

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Consumer and Governmental Affairs Bureau Seeks)	DA 17-1054
Comment on ContextMedia, Inc. d/b/a Outcome)	
Health Petition for Clarification or Declaratory Ruling)	
Under the Telephone Consumer Protection Act of 1991)	
)	

Reply Comments of ContextMedia, Inc. d/b/a Outcome Health

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. CONGRESS DETERMINED THAT THE COMMISSION IS THE EXPERT AGENCY ON TCPA MATTERS AND HAS EXCLUSIVE AUTHORITY TO IMPLEMENT THE STATUTE	1
II. OPPONENTS ERR BY IGNORING MYRIAD PRECEDENT IN WHICH THE COMMISSION HAS DETERMINED THAT GOOD FAITH COMPLIANCE, TECHNICAL ERROR, OR BOTH, MERIT RELIEF FROM STRICT APPLICATION OF THE COMMISSION’S RULES	3
III. REGARDLESS, GRANT OF THE OUTCOME PETITION WOULD BE CONSISTENT WITH A LONG LINE OF COMMISSION RULINGS IN BOTH POLICY AND ADJUDICATORY MATTERS	4
CONCLUSION	8

INTRODUCTION

ContextMedia, Inc. d/b/a Outcome Health (“Outcome”) hereby submits the instant reply to the comments in opposition to the Outcome Petition.¹ As discussed below, Congress long ago determined that the Federal Communications Commission (“Commission”) is the expert agency on matters involving the Telephone Consumer Protection Act (“TCPA”),² and possesses exclusive authority to implement the statute. As a policy-setting agency, the agency promulgates reasonable rules consistent with Congress’s intent. Moreover, Congress never intended that the private right of action set forth in the TCPA would become an unscrupulous scheme for extracting millions of dollars from calling parties acting in good faith to comply with the Commission’s TCPA requirements. But while the opponents lay bare their interest in perpetuating the manipulation of the TCPA for predatory litigation, their filings utterly ignore Outcome’s substantive analysis of the longstanding, myriad precedent in which the Commission has determined that good-faith compliance, technical error, or both, merit relief from the strict application of the Commission’s rules. The Outcome Petition presents a compelling case: Commission action to grant the petition would be entirely consistent with a long line of the agency’s rulings in both policy and adjudicatory matters.

I. CONGRESS DETERMINED THAT THE COMMISSION IS THE EXPERT AGENCY ON TCPA MATTERS AND HAS EXCLUSIVE AUTHORITY TO IMPLEMENT THE STATUTE

As an initial matter, we note that, in enacting the TCPA, Congress armed the Commission with exclusive authority to implement the statute. Indeed, the Commission has handled numerous rulemakings and adjudicatory proceedings since Congress enacted the TCPA

¹ Petition of ContextMedia, Inc. d/b/a Outcome Health for Clarification or, in the Alternative, for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 20, 2017) (“Outcome Petition”).

² 47 U.S.C. §227.

in 1991.³ The Commission’s first order implementing the TCPA stated, “This proceeding was initiated by passage of the [TCPA] ... Our task in this proceeding is to implement the TCPA in a way that reasonably accommodates individual’s rights to privacy as well as the legitimate business interests of” calling parties.⁴ The Commission has carried out this responsibility for 25 years.

As noted in the Outcome Petition, the TCPA authorizes the Commission to issue clarifications and declaratory rulings regarding the agency’s interpretation and implementation of the TCPA.⁵ Indeed, the Commission has cited its “significantly broad” jurisdiction over practices subject to the TCPA.⁶ Yet, the Glapion Opposition⁷ places undue emphasis on “court-ordered fact discovery.”⁸ As a policy-setting agency, however, the Commission is not a finder of fact unless engaged in an investigation.⁹ Rather, the agency promulgates reasonable rules consistent with Congress’s intent, and through the Enforcement Bureau, enforces these rules . The question before the Commission (and only the Commission) in this proceeding is whether

³ See *e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-80, Report and Order, 7 FCC Rcd 8752 (1992).

⁴ *Id.* at ¶¶ 2-3.

