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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of	CG Docket No. 02-278
Lifetime Entertainment Services, LLC's Petition for Declaratory Ruling	Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
	DA 16-128 5 February 2016

**Gerald Roylance's Comments re Lifetime Entertainment
Services' Petition for Declaratory Ruling**

In DA 16-128,¹ the FCC seeks comment about Lifetime Entertainment Services' petition.² The petition seeks a declaration that prerecorded calls by cable television operators or networks that are intended to reach the operators' subscribers are not restricted by the TCPA. The request is overbroad, poorly formed, and should be denied.

The prerecorded calls were not by the cable television provider to its subscribers. The calls were made by a network that does not have a business relationship with the cable subscribers. The intent of the calls was to get more viewers to watch the pay-

¹ FCC, 5 February 2016, *Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Declaratory Ruling filed by Lifetime Entertainment Services, LLC.*, http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0205/DA-16-128A1.pdf

² Lifetime Entertainment Services, LLC, 11 December 2015, *Petition for Declaratory Ruling to Clarify Scope of Rule 64.1200(a)(3) or, in the Alternative, for Retroactive Waiver*, <http://apps.fcc.gov/ecfs/comment/view?id=60001390696>

television *Project Runway*. The network was advertising its programming services and trying to get more viewers in the New York metropolitan area.

Lifetime did not even get a list of telephone numbers from Time Warner. Lifetime got some telephone numbers from other sources. Calls presumably went to non-subscribers.

Even if Lifetime's calls reached a Time Warner subscriber, that subscriber may not have a subscription that permits viewing Lifetime. Even if the subscriber could watch Lifetime, that does not mean the subscriber ever watched the channel or was even interested in its programming. Lifetime wanted more people to tune in.

Lifetime does not supply healthcare services; it is not updating a drug formulary; the information benefits Lifetime. Any information that Lifetime provided in the message is about its products and services.

The matter is also currently being litigated; the FCC should decline such petitions – especially when the petitions do not attach the relevant complaints, answers, and orders. Courts are perfectly capable of deciding such issues. Courts also have discovery, so they can investigate claims more effectively than commenters or the Commission. Furthermore, petitioners often withhold crucial information about the circumstances of the calls. See, for example, the ruling in the matter of iHire.³ Petitioner iHire glossed over several details about its services; subsequent inquiries by the FCC caused the FCC to not only deny iHire's request, but to also conclude that iHire's faxes were unsolicited advertisements.

The Petition also informs us that the District Court denied a motion to dismiss and made an adverse ruling against Lifetime. (Petition p. 3.) The Petition does not include a copy of the Court's ruling. The Court also denied Lifetime's motion for summary judgment. (Petition p. 8.) The Petition only gives us Lifetime's (biased) view of those results.

³ FCC, 28 August 2015, *Declaratory Ruling*, In the matter of iHire, LLC Petition for Declaratory Ruling. https://apps.fcc.gov/edocs_public/attachmatch/DA-15-978A1.pdf

When Congress passed the TCPA, it made a finding that consumers do not like automated messages no matter what the content. That is the starting point of any automated message discussion. If cable customers want to receive prerecorded messages, then they can provide prior express (possibly written) consent to their cable providers for such messages. Cable providers and networks should not have an unfettered right to hit subscribers with prerecorded messages. If people watch your channel, then use that medium to do your advertising.

I. FCC may not exempt unsolicited advertisements

A. Project Runway

Project Runway is an exceptional television show. My mother loved it and watched every season. The challenges were interesting and often unusual, Tim Gunn has wonderful insights (who knew fashion could be so academic?), the workroom drama was entertaining, the runway show was impressive, and the judges' deliberations were pointed. The hostess, Heidi Klum, is both beautiful and insightful. Nina Garcia is okay, but Michael Kors delivers simple but devastating comments.

That said, Lifetime is a commercial channel. People must subscribe to a service that has the channel. It is not something available for free like typical broadcast channels. Lifetime faces competition, so it must provide high quality television. Lifetime must make its shows attractive to the subscribers so the cable television providers will carry the channel. Lifetime must develop new shows and advertise them to attract viewers. Without viewer interest, cable companies would drop the channel. With viewer interest, Lifetime can command higher fees. That is, Lifetime can get a larger cut of what the subscribers pay the cable company.

