

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Consumer Bankers Association, Petition for
Declaratory Ruling

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

**Reply Comments of Robert Biggerstaff on the Petition for Declaratory Ruling of the
Consumer Bankers Association**

Robert Biggerstaff submits these comments in response to the Petition¹ for Declaratory Ruling of the Consumer Bankers Association (“Petitioner”), which asks the Commission to limit the term “called party” under the Telephone Consumer Protection Act (“TCPA”) to only those consumers who were the “intended recipients” of the call. I urge the Commission to deny the Petition.

First, I agree with the desirability of a uniform interpretation of the TCPA. If large numbers of lower courts have ultimately reached substantively differing interpretations not unified by later appellate decisions, I encourage the Commission to use its own expertise and that of appellate courts to provide appropriate and uniform interpretations.

Second, Petitioner itself cautioned that “[w]hen considering a ruling, it is only prudent for the Commission to anticipate unintended consequences of granting a specific

1. *Consumer Bankers Association, Petition for Declaratory Ruling*, GC Docket No. 02-278 (filed Sept. 19, 2014) (“Petition”); *Public Notice*, DA 14-1511 (Oct. 17, 2014).

form of relief.”² I concur in this cautionary sentiment. But in its zeal to achieve relief, Petitioner seems not to followed its own advice.

As a threshold matter, implementing a construction of “called party” as the “intended recipient” leads directly to facially absurd consequences, since the term is used at least a dozen times in the TCPA and the Commission’s TCPA rules. For example, the TCPA requires automated calls to “release the called party’s line within 5 seconds”³ but if the “called party” is the “intended recipient” then the “called party’s” line was never engaged in the first place, so there is nothing to release. Telemarketers can make collect calls, charged to the answering party’s phone bill, but if the “called party” is the “intended recipient” who no longer has the phone number, the “called party” was not “charged” for the call.

Indeed, since the Commission’s rules require that the caller provide proper identification to the “called party”⁴ adopting the construction wanted by Petitioner and its supporters would mean that the “called party” was obviously not provided with the required identification. This would result in yet a different TCPA violation.

Adopting Petitioner’s construction of “called party” would cause the TCPA and the Commission’s rules to be unacceptably inconsistent and confusing.⁵ Such a result serves neither consumers nor businesses. The only reason to even ask for such a tortured result is

2. *Comments of Consumer Bankers Association in Support of its Petition for Declaratory Ruling*, at 2 (dated November 17, 2014.)

3. 47 U.S.C. § 227(d)(3)(B).

4. 47 C.F.R. § 64.1200(d)(4).

5. This would be orders of magnitude worse if the same term (“called party”) was read to have manifestly different meanings when used in different parts of the TCPA and the Commission’s rules.

the selfish and pecuniary interests of robocallers. The Commission should decline such requests.

Another problem with the form of relief sought by the CBA is that while the Petition and most supporters⁶ only seek relief for “informational, non-telemarketing calls” the term “called party” is relevant to both non-telemarketing calls and telemarketing calls. Thus the relief sought would have wide unintended consequences outside the context of the Petition.

If any relief is justified, it should be provided under § 227(b)(2)(C).

If the Commission is of a mind to provide limited relief in some circumstances for non-telemarketing robocalls to reassigned wireless numbers, this Petition is the wrong way to do it. As discussed in other comments on this docket, 47 U.S.C. § 227(b)(2)(C) provides the proper vehicle for a narrowly tailored exemption with appropriate strict criteria.⁷ Such an approach avoids the unintended and absurd consequences that would flow from Petitioner’s proposal.

However the single condition suggested by Petitioner and others of merely stopping the calls when the caller affirmatively knows the number is reassigned, is not adequate—anyone employing automated calling or text messages (and thus benefitting from the supposed reduced costs) must have a much higher duty to consumers. Some of

6. *Cf. Comments of Stage Stores*, at 1, 3 (dated Nov. 17, 2014). (Arguing that “any clarification by the FCC [should] apply to all calls for purposes of TCPA enforcement, including marketing calls and text messages.”)

7. NSC also suggested an exemption as one of “a number of different means to this end.” *Comments of Noble Systems Corp.*, at 5 (dated Nov. 17, 2014). The ACA also pointed to a safe harbor exemption in its comments. *ACA Comments*, at 5 n.5, citing *Petition for Rulemaking of ACA International*, CG Docket Nos. 02-278, RM-11712, at 15 (filed Jan. 31, 2014).

the criteria⁸ of that duty also include confirming express consent and accurate phone number with a live call before making automated calls to that number; required daily scrubbing against reassigned number databases; only calling numbers provided directly by the called party (i.e. no numbers obtained from third-party lists); automated opt-out mechanisms; and stopping automated calls where SIT tones indicate a number is permanently disconnected until express consent can be reconfirmed with a live call or other mechanism.⁹

“Called Party” is correctly interpreted as the Subscriber to the Wireless Service

In addition to avoiding absurd consequences, what makes the best sense is that “called party” is properly the subscriber of the cell phone service. Who answers the phone doesn’t matter because authorizing others to use of the phone is a right solely belonging to the owner.