⁵ The Commission may issue a declaratory ruling “terminating a controversy or removing uncertainty.” 47 CFR § 1.2.

⁶ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 15 (2003) (noting that the Commission’s jurisdiction over telemarketing practices is “significantly broader” than the Federal Trade Commission’s).

⁷ See Comments Opposing the Petition for Declaratory Ruling filed by Jeremy M. Glapion on behalf of Consumer-Plaintiff Christy Griffith, GC Docket No. 02-278 (filed Nov. 27, 2017) (“Glapion Opposition”).

⁸ See *id.* at 1-3. *Cf.* The Consumer Opposition recognizes that the Commission provides “no process for a full and fair evaluation of the facts at issue in [TCPA] cases,” but implies that the agency ought to create such a process. See Comments in Opposition to the Petition for Declaratory Ruling filed by the Nat’l Consumer Law Center, Consumer Action, Consumer Federation of America, Nat’l Ass’n of Consumer Advocates, Public Citizen, Public Knowledge, and U.S. PIRG, CG Docket No. 02-278 (filed Nov. 27, 2017) (“Consumer Opposition”) at 5.

⁹ See 47 CFR § 0.111 (setting forth the responsibilities of the Enforcement Bureau).

Outcome's request is reasonable and consistent with the Commission's authority to interpret and implement the TCPA.

II. OPPONENTS ERR BY IGNORING MYRIAD PRECEDENT IN WHICH THE COMMISSION HAS DETERMINED THAT GOOD FAITH COMPLIANCE, TECHNICAL ERROR, OR BOTH, MERIT RELIEF FROM STRICT APPLICATION OF THE COMMISSION'S RULES

Both the Glapion Opposition and the Consumer Opposition focus exclusively on the Outcome Petition's analysis of the *SoundBite* order.¹⁰ Not only is their approach too narrow, both oppositions incorrectly conclude that *SoundBite* is inapt.¹¹

In reaching its determination in the *SoundBite* order,¹² the Commission sought to ensure that wireless consumers would continue to benefit from the TCPA's protection against unwanted text messages, while giving consumers certainty that their opt-out requests are successfully processed. *SoundBite* applies to situations in which a consumer has opted-in to receive text messages, but then subsequently decides to opt-out. At its core, *SoundBite* is intended to ensure that companies are establishing reasonable procedures to honor opt-out requests, including the transmittal of a text confirming an opt-out request.

The Outcome Petition thus requests that the Commission afford the liability protection contemplated by *SoundBite* to those companies that undertake good-faith efforts to develop

¹⁰ Petitioners also argue that Commission action in this matter would interfere with their litigation effort—and that discovery and other litigation-related efforts would be inefficient and burdensome to both the court system and litigants. See Glapion Opposition at 1 (“Unpacking the legitimacy and contours of such defense, and determining the ultimate responsibility for the glitch, will significantly increase litigation costs to both sides and further burden the courts.”); see also Consumer Opposition at 8 (“Rather than stop TCPA cases from being filed, or providing the calling party an opportunity to end cases early, the ‘technical error’ defense would only be another item for the parties to address in discovery, motion practice and trial.”). Given the Glapion plaintiff's demand for millions of dollars in damages and the many examples of frivolous TCPA suits discussed in the Outcome Petition, as well as in the instant docket, these arguments lack merit.

¹¹ See Glapion Opposition at 14; Consumer Opposition at 5-7.

¹² *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 27 FCC Rcd 15391 (2012) (“*SoundBite*”).

and implement a means to honor opt-out requests in compliance with the ruling. Outcome's internal procedure was designed to cease sending Healthy Tips messages upon receipt of an opt-out request. Outcome should not be held liable when the company engaged in good-faith efforts to ensure that opt-out requests were being honored.

III. REGARDLESS, GRANT OF THE OUTCOME PETITION WOULD BE CONSISTENT WITH A LONG LINE OF COMMISSION RULINGS IN BOTH POLICY AND ADJUDICATORY MATTERS

In addition to *SoundBite*, the Outcome Petition also cites a host of instances within the Commission's long history of interpreting and implementing the TCPA in which the Commission has established or proposed a safe harbor for good-faith compliance efforts.¹³ Opponents do not raise, let alone refute, any of the complementary rulings analyzed in the Outcome Petition.¹⁴ Moreover, the Glapion Opposition places great emphasis on securing significant damages from Outcome, and thus cites only court precedent, which is not applicable before the Commission.

