

Wireless Telecommunications Bureau Seeks Comment on Twilio Petition Requesting Classification of Messaging Services Under Title II; Comments Due November 20th, Replies Due December 21st

October 14, 2015

On October 13, 2015, the Wireless Telecommunications Bureau (Bureau) of the Federal Communications Commission (FCC or the Commission) issued a [Public Notice](#) seeking comment on a Petition for Expedited Declaratory Ruling ([Petition](#)) from Twilio Inc. (Twilio), a cloud-based developer-platform for communications services, requesting that the Commission clarify that certain messaging services are “telecommunications services” under Title II of the Communications Act of 1934, as amended (the Act). The Bureau also seeks to refresh the record on a similar [2007 petition](#) from Public Knowledge and other public interest organizations seeking to reclassify SMS messages and short codes as Title II telecommunications services, or alternatively as Title I services subject to the non-discrimination provisions of Section 202 of the Act.

In its Petition, Twilio argues that “messaging services”—i.e., Short Message Service (SMS) messages, Multimedia Messaging Service (MMS) messages, and short-code based services, that are interconnected with the public switched telephone network (PSTN) and/or utilize North American Number Plan (NANP) numbers—should be classified as telecommunications services for three reasons. First, Twilio asserts that under the D.C. Circuit’s [Verizon](#) decision vacating, in part, the Commission’s 2010 Open Internet Order, “the Commission cannot subject messaging services to Title II in certain respects [e.g., its Telephone Consumer Protection Act rules] without classifying messaging services as telecommunications services.” Second, Twilio argues that “messaging services are telecommunications services subject to Title II under the Communications Act and the Commission’s *Open Internet* framework” because “the *only* offering the wireless carriers make to the public with respect to messaging services is the ability of consumers to send and receive messages of the consumers’ design and choosing.” Third, Twilio contends that messaging services are independently subject to Title II as “commercial mobile services because they are interconnected with the public switched telephone network.”

This proceeding is important for several reasons. As an initial matter, if the FCC were to grant the petition, it would represent a further expansion of FCC authority into previously lightly regulated communications services, following closely on the heels of the 2015 Open Internet Order, which reclassified broadband Internet access services (BIAS) as telecommunications services under Title II.

Indeed, while the Commission has asserted jurisdiction over text messages in limited contexts, it has declined, for years, to formally classify messaging services under the Communications Act. Moreover, if the Commission were to classify messaging services as Title II telecommunications services, it would need to address the panoply of Title II regulations that attach to common carriers, including privacy and other obligations. Further, this proceeding could open the door for the Commission to consider the regulatory status of non-interconnected over-the-top (OTT) messaging and video communications platforms. Notably, the Commission already has begun to think more broadly about its role in the OTT messaging ecosystem in the context of its [accessibility rules](#) and [text-to-911](#).

Comments are due on November 20, 2015, and replies are due December 21, 2015. Should you have any questions about this proceeding and what it means for your business, feel free to contact a member of Kelley Drye's Communications practice.