

LANE REGIONAL AIR PROTECTION AGENCY (LRAPA) RULES, APPROVED BUT NOT INCORPORATED BY REFERENCE—
Continued

LRAPA citation	Title/subject	State effective date	EPA approval date	Explanation
Title 31—Public Participation				
31-0070	Hearing Procedures	3/23/2018	10/5/2018, 83 FR 50274	

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[FR Doc. 2019-02545 Filed 2-19-19; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2018-0508; FRL-9989-15-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Under the 2008 Ozone National Ambient Air Quality Standard (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the State of Maryland’s state implementation plan (SIP). The State of Maryland’s SIP revision satisfies the volatile organic compound (VOC) reasonably available control technology (RACT) requirements for the 2008 8-hour ozone national ambient air quality standard (NAAQS). The State of Maryland will address RACT for oxides of nitrogen (NO_x) in another SIP submission. Maryland’s VOC RACT submittal for the 2008 ozone NAAQS includes certification that previously adopted RACT controls in Maryland’s SIP approved by EPA under the 1-hour ozone and 1997 8-hour ozone NAAQS were reviewed based on the currently available technically and economically feasible controls, and that they continue to represent RACT; a negative declaration for certain control technique guideline (CTG) categories that no facilities exist in the State for these certain categories; and adoption of new or more stringent RACT determinations where necessary. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on March 22, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID

Number EPA-R03-OAR-2018-0508. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Gregory A. Becoat, (215) 814 2036, or by email at becoat.gregory@epa.gov.

SUPPLEMENTARY INFORMATION: On August 18, 2016, the Maryland Department of the Environment (MDE) submitted a revision to its SIP that addresses the VOC requirements of RACT for the 2008 8-hour ozone NAAQS.

I. Background

A. General

Ozone is formed in the atmosphere by photochemical reactions between VOCs and NO_x in the presence of sunlight. In order to reduce ozone, the CAA requires control of VOC and NO_x emission sources to achieve emission reductions in moderate and above ozone nonattainment areas. Among effective control measures, RACT controls significantly reduce VOC and NO_x emissions from major stationary sources.

RACT is defined as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.¹ Section 172(c)(1) of the CAA provides that SIPs for nonattainment areas must

¹ See December 9, 1976 memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, to Regional Administrators, “Guidance for Determining Acceptability of SIP Regulations in Non-Attainment Areas.” see also 44 FR 53761, 53762 (September 17, 1979).

include reasonably available control measures (RACT) for attainment of the NAAQS, including emissions reductions from existing sources through adoption of RACT. A major source in a nonattainment area is defined as any stationary source that emits or has the potential to emit NO_x or VOC emissions greater than a certain ton per year threshold that varies based on the ozone nonattainment classification of the area: Marginal, Moderate, Serious, or Severe. See “major stationary source” in CAA sections 182(b), 184(b) and 302. Sections 182(b)(2) and 182(f)(1) of the CAA require states with ozone nonattainment areas classified as moderate or higher to implement RACT controls on all stationary sources and source categories covered by a CTG document issued by EPA, and also on all major sources of VOC and NO_x emissions located in the area. EPA’s CTGs provide guidance for RACT control requirements for various VOC source categories. The CTGs typically identify a particular control level that EPA recommends as being RACT. In some cases, EPA has issued Alternative Control Techniques guidelines (ACTs), primarily for NO_x source categories, which in contrast to the CTGs, only present a range of possible control options but do not identify any particular option as the recommendation for what can be RACT. Section 183(c) of the CAA requires EPA to revise and update CTGs and ACTs as the Administrator determines necessary. States are required to implement RACT for the source categories covered by CTGs through the SIP.

Section 184(a) of the CAA establishes a single ozone transport region (OTR) comprising all or part of 12 eastern states and the District of Columbia,² including the entire State of Maryland. Section 184(b)(1)(B) and (2) of the CAA set forth requirements for states in the OTR. Specifically, section 184(b)(1)(B) requires the implementation of RACT in OTR states with respect to all sources of VOC covered by a CTG. Additionally,

² Only a portion of the Commonwealth of Virginia is included in the OTR.

section 184(b)(2) states that any stationary source with the potential to emit 50 tons per year (tpy) of VOCs shall be considered a major source and requires the implementation of major stationary source requirements in the OTR states as if the area were a moderate ozone nonattainment area. A major source in a nonattainment area is defined as any stationary source that emits or has the potential to emit NO_x or VOC emissions above a certain applicability threshold that is based on the ozone nonattainment classification of the area: Marginal, Moderate, Serious, or Severe. *See* “major stationary source” in CAA sections 182(b) and 184(b).

