

**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 Blackboard Inc. Petition for Declaratory Ruling

I hereby submit these comments addressing the Blackboard Petition for Declaratory Ruling. Blackboard requests that the Commission improperly rule that **all** informational, non-commercial, non-advertising, and non-telemarketing autodialed and prerecorded messages sent by Blackboard’s educational institution customers to cell numbers are emergency calls exempted under the TCPA. Alternatively, Blackboard requests that the Commission improperly create an “intended” called party exemption under the TCPA. The latter is duplicative of several similar petitions filed by banks and debt collection associations and should therefore have been rejected outright by the Commission. Dozens of courts are unified in the definition of called party and have come to the same conclusion that there is no “intended” called party exemption in the TCPA.

The petitioner spouts the ubiquitous and *ad nauseam* claims that non-telemarketing calls to cell numbers should be treated differently than telemarketing calls to cell phones by the TCPA and the Commission. It is undisputed that the TCPA is content neutral in the treatment of **all** autodialed or prerecorded call to cell numbers. The petitioner cites to the Commissions 2012 Report and Order; 27 FCC Rcd 1830, ¶28 (2012) which clearly states that: “...such calls, to the extent that they do not contain telemarketing messages, would not require any consent when made to residential wireline

consumers, **but require either written or oral consent if made to wireless consumers...**” There is nothing in paragraph 28 of the cited Report and Order that states or even implies that any of Blackboards automated or prerecorded calls to cell numbers should fall under the emergency exemption of the TCPA.

If the Commission were to provide too many emergency exceptions than consumers could become accustomed to emergency messages and ignore them. “One resident of a tornado-damaged town in northern Illinois says he ignored an early warning on his cellphone about the impending twister. Sixty-year-old machinist Al Zammuto of Fairdale tells The Associated Press he has received similar warnings before but they have never amounted to anything.” Latest on Twisters..., The Associated Press, April 10th, 2015¹. “Apparently the process of having school officials personally call parents of missing children is too archaic for twenty-first-century educational institutions.” School's robocall-gone-wrong tells parents their kids are all missing, The Daily Dot, Nov. 5, 2014². Technology must be used responsibly or it will sour consumer's interest in using it!

Further, the petitioner cites to footnote 73 in the same Report and Order to support its claim that all of petitioners automated or prerecorded calls are exempt emergency calls. Again, the petitioner misrepresents what the Commission stated:

“...we maintain the existing consent rules for nontelemarketing, informational calls, such as those by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings. Our rules for these calls will continue to permit **oral consent if made to wireless consumers** and other specified recipients, and will continue to require no prior consent if made to residential wireline consumers.⁷³”

¹http://hosted.ap.org/dynamic/stories/U/US_SEVERE_WEATHER_THE_LATEST?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT

² <http://www.dailydot.com/news/school-accidentally-robocalls-parents-missing-children/>

The petitioner repeatedly takes out of context Commission guidance on consent for all autodialed or prerecorded message calls including desired informational calls. Typically, petitioners and defendants in TCPA claims provide only snippets of Court Decisions and Commission Orders to make their position look good. When taken in proper context the snippets are easily dismissed as only partial citations that do not provide the entire truth of the matter.

Granted there is some urgency in weather related school closings or threat situations but these are easily and best covered under the Wireless Emergency Alerts (WEA) system which was implemented by the FCC under 47 U.S. Code §1202 and by FEMA at the federal level through broadcasters and other media service providers (Public Law 109-347 Title VI--Commercial Mobile Service Alerts.) See also: *In the Matter of The Commercial Mobile Service Alert System*, DA 12-1267, PS Docket No.: 07-287 and 08-146, Order, Released August 3rd, 2012. There is also the reverse 911 system available to schools.

Alternatively, consumers can opt in to weather related school closings or threat situation notifications on their cell numbers. As pointed out above, petitioner wants the Commission to exempt **all** of Blackboards automated or prerecorded message calls to cell numbers: "...which allows Blackboard's customers to send emergency notifications **and other informational messages...**" Consumers that opt in to weather related school closings or threat situation notifications are not opting in to all **other** informational messages that Blackboard might deem necessary to broadcast.

Apparently, Blackboard seeks a business specific exemption because it wants to make marketing related calls to consumers that have opted in to weather related school

closings or threat situation notifications on their cell numbers. Blackboards web site indicates that the petitioner engages in much more than informational calls: ““...access to marketing materials...“”, “...customized marketing campaigns...” and “...Blackboard supported marketing...”³” From the same web page one can see that Blackboard uses its survey calls for marketing purposes. See under “Sales” the “Joint Market Study/Research” category. A business specific exemption that Blackboard is asking the Commission to create is clearly not warranted.

Petitioner claims it: “...does not take the steps necessary to physically place the call...” The claim is a red herring! Clearly, Blackboard’s system makes the calls in question. The petitioner cites to the Commission Dish Network Order which dealt with 3rd party telemarketers. There is a stark and very real difference between the calls made by third party Dish Network dealer’s telemarketers and petitioners automated or prerecorded message calls.

