

After a 10-year Proceeding, the FCC Classifies Wireless Messaging as an Information Service

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At the Federal Communications Commission (“FCC”) December Open Meeting, commissioners voted to approve a Declaratory Ruling (“Ruling”) that classifies native forms of wireless messaging, short message service (“SMS”) and multimedia messaging service (“MMS”), as information services, and declares that such services are free from regulation as commercial mobile services. The FCC’s objective with the Ruling is to remove uncertainty for messaging service providers about applicable regulations and also enable wireless messaging providers to adopt more rigid efforts to block spam and spoofing messages. This action comes only a few months after Commissioner Mike O’Rielly publicly called for the FCC to finally act on the pending classification proceeding.

The Ruling serves to address two outstanding petitions for declaratory ruling on the matter of classification for messaging services that were filed with the FCC years ago. First, in 2008, Public Knowledge, along with other non-profit organizations, sought to classify text messaging as a common carrier service and seven years later in a related petition, Twilio asked the FCC to declare that text messaging services were telecommunications services subject to stricter regulatory requirements under Title II of the Communications Act. The Ruling denies both parties’ declaratory ruling petitions and instead, affirms that these wireless messaging services satisfy the definitional criteria for an information service.

The FCC employs its traditional analytical approach toward the definitions of “telecommunications services” and “information services” and concludes that SMS and MMS wireless messaging are information services because they are asynchronous communications tools with the capability for storage and retrieval of content at the user’s request. Additionally, the FCC’s discussion of its decision primarily relies on the “trusted medium” idea for text messaging. The Ruling emphasizes the fact that text messaging is currently a trusted communications medium with a high approval rate among consumers which the FCC attributes to low receipt of spam. The Ruling states that the volume of attempts to send spam and fraudulent messages has increased significantly but the actual transmission to consumers continues to be low because of the ability of carriers to block or deny messages. The FCC determined that without classification as an information service, providers would be hindered in their ability to continue to eliminate text-spam.

In the draft declaratory ruling, the Commission stated that there was not enough information in the record to address RCS at this time. However, Commissioner O’Rielly strongly expressed his view that SMS and succeeding messaging technologies are applications that should also be classified as information services. As a result, in the final item the FCC included language stating its expectation that RCS and successor technologies with characteristics similar to SMS and MMS would be considered information services.

Commissioner Rosenworcel, the sole oppositional vote to this item, highlighted concerns expressed by some public interest groups about the Ruling possibly giving wireless carriers and other messaging providers more authority to block or restrict unpopular or controversial speech.