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

In the Matter of		
Petition of Twilio, *et al.* For Declaratory Ruling that Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules	)	WT Docket No. 08-7

Reply Comments of ITIF

December 21, 2015

The Information Technology and Innovation Foundation (ITIF)[1] appreciates this opportunity to comment on the appropriate regulatory framework for mobile messaging services. While we believe as a matter of law, mobile messaging services are information services that are precluded from treatment as common carriers, here we focus on the policy reasons why the Commission should prefer a continued light-touch approach to messaging as an information service.

The petition filed by Twilio on August 28, 2015, asked the Commission "to declare that messaging services are governed by Title II." This would be a mistake. Title II classification of messaging and short codes would significantly disrupt efforts that have made messaging a successful service. Here the primary concern is how common carrier status would lead to an increase in unwanted messages, significantly undermining the value of these services to end users. Furthermore, a change in the regulatory classification, requiring carriers to hold themselves out to all incoming messaging traffic, would undermine ongoing competition between messaging platforms with unpredictable consequences. The information service status of mobile messaging has allowed carriers to create a valuable service for consumers, and the Commission should maintain this environment.

[1] Founded in 2006, ITIF is a 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank—focusing on a host of critical issues at the intersection of technological innovation and public policy. Its mission is to formulate and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

Simply put, none of the harms described in the petition rise to the level of necessitating Title II classification or oversight through Title II non-discrimination rules. As well-discussed in the record, particularly in the opposition of CTIA, carriers go to great lengths to provide a curated messaging environment that is virtually spam-free.[2] Consumers have come to trust this service and value it highly—SMS messages have an open rate of approximately 98 percent—and, in turn, marketers see a lucrative opportunity.[3] Some entities, enabled by software-based innovations in the IT stack by companies like Twilio or Bulk SMS, for example, see an opportunity to exploit consumers' trust in this system. Carriers' efforts to limit any ill-effects of an increase in unwanted messages are entirely appropriate to ensure consumers' text message inboxes do not end up looking like email junk folders. Common carrier classification, or even one-sided oversight of disputes under Title II jurisdiction, would disrupt these successful efforts.

It is disappointing to see parties in the record import the inflated rhetoric that saw them success in the Open Internet proceeding.[4] Some seem to think the term "gatekeeper" is a magic wand that somehow justifies common carrier regulation wherever a customer purchases service from a single communications provider, with little regard for the numerous ways in which modern day business disputes are different from the narrow regulatory arbitrage problem of the so-called "terminating access monopoly" under prior intercarrier compensation regimes.[5]

There is ample evidence on the record to show that any "blocking" is a result of either appropriate curation of the service or, on the margins, an overly aggressive filtering algorithm, and in any event is a very different situation than the harms focused on in the open Internet context. There, the broad array of services enabled by unfettered access to the Internet implicates a diversity of important economic and noneconomic interests, and it is entirely understandable that the Commission sought to protect the open Internet, even if ITIF continues to believe it chose the wrong legal vehicle. Messaging is obviously an altogether different service from Internet access; even if the Commission believes consumers are being harmed—which we believe they are not—it should take as narrow of steps as possible to correct those harms, and not resort to Title II with its unintended consequences.

Moreover, the Commission should recognize that carrier-provided mobile messaging is one offering among a wide diversity of increasingly popular over-the-top messaging services, and allow messaging services and protocols to adapt without regulatory intervention. Although the internal maneuverings of the W3C, IETF,

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[2] *See* Opposition of CTIA-The Wireless Association.
[3] Aine Doherty, "SMS Versus Email Marketing," Business 2 Community (July 28, 2014), http://www.business2community.com/digital-marketing/sms-versus-email-marketing-0957139#!bth7SG#p4yrrrEp364ECQfI.97.
[4] *See* e.g. Comments of Public Knowledge, Common Cause, and Free Press.
[5] *See* Jonathan E. Nuechterlein & Christopher S. Yoo, "A Market-Oriented Analysis of the 'Terminating Access Monopoly Concept'" 14 Colo. Tech. L.J. 21 (December 2015), *available at* http://ssrn.com/abstract=2698393.

or GSMA don't make for good headlines, the strategic positioning of various forward-looking, real-time communications platforms is high drama for those who follow them. Here the most interesting competition is between WebRTC, particularly the open-source version Google is backing, and Rich Communications Services (RCS), developed by GSMA. In-app or OS-based mobile notifications and messaging systems are becoming increasingly popular. Even email serves the same purposes as text messaging in most contexts. Carriers' successful curation of their messaging ecosystem is a competitive advantage in messaging that helps spur others to innovate—overly-broad regulation, especially implication of Title II, would disrupt that dynamic competition.

Oversight via Title II would likely slide into restrictions on carriers' ability not only to protect users from spam, but also to price services appropriately. It is an unfortunate reality that these networks actually have to be built, and it costs real money to do so. Unlike the software world, wireless networks simply cannot recoup investments in equipment, siting, backhaul, etc. by pricing all services at marginal cost. For this reason, Twilio's comparison of message pricing and payload size to telephone calls is unhelpful.[6] There is no reason the pricing of enterprise or nonprofit access to a communications platform that consumers trust should be related to data use of the service. As the nation begins considering the shape of 5G deployments, one thing is certain: next generation wireless access will see tremendous investment for the densification and backhaul needed to make visions of 5G a reality—sliding into second-guessing of service pricing would reduce a source of revenue that could be directed to this infrastructure investment.

As an aside, Ramsey pricing teaches us that to maximize social welfare of a service, we generally want higher costs on those with relatively inelastic demand. In this context, businesses, marketers, and fundraisers who are willing to pay for short codes essentially help subsidize the relatively elastic demand of the texting public, who now enjoy large buckets of low-priced messages. In other words, it is unclear how even extensive regulation could possible improve the current situation of beneficial curation and price discrimination. Twilio claims "the wireless carriers, in effect, use blocking to enforce price discrimination," without recognizing not just that consumers may not want these messages, but also that this is exactly the type of circumstance where price discrimination would be welfare maximizing.[7]

Even if one construes all the facts against wireless providers, takes an overly narrow view of the messaging market, and wrongly believes this is a terminating access problem (in other words, even if one reads the comments of Public Knowledge, Common Cause, and Free Press at face value, which ITIF does not), the Commission should still only take narrow action and avoid Title II. There are, of course, network effects and network externalities to a thriving messaging system like that established by carriers. There is good reason to want these services accessible to outside innovators under the right circumstances. But that does not mean common carriage, with all its unintended consequences, is warranted. There are private solutions to all of the

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[6] Twilio Petition at 12.
[7] *Id.* at 8.

problems alleged in the petition, and to the extent there are any problems, the Commission should encourage industry to resolve them and avoid the ill-effects of implicating common carriage before exploring sources of oversight authority other than Title II.[8]

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[8] *See* Voice on the Net Coalition Comments at 6.