

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Targeting and Eliminating Unlawful Text Messages)	CG Docket No. 21-402
)	
In the Matter of Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service)	WT Docket No. 08-7
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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SUMMARY

Public Knowledge files these reply comments in support of commenters in favor of the efforts by the Federal Communications Commission (“Commission” or “FCC”) to protect consumers from unwanted and scam text messages. Specifically, Public Knowledge writes to emphasize that the proposed network-level blocking rule in the Targeting and Eliminating Unlawful Text Messages NPRM¹ is a common-sense measure to universalize existing measures that target blatantly illegal text messages sent to consumers.

Further, Public Knowledge writes to clarify that the Commission should also: (1) issue a declaratory ruling to clarify that prior express consent to receive a call or text can only be provided to one caller at a time; (2) clarify and finalize its TCPA exemption rules to specifically exclude scam calls and texts; and, most importantly, (3) properly reclassify text messaging services as Title II services to strengthen its authority to combat illegal text messages and advance its efforts in parallel with the Commission’s mission to eliminate unwanted and scam telephone calls while ensuring texting remains fair, accessible, competitively-neutral, and non-discriminatory.

¹ *Targeting and Eliminating Unlawful Text Messages*, CG Docket No. 21-402, Notice of Proposed Rulemaking, 87 Fed. Reg. 61, 271 (Oct. 11, 2022), available at <https://www.federalregister.gov/documents/2022/10/11/2022-22049/targeting-and-eliminating-unlawful-text-messages> (“Unlawful Texts NPRM”).

I. THE PROPOSED SCOPE OF MANDATORY NETWORK-LEVEL BLOCKING IS BOTH NECESSARY AND BENEFICIAL

As noted in the Unlawful Texts NPRM, text messaging is one of the most popular forms of communication in the United States.² This popularity, as well as specific features of the medium, makes text messaging a tempting vehicle for annoying telemarketing, illegal spam, and criminal scams. For example, text messages can contain hyperlinks that directly link consumers to phishing pages or even load malware onto mobile devices. Additionally, consumers regularly receive brief messages from unfamiliar short codes with valid alerts and reminders from service providers, financial institutions, and other important and trusted institutions. The brevity of these messages—and their often-urgent nature—can make it much more difficult for someone to recognize a fraudulent message when compared with a suspicious phone call or email.

Unfortunately, all indications point to unwanted and illegal texts growing as a problem.³ We concur with the Commission’s assessment that increases in illegal texts may be linked to improvements in call blocking, resulting in migration by bad actors to text.⁴ Absent Commission action this trend will increase, so decisive changes are needed to reverse this trend and prevent further abuse of text messages. Additionally, it is necessary for the Commission to take actions against illegal and unwanted calls and texts in parallel, to prevent merely shifting problems from one component of our communications networks to another.

The Commission has proposed a requirement for mobile wireless providers to block text messages at the network level “that purport to be from invalid, unallocated, or unused numbers, and numbers on the DNO list.”⁵ This requirement obliges carriers to comply with a baseline level

² Unlawful Texts NPRM at para. 1.

³ Unlawful Texts NPRM at para. 3.

⁴ Unlawful Texts NPRM at para. 21

⁵ Unlawful Texts NPRM at para. 19.

of enforcement that is both necessary to the larger ongoing fight against illegal calls and texts and will benefit consumers in its effects. Some commenters noted that “intercarrier text messages from invalid, unassigned and unallocated NANP numbers are already generally blocked by existing anti-spoofing checks”⁶ and that “[r]obust, existing countermeasures prevent messages from invalid, unallocated, unused or DNO telephone numbers from being transmitted to consumer’s wireless devices.”⁷ These existing voluntary implementations mean that the proposed rule may not have considerable additional effect, but it also means that implementation and compliance with the rule should be relatively easy, inexpensive, and is unlikely to result in overblocking. The Commission should ensure that any final rule is technically compatible with existing voluntary blocking schemes that have proven effective. But those asserting that the Commission’s rule is unnecessary because it replicates existing voluntary measures have provided no evidence by which to evaluate this claim. What is clear is that voluntary blocking measures alone are insufficient and that any texts from “invalid, unallocated, or unused numbers, and numbers on the DNO list” are extremely likely to be illegal scam calls. Thus, it is necessary for the Commission to provide industry-wide, enforceable minimum standards to provide a baseline of protection for consumers as the Commission continues to evaluate the efficacy of other steps to combat illegal texts.

Dedicated bad actors are particularly challenging to address with voluntary measures that rely on cooperation—such as voluntary registries, consent requirements, or call limits—when scammers are already flaunting the law and engaging in fraud. Network-level blocking that

⁶ Comments of the Messaging Malware Mobile Anti-Abuse Working Group (M3AAWG) on the Notice of Proposed Rulemaking, CG Docket No. 21-402 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/11081168704757/1>.

