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

In the Matter of: Petition of Twilio Inc. for an Expedited Declaratory Ruling Stating That Messaging Services Are Title II Services	))))))))	WT Docket No. 08-7

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition ("VON")[1] hereby submits these comments in response to the Federal Communications Commission's ("Commission") October 13, 2015, Public Notice, seeking comments regarding the above-captioned matter. While VON agrees with Twilio's assessment that wireless carriers have unreasonably disadvantaged non-carrier messaging services, VON does not at this time believe it is necessary to address the classification of messaging services in order to resolve the issue. Instead, the Commission should use its existing authority over wireless and broadband networks, employing its available existing enforcement tools to resolve recurring problems that cannot be solved by industry.

I. Background

On August 28, 2015, Twilio[2] filed a petition for an expedited declaratory ruling asking the Commission "to declare that messaging services are governed by Title II" of the Communications Act.[3] Twilio asserts that wireless carriers engage in a variety of discriminatory

[1] The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of IP enabled communications. VON Coalition members are developing and delivering voice and other communications applications that may be used over the Internet. For more information, see www.von.org.
[2] Twilio describes itself as a company that merges cloud computing, web services, and traditional voice and messaging communication. *See In the Matter of Petition of Twilio Inc. for an Expedited Declaratory Ruling Stating that Messaging Services are Title II Services,* WT Docket No. 08-7 at 4 (August 28, 2015) ("*Twilio Petition*").
[3] *Twilio Petition* at 39.

and anti-competitive practices that cannot be adequately addressed absent a declaratory ruling classifying messaging services under Title II.[4] Specifically, Twilio states that wireless carriers block messaging traffic based on content as a means to require providers of certain messaging to use the premium Common Short Code ("CSC") system, resulting in unnecessary charges and lengthy wait times for approval of the code by the same wireless carrier.[5] Twilio also states certain wireless carriers have attempted to impose expensive per message fees for originating or terminating messages by non-wireless entities by inserting an intermediary gatekeeper in the transport process.[6]

Twilio further asserts that, under judicial and Commission precedent, messaging services constitute telecommunications services and commercial mobile radio services ("CMRS") and are thus subject to Title II.[7] Twilio argues that "messaging services are Title II services because the Commission has already classified messaging services as calls subject to certain Title II obligations."[8] Twilio also contends that "refusing to classify messaging services as Title II services after the *Open Internet Order* creates an untenable contradiction in the statutory framework."[9]

II. Messaging Services Are Not Treated Equally By Wireless Carriers

VON agrees with Twilio that carrier and non-carrier messaging services are not treated equally by wireless carriers, and this different treatment often is not justified by different characteristics of the services.[10] Indeed, as explained in more detail below, there are a number of concerning issues in the United States messaging ecosystem. First, the short code use case

[4] *Id.* at 2-25.
[5] *Id.* at 18.
[6] *Id.* at 19-25.
[7] *Id.* at 25-36.
[8] *Id.* at 26.
[9] *Id.* at 29.
[10] *See Id.* at 2-25.

approval process is not timely or uniformly applied, and pricing is excessive; second, SMS enablement of toll free services lacks healthy competition; and third, mobile operators have designed an ecosystem that discriminates against messaging services that are delivered by entities that are not tethered to the underlying network operator, i.e., services often referred to as over-the-top ("OTT") services.

A. Short Code Use Case Approval Process Is Not Timely Or Uniformly Applied, And Pricing Is Excessive

The current short code approval and provisioning process requires a business seeking a short code to engage with a third party administrator (Neustar, soon to be iconectiv) to lease the code. The short code can be leased for a period of 3, 6, or 12 months for a non-refundable fee of $1,000 per month. The entire lease payment must be paid upfront before the short code is assigned to the applicant and registered.

Next, the applicant must submit a program brief to inter-carrier vendors ("ICVs" such as Syniverse or Sybase) for approval by each wireless carrier -- a process whereby the carriers review content and determine, *a priori*, which speech may be transmitted over their networks by those using short codes. The applicant must pay for the short code upon assignment from the administrator, and it is only at that point that the applicant can begin the time-consuming provisioning process. The wireless carriers commonly take an unreasonably long time to issue approvals – typically between 8 and 16 weeks, and they provide no clear guidance on approval timelines. Although an applicant cannot use a short code during this content review process, an applicant must continue to pay the monthly lease fees during the review period.

In addition to being unreasonably slow, the current approval process for short codes is unpredictable. Carriers reject program briefs based on ambiguities and discrepancies in industry rules and best practices, and on the basis of policies unilaterally applied by individual carriers. It

is not uncommon for three of the four major wireless carriers to approve a particular use case, while the fourth rejects it on account of a unique requirement that does not implement any industry standard or even any industry-recognized principle.[11]

These practices erect unnecessary hurdles for businesses that seek to use short codes, and give wireless carriers extraordinary power to control which services timely make it to market and which do not—thus creating the potential for carrier abuse.

