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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of United Healthcare Service's Petition for Expedited Declaratory Ruling	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 14-1228 September 24, 2014
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Gerald Roylance's Comments re Rubio's Restaurant Petition

I. Introduction

In DA 14-1228,¹ the FCC seeks comment about Rubio's Restaurant's August 15, 2014.²

First, Rubio wants to avoid liability when it delivers autodialed or prerecorded calls to cellular telephone subscribers who have not given their prior express consent. That request is clearly against the plain statutory language of the TCPA. Rubio wants to justify these calls with the prior express consent of an unrelated third person who previously held the telephone number.

¹ FCC, 25 August 2014, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from Rubio's Restaurant, Inc.*, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0825/DA-14-1228A1.pdf

² Rubio's Restaurant, 15 August 2014, *Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling*, <http://apps.fcc.gov/ecfs/document/view?id=7521768526>

Second, Rubio believes the TCPA should not apply to its automated calls because the calls are not about telemarketing. Rubio demonstrates a poor understanding of the TCPA. Section 227(b) prohibits certain automated calls; fundamentally, its purpose is not directed at just telemarketing but rather at all automated calls – calls that recipients can find annoying, can be difficult to stop, and can drain a consumer’s wallet or bucket of minutes. The limitation on telemarketing is the primary focus of 227(c), but Rubio is not being sued for violations of 227(c). Rubio should find better attorneys.

Rubio states that it is a party to a lawsuit, but it does not identify the suit nor supply copies of the complaint or answer. Rubio wants the FCC to rule in the dark. The petition should be denied as forum shopping.

II. Issues

A. Consent

Consent is the first issue for which the FCC requested comments.

1. Consent must come from current subscriber

Rubio wants a world where a third-party can supply consent for the consumer. That does not make sense. Say my friend lets me use his ski cabin in the Sierras. He tells me where it is located, he gives me a key, and I use it off and on. A few years down the road, my friend sells his ski cabin but forgets to tell me. Under Rubio’s world view, I should be permitted to continue to use the ski cabin until (1) my friend tells me he sold the cabin (the employee tells Rubio that he no longer has the cellular telephone number) or (2) the new owner catches me using the cabin and chases me off (the new subscriber finally figures out who is calling). I might use the ski cabin for years before the new owner catches me; the new owner might notice some beer missing from the fridge or some dirty linen, but if he’s not at the ski cabin at the same time I’m there, then he has no idea who I am.

I would be guilty of trespassing. I could not use the permission from my friend to prove that I had a right to use the cabin. From time to time, I should have checked with my friend to see that I still had permission to use the ski cabin.

Consent must come from the current subscriber to the telephone number. The TCPA has a good-faith affirmative defense at 47 U.S.C. § 227(c)(5), but there is not a similar good-faith affirmative defense under subsection (b). Congress could have added one, but it did not. Consequently, even good faith violations of subsection (b) are not excused. In good faith situations, it is unlikely that a court or a jury will impose treble damages. That also brings up another difference between subsections (b) and (c). Violations of subsection (b) carry minimum damages of \$500, but violations of subsection (c) have no minimum damage amount. Congress created a zero tolerance view about automated calls.

Rubio should have been more careful when it designed its automated system. Rubio is also obtuse about how its Remote Messaging System works. It doesn't appear to be a text message because it "allows the QA staff to directly access the QA Hotline Voicemail after entering a password." (Petition, page 2.) That suggests the call is done with an IVR system, but it leaves us in the dark about the system's interaction with non-employees. Does the system identify Rubio's Restaurant or does it just ask for a password? Any prerecorded voice message must provide an identity and a telephone number under 47 C.F.R. § 64.1200(b). If the message does not provide that information, then it violates the TCPA even if there is prior express consent. The FCC should not rule in the dark here.

Also, does the Remote Messaging System provide a way to remove the telephone number? That would have been a good thing to put into the IVR menu.

