

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 02-278
the Telephone Consumer Protection)	
Act of 1991)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA)¹ hereby submits comments in support of the Petition for Declaratory Ruling (“*Petition*”) filed by Lifetime Entertainment Services, LLC (“Lifetime”).² Lifetime asks the Commission to issue a declaratory ruling clarifying that the restrictions of the Telephone Consumer Protection Act of 1991 (“TCPA”)³ on unsolicited, prerecorded telephone calls do not cover calls “providing information about television programming distributed by cable operators and cable programming networks that are intended to reach the cable operator’s subscribers who are already entitled to watch such cable programming without having to pay any additional charges.”⁴ We support Lifetime’s request.

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 80 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$230 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to approximately 30 million customers.

² See FCC, Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by Lifetime Entertainment Services, LLC*, CG Dkt. No. 02-278, DA 16-128 (rel. Feb. 5, 2016) (*Public Notice*).

³ See generally Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, (as codified at 47 § U.S.C. 227) (“TCPA”).

⁴ Lifetime Entertainment Services, LLC, *Verified Petition for Declaratory Ruling to Clarify Scope of Rule 64.1200(a)(3), or in the Alternative, for Retroactive Waiver*, CG Dkt No. 02-278 at 1 (filed Dec. 11, 2015) (“*Petition*”).

DISCUSSION

As explained in the *Petition*, the call in question was a 20-second pre-recorded call placed in August 2009 to residential lines in New York City to inform Time Warner Cable (“TWC”) subscribers that its television show *Project Runway*:

had moved from the Bravo cable network to the Lifetime network and could be found at a new channel location. The pre-recorded call was expressly addressed to [TWC] subscribers who were already receiving *Project Runway* as part of their “basic” cable subscription packages. . . . Like Bravo, the Lifetime network was (and still is) included in all New York City Time Warner subscribers’ cable packages at no additional charge.⁵

This one-time call informing existing subscribers of a change in the network and channel location of a popular program they might want to continue watching is the basis of a complaint filed in federal district court, claiming that Lifetime violated the TCPA’s provisions, in Section 227 of the Communications Act, barring certain pre-recorded calls to residential lines without the consent of the called party.⁶

But Section 3 of the TCPA allows the Commission to adopt rules exempting from this prohibition “calls that are not made for a commercial purpose,” as well as calls “made for commercial purposes” but that (1) “will not adversely affect the privacy rights that this section is intended to protect” and (2) “do not include the transmission of any unsolicited advertisement.”⁷

The Commission subsequently adopted rules implementing these exemptions.⁸ In May 2015,

⁵ *Id.* at 2.

⁶ *See id.* at 2.

⁷ TCPA § 3(b)(2)(B) (as codified at 47 U.S.C. § 227(b)(2)(B)). “Unsolicited advertisement” is defined as “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.” TCPA § 3(a)(5) (as codified at 47 U.S.C. § 227(a)(5)).

⁸ *See* 47 C.F.R. § 64.1200(a)(3)(ii)-(iii).

Lifetime moved for summary judgment on the basis that the call was neither “advertising” nor made for a “commercial” purpose, and hence was exempt from TCPA liability.⁹ The court denied Lifetime’s motion, based on its misinterpretation of language in previous Commission rulings implementing the statutory prohibition and exemptions.

Specifically, the court relied on, but mischaracterized, the Commission’s statement that a call that encourages consumers “to listen to or watch programming, including programming that is retransmitted broadcast programming *for which consumers must pay* (e.g., cable, digital satellite, etc.), would be considered advertisements for purposes of our rules.”¹⁰ The court read this to mean that any call regarding programming carried on a pay service – including programming that the recipient has *already* purchased – is prohibited, stating that the Commission “has ruled twice that a promotion for programming *provided by a paid-for service* is deemed a commercial advertisement that is barred under the statute.”¹¹ But that cannot reasonably be what the Commission meant.

When the Commission said that messages inviting consumers to watch programming “for which consumers must pay” was not exempt, it must have been referring to messages seeking to induce consumers to *purchase* the programming – not to messages regarding programming that consumers have *already* purchased from a pay service such as cable or direct broadcast satellite (“DBS”). For example, if a message invited consumers to watch a “pay-per-view” movie or sporting event for which the consumer had to pay an additional fee, such a call would relate to programming “for which consumers must pay.” So might messages suggesting that a consumer

⁹ *Petition* at 7-8.

¹⁰ *In re Rules and Regulations Implementing the TCPA*, Report & Order, 18 FCC Rcd 14014 ¶ 145, n.499 (2003) (emphasis added) (“2003 TCPA Order”).

