

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
) CG Docket No. 02-278
Petition for Expedited Declaratory Ruling)
of VoAPPs, Inc.)

REPLY OF VoAPPs, INC.

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SUMMARY

VoAPPs Reply to Comments submitted with respect to its Petition for Expedited Declaratory Ruling demonstrates the following:

1. As emphasized by most commenting parties, VoAPPs technology benefits both businesses and consumers, by providing businesses a cost-effective, efficient, and, at the same time, non-invasive means to contact consumers by delivering messages directly to voicemail without a call being made to the consumer's wireless phone.
2. Contrary to the one set of opposing comments, VoAPPs technology does not result in a call being made to a wireless number or a charge to a wireless customer for the voicemail.
3. Under longstanding Commission precedent, voicemail is classified as an Enhanced or Information Service and not a radio common carrier service. Therefore the delivery of messages directly to voicemail through the application of VoAPPs technology is not subject to the restrictions of Section 227(b)(1)(A)(iii) of the Act or Commission implementing regulations.
4. Even if found not to be categorically exempt from that Section of the Act, ample grounds exist for the Commission to exercise its discretion to provide relief through the exercise of its authority Section 227(b)(2)(C) of the Act. Specifically with regard to the consumer privacy concerns reflected therein, VoAPPs technology is designed to enhance and fully protect the consumer's

privacy rights by putting the consumer to be in charge of if, when, where, how and even whether to access a message left in his or her voicemail.

VoAPPs respectfully requests prompt and favorable action on its pending Petition.

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REPLY OF VoAPPs, INC.

VoAPPs, Inc. (“VoAPPs”) hereby submits this Reply to comments submitted with respect to its above-referenced Petition for Expedited Declaratory Ruling (“Petition”).¹ With one exception, all parties filing comments strongly support VoAPPs’ Petition. As set forth below, these comments make clear the benefits of VoAPPs’ technology both to businesses and consumers, as a cost-effective, efficient, and, at the same time, non-invasive means to contact consumers. These parties urge the Commission to make clear that VoAPPs’ technology is not precluded by the Telephone Consumer Protection Act (“TCPA”).

The primary focus of this Reply, however, deals with the comments that were filed in opposition by Joe Shields (the “Shields Comments”), which are premised on a misunderstanding or mischaracterization of VoAPPs’ technology.²

¹ See Letters of Support in CG Docket No. 02-78 submitted by Videlica (Oct. 3, 2014) (“Videlica Comments”); KMJ Partners, LLC (Oct. 3, 2014) (“KMJ Comments”); J.C. Christensen and Associates (Sep. 16, 2014) (“Christensen Comments”), as well as VoAPPs’ own Comments submitted on Oct. 3, 2014.

² See Comments of Joe Shields on the Petition for Expedited Declaratory Ruling of VoAPPs Inc., CG Docket No. 02-278 (Oct. 3, 2014).

As demonstrated below:

(i) The Shields Comments proceed from an erroneous assumption that the delivery of voice messages to voicemail through VoAPPs' technology requires that a call be first made to a common carrier wireless number. It does not -- and, because it does not, TCPA prohibitions on the use of automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice to "initiate a telephone call...[t]o any telephone number that is assigned to a paging service, cellular telephone service, specialized mobile radio service or other radio common carrier service" do not apply.³

Further, neither the discussion in the Commission's Report and Order cited in the Shields Comments involving messages left on a residential answering machines nor the Enforcement Bureau citations regarding messages left on residential answering machines or residential or wireless voicemails are apposite. All cited examples involve calls first made to a number assigned to a residential telephone line or to a wireless service and then, only when the phone associated with that number was busy or unanswered, was the call moved to an answering machine or to voicemail.