The direct harms from unwanted robocalls are a form of trespass to chattels—which flows from property rights. The owner of the property is the ultimate party injured. With cell phones, that is the subscriber to the phone service. Other parties with an interest in the property, such as other regular users, have no more legal interest in misappropriation of the cell phone time than a neighbor to whom you usually give a ride to work has in your car if your car is stolen. If a subscriber permits a family member to use the phone, that is

8. This is not intended to be an exhaustive list, which is beyond the scope of this particular Petition.

9. Wells Fargo (*Comments of Wells Fargo* at 7 (dated Oct. 29, 2014)) claims this is improper. Apparently Wells Fargo is unaware that the Special Information Tones (SIT) indicating a non-deliverable call distinguish between permanent disconnected numbers and those only temporarily unreachable. *See, e.g. Feuer, Special-Information-Tone Frequency Detection, The Bell System Technical Journal* (AT&T, Sep 1981).

gratuitous conduct of the subscriber, but any perceived injury to the family member from unwanted robocalls operates through the sole interest of the subscriber. A violation of the TCPA gives standing to the subscriber for calls to that number, regardless of which user answers the call.

Best Practices

Petitioner claims that “[t]o ensure TCPA compliance, many of our members have instituted stringent best practices and thorough procedures requiring customers’ prior express consent before placing automated calls”¹⁰ but Petitioner, coyly, never states *what* those “best practices” are. I suspect those practices are woefully inadequate and instead reflect business decisions that sacrifice compliance with the law in return for some marginal savings in compliance costs. But compliance with the law is mandatory—not an option to be bargained with on a balance sheet.

For example, when initially acquiring consent, do businesses intending to make robocalls verify the accuracy of numbers in their system by making just a single live call *before* allowing the first autodialed or robocalls to that number?¹¹ They should, since phone numbers can be entered into a dialer database incorrectly (data entry errors), or “fake” numbers could have been improperly entered by an employee. A perfect example of the need for this step is a recent case involving AT&T where, according to press reports,¹²

10. *Petition* at 8. One must ask why have only “many” of CBA’s members done so, rather than “all” or even “most?”

11. This is a light form of confirmed opt-in, such as is the industry standard for acquiring consent for commercial e-mails.

12. All observations set out in these comments are obtained solely from press accounts of that case, such as *AT&T Mobility Enters Into \$45 Million TCPA Settlement*, <<http://www.mondaq.com/unitedstates/x/344720/Telecommunications+Mobile+Cable+Communications/ATT+Mobility+Enters+into+45+Million+TCPA+Settlement>> (last visited Nov. 21, 2014).

some employees at an AT&T retail store entered an intentionally wrong number (that happened to belong to a hapless non-AT&T customer) as a secondary contact phone number for new AT&T customers who did not have a secondary contact telephone number. I am also aware of cases where phone numbers ended up with transposed digits when being entered into a computer from a hand-written form filled out by a customer. If one is actually serious about TCPA compliance, and being a decent user of the national telecommunication infrastructure, they must employ procedures to eliminate this source of illegal calls.

We must not forget, that no one is prevented from making non-solicitation calls to any cell phone using live human beings and direct “human intervention.”^{13,14} There is no impossibility of compliance—only a narrow-minded insistence by some businesses on using particularly intrusive technology in order to maximize profits at the expense of innocent consumer bystanders. To paraphrase the Court:

That more people may be more easily *and cheaply* reached by [robocalls or text messages], is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when other easy means of [calling] are open.¹⁵

A business that can launch robocalls or text messages to a list of 100,000 phone numbers with the single click of a mouse, and wants the benefits of marginally lower costs of that

13. As discussed in other comments on this docket, a “direct human intervention” test is an easy to understand and practical test that permits, among other things, using efficient computer-based dialing systems in agent-initiated preview mode will satisfy the needs of call centers. Claims that only “manual dialing” satisfies the TCPA’s restrictions are incorrect.

14. *See, e.g., Notice of Ex Parte Presentation of Robert Biggerstaff*, CG Docket No. 02-278, at 1-6 (dated May 2, 2014); *Supplemental Comments of Robert Biggerstaff on the Petitions of Communications Innovators, et al.*, at 2 (dated June 9, 2014).

15. *Kovacs v. Cooper*, 336 U. S. 77, 89 (1949) (emphasis added)..

communications medium, has a public duty to ensure it is only sending those missives in compliance with the express wishes of those consumers who receive those missives.

