

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	CG Docket No. 92-90
)	
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)	

To: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) submits these comments in response to the Commission’s *Notice of Proposed Rulemaking* in this proceeding. The Commission seeks comment on whether it should, in the context of revisiting its rules regarding exemptions from the Telephone Consumer Protection Act of 1991’s (“TCPA”) prohibitions of prerecorded message calls, specifically address prerecorded messages sent by radio or television broadcasters that encourage audiences to tune in to broadcasts at a particular time for a chance to win a prize or similar opportunity. The Commission also seeks comment on whether it should adopt new rules with respect to such calls, and if so, asks what rules it might adopt to appropriately balance consumer’s privacy interests with broadcasters’ freedom of speech.

Television and radio broadcasters have used telephone contacts to promote their programming services in the belief that the calls described in the *Notice* fall outside the scope of the TCPA’s prohibitions on unsolicited prerecorded advertising and solicitation calls. In doing so, broadcasters have relied on statements by the Commission and Congress indicating that the prerecorded “advertisements” prohibited by the TCPA *must seek to sell a product or service to the called party*. Pursuant to express statutory authorization, the FCC has exempted from liability numerous categories of prerecorded calls, including all prerecorded messages placed by tax-exempt non-profit entities, and all prerecorded calls placed by callers that are not made for a “commercial purpose.” Congress likewise emphasized that a prerecorded message qualifies as a prohibited “advertisement” within the meaning of the TCPA only if the “principal purpose” of that

message is to encourage the called party to purchase goods or services. Congress also very deliberately authorized exemptions that would tailor the TCPA's prohibitions to the contours of commercial speech – defined by the United States Supreme Court as speech that does “no more than propose a commercial transaction.” Over-the-air broadcasts do not constitute a “commercial transaction” nor are they “commercially” available to listeners and viewers; instead, they are available for free to anyone with access to a television or radio receiver. Accordingly, concepts of “commercial” availability or quality simply have no applicability to the programming that broadcasters transmit over the public airwaves or to broadcast invitation calls that invite a listener to simply tune in to a program to participate in a free promotional giveaway.

Thus, NAB urges the Commission to expressly acknowledge in its Report and Order in this proceeding that broadcaster audience invitation calls described in the *Notice* fall within two independent exemptions under its rules that permit prerecorded messages that “are not made for a commercial purpose” and messages that do not promote the commercial availability or commercial quality of property, goods or services. Simply stated, the broadcast audience invitation calls described in the Notice are permissible under the Commission's existing rules. Further, the scope of the TCPA's prohibitions on prerecorded messages must be construed narrowly to avoid serious Constitutional issues.

Finally, the Commission's decision in this matter will likely affect the outcomes of the pending private class action lawsuits against broadcasters. If the Commission nonetheless determines that it can and should prohibit such calls, it should do so only prospectively, through a new or modified rule. Due process considerations would preclude any other approach. Broadcasters may not be punished for their good faith

reliance on Congress and the Commission's statements that the prerecorded messages in question are not prohibited by the TCPA.

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I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s *Notice of Proposed Rulemaking* in this proceeding.² The Commission seeks comment on whether it should, in the context of revisiting its rules³ regarding exemptions from the Telephone Consumer Protection Act of 1991’s (“TCPA”) ⁴ prohibitions of prerecorded message calls, specifically address prerecorded messages sent by radio or television broadcasters that encourage audiences to tune in to broadcasts at a particular time for a chance to win a prize or similar opportunity. The Commission also seeks comment on whether it should adopt new

¹ NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 02-250, CG Docket Nos. 02-278 and 92-90, (rel. Sept. 18, 2002) (hereinafter “*Notice*”).

³ 47 C.F.R. § 64.1200.

rules with respect to such calls, and if so, asks what rules it might adopt to appropriately balance consumer's privacy interests with broadcasters' freedom of speech.⁵

Television and radio broadcasters have used telephone contacts to promote their programming services in the belief that the calls described in the *Notice* fall outside the scope of the TCPA's prohibitions on unsolicited prerecorded advertising and solicitation calls. In doing so, broadcasters have relied on statements by the Commission and Congress indicating that the prerecorded "advertisements" prohibited by the TCPA must seek to sell a product or service to the called party. For example, the Commission has expressly stated that its exemption for commercial messages that do not contain "advertisements" was appropriate because "[s]ome messages, albeit commercial in nature, *do not seek to sell a product or service* and do not tread heavily upon privacy concerns."⁶ Similarly, the Commission justified its related exemption for recorded message calls by tax exempt nonprofit organizations by explaining that "[t]ax exempt nonprofit organizations by definition are not seeking to make a profit *on the sale of goods to the called party* in a way that the TCPA was attempting to restrict."⁷

Congress likewise emphasized that a prerecorded message qualifies as a prohibited "advertisement" within the meaning of the TCPA only if the "principal purpose" of that message is to encourage the called party to purchase goods or services.⁸ As discussed more fully below, Congress did not accidentally equate calls that transmit "unsolicited advertisements" with calls that solicit a purchase from called parties. Rather, Congress very deliberately authorized

⁴ Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

⁵ *See Notice* at ¶ 32.

