

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

In the matter of Mobile Media Technologies for  
Declaratory Ruling or, In the Alternative  
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 Petition<sup>1</sup> of Mobile Media Technologies (“Mobile Media”).

As a threshold matter, sending a “STOP” message in reply to an incoming text message is the epitome of a “reasonable method” of communicating to the sender to stop such messages and of revoking consent for future messages (if consent actually existed prior to the call). This has been the standard for years, as promulgated by industry group like the Mobile Marketing Association (“MMA”). For example, the current MMA standard<sup>2</sup> provides:

1.5-1 Content providers must offer subscribers the opportunity to cancel the service at any time. The following rules govern program opt-out:

1.5-2 A subscriber must be able to stop participating and receiving messages from any program by sending STOP to the short code used for that program.

- END, CANCEL, UNSUBSCRIBE or QUIT should also be opt-out key words for all programs; however, content providers should feature the word

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<sup>1</sup> *Petition of Mobile Media Technologies for Declaratory Ruling or, In the Alternative Retroactive Waiver*, CG Docket No. 02-278, WC Docket No. 07-135 (filed April 5, 2016).

<sup>2</sup> *U.S. Consumer Best Practices for Messaging*, Mobile Marketing Association (Effective Date: October 16, 2012), available at <<http://www.ctia.org/docs/default-source/default-document-library/industry-best-practices.pdf>> (last visited Jun. 13, 2016).

STOP in their advertising and messaging. Messaging content providers must process a stop message from a subscriber regardless of the keyword STOP's case sensitivity

- The STOP keyword must work in the native language of the program. In a non-English program, the English keyword must not return an error message.
- Short code programs must ignore subsequent non-keyword text included in STOP Mos.
- Short codes running MMS programs should handle the STOP keyword correctly, regardless whether the subscriber sends the keyword via MMS or SMS.
- When sent, these words cancel the subscriber's previous opt-in for messaging.

1.5-7 This STOP command functionality requirement applies to all programs, including one-time use programs where the subscriber will not receive additional messages. This is to avoid subscriber confusion around the use of the STOP command.

1.5-8 The STOP command should never result in an error being sent back to the subscriber.

1.5-9 Any IVR system that offers the possibility to opt-in to a mobile service must also offer the possibility to opt-out. This should be available through the IVR, customer service, a web site, or SMS.

1.5-10 The content provider must record and store all opt-out transactions.

1.5-11 If a user is inactive (no program MTs or MOs exchanged) in any recurring message program for eighteen months, the opt-in should expire. At that time, it is permissible to send the subscriber one final MT message notifying them that his/her username and other subscription information will be deleted from the program. No messages to the subscriber after the expiration are permitted unless the subscriber re-opts-in to the program.

If Mobile Media refused to accept an industry-standard "STOP" message, such a refusal was by definition refusing to accept a "reasonable method" of communicating to the sender to stop and thus is liable for that refusal.

A requirement that a request to "STOP" request must "reach" the sender of a text

message is similarly absurd. A STOP message uses the same path utilized by the sender. If the sender's agents employed for sending the initial message are unable to process the "STOP" response, or (more likely) simply ignore it, that is not the responsibility of the consumer. As the Commission pointed out previously, after a STOP is received, a "confirmation" text is permissible to confirm to the consumer their STOP was received (and the MMA standards require this to be immediate). A consumer can thus resend a STOP if unconfirmed. Mobile media suggests that "[a] non-functional method of revoking consent is neither an effective nor 'reasonable' method" but in the case of Mobile Media, the "non-functionality" was by design—by Mobile Media and its agents.

Furthermore, a contrary rule would encourage text senders to have unreliable response mechanisms for opt-outs so they can always argue "we didn't get it." Senders of bulk text messages are the ones in the best position as gatekeepers to utilize the most reliable systems, by being responsible for failures of those systems to protect the consumers the TCPA is intended to protect.

A serious flaw is apparent in Mobile Media's logic, since they do not consider the plight of reassigned numbers and wrong-numbers entered into their systems. Mobile Media states:

For subscribers' ease, however, they are informed multiple times during the sign-up process that they may manage their TextCaster text alert subscriptions (including canceling them) at any time simply by returning to the same sign-up page – a web-based portal always accessible via a link from the Licensee's own web page.<sup>3</sup>

But what is a hapless consumer to do if they are not the person who signed up with TextCaster, they have no TextCaster account, nor any contact information of the sender of

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<sup>3</sup> Petition at 6-7.

the message? Indeed, this demonstrates why a “STOP” response back to the sender is the industry standard for opting out of text messages since that mechanism is usable by all recipient, including those with reassigned numbers, no TextCaster accounts, and no contact information for the senders.

### **No Grounds for a Waiver**

Mobile Media claims that “[p]rior to the release of the July 2015 DRO, Petitioner had no way of anticipating from the text of the TCPA or any existing regulation that it was *required* to provide consumers bilateral text messaging functionality as method of revoking consent.”<sup>4</sup> This is facially absurd and a false statement of the law. It was abundantly clear that all text messengers must accept and “reasonable” method of opting out. Mobile Media is thus claiming that a “STOP” response message is not a “reasonable” method.

More importantly, Mobile Media has failed to articulate, much less meet the standards to qualify for a waiver. The only “basis” stated in the Petition is that “[e]xtending the retroactive waiver by 120 days following the release of the July 2015 DRO is both warranted and fair in order to relieve Petitioner and its Licensees of the risk of liability” for that 120 day time period, which conveniently exculpates them from TCPA liability for a lawsuit.

Mobile Media seems to have failed to understand the requirements for a waiver—in particular the requirement that the waiver itself must be in the public interest. “To make this public interest determination, the waiver cannot undermine the purpose of the rule,

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<sup>4</sup> Petition at 5.

and there must be a stronger public interest benefit in granting the waiver than in applying the rule."<sup>5</sup> It is a petitioner's burden to show that granting the waiver is affirmatively in the stronger public interest than letting the rule operate as written. Mobile Media has only identified their own private pecuniary interests that will be furthered by such a waiver (i.e. escaping a private lawsuit). There is a strong presumption that allowing the Commission's rules to operate as written is in the public interest. Having failed to identify and prove a qualifying public interest that would be served by granting the discretionary waivers, the Petitions for waivers must fail as a matter of law. "When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action."<sup>6</sup> Mobile Media has failed meet this standard.

When a waiver request provides inadequate information "then our inquiry need go no further because the petitioner has failed in its obligation to plead with particularity the facts and circumstances warranting its requested relief."<sup>7</sup> Accordingly, Mobile Media's Petition for a waiver does not warrant further consideration.

### **Conclusion**

In summary, a "STOP" reply, consistent with the MMA industry-standard, is by definition a "reasonable method" of communicating to the sender to stop such messages and of revoking consent for future messages (if consent actually existed prior to the call).

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<sup>5</sup> *In the Matter of Curtiss-Wright Controls Inc.*, 27 FCC Rcd. 234 • ÷8 (2012).

<sup>6</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (DC Cir. 1968).

<sup>7</sup> *In the Matter of Section 68.4(a) of the Comm'n's Rules Governing Hearing Aid-compatible Telephones*, 23 FCC Rcd. 3352 (2008) ¶7.

Refusing to accept a “STOP” message (including by choosing to use a system where response messages were discarded or blocked) is refusal to accept a “reasonable” method to opt out of their text messages.

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

Sincerely

*/s/ Robert Biggerstaff*

Robert Biggerstaff  
June 13, 2016