

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

In the Matter of the)
)
Rules and Regulations Implementing)
) **CG Docket No. 02-278**
the Telephone Consumer Protection)
)
Act of 1991)

**Comments of Joe Shields on the Petition for Expedited Declaratory Ruling of
VoAPPS Inc.**

The Commission is seeking comments on yet another in an unending line of petitions seeking to either limit an aspect of the TCPA or neuter the TCPA. VoApps asks the Commission to conclude that delivery of a voice message directly to a voicemail box through the use of VoApps' DirectDROP Voicemail technology does not constitute a call that is subject to the prohibitions on the use of robocalls to cell phones as set forth in the TCPA. The VoAPPS Inc. petition is based on the assumption that the privacy of wireless subscribers is not invaded by robocalls to voicemail and/or that wireless carriers do not charge for calls from a wireless subscriber to their voice mail. Both are false assumptions.

Robocalls to Cell Phone Voicemail Cause a Cell Phone to Ring

Robocalls to voicemail cause a cell phone to ring. Even the petitioner admits that a cell phone "...receives a Message Waiting Indicator ("MWI") via the consumer's mobile service provider. Further, for the VoAPPS technology to work a cell number must be "dialed". It is the DTMF tones that determine what cell number the voice mail is delivered to and as such is no different than the dialing of a cell phone number. Clearly, VOAPPS must "dial" a cell phone number and contrary to the assertions of the petitioner VoAPPS does make a call to a telephone number assigned to a cellular telephone service.

This MWI is not a silent announcement. The cell phone rings according to either the default ring tone of the cell phone manufacturer, the ring tone the carrier has set up on the cell phone or the ring tone set by the cell phone user. Thus, there is no difference between a call, text message or MWI in implicating consumer privacy concerns that underlie the TCPA. Robocalls to cell phone voice mail disrupt cell phone user's lives with a call over dinner, or when with their children, or at work, or while driving, or any other time that a call, particularly about an outstanding debt, might be disturbing.

The TCPA Does Apply To VoAPPS Technology

The TCPA does apply to emerging technologies such as the VoAPPS technology. The original purpose of the TCPA was to regulate certain uses of technology that are abusive and potentially dangerous. The TCPA regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. Congress foresaw the changes in technology that would allow increased access to consumers and in response crafted the TCPA.

It is not uncommon to reach a "voicemail is full" when dialing a cell phone number and the called party is unavailable. Congress found that complaints about automated calls included the fact that such calls fill the entire tape of an answering machine, thereby preventing the called party from receiving messages from family or messages from businesses that they have requested. *S. Rep. No.: 102-178*, at 2 (1991).

Cell phones no longer use tape but even then voicemail storage is limited between 10 and 40 one minute messages for most wireless carriers. In the case of visual voicemail there is a limitation on the amount of space on the cell phone that can be used by visual voicemail generally 25mb. The Commission has acknowledged the fact that voicemail

storage is limited: “Consumers are frustrated by such messages, which often fill up the tapes of their answering machines.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, ¶ 137, 18 FCC Rcd. 14014, 2003 WL 21517853, 2003 FCC Lexis 3673 (2003).

Calls To Voicemail Are Charged To The Consumer

The petitioner falsely claims that calls to voicemail are not charged to the consumer. The petitioner has not provided any evidence to support their contention. In fact T-Mobile, Sprint, Verizon and AT&T charge for calls from a cell phone to voicemail by way of minutes deducted from the call plan depending on the type of plan. But then whether someone is charged for the call is not an issue. It is the invasion of privacy that the TCPA intended to address and as shown above the VoAPPS calls are calls that invade the privacy of the called party regardless of how the call is received.

For example part of the retaliation and harassment for making do-not-call demands that those that make the illegal Rachel robocalls routinely engage in is forcing robocalls to voicemail. The way it works is they make a call to a cell number and immediately make a 2nd call while hanging up on the 1st call before CID is transmitted. That way the robocall goes straight to voice mail leaving no record of an incoming call. Obviously this can only be done intentionally as dialer software will not permit calls to the same number within the same minute. Of the 509 Rachel robocalls to my cell number 18 of those were forced to voicemail in that fashion. Apparently, the petitioner is suggesting that the Commission consider these types of robocalls to voicemail as outside of the TCPA’s reach. These robocalls to voicemail are no different than the VoAPPS voicemail calls.

