

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

In the Matter of Rules and
Regulations Implementing the
Telephone Consumer Protection
Act of 1991

CG Docket No. 02-278

COMMENTS OF ROBERT BIGGERSTAFF ON THE WELLS FARGO EX PARTE NOTICE

In its *ex parte* notice¹ a group representing Wells Fargo misstated my prior comments² on this docket. The Wells Fargo filing states:

Mr. Biggerstaff proposed four “foundational principles” and nine basic elements that he believes should underlie a “safe harbor” for “wrong number” calls. Wells Fargo highlighted to staff that, critically, Mr. Biggerstaff’s “safe harbor” proposal correctly assumes “called party” to mean “intended recipient. Perhaps most important is Biggerstaff’s express recognition that the phrase “called party” must be defined in this manner even if a safe harbor is adopted.”³

This characterization of my comments is false. Nowhere do I suggest in any way that “called party” should mean “intended recipient.” Indeed, I expressly stated the opposite.⁴

My comments made clear that I do not believe a safe harbor is warranted.⁵ But in the event that the Commission wants to explore a safe harbor, and in the spirit that I

¹ *Wells Fargo Ex Parte Notice*, CG Docket No. 02-278, dated Jan. 26, 2015 (“Wells Fargo”).

² *Supplemental Comments of Robert Biggerstaff on the Petition for Expedited Declaratory Ruling filed by United Healthcare Services, Inc.; Supplemental Comments of Robert Biggerstaff on the Petitions regarding “wrong number” calls to wireless phone numbers*, CG Docket No. 02-278, RM 11712, dated Dec. 19, 2014 (“Biggerstaff Comments”).

³ *Wells Fargo*. p.5 (footnotes omitted).

⁴ *See, e.g. Reply Comments of Robert Biggerstaff on the CBA Petition*, CG Docket No. 02-278, dated December 1, 2014.

⁵ *Biggerstaff Comments*, at 2 (“I do not believe a safe harbor is warranted.”)

believed comments were solicited by the Commission, I sought to give the Commission my insights on that issue.

My comments do not in any way assume or even suggest that “called party” should mean “intended recipient.” My prior comments expressly stated that such a construction is absurd given the text of the TCPA, Commission rules, and plain common sense.⁶ I used the term “recipient” in contrast with “intended recipient.”⁷

A safe harbor works to excuse something that would otherwise be a violation of the law. Calling a cell phone number with an ATDS, robocall, or robotext without express consent is a violation of the TCPA. But an existing safe harbor excuses certain such violations if the cell phone number was ported in the last 15 days. In the context of wrong number ATDS calls, the safe harbor I discussed—if all the elements I suggested are met—assumes the call *does* violate the TCPA and thus *needs* a safe harbor. If the TCPA was not violated, then a safe harbor is irrelevant.

As my comments made clear, the “called party” cannot mean the “intended recipient.” If a cellular number has been reassigned, express consent for you to call that number with an ATDS or robocall (or robotext) is vitiated in the same way that if your neighbor gives you express consent to use his pool, but then your neighbor sells the house, you no longer have permission to use the pool. So that there are no misunderstandings, the following example should make clear what I mean:

Suppose Bill Smith has a cell number and gives Acme Credit express consent to call him at that specific cell number regarding his account with Acme Credit. A year later, Bill gets a new cell phone provider with a new

⁶ *Reply Comments of Robert Biggerstaff on the CBA Petition*, CG Docket No. 02-278, dated December 1, 2014 (“[I]mplementing a construction of ‘called party’ as the ‘intended recipient’ leads directly to facially absurd consequences.”)

⁷ Biggerstaff Comments, at 3.

phone number and his old cell phone number is then reassigned after a few months to a new person, Mary Doe.

If Acme Credit calls that phone number to collect a debt from Bill Smith, but the call now goes to Mary Doe's phone number, the "intended recipient" is Bill Smith. The "recipient" is Mary Doe. The "called party" is Mary Doe. Assuming that Acme met *all* the elements for the safe harbor, such as having received both the cell phone number and express consent directly from the "intended recipient" (Bill), diligent use of reassignment databases, etc., Acme has an affirmative defense of the safe harbor for the call received by Mary.