B. Maryland's History

Maryland has been subject to the CAA RACT requirements because of previous ozone nonattainment designations. The Baltimore (which includes Anne Arundel, Baltimore, Carroll, Harford, and Howard Counties, MD, and Baltimore City, MD), Washington, DC (which includes Calvert, Charles, Frederick, Montgomery, and Prince George's Counties, MD), and Philadelphia (which includes Cecil County, MD) nonattainment areas were designated as severe 1-hour ozone nonattainment areas. Kent and Queen Anne's Counties, MD were designated as a marginal 1-hour ozone nonattainment area. In addition, all of Maryland is included in the Ozone Transport Region (OTR). *See* CAA section 184(a). As a result, the entire State of Maryland is required to address the CAA RACT requirements by submitting to EPA a SIP revision that demonstrates how Maryland meets RACT requirements under the revised 2008 ozone standard. *See* CAA section 184(b). Since the early 1990s, Maryland has implemented numerous RACT controls throughout the State to meet the CAA's RACT requirements for the 1-hour and the 1997 8-hour ozone standards. Maryland also implemented controls necessary to meet the requirements of the NO_x SIP Call (40 CFR 51.121).

Under the 1997 8-hour ozone NAAQS, the Baltimore, Washington, DC, and Philadelphia areas were designated as serious nonattainment areas. Kent and Queen Anne's Counties, MD were designated as a marginal ozone nonattainment area. As discussed above, all of Maryland is in the OTR and therefore required to comply with the CAA RACT requirements. As a result, Maryland continued to be subject to the CAA RACT requirements. *See* 69 FR 23858, 23931 (April 30, 2004). Maryland revised and promulgated its RACT regulations and demonstrated that it

complied with the 1997 CAA RACT requirements in a SIP revision approved by EPA on July 13, 2012 (77 FR 41278).

Under CAA section 109(d), EPA is required to periodically review and promulgate, as necessary, revisions to the NAAQS to continue to protect human health and the environment. On March 27, 2008, EPA revised the 1997 8-hour ozone standard by lowering the 8-hour standard to 0.075 ppm (73 FR 16436). On May 21, 2012, EPA finalized attainment/nonattainment designations for the 2008 8-hour ozone NAAQS (77 FR 30087). Under the 2008 8-hour ozone standard, EPA designated as nonattainment three areas that contain portions of Maryland. These nonattainment areas are: The Baltimore moderate nonattainment area; the Washington, DC marginal nonattainment area; and the Philadelphia marginal nonattainment area. All Maryland counties are part of the OTR, and as a result, the entire State of Maryland is required to address the CAA RACT requirements by submitting to EPA a SIP revision that demonstrates how Maryland meets RACT requirements under the revised 2008 ozone standard. Maryland is required to implement RACT for the 2008 ozone NAAQS on all VOC sources covered by a CTG issued by EPA, as well as all other major stationary sources located within the State. The RACT requirements under CAA sections 182 and 184 apply to all sources for which a CTG has been issued, and any other major stationary sources of VOC or NO_x Maryland has retained its major source thresholds at 25 tpy for VOC and NO_x sources in the Baltimore, Washington, DC, and Philadelphia severe 1-hour ozone nonattainment areas. Maryland has retained its major source thresholds at 50 tpy for VOC and 100 tpy for NO_x in all remaining Maryland counties, consistent with the CAA requirements for states in the OTR.

C. EPA Guidance and Requirements

EPA has provided more substantive RACT requirements through final implementation rules for each revised ozone NAAQS, as well as guidance. On March 6, 2015, EPA issued its final rule for implementing the 2008 8-hour ozone NAAQS (the 2008 Ozone Implementation Rule). 80 FR 12264. This rule addressed, among other things, control and planning obligations as they apply to nonattainment areas under the 2008 8-hour ozone NAAQS, including RACT and RACM. In this rule, EPA specifically required that states meet the RACT requirements either (1) through a certification that previously adopted RACT controls in

their SIP approved by EPA under a prior ozone NAAQS continue to represent adequate RACT control levels for attainment of the 2008 8-hour ozone NAAQS, or (2) through the adoption of new or more stringent regulations or controls that represent RACT control levels. A certification must be accompanied by appropriate supporting information such as consideration of information received during the public comment period and consideration of new data. Adoption of new RACT measures will occur when states have new stationary sources not covered by existing RACT measures, or when new data or technical information indicates that a previously adopted RACT measure does not represent a newly available RACT control level. Additionally, if there are no sources of VOC emissions covered by a CTG source category within the OTR state, then states are required to submit a negative declaration in lieu of, or in addition to, a certification.

