

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Twilio Inc.)	WT Docket No. 08-7
)	
For An Expedited Declaratory Ruling Clarifying)	
the Regulatory Status of Mobile Messaging)	
Services)	

**REPLY COMMENTS OF
THE FREE STATE FOUNDATION***

I. Introduction and Summary

These comments are submitted in reply to the comments requested by the Commission regarding Twilio’s petition for a declaratory ruling on the regulatory status of mobile (wireless) messaging services. Twilio’s petition requests that the Commission define messaging services as “telecommunications services” and declare that messaging services are subject to Title II of the Communications Act.

The Commission should not subject messaging services to Title II common carrier regulation. The wireless messaging services market is competitive and consumers have choices not only among messaging services provided by wireless carriers but among wirelessly-accessible IP-based alternatives, including instant messaging, social media, and email. Title II regulation would saddle messaging services with special burdens and unnecessary costs and put

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

them at a competitive disadvantage vis-à-vis those alternatives, most of which are not (at least presently) regulated by the Commission.

Title II is a vestige of the analog-era monopoly telephone service regime, itself based on a 19th Century regulatory apparatus adopted for railroads. Title II is ill-suited to the wireless market and to contemporary messaging services. No evidence of market power or consumer harm has been shown regarding messaging services. Continuing innovation and growth in wireless services would be severely threatened if wireless messaging services were subjected to Title II. Importantly, no consumer welfare-focused case exists for subjecting messaging services to Title II common carrier regulations. In contrast, though, imposing Title II regulation on messaging services almost certainly would harm consumers by restricting the ability of carriers to combat spam and unwanted messages. Imposing common carrier regulation would make it more difficult for wireless providers to devise and implement new business models and protocols designed to restrict the flow of unwanted and possibly harmful and fraudulent messages.

Subjecting messaging services to Title II would also likely infringe on First Amendment rights of wireless carriers. Title II regulations would constitute compelled speech mandates, requiring carriers to send messaging content through their networks in a manner not of their own choosing. A First Amendment violation is especially likely where Title II mandates infringe upon carriers' exercise of editorial judgments in administering and curating their branded CSC messaging services.

Given the type of usage and technological processes involved, messaging services are Title I "information services" and not Title II "telecommunications services." Messaging services involve store and forward as well as other information processing, and they do not require "live" communication between messaging parties. Functionally, they are similar to

voicemail and email and should be similarly treated for definitional purposes under the Communications Act.

The Commission should seize the opportunity to clarify that wireless providers' messaging services are "information services" and not Title II services regulated in a public utility-like manner. In so doing, the Commission can provide regulatory certainty and preserve the free market environment in which messaging services have emerged and flourished.

II. The Competitive Market for Messaging Services Should Remain Unregulated

The market for wireless services, including messaging services, is a digital dynamic success story. Wireless services are an engine of explosive economic growth and sources of tremendous value to consumers of information services. Today's market is characterized by successive advance in network capability, device, and application technologies. Innovation in wireless products and services include rollouts of both high-end specialty functions for early adopters and down-market disruptive options for value conscious consumers.

Messaging services, which are offered to consumers through a number of different service and price options, are fruits of the wireless market's dynamism. Short messaging services (SMS) transmit text messages of up to 160 characters from person-to-person. Another form of SMS is application-to-person (A2P) messages, sent using 5- or 6-digit short codes.¹ Multimedia messaging services (MMS) typically deliver picture images, audio, or video clips and can include accompanying text. As is typical with most email systems, wireless carriers use store and forward techniques for SMS and MMS. Other network processing is also involved.

These messaging services have undergone explosive growth over the past decade. In 2014, consumers sent approximately 169.3 billion text messages each month, for a yearly total of

¹ See <http://www.usshortcodes.com/> (website of the Common Short Code Administration).

1.92 trillion text messages.² Also in 2014, consumers sent approximately 15.4 billion multimedia messages per month, totaling 151.99 billion for the year.³

Importantly for present purposes, consumers enjoy competitive choices among wireless providers of messaging services. As the *Seventeenth Wireless Competition Report* (2014) stated: “Each of the four nationwide service providers has a mobile wireless network that covers in excess of 99 percent of the U.S. population.”⁴ According to data cited in the *Report*, as of January 2014, 96.8% of the U.S. population was served by three or more mobile voice providers, and 91.4% was served by four or more providers.⁵ And as of that same date, 93.4% of the population was served by three or more wireless mobile broadband providers and 82.1% was served by four or more.⁶

It is common knowledge that nationwide as well as regional and local wireless providers offer consumers unlimited wireless messaging service plans, bundled with voice and data services. Unlimited messaging plans have facilitated heavy-volume messaging by wireless consumers at low costs. The story of a 13-year old who sent more than 14,000 text messages in a single month but incurred no extra charges under her father’s flat-rate plan provides a stark but simple illustration of the point.⁷

Convergence of the advanced communications market on digital, IP-based, Internet-connected technologies has also brought wireless services into competition with other services.⁸

² See CTIA Annual Wireless Industry Survey, at <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>.