(ii) Voicemail is not a radio common carrier service and therefore falls outside of prohibition of calls made to telephone numbers that are assigned to a radio common carrier service. As demonstrated in the Petition and as

³ See 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

set forth below, the Commission has determined that voice messaging, now more commonly referred to as voicemail, is an Enhanced or Information Service.⁴

(iii) The delivery of a voicemail through VoAPPs' technology does not result in "the called party [being] charged for the call."⁵ In the voicemail call discussed in his comments, Mr. Shields chose to initiate his call to his voicemail provider's voicemail platform using a method that resulted in a charge for his call. This does not, of course, mean that there is a charge to the consumer for the delivery of a message to voicemail using VoAPPs' technology.⁶ There is not.

(iv) Finally, while the Shields Comments simply assert that the TCPA "prohibits certain technologies altogether," that is not the case.⁷ Because the Shields Comments take an all or nothing approach, they do not address the alternative form of relief suggested by VoAPPs pursuant to the Commission's authority to exempt the use of VoAPPs' technology from the restrictions here at issue.⁸

⁴ See Petition at 15-16.

⁵ *Id.*

⁶ Further, even if a charge for a separately initiated call to a voicemail provider's platform to retrieve a voicemail were to be deemed relevant under the TCPA, as demonstrated in the Petition, there are other means available to a user to call his voicemail provider without incurring a charge. See Petition at 18-19.

⁷ See Shields Comments at 2.

⁸ 47 U.S.C. § 227(b)(2)(C).

I. MOST PARTIES EMPHASIZE THE BENEFITS OF VoAPPS' TECHNOLOGY AND REQUEST GRANT OF THE PETITION.

Most of the comments filed in this proceeding support grant of the Petition.

Among other points made in the supporting comments, KMJ emphasizes the value of VoAPPs' technology both to businesses and consumers, allowing businesses a cost-efficient, effective means of communicating with consumers in a manner that is less intrusive to their private lives than means to which most businesses must employ without benefit of VoAPPs' technology.⁹ Videlica focuses on the benefits of VoAPPs' technology as providing a means to reach consumers without running afoul of the TCPA and an "ever increasing risk of litigation" under the statute.¹⁰ Christensen too points to the benefits of VoAPPs' technology as providing a means for businesses "to contact debt holders in a respectful, effective, and unobtrusive way," while at the same time indicating the need for Commission action to provide certainty that the use of such technology is permitted under the TCPA.¹¹

II. VoAPPS' TECHNOLOGY DOES NOT CALL A WIRELESS NUMBER.

As demonstrated in its Petition, including the Technical Overview attached thereto, use of VoAPPs' technology does not result in the initiation of a "telephone call ...[t]o any telephone number assigned to a paging service, cellular telephone service,

⁹ See KMJ Comments at 1-2.

¹⁰ Videlica Comments at 2.

¹¹ Christensen Comments at 1.

specialized mobile radio service, or other radio common carrier service.”¹² VoAPPs demonstrated that its technology operates within the telephone signaling network, using technology that enables its calls to be made directly to the voicemail provider’s enhanced service platform by way of a telephone number assigned to a business class, landline service. The VoAPPs’ technology does not result in a call to the consumer’s mobile phone.¹³

The Shields Comments do not address VoAPPs’ technology, but instead address an altogether different way to reach the voicemail platform. This method of reaching voicemail, including keying in a cell number through DTMF tones, is nothing like that employed by VoAPPs. That said, the discussion of this methodology is helpful in providing a simplified explanation of how messages can be delivered to a consumer’s voicemail without calling a wireless telephone number.

By his own description, Mr. Shields did not initiate a call to a wireless number, but rather to the toll-free number provided by T-Mobile, his wireless carrier for reaching its voicemail system.¹⁴ Then, at the prompting of the voicemail system to leave a message, he entered his own wireless telephone number and left a voice message. But, contrary to what is assumed in the Shields Comments, the entry of his telephone number did not result in a call to the wireless number. It did nothing more

¹² See 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

¹³ See Petition 12 and the Technical Overview in Attachment A to the Petition.

