

**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)	WT Docket No. 08-7
Services Are Title II Services)	
)	
)	

REPLY COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (“VON”) hereby submits this reply to comments regarding the above-captioned matter. The comments filed by VON and many others provide additional evidence in support of Twilio’s assessment that wireless carriers have unreasonably disadvantaged non-carrier messaging services. The discrepancy between the examples of such treatment provided in the comments of VON and others, and the lack of a convincing rationale by wireless carriers for this treatment, is telling. The Commission can address these issues more quickly using existing tools than it could through classification of messaging services; and should do so if carriers do not timely address the industry-wide process and pricing problems identified in Twilio’s petition and the responsive comments.

I. Wireless Carriers Fail to Justify Unnecessary Delays, Excessive Pricing, and Unpredictability that Exist in the Short Code Approval and Provisioning Process

Comments filed in this proceeding describe the existence of wireless carrier practices in the short code application and provisioning process 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 The result is a process full of uncertainty for applicants.

In their comments, wireless carriers make little attempt to provide a credible rationale for the unnecessary delays, excessive pricing, and unpredictability that exists in the short code application and provisioning process. To the contrary, CTIA itself admits that the “review process can be time-consuming.”² And while CTIA’s claims that carriers have taken steps that “led to reductions in the time required for individual providers to approve campaigns,” it offers no data to support its suggestion that approval times are falling.³ Indeed, VON members are not experiencing noticeably faster approvals.

In addition, CTIA does not adequately address the fee regime associated with the short code application process. As discussed in VON’s comments, applicants cannot use a short code during the review process, but must pay monthly lease fees during the lengthy review period, which typically takes between 8 and 16 weeks.⁴ In response, CTIA states in general terms that carriers must make sure the proposed content is not SPAM and vet all would-be short code holders, and that this process is “not without cost.”⁵ CTIA does not explain, however, why lease fees must be paid during the entire application period before the short code can be used and whether fees are reasonably related to costs actually incurred.

Furthermore, CTIA does not address the unpredictable nature of the short code approval process, where program briefs sometimes are approved by three of the four major carriers, but

¹ See, e.g., Comments of NexGen Global Technologies, LLC, WT Docket No. 08-7, at p. 4 (filed Nov. 17, 2015); Comments of OneReach, WT Docket No. 08-7, at p. 1 (filed Nov. 12, 2015); Comments of HeyWire, WT Docket No. 08-7, at p. 1-2 (filed Nov. 20, 2015); Comments of Polaris, WT Docket No. 08-7, at p. 1 (filed Nov. 17, 2015); Comments of CallFire, WT Docket No. 08-7, at p. 2 (filed Nov. 20, 2015).

² Comments of CTIA – The Wireless Association, WT Docket No. 08-7, at p. 23 (filed Nov. 20, 2015) (“CTIA Comments”).

³ *Id.* n.61.

⁴ Comments of The VON Coalition, WT Docket No. 08-7, at p. 3 (filed Nov. 20, 2015) (“VON Comments”).

⁵ CTIA Comments at p. 22.

rejected by the fourth without explanation or citation to any industry standard or requirement. The closest CTIA comes to addressing this unpredictability is in its drawing an analogy between the short code review process and the Transportation Security Administration's "TSA Pre" program.⁶ It is ironic that CTIA would use such an analogy, because it highlights the problem. Just as long security lines drive travelers to pay for the TSA Pre program, long delays in the short code provisioning process compel consumers to use carrier messaging services. In other words, carriers can increase demand for their services by maintaining delays and other obstacles in the short code provisioning process.

There are other holes in the carrier arguments as well. In particular, CTIA argues that the carriers' pre-approval processes for non-carrier messaging services are necessary to protect users from unwanted messages,⁷ but Zipwhip says this is not true. To the contrary, Zipwhip reports that it has worked with the carriers on a solution outside the CTIA Messaging Guidelines that provides the carriers higher payments from non-carrier providers.⁸ Even as it highlights the systemic disadvantages imposed on non-carrier providers, therefore, Zipwhip's filing undermines

⁶ *Id.* at 21.

⁷ CTIA Comments at p. 26 ("Hybrid messages sent as ten-digit number traffic *are* subject to the traditional spam filters applied to such traffic, but these filters inevitably disrupt messaging traffic that some cloud-based service providers argue is wanted traffic. For example, under some circumstances, traffic from commercial call centers may use long codes and thus be treated as P2P, but may be blocked by spam filters because it exceeds filters' thresholds for volume, throughput, number of recipients, and/or traffic balance. Put differently, the traffic bears all the hallmarks of spam, and is treated as such. As noted, the Short Code program is meant to "pre-approve" such traffic and thus to ensure that it will *not* be disrupted by P2P spam filters. **But without the protections of the Short Code program, wireless providers have no means of protecting their customers except by applying such filters.**") (emphasis added).

