

September 19, 2016

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Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of Ex Parte Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On September 15, 2016, I met with David Gosset, Scott Noveck, Micah Caldwell, Antonio Sweet, Richard Mallen, Kurt Schroeder, Alison Kutler, Kristi Thornton, John B. Adams, Henning Schulzrinne, and Mark Stone. The purpose of this meeting was to discuss the comments I filed on this docket regarding the following issues relevant to the Petition for Reconsideration filed by NCLC pending before the Commission.

Free to End User Calls to Cell Phones are Currently Being Employed

Free to End User (“FTEU”) calls to cell phones are currently being employed by many carriers. These take place in at least two contexts: carriers’ calls to their own customers and “friends and family” plans where calls to and from certain numbers are FTEU. While calls to their own customers are generally within the same carrier’s infrastructure, this is not always true with situations like roaming.

Various “friends and family” type plans provide FTEU calls to/from numbers on different carrier’s network. Alltel Wireless is one example (with their “My Circle” plan) of a carrier with a product that provided FTEU even for calls that are from outside the Alltel infrastructure. Verizon’s “Friends and Family” and T-Mobile “myFaves” are examples of similar programs of FTEU calls regardless of the source network. Given these examples, it is hard to imagine that handling FTEU calls presents any challenge to wireless operators. It is even harder to imagine FTEU call services not appearing rapidly once a desire to make them appears in the marketplace.

Role of Service Providers

While FTEU cell phone calls are a reality, I am unaware of any vendors currently offering bulk FTEU calls the way bulk FTEU text messages are offered. There are, however, many

service providers providing “ringless voicemail” calls where prerecorded message calls are delivered to users’ voice mail inboxes.¹ These calls are FTEU.

Many service providers, such as RingCentral, offer services where an entity that wishes to send FTEU text messages can do so easily and conveniently. The service provider maintains contracts with cell phone providers and other intermediaries, so the message senders (i.e. clients of the service provider) only have to deal with one entity—the service provider.

The same paradigm works for FTEU calls. Randall Snyder, a widely-known expert in the field of wireless telecommunications and infrastructure, filed comments² explaining how carriers can allocate dedicated phone numbers for use by such service providers, and “zero rate” incoming calls from those numbers. A service provider like RingCentral, would then contract with the desired carriers, and route autodialed or prerecorded message calls to the carriers using the “zero-rated” source number as the originating ANI. No air-time charges or plan-minutes would be charged to the receiving cell phone account.

Compliance Products Come to Market When Needed

In several instances in its 25 year history, the TCPA and Commission rules have fostered industry compliance solutions that only matured after their need was first created by the Commission. Even in the face of commenters suggesting that compliance products were not yet adequate, the Commission correctly moved forward. The proliferation of FTEU text service providers are just one example of industry services growing rapidly *after* the need to send FTEU text messages first arose due to the TCPA.

An additional example was the ability to scrub cell numbers taking into account local number portability. Another was the Omnibus Ruling³ with its requirement that callers are responsible for properly handling calls to reassigned numbers. There has been an exponential growth in the compliance products for meeting the reassigned number rules after the Omnibus Ruling. The industry’s responsiveness will be further demonstrated this coming week in Washington at the PACE conference by Quality Voice & Data, Inc., when it will debut what it calls the “Compliance Phone” specifically in response to the TCPA Omnibus Ruling.⁴

These examples demonstrate the industry’s adaptability and ingenuity in rapidly meeting

¹ See, e.g., *Ringless VoiceMail*, <http://straticsnetworks.com/ringless-voicemail-drops/> (last visited Sep. 18, 2016).

² *Comments of Randall A. Snyder, in Support of the Petition of NCLC for Reconsideration*, dated Sep. 13, 2016.

³ *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd 7961 (2015).

⁴ *Standalone Non-ATDS Telephone Ensures Compliance with the Telephone Consumer Protection Act (TCPA)*, <http://news.sys-con.com/node/3910837> (last visited Sep. 14, 2016).

the needs of entities that want to comply with the TCPA and Commission rules. There is no reason to expect it will be any different for FTEU calls once a desire to make them arises.

