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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

DEC - 6 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Freedom of Information Act Request)
)
Rules and Regulations Implementing)
The Telephone Consumer Protection)
Act of 1991)

Control No. 2003-023

CG Docket No. 02-278

REVIEW OF FREEDOM OF INFORMATION ACTION

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December 6, 2002

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TABLE OF CONTENTS

	Page
Summary	ii
I. BACKGROUND	2
III. THE STAFF ERRED IN WITHHOLDING THE REQUESTED DOCUMENTS AND IN CLASSIFYING THEM AS “NOT ROUTINELY AVAILABLE”	6
A. The Commission Should Make the Requested Documents Available to All Commenters	6
B. The TCPA Informal Complaints Should Be “Routinely Available” Pursuant to 47 C.F.R. § 0.453.....	8
IV. THE COMMISSION SHOULD GREATLY ACCELERATE PRODUCTION OF THE REQUESTED DOCUMENTS.....	12
V. THE STAFF’S CHARGES FOR PROCESSING THE FOIA REQUEST ARE EXCESSIVE AND SHOULD BE REDUCED OR WAIVED PURSUANT TO 47 C.F.R. § 0.470	14
VI. CONCLUSION	16

Summary

This application for review raises a very straightforward question: Can the Commission delay the release of documents that it has cited as a principal basis for a rulemaking proceeding and charge interested commenters approximately \$25,000 in order to obtain the documents? The American Teleservices Association (“ATA”) maintains that it cannot.

In September, the Commission initiated a proceeding to review and possibly adopt far-reaching revisions to its rules implementing the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”). In doing so, it cited “the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements.” In order to meaningfully participate in the proceeding, ATA sought access to the complaints upon which the Commission relied.

The staff responded to ATAs request for the documents by requiring it to file a request under the Freedom of Information Act (“FOIA”) and the FCC’s FOIA rules. However, there was no legal basis to require proceeding under FOIA rather than simply making the documents publicly available. Documents upon which the Commission relies in a rulemaking proceeding must be available for public inspection during the notice and comment period so a complete record can be established.

Additionally, as informal complaints, the requested documents are generally classified as “routinely available” under the Commission’s current rules. Parties seeking to withhold such documents from public inspection must avail themselves of the request process set forth in Section 0.459(a) of the rules. While the staff seeks to subject these documents to a redaction process and thereby delay their release until months after the NPRM comment period has closed, it cannot do so

legitimately. There is only a *de minimis* privacy interest supporting redaction of the complainants' names under the Commission's rules governing informal complaints and its standard practice in the TCPA rulemaking proceeding of personally identifying the thousands of individual commenters makes the assertion of a privacy interest all the more questionable here. It is critical to note that ATA is not seeking access to the names of the complainants, and ATA would not publicly disclose such information in any case. In this circumstance, there is no basis for the staff's asserted need to delay the release of the complaints in the name of privacy.

The Bureau's response not only violates 47 C.F.R. § 0.461(g) of the Commission's rules by not providing the requested documents within 30 working days of the FOIA request, but the estimated time for compliance – “a number of months” – seriously damages ATAs and other commenters' ability to meaningfully participate in the underlying rulemaking. In fact, since the Commission had already counted, collected and reviewed all of the documents that ATA requested (otherwise it could not have cited them in the NPRM) there should be no search and review time involved in fulfilling the request. In addition, the estimated costs associated with processing ATAs FOIA request and the associated costs to ATA are excessive and should be greatly reduced or waived entirely in the public interest pursuant to 47 C.F.R. § 0.470(e).

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)	
Freedom of Information Act Request)	Control No. 2003-023
)	
Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278

REVIEW OF FREEDOM OF INFORMATION ACTION

The American Teleservices Association (“ATA”), by counsel and pursuant to 47 C.F.R. §§ 0.461(j) and 1.115, herein respectfully requests that the full Commission review the above-captioned Freedom of Information Act (“FOIA) action, in which the Consumer and Governmental Affairs Bureau (“CGB) claimed (i) it could not fulfill ATAs FOIA request within the period mandated by FOIA and the Commission’s rules, but rather would require “a number of months” to provide the requested information, and (ii) estimated that implementing the request would cost ATA approximately \$6,800 just to copy the requested materials (at \$0.17 per page) and between \$16,480 and \$19,468 for “search and review costs.” ^{1/}

This application for review arises out of ATAs effort to obtain and analyze informal complaints relied upon by the Commission in initiating a proceeding to review and possibly adopt far-reaching revisions to its rules implementing the Telephone

^{1/} Letter of K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, to Ronnie London, Counsel for ATA, filed in Control No. 2003-023 (Nov. 29, 2002) (See Tab 1).

Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”).²¹ ATA believes that the staff response, which would delay release of the requested documents until several months **after** the comment period in the underlying proceeding has closed, and which would effectively impose a surcharge of \$25,000 for the privilege of commenting intelligibly in the proceeding, is clearly erroneous.

First, the staff’s claim that such informal complaints are not routinely available, and that a FOIA request had *to* be filed, is incorrect. Second, not only has the staff violated 47 C.F.R. § 0.461(g) of the Commission’s rules by not processing ATAs FOIA request within 30 days, but the estimated time for compliance greatly prejudices ATAs ability to meaningfully participate in the underlying rulemaking. Third, even if such a FOIA request was required, the resources necessary to process the request, and the resultant costs to ATA, are excessive and should be greatly reduced or waived entirely.

I. BACKGROUND

On September 18, 2002, the Commission issued the TCPA NPRM. The notice stated that the proceeding was “prompted, in part, by the increasing number and variety of inquiries and complaints involving our rules on telemarketing and unsolicited fax advertisements.” *Id.* ¶ 8. The Commission observed that it received over 11,000 complaints about telemarketing practices from January 2000 through December 2001, *id.* ¶ 8, and over 1,500 inquiries about predictive dialing between June 2000 and

²¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1997, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278, FCC 02-250 (rel. Sept. 18, 2002) (“TCPA NPRM”).

December 2001. *Id.* ¶ 26. As a result, the Commission sought comment on whether it is necessary for it to adopt new rules regulating the provision of teleservices.

