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January 23, 2015

Via ECFS

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Establishing Just and Reasonable Rates for Local Exchange Carriers, CG Docket No. 02-278, WC Docket No. 07-135*

Dear Ms. Dortch:

Trading Advantage, LLC (“Trading Advantage”) hereby submits this letter in response to the Commission’s Public Notice seeking comment on robocall and call blocking issues raised by the National Association of Attorneys General.¹ Specifically, the Attorneys General requested a formal Commission opinion on three categories of questions: 1) what legal or regulatory prohibitions, if any, prevent telephone carriers from implementing call-blocking technology?; 2) can telephone carriers legally block certain types of calls if technology is able to identify incoming calls as originating or probably originating from a telemarketer?; and 3) is it the FCC’s position that carriers may not block, choke, reduce or restrict telecommunications traffic in any way, and if so, what is the basis for that position?²

The Commission’s Public Notice sought comment on, among other items, how current call-blocking technologies operate, and whether that operation should inform the Commission’s

¹ Consumer and Governmental Affairs Bureau Seeks Comment on Robocalls and Call-Blocking Issues Raised by the National Association of Attorneys General on Behalf of Thirty-Nine Attorneys General, *Public Notice*, DA 14-1700, CG Docket No. 02-278, WC Docket No. 07-135, 2014 WL 6680451 (rel. Nov. 24, 2014) (Public Notice).

² *Id.* at 1-2.

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analysis into the legality of call-blocking.³ Trading Advantage submits this comment in response to the foregoing inquiry.

The development and operation of at least one current call blocking technology, “Nomorobo,” raises substantial questions regarding the legality of call blocking technologies in general. Nomorobo is a subscription service that purports to stop unwanted telemarketing calls from reaching people’s phones.⁴ Nomorobo works by using simultaneous ringing to route calls to Nomorobo’s telephone in addition to the subscriber’s phone.⁵ Nomorobo intercepts calls from supposed telemarketers and hangs up on the caller after the first ring.⁶ Nomorobo operates by filtering calls using its undisclosed proprietary technology to “blacklist” calls from numbers it has unilaterally determined are conducting telemarketing, and “whitelist” numbers associated with acceptable incoming calls.⁷

In order to detect robocalling patterns so as to blacklist alleged telemarketers, Telephone Science Corporation (“Telephone Science”), which operates Nomorobo, requires a large volume of incoming call data.⁸ Telephone Science collects this data by purchasing telephone numbers in bulk from its service provider, Twilio.⁹ Prior to assigning any telephone number to a consumer, Twilio sequesters each phone number and monitors the calls the numbers receive for 60 days.¹⁰ At the end of this period, phone numbers that don’t receive any calls are considered “clean,” and are assigned for use by Twilio’s customers.¹¹ Phone numbers that have received telephone calls are considered “dirty,” and are sold to Telephone Science in bulk for use in the Nomorobo dataset, often referred to as a “honeypot.”¹² Twilio is warehousing toll free numbers in violation of 47 CFR 52.105, which defines warehousing as “the practice where [an organization], either directly or indirectly, through an affiliate, reserve toll free numbers from the Service Management System database without having an actual toll free subscriber from whom those numbers are being reserved.” 47 CFR 52.105 prohibits organizations from warehousing toll free numbers. To date, Telephone Science has collected one of the nation’s largest honeypots for the

³ *Id.* at 1-2.

⁴ <https://www.nomorobo.com/> (last visited Jan. 20, 2014).

⁵ *Id.*

⁶ *Id.*

⁷ <http://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners> (last visited Dec. 30, 2014).

⁸ *Telephone Science Corporation v. Trading Advantage, LLC*, 14-cv-4369, United States District Court for the Northern District of Illinois, Dkt. No. 72-2.

⁹ *Id.*

¹⁰ <https://www.twilio.com/voice> (last visited Jan. 20, 2014).

¹¹ *Telephone Science Corporation v. Trading Advantage, LLC*, 14-cv-4369, United States District Court for the Northern District of Illinois, Dkt. No. 72-2.

¹² *Id.*

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detection of telemarketing call patterns.¹³ Telephone Science currently has tens of thousands of telephone numbers, including 8YY numbers, for use in its honeypot.¹⁴ The numbers in the honeypot are not assigned to end users, but rather remain in the honeypot indefinitely as data points for the operation and benefit of Nomorobo.¹⁵

The Federal Communications Commission (the “Commission”) has long expressed its public policy against the hoarding of telephone numbers. Specifically, 47 CFR 52.107 defines “hoarding” as “the acquisition by a toll free subscriber . . . of more toll free numbers than the toll free subscriber intends to use for the provision of toll free services” and states “toll free subscribers shall not hoard toll free numbers.” For example, in a 2000 rulemaking implementing national standards to address the rapid depletion of available telephone numbers, the Commission specifically sought to minimize the hoarding of large inventories of numbers.¹⁶ In addition, the regulations prohibit hoarding toll free numbers.¹⁷ Telephone Science’s collection of extremely large data sets of telephone numbers directly contradicts the basic principles of the Commission’s implementation of the North American Numbering Plan (“NANP”).