**Response to Comments of Coalition of Higher Education Assistance
Organizations (“COHEAO”)**

COHEAO claims the “very purpose of the TCPA, which is to limit intrusive telemarketing”¹⁶ which perpetuates a false claim that pervades industry comments on this docket. While parts of the TCPA deal with “telemarketing” the provisions of the statute at issue in this Petition regarding automated calls to cell phones have nothing to do with telemarketing . . . all forms of calls from telemarketing to political calls are treated virtually identically when made to cell phone or other special numbers. It is time for industry filers like COHEAO to drop this continuing misdirection.

COHEAO claims that “useful communications are inhibited by the present litigation environment, including the threat of lawsuits based upon calls to reassigned numbers.”¹⁷ This is like a debt collector complaining that “useful collection tactics” like public shaming and leg-breaking are inhibited by the “present litigation environment” under the Fair Debt Collection Act. I suggest that “useful communications” are not seriously inhibited at all. It is only the business choice to use a regulated mechanism of calling (e.g. robocalls) without a proper attention to legal compliance. As noted earlier, compliance with the law is mandatory—not an option to be bargained with on a balance sheet. Each and every “useful communication” can be made using a live person and direct human intervention.

16. *Comments of COHEAO* at 3.

17. *Id.*

Finally, I cannot help but note that I did not see the word “debt” anywhere in COHEAO’s filing, despite the TCPA’s impact on debt collection calls and messages appearing to be a core issue of concern for COHEAO and its members. COHEAO’s thesaurus and list of euphemisms for “debt collection” must be well worn by now.

Response to Comments of the National Rural Electric Cooperative Association (“NRECA”)

NRECA claims “there is no need or incentive for NRECA’s members to contact anyone other than the intended recipient, nor is there any benefit to NRECA’s members to doing so.”¹⁸ This sentiment (repeated in many variations on industry comments on this docket) only tells half the story—and the second clause is false. While there may be no direct incentive to *affirmatively* call someone else with some types of messages,¹⁹ there is a significant financial incentive for NRECA to refuse to implement measures that would ensure or enhance TCPA compliance. In short, its cheaper to make calls knowing some percentage will be to wrong numbers, than to employ the resources that would affirmatively prevent illegal calls.

Response to Comments of the National Consumer Law Center, *et al.*

I concur with the comments of NCLC, and can confirm a number of the facts they present. As a certified computer forensic examiner with 30 years of experience, and having

18. *NRECA Comments* at 5. *See also ACA Comments*, at 9 (“callers making informational, non-telemarketing calls have no incentive to knowingly dial reassigned numbers.”)

19. One notable exception is debt collectors, who collect numbers *affirmatively known* to be relatives, employers, and even mere neighbors of debtors. While *knowing* those numbers belong to these entities that are *not* the debtor, and *knowing* these numbers came from skip tracing and were not provided by the debtor, debt collectors robocall these numbers anyway, on the off chance that they *might* reach someone who can connect them with the debtor.

been retained as a forensic computer expert to examine records and testimony in a number of TCPA cases, my experience confirms that of NCLC and its co-commenters, such as:

- “Wrong number” robocalls are largely the result of inadequate calling practices and a pervasive environment of indifference.
- The CBA’s assertion that companies might have “unknowingly called unintended persons” is often false and callers ultimately turn out to have known that they were making prohibited calls.
- Claimed “informational, non-telemarketing” calls are often simply a pretext for telemarketing.
- Frequently, prerecorded voice calls fail to provide any mechanism to opt out or to notify the caller that it is calling the wrong person (this has been repeatedly shown in recordings of calls received by consumers).
- Frequently, consumers’ do-not-call requests and notifications that a wrong number is being called are completely ignored.

All in all, my experience is that a large segment of businesses exploiting the purported cost savings of robocalls (such as Dialing Services²⁰) and other automated messaging regulated by the TCPA, have done so at the expense of innocent consumers. Many of these entities only recently got serious about the TCPA. As one recent industry article put it “[t]he days of ‘seat of your pants’ TCPA compliance are over. Resist the temptation to gauge your TCPA compliance by anecdotal comparison to that of your peers.”²¹ “Seat of the pants” compliance should have never become the norm. Such casual ill-attention to compliance with the TCPA is now coming home to roost, which is unfortunately not surprising given an industry that considers consumer protection systems

20. *Dialing Services*, FCC 14-59 (May 8, 2014) (NAL), finding “Dialing Services has profited at the expense of consumers.”

21. David O. Klein, *Protect yourself against personal liability under the TCPA*, available at <<http://www.lexology.com/library/detail.aspx?g=2ff25592-0f70-4907-a719-c5ab373c0005>>.

like the TCPA as merely an impediment to its profits. That is no justification for weakening the TCPA's protection at the expense of consumers.

Respectfully submitted, this the 1st day of December, 2014.

/s/ Robert Biggerstaff