Here the petitioner has a direct involvement in delivering automated or prerecorded calls to cell numbers. The Commission has held that entities like the petitioner are responsible for violations of the TCPA. See for example *Correctional Billing d/b/a Evercom Systems*, FCC File EB-07-TC-683, DA 07-1034, March 5th 2007 and Citations EB-TCD-12-00001812 and EB-TCD-12-00004943 against *Dialing Services LLC and Richard Gilmore d/b/a Democratic Dialing* respectively and the Notice of Apparent Liability for Forfeiture Order, FCC Record DA 14-59, May 8th, 2014.

The sought declaratory ruling will not terminate a controversy or remove any uncertainty. See 47 C.F.R. §1.2. Petitioner has failed to provide any evidence that a

³ <http://www.blackboard.com/Partnerships/Partnerships-Program/Program-Levels-and-Benefits.aspx>

controversy or uncertainty exists. The sole basis for the petition is that: “Blackboard has been subjected to several private right of actions by consumers...” Being sued for violating the TCPA is not a valid reason to claim that a controversy or any uncertainty exists. The TCPA is very clear on the requirement of prior express consent for all automated or prerecorded calls to cell phones.

When the statutory language is clear, as it is here, there is no need to clarify any statutory ambiguity. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984) “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

The TCPA is much more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through an EBR or similar exemption would drastically increase the amount of calls a consumer could receive. The heightened cost-shifting, privacy, and safety concerns for cell phones justify a continued strict consent scheme with respect to such communications.⁴

“The TCPA is not only directed at telephone solicitations, it is also directed at autodialer calls to cellular phones, as reflected by the different subsections of § 227, which create separate causes of action for telephone solicitations and automated calls to cellular phones.” *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 752 (W.D. Tex. 2011). “While Congress did express its intent to loosen the prohibitions of the TCPA with regard to non-telemarketing calls to residential phone lines..., Congress chose

⁴ *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.

not to create such an exception for cell phones when it amended other provisions of the TCPA to include similar exceptions for residential telephone lines and fax machines.” *Leckler v. CashCall, Inc.*, No. C 07-04002 SI (N.D. Cal. Nov. 21, 2008).’

The petitioner cites to several cases that have been repeatedly debunked as not having anything to do with reassigned cell numbers. For example in *Leyse I*⁵ and *Leyse II*⁶ the TCPA claim was rejected by the court because the plaintiff was not the subscriber to the phone number called. The courts in *Leyse I* and *Leyse II* were never asked to interpret called party in regard to a reassigned cell phone number. The uncontroverted facts in *Leyse I* and *Leyse II* are that Leyse was never the subscriber to the number called and thus was not the called party!

“*Leyse*, 2010 WL 2382400, and *Kopff*, 568 F. Supp. 2d 39, are thus distinguishable because it was undisputed in those cases that the plaintiffs were not the subscribers to the telephone numbers called.” *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014). The *Olney* case is particularly instructive in that the court in *Olney* addressed the issue of called party and intended called party in the context of a reassigned cell phone number. The court in *Olney* issued a 5 page analysis on “Called Party”, “Intended Recipient”, “Person” and “Subscriber”. The Commission should ask itself why petitioners such as Blackboard continue to cite the *Leyse* cases knowing full well they do not have anything to do with automated or prerecorded calls to reassigned cell numbers.

As pointed out in numerous earlier comments the Commission never hears from businesses that comply with the TCPA. The Commission only hears from those being

⁵ *Leyse v. Bank of America*, No. 09-7654, 2010 WL 2382400 (S.D.N.Y. 2010)

⁶ *Leyse v. Bank of America, National Association*, Civ.Action No. 11-7128 (D.N.J. Sept. 8, 2014)

sued for violating the TCPA. It is clear from the vast number of court decisions that called party is not synonymous with intended called party. Consequently, petitioner has not presented any evidence that a controversy or uncertainty exists that the Commission needs to address.

The schema of prior express consent has worked since the enactment of the TCPA. Now that automatically dialed, text message or prerecorded message calls have become so cheap businesses want to do away with the TCPA. Petitioner already has what they want and a declaratory ruling will not settle a controversy or uncertainty. No Commission action is necessary since petitioner already has prior express consent to make requested emergency notifications. What petitioner wants is an exemption where prior express consent does not exist. The Commission cannot grant such a request.

The Commission should exercise its duty to the public to protect the privacy and safety of cell phone users. The Commission should be issuing citations to petitioner's that violate the TCPA and come running to the Commission for protection from liability instead of molycoddling them. The Commission must deny the Blackboard Inc. petition as any Commission clarification will not terminate a controversy or remove any uncertainty. It will only serve the defendant i.e. the petitioner in proper TCPA claims.

Respectfully submitted,

_____/s/

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