Not only is Telephone Science hoarding a valuable public resource, but it has positioned itself to be significantly enriched through the use of the thousands of numbers contained in its honeypot.¹⁸ Telephone Science has filed at least one, and is positioned to file potentially thousands, of lawsuits against alleged telemarketers for violations of the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227, *et seq.*¹⁹ The first of these lawsuits seeks to collect statutory damages in the amount of \$1,500 per call received to numbers in the honeypot in violation of the TCPA, for a total of \$9,781,500.00.²⁰ In other words, Telephone Science is

¹³ <http://www.marketwired.com/press-release/nomorobo-the-federal-trade-commission-join-forces-battle-illegal-robocalls-def-con-22-1935841.htm> (last visited Jan. 20, 2014).

¹⁴ *Telephone Science Corporation v. Trading Advantage, LLC*, 14-cv-4369, United States District Court for the Northern District of Illinois, Dkt. No. 72-1 at 4:9-16, 5:18-20.

¹⁵ *Telephone Science Corporation v. Trading Advantage, LLC*, 14-cv-4369, United States District Court for the Northern District of Illinois, Dkt. No. 72-2.

¹⁶ *In re Numbering Res. Optimization*, 15 F.C.C. Rcd. 7574, 7578 (2000) (“2000 Report and Order”).

¹⁷ 47 C.F.R. § 52.107(a) (“(1) Toll free subscribers shall not hoard toll free numbers. . . (3) Routing multiple toll free numbers to a single toll free subscriber will create a rebuttal presumption that the toll free subscriber is hoarding or brokering toll free numbers.”)

¹⁸ Notably, Nomorobo does not charge consumers for its service. Aaron Foss, the sole owner of Telephone Science, testified before the Senate Subcommittee on Consumer Protection, Product Safety, and Insurance that he intended to finance the Nomorobo operation by offering the product for sale to businesses, while maintaining free access to it for consumers. *See Stopping Fraudulent Robocall Scams: Can More be Done?* S. Hrg. 113-117, July 10, 2013. It is unknown whether this plan was instituted.

¹⁹ *Telephone Science Corporation v. Trading Advantage, LLC*, 14-cv-4369, United States District Court for the Northern District of Illinois, Dkt. No. 1.

²⁰ *Id.* at Dkt. No. 56, fn. 2.

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seeking to collect almost \$10 million for “injuries” it sustained in receiving phone calls to numbers contained in the honeypot, which exists solely to collect data on such calls.

Moreover, the means by which Telephone Science determines which calls to block raise substantial questions regarding the legality of this method. In order to determine whether to “blacklist” or “whitelist” a number, Telephone Science analyzes incoming call data from the honeypot to detect high frequency robocalling patterns.²¹ Telephone Science reviews the incoming call data for frequent, repetitive, and closely timed calls from a single incoming number.²² Using this data, Telephone Science then creates a proprietary algorithm in order to detect and block suspected telemarketers, but this algorithm is not disclosed.²³ Any incoming number that the algorithm has determined is a probable telemarketer is then “blacklisted,” and calls from that number are blocked.²⁴

Without full inquiry into the methods by which Telephone Science determines whether a call is a probable telemarketer, the Commission cannot determine whether Telephone Science is blocking legal calls. For example, does the algorithm make any effort to determine whether the consumer has consented to be contacted by the caller? What about emergency calls, or calls from local schools? What happens if non-robocalls are blocked, does the consumer have any means to correct the error? Does a legitimate caller have any recourse to being “blacklisted?” Is there any accountability for Nomorobo’s determination to block a call? Each of these answers needs to be fully understood before any determination can be made regarding the legality of call blocking technology.

Any approval of call blocking technology that relies on the large datasets known as honeypots to operate could also have several unforeseen severe consequences. First, the collection of potentially hundreds of thousands of telephone numbers by entities enacting such technologies could result in a shortage of available telephone numbers for public use. Second, should Telephone Science be successful in its TCPA lawsuit based on calls received to its honeypot, this could encourage the development of additional honeypots by professional plaintiffs who amass vast collections of telephone numbers for the sole purpose of instituting TCPA lawsuits, further exacerbating any telephone shortage and clogging the courts with lawsuits that were never the intended result of the TCPA. Finally, because Telephone Science and others like it are not required to disclose the algorithm they use to determine whether a call is

²¹ *Telephone Science Corporation v. Trading Advantage, LLC*, 14-cv-4369, United States District Court for the Northern District of Illinois, Docket No. 65-1.

²² *Id.*

²³ *Id.*

²⁴ *Id.*; <http://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners> (last visited Jan. 20, 2014).

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a purported telemarketer, legitimate calls to consumers may be blocked with no recourse by either the consumer or the caller.

The Commission should not approve of the uses of these technologies without fully understanding the mechanisms by which they operate and the collateral consequences that may be engendered by their use. Substantial issues exist that cannot be fully vetted until all information regarding the operation and funding of current call blocking technologies are disclosed and considered by the Commission.

Sincerely,

A handwritten signature in cursive script, appearing to read "Henry T. Kelly".

Henry T. Kelly
Counsel for Trading Advantage, LLC