No One Has a Monopoly on Good (Or Bad) Ideas.

I do not reflexively oppose (or support) ideas from any particular industry or entity. I have had occasion to file comments on various FCC dockets and in many cases my comments may be construed to support or oppose the positions taken by other commenters on that docket. I support good ideas regardless of who proposes them. In some cases, some members of various industries have found themselves on the same side of an issue as myself. I have supported responsible use of ATDS technology and repeatedly suggested that use of an ATDS with appropriate direct human intervention is not a violation of the TCPA and Commission rules. Of course, there are places, such as in the political arena, where ideas are determined to be good or bad based on the party affiliation of the author. I realize some others may oppose a good idea solely because of which "industry" supports or opposes it—but I do not think such *ad hominem* ethics contribute usefully to rational discussions.

Reasoned and authoritative conclusions derive value not by virtue of the identity of the speaker or the number of cheerleaders, but from their intrinsic logic. Merit is not weighed by stuffing ballot boxes or picking a side of an argument before hearing them out. This is why I prefaced my prior comments with four *principles* that were chosen on the

basis of merit and common sense, without first filtering them through a maze of who are “winners” or “losers” under those principles.

For example, the first principle from my comments is that the consumer always has the unilateral right to withdraw consent for robocalls to cell phones at any time. The fact that some particular industry may perceive itself as a “loser” under that principle should not be a consideration in evaluating the principle as a good one or not. The First Amendment’s guarantee of freedom of speech is a good idea, regardless of the fact that pornography, racism, and a plethora of speech most people find flat out offensive, benefit from that guarantee.

Obviously, those industries whose oxen are being gored (or gilded) by proposed changes to the Commission’s rules are motivated to lobby the Commission on those issues. And they should since their perspectives and voices should be heard. But are their arguments driven by good ideas, or are selfish pecuniary interests feeding a spin machine that is putting window dressing on a bad idea? The latter often leads to unintended consequences because the tunnel vision induced by their own particularized interests is an impediment to proper evaluation of the issue (and their proposed solution) in other contexts.

For example, the ABA Petition⁸ claimed “60 percent of consumers preferred to be contacted on their mobile telephones concerning fraudulent activity, and that more than one in three consumers preferred to receive those notification by means of text

⁸ *Petition for Exemption of the American Bankers Association*, CG Docket No. 02-278 (filed October 14, 2014).

messaging.”⁹ But this ignores the 40% of those consumers who do **not** want to be so contacted, and the vast majority (2 out of 3) that do not want such text message notifications. In its zeal to make its case for the right to make robocalls and robotexts that a consumer is not allowed to stop, the ABA ignored its own numbers that show such messages are not wanted by very large numbers of consumers.

There are voluminous comments, such as those related to the AAHAM and ABA petitions, lauding the benefits and unobtrusiveness of “informational messages” and claiming that consumers want and even like these messages. That might apply to some consumers, and to some of the described calls, such as appointment reminders. But the spin control is apparent from the fact that *the vast majority of these comments are from debt collectors*—but somehow they never mention the fact that debt collection messages will be equally permitted by the changes sought by those petitions. They conveniently sweep that fact under the rug since it disrupts the rosy narrative that consumers “want” these calls.

Various industry filers claim that the current application of the TCPA is not what Congress intended, or in other words, an “unintended consequence.” Yet these same filers fail to see the consequences of the “solutions” they propose. Instead of the broad axe of sweeping changes from reinterpretations of the statute and Commission’s rules, they should follow the model of the CAA Order¹⁰ in using a scalpel to seek narrowly targeted exemptions pursuant to §227(b)(2). This both minimizes the unintended consequences and provides greater flexibility since a targeted exemption can adopt any necessary

⁹ *Id.*, at 3, citing *ABA Petition* at 6-7.

¹⁰ *Cargo Airline Association Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 FCC Rcd 3432 (2014)

contours, whereas a sweeping reinterpretation of existing language tends to be an all-or-nothing binary result with no opportunity for careful tailoring.

The Commission should not take their bait. Just because a petition raises a potentially legitimate issue that justifies a tweak in the rules, doesn't mean the change requested by that petition is the right way to address it.

Respectfully submitted, this the 2nd day of February, 2015.

/s/ Robert Biggerstaff