TCPA Law Suits Benefit Consumers

Petitioner laments some nebulous “massive” surge in TCPA litigation. Most of the criticism is levied on the impact of the class action mechanism in TCPA litigation. Contrary to petitioners claims the intentional abuses of the TCPA by legitimate companies, especially debt collectors, are the cause for the increase in TCPA claims. In the year since federal courts were opened to private TCPA litigants, the number of TCPA cases filed increased by 34%. However, relative to other consumer protection statutes (e.g., FDCPA and FCRA), TCPA litigation remains a relatively low proportion of a federal court’s docket¹.

The prospect of a large class action suit provides a significant deterrent, especially given the FCC’s limited enforcement efforts. The Commission issued five Notices of Apparent Liability, resulting in only two forfeiture orders addressing Do-Not-Call violations between 2003 and 2009². If the FCC continues to proceed at this pace, its enforcement of the TCPA will be entirely ineffective.

Class actions also bring attention to the TCPA and the illegal conduct by legitimate companies. Increased attention to the statute increases compliance by industry members and increases awareness by consumers, which is important where enforcement is lacking.

The Commission must bear in mind that consumers are increasingly experiencing more unlawful conduct on their cell phones from legitimate companies than by any other

¹ *Heidtke, Daniel B. and Stewart, Jessica and Waller, Spencer Weber, The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology* (September 17, 2013). Loyola University Chicago School of Law Research Paper No. 2013-016.

² Since 2009 (the last five years) not one NAL or Forfeiture Order has been issued by the Commission for Do-Not-Call violations.

media. The blame is put on the widening use of cell phones. Such blame is misplaced. It is the use of automatic dialing technology that is to blame. Opening cell phones to more calls runs counter to Congressional intent and the TCPA. Allowing any new technology to bypass the requirements of the TCPA will result in increased invasions of privacy and costs to cell phone users.

VoAPSS Voicemail Technology

There is no big secret on how VoAPPS technology works. I was able to recreate how it works by dialing my cell phone voicemail number. I called my cell phone carriers voicemail number and reached a recording: “You have reached the voicemail system. If you have a mail box on this system press star. To leave a message for someone enter their ten digit phone number now.” I then entered my cell phone number and another recorded message was played: “Please leave your message for <user name>” which was followed by a beep. I then recorded a test message. Within seconds my cell phone rang indicating an incoming call or message. When I picked up the cell phone the T-Mobile visual voicemail icon had appeared on my cell phone. For a voicemail one of the two icons below will appear together with a ring tone announcement:



Phone rings and displays the icon when there is a new voicemail message.



Phone rings and displays the icon when there is a new visual voicemail message.

In response to my test message in my call to my carrier’s voicemail number I received the below icon:



When clicking on the icon I was presented with 3 options:

1. Listen to visual voicemail (The voicemail message is downloaded and stored on the cell phone. The download is charged as data usage and is deducted from the data usage plan.)
2. Call in to my voice mail box and listen to the message. (Carriers charge air time to access voicemail from a cellphone.)
3. Read a transcript of the voicemail message. (This is part of the download deducted from the data usage plan.)



Petitioner's claim that VoAPPS only dials a business number is a red herring. As the above clearly shows before any voicemail message can be created a cell phone number must be dialed. Thus, because VoAPPS has automated the process in making the voicemail message call then the VoAPPS calls clearly fall within the scope of the TCPA.

