

March 28, 2024

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L St. NE
Washington, DC 20554

re: Regulatory Status of Wireless Messaging Service, WT Docket No. 08-7; IP-Enabled Services, WC Docket No. 04-36

Dear Ms. Dortch:

On Tuesday, March 26, Eric Migicovsky, CEO of Beeper; Kevin Joseph, advisor to Beeper; John Bergmayer, Legal Director of Public Knowledge; Harold Feld, Senior Vice President of Public Knowledge; and Thomas Jones, outside counsel to Reset.tech, met with Hannah Lepow, Legal Advisor for Media and Consumer Protection, and Shiva Goel, Legal Advisor, Wireless, Space, & International, from Commissioner Starks office.

Beeper is a software company that develops interoperable messaging apps, including Beeper Mini, an app that brought end-to-end encrypted iMessage communication between iPhone and Android users. Apple blocked Beeper from providing this functionality, as highlighted in the recent antitrust lawsuit brought by the Department of Justice, and a coalition of states and the District of Columbia.¹ Reset.tech is a global not-for-profit dedicated to realigning digital media markets with democratic values. Public Knowledge is a consumer rights group that promotes freedom of expression, an open internet, and access to affordable communications tools and creative works.

The purpose of this meeting was to inform the Commission about how Beeper Mini works, and to discuss the legal implications of Apple's blocking it that are relevant to the Commission's authority—in particular, but not limited to, interconnection requirements under Title II of the Communications Act and possible implications with regard to the 21st Century Communications and Video Accessibility Act.

Eric Migicovsky explained that Beeper Mini is an Android application that implements the iMessage protocol, allowing iPhone and Android users to send and receive encrypted messages with each other. At present, Apple bundles all its text messaging capability into its Messages App. When Apple users communicate with other Apple users, they have access to

¹ Complaint, United States v. Apple Inc., No. 2:24-cv-04055 (D.N.J. filed Mar. 21, 2024), <https://www.justice.gov/opa/media/1344546/dl?inline>.

features such as end-to-end encryption, high-resolution images, delivery receipts, the ability to seamlessly participate in group texts, and more. These texts appear in a “blue bubble” which highlights these improved functionalities. But when Apple users attempt to text Android users (or when Android users text Apple users), Apple restricts these texts to SMS — which lacks these enhanced features. To highlight the limitations of SMS as compared to Apple’s Message app, texts between Apple users and Android users are displayed in a green bubble. A technical explanation of how Beeper functions is attached to this filing, as well as relevant passages from the DOJ’s complaint.

Public Knowledge reiterated its support for Title II classification of interconnected VOIP,² and of SMS text messaging (SMS). These services are “telecommunications” in that they provide “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”³

Public Knowledge, joined by other public interest groups, first petitioned the FCC to classify SMS as “telecommunications” in 2007,⁴ after Verizon blocked access to SMS short codes to NARAL (now known as Reproductive Freedom for All). The Commission put this petition out for public comment in January 2008,⁵ but took no subsequent action. In 2015, Twilio filed a petition for an expedited declaratory ruling, asking the Commission “to declare that messaging services are governed by Title II” of the Communications Act. The Commission put this petition out for public comment as well,⁶ and again took no immediate action.

In December 2018, under new leadership, the Commission issued a Declaratory Ruling that SMS was a Title I information service.⁷ Public Knowledge, joined by other public interest groups, filed a petition for reconsideration, arguing among other things that the Declaratory Ruling’s reasoning was flawed.⁸ The DC Circuit subsequently validated this position by

² Petition of Public Knowledge et al. for Declaratory Ruling That Facilities-Based Interconnected VoIP & Nomadic Interconnected VoIP Are Title II Services, RM-____ (filed Mar. 2, 2022), https://publicknowledge.org/wp-content/uploads/2022/03/VOIP-Declaratory-Ruling-Petition_03-02-22.pdf.

³ 47 U.S.C. § 153(50).

⁴ Petition of Public Knowledge et al. for Declaratory Ruling that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, WT Docket No. 08-7, (filed Dec. 11, 2007), <https://publicknowledge.org/policy/fcc-petition-for-text-messaging-and-short-codes>.

⁵ Comment Sought on Petition for Declaratory Ruling That Text Messages and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Non-Discrimination Rules, WT Docket No 08-7, 73 FR 4866 (2008), <https://docs.fcc.gov/public/attachments/DA-08-282A1.pdf>

⁶ WTB Seeks Comment on a Petition for Declaratory Ruling Clarifying the Regulatory Status of Mobile Messaging Services, WT Docket No. 08-7, 80 FR 69630 (2015), <https://docs.fcc.gov/public/attachments/DA-15-1169A1.pdf>.

⁷ Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Serv., Declaratory Ruling, WT Docket No. 08-7, 33 FCC Rcd 12075 (2018), <https://docs.fcc.gov/public/attachments/FCC-18-178A1.pdf>.

⁸ Petition for Reconsideration of Public Knowledge et al., WT Docket No. 08-7, (filed Jan. 28, 2019), https://publicknowledge.org/wp-content/uploads/2021/11/PK_et_al_SMS_Order_recon.pdf. *See also* Reply to Oppositions of Public Knowledge, WT Docket No. 08-7 (April 2, 2019), <https://publicknowledge.org/policy/fcc-sms-ruling-reply-to-opposition>.

rejecting the same reasoning in the broadband context in *Mozilla*.⁹ The Commission put this petition for reconsideration out for public comment in March 2019,¹⁰ but took no subsequent action.