⁶ In the Matter of The Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking*, 7 FCC Rcd 2736, 2737 (1992) ("*1992 NPRM*") (emphasis added).

⁷ *Id.* (emphasis added).

⁸ H.R. Rep. No. 101-633, at 8 (1990).

exemptions that would tailor the TCPA’s prohibitions to the contours of commercial speech – defined by the Supreme Court as speech that does “no more than propose a commercial transaction.”⁹

For the reasons discussed below, NAB urges the Commission to expressly acknowledge in its Report and Order in this proceeding that broadcaster audience invitation calls described in the *Notice* fall within two independent exemptions under its rules that permit prerecorded messages that “are not made for a commercial purpose” and messages that do not promote the commercial availability or commercial quality of property, goods or services. This acknowledgment is warranted for all of the statutory, regulatory and constitutional reasons discussed below, and because it could affect the outcomes of the pending private class action lawsuits against broadcasters who relied in good faith on statements by Congress and the Commission regarding the scope and purpose of these exemptions.

II. The FCC’s Decision in This Proceeding Will Affect The Rights of Parties in Pending Litigation.

Clarification by the Commission regarding the applicability of its exemptions to the types of prerecorded message calls by broadcasters described in the *Notice* is of vital and immediate importance to NAB members, especially in light of pending litigation. Specifically, two putative private class action lawsuits now pending in Georgia against Cox Radio, Inc. and Susquehanna Radio Corp.¹⁰ are the first to allege that calls encouraging audiences to tune in to a free broadcast are unlawful prerecorded telemarketing solicitations under the TCPA. The named plaintiffs in these suits seek to recover \$1,500 in statutory damages for themselves and, if class certification

⁹ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

¹⁰ *Garver v. Susquehanna Radio Corp.*, Civ. No. 00-VS-002168-F (Fulton County); *Abt v. Cox Radio, Inc.*, Civ. No 01-VS-017817 (Fulton County).

motions are granted, on behalf of every person in the state of Georgia who received a similar prerecorded message call from a Cox or Susquehanna radio station.¹¹ If plaintiffs prevail on the theories advanced in the Susquehanna and Cox lawsuits, the potential liability for aggregated statutory damages in class action judgments could be devastating to individual licensees and the potential exposure to the broadcast industry as a whole could be enormous.

The lawsuits pending in Georgia involve precisely the same issue raised by the *Notice* – *i.e.*, whether “prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity” are prohibited by the TCPA or exempted by the Commission’s existing rules. The Commission’s exemptions determine the legal standards applied in private suits under the TCPA. Accordingly, any finding by the Commission that its existing rules prohibit the prerecorded calls by broadcasters addressed in the *Notice* would invite further class action litigation and expose broadcasters to potentially devastating liability. Consistent with due process requirements, broadcasters cannot be exposed to ruinous federal statutory damages judgments for decisions based on reasonable and good faith interpretations of the Commission’s rules. As the D.C. Circuit has held, “[t]he Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble ‘Russian Roulette.’”¹²

The TCPA as implemented by the Commission does not prohibit prerecorded message calls inviting audiences to listen to or view free broadcast programs and it is doubtful whether

¹¹ The attorneys who represent the plaintiffs in both lawsuits have filed comments in their own names in this proceeding. *See* Comments of Marc B. Hershovitz, Michael Jablonski, Ned Blumenthal and C. Ronald Ellington (filed Nov. 20, 2002) (hereinafter “Plaintiffs’ Attorneys’ comments”).

Congress or the Commission could do so consistent with the First Amendment. Nonetheless, if the Commission concludes as a matter of policy that such prerecorded message calls should be proscribed by the TCPA, due process requirements dictate that it must do so only through a new or modified rule that would apply prospectively.

III. Neither Congress Nor The Commission’s Rules Prohibit Broadcast Audience Invitation Calls.

It is necessary and appropriate for the Commission to clarify the applicability of its prerecorded message calls made by broadcasters in light of the unique nature of broadcast services and the unique relationship between broadcasters and their audiences. As the Commission understands very well, free over-the-air radio and television broadcasts are not consumer products or services that are bought and sold in commercial transactions. Instead, over-the-air radio and television broadcasts are sources of news, information and entertainment programming that are by federal mandate available for free to every person within a station’s listening or viewing area. As the Commission and the courts often have recognized, the preservation of our nation’s free over-the-air broadcast system is vitally important to the public interest.¹³

¹² *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987); *accord Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

¹³ As the Commission and the courts often have recognized, the preservation of our nation’s free over-the-air broadcast system is vitally important to the public interest. *See, e.g.*, Statement of former FCC Commissioner James H. Quello Regarding Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 11 FCC Rcd 6235, 6274 (1996) (acknowledging “the vital importance of our only universal, free over-the-air broadcast system”); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (recognizing an important government interest in “preserving the benefits of free, over-the-air local broadcast television”); *In re Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Notice of Proposed Rulemaking*, 15 FCC Rcd 1722, 1724 (1999) (“The Commission often has recognized the importance of our free, over-the-air radio broadcast service, with its unrivaled accessibility and unique ability to provide local news, information and public service programming.”) (“*Digital Audio NPRM*”).