Incremental Costs / Offset to Callers Making FTEU Calls

A question was raised regarding costs for FTEU calls. While there were no hard numbers on what fees service providers would charge, there would be an offset of substantial savings for entities currently employing live/manual calling to reach cell phones. This current system has high wage costs compared to robocalls costing less than a penny to make.⁵

Who Should Pay for Calls on Behalf of the Federal Government

Someone has to pay for every call to a cell phone. Even people with unlimited plans who do not pay incrementally for each incoming call, each call adds to the costs of the carrier. Each call occupies a discrete amount of capacity usage and incrementally adds to the need for more capacity. More calls mean more capital investment is required. Carriers pay for these things and those costs are passed on to the customers in one way or the other. More calls means (eventual) higher rates for the unlimited plans.⁶

If we assume that our government, in hiring an agent to make robocalls, is acting for the public benefit, the public should pay the costs of those calls. There is no justification for shifting the costs for the calls to the recipient, particularly to an unwilling recipient. Indeed, compelling those recipients to subsidize government calls could be construed as an unconstitutional taking.

Perverse Incentives

It was suggested in some comments that there is no incentive for callers to violate the TCPA's other provisions such as falsified callerID and limitations on calls to nursing homes, hospital rooms, emergency lines, etc. There is, however, a financial incentive to minimize compliance costs. Callers who are not "persons" can reduce those costs by simply not paying for compliance scrubbing for those numbers.

There is also a perverse incentive to falsify callerID. As consumers become more and more suspicious of unknown calls, some large call centers are using fake callerID to entice people into answering by making the callerID match a local call in the same area code and exchange of the called party. Some have even gone so far as to falsify the callerID to match

⁵ Lesley Fair, Federal Trade Commission, March 17, 2016, *available at* <<https://www.ftc.gov/news-events/blogs/business-blog/2016/03/vacation-station-lead-generation-on-your-do-not-call-obligation>>.

⁶ Even in an environment where technology improvements lead to lower consumer costs as time passes, those lower costs can be delayed and less generous due to carriers absorbing other costs.

a local law enforcement entity or court to try to trick consumers into answering the phone and to harass them.^{7,8}

In addition, many call blocking products work solely on callerID. In response, some robocall service providers randomize the callerID for each outgoing call rendering such blocking technology useless.

While I am personally unaware of government contractors who are in a common-law agency relationship with the federal government doing so, there certainly are examples of government contractors that provide addiction treatment services and diabetic supplies under Medicare and Medicaid. Such contractors reap additional income for each client they bring into their fold. Robocalls to cell phones without permission advertising addiction treatment services and diabetic supplies are a well known genre of illegal robocalls. If contractors offering such services were exempted from the TCPA, there would naturally be a substantial increase in such calls. The trivial cost for making robocalls makes indiscriminate calling cheaper than using databases to conduct more targeted campaigns and doing proper compliance scrubbing.

Retroactivity of Statutory Interpretation

It was suggested that because the Broadnet Decision was based on a statutory interpretation, that its application would be potentially retroactive. This may be problematic because the Broadnet Decision does not modify the existing CFR. Notably, the existing rules apply to “any person or entity” so no amount of statutory interpretation of “person” will affect the rule so a rule change is necessary. The retroactive application of a rule change is not justified.

Broadnet Cannot Legitimately Claim That it Thought the Calls Were Permitted Based on Broadnet Not Being a “Person”

It was suggested that Broadnet and others may have been making non-consensual robocalls as federal government contractors in the past, believing the TCPA did not apply to them because they were “standing in the shoes” of the federal government and thus not a “person.” Assuming that is true for the sake of argument, that cannot exculpate such a caller from past conduct. Had they read the regulations in effect since 2006, the

⁷ “At the time, Mey said she didn't make a connection between that call and the collectors. But then she learned the call hadn't come from the local sheriff's office after all. The caller ID had been manipulated to look like it did, a practice called spoofing. That's when she went online and discovered complaints about RFA debt collectors pretending to call from sheriff's offices.” *W. Va. Woman Fights to Collect \$10 Million from Debt Collectors*, <http://abcnews.go.com/US/va-woman-fights-collect-10-million-debt-collectors/story?id=16205697> (last visited Sep. 18, 2016).

⁸ See also, *Dudley-Jenkins v ACM Group, et al.*, No.: 1:11-cv-00279 (S.D. Ohio) (debt collection calls spoofing number of local court.) Another consumer reported to me an instance of a robocaller spoofing the callerID for the local nuclear power plant emergency community alert center number.

prohibition on robocalls to cell phones applies equally to any “person or entity.”⁹ Believing they were not a “person” is not enough, since violations of the CFR are equally actionable under the TCPA’s private right of action.

Of course the issue of immunity is very different than whether or not Broadnet thought it was not a “person” under the TCPA. If Broadnet believed it enjoyed a form of *Yearsley* immunity¹⁰ then it still has that defense available to it and no Commission action is needed. Since *Yearsley* immunity is a judicial creation, based on constitutional principals, the Commission should not seek to define it under the guise of rulemaking or statutory interpretation.