To recap briefly, the Outcome Petition discusses:

- the Commission's explicit acknowledgement of the substantial consumer benefits arising from legitimate communications between businesses and consumers,¹⁵ noting that Outcome did not sell any products or generate any revenue through Healthy Tips; rather, the program was intended to fulfill the goal set by medical personnel: to regularly, but gently, inform and remind consenting patients about activities and choices that would bring about positive health outcomes in between medical visits;

¹³ Consumers Union urges the Commission to deny the Outcome Petition, arguing that the TCPA does not give the Commission "the authority to exempt robocalls (or texts)." Letter from Consumers Union to Ms. Marlene H. Dortch, Secretary, Federal Communications Comm'n, CG Docket No. 02-279, at 3 (filed Dec. 11, 2017) (emphasis added). We note, however, that Outcome does not seek an exemption. Outcome has requested only a safe harbor as a result of good-faith compliance with the Commission's TCPA rules.

¹⁴ The Glapion Opposition cites only a handful of district court cases rather than citing and analyzing Commission rulings. But, district court cases have no precedential value at the Commission, a federal administrative agency, which, as noted above, has exclusive jurisdiction over TCPA policies and rules.

¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 37 (2003) ("2003 TCPA Order").

- instances in which the Commission provided safe harbor relief, noting that, as far back as 2003, the Commission determined “that a safe harbor should be established for telemarketers that have made a good-faith effort to comply with the national do-not-call-rules,”¹⁶ and concluded that a seller or its agent would not be liable for violating the rules if the seller could demonstrate compliance with certain criteria as part of its “routine business practice,” even in the event of an error;¹⁷
- the *Dynasty Mortgage* order, in which the Commission further recognized “that parties who have made good-faith efforts to comply with the national do-not-call rules may, nonetheless, occasionally make some calls in error to registered telephone lines,” and thus established standards for a safe harbor exemption from liability;¹⁸
- the Commission’s actions to create a safe harbor from the prohibition on autodialed or prerecorded message calls to wireless numbers for those numbers recently ported from wireline service;¹⁹
- the Commission’s 2015 conclusion that “where a caller believes he has consent to make a call and does not discover that a wireless number had been reassigned prior to making or initiating a call to that number for the first time after reassignment, liability should not attach for that first call,”²⁰ and
- the Commission’s current effort to examine whether to adopt a safe harbor to give callers the certainty that they will not be found in violation of the Commission’s rules when they block fraudulent calls.²¹

¹⁶ *Id.* at ¶ 38.

¹⁷ *Id.* (stating that telemarketers must have: (i) established and implemented written procedures to comply with the do-not-call rules; (ii) trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the do-not-call rules; (iii) maintained and recorded a list of telephone numbers the seller may not contact; (iv) used a process to prevent telemarketing to any telephone number on the do-not-call list no more than three months prior; and (v) ensured that any subsequent call otherwise violating the do-not-call rules is the result of error). *See also* 47 CFR § 64.1200(c)(2)(i)(A)–(E).

¹⁸ *See Dynasty Mortgage, L.L.C., Order of Forfeiture*, 22 FCC Rcd 9453 at ¶ 4 (2007) (“*Dynasty Mortgage*”); *see also* 2003 TCPA Order, 18 FCC Rcd at 14040.

¹⁹ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004) (“2004 TCPA Order”).

²⁰ *Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd 7961, 8006 ¶ 85 (2015).

²¹ *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 2306, 2316 ¶ 34 *et al.* (2017).

The Glapion Opposition and the Consumer Opposition are devoid of analysis of these Commission precedent. Both discuss only *SoundBite* without covering any other Commission rulings, which are controlling here.

