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

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| In the matter of<br><br>Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service | WT Docket No. 08-7 |

**REPLY TO OPPOSITIONS OF PUBLIC KNOWLEDGE**

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As Public Knowledge *et al.* pointed out in the Petition, the Commission's final order failed to adequately address new arguments submitted to the Commission after it circulated its draft order. By introducing new legal and procedural errors in the final order that were not present in the draft, and not present in any previous notice in the record, the Commission deprived commenters of a meaningful opportunity to respond. Additionally, reporting concerning the privacy of mobile users, and prudential concerns relating to the weakness of the Commissions argument in chief for reclassification, further show that the SMS Order was ill-considered. Opposition has failed to substantively respond to these points, and mostly content themselves with simply repeating the arguments in the Commission's order. Thus the best course for the Commission is to cure the various defects and policy shortcomings of its SMS Order by rescinding it.

***Robotexts***

Specifically as to robotexts, the Commission has failed to explain the gap between its approach to robotexts, which it says can only be stopped under a Title I regime, and robocalls, where measures to address this very real problem continue to be rolled out, despite the Title II status of voice. The illogical claim that the very same law on the one hand is consistent with, and on the other hand poses an insurmountable obstacle to protecting consumers from unwanted communications, is repeated in the oppositions of

AT&T and CTIA. Neither carriers nor the FCC have supplied any evidence that Title II would prevent blocking robotexts—rather, carriers simply have claimed that it would, and the FCC has repeated those claims. Carriers then cite back to the FCC as "authority" for their initial baseless claims. This bootstrapping process falls far short of the APA's requirement that agencies engage in reasoned decision-making.

Fortunately, despite the rhetoric, Title II has so far proved no barrier to carriers implementing anti-robocall tools.[1] If anything, comments from Chairmain Pai, where he suggests that "regulatory intervention" may be necessary if carriers do not adopt caller ID authentication in a timely matter,[2] demonstrate that the strong authority Title II provides to the Commission may be the only way to ensure that carriers adopt the technical measures necessary to reduce unwanted calls and texts on a more timely basis. Far from being an obstacle to blocking robotexts, Title II may be required.

The claims made by CTIA and AT&T in opposition to the Petition are contradicted by claims by the very same parties before the Commission just a few months ago. CTIA now claims that classifying SMS as a Title I service is "is imperative to preserve wireless providers' ability to maintain messaging's status as a trusted and convenient communications medium,"[3] and that the Commission provided evidence that "Title II classification would hamper efforts to filter unwanted robotexts[.]"[4] Yet just a few months

[1] Verizon: Call Filter, https://www.verizonwireless.com/solutions-and-services/call-filter; AT&T, Press Release, AT&T, Comcast Announce Anti-Robocalling Fraud Milestone Believed to be Nation's First. https://about.att.com/story/2019/anti_robocall.html; T-Mobile, Press Release, T-Mobile First to Launch Caller Verification to Help Protect Customers From Scams, https://www.t-mobile.com/news/caller-verified-note9.
[2] FCC, Press Release, Chairman Pai: Caller ID Authentication Is Necessary For American Consumers In 2019 (Feb. 13, 2019), https://docs.fcc.gov/public/attachments/DOC-356187A1.pdf
[3] CTIA Opposition 2.
[4] CTIA Opposition 6.

ago, CTIA recommended that "[t]he Commission should couple a permissive call-blocking authorization with a robust safe harbor to promote carrier-initiated call blocking,"[5] noting that common carriage (that is, voice calling's status as a Title II service) posed no obstacle to call blocking with respect to illegal robocalls. Like the Commission, CTIA refuses to explain why Title II classification poses a barrier to efforts to protect consumers from robotexts, but not robocalls (both of which, it should be noted, are considered "calls" under the Telephone Consumer Protection Act).

Similarly, AT&T has stated that it "stands ready, willing, and able to target and block illegal robocalls more aggressively on its network,"[6] and advocates for a safe harbor similar to the one endorsed by CTIA. But it likewise maintains that Title II presents an obstacle to preventing robotexts.[7]

It is of course true that common carriage rules prevent carriers from blocking arbitrary calls (or texts) as they see fit. But it does not prevent them from blocking unwanted (to the user) or harmful calls or texts. A Title II regime for SMS would give carriers the same ability they have to block unwanted texts as they have to block unwanted calls, while also ensuring that carriers continued to act in a just and reasonable way, maintaining guardrails to ensure that carriers did not abuse their position and begin to block communications for other reasons. By contrast, a Title I regime for SMS only makes sense starting from the premise that carriers should be able to block and interfere with any

[5] CTIA Comments in CG Docket No. 17-59, Advanced Methods to Target and Eliminate Unlawful Robocalls (filed Sep. 24, 2018), at 6.
[6] AT&T Comments in CG Docket No. 17059, Advanced Methods to Target and Eliminate Unlawful Robocalls (filed Sep. 24, 2018), at 3.
[7] AT&T Opposition 7-8.

text communications they want, or should be able to label as "spam" any texts they please, without restriction. But there is no reason to trust carriers with such discretion.

***Store-and-forward***

As Public Knowledge *et al.* observed in their petition, the Commission in its final order failed to respond to substantive criticism of its draft order, merely reiterating its same conclusions. For instance, petitioners noted that the FCC was simply factually incorrect as to the nature of SMS (it is primarily a real-time, not an asynchronous service, and customers do not interact with a carrier-maintained remote database of texts), and that its reading of "store-and-forward" to include (as a legal matter) essentially any communications buffer would, similarly to its other legal theories, effectively write "telecommunications" out of the law. Opposition uses the same technique, simply repeating that the Commission got it right without providing any principled basis to distinguish SMS from other modern communications services. The Commission must therefore remedy its error by rescinding the SMS order.