II. Summary of SIP Revision and EPA Analysis

On August 18, 2016, Maryland submitted a SIP revision to address all of the VOC RACT requirements set forth by the CAA for the revised 2008 8-hour ozone NAAQS (the 2016 RACT Submission). Specifically, Maryland's 2016 RACT Submission includes: (1) A certification that for certain sources, previously-adopted VOC RACT controls in Maryland's SIP that were approved by EPA under the 1979 1-hour and 1997 8-hour ozone NAAQS, when considered in light of currently available technically and economically feasible controls, continue to represent RACT for implementation of the 2008 8-hour ozone NAAQS; (2) the adoption of new or more stringent regulations or controls that represent RACT control levels for certain categories of sources; and (3) a negative declaration that certain sources covered by certain CTGs do not exist in Maryland.

Most of Maryland's Regulations, under Code of Maryland Regulations (COMAR) 26.11.06, 26.11.10, 26.11.11, 26.11.13, 26.11.14, 26.11.19 and 26.11.24, contain the VOC RACT controls that were implemented and approved into Maryland's SIP for the 1-hour and 1997 8-hour ozone NAAQS. Maryland also relies on COMAR 26.11.06.06—“General Emissions Standards, Prohibitions, and Restrictions—Volatile Organic Compounds,” to achieve significant reductions from unique VOC sources. Maryland is certifying that these regulations, all previously approved by EPA into the SIP, continue to meet the

RACT requirements for the 2008 8-hour ozone NAAQS for major stationary sources of VOCs and for sources subject to CTGs. Maryland also submitted a negative declaration for the CTGs that have not been adopted because no facilities subject to these CTGs exist in Maryland and included Alternative Control Technologies (ACTs) in their review of applicable 2008 8-hour ozone RACT requirements. Maryland considered controls on other sources of VOCs not covered by a CTG and adopted rules whenever deemed to be reasonably available controls. Additionally, Maryland conducted a RACT analysis for each major Non-CTG stationary source of VOC. As previously discussed, Maryland retained its major source levels at 25 tpy for VOC sources in the Baltimore, Washington, DC and Philadelphia 1-hour severe nonattainment areas. All remaining counties are part of the OTR and therefore major source levels remain at 50 tpy for VOC. More detailed information on these provisions, as well as a detailed summary of EPA's review and rationale for approving these SIP revisions, can be found in the Technical Support Document (TSD) for this action which is available on line at www.regulations.gov, Docket number EPA-R03-OAR-2018-0508.

After evaluating the SIP revision submittal, EPA concluded that it meets the VOC RACT requirements for the 2008 8-hour ozone NAAQS as set forth by sections 182(b) and 184 of the CAA. Maryland's SIP revision satisfies the 2008 8-hour ozone NAAQS RACT requirements for VOCs through (1) certification that previously adopted RACT controls in Maryland's SIP that were approved by EPA under the 1-hour ozone and 1997 8-hour ozone NAAQS continue to represent RACT, in light of currently available technically and economically feasible controls; (2) a negative declaration for certain CTG source categories that no such sources exist in the State; and (3) adoption of new or more stringent RACT determinations when technically and economically feasible. EPA finds that Maryland's 2016 RACT Submission demonstrates that the State has adopted air pollution control strategies that represent RACT for the purposes of compliance with the 2008 8-hour ozone standard for all major stationary sources of VOC. EPA also finds that Maryland's SIP implements RACT with respect to all sources of VOCs covered by a CTG.

On August 3, 2018 (83 FR 38110), EPA published a notice of proposed rulemaking (NPR) for the State of Maryland SIP revision. EPA received

one relevant adverse comment on the NPR, which is addressed below.

III. Response to Comments

During the comment period, EPA received two anonymous comments on the rulemaking. One comment generally discussed wildfires and wildland fire management policy. EPA believes this comment is not germane to this rulemaking and therefore no further response is provided. The following is the comment pertinent to this rulemaking action, and EPA's response.

Comment #1: The anonymous commenter stated the following: "It appears that this SIP revision is related to the SIP revision under docket number EPA-R03-OAR-2018-0153 (Maryland; Control of Emissions of Volatile Organic Compounds from Consumer Products)? Is what you are proposing to approve in that docket being reapproved in this revision? If so, if that revision is not final yet, how can you effectively say here that all the RACT requirements for the 2008 8-hour ozone NAAQS have been satisfied? I don't think this SIP revision is approvable before the consumer products one is finalized because you are not fully meeting RACT requirements yet."

