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Free Press

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

Re: WT Docket No. 08-7
Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service

Dear Ms. Dortch:

As any watcher of this agency knows, including the appellate courts that review its orders, the Commission has frequently made fatal substantive and procedural errors in its information service classification decisions. It has committed reversible error on numerous occasions, especially when purporting to retain longstanding and vital communications rights while foolishly sweeping away the proper legal framework for such rights.

Yet before Donald Trump's unfortunate election, and his disastrous decision to let Ajit Pai serve as the chair, the Commission had been less in the habit than it is now of lying to the public whose interest it is charged to serve.

The Draft Declaratory Ruling ("Draft")[1] in the above-captioned docket is full of the same kinds of mistakes, errors, and lies that Pai and his team have made their specialty, all delivered with the knowing smirk and feigned concern that serves as the facade for their every utterance.

It is fitting that the final day to submit comments on the Draft falls on the same day as the annual chairman's charity dinner, where for an admittedly good cause Pai will awkwardly fumble his way through a series of jokes to amuse the corporate bar. The Draft's proposed classification of SMS and MMS services is, likewise, a joke. Yet despite the good intentions professed by its very few proponents, it is simply not funny. And it will make no one any better off or happier, save for the telecom carriers writing the script for this unpopular performance.

The procedural irregularities plaguing this proceeding, the phony justification that the decision would help to combat spam and unwanted messages, and the shoddy legal analysis put forward to support the classification decision, are all alarming. Free Press offers this brief submission to amplify these points as already raised by other public interest commenters. We also explain our own view on the necessity of maintaining nondiscrimination protections applicable to telecommunications services for sending and receiving text messages of the user's choosing.

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[1] *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, WT Docket No 08-7, Declaratory Ruling, FCC-CIRC 1812-04 (rel. Nov. 21, 2018) ("Draft").

The Poorly Reasoned Draft Appeared Out of Nowhere, Based on a Stale Record.

There is no time limit of which we are aware on Commission response to requests for declaratory ruling. Nor is there a set requirement on the record the Commission must compile to act on such requests. Even acknowledging the flexibility the agency has in such matters, the timing and process for the proposed decision are unwise at best and inexplicable at worst

The Commission opened the above-captioned docket nearly eleven years ago in response to a Petition for Declaratory Ruling submitted by Public Knowledge, Free Press, and six other organizations in December 2007 ("Petition").[2] Much has changed in the intervening years, though the public's need for a reasonably nondiscriminatory telecommunications network certainly has not – despite the Pai administration's attempts to eradicate that network.

As the Draft barely recounts, the Petition was prompted by harmful decisions like the one made by Verizon in 2007 to unreasonably discriminate against its customers' communications – and to do so based solely on the content and viewpoint of their speech. At that time, Verizon Wireless blocked NARAL from using short codes to send political text messages to NARAL members (and other individuals) who had affirmatively opted to receive those communications.[3]

A cursory review of ECFS shows the docket contains more than 1,200 submissions as of today. Yet just a few more than thirty of those came in 2018. Several hundred from 2016 and 2017 appear to be comments supporting Net Neutrality and Title II classification of broadband internet access services rather than text messaging services. And the Commission offered no guidance after February 2008 on this proceeding until this Draft materialized. The intervening decade only saw calls for further comment, in 2015 and 2016, on related petitions filed by Twilio and Somos.

The sole clue as to the prompt for the Commission's headlong rush to the wrong decision now is a wireless lobby filing posted just two days before the Draft appeared.[4] That filing claims, erroneously (see below), that "a telecommunications service classification would upend wireless providers' active management . . . successfully restricting a torrent of unwanted messages."[5]

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[2] Petition for Declaratory Ruling of Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, and U.S. PIRG, WT Docket No. 08-7 (filed Dec. 11, 2007).

[3] *See* Letter to Chairman Ajit Pai from Access Humboldt, *et al.*, WT Docket No. 08-7, WC Docket No. 06-122, at 2 (filed Dec. 5, 2018) ("Public Interest Letter"); *see also* Adam Liptak, "Verizon Blocks Messages of Abortion Rights Group," N.Y. Times (Sept. 27, 2007) ("Saying it had the right to block 'controversial or unsavory' text messages, Verizon Wireless has rejected a request" to "allow[ ] people to sign up for text messages from Naral by sending a message to a five-digit number known as a short code.").

[4] *See* CTIA *Ex Parte* Presentation, WC Docket No. 18-28, WC Docket No. 17-59, WT Docket No. 08-7, CC Docket No. 95-155 (filed Nov. 16, 2018).

[5] *Id.* at 5.

This claim is patently absurd on the law and the facts. Yet it is essentially the only show of support for the Commission's proposed course of action now, some eleven years after the Petition was originally filed and almost half a decade after the majority of the record evidence came in. The Commission should have at least sought further comment before launching this sneak attack on people's rights to nondiscriminatory telecommunications services, having failed to see the wisdom of proposing a proper telecom services classification decision on the (now stale) record it has compiled to this point.

The Draft Fails Utterly to Demonstrate the Need for an Information Service Classification When It Comes to Permitting Preventive Measures for Spam and "Robotexts."