³ *Id.*

⁴ Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services (“*Seventeenth Report*”), WT Docket No. 13-135 (released Dec. 18, 2014), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1862A1.pdf; at 7, ¶ 12.

⁵ *Seventeenth Report*, at 24, ¶ 48 (Chart III A.1).

⁶ *Seventeenth Report*, at 26, ¶ 51 (Chart III A.2).

⁷ Chris V. Thangham, “13-year-old girl sends 14,528 text messages in one month,” *Digital Journal* (Jan. 12, 2009), at <http://www.digitaljournal.com/article/265046>.

⁸ See, e.g., Comments of the American Consumer Institute (ACI), at 2-3.

Through broadband connections – including wireless broadband connections – online content or “edge providers” of information-based services offer “instant” messaging or social media services that constitute close substitutes for instant messaging offered by traditional wireless carriers. Standalone instant messaging services such as Skype are typically available to consumers as mobile applications, and even social media apps such as Facebook include instant messaging functionalities. E-mail also provides a widely used alternative means for messaging.

The competitive and innovative state of the wireless market, including messaging services, calls for a continued deregulatory approach. Competing providers in fast-changing markets are far better positioned than government bureaucracies to address consumers’ needs with new offerings and products. And competing providers are best positioned to respond to changes in consumers’ preferences and demands. In today’s competitive environment, failure by a wireless provider to satisfy consumer preferences for type and quality of service as well as price inevitably results in consumer migration to competitors.

Wireless messaging services have emerged and thrived free from government restrictions. This fact, bolstered by ample publicly available data regarding wireless and messaging competition, warrants the preservation of a deregulatory policy toward messaging services. Continuing innovation and growth in wireless services would be severely threatened if wireless messaging services were subjected to new regulations under Title II.

III. No Evidence of Anticompetitive Conduct Has Been Offered to Justify Title II Regulation

Given the severe intrusiveness of Title II regulations, actual evidence of wireless consumer harm relating to messaging services and tied to wireless provider market power should be demonstrated before any serious contemplation of Title II classification. But the petition and comments are devoid of evidence of a genuine market power problem or harm to consumers.

Criticizing wireless carriers for not acting like common carriers in their provision of messaging services does not amount to a showing of anticompetitive conduct.⁹ Rather than emphasize consumer welfare, the comments offer “competitor-welfare” arguments for regulations that would make suppliers provide inputs under mandates designed to improve the competitors’ prospects.¹⁰

The failure of petitioner and supporting comments to make any threshold showings of anti-competitiveness in messaging services should hardly be a surprise. Over five years ago, the U.S. Department of Justice closed its investigation into text messaging pricing without taking any action.¹¹ And a nationwide class action lawsuit alleging collusion and price fixing for text messaging services failed to substantiate any of its far-fetched claims. In April, the U.S. Court of Appeals for the Seventh Circuit affirmed a trial court’s dismissal of a nationwide class-action antitrust action against wireless providers for alleged price collusion.¹² And in upholding the trial court’s dismissal based on lack of evidence, the Seventh Circuit pointed to “the advent and increasing popularity of volume-discounted text messaging plans” that “entitled the buyer to send a large number of messages (often an unlimited number) at a fixed monthly price that made each message sent very cheap to the sender.”¹³ In any event, “competitor welfare” provides a decidedly unsound basis for imposing Title II regulation.

Imposing Title II regulation on messaging services is not only unnecessary but it likely would harm consumers by restricting the ability of carriers to thwart the flood of spam and unwanted messages. Imposing common carrier regulation would make it more difficult for

⁹ See, e.g., Petition at 15-18; Comments of Public Knowledge, Common Cause, and Free Press; Comments of The Voice on the Net Coalition.

¹⁰ See Petition of Twilio Inc. See also Comments of ACI, at 1, 3 (describing the petition as “rent-seeking”).

¹¹ See Amy Schatz and Thomas Catan, “Justice Ends Probe of Texting Rates,” *Wall Street Journal* (Jan. 15, 2010), at: <http://www.wsj.com/articles/SB20001424052748704281204575003321521100514>.

¹² *In re Text Messaging Antitrust Litigation*, 782 F. 3d 867 (7th Cir. 2015).

¹³ *Id.* at 875.

wireless providers to devise and implement new business models designed to restrict the flow of unwanted and sometimes harmful and fraudulent messages. The Commission likely would soon find that adopting an action that hinders carriers' ability to control spam is not consumer-friendly.