⁷ Comments of CTIA, CG Docket No. 21-402 at 11 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/11101045415230/1>.

targets these bad actors is therefore a necessary component of maintaining a healthy communications network. Ensuring that texts from this pool of “bad numbers” are blocked is a simple, common-sense step that carriers already acknowledge as an effective aspect of their voluntary anti-spam efforts.⁸ The record indicates that there is virtually no risk that blocking texts from bad numbers will result in blocking wanted texts, and so even if illegal texts from bad numbers represent only a fraction of the illegal and unwanted text problem, a benefit accrues to consumers with the blocking in place. In addition, implementing mandatory network-level blocking on texts from bad numbers now will prevent scammers from making future inroads into that space in the future and ensure that all carriers are meeting this simple baseline of protection going forward.

II. THE COMMISSION MUST TAKE FURTHER ACTIONS TO PROTECT CONSUMERS FROM UNWANTED AND ILLEGAL TEXT MESSAGES

The proposed network-level blocking of texts from bad numbers is a beneficial and necessary step towards a cohesive regime for combatting unwanted and illegal communications, but it will not impact many of the most prevalent sources of illegal text messages. As addressed in Public Knowledge’s joint comments with public interest and consumer advocacy organizations,⁹ there are two additional steps the Commission could take very quickly to have a huge impact on unwanted and illegal text messages: (1) issue a declaratory ruling to clarify that prior express consent to receive a call or text can only be provided to one caller at a time and (2)

⁸ *Id.*

⁹ Comments on Notice of Proposed Rulemaking in CG Docket No. 21-402 by Electronic Privacy Information Center, National Consumer Law Center, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, National Consumers League, Public Knowledge, U.S. PIRG, CG Docket No. 21-402 (filed Nov. 10, 2022), available at <https://www.fcc.gov/ecfs/document/11110142720936/1> (Public Interest Comments).

clarify and finalize its TCPA exemption rules to specifically exclude scam calls and texts. In a recent *ex parte* statement related to other matters pending before the Commission, Public Knowledge—along with other consumer advocacy organizations—urged the commission to take these actions.¹⁰

First, the Commission should issue a declaratory ruling to explicitly require that express consent to receive calls or texts must be made directly to one entity at a time in response to the 2020 petition of Assurance IQ, LLC.¹¹ Even though Assurance requested that its petition be dismissed, the issues raised in the proceeding are critical for striking at one of the root causes of unwanted and illegal robocall proliferation: lead generators and data brokers. Lead generators and data brokers harvest consumer telephone numbers along with thin—if not outright fraudulent—consent agreements attached and pass on those numbers and supposed consents to telemarketers and scam callers. As described in the Public Interest Comments and Public Interest *ex parte*, an unwitting consumer might enter their phone number on a website purporting to give an insurance quote only to have that be interpreted as “explicit consent” to receive calls from literally *thousands* of “partners,” most of which have nothing to do with insurance. The opaque web of relationships between those collecting, distributing, and making calls further complicates

¹⁰ Notice of Ex Parte Presentation, National Consumer Law Center et al., CG Docket No. 02-278 Report No. 3170—relating to the limits on Exempt Calls to clarify that that prerecorded scam calls and automated scam texts are not exempt from TCPA consent requirements; and in the Matter of Assurance IQ, LLC’s Petition, DA 20-540 (Oct. 4, 2022), available at <https://www.fcc.gov/ecfs/search/searchfilings/filing/1005271665623https://www.fcc.gov/ecfs/document/1005271665623/1> (Public Interest *ex parte*).

¹¹ Petition for Expedited Declaratory Ruling Regarding the Application of U.S.C. § 227(b)(1) of the Telephone Consumer Protection Act by Assurance IQ, LLC, CG Docket No. 02-278 (filed May 12, 2020) available at <https://www.fcc.gov/ecfs/file/download/ASSURANCE%20IQ,%20LLC%20FCC%20PETITION.pdf?folder=10512089842790>.

efforts to trace a path of accountability for such actions.¹² The Commission should take swift action to explicitly denounce these practices and clarify that they are illegal under existing law. Doing so would immediately have a significant impact on the commercial ecosystem that supports unwanted and illegal phone calls and text messages.