Petitioner claims that "No call appears on the consumer's telephone bill." That claim is another red herring. Bills from two carriers refute petitioners claim:

AT&T Wireless Bill:

10:18a VMAIL CL 281-455-9402 RM70 VM
03:40p VMAIL CL 281-455-9402 UNW9 VM

T-Mobile Wireless Bill:

12/03/13 Vm Retrieval 1:12 PM 123 (G) ("G" is code for voicemail)
05/16/14 Vm Retrieval 5:56 PM 123 (G)

Petitioner repeatedly claims that their technology never dials a cell number. As pointed out above the VoAPPS technology dials both the voicemail number of the wireless carrier and the cell phone number of the consumer!

Petitioner claims that consumers have several options on retrieving voicemail messages. It is the initiation of the call that violates the TCPA not on how the call is received. The Commission squarely addressed this fact: “We reiterate that under the TCPA, it is unlawful **to initiate** (emphasis added) any telephone call to any residential line using a prerecorded message without the prior express of the called party, absent an emergency or an exemption by Commission rule or order. **Delivery of a message to an answering machine does not render the call lawful.** (emphasis added) See 47 U.S.C. § 227(b)(1)(B).” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, Footnote 544, 18 FCC Rcd. 14014, 2003 WL 21517853, 2003 FCC Lexis 3673 (2003).

Additionally, the FCC has issued citations for robocalls to voicemail:

Company Cited	Complaint Excerpt
Direct Data USA	“The third call was recorded in my voice mail and I still have that message archived.”
Lifetime Capital	“I received a call to my cell phone that was a pre-recorded message selling debt consolidation mortgages. As the telephone was not on at that time, the message was recorded by my Sprint PCS service.”
Warrior Custom Golf	“I have received three unsolicited, automated, prerecorded messages on my voice mail in the past month.”

AV Marketing	<ol style="list-style-type: none"> 1. "A call, which seems to be a recorded message, from a "caller" who identifies himself only as "Steve from Dish Network" has left messages on my home voice mail at least half a dozen times in the past few months. This is an expense as well as annoyance since I pay for calls over the message unit allowance on my home phone, and have to call my Verizon voice mail to find out that it's a junk message and then call again with the (apparently unheeded) don't call requests." 2. "...after several recorded messages were left on my voice mail, I called back to the number in the recorded message, ordered them to place me on the don't call list..."
Rayco Carpet Cleaning	"Transcript attached, audio copy still resides in my voice mail."
E.P.C. Elite Professional Cleaning	"...a message was left on my voice mail by Elite Professional Cleaning using a recorded message."
Powerplus Mortgage	"The calls were clearly pre-recorded messages which were left on an answering machine."
English Sports Betting	<ol style="list-style-type: none"> 1. "The calls were pre-recorded and were left on my answering machine." 2. "I have called the number they leave on my recorder numerous times and requested that they take my name off the list."

This is not an exhaustive list, only a few complaint enclosures obtained through FOIA requests. There are many more complaints filed with the Commission on robocalls to voicemail. Thus, the Commissions own records show that the VoAPPS robocalls to voicemail violate the TCPA.

Conclusion

The prohibition on the “initiation” of robocalls to cell numbers applies equally to telemarketing calls, political calls, survey calls, informational calls, debt collection calls, text message calls and robocalls to cell phone voicemail. How a robocall is received is not an issue as it is the initiation of robocalls without prior express consent of the called party that violates the TCPA.

Obviously day and time restrictions apply as well. It is asinine to suggest that a voicemail call that causes a cell phone to ring at 2:00 a.m. is not an invasion of privacy and does not fall under the restrictions of the TCPA.

There are other party’s that would love to have robocalls to voicemail exempted from the TCPA³. An exemption such as the petitioner is proposing would cause an avalanche of unwanted and unauthorized robocalls to cell phone voicemail.

The Commission must bear in mind that the effectiveness of the TCPA will ultimately be defined by its ability to protect consumers’ cell phones. Caller efficiency is not a valid excuse to neuter the TCPA. It is after all a consumer protection statute and not a business protection statute. Granting an exemption for any new technology to harass millions with unwanted and unauthorized robocalls is not in the best interest of the public! The Commission needs to protect consumer’s cell phones and denying the VoAPPS petition would be one way to protect consumer’s cell phones.

Respectfully submitted,

_____/s/_____

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