As the trade association of the teleservices industry representing teleservice providers and users in the United States, ATA is participating in the proceeding. Because the Commission's reliance on the complaints is a significant factor underlying its issuance of the *TCPA NPRM*, ATA requested access to the complaints and inquiries. In response to an informal inquiry, counsel for ATA was instructed by the CGB staff that the only means of reviewing the documents would be filing a request under FOIA and the FCC's FOIA rules. ^{3/}

On October 16, 2002, Counsel for ATA submitted a FOIA request to the Commission as directed by the CGB staff. ^{4/} During follow-up conversations regarding the request, ATA was told that it would take the Commission six to eight months to provide the requested documents. The CGB indicated that, during this time, a staff member at the GS-13 or GS-14 level would have to redact the personally identifiable information from the complaints before ATA could receive them. On November 6, 2002, Counsel for ATA and ATAs Director of Government Affairs met with K. Dane Snowden, Chief of CGB, and several other members of the CGB staff, along with a representative from the Commission's Office of General Counsel. ^{5/} The meeting confirmed the original time and expense estimate for responding to ATAs FOIA request, and the CGB

³¹ See 5 U.S.C. § 552(b); 47 C.F.R. § 0.441 et seq.

⁴¹ FOIA Control No. 2003-023 (Oct. 16, 2002) (see Tab 2)

⁵¹ See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Ronald G. London, Counsel for ATA, filed in CG Docket No. 02-278 (Nov. 7, 2002) (see Tab 3).

offered several options that fell well short of complying with the request. These included providing a sample of a few hundred of the 11,000 complaints, or allowing ATA to specify two months during the two-year period in which the complaints were received for which the Commission would provide documents responsive to the FOIA request.

On November 7, 2002, Counsel for ATA submitted two letters following the meeting with the CGB staff (see Tabs 4 & 5). The first letter memorialized the meeting and scope of the FOIA request as clarified through discussion at the meeting. It also memorialized the understanding that a written response to the FOIA request was due November 14, 2002, and that the staff anticipated exercising the ten-day extension provided under rules for situations when “it is not possible to locate the records and determine whether they should be made available for inspection.” 47 C.F.R. § 0.461(g). The second letter, while confirming ATAs continued interest in receiving all the documents sought by its FOIA request, agreed as an interim measure to receipt of a two-month sampling of responsive documents while the rest of the documents responsive to the request are compiled. ^{6/}

On November 14, 2002, CGB issued a letter exercising the 10-day extension, thereby moving back the time for substantive response to the FOIA request until November 29, 2002, the Friday after Thanksgiving (see Tab 6). At the same time, the letter acknowledged ATAs continued interest in receiving all the documents sought by its FOIA request, and it provided as an interim measure a sample of complaints

^{6/} The letter (i) consented to receipt of “complaints received about telemarketing practices” referenced at ¶ 8 of the *TCPANPRM* for the months August 2001 and March 2002, (ii) requested the documents be provided no later than November 14, 2002, and (iii) further requested provision of the remaining documents responsive to the FOIA request on a rolling basis as they become available for release.

received in the two months specified by ATA, August 2001 and March 2002 (125 for each month). *Id.*

On November 29, 2002, the Commission staff issued its final written response to the FOIA request, stating “that it would take a number of months and considerable staff resources in order to provide” the documents requested by ATA. The staff indicated that, according to its “tentative estimates,” copying costs would amount to \$6,800 (\$0.17 per page) and the fee for “search and review costs” would total at least \$16,480 (GS-13 level staff billed at \$41.20 per hour for 400 hours) to \$19,468 (GS-14 level staff billed at \$48.67 per hour for 400 hours) (see Tab 1). The Bureau further indicated that such review and search costs were only for “complaints that are available electronically” and that such costs would increase for any non-electronic complaints. The staff provided an additional 188 redacted TCPA-related complaints along with its letter.

II. REQUESTED RELIEF

ATA respectfully requests that the Commission overturn the staffs classification of the telemarketing complaints and predictive dialing inquiries as “not routinely available” documents and immediately release those documents for public consideration during the notice and comment period for the *TCPA NPRM*. In the alternative, ATA requests that the Commission require the staff to significantly accelerate its release of the redacted documents in time for consideration of them in the notice and comment period, and to substantially reduce or waive the charge associated with producing the requested documents.

III. THE STAFF ERRED IN WITHHOLDING THE REQUESTED DOCUMENTS AND IN CLASSIFYING THEM AS “NOT ROUTINELY AVAILABLE”

The Bureau incorrectly classified the telemarketing complaints and predictive dialing inquiries as documents that are “not routinely available” and therefore available only through a FOIA request. In the *TCPA NPRM*, the Commission relied upon the complaints and inquiries as a principal basis for the rulemaking. The Commission cannot now reasonably limit public access to the documents that it has identified as relevant to possible changes in its TCPA rules. Such documents are precisely the types of materials that are “routinely available” for public inspection and comment

A. The Commission Should Make the Requested Documents Available to All Commenters

Federal case law and Commission precedent require Commission disclosure of the complaints and inquiries in time for consideration in the comment period. Requiring disclosure of such files in agency proceedings ensures “that interested parties have a meaningful opportunity to participate . . . and that the Court has an adequate record from which to determine whether the agency properly performed its functions.”⁷¹ The Commission has observed the “significant impact” that non-disclosure of documents in a rulemaking can have on whether commenters have

⁷¹ *Abboft Laboratories v. Young*, 691 F. Supp. 462, 467 (D.D.C. 1988), *remanded on other grounds*, 920 F.2d 984 (D.C. Cir. 1990), *cert. denied sub. nom.*, *Abboft Laboratories v. Kessler*, 502 U.S. 819 (1991).

had meaningful notice and opportunity to comment. ^{8/} It has noted that one purpose for disclosure "is to ensure that interested parties have full opportunity to participate in the proceeding by providing a different perspective on materials that may be relied upon by the agency." ^{9/}

Since the Commission expressly relied upon the telemarketing complaints and predictive dialer inquiries in initiating the TCPA NPRM, it must not only make them publicly available, but must do so in time for the interested parties to comment upon them. The Commission recently applied this principle in its broadcast ownership proceeding, making its internal data available to commenters. ^{10/} In doing so, it acknowledged that by placing documents over which it has complete control at issue in a rulemaking proceeding, it is obligated to provide sufficient time for the parties to analyze the information before filing comments.