Response #1: EPA does not agree that this SIP revision (proposed for approval by EPA via docket number EPA-R03-OAR-2018-0508), addressing Maryland's compliance with the VOC RACT requirements for the 2008 ozone NAAQS, cannot be approved until Maryland's SIP revision for the control of VOCs from consumer products (proposed for approval by EPA via docket number EPA-R03-OAR-2018-0153) is approved. Also, EPA is not, as the commenter suggests, re-approving Maryland's SIP submission for control of VOCs from consumer products in this SIP action related to RACT. As explained below, these two SIP revisions are not related in a way that requires EPA to approve the consumer products SIP before the VOC RACT requirements for the 2008 ozone NAAQS SIP.

This final action (docket ending in 0508) related to Maryland's SIP revision for 2008 ozone VOC RACT is intended to satisfy the requirements of section 182(b)(2) and section 184 of the CAA. Section 182(b)(2) requires that each state containing a moderate ozone nonattainment area submit a SIP revision requiring RACT for (1) each category of VOC sources in the area covered by a CTG issued after November 15, 1990; (2) all VOC sources in the area covered by a CTG issued before November 15, 1990; and (3) all other major stationary sources of VOC that are

located in the area. See section 182(b)(2)(A), (B), (C). As stated in the NPR for this action, EPA's implementation rule for the 2008 ozone NAAQS clarifies that states can certify that previously-adopted RACT controls approved by EPA into a SIP for the 1-hour and/or 1997 ozone NAAQS continue to represent RACT under the 2008 ozone standard. If there are no facilities or sources in the state covered by certain CTGs, states can submit a negative declaration that there are no such facilities or sources. 83 FR 38110 (August 3, 2018). Maryland's SIP revision at issue in docket number EPA-R03-OAR-2018-0508 addresses all of the section 182(b)(2) and 184 requirements. Table 2.3 of Maryland's SIP submittal (Docket ID EPA-R03-OAR-2018-0508-0002, p. 34) lists major stationary sources of VOCs in Maryland and evaluates whether controls applied to these sources still constitute RACT for the 2008 ozone NAAQS, as required by sections 182(b)(2)(C) and 184(b)(2). Table 2.1 of Maryland's SIP submittal (Id. at 7) lists those EPA CTGs for which Maryland has adopted State regulations to address the CTGs and which EPA has approved into Maryland's SIP. Finally, Section 2.2.1 lists those CTGs for which Maryland has submitted a negative declaration that no source covered by these CTGs exists in the State (Id. at 27). Table 2.1 and Section 2.2.1 address the requirements of CAA sections 182(b)(2)(A) and (B) and 184(b)(1)(B), and Maryland has certified that for the sources in Table 2.1, the existing Maryland regulations still constitute RACT for those sources. Thus, Maryland's SIP revision that EPA is taking action on here addresses all of the requirements of CAA section 182(b)(2) and 184 for the 2008 ozone NAAQS. Maryland's SIP revision at issue in docket number EPA-R03-OAR-2018-0153 is not meant to implement any RACT requirement for CTG-covered sources or major sources of VOCs under sections 182(b)(2) or 184. That SIP submittal, which seeks to adopt limits for VOCs in consumer products, is a SIP strengthening measure that is not required by section 182(b)(2) or 184 of the CAA. Indeed, EPA has not issued a CTG for consumer products. See <https://www.epa.gov/ozone-pollution/control-techniques-guidelines-and-alternative-control-techniques>, for a list of all CTGs. Instead, EPA has issued a regulation governing VOC emissions from consumer products, entitled "National Volatile Organic Compound Emission Standards for Consumer Products." 40 CFR part 59, subpart C (promulgated per

the authority in CAA section 183(e). This regulation, which has nationwide applicability, requires that manufacturers, importers, and some distributors of certain consumer products ensure that the VOC content of those products do not exceed the regulated limits. See 40 CFR 59.201. States do not need to adopt 40 CFR part 59, subpart C, into their SIPs because the VOC limits already apply to these products in all states throughout the United States. RACT for VOCs and VOC emission standards for consumer products are managed by different regulatory structures established by the CAA. While these separate programs have a common goal of reducing VOC emissions, they are managed by EPA, and the states, in different ways, and they do not overlap in the manner suggested by the commenter. The new VOC limits adopted by Maryland that are under EPA consideration in docket number EPA-R03-OAR-2018-0153 are SIP strengthening measures, rather than RACT requirements under CAA section 182(b)(2) or 184. As noted in Maryland's public notice for the adoption of new VOC limits on consumer products, EPA's consumer products regulation in subpart C was last amended in 1998. 44:11 Md. R. 543 (May 26, 2017). Maryland's newly adopted consumer product VOC limits reflect more recent consumer product VOC limits adopted by the Ozone Transport Commission (OTC) in 2010 and 2014, of which Maryland is a member. *Id.* Indeed, a comparison of the limits in Tables 1 and 2 of 40 CFR part 59, subpart C, to the limits in COMAR 26.11.32.04, Table 1, shows that Maryland has chosen to adopt VOC limits for many more consumer products than EPA adopted in 40 CFR part 59, subpart C. Because there is no CTG for consumer products, Maryland did not need to consider RACT controls for consumer products in its SIP revision covering VOC RACT for the 2008 ozone standard (0508), and it is therefore not necessary for EPA to approve Maryland's SIP revision covering consumer products (0153) before approving the VOC RACT SIP (0508).