Broadcasters also relate to their audiences in ways that differ fundamentally from the relationship between sellers and consumers in commercial transactions. As one federal court explained, there is “a basic difference between broadcasters and other producers” in the economy.¹⁴ This is because, “in an economic sense, radio listeners are not the radio station’s customers, but rather, they (or their collective attention) are its *product*.”¹⁵ As another federal court explained, “[r]adio listeners are not the radio stations’ customers The radio stations’ customers are the advertisers who pay the stations to broadcast commercial messages to the listeners.”¹⁶

The fundamental differences between broadcasters and other producers in the economy also give rise to important First Amendment considerations. Because broadcast programming is a form of constitutionally-protected speech,¹⁷ messages encouraging people to listen to a free over-the-air broadcast are not susceptible to the same kinds of regulation as ordinary telemarketing pitches for time share vacation rentals, automotive oil change services, or vinyl replacement windows.¹⁸ In other words, promotions for protected expression are not amenable to regulation as ordinary commercial speech.¹⁹

¹⁴ *Walt-West Enters., Inc. v. Gannett Co.*, 695 F.2d 1050, 1061 (7th Cir. 1982).

¹⁵ *Id.*

¹⁶ *Pathfinder Communications Corp. v. Midwest Communications Co.*, 593 F. Supp. 281, 283 (N.D. Ind. 1984).

¹⁷ *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers *and radio*, are included in the press whose freedom is guaranteed by the First Amendment.”) (emphasis added).

¹⁸ *See, e.g., Bolger*, 463 U.S. at 67 n.14 (finding promotional pamphlets to be commercial speech, but acknowledging that “a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment”).

¹⁹ *Id.*; *see also Page v. Something Weird Video*, 960 F. Supp. 1438, 1443 (C.D. Cal. 1996) (“Promotional speech may be noncommercial if it advertises an activity itself protected by the First Amendment.”).

A. The Scope and Purpose of Exemptions Authorized for Noncommercial Messages and Messages That Do Not Transmit an Unsolicited Advertisement.

The TCPA does not prohibit all unsolicited prerecorded message calls to residential telephone subscribers. Rather, the statute makes it lawful to initiate an unsolicited telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message if the call “*is exempted by rule or order by the [Federal Communications] Commission.*”²⁰

Congress understood that the First Amendment would prevent the suppression of all uses of prerecorded messaging technology that some telephone subscribers might find intrusive, but believed that “the Constitution does not prohibit restrictions on commercial telemarketing practices.” Accordingly, the legislature authorized several specific exemptions with the expectation that the Commission would use them to tailor the prohibitions of the statute to the contours of the commercial speech doctrine – defined by the Supreme Court as speech that does “no more than propose a commercial transaction.”²¹ This intent is clear from the House Report in which the Committee acknowledged that it was “sensitive to restraints on its authority” to regulate “‘core’ First Amendment speech,” but expressed its belief that it would be possible to create a “workable ‘commercial speech’ distinction consistent with Supreme Court precedent.”²² The Senate Report likewise acknowledged “constitutional concerns” with the scope of the statutory restrictions on prerecorded calls but noted that the “Committee expects that the regulations adopted by the FCC” would conform with the Supreme Court’s *Central Hudson* test for commercial speech regulation.²³

²⁰ 47 U.S.C. § 227(b)(1)(B) (emphasis added).

²¹ *Bolger*, 463 U.S. at 66 (citation and quotation omitted).

²² H.R. Rep. No. 102-317, at 17 (1991).

²³ S. Rep. No. 102-177, at 7 (1991).

The Senate Report further explained the Committee’s view that “commercial speech is susceptible to more stringent governmental limits and regulation” than noncommercial speech, and emphasized that “the Constitution accords a lesser protection to commercial speech than other constitutionally guaranteed expression.”²⁴ In a separate statement, the Senate sponsor of the TCPA explained that the phrase “commercial purpose,” as it is used in the exemption authorized by the statute for “calls that are not made for a commercial purpose”²⁵ is “*intended in the constitutional sense and is intended to be consistent with the court decisions which recognize that noncommercial speech can receive less protection than commercial speech.*”²⁶ In this precise “constitutional sense” intended by Congress, speech made for a “commercial purpose” cannot be equated with all speech motivated in any way by profit-making purposes. To the contrary, the Supreme Court has expressly held that the fact that a speaker “has an economic motivation” for conveying particular messages is “clearly ... insufficient by itself to turn the materials into commercial speech” subject to more permissive regulation under the First Amendment.²⁷

B. Exemption for Calls Not Made for a Commercial Purpose.

Pursuant to express statutory authorization, the FCC exempted from liability numerous categories of prerecorded calls, including all prerecorded messages placed by tax-exempt non-profit entities, and all prerecorded calls placed by callers that are not made for a “commercial purpose.”²⁸ The Commission did not define “commercial purpose” in its rules. However,

²⁴ *Id.* (citation omitted).