Because of the difficulty in gaining access to the complaints, ATA filed a motion for extension of time to file comments and a supplemental motion to permit the Commission time to process the FOIA request, disclose the requested documents, and allow interested parties to review and comment upon those materials. ^{11/} The Bureau

^{8/} Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order, 13 FCC Rcd 24816, 24844 (¶ 44) (1998).

^{9/} Id.

^{10/} See FCC's Media Bureau Adopts Procedures for Public Access to *Data Underlying* Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review Of Commission's Media Ownership Rules, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, Public Notice, DA 02-2980 (Nov. 5, 2002).

^{11/} Rules and Regulations Implementing the Telephone Consumer Protection Act of 7997, CG Docket No. 02-278, ATA Motion for Extension of Time (filed Nov. 13, 2002); Rules and Regulations Implementing the Telephone Consumer Protection Act of 7991,

granted ATAs motion in part, extending the comment deadline by 17 days (from November 22, 2002 to December 9, 2002) and the reply comment deadline to 30 days after the new comment deadline (from December 9, 2002 to January 8, 2003). ^{12/} Unfortunately, even with the new comment period, the vast majority of the requested documents will not be available in time for ATA and others to meaningfully provide comment on them. ATA requests that the Commission address this issue by requiring the Bureau to immediately disclose the requested documents in time for interested parties to reasonably review and comment upon them within the established comment period. In the alternative, the Commission should extend the reply comment period to permit adequate analysis of the documents once they are released.

B. The TCPA Informal Complaints Should Be “Routinely Available” Pursuant to 47 C.F.R. § 0.453

The requested documents should be considered “routinely available” pursuant to § 0.453 of the Commission’s rules. The Commission’s FOIA rules contemplate two types of documents, those which are “routinely available” for public inspection (see §§ 0.453 and 0.455) and those which are “not routinely available” (see § 0.457). Routinely available documents include a broad range of materials, including, among other things, all formal and informal complaints filed against common carriers pursuant to 47 C.F.R. §§ 1.711 through 1.735 (§ 0.453(a)(2)(ii)(F)); documents related to enforcement proceedings, public hearings and related matters (§ 0.453(a)(2)(ii)(H));

CG Docket No. 02-278, ATA Supplemental Motion for Extension of Time (filed Nov. 15, 2002).

^{12/} Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order, CG Docket No. 02-278, DA 02-3210 (rel. Nov. 20, 2002).

and all complaints regarding cable programming rates (§ 0.453(a)(2)(v)(A)). Such documents are generally available for public inspection free of charge (except for duplication costs or requests made pursuant to § 0.460(e)) at Commission locations upon request (upon written request for large or complex searches) (see § 0.460).

Conversely, materials that are “not routinely available” constitute a much narrower class of documents, such as those protected pursuant to Executive Order for national security purposes; internal Commission personnel rules and practices; statutorily protected documents; trade secrets and other confidential commercial, financial, and/or technical information; interagency and intra-agency memoranda; “personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy;” and certain investigatory records compiled for law enforcement purposes (see § 0.457). Individuals wishing to obtain documents not routinely available must submit a written FOIA request to the Commission (§ 0.461). The Commission then has 20 working days to act upon the request (plus an additional 10 working days in “unusual circumstances”). Parties requesting not routinely available documents must pay both copying and search/review fees in most cases.

The Commission is in the process of reviewing its rules governing the filing of informal complaints against entities regulated by the Commission. ^{13/} As part of that proceeding, the Commission has proposed changing the current designation of informal complaints as records that are available for public inspection. ^{14/} Specifically,

^{13/} Establishment of Rules Governing Procedures to be Followed When Informal Complaints Are Filed By Consumers Against Entities Regulated by the Commission, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 17 FCC Rcd 3919 (2002) (“*Informal Complaint NPRM*”).

^{14/} *Id.* at 3927.

the Commission has stated that “[b]ecause informal complaint records include personal information relating to consumers such as their names, addresses, and phone numbers, *we propose to no longer make them routinely available for public inspection.*” ^{15/} In other words, under the Commission’s current rules, informal complaints are classified as routinely available documents, and as such, are not subject to FOIA as enumerated in the rules governing documents that are “not routinely available.” The proposed change in the rules has not yet been adopted and cannot control the Commission’s response to ATAs request in this case.

It bears noting that the telemarketing complaints and predictive dialer inquiries also should be classified as “routinely available” documents under § 0.453(a)(2)(ii)(H) of the rules as records associated with “enforcement hearings, public inquiries and related materials.” Moreover, Section 0.459(a) of the Commission’s rules affords individuals filing information with the Commission the opportunity to request that such information not be made available for public inspection. To the extent that the individuals submitting the telemarketing complaints and predictive dialing inquiries did not avail themselves of the request process set forth in Section 0.459(a), the Commission has no basis to withhold the documents for the redaction of personal identifying information. ^{16/}

For these reasons, the Commission should overturn the Bureau’s decision to classify the telemarketing complaints and predictive dialing inquiries as “not routinely available” and should immediately produce the materials for public inspection. In this

^{15/} *Id.* (emphasis added).

