 FCC Rcd 10961, 10962 n.14 (2016) ("we make clear that blocking under the specific circumstances described herein falls within the 'rare circumstances' previously identified by the Commission [in the 2007 Declaratory Ruling]").
[29] *See* News Release, Chairman Pai Calls on Industry To Adopt Anti-Spoofing Protocols to Help Consumers Target Illegal Robocalls (Nov. 5, 2018)
[30] *See* Letter of Richard A. Belden, CFO, USAC to Sharon Gillett, Wireline Competition Bureau Chief, WC Dckt. No. 06-122 (April 22, 2011).
[31] *See* Comments of Public Knowledge and National Hispanic Media Coalition, WC Dckt. No. 06-122 (June 6, 2011).

Classifying text messaging as Title I will deprive USF of much needed support. Not only does this erroneous classification of SMS messaging and short codes as Title I deprive USF of potential revenue going forward, it will withdraw from the already shrinking contribution fund revenue from those carriers that continue to treat text messaging revenue as subject to USF contribution. As the Commission officially, and Chairman Pai and the other commissioners individually, have recognized on numerous occasions the vital importance of USF to closing the digital divide through the High Cost Fund and Lifeline programs, as well as the importance to education and rural health of the E-Rate and Rural Health funds. The Commission cannot reasonably conclude that Title I classification is supported by public policy as contemplated by the Draft Order without first considering the devastating effect of this classification on USF.

Respectfully submitted,

Public Knowledge
Appalshop
Benton Foundation
Center for Democracy and Technology
Center for Rural Strategies
Consumer Federation of America
Electronic Frontier Foundation
The Greenlining Institute
Kentucky Resources Council, Inc.
National Digital Inclusion Alliance
National Hispanic Media Coalition
Open Technology Institute
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