Rubio also seems to be misinformed about reassigned telephone numbers. Rubio claims it could not know the number was reassigned. (Petition, pages 4-5.) Rubio pleads that Neustar is inaccurate, but Rubio does not plead that it actually used Neustar to scrub the telephone numbers. That's a crappy after-the-fact defense.

Rubio also claims that the telephone system does not offer a “change of address” service, but that statement is not quite on point. Before a telephone number is reassigned, it will be in a disconnected state for at least a month. Rubio’s system has huge call volume (it called the plaintiff 876 times), so it presumably would have called the number while it was disconnected. As a result, the telephone exchange should have returned a disconnected special information tone (SIT). Rubio’s system should have caught that SIT and removed (or at least flagged) the telephone number. The implication is that Rubio did not design its system with this (or other) simple safeguards. The SIT does not provide the new telephone number, but it does signal that the telephone number is no longer valid.

Rubio also bemoans class actions, but nothing in its Petition suggests that Rubio is the target of a class action (let alone an unwarranted class action). It seems that Rubio is the target of a direct action.

Rubio cites to some alleged inconsistent court rulings about reassigned telephone numbers, but none of those rulings are on point. Rubio admits that after the first hundred calls, Rubio knew that its Remote Messaging System was making illegal calls. All the court rulings agree that after notice of a new subscriber, the caller is liable.

More telling is that Rubio cites cases that are not on point with respect to “intended recipient”. Roommates and wives who are not part of the business do not have standing to sue; that is not the same fact pattern as a reassigned telephone number.

It is also stupid because Rubio’s lawsuit is apparently in the Ninth Circuit given the attorney’s address, so *Soppet v. Enhanced Recovery* is not only on point but also controlling.

Rubio’s argument has other problems. When it learned about the error, it chose not to fix the problem and continue making violative calls. That ratifies the earlier bad acts. None of the cases address that issue. Why should any court or the FCC excuse bad behavior that was not immediately stopped?

2. Bad faith defense

Rubio only tells us its version of events; we don't know the plaintiff's version. Rubio claims that, "By the time Rubio's was aware of the problem, hundreds of Remote Messaging alerts were received by the wireless subscriber with the reassigned number." (Petition, page 3.) We don't know why it took the subscriber so long to complain. Maybe the subscriber thought the calls would stop. Maybe the subscriber called the CID number back did not have an option to stop the calls. Maybe the subscriber was confronted with a voice menu that required a password.

It does seem clear that the subscriber did not know about the TCPA during the initial hundreds of calls. We know that because Rubio claims the subscriber "solved the problem by blocking the number assigned to the Remote Messaging system". (Petition, page 3.) If the subscriber had known about the TCPA at that point, the subscriber could be demanding \$50,000 for 100 calls.

Rubio suggests but does not actually state that new subscriber forgave the calls. The subscriber may have found that he could block the calls and gain some peace, but that does not necessarily mean that he forgave any violations or told Rubio that it now ignore the problem. Rubio states a conclusion, "therefore, no corrective action was needed", but Rubio does not identify the speaker.

It does seem clear that at the hundreds of calls mark, Rubio was aware of a serious problem with the Remote Messaging System and did nothing to fix it.

Rubio now claims that the new subscriber misled Rubio about the calls, waited until 876 alerts had accumulated, and then filed suit. From what has been said, we don't know if the plaintiff misled Rubio or not. If the plaintiff blocked the calls, then the plaintiff would not see them. Maybe he blocked the calls but still expected Rubio to fix the problem; since the calls were blocked, he may have thought Rubio had fixed the problem. Maybe his cellular telephone plan changed and the blocked calls caused more trouble; maybe the volume of Rubio's alerts increased dramatically and ate into his bucket of minutes. Maybe the subscriber was ignorant of the TCPA's statutory damages provisions until just before he filed. There are many possibilities.

The problem is none of the bad faith defense issues involve the FCC's special expertise in communications. Bad faith is something that the courts can and should resolve. There is no reason for the FCC to weigh in here.