¹⁶¹ ATA is not requesting access to documents in any instances where the complainant has requested confidentiality.

regard, it is also important to note that ATA is not seeking the identities of the complainants, nor will it publicly disclose any names. Accordingly, the Commission cannot rely on FOIA Exemption 6 as the basis for impeding access to the complaints during the comment period. 17/ The problem in this case is of the FCC's making; ATA does not care whether the complainants' names are redacted, but is adamant that the time the Commission takes for doing so should not penalize those who wish to submit comments in the rulemaking proceeding. The core issue is that the Commission has no basis to withhold or delay access to the complaints that it put at issue in an active rulemaking proceeding, and it certainly has no support for passing the cost of such redaction through to ATA. 18/

17/ Exemption 6 of FOIA does not support the Commission's position here because ATA is not seeking and will not disclose the complainants' names or any identifying information. This information raises only a de minimis privacy interest in the first instance given the Commission's rules governing informal complaints and its practice in the TCPA rulemaking proceeding of personally identifying individual commenters. See, e.g., *Baltimore Sun v. United States Marshals Sew.*, 131 F. Supp.2d 725, 729 (D. Md. 2001) (allowing release of records with identifying information because there was "little to fear in the way of harassment, annoyance, or embarrassment."); *Alliance for the Wild Rockies v. Dept. of the Interior*, 53 F. Supp. 32, 36-37 (D.D.C. 1999) (holding that commenters to proposed rulemaking had little expectation of privacy as complete record of proceeding would be publicly available); *Oregon Natural Desert Ass'n v. Dept. of the Interior*, 24 F. Supp.2d 1088, 1093 (D. Or. 1998) (finding release of names of violators of federal grazing law provided public with understanding of how government enforced land management laws); *Urbigkit v. Dept. of the Interior*, No. 93-CV-0232-J, slip op. at 13 (D. Wyo. 1994) (finding release of list of individuals reporting wolf sightings shows how agency meets obligations imposed upon it by Endangered Species Act).

18/ Neither can the documents be withheld based upon the Privacy Act of 1974 (5 U.S.C. § 552a). Section 552a(b)(2) of the Privacy Act "represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access." *Greentree v. United States Custom Sew.*, 674 F.2d 74, 79 (D.C. Cir. 1982).

IV. THE COMMISSION SHOULD GREATLY ACCELERATE PRODUCTION OF THE REQUESTED DOCUMENTS

The staff has violated 47 C.F.R. § 0.461(g) of the Commission's rules by not providing the requested documents within 30 days of ATAs FOIA request. Section 0.461(g) requires that the Commission act upon a FOIA request within 20 business days of the date of the request. "If it is not possible to locate the records and determine whether they should be made available for inspection" the Commission can extend the time for action by another 10 days under certain circumstances. (47 C.F.R. § 0.461(g)).

The extension provision does not apply to ATAs FOIA request for documents relied upon in the *TCPA NPRM*. The extension period is to be taken only in "unusual circumstances," 19/ which for the Commission are delineated in §§ 0.461(g)(1), (2) and (3) of the Commission's rules. However, it is clear that the staff did not need to gather the documents from field offices (§ 0.461(g)(1)), search for the records (§ 0.461(g)(2)), or obtain the cooperation of other federal bodies having a substantial interest in the determination of the request (§ 0.461(g)(3)). The Commission had already collected, counted, and reviewed the documents, or it could not have cited to them in the *TCPA NPRM*. Thus, no "search time should be required. Nor is it necessary to conduct "research." Even assuming that the staff is correct that a FOIA request is required here, all it need do is go through the documents, redact the personal identifying information, and copy them. Accordingly, there was no basis for the staff to claim the need for an extension.

19/ See *Ogelsby v. U.S. Dept. of the Army*, 920 F.2d 57, 62 n.2 (D.C. Cir. Oct. 22, 1990) (citing legislative history of the FOIA).

Moreover, the staff did not meet the 30-day requirement under the rules for acting upon the FOIA request in any event. The 30 days have passed, and little more than 3.9 percent of the documents ATA requested have been produced. The unavailability of these documents greatly diminishes the value of the comment period and completeness of the record in the rulemaking, as documents on which the *TCPA NPRM* rests will not be reviewed in full by any party to the proceeding.

As a basis of comparison, the Federal Trade Commission has demonstrated that the FOIA response process can be more simple and swift. On November 1, 2002, Counsel for ATA requested access to telemarketing complaints submitted to the FTC over the past 5 years (see Tab 5). On November 12, 2002 – only seven business days after the initial request – the FTC responded in partial fulfillment of ATAs request, providing a clearly delineated response and cost breakdown in addition to the redacted documents themselves (see Tab 6). The FTC has been providing the rest of the requested documents on a rolling basis since that time with separate and clearly defined invoices for work performed.

In contrast, the Commission provided “randomly selected and redacted documents 20 days after ATAs initial request and then reserved to itself another 10 days to comply with the request. Now, the Bureau states that processing the entire request will take several months more, at a cost of at least \$25,000. This delay and the projected costs are difficult to understand in light of the FTC’s response. They are even more difficult to justify in light of commenters’ need for the documents to effectively participate in this ongoing proceeding.

Accordingly, the Commission should require the staff to greatly expedite processing of ATAs FOIA request. Currently, the Bureau is processing an average of 14.6 documents per day (438 documents divided by 30 days) yielding only 3.9 percent of the documents requested in one month's time. "[I]nformation is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial." ^{20/} The current response is inconsistent with both the spirit and the letter of FOIA, greatly hampering ATAs ability to meaningfully participate in the comment period established by the TCPA NPRM.

V. THE STAFF'S CHARGES FOR PROCESSING THE FOIA REQUEST ARE EXCESSIVE AND SHOULD BE REDUCED OR WAIVED PURSUANT TO 47 C.F.R. § 0.470

The staff asserts that redaction of the personal identifying information from the telemarketing complaints and predictive dialing inquiries combined with copying fees will take several months and cost at least \$25,000. Even assuming that the Bureau did not erroneously classify the documents as "not routinely available," the estimated fees for processing ATAs FOIA request are excessive. ^{21/} If the Commission determines the materials at issue are protected, it should at least greatly reduce or waive the fees

^{20/} *Gilmore v. U.S. Dept. of Energy*, 33 F. Supp.2d 1184, 1187 (N.D. Cal. Sept. 14, 1998) (quoting legislative history of FOIA).

