

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

In the Lifetime Entertainment Services, LLC,
Petition for Declaratory Ruling to Clarify Scope
of Rule 64.1200(a)(3) or, in the Alternative, for
Retroactive Waiver.

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

Reply Comments of Robert Biggerstaff

Robert Biggerstaff submits these comments on the Petition¹ of Lifetime Entertainment Services, LLC (“Lifetime”). The Petition should be denied.

Like the petitions of Edison Electric Institute and Anthem, the Lifetime petition is yet another attempt to resuscitate the “established business relationship” exemption for robocalls and texts. Like the other attempts, this one must be denied as contrary to established Commission orders rejecting that exemption.

Indeed, the Lifetime petition goes farther because the consumers who were called don’t even have a business relationship with Lifetime. None of the consumers wrote a check to Lifetime to purchase Lifetime’s services. Consumers paid² their cable companies for cable service that included multiple channels which in some cases included Lifetime’s programs. Many of those consumers likely never even viewed Lifetime’s programming. Lifetime robocalling random cable subscribers is like Steven Spielberg robocalling

¹ *In the Lifetime Entertainment Services, LLC, Petition for Declaratory Ruling to Clarify Scope of Rule 64.1200(a)(3) or, in the Alternative, for Retroactive Waiver.*, CG Docket No. 02-278 (filed Dec. 11, 2015); *Public Notice*, DA: DA 16-128 (Feb. 5, 2016).

² It seems Lifetime also mass-dialed many people who were not subscribers.

consumers that bought a discount collection of 20 DVD's at Walmart to tell them about the special director's commentary track on the *Saving Private Ryan* DVD they might not know about.

Lifetime's calls appear to also violate the Federal Trade Commission's rules for robocalls. Therefore if the Commission granted Lifetime's request, it would de-harmonize the Commission's rules with those of the FTC. That would benefit neither industry nor consumers.

Lifetime's service is not "free" nor is it an over the air "broadcast." Lifetime is not a radio or TV station nor a broadcaster, but is instead a commercial content provider. This places it firmly outside any prior Commission guidance implying an exemption for some non-advertising calls related to free over the air broadcasts by radio and TV stations made to land lines, but not to cell phones.

Lifetime's calls fall squarely within the 2003 R&O definition of "advertisement" as calls "that describe the commercial availability or quality of any goods or services."³ Therefore the relief sought by Lifetime is contrary to the existing Commission Order and must be denied.

I also note that 13 years ago the Commission found a sparse record of calls related to TV programming being made or of complaints for such calls.⁴ Now with the Lifetime calls, we have both. We also have additional history of the progression of steps the robocalling industry has taken that increases the incentives to make these calls and the consumers' universal disdain with these calls. This history militates strongly against granting

³ 2003 Report & Order ¶145.

⁴ *Id.*

Lifetime's request.

The claim that consumers who were called had already "paid" for Lifetime's product does not exculpate Lifetime. Even assuming this claim is true (which I is not) Lifetime is an advertising venue. Unlike a PPV movie provider which makes its money from the purchase of a particular item by the consumer, more eyeballs on Lifetime means more advertising revenue for Lifetime beyond cable carriage fees. Thus advertising it's programming to people who have already "paid" for it is appropriately denoted as "advertising" as is fully within the letter and spirit of the TCPA.

Against the background of increased consumer disgust for robocalls, the cost to make robocalls continues to decrease. A recent FTC publication noted the cost was now "less than a penny" per robocall.⁵ Decreasing costs for robocalls increase the temptation to skirt the rules and seek "creative" interpretations around them. As a result, the value of legitimate communications is being lost as more and more consumers ignore calls from unknown numbers and immediately hang up on robocalls. As a result, the calls that consumers *should* listen to—such as calls of a emergency nature or calls from legitimate unknown numbers such as the police or fire department—are receiving less penetration to the recipients. The Commission should vigorously protect this medium for the public good.

As the Court made abundantly clear in *Kovacs v. Cooper*, a speaker is not entitled to the cheapest method of distributing its messages. "That more people may be more easily and cheaply reached by [robocalls or text messages], is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a

⁵ Lesley Fair, Federal Trade Commission, March 17, 2016, *available at* <<https://www.ftc.gov/news-events/blogs/business-blog/2016/03/vacation-station-lead-generati-on-your-do-not-call-obligation>>

nuisance when other easy means of [calling] are open.”⁶ The comments on this docket make abundantly clear that people are sick of robocalls—all robocalls—and our government has responded to that appropriately by strictly limiting such automated calling devices. More exemptions and loopholes are not what consumers want.

In addition, to the extent the exemptions sought by this petition (and others) are beyond the existing “emergency” exemption in the TCPA and Commission rules, they are facially content-based exemptions. The law of content-based restrictions on speech has seen important decisions recently, in particular the Court’s recent decision in *Reed v. Town of Gilbert*⁷ that strengthened the application of strict scrutiny to such restrictions (and exemptions) on speech.

A few months ago the Fourth Circuit, following *Reed*, invalidated South Carolina’s robocall statute in *Cahaly v. Larosa*⁸ because it excepted certain calls based on content; it permitted debt collection and survey robocalls without consent while prohibiting political robocalls without consent. Many of the exceptions sought by this and other petitioners on this docket clearly must fail under the same analysis.

With respect to Lifetime’s request for a waiver, the elements of a waiver have not been identified, much less met (and indeed were incorrectly quoted by Lifetime by omitting some elements). Lifetime itself seems to know it can’t provide the foundational elements of a waiver as it only set out a single paragraph of purported “facts” in support thereof. The TCPA was intended to protect consumers from robocalls and should not be

⁶ *Kovacs v. Cooper*, 336 U. S. 77, 89 (1949) (emphasis added).

⁷ 135 S. Ct. 2218 (2015).

⁸ No. 14-1680 (4th Cir. Aug. 6, 2015).

subverted by an unjustified waiver merely because a commercial advertiser sees the TCPA as an obstacle to its pecuniary interests.

The Commission's 2003 Order was crystal clear: calls "that describe the commercial availability or quality of any goods or services"⁹ are advertisements covered by the TCPA even when made by a radio or TV broadcaster¹⁰ and any exemption for radio or TV broadcaster calls described in the 2003 Order applies only to calls to landline and not to cellular numbers.

Finally, I concur with many of the other commenters setting out many additional reasons for rejecting Lifetime's petition.

Thank you very much for your time considering my comments. I remain,

Sincerely

/s/ Robert Biggerstaff
Robert Biggerstaff
March 21, 2016

⁹ 2003 Report & Order ¶145.

¹⁰ Even if Lifetime were a radio or television broadcaster (which it is not) its calls would still be "advertisements" under the 2003 R&O so the calls would be violative even if made by a radio or TV station itself.