During this time, SMS has become more important than ever. Smartphones have achieved almost universal adoption. Schools and governments use SMS to communicate with parents and the public. One-time security codes for accessing banking services are sent via SMS, and SMS, as a carrier-based service, remains the only way senders can be sure to reach nearly every member of the public, relative to non-carrier services like WhatsApp that require users to install and set up a third-party app. The problems caused by the Commission’s inaction, and flawed actions on this subject, have not gone away. If anything they have gotten worse, and though the FCC and FTC have taken actions directed at the scourge of robotexts and scams,¹¹ stronger legal authority would allow the Commission to take swifter and firmer action.

Non-carrier services like iMessage may also fit the definition of “telecommunications.” Apple, via the built-in and uninstalleable Messages app on the iPhone, combines SMS and iMessage into one seamless user experience—which users experience as “green bubbles” (SMS) and “blue bubbles” (iMessage).¹² Like with interconnected VOIP services, though with text and media messages instead of calls, Apple allows users to receive communications “that originate on the public switched telephone network” and to send messages that “terminate... [on] the public switched telephone network.”¹³ As the DOJ notes in its recent lawsuit against Apple, Apple has prevented third-party apps like WhatsApp and Beeper from integrating with SMS as it does with its bundled app. Further, it has been slow to adopt industry standards like RCS that would improve cross-platform messaging, and has taken affirmative steps to block Beeper’s attempt to interoperate with iMessage.

⁹ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

¹⁰ Petition for Reconsideration of a Declaratory Ruling on Regulatory Status of Wireless Messaging Service, 84 FR 8497 (2019).

¹¹ E.g., Targeting and Eliminating Unlawful Text Messages, CG Docket No. 21-402, Report and Order and Notice of Proposed Rulemaking, 38 FCC Rcd 2744 (2023); FTC, IYKYK: The Top Text Scams of 2022, <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2023/06/iykyk-top-text-scams-2022>.

¹² In the *Pulver.com* Petition, the Commission distinguished between services that did not provide transport and relied on a database of user names which the service provider independently stores, and services which provided transport and/or relied on North American Numbering Plan (NANP) phone numbers. In the 20 years since then, the Commission has not considered how technological and market changes may have changed the underlying reasoning in *Pulver.com*. But the Commission need not go so far as to reconsider *Pulver* to reach the conclusion that iMessage and SMS are properly classified as Title II.

¹³ 47 CFR § 9.3.

Beeper also highlighted a recent letter from the American Economic Liberties Project et al.,¹⁴ consistent with arguments put forward by Commissioner Carr,¹⁵ that Apple’s blocking of Beeper Mini may violate the 21st Century Communications and Video Accessibility Act.¹⁶ The letter argues that Apple’s actions to block Beeper Mini’s functionality with iMessage may have violated the FCC’s Part 14 rules, which are based on the CVAA. These rules require “covered providers,” including Apple, to ensure accessibility and usability of advanced communications services and equipment for people with disabilities. By impeding Beeper Mini’s interoperability with iMessage, and given the accessibility shortcomings of SMS relative to iMessage, Apple has potentially violated the rule stating that covered providers “shall not install network features, functions, or capabilities that impede accessibility and usability.”¹⁷

Interoperability and interconnection are core Title II requirements with a long pedigree. In *Carterfone*, the Commission required AT&T to allow third-party equipment to be used with the telephone system,¹⁸ and followed this up with standard-setting activity designed to facilitate interconnection and industry standardization.¹⁹ The Commission has used its Title II authority to promote competition and protect consumers in a variety of contexts, such as requiring interoperability measures like number portability. The Commission has also used its Title II authority to promote accessibility, through the establishment of TTY rules and other measures. The Title II toolbox is available to be used for pro-competition, public interest obligations, and is relevant to the current situation with SMS and iMessage. Just as the Commission used its Title II authority to promote competition and protect consumers in the telephone context, it can use that same authority to promote competition and protect consumers in the context of SMS and iMessage. By classifying these services as Title II telecommunications services, the Commission could ensure that they are subject to the same pro-competition, pro-consumer rules that have long applied to other important telecommunications services.

Respectfully submitted,

/s/ John Bergmayer
Legal Director
Public Knowledge

cc: Hannah Lepow, Shiva Goel

¹⁴ Letter from the American Economic Liberties Project et al. to The Honorable Jessica Rosenworcel, Chairwoman, FCC (Feb. 27, 2024),

<https://www.economicliberties.us/wp-content/uploads/2024/02/2024-02-27-FCC-Apple-Beeper-Mini-Letter.pdf>.

¹⁵ Emma Roth, *FCC Commissioner Wants to Investigate Apple over Beeper Mini Shutdown*, The Verge (Feb. 12, 2024), <https://www.theverge.com/2024/2/12/24071226/fcc-commissioner-brendan-carr-apple-beeper-mini>.

¹⁶ Pub. Law No. 111-260, codified at 47 U.S. Code § 617 et seq.

¹⁷ 47 CFR § 14.20.

¹⁸ Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968).

¹⁹ The FCC’s rules regarding interconnection between telephone networks and “terminal equipment,” which reference standards such as the RJ11 phone jack, are codified in its Part 68 rules. See 47 C.F.R. § 68.1-68.614; FCC, <https://www.fcc.gov/part-68>.