B. Carriers Are Participating In Arrangements That Impose Excessive Fees On Toll Free Services

Enabling SMS over long codes in toll free ranges (currently identified as numbers in NANPA-administered NPA ranges starting with 800, 888, 877, 866, 855, and 844) is another area in which wireless carriers are selectively disadvantaging traffic. Toll free ranges are assigned to RESPORGS, rather than wireless carriers. Certain wireless carriers require that this non-mobile traffic must be routed to an ICV partner of the carrier. The ICV then treats the toll free traffic less favorably than traffic that uses wireless carrier number ranges, subjecting the toll free traffic to inflated fees, a portion of which is returned to the wireless carrier that established the ICV as its intermediary.

This burdensome arrangement is not justified by technical limitations. As Twilio notes on pages 8-9 of its petition, texting to toll free numbers, without special charges, was routine before it was blocked by mobile operators in favor of the new, more costly practice.

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[11] In certain cases, a single carrier may not act at all; and, if the messaging provider attempts to send test messages to that carrier the messages will likely not be delivered. *See also* Natalie Gagliordi, *The other net neutrality debate: After FCC ruling, SMS still mired in ambiguity,* ZDNet.com (March 10, 2015), *available at* http://www.zdnet.com/article/the-other-net-neutrality-debate-should-mobile-messaging-be-subject-to-provider-policing/.

C. Mobile Operators Have Widely Discriminated Against Non-Carrier Messaging Services

The conditions described above are symptoms of a pervasive problem. Across the messaging ecosystem, wireless carriers have engaged in practices that systematically disadvantage non-carrier providers that seek to introduce new and innovative services the carriers perceive as a threat to their own messaging revenues.

1. Delayed MMS Interoperability

Around 2007, entities other than wireless network operators began deploying services using landline numbers that were SMS-enabled. This created an influx of innovative SMS services such as Google Voice, Pinger, TextPlus, and Twilio, to name just a few. Today this capability is used by almost all operators using non-mobile numbers. However, because carriers withheld their approval in 2007, MMS was not enabled on many of these services until recently.

The delay in MMS interoperability had little if anything to do with technical limitations. In the years between the launch of non-carrier provided SMS services using SMS and the availability of non-carrier provided MMS messaging, wireless carriers created a competitive advantage for themselves by denying interoperability to non-carrier providers while allowing for MMS interoperability among themselves.

2. Ongoing Threat Of Discrimination Against Non-Carrier Messaging Services

Non-carrier messaging providers have been specially disadvantaged by practices that ICVs enforce in conjunction with wireless operators. For instance, in 2014 the ICV Syniverse – collaborating with several large wireless carriers – moved to impose a new fee on non-carrier messaging providers in order for their customers to send texts to, or receive texts from, the carriers' customers. The wireless carriers would be exempt from the fee. Moreover, while non-carrier messaging providers would have to pay, they could not similarly have Syniverse charge

the wireless carriers for messaging traffic terminating to the non-carrier messaging providers' own customers. Although, due to industry outcry, Syniverse did not implement its scheme as originally designed, the risk of such discrimination (and the potential burden of these fees) remains a foremost concern for non-carrier messaging providers.[12] This fear of targeted adverse action by carriers is a material impediment to other providers' investment in new and innovative messaging services.

III. At this time, the Commission Should Encourage Industry to End the Unreasonable Practices, and if Industry Cannot, the Commission Should Exercise its Existing Statutory Authority to Address the Issues

While VON agrees with Twilio's assertion that non-carrier provided messaging services receive unequal treatment by wireless carriers, VON does not believe that the Commission should pursue Title II classification at this time. Rather, the Commission can use its existing authority over wireless carrier networks and messaging services to incentivize the industry to resolve the problem itself.[13]

The Commission has frequently used its Title I and Title III authority over messaging services to impose requirements on providers of those services. For example, in May 2013, the Commission issued its *Bounce-Back Order* requiring wireless carriers to provide consumers attempting to send a text message to 911 with an automatic "bounce-back" text message when the service is unavailable.[14] In response to arguments from commentators that the Commission lacked authority,[15] the Commission asserted that its authority to require wireless carriers to

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[12] *See Twilio Petition* at 15-25; Robert X. Cringely, *Mobile Carriers are Trying to Control Your Texting,* Forbes.com (Sept. 8, 2014), *available at* http://www.forbes.com/sites/robertcringely/2014/09/08/mobile-carriers-are-trying-to-control-your-texting/.

[13] The Commission should work with the industry to decide the appropriate approach to resolving the problems identified by Twilio and herein.

[14] *Facilitating the Deployment of Text-to-911 & Other Next Generation 911 Applications*, PS Docket Nos. 10-255 and 11-153, Report and Order, 28 FCC Rcd 7556 (2013) ("*Bounce-Back Order*").