Further, Title II regulation is entirely inappropriate given today's marketplace realities. Title II was designed for plain old telephone service (POTS), provided using analog technologies through copper-based transmission, under tightly regulated monopoly conditions. Indeed, Title II is the regulatory construct originally devised to regulate the monopoly power of late nineteenth century railroads. It was incorporated without material change in the Communications Act of 1934 to regulate Ma Bell when POTS was a monopolistic service. Applying Title II regulation, with its regulation of charges, practices, and classifications, would put messaging services in an ill-suited regulatory straight-jacket.

IV. Title II Regulation of Messaging Services Would Infringe on Protected Free Speech

Title II regulations would constitute compelled speech mandates that likely violate the First Amendment. Violation of the First Amendment stems from requiring a wireless carrier to send and allow access to messaging content through one of its network services when the carrier prefers not to send or allow access in that manner. First Amendment violation is especially likely where Title II regulations compel messaging content as a part of a wireless carrier's CSC service.

Wireless carriers possess free speech rights just like newspapers, magazines, and cable TV operators. The medium or technological platform employed and the particular type of service being provided may impact the degree of First Amendment protection accorded or the standard of review to be applied. But there should be no doubt that wireless carriers offering messaging services possess First Amendment rights as speakers.

As the Supreme Court has recognized, “leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.”¹⁴ The First Amendment is concerned with government’s restrictions on speech. And it turns the First Amendment on its head to regard it as a power to compel the exercise of speech in non-government settings and at the expense of non-government actors.¹⁵ In *Pacific Gas & Electric Company v. Public Utility Commission*, the Court explained: “[c]ompelled access...both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.”¹⁶ First Amendment protections against compelled speech have been expressly recognized in the context of media and communications.¹⁷

In particular, editorial judgments receive First Amendment protection from compelled speech mandates. For instance, the protected status of newspaper editorial judgments concerning the numbers of pages for each issue, what sections they will include, what articles they will run, and what ads they will print was recognized in the Supreme Court in *Miami Herald Publishing Company v. Tornillo*.¹⁸ For similar reasons, First Amendment protections exist for the editorial judgments of wireless carriers concerning text messaging.

Wireless carriers exercise editorial judgments in reviewing common short code (CSC) campaigns applications to provide a curated experience for their subscribers.¹⁹ Industry best practices have developed for text messaging CSCs that unmistakably involve editorial

¹⁴ *Rumsfeld v. CAIR*, 547 U.S. 47, at 61 (2006).

¹⁵ See Comments of Public Knowledge, et al., at 3.

¹⁶ 475 U.S. 1, 9 (1975).

¹⁷ See, e.g., *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, 125 F. Supp. 2d 685 (S.D. Fl. 2000).

¹⁸ 418 U.S. 241 (1974).

¹⁹ See <http://www.usshortcodes.com/index.php>.

functions.²⁰ Editorial discretion is often necessary even where, as here, carriers have strong economic incentives to make CSCs open to widely divergent viewpoints and available to the widest scope of customers. Carriers are conscious of their own branding and need to ensure service quality by filtering out messaging content that they believe consumers don't want. If wireless messaging services were subject to Title II regulation, government proscriptions would override CSC-related editorial decisions of wireless carriers.

V. Messaging Services Meet the Statutory Definition of Title I “Information Services,” Not Title II “Telecommunications Services”

The arguments of the Petitioner and certain commenters contending that messaging services are Title II “telecommunications services” are not persuasive.²¹ Given the type of usage and technological processes involved in messaging services, they are not “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”²² Instead, messaging services are Title I “information services” offering “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”²³ As other commenters have pointed out, messaging services are functionally similar to voicemail and to e-mail.²⁴ Messaging services involve store and forward as well as other information processing functionalities, and they do not require “live” communication between parties.²⁵

Further, CSCs, which are “number sequences that serve as addresses for text messages” and not phone numbers, were “were primarily developed by commercial entities as a marketing

²⁰ See <http://www.mmaglobal.com/files/uploads/Consumer-Best-Practices.pdf>.

²¹ See, e.g., Comments of Public Knowledge, *et. al*, at 8-14.

²² 47 U.S.C. § 153(53).

²³ 47 U.S.C. § 153(24).

²⁴ See, e.g., Comments of CTIA, at 35, 40, 42; Comments of Verizon, at 15-17; Comments of AT&T, at 10.

²⁵ See, e.g., Comments of CTIA, at 37-39; Comments of AT&T, at 9.

and billing tool for advertisers and other third parties.”²⁶ There is no transmission service or transmission involved when a wireless carrier contracts to provide a CSC to a third party.

The Commission has an opportunity to affirm that messaging services are “information services.” It should seize that opportunity. By declaring messaging services to be information services, the Commission can preserve the free market environment in which messaging services have emerged and thrived.

VI. Conclusion

The Commission should act consistent with the views expressed herein.

Respectfully submitted,

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²⁶ Comments of AT&T, at 9-10.