In addition to these instances of relief in the TCPA context,²² Commission action to grant the Outcome Petition would be consistent with a long line of similar determinations pertaining to both policy and adjudicatory matters. For example, the Commission has cited good-faith as a mitigating factor in adjudicatory proceedings arising in the Enhanced 911 (“E-911”) context. In 2005, the Commission waived the deadline for E-911 compliance for smaller wireless service providers acting in good faith to timely comply with the milestones set forth in the agency’s rules.²³

Additionally, the Commission has acted to waive certain policies and rules when a good-faith actor’s effort was hampered by an inadvertent technical glitch.²⁴ Just three months ago, the Commission ruled to waive a compliance deadline applicable to manufacturers of vehicles that contain rear-seat video systems. The Commission’s rules mandated that such video systems were to be compliant by December 21, 2016. In concluding that vehicle manufacturer Fiat-Chrysler was entitled to relief, the Commission noted that the accessible systems “were inadvertently manufactured without the requisite ... built-in functions” and that the issue affected “a relatively small number” of vehicles.²⁵ As discussed in the Outcome Petition, like

²² We note that the Commission’s most recent action to waive certain TCPA rules in adjudicatory proceedings, explicitly noted that the relief granted “will benefit consumers and good-faith callers alike[.]” *Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd at 7962 ¶ 2.

²³ See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 91 Emergency Calling Systems, E911 Phase II Compliance deadlines for Tier III Carriers*, 20 FCC Rcd 7709 (2005).

²⁴ See *Accessibility of User Interfaces and Video Programming Guides and Menus*, Memorandum Opinion and Order, 32 FCC Rcd 7275 (2017).

²⁵ *Id.* at 7277 ¶ 5.

Fiat-Chrysler, Outcome's internal investigation identified an unknown and inadvertent technical error that caused the improper processing of unsubscribe requests in certain limited circumstances. Accordingly, action to grant the Outcome Petition would be consistent with the Fiat-Chrysler Order.

In addition, in 2004, the Commission declined to take enforcement action against Comcast Corporation when, due to "a series of technical errors," Comcast "unknowingly and unintentionally sent certain programming to subscribers that had not requested that programming."²⁶ The Commission determined that Comcast's action was neither intentional nor pre-planned, and that Comcast did not offer the programming in a "deliberate" manner.²⁷ Here again, as set forth in the Outcome Petition, the company's error was unintentional rather than deliberate. Thus, Outcome meets the test set forth in the *Ames Letter*.

Likewise, the Commission upheld award of a wireless license given that "the station was constructed in good faith [and] the incorrect coordinates on the license were due to inadvertent error."²⁸ In Outcome's case, the company acted in good faith to develop a routine system for identifying and honoring opt-out requests. Nonetheless, an unknowable technical issue arose, which prevented the company from honoring opt-out requests in some instances. Thus, Outcome merits similar relief.

Thus, the Commission has repeatedly recognized that, even in the case of good-faith actors, unforeseen technical issues arise. Outcome acted in good faith to develop and implement a routine system for identifying and honoring opt-out requests. Yet, through no

²⁶ *Letter to Mr. Matthew C. Ames*, 19 FCC Rcd 20342 (2004).

²⁷ *Id.* See also, *Dynasty Mortgage*.

²⁸ See *Susan J. Palmer, Finders Preference Proceeding Involving SMR Station WNYE753 at New Orleans, Louisiana*, Memorandum Opinion and Order, File No. 94F192, 15 FCC Rcd 3449, 3452 ¶ 9 (1999).

fault of its own, an inadvertent technical glitch arose, which precluded Outcome's ability to follow its procedure in every instance. Outcome's otherwise diligent efforts do not warrant a result as severe as a \$192 million punishment. The Commission should use its exclusive authority to implement the TCPA to clarify that good-faith efforts to comply with the statute warrant protection from predatory litigation.

CONCLUSION

In light of the foregoing, Outcome respectfully requests the Commission to clarify or declare that a discrete, obscure technical error does not eliminate the liability protection afforded by the 2012 *SoundBite* Declaratory Ruling, or, in the alternative, preclude the granting of a safe harbor. Outcome submits that either action would serve the public interest.

Respectfully submitted,

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