IV. Final Action

EPA is approving the State of Maryland's August 2016 SIP revision submittal on the basis that Maryland has met the RACT requirements for the 2008 8-hour ozone NAAQS as set forth by sections 182(b) and 184(b)(2) of the CAA.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because it is not a significant action under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by

Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 22, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, which approves Maryland's 2008 8-hour ozone RACT SIP revision, may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 28, 2018.

Cecil Rodrigues,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart V—Maryland

■ 2. In § 52.1070, the table in paragraph (e) is amended by adding an entry for “Reasonably Available Control Technology under 2008 8-hour ozone National Ambient Air Quality

Standard” at the end of the table to read as follows:

§ 52.1070 Identification of plan.

* * * * *
(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
Reasonably Available Control Technology under 2008 8-hour ozone National Ambient Air Quality Standard.	Statewide	08/18/2016	02/20/2019 [Insert Federal Register citation].	

[FR Doc. 2019–01881 Filed 2–19–19; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 08–7; FCC 18–178]

Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service

AGENCY: Federal Communications Commission.

ACTION: Declaratory ruling; denial of petitions.

SUMMARY: In this Declaratory Ruling, the Commission finds that two forms of wireless messaging—Short Message Service (SMS) and Multimedia Messaging Service (MMS)—are information services, not telecommunications services under the Communications Act (the Act), and that they are not commercial mobile services nor their functional equivalent. In so doing, the Commission denies petitions filed by Twilio and Public Knowledge asking that the Commission subject text messaging services to common carrier regulation under Title II of the Act. This document concludes that classifying SMS and MMS wireless messaging services as information services will enable wireless providers to continue their efforts to protect American consumers from unwanted text messages and is therefore in the public interest.

DATES: The Declaratory Ruling was released and became effective on December 13, 2018.

FOR FURTHER INFORMATION CONTACT: Elizabeth McIntyre, Deputy Chief, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau, (202) 418–0668, email elizabeth.mcintyre@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Declaratory Ruling, WT Docket No. 08–7; FCC 18–178, adopted December 12, 2018 and released December 13, 2018. The full text of this document is available for inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554. Copies of the Declaratory Ruling and Order also may be obtained via the Commission’s Electronic Comment Filing System (ECFS) by entering the docket number 08–7. Additionally, the complete item is available on the Federal Communications Commission’s website at <http://www.fcc.gov>.

I. Discussion

A. SMS and MMS Wireless Messaging Services Are Information Services

1. The Communications Act defines an “information service” as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. SMS and MMS wireless messaging services meet this definition. First, 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. The messaging center will then forward the message to the recipient device when it becomes available. After the network delivers the message, the message is then stored on the user’s device and will remain stored there until the user deletes it. This storage and retrieval capability is analogous to email service, which has been recognized under Commission

precedent as an information service and similarly involves storage and retrieval functionality. Both email and SMS and MMS messaging services support asynchronous transfer of information allowing users to send messages without the need for the recipient of the message to be available to receive it.

2. The storage and retrieval functionality of SMS and MMS wireless messaging is an essential component of the services. It allows users to retrieve messages at any time and to interact with the stored information. The storage and retrieval functionality of SMS and MMS wireless messaging services also support users’ expectation that the wireless messages they send will be delivered to their intended recipients even if the recipients’ devices are turned off or are otherwise unavailable.

3. SMS and MMS wireless messaging services also involve the capability for “acquiring” and “utilizing” information. MMS also allows users to interact with data by watching and replaying videos and opening attachments. The Commission has found that services that provide this ability for subscribers to utilize and interact with stored information, even information provided by third parties, are information services.

4. In addition, 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. They can also reformat multimedia messages before delivery to resolve the differences in the media processing capabilities of the sending and receiving devices. Commonly, wireless providers may compress or reduce the quality or size of photos and videos to optimize the viewing of a message on a particular receiving device. The Commission