

## **Now I Get It!: Using the FCC’s Order Keeping Text Messages as “Information Services” to Better Understand the Communications Act**

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Little known fact: the TCPA is just a tiny little part of something much bigger and more complex called the Communications Act of 1934, as amended by Telecom Act of 1996 (which the FCC loves to just call the “Communications Act.”) And yes, I know the TCPA was enacted in 1991 but trust me it is still part of the Communications Act of 1934.

The Communications Act divides communications services into two mutually exclusive types: highly regulated “telecommunications services” and lightly regulated “information services.”

So let’s look at some definitions:

A “telecommunications service” is a common carrier service that requires “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.”

“Telecommunications” is “the transmission, between or among points specified by the end user, of information of the user’s choosing without change in the form or content of the information as sent and received.”

By contrast, an “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”

Make sense so far? Basically a telecommunications service is something that telecommunications companies—who are common carriers— can’t tinker with and have to automatically connect without modifying. For instance, if I want to call my friends from law school and wish them well Verizon can’t say—wait a minute, Eric doesn’t have any friends from law school and refuse to connect the call. Verizon must just connect the call. It doesn’t matter who I am calling, how long the call will be, or why I’m making the call, the call must connect. The end.

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Information services are totally different animals. Carriers can offer or not offer and tinker and manipulate such messages all they want—see also net neutrality.

So if text messages are a telecommunication then they must be connected without question. But if text messages are an information service then carriers can decide which messages get through and which don't.

It might seem like you'd want text messages to be information services—after all why would we want the carriers determining how and when we can text each other? Well the FCC has an answer—automatic spam texts.

If text messages are subject to common carrier rules then people can blast your phone with spam text messages and the carriers can't stop them. True the TCPA exists so you can sue the texter but—as we know—the vast majority of spammers are shady fly-by-nights or off-shore knuckleheads that you can't find. So the FCC believes that keeping text messages categorized as “information services”—as they are currently defined—will keep spammers away from your SMS inbox. It issued [a big order today accomplishing just that.](#)

And to be sure, the carriers are monitoring and block spam texts as we speak. As the FCC finds: “wireless messaging providers apply filtering to prevent large volumes of unwanted messaging traffic or to identify potentially harmful texts.” The FCC credits these carrier efforts with keeping text messages relatively spam free:

For example, the spam rate for SMS is estimated at 2.8% whereas the spam rate for email is estimated at over 50%. Wireless messaging is therefore a trusted and reliable form of communication for many Americans. Indeed, consumers open a far larger percentage of wireless messages than email and open such messages much more quickly.

So from a policy perspective keeping text messages as information services probably makes sense, but let's review those definitions again.

A telecommunication service is essentially the transmission of information of the user's choosing.

An information service is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”

So is a text message the transmission of information of my choosing or is it the use of Verizon's ability to store and retrieve information I am sending? (And is there really even a difference?)

Well the FCC says texts are absolutely information services and here's why:

- SMS and MMS wireless messaging services provide the capability for “storing” and “retrieving” information. When a user sends a message, the message is routed through servers on mobile networks. When a recipient device is unavailable to receive the message because it is turned off, the message will be stored at a messaging center in the provider's network until the recipient device is able to receive it.

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- SMS and MMS wireless messaging services also involve the capability for “acquiring” and “utilizing” information. As CTIA explains, a wireless subscriber can “ask for and receive content, such as weather, sports, or stock information, from a third party that has stored that information on its servers. SMS subscribers can ‘pull’ this information from the servers by making specific requests, or they can signal their intent to have such information regularly ‘pushed’ to their mobile phone.
  - SMS and MMS wireless messaging services involve “transforming” and “processing” capabilities. Messaging providers, for example, may change the form of transmitted information by breaking it into smaller segments before delivery to the recipient in order to conform to the character limits of SMS.

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Yeah...I guess. But realistically when I send a text I just want it to get there the way I sent it. Maybe there's some storing and utilizing and processing or whatever but not very much.

And that was Twilio's point. It asserted: “the only offering that wireless carriers make to the public, with respect to messaging, is the ability of consumers to send and receive messages of the consumers' design and choosing.” That sounds right.

Well the FCC disagrees: “These arguments are unpersuasive.”

The FCC's point is that “what matters are the capabilities offered by the service, and as we explain above, wireless messaging services feature storage, retrieval, and other information-processing capabilities.”

Hmmm. ok. I guess I'm ok with that if you are.

But let's get to the good stuff from a TCPA perspective. Recall that a text message is a “call” for purposes of the TCPA. Well if a text isn't even a telecommunication how can it be a call? Asks Twilio.

Yeah, FCC, how can it be a call? Asks the Czar.

The Commission answers:

the Commission's decision merely clarified the meaning of the undefined term “call” in order to address the obligations that apply to telemarketers and other callers under the TCPA. That decision neither prohibits us from finding that wireless messaging service is an information service, nor compels us to conclude that messaging is a telecommunications service.

Ok. Well. Why not?

The Commission answers further:

The TCPA provision itself generally prohibits the use of a facsimile machine to send unsolicited advertisements, but that does not constitute a determination that an individual's sending of a fax is a telecommunications service, just as the application to an individual's making "text calls" does not reflect a determination that wireless messaging is a telecommunications service. In any event, for purposes of regulatory treatment, there is a significant difference between being subject to Commission regulation and being subject to per se common carrier regulation. Only the latter requires classification as a telecommunications service. We clarify herein that SMS and MMS wireless messaging are Title I services, and thus, will not be subject to per se common carrier regulation.

Umm FCC, no disrespect intended, but I kind of feel like that doesn't really answer the question.

But in any event, the FCC plainly believes that text messages are a "call" for purposes of the TCPA but are not a "telecommunication" for purposes of common carrier regulation.

From a policy perspective I'm fine with the conclusion the Commission reached—it makes sense to keep text messages free from spam. But we have to be honest with ourselves here, the Commission just did legal somersaults to get there. Maybe its time for Congress to take another look at the Communications Act hmmm?

In any event, now you get it!

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