

Gerald Roylance  
1168 Blackfield Way  
Mountain View, CA 94040-2305  
March 19, 2016

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

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

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

In DA 16-128,<sup>1</sup> the FCC seeks comment about Lifetime Entertainment Services' petition.<sup>2</sup> 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 petition should be denied.

Mark Leyse, the plaintiff in the underlying action, filed 137 pages.<sup>3</sup> Leyse's comments are buried at the end of the submission (pp. 119-137). They are on point and

---

<sup>1</sup> 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](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0205/DA-16-128A1.pdf)

<sup>2</sup> 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>

<sup>3</sup> <http://apps.fcc.gov/ecfs/comment/view?id=60001391651> 3 February 2016

should be given great weight. Leyse points out that Lifetime's petition has significant mischaracterizations. For example, not all TWC subscribers could watch *Project Runway* for free.

Leyse's attorney, Todd Bank, has prefixed the comments with several exhibits. Two of them stand out to me.

Exhibit I (pp. 95-104) is the court's ruling. The court noted that, "Lifetime admits, however, the FCC 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. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed.Reg. 44144, 44163 (F.R. July 25, 2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19330, 19335 (F.R. Apr. 13, 2005). That ruling is reasonable and appropriate, and I accept it. Lifetime's arguments that this Court should ignore those rulings, throw them out on First Amendment grounds, or stay this case until Lifetime seeks reconsideration of them, are not persuasive."

Exhibit J (pp. 105-118, is a copy of FCC General Counsel Samuel L. Feder's 11 April 2007 letter to the court in another case, *Leyse v. Clear Channel Broadcasting, Inc.*, No. 06-0152-cv. The letter describes the Biggerstaff request for clarification about prerecorded messages about broadcast television programs. Feder states that the FCC adopted the National Association of Broadcaster's view that "free over-the-air radio and television broadcasts are not consumer products or services that are bought and sold in commercial transactions." Feder's letter went on to distinguish that free broadcasts from paid services such as satellite or cable television: "Prerecorded messages 'that encourage consumers to listen to or watch programming ... for which consumers must pay ... would be considered advertisements for purposes of our rules.'" Feder points out that the FCC reiterated that position in the *2005 TCPA Reconsideration Order*, 20 FCC Rcd 3788, 3805-3806 (2005). Invitations to listen or view programs "from providers of paid programming ... would be considered advertisements because they describe the *commercial* availability or quality of a service."

The comments of Gerald Roylance oppose the petition.<sup>4</sup> Roylance argues that the prerecorded call is an unsolicited advertisement that the FCC is powerless to exempt. Lifetime also seeks something overbroad: the absolute right of networks to inundate consumers with prerecorded telephone requests to watch pay-TV television. No consent would be required, and the consumer could not stop the “informational” calls even if he wanted to stop them. Even consumers who do not subscribe to such paid services would be powerless to stop those robocalls as long as the caller “intended” to reach an existing subscriber. Roylance also points out that the prerecorded call violated the TCPA’s identification requirements. Furthermore, the managers at Lifetime who were responsible for the prerecorded calls were responsible for advertising and marketing.

The comments of the National Cable & Telecommunications Association (NCTA) support the petition.<sup>5</sup> NCTA believes the court mischaracterized the FCC’s prior rulings. Specifically, NCTA believes the prior rulings do not apply to programs for which the consumer has paid already. NCTA believes there must be an inducement to purchase the programming or there would be an “irrational disparity” between announcements about free television programming and already purchased programming. Besides labeling the FCC and the judge irrational, NCTA does not analyze their reasoning. Free TV is not a commercial product or service, so it gets the FCC exemption. The prerecorded message announced the commercial availability and quality of *Project Runway*, so it is an advertisement. NCTA wants to make a distinction about when the consumers pay for the services, but that has no impact on whether the services is commercial or whether the announcement is an “unsolicited advertisement”. Under the NCTA’s view, HBO and Showtime could provide “information-only” announcements that their programming is available during a free preview week. No purchase necessary; enjoy our services for free. But, of course, HBO and Showtime hope to get viewers hooked. Lifetime does not want the prerecorded call’s recipients to watch just tomorrow night’s premier; Lifetime wants the recipients to watch *Project Runway* tomorrow night, get hooked, and watch each week thereafter (including sweeps week). To do that, the TWC subscriber must continue to pay TWC for its services. In a very real sense,

---

<sup>4</sup> <http://apps.fcc.gov/ecfs/comment/view?id=60001490286> 29 February 2016

Lifetime wants the recipients to continue purchasing TWC's services. For Lifetime to deliver a prerecorded unsolicited advertisement, Lifetime (not TWC) must have prior express written consent from the recipients.

The comments of Jimmy Sutton oppose the petition.<sup>6</sup> Sutton adopts Roylance's comments and goes on to characterize Lifetime's petition as a further attempt to erode consumers' TCPA rights.

The comments of Vincent Lucas oppose the petition.<sup>7</sup> Lucas points out that the calls "would be a nuisance and an invasion of privacy to most cable subscribers". Lucas points out that providers such as Lifetime get less than 2% of primetime viewers. The implication is that even if Lifetime reached only TWC viewers, 98% of those viewers would not be watching Lifetime. Lifetime did not target viewers of *Project Runway*; Lifetime targeted consumers that would easily allow Lifetime to increase its viewership. Lucas also points out that the calls were commercial in nature and were advertisements because they "serve to encourage the recipient to continue his subscription". Lucas further points out that subscribing to TWC is not an automatic opt-in to advertising. (Leyse's comments point out that TWC's contact has a clause that permits TWC to call but does not include third-party networks such as Lifetime to make those solicitations.)

The comments of Mark Lee oppose the petition.<sup>8</sup> Lee took pointed issue with a blanket exemptions based upon what callers "intend" to do. Lee goes on to speculate that Lifetime may have wanted to capture new viewers as well as retain old ones.

By the way, I went to <http://www.timewarnercable.com> to check its channel line up. I entered ZIP code 10025, which I believe is Leyse's ZIP code. Neither Lifetime nor Bravo is included in TWC's "Starter TV" package. They are also not in the "El Pacquetazo" package.

---

<sup>5</sup> <http://apps.fcc.gov/ecfs/comment/view?id=60001497205> 7 March 2016

<sup>6</sup> <http://apps.fcc.gov/ecfs/comment/view?id=60001497282> 7 March 2016

<sup>7</sup> <http://apps.fcc.gov/ecfs/comment/view?id=60001497743> 7 March 2016

<sup>8</sup> <http://apps.fcc.gov/ecfs/comment/view?id=60001497915> 8 March 2016

The FCC should 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.