If we go back to my mother, she subscribed to Dish Network. Her favorite channels were Turner Classic Movies, Lifetime (because it carried *Project Runway*; before that it was on Bravo), and TLC (which carried *What Not to Wear*). Without Robert Osborne, Tim Gunn, and Stacy London, she would not subscribe. Her other favorites, *The Bachelor* and *Dancing with the Stars*, she watched with an antenna.

B. Authority

Although the FCC is empowered to exempt some prerecorded calls from the proscriptions of the TCPA, the FCC may not exempt any call that constitutes an unsolicited advertisement. See 47 U.S.C. § 227(b)(2)(B) that permits exemptions for commercial calls that “do not include the transmission of any unsolicited advertisement”.

The definition of “unsolicited advertisement” in the TCPA is found at 47 U.S.C. § 227(a)(5):

The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.

1. Availability

The call advertised the commercial availability of Lifetime’s services. The purpose of the voice broadcast was to tell residents in the New York City area that *Project Runway* would be available on a specific cable television channel. Lifetime’s concern was to tell people where they could catch the show.

2. Quality

The prerecorded message also described the quality of *Project Runway* show. The message stated the show had Tim Gunn and Heidi Klum. The message stated the quality of the show when it characterized it as “the exciting Season 6 premiere”. (Petition p. 6.)

3. An offer for goods or services is not required

The Petition says, “Lifetime’s Call on its face did not offer any goods or services for sale”. (Petition p. 15.) The definition of “unsolicited advertisement” does not require a facial offer of goods or services. Advertising comes in many forms. There are hard sells, and there are image ads. Lifetime is not selling directly to the public, so its advertising is not going to include explicit offers. However, Lifetime will have an advertising budget for its shows. It will spend money to develop advertisements for both

television and print media. Lifetime is not just offering information; it is seeking viewers for its programming services.

4. Commercial

New York is a huge market. If Project Runway was not watched because subscribers did not know it was available, then the show's ratings could suffer. That could have a huge impact on Lifetime's revenues.

Tracy Barrett Powell's job at the time was Vice President, Distribution Marketing. Powell's job was making sure that Lifetime made money.

II. Privacy

It is disturbing that the Petition is apparently misinformed about the TCPA. The Petition flatly states that, "The TCPA expressly excludes from liability noncommercial calls." The statement is just not true. The TCPA prohibited all prerecorded calls, but then it gave the FCC the authority to exclude some calls.

Lifetime goes on to confuse 227(b) and 227(c). The Petition states, "As Congress made clear, it passed the TCPA in response to consumer complaints about telemarketing calls in particular – not in response to generalized complaints about all pre-recorded calls." (Petition p. 10.) Lifetime has not done its research. When Congress passed the TCPA, it made a finding: "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy."⁴ Congress gave the FCC the power to exempt some calls. Congress was apparently worried that it might have missed something. Sadly, the mutton-headed FCC ignored that finding and made the largest possible exemption. The FCC's used the lack of evidence to overrule Congressional findings: "no evidence has been presented in this

⁴ PL 102-243 § 2 Finding 10.

proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls.”⁵

The FCC has been consistent with the notion of commercial availability. Broadcast television is free for everyone; there is no bill for receiving the programming. Consumers do not have to weigh the quality of the programming and decide whether it is worth purchasing. That is not the situation with pay television. The subscriber pays, and any advertisement about the quality of the programming will encourage him to keep paying for the service.

Lifetime does not argue that its calls were not an invasion of privacy. It argues that lots of people watch pay television, but that is not the heart of the matter. The TCPA wants to prohibit intrusive calls. Leyse found the call objectionable. Arguably, other recipients answered their telephones only to hear machine spit out a prerecorded message. Yes, lots of people subscribe to pay television, but that does not mean they want to receive calls telling them to watch a particular show at 8 o'clock tonight.