¹⁴ To VoAPPs’ knowledge, of the wireless carriers, only T-Mobile provides ready access to its voicemail platform in this manner. While such access to the voicemails of T-Mobile customers has been available for a long period, to VoAPPs’ knowledge, no consumer complaints have arisen as a result.

than to act in a manner similar to a Personal Identification Number (“PIN”), to identify the specific voice mailbox on the voicemail provider’s platform in which his message would be left. In fact, consumers enter their phone numbers routinely for various purposes of identification: *e.g.*, to the electric company to confirm the location of an electrical outage at their residence; to a credit card company to help confirm their identity; to services that can help identify a person or address associated with a telephone number; to a computerized contact list; etc. Yet none of these entries of telephone numbers are calls to the wireless telephone number itself.

The Shields Comments are also mistaken as to the nature of a Message Waiting Indicator (“MWI”). An MWI does not indicate that a call has been made to a wireless telephone number. Were a call to be made, the phone would ring. Instead, a MWI is a separate and optional service delivered over a separate, non-charged data path and is optionally available as a feature of voicemail. Voicemail itself has long been characterized by the Commission as a separate Enhanced or Information Service and not a radio common carrier telephone service.¹⁵ Depending on the settings selected by the consumer,¹⁶ an MWI might make some sort of a sound, a beep, just as a cellphone equipped with email access might make a sound to indicate that a new email has arrived. But the fact that a wireless phone might be programmed to give such an

¹⁵ See Section II of this Reply and Commission cases and policy papers cited at notes 22 and 23 *infra*.

¹⁶ With all such optional services (email, voicemail, MWI, appointment reminders from iCloud, etc.) the consumer may generally elect to program the type, degree and even the presence or absence of such notifications on his or her handset.

audible alert no more makes voicemail a radio common carrier service than would be the case with email.

The Commission precedent cited in the Shields Comments regarding messages left on answering machines and citations involving voicemails have no relevance here because they all involve calls first made to residential or wireless numbers that, when unanswered by the consumer, were then recorded on the consumer's answering machine or voicemail.¹⁷ The text from the Commission ruling cited and highlighted in the Shields Comments serves to emphasize the point: "under the TCPA, it is unlawful **to initiate** any telephone call to any residential line using a prerecorded message...."¹⁸ That call having been so initiated, the continuation of the call to deliver "a message to an answering machine does not render the call lawful."¹⁹ As demonstrated in its Petition and above, however, that is not how VoAPPs' technology works.

VoAPPs made clear in its Petition that its "method of delivery does not involve a call made to a wireless service number that then reverts to voicemail, but a call made to the wireline number of the voicemail service provider so as to allow a voicemail message to be placed upon the voicemail service provider's voicemail server."²⁰ From what can be gleaned from the excerpts of other complaints regarding voicemail messages cited in the Shields Comments,²¹ unlike VoAPPs' calls, all of these voicemails

¹⁷ See Shields Comments at 8-9.

¹⁸ See Shields Comments at 8.

¹⁹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14107, n.544 (2003).

²⁰ See Petition at 15, n.32.

²¹ See Shields Comments at 8-9.

were apparently initiated by calls made first to residential or wireless telephone numbers, which, therefore, constituted a violation of the TCPA.

III. VOICEMAIL IS NOT A COMMON CARRIER SERVICE AND IS NOT SUBJECT TO THE RESTRICTIONS SET FORTH IN SECTION 227(b)(1)(A)(iii) OF THE ACT OR COMMISSION IMPLEMENTING REGULATIONS.

As discussed in the Petition, but ignored in the Shields Comments, under longstanding Commission precedent, voicemail is classified as an Enhanced or Information Service; it is not a radio common carrier service.²² The distinction between common carrier telecommunications services and information services is not a minor distinction. It reflects a longstanding, fundamental determination by the FCC that is codified in both telecommunications law and regulation.²³ Therefore, delivering a message directly to voicemail without calling a radio common carrier service number is not governed by the TCPA, which prohibits the initiation of telephone calls to a “telephone number assigned to a radio common carrier service.” The fact that, after a voicemail is delivered, it may be accessed, among other ways, by a separately initiated call made on a common carrier wireless phone to a landline number serving the

²² See, e.g., *Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, Order, 10 FCC Rcd 13758, 13770-74 (1995); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, Access to Telecommunications Service, Telecommunications, Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6452 (1999).