²⁵ 47 U.S.C. § 227(b)(2)(B)(i).

²⁶ 137 Cong. Rec. S18781, S18784 (daily ed. Nov. 27, 1991) (statement of Sen. Hollings) (emphasis added).

²⁷ *Bolger*, 463 U.S. at 67.

²⁸ 47 C.F.R. §§ 64.1200(c)(1), 64.1200(c)(4).

consistent with Congress' direction that the noncommercial purpose exemption was intended to dovetail with the Supreme Court's definition of commercial speech, the Commission construed this exemption to apply to prerecorded messages that do not solicit a commercial transaction.²⁹ Specifically, the Commission considered proposals by several commenters to create particular exemptions for recorded message calls that were placed for purposes of conducting market research, market surveys and polling activities. The Commission concluded that it was unnecessary to create these specific exemptions because such activities do not transmit "solicitations" within the meaning of its rules and therefore were covered by its categorical exemption for calls not made for a commercial purpose:

We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities *which do not involve solicitation as defined by our rules*. We thus reject as unnecessary the proposal to create specific exemptions for such activities.³⁰

The *Notice* in this proceeding reiterates that the "exemption for non-commercial calls applies to a wide range of entities" and explains that the Commission's decision to create a broad noncommercial calling exemption was rooted in the recognition that "messages *that do not seek to sell a product or service* do not tread heavily upon the consumer interests implicated by Section 227."³¹ The Commission's decision to equate calls made for a commercial purpose with calls that contain "solicitations" is entirely consistent with this recognition. Both the TCPA and the FCC Rules expressly define a "telephone solicitation" as the "initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property,

²⁹ In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd 8752 (1992) ("TCPA *Report and Order*").

³⁰ *Id.* at 8774 (emphasis added).

³¹ *Notice* at ¶ 30 (emphasis added).

goods, or services, which is transmitted to any person” This definition of a “telephone solicitation” also closely mirrors the definition of commercial speech articulated by the Supreme Court.³²

C. Exemption for Calls That Do Not Contain an “Unsolicited Advertisement.”

Congress also authorized, and the Commission adopted, an independent exemption for prerecorded message calls that do not contain an “unsolicited advertisement.” This latter term is defined by both the statute and the Commission’s rules as a message promoting 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 consent.”³³ The TCPA incorporated this definition verbatim from predecessor legislation, the “Telephone Advertising and Regulation Act,”³⁴ that was accompanied by a House Report explaining that a prerecorded message does not transmit an “advertisement” if the principal purpose of the call is not to generate a purchase.³⁵ The House Report expressly stated that the prohibition against prerecorded message calls transmitting “advertisements” would not apply if the “*principal purpose of the call was not to generate a purchase*” from the called parties.³⁶

³² Compare 47 U.S.C. § 227(a)(3); 47 C.F.R. § 64.1200(f)(3), with *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

³³ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(c); 47 C.F.R. § 1200(f)(3).

³⁴ H.R. 2921, 101st Congress (1990). Like the fully-implemented TCPA, this predecessor legislation permitted commercial enterprises to make prerecorded message calls that did not contain an “advertisement.” Specifically, subsection B(2) of the Telephone Advertising Regulation Act provided that “[i]t shall be unlawful for any person in the United States . . . to use automatic telephone dialing systems to deliver without initial live operator contact, any prerecorded advertisement” H.R. Rep. No. 101-633, at 8.

³⁵ *Id.* at 8.

³⁶ *Id.* at 7-8 (emphasis added).

Consistent with this legislative history, the Commission determined that its exemption for commercial calls that do not contain “unsolicited advertisements” includes any prerecorded messages by commercial enterprises that do not seek to *sell* a product or service to the called parties.³⁷ Specifically, the Commission explained that it was appropriate to exempt categorically calls that do not contain “advertisements” because “[s]ome messages, albeit commercial in nature, *do not seek to sell a product or service* and do not tread heavily upon privacy concerns.”³⁸ Thus, broadcast audience invitation calls, which do not seek to sell a product or service, are not advertisements.

IV. The Broadcast Audience Invitation Calls Described in the *Notice* Are Permissible Under the Commission’s Existing Rules.

The prerecorded audience invitation calls described in the *Notice* are permissible pursuant to both of the exemptions for noncommercial calls and calls that do not transmit an unsolicited advertisement.³⁹ Calls encouraging audiences to tune in to a free over-the-air broadcast are not made for a “commercial purpose” in the “constitutional sense” mandated by Congress because such calls do not propose a commercial transaction. Nor do these calls contain a “telephone solicitation” as defined by the Commission’s rules. Accordingly, like calls conducting research, market surveys, or polling activities, prerecorded messages that invite audiences to tune in to a broadcast program are lawful under the Commission’s noncommercial purpose exemption because they do not solicit any form of purchase, rental or investment transaction. Like companies that use prerecorded voice messages to conduct market research

³⁷ 1992 *NPRM*, 7 FCC Rcd at 2737.