[15] *See Bounce-Back Order* at ¶¶ 93-118.

provide bounce-back messages stemmed from several sources, including the 21st Century Communications and Video Accessibility Act of 2010, and its Title III and ancillary powers.[16]

Regarding Title III authority, the Commission explained that "numerous Title III provisions provide the Commission with direct authority to impose the bounce-back requirement on CMRS providers. Indeed, the Supreme Court has long recognized that Title III grants the FCC 'expansive powers' and a 'comprehensive mandate' to regulate the use of spectrum in the public interest."[17] The Commission concluded that "Sections 301,[18] 303,[19] 307,[20] 309,[21] and 316,[22] taken together or individually, provide the FCC with authority to apply the bounce-back requirement to messaging services provided by both CMRS providers and other providers of interconnected text messages."[23]

The Commission also asserted that its ancillary authority empowered it to apply the bounce-back requirement. The Commission cited its general grant of jurisdiction under Title I as extending to "all interstate and foreign communication by wire or radio."[24] It explained that "interconnected text messaging applications, including those provided by OTT providers, fall

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[16] *Id.* at ¶¶ 88-140.
[17] *Id.* at ¶ 89.
[18] 47 U.S.C. § 301 ("It is the purpose of this [Act], among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority.").
[19] 47 U.S.C. § 303(b) (authorizing the FCC to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class"); 47 U.S.C. § 303(g) (the Commission shall "encourage the larger and more effective use of radio in the public interest"); 47 U.S.C. § 303(r) (the Commission may "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]").
[20] 47 U.S.C. § 307 (authorizing the FCC to grant station licenses "if public convenience, interest, or necessity will be served thereby").
[21] 47 U.S.C. § 309(a) (authorizing the Commission, in acting on certain license applications, to determine "whether the public interest, convenience, and necessity will be served by granting such application").
[22] 47 U.S.C. § 316(a) (authorizing the FCC to modify existing licenses to impose new license conditions if, in the judgment of the Commission, such action will promote the public interest, convenience and necessity).
[23] *Bounce-Back Order* at ¶ 90.
[24] *Id.* at ¶ 129.

within the FCC's general subject matter jurisdiction to the extent they are enabling consumers to transmit text messages via radio communication."[25]

The Commission's 2014 *Text-to-911 Order* that required wireless carriers to be capable of providing text-to-911 services illustrates the same point.[26] Similar to the explanation of its authority to require bounce-back services a year earlier, the Commission held in the *Text-to-911 Order* that "there are multiple reasons why mandating text-to-911 capability by interconnected text providers is within the broad scope of the Commission's ancillary authority."[27] The Commission went on to state that, "[a]s outlined in the *Bounce-Back Order,* the Commission has broad authority under Title III to prescribe the nature of the service provided by CMRS providers, and it is undisputed that such authority extends to requiring text-to-911 capability."[28] While explaining that it did not have unbounded authority, the Commission concluded that its exercise of authority fell "squarely within the core of general grant of jurisdiction in Title I with respect to 'all interstate and foreign communication by wire and radio,'" including communications by CMRS providers and other providers of interconnected messaging applications, such as those providers delivering services via the Internet.[29]

If the Commission had jurisdiction under Title I and Title III in those circumstances, then it has jurisdiction here. As CMRS providers, wireless carriers are subject to Sections 201 and

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[25] *Id.*
[26] *Facilitating the Deployment of Text-to-911 & Other Next Generation 911 Applications*, PS Docket Nos. 10-255 and 11-153, Second Report and Order and Third Further Notice of Proposed Rulemaking, 29 FCC Rcd 9846 (2014) ("*Text-to-911 Order"*).
[27] *Id.* at ¶ 75 (citing 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.") and 47 U.S.C. § 303(r) ("Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party")).
[28] *Text-to-911 Order* at ¶ 76.
[29] *Id.* at ¶¶ 71-75, 78 (citing 47 U.S.C. § 152(a)).

202 of the Communications Act for any content carried on those licensed wireless networks.[30] Twilio asserts that Title II classification of messaging services is necessary for messaging services to fall under the auspices of these provisions.[31] However, the Commission does not need to classify these or similar messaging services under Title II to regard them as subject to non-discrimination and no blocking provisions.

CONCLUSION

While the unreasonable and unequal treatment of non-carrier provided messaging services by wireless carriers is a problem that threatens the healthy development of innovative and diverse offerings to consumers, the Commission should both a) encourage messaging industry participants to resolve these matters voluntarily and b) employ existing tools to address issues that industry cannot otherwise resolve itself. For the foregoing reasons, the VON Coalition believes that the Commission has sufficient authority to address the issues without classification of messaging services under Title II at this time.

Respectfully submitted,

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[30] The wireless carriers' discriminatory practices cannot withstand scrutiny even if the messaging services are transported over the wireless carriers' broadband networks. The Commission stated in its *Open Internet Order* that "the rules we adopt today prohibit broadband providers from, for example, blocking messaging services that are delivered over a broadband Internet access service." *Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5746 at n.881 (2015).

[31] *Twilio Petition* at 25-39.