Protect the Medium

I also suggested that there is a strong public interest in protecting the medium of cell phone communications. The comments on this docket and in the press demonstrate the universal revulsion and contempt consumers have for robocalls. As a result, the response of many consumers is an instant hang up whenever a robot call is detected—either by the sound of a prerecorded voice or the dead air that indicates an autodialer was employed.¹¹ Many cell phone users today automatically ignore calls from “unknown” numbers.

As a result, the calls that consumers *should* listen to—such as calls of a emergency nature or calls from legitimate unknown numbers such as the police or fire department— are achieving less penetration to the recipients. The Commission should vigorously protect this medium for the public good.

The usefulness of phone surveys is also diminishing. Research shows staggering errors are likely in certain survey topic areas. Pew Research noted that refusal rates for phone surveys are at record levels (over 90%) and growing.¹² The same study found that on some topics, results obtained by typical phone surveys were believed to be 300% or more in error. This is not surprising since the population willing to participate in phone surveys

⁹ 47 C.F.R. § 64.1200(a)(1).

¹⁰ *Yearsley v. W.A. Ross Constr. Co.*, 309 U. S. 18 (1940).

¹¹ See, e.g., *Predictive Dialer Pause Puts off Otherwise Responsive Consumers*, <<http://www.bizreport.com/2013/09/predictive-dialer-pause-puts-off-otherwise-responsive-consumers.html>> (last visited Oct. 13, 2015) (study of 2,034 U.S. adults conducted by Harris Interactive, found that half (49%) of consumers hang up when they hear a predictive dialer “pause” when they answer the phone.)

¹² “[T]he response rate of a typical telephone survey was 36% in 1997 and is just 9% today.” *Assessing the Representativeness of Public Opinion Surveys*, Pew Research Center, <http://www.people-press.org/2012/05/15/assessing-the-representativeness-of-public-opinion-surveys> (last visited Sep. 18, 2016).

simply is not homogeneous with the population that refuses to do so.

FTEU calls are one way to protect the medium for the public benefit. This is particularly true if FTEU calls can be readily identified by consumers before answering the call such as by releasing the non-geographic “500” area code for allocation to FTEU callers as suggested by Mr. Snyder.¹³ But even if the consumer has to listen to the first part of the call to know it is FTEU, it will certainly remove some of the resistance to the call at that point.

Silence Is Not a Directive.

I noted that there are factual scenarios in the Broadnet Decision that should be clarified to prevent contrived misunderstandings or circumventions.¹⁴ Specifically, that as *Campbell-Ewald* held, the government contractor must be following a clear *directive* from the government. Mere silence is not a directive to act, particularly when a contractor acts in a way that—absent a directive from the government—would be unlawful.

The Statutory Interpretation of “Person” in the Broadnet Decision Has Many Unforeseen Consequences

Any step the Commission takes in “statutory interpretation” of the term “person” will have far reaching consequences. Courts and the industry will undoubtedly apply the same interpretation to other parts of the TCPA and to other parts of the Communications Act. The Commission cannot put a fence around it to prevent that from happening. Declining to reach a particular question is simply an invitation to others to do so to fill that void.

The Commission’s invocation in the Broadnet Decision of *United States ex rel. Long v. SCS Business & Technical Institute* provides no fence either.¹⁵ The context of *Long* was the avoidance of an absurd result. *Long* does not stand for the proposition that the Commission can adopt a different definition of “person” for different parts of the Communications Act—much less within the TCPA itself—merely because it wants to. That is the epitome of an arbitrary and capricious agency action. *Long* notwithstanding, the Commission will face difficulties justifying a different interpretation of “person” elsewhere in Chapter 5.

Furthermore, the flawed logic of a federal contractor being able to “stand in the shoes” of its federal principal and thereby have “non-person” status, will equally and directly apply to a state contractor being able to “stand in the shoes” of its state principal. This is yet another reason to eschew the ill-conceived “person” construction and provide relief by way

¹³ *Comments of Randall A. Snyder, in Support of the Petition of NCLC for Reconsideration*, dated Sep. 13, 2016.

¹⁴ *Reply Comments of Robert Biggerstaff*, dated Sep. 9, 2016.

¹⁵ *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 881 n.15 (D.C. Cir. 1999).

of a carefully tailored exemption under section (b)(2)(C).¹⁶

As a result, we can look forward to state prisons and contractors running cell phone cell phone jammers and state highway departments and contractors using high-powered radios.¹⁷ Not to mention the mischief that other state agencies and contractors such as state debt collectors would employ if freed from Communications Act limitations on “persons.”