³⁸ *Id.* (emphasis added). The FCC similarly justified its related exemption for recorded message calls by tax exempt nonprofit organizations by explaining that “[t]ax exempt nonprofit organizations by definition are not seeking to make a profit on the sale of goods to the called party in a way that the TCPA was attempting to restrict.” *Id.*

³⁹ *Notice* at ¶ 32.

activities, radio and television stations may possess an underlying economic *motivation* for making calls to promote their broadcasts.⁴⁰ But the Supreme Court has made clear that a profit-making motivation alone does not constitute a “commercial purpose” in the “constitutional sense” intended by Congress. As the Supreme Court explained, if the mere existence of a

profit motive were determinative [of whether expression could be regulated as commercial speech,] all aspects of [a newspaper’s] operations – from the selection of news stories to the choice of editorial position – would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.⁴¹

Instead, the “critical feature” of commercial speech is that it does “no more than propose a commercial transaction.”⁴²

Nor do these messages, even if transmitted on behalf of a “commercial” broadcaster, contain an “unsolicited advertisement” within the defined meaning of that term as a message that advertises the “commercial” availability or quality of property, goods, or services.⁴³ As

⁴⁰ Indeed, there are a variety of commercial *motivations* that may underlie prerecorded message calls that the FCC has deemed “noncommercial” under the TCPA. For example, an organization that conducts market research or surveys may be paid based on the number of calls it makes and by definition, market research is an activity designed to further a company’s ability to market its goods and services profitably to consumers. Similarly, an organization that conducts political polling may be using the polling to determine how best to obtain governmental funding for its organization. As the Commission implicitly recognized, however, none of these economic *motivations* transform the calls themselves into “commercial” calls within the meaning of the TCPA. Such calls are noncommercial, not because they lack a profit-making motivation, but because they do not involve “solicitation” as defined by the Commission’s rules.

⁴¹ *Pittsburgh Press*, 413 U.S. at 385.

⁴² *Id.*

⁴³ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5). Of course, this express statutory definition precludes other plausible interpretations of the term “advertisement.” At least one court has made clear that the TCPA’s statutory definition of the word “advertisement” is considerably narrower than its colloquial usage. *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181-82 (E.D. Pa. 1994) (holding that a “company’s advertisement of available job opportunities” is not an “advertisement” within the meaning of the TCPA).

numerous courts have recognized, broadcast stations do not stand in a commercial relationship with their audiences.⁴⁴ Over-the-air broadcasts are not “commercially” available to listeners and viewers; instead, they are available for free to anyone with access to a television or radio receiver. Accordingly, concepts of “commercial” availability or quality simply have no applicability to the programming that broadcasters transmit over the public airwaves.⁴⁵ The plain language of the controlling rule and statutory definition therefore mandates the conclusion that calls encouraging audiences to tune in to a broadcast are exempt from the TCPA’s prohibitions against prerecorded calls to residences.⁴⁶

As explained above, compelling legislative history also supports the same conclusion. In a report⁴⁷ on a predecessor bill specifically addressing the legislative purpose underlying the definition of the term “unsolicited advertisement,” the House Committee stated that, in order to distinguish permissible prerecorded message calls from prohibited “advertisements,” the “principal purpose of the call should be determinative,” and that a “call made *principally for a*

⁴⁴ See, e.g., *Pathfinder Communications Corp.*, 593 F. Supp. at 283.

⁴⁵ Of course, the fact that a particular radio or television station is licensed to a commercial enterprise does not make the free broadcasts it transmits over the public airwaves “commercially” available to listeners. Such reasoning impermissibly would conflate the commercial character of a caller’s business with the commercial availability of the caller’s goods or services. Indeed, the distinction is vital given the unique nature of a broadcast station’s relationship to its audience. To be sure, many broadcasters are “commercial” inasmuch as they sell broadcast commercials to advertisers. But this is of no consequence under the relevant exemption, which expressly contemplates that lawful recorded messages may be sent by commercial enterprises. 47 C.F.R. § 64.1200(c)(1). The question is not whether the caller is a “commercial” entity, but whether the call itself encourages a purchase by advertising the existence or quality of goods or services that are commercially available to call recipients.

⁴⁶ 47 C.F.R. §§ 64.1200(a)(2) and 64.1200(c)(1).

⁴⁷ The Supreme Court has not hesitated to follow the guidance of committee reports on predecessor legislation to resolve questions of statutory construction. For example, in *Begier v. IRS*, the Supreme Court expressly relied on the House Committee Report for a prior version of the law in question, and noted that “[p]etitioner’s claim that this legislative history is irrelevant

purpose other than to encourage a purchase would not be covered merely because the message contained an incidental reference to a potential sale, rental or investment opportunity.”⁴⁸ This unambiguous statement of congressional intent precludes a finding that the audience invitation calls described in the *Notice* constitute prohibited “advertisements.” Prerecorded messages encouraging audience members to tune in to an over-the-air broadcast do not propose to sell anything to anybody, and, do not even identify any “property, goods, or services” that could be purchased by the called parties.