***Prudential grounds***

Petitioners do not claim that the mere fact of a challenge to a related agency order provides grounds, without more, for the Commission to prudentially rescind an order. But this is not the usual case. Here, the Commission, as in the Restoring Internet Freedom order, put forth a wholly novel and untested theory whereby any service that offers customers the ability to access third-party information services becomes and information service itself. Out-of-context citations to the Stevens Report aside, this new theory, founded on shaky statutory interpretation, simply writes telecommunications services out of the law, as challengers in the Mozilla case have convincingly explained to the court. Things

have only gotten worse for the FCC since the filing of the petition, as this excerpt of the transcript of the oral argument shows:

> JUDGE MILLETT: I'm trying to pin you down on [how] to distinguish telephones and computers. And I thought the example you gave me as to what you meant by capability having different meanings was that you can do a lot, get to a lot more information when you have internet access than when you have telephonic access. And if I misunderstood you I certainly want you to have a chance to explain yourself.
>
> MR. JOHNSON: I would just put it a little bit differently. I think it's a lot more functionality, and the fact that, again, as the Court said in Brand X the fact that the telephone service is occasionally used to access things that we might consider to be apps, like --
>
> JUDGE MILLETT: Really? No, no, no, no. No. I mean, telephone service is constantly used to acquire information.
>
> MR. JOHNSON: Well, again, Your Honor -
>
> JUDGE MILLETT: And to share information.
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> MR. JOHNSON: Well, it's used to transmit information, Your Honor, and again, that is the key ambiguity in the statute.
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> JUDGE MILLETT: Not just to transmit it, they've got to, want to -- if I want to get information from my pharmacy I'd like to have something refilled, I can call over the phone and push a bunch of buttons, push buttons, and eventually I will have a prescription refilled. I can also go on the website and type in, tell the doctor's office I'd like a prescription refilled, but it seems to me the exact same functionality, one is voice and one is typing. But that can't be the difference.[8]

It seems unwise for the Commission to rely on the reasoning questioned here.

***Consumer privacy***

In the petition, Public Knowledge *et al.* observed that events since the Order was released provide grounds for its rescission. Specifically, carriers have been, at times

[8] Oral Argument Transcript, *Mozilla Corporation, et al., v. FCC* (DC Cir. No. 18-1051) (Transcript of Feb. 1, 2019 oral argument, dated Feb. 19, 2019) (cleaned up).

unlawfully, selling access to real-time location records of their customers.[9] Carriers only have this information by virtue of providing customers with various communications services, and the required legal treatment of data derived from providing these services will depend, in part, on the regulatory status of those services. By classifying first mobile broadband, now SMS, as Title I information services, the Commission has unnecessarily weakened its ability to protect customer proprietary data, even though voice remains Title II. These recent privacy lapses simply emphasize the point. Recent data breaches involving SMS messages themselves provide further evidence that deregulating SMS was a mistake. SMS VoIP providers Voxox[10] and Voipo[11] failed to secure SMS logs, exposing their users to identity theft and other forms of fraud. The best way for the Commission to protect the privacy of mobile users would be for it to rescind its SMS Order and rely on the strong, court-upheld provisions of Title II.

***Notice***

Finally, Petitioners observed that the Commission provided parties with little notice of its intended action (even leaving aside the new errors introduced for the first time in the final order)—it circulated a draft order on November 21,[12] and released the final order on December 13. Public Knowledge et al. did file an *ex parte* with the Commission on

[9] *See* Geoffrey Starks, *Why It's So Easy for a Bounty Hunter to Find You*, NEW YORK TIMES (Apr. 2, 2019), https://www.nytimes.com/2019/04/02/opinion/fcc-wireless-regulation.html Sean Hollister, *Carriers Selling Your Location to Bounty Hunters: It Was Worse Than We Thought*, THE VERGE (Feb. 6, 2019), https://www.theverge.com/2019/2/6/18214667/att-t-mobile-sprint-location-tracking-data-bounty-hunters.

[10] Zack Whittaker, Another Huge Database Exposed Millions Of Call Logs and SMS Text Messages, Techcruch (Jan. 15, 2019), https://techcrunch.com/2019/01/15/another-huge-database-exposed-millions-of-call-logs-and-sms-text-messages/

[11] VOIPO Data Leak, Jan. 15, 2019, https://rainbowtabl.es/2019/01/15/voipo-data-leak/

[12] Fact Sheet and Draft Order, Wireless Messaging Service Declaratory Ruling (Nov. 21, 2018), https://docs.fcc.gov/public/attachments/DOC-355214A1.pdf.

December 4th, highlighting the most egregious of the SMS Order's errors. But Opposition notes that Public Knowledge and others had ample time before then to file various legal theories in the docket,[13] which, after all, has been open since 2008, when Public Knowledge first filed a petition asking the Commission to formally classify SMS as a Title II service. However, Public Knowledge is not in the habit of filing legal arguments in dormant FCC dockets for no particular reason, nor would it have been possible to respond to errors in the Commission's draft order before it was circulated.

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For the foregoing reasons the Commission should grant the request of Public Knowledge et al. to rescind the SMS Order.

Respectfully submitted.
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April 2, 2019

[13] *See* CTIA Opposition 8.