⁸ Comments of Zipwhip, WT Docket No. 08-7, at p. 1 (filed Nov. 20, 2015) ("Twilio and the other responders currently use the P2P (person-to-person) SMS ecosystem to send their commercial traffic. That set of P2P connectivity has volumetric spam algorithms in place as a first line of defense against spam which is what Twilio and other filers are referring to as "arbitrary blocking". The volumetric technique is not compatible with commercial traffic which can accidentally get blocked because the high volume can trigger a volumetric filter. **Zipwhip has worked with the wireless carriers over the last 2 years to help solve this problem. The solution exists today and is known as E2P texting. Any provider who uses the P2P ecosystem, Twilio included, has the option to move to the E2P ecosystem to gain a higher class of service where volumetric spam catching no longer occurs.**") (emphasis added).

the contention that the Messaging Guidelines are essential for SPAM protection, and cannot be varied without harming users.

Furthermore, the delays and reviews that attend the short code program are not limited to protect those consumers who have affirmatively requested SPAM controls. If a carrier rejects a short code use case submission, it effectively blocks its subscribers from receiving SMS-based communications from certain senders without notifying the subscriber. CTIA provides no reason to believe consumers prefer this outcome. To the contrary, carrier use preferences, rather than consumer use preferences, govern the determination of whether or not to block messages. Further, consumers do not know who is being blocked or why – or even that any blocking is taking place.

In its recent Declaratory Ruling regarding implementation of the Telephone Consumer Protection Act, the Commission clarified that call blocking technologies are permissible only if consumers chose to use such technology through an informed opt-in process.⁹ It emphasized that “consumers have the right to block calls”¹⁰ but cited a 2007 Declaratory Ruling stating that “no carriers . . . may block, choke, reduce or restrict traffic in any way” as addressing concerns about carriers “blocking calls at their own discretion without providing consumers any choice or, indeed, even awareness of the practice.”¹¹ That’s precisely what’s happening with the short-code program. CTIA offers no suggestion that consumers are given an informed opt-in process to utilize the short-code administrative regime as a SPAM blocking mechanism. Nor are consumers afforded the opportunity to identify senders of calls – in this case, texts – with whom

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 and WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 at ¶¶ 152-258 (2015) (“*TCPA Declaratory Ruling*”). That opt-in process must inform consumers of the risk that the technology may inadvertently block desired calls. *Id.* at n.514.

¹⁰ *Id.* at ¶ 158 (emphasis in original).

¹¹ *Id.* (citations omitted).

they wish to communicate. Without these measures in place, the current short code program is deficient even when viewed as a SPAM control mechanism.

In addition, high prices imposed on senders of messages through the short code program deter legitimate communications with the subscribers of mobile operators who pay those mobile operators to deliver their messages to them. Well-funded entities might be able to afford this payment regime, but it deters or prevents lesser-funded entities, such as some non-profit organizations, from communicating with wireless subscribers. The high cost is particularly surprising given that the short code system constitutes a double recovery mechanism whereby the calling party (in this case, the messaging entity) pays *and* the called party pays (through service payments to the mobile operator).

II. Title II Classification is Not Necessary at this Time

Twilio and commenters in favor of Title II classification focus on classification as if it is the only way the Commission can address the wireless carriers' anti-competitive practices. However, they do not adequately address why Title II is the *only* means by which these issues could be resolved. On the other side, wireless carriers flatly deny that there is anything wrong with their practices. These two positions ignore the middle ground between Commission inaction and Title II classification that VON proposed in its comments.¹² Specifically, VON proposed that the Commission encourage the industry to resolve these matters voluntarily. For matters that cannot be resolved voluntarily, the Commission can use its Title I and Title III authority to impose requirements on providers of messaging services, just as it did in the 2013 *Bounce-Back Order* and the 2014 *Text-to-911 Order*.¹³ The Commission should exercise that

¹² VON Comments at pp. 6-9.

¹³ *Facilitating the Deployment of Text-to-911 & Other Next Generation 911 Applications*, PS Docket Nos. 10-255

statutory authority if carriers do not, within the first half of 2016, adopt reforms such as eliminating use case review, tightening compliance with CTIA's own Messaging Guidelines, and reducing short code prices.

CONCLUSION

As the record clearly indicates, unreasonable and unequal treatment of non-carrier provided messaging services by wireless carriers negatively impacts innovation and new offerings to consumers. In response, 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. The Commission should establish a clear expectation regarding the date by which it will expect corrective industry action. But if that corrective action is not taken voluntarily, the Commission has sufficient authority and the processes in place to address the issues without classification of messaging services under Title II at this time.

Respectfully submitted,

VOICE ON THE NET COALITION

/s/

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and 11-153, Report and Order, 28 FCC Rcd 7556 (2013) ("*Bounce-Back Order*"); *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*").