^{21/} As a basis for comparison, a random sampling of other FOIA-related cases show great differences between the Commission and other federal agencies in the cost of processing FOIA requests. See, e.g., *Comsat Corp. v. National Science Found.*, 190 F.3d 269, 272 n.4 (4th Cir. 1999) (cost of processing 40 linear feet of files approximately \$20,000); *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 34 F. Supp. 28, 31 (D.D.C. 1998) (cost of processing request for 28,000 pages of documents approximately \$13,000); *Summers v. U.S. Dept. of Justice*, 925 F.2d 450, 451 (D.C. Cir. 1991) (cost of processing request for 17,100 pages of material approximately \$1,710).

for processing the FOIA request and provide a clear estimate, invoice and receipt for the required staff work.

As already indicated herein, the Commission has based a rulemaking in substantial part upon the requested documents. As such, the documents should have been made part of the record in that proceeding and made available to interested parties at no charge. Moreover, the documents normally would be routinely available under the Commission's current rules. Thus, the Commission has no legal basis to charge ATA for "review and search costs" related to redaction and production of the materials. At most, ATA only should be required to pay reasonable duplication fees pursuant to § 0.465 of the Commission's rules.

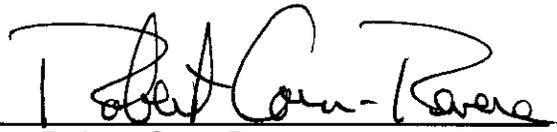
In addition, to the extent any fees, including copying fees, are applicable to ATA for production of the requested documents, ATA hereby requests a waiver or reduction of all such fees pursuant to 47 C.F.R. § 0.470(e). Section 0.470(e) states that "[c]opying, search and review charges shall be waived or reduced. . .when 'disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding or the operations or activities of the government and is not primarily in the commercial interest of the requester'" (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Ensuring meaningful and fair public participation in the Commission's rulemaking process is essential to preserve the integrity of the TCPA proceeding. Accordingly, the Commission should waive the fees entirely, since facilitating public comment serves the public interest.

VI. CONCLUSION

For the foregoing reasons, ATA herein respectfully requests that the Commission grant ATAs requested relief.

Respectfully submitted,

AMERICAN TELESERVICES ASSOCIATION

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December 6, 2002



**Federal Communications Commission
Consumer & Governmental Affairs Bureau
Office of The Bureau Chief**

CGB

November 29, 2002

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FOIA Control No. 2003-023

Dear Mr. London:

This is in reference to our meeting of November 6, 2002, to discuss your pending request under the Freedom of Information Act (FOIA) for access to consumer complaints related to the Telephone Consumer Protection Act (TCPA), and your subsequent correspondence. **Among** other things discussed at the meeting, we stated that it would take a number of months and considerable staff resources in order to provide the over 11,000 documents encompassed by your request. **You** asked for an estimate of costs involved to process your FOIA request. Pursuant to the FOIA, 5 U.S.C. § 552(a)(6)(B), the response is currently due by the close of business on November 29, 2002.

We have done a preliminary and tentative assessment of the costs involved. **They are as follows.**

- (i) Duplication costs @ .17 cents a page = \$6800.00. This tentative assessment is based on duplication of an estimated 20,000 records responsive to your request, each record tentatively consisting of 2 pages. **This** estimate would vary if the actual number of records involved, and/or the number of pages of the records involved, are different from the estimated numbers
- (ii) Search and Review is normally conducted by staff members who are at grade levels GS-13 or GS-14. Search and review conducted by a GS-13 staffer would be @ \$41.20 per hour and search and review conducted by a GS-14 staffer would be @ \$48.67 per hour. Tentatively, we estimate that the search and review costs associated with 20,000 records would be \$16,480.00 if performed by GS-13 staff @ \$41.20 per hour, and \$19,468.00 if performed by a GS-14 staff @ \$48.67 per hour. For the purpose of this assessment we are assuming that it would take bureau staff approximately 20 hours to search and review 1,000 records and, therefore, 400 hours to search and review 20,000 records. We base this estimate on the fact that it took 2 GS-13 and 1 GS-14 staff members approximately 5 hours to search, review, and redact the 250 complaints that were provided to you on November 14. Please note, however, that the 250 complaints that you received were available electronically. Not all complaints are available electronically. If a complaint is not available electronically, then it involves more search time. We are unable to estimate

the number of complaints that are available electronically, at this time

Please note that the estimated number of records and number of pages are tentative estimates which may change significantly upon more detailed review by the staff. The estimations provided in this letter are for informational purposes only and should not be construed as any offer to process your FOIA request for the estimated costs set forth above. We look forward to hearing from you as to whether you are agreeable to the estimated CON.

On November 14, 2002, pursuant to the November 6, 2002 meeting and your subsequent correspondence dated November 7, 2002, we provided 250 randomly selected and redacted TCPA-related complaints received in August 2001 and March 2002, in partial fulfillment of your FOIA request. With this letter we are also providing an additional 188 redacted TCPA-related complaints received in August 2001 and March 2002. As noted in the November 14 letter, the enclosed complaints are not lieu of our ongoing efforts to provide a complete response to your FOIA request. Again, we have to reiterate that it will take a number of months and considerable staff resources in order to provide all the records you have requested.

If you consider this letter to be a denial of your FOIA request, you may file an application for review with the Office of the General Counsel within 30 days of the date of this letter in accordance with Section 0.461(j) of the Commission's rules, 47 C.F.R. Section 0.461(j).