Second, the Commission should clarify and finalize the exemptions to its 2020 TCPA Order implementing call limits to specifically exclude scam calls from the exemptions list.¹³ Under the TCPA, “calls” include text messages and so finalizing these rules is important for combatting both illegal texts and telephone calls simultaneously.¹⁴ The Commission should clarify that scam calls—communications that are deceptive, misleading, or which are made with intent to defraud, cause harm, or wrongfully obtain anything of value from the recipient—as a class of call can never qualify for exemption under 47 USC § 227(b)(2). As with the declaratory ruling suggested above, doing so would eliminate cover for illegal text messages and enhance the ability of the Commission and other authorities to carry out enforcement against violators.

III. THE COMMISSION HAS ADEQUATE AUTHORITY TO IMPLEMENT THE PROPOSED MANDATORY BLOCKING RULES

The Commission seeks comment on its legal authority to implement its proposed mandatory blocking rule.¹⁵ The Commission likely has adequate authority through both section 251(e) and its ancillary authority over text messaging insofar as it is an interconnected service.

¹² See Federal Trade Comm’n, “Follow The Lead” Workshop Staff Perspective (Sept. 2016), available at

https://www.ftc.gov/system/files/documents/reports/staff-perspective-followlead/staff_perspective_follow_the_lead_workshop.pdf.

¹³ 2020 TCPA Order.

¹⁴ See, *Pariseau v. Built USA, LLC*, 2022 WL 3139243 (M.D. Fla. Aug. 5, 2022).

¹⁵ Unlawful Texting NPRM at para. 40.

In its 2017 Call Blocking Order,¹⁶ the Commission explained that spoofing an invalid, unallocated, or unused number was a violation of its numbering rules. Similar logic also extends to spoofing a number from a DNO list. While the Commission declined to extend its call blocking rules to text messages at that time, the same logic applies to text messages that make use of NANP numbers as does to voice telephone calls. The use of invalid, unallocated, unused or DNO numbers is on its face a violation of the Commission’s rules on numbering and so under its authority in section 251(e) the Commission can mandate blocking of text messages that purport to be from such numbers. The comments of Somos Inc. explicitly support this same theory of Commission authority.¹⁷

Additionally, text messaging is interconnected with telephone service, both in the legal and technical senses but also as a practical matter. As discussed above, there is a clear relationship between the ebb and flow of illegal telephone calls and text messages; the health of one service directly impacts the other and for any measure undertaken against unwanted and illegal communications to be successful parallel efforts will be required for the other service. These factors provide compelling justification for the Commission’s extension of ancillary authority to implement mandatory blocking on text messaging that parallels the rules for telephone calls.

¹⁶ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, WC Docket No. 17-97, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706, 9707, para. 3 (2017) (“2017 Call Blocking Order”).

¹⁷ Comments of Somos, Inc. on Notice of Proposed Rulemaking, CG Docket No. 21-402 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/1110196433557/1>.

IV. THE COMMISSION’S AUTHORITY TO COMBAT ILLEGAL TEXT MESSAGES WOULD BE ENHANCED BY PROPER RECLASSIFICATION AS A TITLE II SERVICE

While the Commission likely has adequate authority to implement its proposed mandatory call blocking rule, its authority to implement robust protections for consumers would be enhanced by correcting the classification status of text messaging to be a Title II service, just like voice telephone service. In addition to enhancing its authority to engage in consumer protection, Title II classification may be necessary to address concerns raised in the record concerning discrimination in the existing voluntary authentication programs.

In 2018 the Commission erred in adopting a Declaratory Ruling that classified texting as a Title I information service.¹⁸ Among other defects, the 2018 SMS Ruling advanced a justification for its decision that “such a classification will empower wireless providers to continue their efforts to protect consumers from unwanted text messages.”¹⁹ Unfortunately, recent history has proven that this approach was incorrect. While carriers have established voluntary programs which incentivize good faith mass texters to abide by some security and consumer protection rules, these structures are purely voluntary and bad actors are incentivized to evade them completely. Despite claims from commenters that deregulation has been a success for combatting unwanted and illegal text messages,²⁰ the Commission has instead observed an increase in unwanted and illegal text messages while it has continued to advance efforts to combat unwanted and illegal telephone calls under its Title II authority. As Public Knowledge

¹⁸ *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling, WT Docket No. 08-7 (rel. Dec. 13, 2018) (“2018 SMS Ruling”).

¹⁹ 2018 SMS Ruling at para. 42.

²⁰ *See e.g.* Comments of CTIA, CG Docket No. 21-402 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/11101045415230/1>; Verizon Comments, CG Docket No. 21-402 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/1110088820229/1>.

has previously argued, far from being an obstacle to winning the war against illegal and unwanted text messages, Title II is an important arrow in the Commission’s regulatory quiver.²¹

It is of course true that common carriage rules prevent carriers from arbitrarily or maliciously blocking calls as they see fit. But—as the Commission’s own actions show—common carriage rules do not prevent blocking unwanted or harmful calls, and therefore would not prevent blocking of unwanted texts. A Title II regime for text messaging would enhance Commission authority, harmonize regimes for combating unwanted and illegal calls and texts, give carriers the same ability they have to block unwanted texts as they have to block unwanted calls, while also ensuring that carriers do not abuse their position and begin to block communications for other reasons.