The fact that some messages by broadcasters may encourage audience members to tune in to a particular time for a chance to win a prize or similar opportunity does not change the fact that the principal purpose of such calls is to attract an audience, and not to generate a purchase from the called parties. This fact distinguishes prerecorded calls by broadcasters from calls by sellers of consumer goods and services that offer “information-only” about a product or service, or promote offers for “free estimates” or “free analyses” or other free products or services as a prelude to an actual sales solicitation or an offer of goods for purchase. As the Commission acknowledges in its *Notice*,⁴⁹ these latter calls usually are motivated by the caller’s ultimate desire to sell goods or services to the call recipient. By contrast, the purpose of a call from a broadcast station inviting telephone subscribers to tune in for a chance to win is simply to attract an audience, not to consummate a sale with a consumer. Unlike typical offers of “free” goods or services that ultimately are intended to lead to a sale, calls that promote free broadcasts in

because the House Bill was not enacted is in error. The exact language to which the quoted portion of the House Report refers was enacted into law.” 496 U.S. 53, 59, 67 n.6 (1990).

⁴⁸ H.R. Rep. No. 101-633, at 8 (emphasis added).

⁴⁹ *Notice* at ¶ 31.

connection with a free prize or giveaway can *never* result in a commercial transaction between the telephone subscriber and the caller.

Moreover, in the typical broadcast promotion, it is impossible either to purchase a prize from the station or to purchase an entry in the promotion. Instead, these promotions typically involve purely gratuitous giveaways of money or prizes in random drawings to people who tune in to watch or listen. By definition, property available only as a contest prize to be distributed free of charge by chance through a random drawing is not “commercially” available to broadcast audience members.

The plaintiffs’ lawyers argue otherwise in their comments, claiming that if a station giveaway requires audience members to tune in at a particular time, this effort involves sufficient detriment or inconvenience to constitute “consideration.”⁵⁰ Their only support for this contention is a 1955 New Jersey case holding that a promotion requiring contestants to travel to a particular supermarket to deposit an entry blank presented an element of “consideration” and therefore constituted an illegal lottery.⁵¹

Of course, the question of what constitutes “consideration” for purposes of establishing a lottery violation is unrelated to the question of what constitutes a commercial transaction, and the *Lucky Calendar* case therefore has little, if any, relevance to the issue at hand. Moreover, it is doubtful whether this old concept of “store visit consideration” has any continuing force – even in New Jersey – given the sheer number of national sweepstakes and contest offers that require some form of a store visit to obtain or to submit an entry. Indeed, a 1983 New Jersey Attorney General decision explains that *Lucky Calendar* was decided under a statutory scheme (long ago repealed) that “required no consideration whatever or only the most minimal consideration” to

⁵⁰ Plaintiffs’ Lawyers’ Comments at 12.

constitute a gambling or lottery offense.⁵² The same opinion expressly contrasts the expansive *Lucky Calendar* view of consideration with the narrower view exemplified by the current New Jersey criminal code which “concerns only valuable items or the kinds of personal efforts calling for substantially more than mere personal inconvenience.”⁵³ Further, the theory of “consideration” considered in *Lucky Calendar* involved a requirement that contestants physically travel to a retail location to submit their entry – an action that requires considerably more effort than passively viewing or listening to a broadcast program. The Plaintiffs’ Lawyers’ comments fail to note that the Supreme Court has flatly rejected this latter notion of consideration, holding that the act of tuning-in to a free over-the-air broadcast program does not constitute consideration for purposes of transforming a broadcast promotion into an illegal lottery.⁵⁴ In one of many decisions following this holding, the Kansas Supreme Court stated that “the bounds of reason would be exceeded were we to say that the requirement of consideration has been fully met whenever a TV fan turns the dial of his machine to Dialing for Dollars and then relaxes in his easy chair awaiting the call which he hopes will bring him fortune.”⁵⁵

Nor can a message that informs audience members about a free broadcast and related giveaway be said to promote the “commercial availability” of property simply because it identifies the prize offered in the giveaway. An incidental reference to an opportunity to win a prize is even more attenuated than an incidental “reference to a potential sale, rental or

⁵¹ *Lucky Calendar Co. v. Cohen*, 117 A.2d 487 (1955).

⁵² 1983 N.J. Op. Atty. Gen. 276 at n.2.

⁵³ *Id.*

⁵⁴ *FCC v. American Broad. Co.*, 347 U.S. 284, 294 (1954) (Warren, C.J.) (effort of listening to a particular broadcast program does not constitute “consideration” even though the contestants’ “listening” conferred some benefit on the broadcasters who sponsored “listen and win” promotions).