Sincerely,

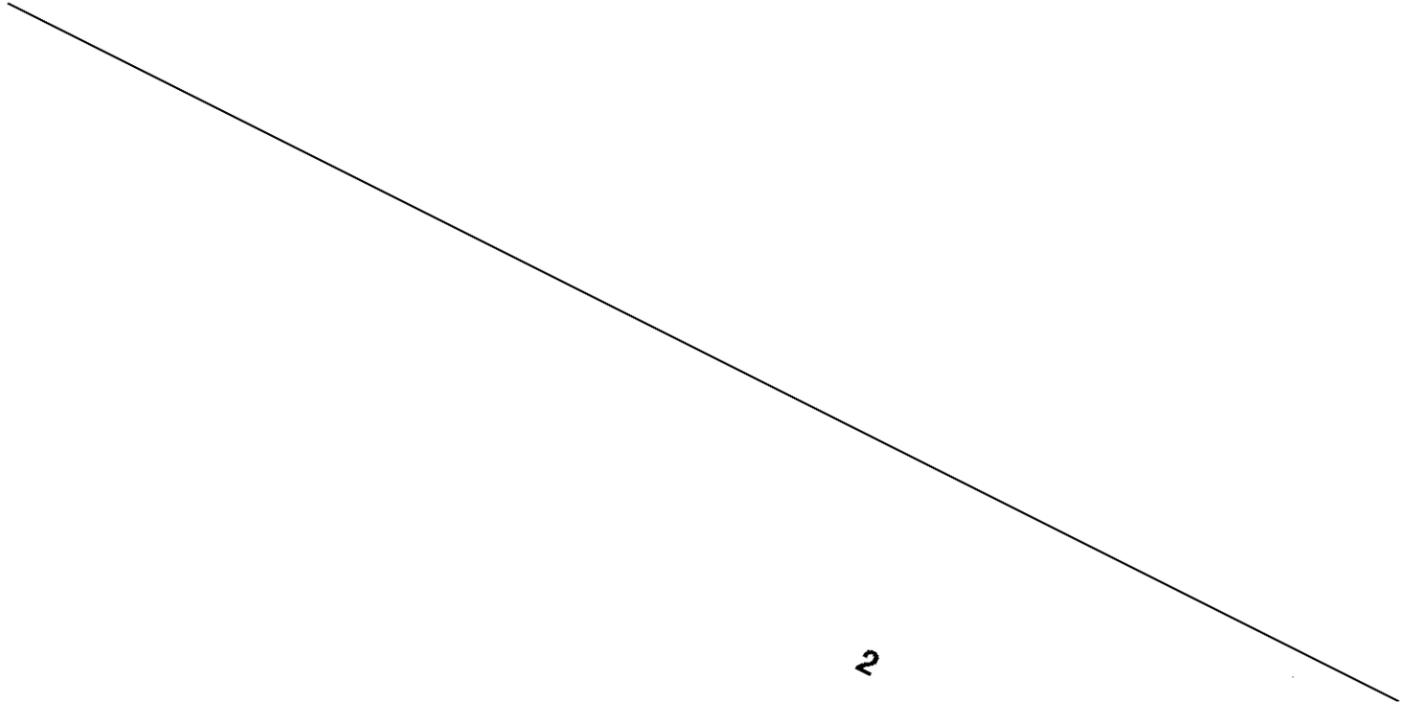


K. Dane Snowden

Chief

Consumer & Governmental Affairs Bureau

Encls.



2

FOIA - Electronic FOIA (E-FOIA) Request Form

From: Ronnie London <rglondon@hhlaw.com>
 To: <FOIA@fcc.gov>
 Date: 10/16/2002 5:41 PM
 Subject: Electronic FOIA (E-FOIA) Request Form

Ronnie London
 555 13th Street N.W.
 11W-309
 Washington, CC U.S.
 20004

Phone Number: 202-637-8537
 Fax Number: 202-637-5910
 Email Address: rglondon@hhlaw.com
 Date of Request: 10/16/02

2002 OCT 17 A 9:25
 CONTROL STAFF
 2003-023

Ronnie London Requests:

Please make available for copying or provide copies of the "over 11,000 complains about telemarketing practices" received 'during the period January 2000 through December 2001" as referenced in paragraph 8 of the FCC's recent Notice of Proposed Rulemaking in Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991. CC Docket NO. 02-278, FCC 02-250 (rel. Sept. 18, 2002) (Telemarketing NPRMO). Please also make available for copying or provide copies of all similar complaints about telemarketing practices the FCC has received since January 1, 2002. Please also make available for copying or provide copies of the Over 1,500 inquires about Predictive dialing received from June 2000 to December 20010 referenced in paragraph 26 of the Telemarketing NPRM. Finally, please also provide any non-publicly released FCC responses to the abovereferenced complaints.

Maximum Fee: no limit

Listed In CFR 47:

If Yes Give Reasons for Inspection:

Is the requester entitled to a restricted fee assessment? No

If Yes Give Reasons for Inspection:

Any Additional Information and/or Comments:

Server protocol: HTTP/1.1
 Remote host: 205.138.200.84
 Remote IP address: 205.138.200.84

Received: from gatekeeper2.fcc.gov
 ([165.135.0.253])
 by gwmail.fcc.gov: Wed, 16 Oct 2002 17:40:40 -0400
 Received: by gatekeeper2.fcc.gov; id RAA05268; Wed, 16 Oct 2002 17:42:00 -0400 (EOT)
 Received: from unknown(192.104.54.252) by gatekeeper2.fcc.gov via smap (V5.5)
 id xma005255; Wed, 16 Oct 02 17:41:34 -0400
 Received: (from nobody@localhost)
 by www.fcc.gov (8.9.0/8.8.8) id RAA06856
 for FOIA@fcc.gov; Wed, 16 Oct 2002 17:41:32 -0400 (EDT)
 Date: Wed, 16 Oct 2002 17:41:32 -0400 (EDT)
 Message-Id: <200210162141.RAA06856@www.fcc.gov>
 To: FOIA@fcc.gov
 From: rgldon8Phlhw.com (Ronnie London)
 Subject: Electronic FOIA (E-FOIA) Request For

Ronnie London
 555 13th Street N.W.
 11W-309
 Washington, DC U.S.
 20004

Phone Number: 202-637-8537
 Fax Number: 202-637-5910
 Email Address: rgldon8@hhlw.com

Date of Request: 10/16/02

Ronnie London Requests:

Please make available for copying or provide copies of the 'over 11,000 complaints about telemarketing practices' received during the period January 2000 through December 2001 as referenced in paragraph 8 of the FCC's recent Notice of Proposed Rulemaking in Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 02-278, FCC 02-250 (rel. Sept. 18, 2002) (Telemarketing NPRMO). Please also make available for copying or provide copies of all similar complaints about telemarketing practices the FCC has received since January 1, 2002. Please also make available for copying or provide copies of the over 1,500 inquiries about predictive dialing received from June 2000 to December 2001 referenced in paragraph 26 of the Telemarketing NPRM. Finally, please also provide any non-publicly released FCC responses to the above-referenced complaints.