Indeed, numerous commenters have raised the concern that the current voluntary regime is one where content and sender-based discrimination is not only possible, but already commonplace. The National Opinion Research Center at the University of Chicago notes that:

“[a]s it stands today, the wireless industry has a broad and unaccountable ability to reject texts that are legal for a range of both known and unknown reasons. Even when a party registering for a campaign can demonstrate it has opt-in express consent to text and the campaign registration is approved, their texts can suddenly be blocked at any time for no obvious reason, resulting in increased costs, delay, and uncertainty.”²²

Related concerns were raised by State Voices and the Coalition for Open Messaging, which both expressed that existing policies ostensibly aimed at protecting consumers from unwanted and

²¹ *Petition for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Reply to Oppositions of Public Knowledge, WT Docket No. 08-7 at 2 (Apr. 2, 2019) available at <https://www.fcc.gov/ecfs/document/10402437305413/1> (“PK Reply to Opposition”).

²² Comments of National Opinion Research Center, CG Docket No 21-402 at 2 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/1110291150463/1>.

illegal text messages may in fact perversely incentivize corporate marketing and partisan solicitation, while discriminating against non-partisan and informational messaging.²³

Some communications industry commenters also raised concerns about anti-competitive discrimination and effects emerging from the current regime. For example, INCOMPAS writes that carriers “impose fees for a myriad of registries and ‘compliance’ penalties that mobile operators themselves do not pay, degrade competitors’ products through blocking, and collect sensitive information about their competitors’ customers without any methods for recourse.”²⁴

Concerns about unjust blocking, discrimination, and throttling are deeply troubling, and highlight the need for Title II classification. Consumers need to be protected from the scourge of illegal text messages, but the pressing nature of that mission should not afford carriers a veil behind which they can conceal practices that threaten to undermine the fair, open, and non-discriminatory expectations that the public has for their communications.

If the Commission adopts mandatory text blocking rules, these concerns become even more urgent. History shows that carriers will justify unfair fees or anticompetitive action by pretending that these fees and actions are required by regulation when they are not. But without Title II authority, the Commission’s ability to act in the face of such false claims is severely undermined.

Public Knowledge—in conjunction with fifteen other public interest and consumer advocacy organizations—submitted a Petition for Reconsideration of the 2018 SMS Ruling that

²³ See Comments of State Voices, CG Docket No 21-402 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/1110252526118/1>; Comments of the Coalition for Open Messaging, CG Docket No 21-402 at 2 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/search/search-filings/filing/1110088217531>.

²⁴ Comments of INCOMPAS, CG Docket No 21-402 at 3-4 (filed Nov. 10, 2022) available at <https://www.fcc.gov/ecfs/document/11112837315346/1>.

is still pending.²⁵ The Commission should act on that Petition for Reconsideration to properly reclassify text messaging as a Title II service. A correct classification regime that properly considers text messaging alongside telephone service will provide the Commission authority to undertake robust regulatory measures to stamp out unwanted and illegal calls and text throughout our communications networks, returning trust and reliability to communications, while simultaneously ensuring that our communications ecosystem remains just and equitable.

V. CONCLUSION

The Commission should adopt the proposed network-level blocking rule to provide industry-wide, enforceable minimum standards that will provide a baseline of protection for consumers as the Commission continues to evaluate the efficacy of other steps to combat illegal texts.

In addition, the Commission should: (1) issue a declaratory ruling to clarify that prior express consent to receive a call or text can only be provided to one caller at a time; (2) clarify and finalize its TCPA exemption rules to specifically exclude scam calls and texts; and, most importantly, (3) properly reclassify text messaging services as Title II services to strengthen its authority to combat illegal text messages and advance its efforts in parallel with the Commission's mission to eliminate unwanted and scam telephone calls while ensuring texting remains fair, accessible, competitively-neutral, and non-discriminatory.

We thank the Commission for its continued work in protecting consumers from illegal and unwanted communications and for the opportunity to provide comment on this Notice of Proposed Rulemaking.

²⁵ Petition for Declaratory Ruling on Regulatory Status of Wireless Messaging Service, Petition for Reconsideration of Public Knowledge, et. al., WT Docket No. 08-7 (Jan. 28, 2019) available at <https://www.fcc.gov/ecfs/document/101280325600285/1>.