⁵⁵ *Kansas ex. rel. Frizzell v. Highwood Serv., Inc.*, 473 P.2d 97, 99 (Kan. 1970).

investment opportunity” that Congress made clear *would not* transform a message into an “unsolicited advertisement” if the principal purpose of the message was not to “encourage a purchase” from the called parties.⁵⁶ The FCC’s rules affirmatively require licensees to accurately describe the nature of prizes offered in licensee-conducted giveaways in related promotional announcements.⁵⁷ In a closely analogous context, the FCC has concluded that such descriptions do not constitute advertisements for the prizes offered by the station. Specifically, for purposes of construing its commercial limits in children’s programming, the Commission determined that a station’s own self-promotional announcement does not constitute “commercial matter” and that the mere identification of a product offered as a prize in connection with a station promotion will not transform the announcement into “commercial matter.”⁵⁸ Significantly, the Commission has construed “commercial matter” to mean “airtime sold for purposes of selling a product or service.”⁵⁹ The Commission commented that this “definition comports with marketplace realities and is crafted carefully to avoid encompassing noncommercial material.”⁶⁰ The Commission similarly has construed “unsolicited advertisements” to mean messages that “do not seek to sell a product or service”⁶¹ and its

⁵⁶ H.R. Rep. No. 101-633, at 8.

⁵⁷ See 47 C.F.R. § 73.1216 (Requiring radio station licensees to “fully and accurately disclose the material terms” of their contest offers, generally including how and when prizes can be won and “the extent, nature and value of prizes.” The rule expressly provides that these disclosures may be made in a “non-broadcast manner.”).

⁵⁸ In re Policies and Rules Concerning Children’s Television Programming, *Report and Order*, 6 FCC Rcd 2111, 2112 (1991) (hereinafter “*Children’s Television Report and Order*”); In re Policies and Rules Concerning Children’s Television Programming, *Memorandum Opinion and Order*, 6 FCC Rcd 5093, 5095 (1991) (“A promotional announcement will not be considered commercial matter simply because it includes mere identification of a product to be used as a prize.”).

⁵⁹ 47 C.F.R. § 73.670 n.1 (emphasis added).

⁶⁰ *Children’s Television Report and Order*, 6 FCC Rcd at 2112.

continuing construction of this term should be guided by the same “marketplace realities” and consideration for the heightened protection afforded to noncommercial speech.

V. The Scope of the TCPA’s Prohibitions on Prerecorded Messages Must Be Construed Narrowly to Avoid Serious Constitutional Issues.

Prerecorded message calls that encourage audiences to tune in to a station’s free over-the-air programming are permissible pursuant to the unambiguous language of the controlling regulations and the unambiguously-expressed intent of both Congress and the Commission. But even if there were any ambiguity in the legislative scheme, that ambiguity must be resolved in favor of a construction that avoids the serious constitutional problems that otherwise arise if the TCPA’s prerecorded message prohibitions were deemed to apply to calls soliciting audiences to listen to constitutionally protected speech. Such messages do not “propose a commercial transaction” and are incidental to the dissemination of fully protected speech.⁶² Accordingly, such calls are not subject to regulation under the commercial speech standards applicable to telemarketing pitches hawking sales of ordinary household and consumer goods and services. Thus, if the TCPA could be construed to restrict such expression (contrary to the TCPA’s language and legislative history as described above), a restriction on messages promoting a particular station’s broadcast must be justified under the standard of strict constitutional scrutiny applicable to fully-protected, as opposed to purely commercial, speech.

⁶¹ 1992 NPRM, 7 FCC Rcd at 2737.

⁶² *Bolger*, 463 U.S. at 67 n.14; *Page v. Something Weird Video*, 960 F. Supp. at 1443 (C.D. Cal. 1996) (“Promotional speech may be noncommercial if it advertises an activity itself protected by the First Amendment.”); *People v. Fogelson*, 577 P.2d 677, 681 n.7 (1978) (“[C]ommercial solicitation or promotion of constitutionally protected written works is protected as an *incident* to the First Amendment value of the underlying speech or activity.”) (emphasis added). *Accord*, *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988) (Commercial speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech.”).

Pursuant to this standard, the Commission would have to show that a prohibition against recorded messages encouraging people to listen to a broadcast – a vital communications service that provides “unrivaled accessibility” to “local news, information and public service programming”⁶³ – is the least restrictive means available to achieve a compelling state interest.⁶⁴ Congress never characterized any interest underlying the TCPA’s prerecorded message prohibitions as “compelling.” Instead, Congress found only that “there is a *substantial* governmental interest in protecting telephone subscribers’ privacy rights from unsolicited telephone solicitations.”⁶⁵ “Substantial interests” are not “compelling interests” as a matter of law, and cannot justify restrictions on protected speech subject to the rule of strict scrutiny.⁶⁶

Moreover, the First Amendment would not tolerate a regulatory scheme that outlawed prerecorded messages encouraging audiences to tune in to commercial broadcasts, but unquestionably permitted noncommercial public broadcast stations – all of which are tax exempt non-profit entities – to deliver identical recorded message calls to their potential audience members. As the Supreme Court stated in *Greater New Orleans*, “[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.”⁶⁷ Indeed, because such a distinction between nonprofit speakers and other

⁶³ *Digital Audio NPRM*, 15 FCC Rcd at 1724.

⁶⁴ *Sable Communications of Ca., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

⁶⁵ S. Rep. No. 102-177, at 7 (emphasis added).