Rubio claims the plaintiff released the calls after the first couple hundred. If there was a release, then Rubio is off the hook. If there was no release, then the courts can look into the issue further. In this comment period, we don't have discovery, and we don't have the other side's story.

Courts are also good a looking at other defenses such as mitigation of damages. Plaintiffs, if they are suffering continuing damage, need to take steps to mitigate that damage. The courts are perfectly capable of investigating that defense. The doctrine does not say that plaintiffs need to mitigate the defendant's damages. Once again, we don't have the whole story, and the issue is a legal one that is outside of the FCC's expertise.

Courts can also look to the resulting penalty being unconscionable under the Constitution. That inquiry is also outside of the FCC's expertise.

B. Non-telemarketing alerts

The second question the FCC seeks comments on is whether “the TCPA [applies] to intra-company messaging systems which are not aimed at consumers and [are] never intended to reach the public.”

This question is a non-starter. TCPA subsection (b) prohibits “any call”. The TCPA did not limit the protection to only calls that are aimed at consumers. Subsection (b) is not about telemarketing calls. Congress did not intend to excuse calls that were the result of simple mistakes or errors; there is no affirmative defense in subsection (b).

Congress took several hard lines here. What if Rubio had accidentally included the telephone number of a hospital room into the Remote Messaging System and then proceeded to call that telephone number 867 times? Would there be any debate?

Rubio turns the prohibition on its head. Rubio was “never intending to communicate with any member of the public for telemarketing, customer surveys, or solicitation of any kind”. Rubio ignores the injury to the consumer who never wanted any of the 876 calls from Rubio’s Remote Messaging System. Union Carbide never intended to poison Bopal, but that does not mean Union Carbide should escapes damages for causing injury. Rubio’s alerts escaped the company premises and injured outsiders.

Rubio quotes several Senate Reports cited in an annotated code, but Rubio ignores the clear intent of Congress stated in Public Law 102-243 at Finding 13: “automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call”. Congress was not targeting just telemarketing calls. Yes, automated telemarketing is a scourge, but it is not the only scourge.

Rubio dances around a possible emergency call exception. Rubio’s call was not warning the recipient of any emergency, so it should not be viewed as such an exception. The recipient needed a password to learn the substance of the alert.

I have no problem with an emergency warning system sequentially dialing every number in an exchange to warn of some danger to the public. Such a shotgun warning may reach unexpected destinations, but Congress clearly anticipated that result and excused it.

Rubio has offered no evidence that its Remote Messaging System should be classed as an emergency warning system. In fact, Rubio goes the other way: it tells us that it is a closed system intended only for its employees.

III. Conclusion

I could be sympathetic to a company caught in the situation that Rubio’s Restaurant finds itself. Up to the point that Rubio discovered the error, there is an element of simple mistake. Simple mistakes should be easy and relatively painless to resolve. It was not fixed at the \$100K mark. Maybe the initial calls were forgiven; maybe there was an accommodation. Yes, \$500K would be an enormous windfall to the plaintiff, but we don’t know the facts, and it’s not the FCC’s playground. Unfortunately,

Rubio does not seem to be blameless here; it sounds more that Rubio ignored the problem rather than fix it. If Rubio's recitation is correct, then it has some substantial legal defenses. Courts can handle issues like that without the FCC's help; they have discovery and juries to determine the facts.

As an aside, I am shocked by the sheer number of calls that the plaintiff received: 876. I don't know the time interval over which the calls took place, but it suggests that there are lots of health issues at the 190 Rubio's Restaurants. If the calls were over two years, that means there were more than 2 alerts per day. That means that Rubio's Restaurant has two company-wide problems every day. Should food inspectors shut down the chain for health violations? Did Rubio build the system because it was having lots of problems with health inspections? How much did the system cost? Has it been effective? Something just does not sound right.

Deny the petition. This case belongs in the courts.