Maximum Fee: no limit

Listed In CFR 47:

If Yes Give Reasons for Inspection:

Is the requester entitled to a restricted fee assessment? No

If Yes Give Reasons for Inspection:

Any Additional information and/or Comments:

Server protocol: HTTP/1.1
 Remote host: 205.138.200.84
 Remote IP address: 205.138.200.84

HOGAN & HARTSON
L.L.P.

Writer's Direct Did:
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November 7, 2002

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-B204
Washington, D.C. 20564

Re: Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991,
CG Docket No. 02-278

Dear Ms. Dortch

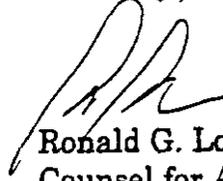
This letter provides notice that Robert Corn-Revere and Ronald London, counsel for the American Teleservices Association ("ATA"), along with Matt Mattingly, ATA's Director of Government Affairs, met yesterday with Dane Snowden, Chief of the Consumer & Governmental Affairs Bureau ("CGB"); June Taylor, CGB's Chief of Staff; Margaret Egler, Deputy Chief (Policy) for CGB; Thomas Wyatt, Deputy Chief (Inquiries and Complaints) for CGB; Michele Walters, Chief of CGB's Policy Division, Sumita Mukhoty, Director of CGB's Information Access and Privacy Office; Laurence Schecker, Attorney-Advisor in the Office of General Counsel's Administrative Law Division; and Erica McMahon and Richard Smith of CGB.

During the meeting, we discussed the Commission's timeframe for the above-referenced proceeding, as well as means by which ATA might obtain the data collected by the FCC referenced in the Notice of Proposed Rulemaking ("NPRM") in the proceeding. We also briefly discussed the proposed national do-not-call list that the Commission describes in the NPRM.

HOGAN & HARTSON L.L.P.

If there are any questions regarding this matter, please contact the undersigned directly.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. London', written over a white background.

Ronald G. London
Counsel for American
Teleservices Association

cc: **Dane Snowden**
June Taylor
Margaret Egler
Thomas Wyatt
Michele Walters
Sumita Mukhoty
Laurence Schecker
Erica McMahon
Richard Smith

HOGAN & HARTSON
L.L.P.

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November 7, 2002

BY TELECOPY AND FIRST CLASS MAIL

Sumita Mukhoty
Director, Information Access and Privacy Office
Federal Communications Commission
Consumer and Government Affairs Bureau
445 12th Street, S.W.
Washington, D.C. 20554

Re: FOIA Request - Control No. 2003-023

Dear Ms. Mukhoty:

Based on our meeting of November 6, 2002, I am writing to clarify our federal Freedom of Information Act ("FOIA") request referenced above. The request was submitted on October 16, 2002, which triggered the deadlines governing the Commission's response. The FOIA request seeks the following information:

- (1) the "over 11,000 complaints about telemarketing practices" received "during the period January 2000 through December 2001" as referenced in paragraph 8 of the FCC's recent Notice of Proposed Rulemaking in Rules and Regulation *Implementing* the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 02-250 (rel. Sept. 18, 2002) ("Telemarketing *NPRM*");
- (2) all similar complaints about telemarketing practices the FCC has received since January 1, 2002;
- (3) the "over 1,500 inquiries about predictive dialing" received "from June 2000 to December 2001" referenced in paragraph 26 of the Telemarketing *NPRM*; and

Sumita Mukhoty
November 7, 2002
Page 2

- (4) any non-publicly released FCC responses to the above-referenced complaints.

We are submitting this letter to memorialize our mutual understanding of the scope of our FOIA request.

Part 1. With respect to the portion of the FOIA request designated as (1) above, you and your colleagues present at the November 6, 2002, meeting did not indicate that any clarification was necessary. However, we hereby confirm that for purposes of this request, we define the term "complaint" in the same way as the Bureau in its quarterly reports on informal consumer inquiries and complaints.

Part 2. Our request designated as part (2) above refers to any complaints about telemarketing of the same character and/or that fit the same criteria as those counted among the 11,000 referenced at paragraph 8 of the *Telemarketing NPRM*. It seeks any complaints that were submitted to the FCC between January 1, 2002, and the present. In essence, as we discussed during the November 6 meeting, our request seeks all the "complaints about telemarketing" filed between January 1, 2002, and present, that would have been included in the figure the Commission discussed in paragraph 8 of the *Telemarketing NPRM* if the more recent period had been included in the Commission's tally of complaints.

Part 3. Our request designated as part (3) above seeks copies of the "inquiries about predictive dialing" the Commission references in the *Telemarketing NPRM*, to the extent such inquiries exist or are reflected in written form. During the November 6 meeting, we learned that some of the 1,500 inquiries referenced at paragraph 26 of the *Telemarketing NPRM* came into the Commission by telephone rather than in writing. To the extent that phone logs or other records reflect the substance of these inquiries, we request copies of such logs or records. Otherwise, we simply seek copies of all written inquiries that were included in the 1500 the Commission references at paragraph 26 of the *Telemarketing NPRM*.

Part 4. Our request designated as part (4) above seeks any written FCC responses to the complaints or inquiries requested in parts (1)-(3) of the FOIA request. This would include any letters, advice, opinions or other written materials not previously made part of the Commission's daily releases or published in the FCC Record during the relevant time period. If no such documents exist, we would appreciate your confirming that fact.

Sumita Mukhoty
November 7, 2002
Page 3

During the November 6 meeting, **you** indicated that a response to our **FOZA** request is due on November 14, 2002. It is our understanding from the meeting that **you** will respond to our request, **in writing, by that date**. Such response will include the projected cost of **fulfilling** our **FOZA** request. **Also, if you determine it is not possible to fulfill our request by the November 14, 2002, the letter will provide notice of your intention to exercise the ten (10) day extension set forth in the rules. See 47 C.F.R. § 0.461(g).** It is our understanding that a ten-day extension, if taken, would require a response to our request by **November 29, 2002**. If the reason the Commission is unable to meet the deadline is your position that **all** personally identifiable information must be redacted from the complaints or other documents, please **identify** the statutory basis for your position in your response.