¹¹ *Leyse v. Lifetime Entm’t Servs.*, No. 13-5794, 2015 WL 5837897, at *4 (S.D.N.Y. Sept. 22, 2015).

might want to watch a program on an optional tier to which the consumer does not currently subscribe. But when the message relates to programming on a tier that is currently available to the recipient without further purchase, the message is not an inducement to buy anything.

If that were not the case, there would be a wholly irrational disparity between virtually identical messages regarding programming received over cable and programming received via over-the-air broadcast stations. The Commission has ruled that a pre-recorded call inviting a consumer to listen to or view a *broadcast* program was exempt from the prohibition because it did not constitute advertising.¹² That must be because broadcast programming is already freely available so that the message is not intended to induce recipients to purchase it. The same, of course, is true of messages regarding programming that is included in the package of cable services that recipients have already purchased.

There is no rational or relevant basis for distinguishing between the messages of broadcasters and cable operators regarding programming that is already available to the consumer who receives it, and the Commission should, as Lifetime requests, make clear that its rules intend no such distinction.¹³ Indeed, as Lifetime's Petition points out, a rule prohibiting or allowing such messages depending on whether the speaker is a broadcast- or cable-affiliated entity would raise serious First Amendment problems,¹⁴ which the Commission would be

¹² See 2003 TCPA Order ¶ 145; *In re Rules and Regulations Implementing the TCPA*, Second Order on Reconsideration, 20 FCC Rcd 3788 ¶ 42 (2005).

¹³ Indeed, an identical call encouraging consumers to view broadcast programming could only be considered exempt when received by an over-the-air only household, but it would be considered an advertisement if a household receives their broadcast stations via a subscription television service. As the *Petition* reports, the Commission estimates that approximately 90% of households subscribe to some form of pay-television service. See *Petition* at 17 (citing *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253 ¶ 8, 135 (2015)).

¹⁴ See *Petition* at 18, n.61.

compelled to avoid in interpreting the language of the statute and its own rules – even if there were some doubt about what the Commission meant in its previous statements.

In any event, not only was Lifetime’s message not intended to induce the purchase of its programming; it was, at bottom, an *informational* message and not an advertisement.¹⁵ It was made to inform existing TWC subscribers “who already received *Project Runway* at no additional charge” of a change in the channel line-up included with their cable subscription.¹⁶ It makes sense that the Commission would treat such a call as informational given that “the message did not sell a product or service, nor would any reasonable consumer understand it to market a product or service. It was designed to inform cable subscribers of a *change* to their *existing* programming service.”¹⁷ Indeed, the Commission has declared that channel line-up information is generally “useful to consumers”¹⁸ and Commission rules *require* such information to be included in cable system public files,¹⁹ supplied to consumers at installment of their service, annually, and any time “upon request,”²⁰ and at any time channel line-ups are changed.²¹

¹⁵ The Commission has deemed similar calls to be non-commercial. *See In re Rules and Regulations Implementing the TCPA*, Report & Order, 27 FCC Rcd 1830 ¶ 28 (2012) (ruling that non-commercial calls include “debt collection calls, airline notification calls, bank account fraud alerts, school and university notifications, research or survey calls, and wireless usage notifications,” so long as such calls do not *also* include a telemarketing message encouraging the called party to engage in a commercial transaction). The calls at issue in this proceeding are particularly akin to airline notifications, in that they provide information about changes to a service already purchased by the consumer.

¹⁶ *Petition* at 7.

¹⁷ *Id.* at 12 (emphasis added). Lifetime points out that such treatment would be consistent with precedent. *See id.* at 11 (noting that the Commission has explained that “application of the pre-recorded message rule should turn, not on the caller’s characterization of the call, but on *the purpose of the message*”) (emphasis in original) (internal citations omitted).

¹⁸ *In re 1998 Biennial Regulatory Review - Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, Second Report & Order, 16 FCC Rcd 19773 ¶ 8 & n.12 (2001).

¹⁹ *See* 47 C.F.R. §§ 76.1705.

²⁰ *See* 47 C.F.R. §§ 76.1602(b).

²¹ *See* 47 C.F.R. §§ 76.1603(b) (requiring that customers be notified of any changes in rates, programming services, or channel positions as soon as possible in writing, and a minimum of thirty (30) days in advance of the change if it is within the control of the cable operator).

Supplying such information to consumers is clearly in the public interest, and categorically treating such information as “commercial” cannot be what the Commission intended.

CONCLUSION

For the foregoing reasons, the Commission should issue a clarification as requested by Lifetime.

Respectfully submitted,

/s/ Rick Chessen

Jill Lockett
Senior Vice President
Program Network Policy

Rick Chessen
Michael S. Schooler
Stephanie L. Poday
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431

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