



of this proceeding and it does not create any of the content sent by its customers over its facilities.

GSI supports the Commission's goal of ensuring that consumers have reliable and simple methods to stop undesired telemarketing efforts. GSI believes that the Commission should explicitly state what constitutes a third party carrier's "high degree of involvement" in sending unlawful telemarketing messages. However, GSI does not believe that the Commission should modify its earlier determination that common carriers, non-carrier fax broadcasters and other third party carriers are to be exempt from the proposed telemarketing rules.

GSI is concerned that any expansion of the Commission's telemarketing rules directly to third party carriers, such as itself, would exceed Congressional intent and also establish a dangerous precedent for Internet backbone access providers by requiring third party carriers to monitor the content of their customers' messages that are being delivered by the third party carriers.

In addition, GSI is concerned that such a requirement would be unduly burdensome since it would force third party carriers to "police" their customers in order to determine whether they have violated any of the Commission's rules. Finally, GSI opposes such requirements since third party carriers would have to pass along their compliance costs to innocent customers who were not violating any of the Commission's rules. Such cost shifting is not in the public interest.

## DISCUSSION

### I. THE COMMISSION SHOULD EXPLICITLY STATE WHAT CONSTITUTES A HIGH DEGREE OF INVOLVEMENT FOR THIRD PARTY CARRIERS IN UNLAWFUL TELEMARKETING ACTIVITIES

It would be helpful for third party carriers if the Commission would explicitly state what constitutes “a high degree of involvement or actual notice of an illegal use...”<sup>3</sup> regarding third party carriers’ distribution of unlawful telemarketing messages. Thus, third party carriers would be on notice as to what particular activities they should avoid in order to maintain an appropriate exemption from TCPA liability under the Commission’s rules.

### II. THE COMMISSION SHOULD NOT MODIFY THE DEFINITION OF THE SENDER OF A MESSAGE OR THE CREATOR OF CONTENT IN THIS PROCEEDING

The Commission previously determined that the “sender” of a facsimile message is the “creator of the content of the message.”<sup>4</sup> In the *Memorandum Opinion and Order* and the *Order on Further Reconsideration* in the associated docket, the Commission further clarified that non-common carrier fax broadcasters are not liable for compliance with the TCPA rules since “[t]he entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements,”<sup>5</sup> and that “[f]acsimile broadcast service providers are businesses or individuals that transmit messages on

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<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CC Docket No. 92-90, 7 FCC Rcd 8752 at 8780 (1992).

<sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Further Reconsideration, CC Docket No. 92-90, 12 FCC Rcd 4609 at 4613 (1997) (Order on Further Reconsideration).

<sup>5</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, CC Docket No. 92-90, 10 FCC Rcd 12391 at 12407 (1995).

behalf of other entities to selected destinations and that do not determine either the message content or to whom they are sent.”<sup>6</sup> This is exactly how GSI is situated

If a third party carrier is not involved in the creating or sending of a consumer message (but simply provides delivery services), it should not be considered either the sender of the message or the creator of the message’s content. GSI supports these earlier determinations and believes that the Commission as a matter of sound and consistent policy should not modify those earlier determinations in this proceeding.

**III. THE COMMISSION SHOULD NOT EITHER REQUIRE THIRD PARTY CARRIERS TO MONITOR THE CONTENT OF THEIR TELEMARKETING CUSTOMERS OR REQUIRE THEM TO POLICE CERTAIN CUSTOMER MESSAGES TO DETERMINE WHETHER THEY VIOLATE THE RULES**

It would be improper for the Commission to impose requirements on third party carriers to monitor the content of their customers’ telemarketing messages, which are only distributed by the third party carriers. The telemarketing customers, not the carriers, create the disputed message content and therefore the carriers are not in any position to perform this task since they cannot access the content of the delivered message. In addition, a requirement to monitor irresponsible business practices should not fall on private parties such as third party carriers. In its official findings, Congress in fact said that it did not want to impose such an undue burden on legitimate telemarketing activities when it enacted the TCPA.<sup>7</sup> GSI argues that delivering a telemarketing message as a third-party carrier without interruption is a legitimate telemarketing practice. Such a requirement would also infringe upon the privacy of

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<sup>6</sup> Order on Further Reconsideration, 12 FCC Rcd at 4610 n. 7.

<sup>7</sup> *Telephone Consumer Protection Act of 1991*, Pub. L. No. 102-243 § 2(9) (1991), “The Congress finds that: Individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”

the third party carriers' customers, which is adverse to Congress' findings and it is not in the public interest.

Further, the Commission should not require third party carriers to "police" whether certain customer messages in question are prohibited by the Commission's rules. Simply, this requirement would be another undue burden for third party carriers and it should not fall on private parties. In fact, in most cases, third party carriers do not have any established business relationships with the receivers of the messages and they therefore cannot reasonably make these determinations. Thus, the Commission should not adopt any such new requirements.

**IV. THE COMMISSION SHOULD BE AWARE THAT ADOPTING ANY NEW REQUIREMENTS MENTIONED IN THESE COMMENTS WOULD FORCE THIRD PARTY CARRIERS TO PASS ALONG THEIR COMPLIANCE COSTS TO ALL CUSTOMERS WHICH IS ULTIMATELY UNFAIR TO INNOCENT CUSTOMERS**

The cost impact of any such new requirements mentioned above on third party carriers would be passed on to all of their customers, thereby unfairly penalizing those customers who legally and innocently use such services. This is clearly not in the public interest. Also, any changes in such requirements could increase third party carriers' general costs of doing business as a result of new costs of litigation and increased product development costs. They could even result in lost business revenues for third party carriers.

## CONCLUSION

For the foregoing reasons, GSI urges the Commission not to expand its telemarketing rules to include third party carriers. Doing so would create a dangerous precedent for other third party carriers that provide similar services, such as Internet backbone access.

Respectfully submitted,

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<sup>8</sup> Bar admission pending.