If that seems far fetched, consider that the Commission has already issued citations and forfeitures for violations of these very rules—with some citations against businesses using jammers merely to prevent employee use of cell phones on the job.¹⁸ It seems quite likely that contractors for state and federal governments would be similarly tempted to use the same technology in similar circumstances if they were not “persons” and thereby exempt.

I cannot over-emphasize this last point: a position that the Commission’s is “reserving” or deferring a decision on whether state governments and their contractors are or are not “persons” under the Communication Act will, in and of itself, be the basis to show the law is not settled, and thus provide qualified immunity to those entities.

The Budget Act Amendment Directly Refutes the Basis of the Broadnet Decision

In my comments on the Broadnet petition, I pointed to other provisions of the Communications Act (i.e. sections 301 and 305) where Congress expressly exempted the federal government. The Commission’s response was

[T]here is no merit to the suggestion that Congress’s decision expressly to exempt the federal government in older provisions of the Communications Act (such as sections 301 and 305) should be construed as evidence that section 227(b)(1) applies to the government.¹⁹

The Broadnet Decision went on to state:

The fact that Congress did not expressly carve out the federal government from

¹⁶ Once again, this is quite distinct from the question of immunity (sovereign, qualified, or otherwise). The “person” definition has no effect whatsoever on the application of immunity doctrines.

¹⁷ The issue of cell phones in prisons even had Commissioner Ajit Pai visiting corrections officials in the field in October 16, 2015, and an NPRM on docket GN 13-111 “to facilitate the development of multiple technological solutions to combat the use of contraband wireless devices in correctional facilities nationwide.”

¹⁸ See, e.g., the NAL issued to Taylor Oilfield Manufacturing, Inc., (FCC 13-46) in 2013.

¹⁹ Broadnet Decition at n. 68.

section 227(b)(1) is consistent with the interpretative presumption, prevailing when the TCPA was enacted in 1991, that the word “person” should not be presumed to include the federal government.

Despite this, the Broadnet Decision failed to acknowledge that after the Broadnet Petition was filed, Congress *did* act to carve out an exception to the robocall provisions of the TCPA for the federal government. This vitiates the Broadnet Decision’s attempt to distinguish what it termed “older” acts of Congress, inferring that a modern Congress would have no need to do so. Clearly Congress and the White House (which proposed the exemption as early as 2013) felt the need to do so.

The Commission noted in the Broadnet Decision “the well-settled presumption that Congress understands the state of existing law when it legislates” citing *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988). Is the Commission suggesting that Congress did not “understand the state of existing law” when it passed the Budget Act Amendment in 2015? An administrative agency should not be quick to attribute ignorance of the law to Congress. Congress’ actions in 2015 demonstrate that the federal government contractors are well known by Congress to be covered by the Communications Act.

An Exemption Under Subsection (b)(2)(C) Provides Relief with Consumer Protection

Finally, once a federal contractor becomes a “non-person” under the TCPA, there are few if any limits (other than for debt collection calls) that the Commission can place on the number, duration, or timing of those calls. No “opt-out” requirements apply to a “non-person” (other than for debt collection calls).

Congress intended the Commission to grant robocall exceptions via the provisions of section 227(b)(2)(C). That provision give the Commission great latitude to fine tune the contours of each exemption specific to different types of situations—such as the conditions of package notification calls. All the problems with the “dull axe” approach of declaring certain federal government contractors to be “non-persons” are avoided if the Commission instead holds contractors to be “persons” and then uses the “scalpel” of subsection (b)(2)(C) to adopt opt-out standards, reasonable limits on frequency, duration, and quantity of calls, and other appropriate criteria for federal government calls.

Conclusion

In the TCPA itself, Congress found that “the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call.”²⁰ In passing the TCPA, Senator Hollings made clear in 1991:

Computerized calls are the scourge of modern civilization. They wake us up in the

²⁰ Telephone Consumer Protection Act, PL 102-243, 105 STAT. 2394, Congressional Findings, No. 13 (1991) (emphasis added).

morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.

The telephone is a basic necessity of life. You cannot get along in this country if you do not have a telephone in your home. However, owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls. These calls are a nuisance and an invasion of our privacy.²¹

No exception is drawn for the federal government in that sweeping indictment of robocalls. The Commission should not pencil one back in.

This disclosure is made pursuant to 47 C.F.R. §1.1206.

Sincerely,

/s/ Robert Biggerstaff

²¹ 137 Cong. Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings); See also, 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("It is telephone terrorism, and it has got to stop.")