Never shying away from Orwellian double-talk, this Commission casts its proposed decision in the Draft as one "helping consumers" by allowing carriers to "incorporate[e] robotext-blocking, anti-spoofing measures, and other anti-spam features into their offerings."[6] Of course, as public interest commenters have pointed out repeatedly since learning of this sham justification for the Draft, "Title II classification does not prevent carriers from using technological means to block unwanted texts or robocalls."[7] In short, Title II's mandates do not prohibit telecom carriers from honoring their subscribers' wishes to filter out unlawful or even unwanted content.

While the "reasonable network management" exception language familiarized by the Commission's Open Internet proceedings is not a precise analogue to TCPA language more relevant here, the concept is the same. Thus, as the Commission properly declared in 2015, "nothing in the Communications Act or our rules or orders prohibits carriers . . . from implementing call-blocking technology that can help consumers who choose to use such technology to stop unwanted robocalls."[8] Just so here.

This Commission and this Draft nonetheless rest on the claim that the current regulatory limbo in which text messaging services reside has allowed carriers to keep wireless messaging a "relatively spam-free service," with the "spam rate" estimated at just 2.8 percent.[9] But what was the terrible fate destined to befall text messaging if the Commission had come out the other way on the classification question? Why, the same fate besetting email, of course, where (according to wireless industry trade groups) "the spam rate . . . is estimated at over 50 percent."[10] Of course, email is the quintessential information service – demonstrating with the Commission's own example more neatly than one could even hope that an information service classification is neither necessary nor sufficient to give users the rights and the tools needed to block unwanted messages.

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[6] Draft ¶ 2.

[7] Public Interest Letter at 2 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, ¶¶ 152-163 (2015)).

[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ¶ 152.

[9] Draft ¶ 12.

[10] *Id*.

The Commission's Shoddy Legal Reasoning Fails to Account for the Potential Differences Between Carrier's Text Messaging Services and Over-the-Top Message Services.

Other public interest commenters have detailed the flawed legal analysis the Draft embraces, which unsurprisingly mirrors the misinterpretations and outright ignorance of the law on display in this Commission's broadband reclassification decision issued a year ago.[11] The Commission's attempts to once more read certain definitions out of the Communications Act fare no better now than they did in December 2017.

Once again, the Commission purposefully conflates the transmission of information of the user's choosing, with no net protocol conversion or change in that information as sent and received, with an information service that still must (on a proper read of the statutory definitions) be made available via telecommunications.[12]

In other words, the use of a telecommunications service to access other information or information services is not just unsurprising, it is the very definition of what a telecommunications service makes possible: "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[13]

The Commission also engages in the same fallacious arguments it honed in the Open Internet repeal to deny the reality that text messaging services are "interconnected" commercial mobile services. The Draft invents and inserts words into the statute, then posits incorrectly that since not all interconnected devices can receive text messages, the service is somehow not truly interconnected with the public switched network.[14]

Yet another failing in the Commission's legal reasoning, if it can be called reasoning, is the utterly indefensible choice to obscure the differences between (1) text messaging services (and indeed all text or voice transmission services) that exclusively utilize ten-digit telephone numbers[15] and (2) "over-the-top" or other integrated wireless messaging services that may utilize broadband connections and IP-enabled technologies.

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[11] *See, e.g.*, Letter to Marlene H. Dortch from Public Knowledge, *et al.*, WT Docket No. 08-7 (filed Dec. 4, 2018).

[12] *See* 47 U.S.C. § 153(24); *id.* § 153(50); *id.* § 153(53).

[13] 47 U.S.C. § 153(50).

[14] *See id.* at 4 ("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[.]' 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.") (citations omitted).

[15] *See* Draft ¶ 11.

For one thing, no matter how strenuously the Pai Commission tries to invent one, there is no test in the Communications Act that provides for changing a transmission service's proper statutory classification so long as there are alternatives available.[16]

What's more, the searingly obvious fact that not every wireless texting service subscriber can afford to or chooses to adopt wireless broadband seemingly escapes the Pai Commission, as the Draft blithely suggests that all "[c]onsumers have a wealth of options for wireless messaging service" including "over-the-top applications."[17] The fact that this Commission would free the carriers' messaging services to emulate the more privacy-invasive alternatives offered by over-the-top providers is of note, and of grave concern too.

Yet not everyone even has that option of switching to such other services. As Free Press research reports[18] and mountains of other evidence show, the individuals least likely to adopt broadband are low-income individuals. They are also disproportionately people of color (at every income level).[19] And they are also more likely to be members of other marginalized and under-served demographic and geographic communities, such as seniors, some non-English speakers, and rural residents. These individuals should not be subject to the whims of wireless carriers' decisions to block political messages – or, in fact, any wanted messages – when those without broadband cannot simply click over to a different application for their messaging needs.

Title II, with its telecom services classification appropriate for text messaging services, safeguards people's rights to just, reasonable, and nondiscriminatory communications services. While this Commission has time and again shown its willingness to deprive people of those congressionally granted rights, the falsehoods and flawed arguments the Draft employs to attempt that repeal here do not withstand scrutiny.

Respectfully Submitted,

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[16] *See id.* ¶ 47.

[17] *Id.* ¶ 46.

[18] *See generally* S. Derek Turner, Free Press, *Digital Denied* (Dec. 2016).

[19] *See, e.g., id.* at 3.