If we take Lifetime's position to the extreme, it wants the absolute privilege to call anybody as often as it wants as long as it is intending to reach cable subscribers. Lifetime wants us to overlook that non-subscribers may also be caught in the net. Imagine the consequences during sweeps week: all the cable channels flooding telephones with pleas to watch our programming tonight. How is that not advertising?

Powell declares, “My responsibilities at that time included, among others, creating and executing partnerships with Lifetime's cable distributors in order to publicize Lifetime's programming.” (Powell Declaration ¶ 2.) I read “publicize” as “advertise”.

Himzman declares, “As part of my duties and responsibilities in 2009, I was responsible for the distribution and promotion of the Lifetime channel....” I read “promotion” as “advertising”.

⁵ FCC, 16 October 1992, Report and Order, FCC 92-443, ¶ 40.

Lifetime sends a confusing message. It is not looking for a one-time thing about a channel change but rather a blanket privilege for any situation. Project Runway is a New York-based show. Fashion is important in New York. Calling New York residents just before the premier sounds like a way stimulate interest in the show.

III. Intended to reach...

Lifetime's Petition has many dubious phrases. Lifetime wants an exemption for the mere "intention" to reach a cable subscriber. *Whiskey Tango Foxtrot*. What happens to Lifetime's argument when it does not reach a cable subscriber? That person cannot watch *Project Runway* for free. The road to hell is paved with good intentions.

Tracy Barrett Powell's declaration is disturbing on a number of fronts. First, Lifetime did not get a list of telephone numbers from Time Warner Cable. Instead, "Time Warner Cable provided Lifetime with a list of zip codes which reflected the areas within New York City in which Time Warner Cable provided service". (Declaration, ¶ 8; see also Hinzman Declaration ¶ 16.) In particular, Lifetime does not state that Time Warner provided the telephone numbers of its customers.

Instead, Lifetime directed OnCall Interactive to get telephone numbers for the cable subscribers in the ZIP Codes provided by Time Warner. We are not told how OnCall Interactive got its telephone numbers. I'm pretty sure if the numbers came from Time Warner, then Lifetime would tell us that. After all, they have discovery in the court case. Lifetime knows where the numbers came from, but it is neglecting to tell us in their Petition. Looking at some court documents, the telephone numbers came from a company that has now vanished.

The Petition is also silent about whether plaintiff Leyse or roommate Genevieve Dutriaux were, in fact, Time Warner cable subscribers. Bury another fact.

Even if a call reaches a Time Warner customer, that customer may not have Lifetime in his lineup. Lifetime is not available in Time Warner's least expensive cable package. Hinzman Declaration ¶ 12, states "Neither Bravo nor Lifetime was available to subscribers of the least expensive Time Warner Cable package in 2009...." Notice the

Hinzman declaration contradicts the Petition's claim that "Lifetime network was (and still is) included in all New York City Time Warner subscribers' cable packages at no additional charge." (Emphasis added.) Powell verifies the Petition ("I have read the Petition and verify that the factual assertions stated within are accurate to the best of my knowledge"), but Powell should know about Time Warner's packages.

A. The call violates the TCPA

A quick look at the message on page 6 shows it violates 47 U.S.C. § 227(d)(3)(A) and 47 C.F.R. § 64.1200(b). The message does not give the legal name of the entity making the call and it does not give a telephone number or street address. Tim Gunn may be the speaker, but nothing suggests that he was responsible for initiating the call. The Petition puts that on the Vice President, Distribution Marketing. The message is also confusing about Time Warner's involvement. Did Time Warner also pay for the call?

The Petition points out that only Leyse complained about the call, but the prerecorded call did not provide an easy avenue for someone to make those complaints. If the message had included a telephone number, how many people would have called to complain? We don't know because Lifetime made it hard for people to complain.

IV. Conclusion

Deny the Petition. The call violates the TCPA. The call is an unsolicited advertisement, so the FCC is powerless to exempt it. The FCC may waive its regulations, but it may not waive the provisions of the statute. The FCC has already drawn a distinction between calls that announce programming that is free and programming that must be purchased.