²³ See Kevin Werbach, *OPP Working Paper No. 29: Digital Tornado: The Internet and Telecommunications Policy* (Mar. 1997); Jason Oxman, *OPP Working Paper No. 31: The FCC and the Unregulation of the Internet* (Jul. 1999); Michael Kende, *OPP Working Paper No. 32: The Digital Handshake: Connecting Internet Backbones* (Sep. 2000).

wireless service provider's business does not in any way change the analysis or the conclusion.

IV. THERE IS NO CHARGE TO THE WIRELESS CUSTOMER FOR THE VOICEMAIL.

VoAPPs demonstrated in its Petition that the consumer is not charged for the delivery of a voice message to the consumer's voicemail through VoAPPs' technology.²⁴ The Shields Comments offer nothing to refute this fact. The charges referred to in the Shields Comments²⁵ are not charges for the delivery of the voice message, but call charges separately incurred by someone using a wireless phone to access that person's voicemail.

Even if a possible charge to a consumer, under some mobile service plans, for the consumer to make a wireless call to his or her voicemail were deemed relevant, that charge is the consumer's choice, since there are several ways in which consumers may access their voicemails, if they choose to access them at all, without making a wireless call for which they may be charged.²⁶ There is nothing in the Shields Comments to refute the availability of these alternative means to access voicemail. Rather, Mr. Shields clearly and accurately states that what is relevant under the TCPA "is the initiation of the call...not how the call is received."²⁷ VoAPPs agrees: and, here, the call

²⁴ See Petition at 17-19.

²⁵ See Shields Comments at 7.

²⁶ See Petition at 18-19.

²⁷ See Shields Comments at 8.

that VoAPPs initiates to the voicemail provider's platform does not result in any charge to the consumer.

Mr. Shields makes a similar observation in the comments he has filed in other Commission proceedings. Thus, earlier this year, in arguing that responsive text messages are subject to the TCPA, Mr. Shields emphasized that the TCPA governs calls made "**to wireless numbers**" not from them.²⁸ To quote from his comments:

"Claiming that the initiator of the responding (emphasis added) text message call is the consumer that made a request or inquiry is absurd. The consumer has no control whatsoever over the device that initiates the response. The consumer requesting the response does not create the responsive text message, does not maintain the equipment that initiates the response, does not configure the equipment that makes the automated response and, simply put, has no accountability whatsoever for the equipment that makes the automated response.

It is entirely unreasonable to claim that the initiation of a text message is made by someone other than the owner of the equipment that transmits the text message."²⁹

Just as described there, VoAPPs has no control over the means or device used by someone to access that person's voicemail and is not accountable under the TCPA for that choice.

²⁸ Comments of Joe Shields on the Petition for Declaratory Ruling of the Retail Leaders Industry Association, CG Docket No. 02-278 (Feb 21, 2014) at 2, n.1.

²⁹ *Id.* at 3.

V. EVEN IF FOUND NOT TO BE CATEGORICALLY EXEMPT, AMPLE GROUNDS EXIST FOR THE COMMISSION TO EXERCISE ITS DISCRETION TO EXEMPT DIRECTDROP VOICEMAIL TECHNOLOGY FROM TCPA RESTRICTIONS.