Finally, during the meeting, we discussed your offer of a partial response, or sampling of responsive documents, by the deadline. We indicated we would consider how a sample could be compiled that would allow **meaningful** comment on the *Telemarketing NPRM* while we await a complete response to our request. We will address such a partial response more specifically in a separate letter.

Thank you again for your assistance in this matter. We hope that the clarifications we provide here will facilitate the Commission's response to our FOIA request. If you have any questions about the clarifications, or regarding our understanding or what we can expect in the way of response, please contact me.

Sincerely,



Ronnie London

cc: Dane Snowden
June Taylor
Laurence Schecker
Margaret Egler
Thomas Wyatt
Michele Walters

HOGAN & HARTSON
L.L.P

Writer's Direct Did:
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November 7, 2002

BY TELECOPY AND FIRST CLASS MAIL

Sumita Mukhoty
Director, Information Access and Privacy Office
Federal Communications Commission
Consumer and Government Affairs Bureau
445 12th Street, S.W.
Washington, D.C. 20554

Re: **FOIA Request - Control No. 2003-023**

Dear Ms. **Mukhoty**:

This follows on our meeting of November 6, 2002, regarding the above-referenced request under the federal Freedom of Information Act ("FOIA"). Part of our FOIA request includes the "11,000 complaints about telemarketing practices" described in ¶ 8 of the NPRM in Rules and Regulation Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 02-250 (rel. Sept. 18, 2002). During the November 6 meeting, your colleagues indicated that we could receive a representative sample of the requested complaints pending an effort to gather and provide all the documents responsive to that part of our FOIA request. Specifically, we were offered the opportunity to specify two months from the relevant time period January 2000-December 2001, ~~from~~ which you will provide the complaints received sufficiently in advance of the NPRM's November 22, 2002, comment deadline to allow reasonable analysis and comment.

The Commission's reliance on telemarketing complaints as one of its motivations for initiating a rulemaking makes the substance and nature of those complaints a critical factor in whether to adopt new rules. Thus, it is imperative that the parties receive a full and fair opportunity to review and, to the extent appropriate, comment on the complaints. We therefore remain interested in timely receiving all the documents sought by our FOIA request. The rules require a response to our FOIA request within 20 business days, i.e., by November 14, 2002. You have indicated that it will take the Commission ~~six~~ to eight months to respond

Sumita Mukhoty
November 7, 2002
Page 2

to our **FOIA** request in full. During the meeting it became clear that we will likely be notified on November **14, 2002**, of our intention to utilize the additional ten days provided under the rules, see **47 C.F.R. § 04.61(g)**, so an official initial response may not otherwise be provided until November **29, 2002**, a week after the NPRM's November **22** comment deadline.

In the interest of receiving at least some of the documents necessary to help us meaningfully comment on the NPRM, we accept your offer to provide before the twenty-day deadline a two-month sampling of responsive documents, while the rest of the documents responsive to our **FOIA** request are compiled. Please provide the "complaints received about telemarketing practices" referenced at ¶ 8 of the NPRM for the months August **2001** and March **2002**. Given the November **22, 2002**, comment deadline for the NPRM, we request that these documents be provided no later than November **14, 2002**. If for any reason this date is not feasible, we request that you contact us immediately upon receipt of this letter to discuss when we can expect fulfillment of the offer made during the meeting. We also request that you provide the remaining documents responsive to our FOIA request on a rolling basis as soon as they become available for release.

We thank you for your assistance in this matter and encourage you to contact us with any questions or further input you may have.

Sincerely,


Ronnie London

cc: Dane Snowden
June Taylor
Laurence Schecker
Margaret Egler
Thomas Wyatt
Michele Walters



Federal Communications Commission
Consumer & Governmental Affairs Bureau
Office of The Bureau Chief



November 14, 2002

Mr. Ronnie London
Hogan & Hartson, L.L.P.
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109

FOIA Control No. 2003-023

Dear Mr. London:

This is in reference to our meeting of November 6, 2002, to discuss your pending request under the Freedom of Information Act (FOIA) for access to consumer complaints related to the Telephone Consumer Protection Act (TCPA), and your subsequent correspondence. Among other things discussed at the meeting, **we** stated that it would take a number of months and considerable staff resources in order to provide the over 11,000 documents encompassed by your request. At our meeting, in an effort to provide a meaningful sample of your request prior to the close of the comment period in Docket No. CG 02-278, I offered to provide a sample of 250 of the requested documents within a week, that is, by November 14, 2002. In your follow-up letter which was faxed to this office on November 7, 2002, you requested documents from August 2001 and March 2002. Accordingly, please find enclosed 250 randomly selected and redacted TCPA-related complaints received in August 2001 and March 2002, in partial fulfillment of your FOIA request. Please note that this sample is not in lieu of our effort to continue to diligently work to provide a complete response to fulfill your FOIA request.

Pursuant *to* the **FOIA**, 5 U.S.C. § 552(a)(6)(B) we are taking the ten workday extension of time. Currently the response is due by the close of business on November 29, 2002. We will bill you for the fees incurred when the request is completely fulfilled.

Sincerely,

K. Dane Snowden
Chief
Consumer & Governmental Affairs Bureau

Encls.

CERTIFICATE OF SERVICE

I, Ronald G. London, hereby certify that on this 6th day of December, 2002, copies of the foregoing APPLICATION FOR REVIEW were hand-delivered or mailed, first-class, postage prepaid, to the following:

Chairman Michael K. Powell*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Kathleen Q. Abernathy*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

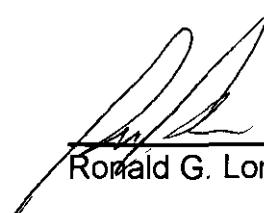
Commissioner Jonathan S. Adelstein*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Michael J. Copps*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Kevin J. Martin*
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

K. Dane Snowden, Chief*
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Office of General Counsel"
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554



Ronald G. London

• HAND DELIVERED