⁶⁶ *Baugh v. Judicial Inquiry & Review Comm’n*, 907 F.2d 440, 445 (4th Cir. 1990); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1146 (9th Cir.) (refusing to find compelling governmental purposes underlying ban on commercial solicitation), *amended*, 160 F.3d 541 (9th Cir. 1998).

⁶⁷ *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 193-94 (1999).

speakers interferes with the exercise of fundamental free speech rights, this construction would violate both the First Amendment and equally important equal protection guarantees.⁶⁸

The Commission need not, and, indeed, should not, grapple with these potential constitutional issues because “where an otherwise acceptable construction [of a statute] would raise serious constitutional problems,” the statute must be construed to avoid them “unless such construction is plainly contrary to the intent of Congress.”⁶⁹ Pursuant to this principle, the Commission should construe its rules to exempt audience invitation calls and thereby avoid the serious constitutional problems that otherwise would arise on First Amendment and equal protection grounds. Such a construction plainly does not conflict with Congressional intent. To the contrary, it is affirmatively mandated by express legislative history stating that Congress did not intend to regulate prerecorded message calls as “unsolicited advertisements” if the calls were “made *principally for a purpose other than to encourage a purchase.*”⁷⁰

⁶⁸ See, e.g., *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 412-14 (1993) (invalidating city’s selective ban on news racks for “commercial handbills” on grounds that distinctions drawn by the ordinance between commercial and noncommercial speech bore no relationship to asserted interests in promoting safety and attractiveness of urban landscape.) See also *Burkhart Advertising, Inc. v. City of Auburn*, 786 F. Supp. 721, 732 (N.D. Ind. 1991) (invalidating statute on equal protection grounds where defendants could not show how billboards advertising goods and services were any more distracting or unattractive than billboards promoting noncommercial services and messages).

⁶⁹ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Jones v. United States*, 526 U.S. 227, 239 (1999) (applying “the rule, repeatedly affirmed, that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter”).

⁷⁰ H.R. Rep. No. 101-633, at 8 (emphasis added).

VI. Any Regulation of Prerecorded Message Calls Encouraging Audience Members to Tune In to Free Broadcasts Must Operate Prospectively and Be Effected Through a New or Modified Rule.

The Commission asks whether it should adopt any new rules with respect to broadcaster audience invitation calls, and if so, what rules it might adopt to appropriately balance consumers' privacy interests with commercial freedoms of speech.⁷¹ As explained above, the Commission's existing rules implementing the prerecorded message restrictions of the TCPA must be construed to exempt calls that do no more than encourage audiences to tune in to a free over-the-air broadcast. This construction is not only reasonable, it is, quite simply, the only correct and constitutionally permissible interpretation that the Commission could adopt in light of the language, purpose and legislative history of the TCPA. Accordingly, beyond confirming that the audience invitation calls described in the *Notice* are permissible under its existing rules, no further action by the Commission would be necessary or appropriate.

Nonetheless, if the Commission determines that it can and should prohibit such calls, it should do so only prospectively, through a new or modified rule. Due process considerations would preclude any other approach. The Commission's exemptions determine the substantive legal standards applied in private suits under the TCPA. Accordingly, any conclusion by the Commission that its existing rules prohibit the prerecorded calls by broadcasters addressed in the *Notice* could expose broadcasters to potentially ruinous federal statutory damages judgments for decisions based on reasonable, good faith interpretations of the Commission's rules. Such an action would impermissibly punish, through the Commission's regulatory power, members of the broadcast industry for reasonably interpreting Commission rules. As the D.C. Circuit

⁷¹ *Notice* at ¶ 32.

recognized, such decision-making threatens to reduce the practice of administrative law to a game of ‘Russian Roulette.’”⁷² The D.C. Circuit further explained that:

Because due process requires that parties receive fair notice before being deprived of property, we have repeatedly held that in the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability. We thus ask whether by reviewing the regulations *and other public statements issued by the agency*, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform⁷³

Thus, due process requires that broadcasters may not be punished for their good faith reliance on Congress and the Commission’s statements that the prerecorded messages in question are not prohibited by the TCPA.

VII. Conclusion.

As explained above, broadcasters have relied in good faith on public statements by both the Commission and Congress indicating that prerecorded messages that do not seek to sell a product or service but merely seek to attract an audience to a free over-the-air broadcast – a vital communications service and a source of constitutionally protected speech – are not prohibited by the TCPA. Due process requires that the Commission unequivocally acknowledge

⁷² *Satellite Broadcasting Co.*, 824 F.2d at 4; *accord Gates & Fox Co.*, 790 F.2d at 156-57.

⁷³ *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (emphasis added; internal quotations and citation omitted).

that its existing rules do indeed exempt such messages, and that any future regulation of these communications be effected prospectively, through a new or modified rule.

Respectfully submitted,

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A handwritten signature in black ink, consisting of a stylized star-like symbol followed by the name "Bobeck".

Henry L. Baumann
Jack N. Goodman
Ann W. Bobeck

December 9, 2002