VoAPPs demonstrated in its Petition that, even if the Commission were to conclude that the delivery of voicemails through VoAPPs' Direct DROP voicemail technology constitutes a call made to the telephone number of a radio common carrier service and that, therefore, the use of its technology is not categorically exempt from the operation of Section 227(b)(1)(A)(iii) of the Act (and Section 64.1200(a)(1)(iii) of the Commission's rules), ample grounds exist for the Commission to exercise its discretion to provide relief through the exercise of its authority Section 227(b)(2)(C) of the Act. That provision allows the Commission to permit the use of autodialers or recorded voice messages for calls made to wireless numbers, subject to the following: (1) calls to the wireless numbers "are not charged to the called party"; (2) the calls are not used for the delivery of "any unsolicited advertisement"; and (3) such conditions "as the Commission may prescribe as necessary in the interests of privacy rights" the TCPA is designed to protect.³⁰

The Shields Comments do not address this alternative form of relief. Rather, they adopt the view that such technology should be categorically prohibited, that restrictions on charges apply even if the consumer is the calling party, and that the TCPA makes no distinction between calls made for telemarketing purposes and calls

³⁰ 47 U.S.C. § 227(b)(2)(C).

made by businesses with a need to contact consumers regarding existing business or other relationships. No possible reading of Section 227(b)(2)(C) of the Act or other provisions of the TCPA supports such a categorical approach.

Addressing the first two of the three prongs of the test for exemption under Section 227(b)(2)(C) above: (1) VoAPPs technology does not result in a call to a wireless number being charged to the called party; and (2) VoAPPs has stated its willingness to accept a restriction to non-telemarketing messages. VoAPPs fully addressed the remaining prong of the test involving consumer privacy in its Petition³¹, to which discussion it adds the following in response to the discussion of privacy in the Shields Comments.

The Shields Comments trivialize VoAPPs' consideration for consumer privacy by equating an audible beep (which the consumer sets as their preferred notification) of a Message Waiting Indicator as the same degree of invasion of privacy as a live call to a consumer. Further, unlike a live call or a text message, with the VoAPPs' technology no message is delivered to the consumer. Rather, the consumer makes a choice to initiate a separate call to the consumer's voicemail service provider to access that or any other message stored on the voicemail provider's platform. As emphasized by VoAPPs, it is the consumer who then determines, if, when, where, how and even whether to access his or her voicemail. It is precisely because voicemail puts the consumer in control of the message that the phrase "let it go to voicemail" has become part of the lexicon of

³¹ See Petition at 20-24.

most American families, so as to avoid the interruption to their privacy of a live call. The VoAPPs' technology goes further and eliminates this interruption because the message is already in voicemail without the intrusion of the phone ringing. The VoAPPs' technology is designed to enhance and fully protect the consumer's privacy rights.

As for the concerns expressed for a potential "avalanche" of voicemail calls and other suggestions of a parade of horrors that might result from grant of VoAPPs Petition, the Shields Comments take no account of the limitations offered by VoAPPs on the use of its technology, including a restriction to non-telemarketing calls, as well as the incorporation of other voice telephone message restrictions as set forth in Section 64.1200(b) of the Commission's rules. Nothing in the grant of VoAPPs Petition would permit debt collectors or other businesses to harass consumers by filling up their voicemails with messages (whether through recorded or live messages) and numerous laws are already on the books making such conduct illegal.³² In addition to such laws and regulations, logic would prevent an abuse of voicemails by those relying on a technology to deliver voicemails to consumers. The purpose of those using VoAPPs' technology is to reach consumers with their voicemail message, not to make it impossible for them to be reached by overwhelming the capacity of their voicemail systems.

³² See Petition at 9-10.

VI. CONCLUSION

As demonstrated both by VoAPPs and the parties filing comments in support of its Petition, grant of the Petition would serve and balance the public interest by enabling debt collection and other non-telemarketing businesses and services to use the most efficient and cost-effective means to reach consumers and in enabling them to do so in a manner that does not violate the consumer privacy concerns that underlie the TCPA.

Accordingly, whether by a determination that the delivery of voicemails through VoAPPs technology falls outside of the scope of the TCPA by the terms of the statute itself or through the exercise of the Commission's discretion thereunder to exempt the VoAPPs' technology from those prohibitions, VoAPPs urges the Commission expeditiously to rule that such voicemail delivery through VoAPPs' technology is not prohibited by the TCPA.

Respectfully submitted,



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