

**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
)	
)	
)	
)	

To: The Commission

**REPLY COMMENTS
OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. The Broadcaster Calls Described in the *Notice* Are Permissible Under Two Exemptions Created by the Commission’s Existing Rules.

The National Association of Broadcasters (“NAB”)¹ hereby submits these reply comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.² NAB established in its opening comments that prerecorded message calls encouraging people to listen to free over-the-air broadcasts are exempt under the Commission’s existing rules, whether or not they invite audience members to tune-in at a particular time for a chance to win a prize or a similar opportunity. Such calls do not seek to solicit sales for products or services but merely seek to attract an audience to free broadcast services that promote

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

important public interests. These calls are permissible under two independent exceptions to the Telephone Consumer Protection Act's ("TCPA") prohibitions against telephone calls that deliver prerecorded messages.

First, the calls described in the *Notice* are lawful pursuant to the exemption for calls that are not made for a "commercial purpose" as that term has been narrowly defined in the legislative history and as construed by the Commission in its implementing orders. As the TCPA's Senate sponsor explained, the statutory term "commercial purpose" was intended in its "constitutional sense" rather than its colloquial meaning, and was intended to be consistent with the court decisions which recognize that commercial speech can receive less protection than noncommercial speech.³ Under these cases, the Supreme Court has held that a mere economic motivation for speech is not sufficient to make it "commercial" in nature. Rather, the "critical feature" of commercial speech is that it does no more than propose a commercial transaction.⁴ The Commission appropriately construed the exemption for noncommercial calls to exclude any calls that are outside the court's narrow definition of commercial speech.⁵ For the reasons explained in the NAB's initial comments, the broadcaster calls described in the *Notice* do not involve "solicitation" as defined by the controlling rules and therefore are covered by the Commission's exemption for noncommercial calls.

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*").

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

⁴ *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

⁵ See NAB Comments at 9; In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd 8752, 8774 (1992) ("*TCPA Report and Order*").

Second, as discussed in Section II, below, even if the Commission accepted the opposing commenters' more expansive definition of a "commercial purpose," the calls addressed by the *Notice* still would be exempt under a second independent exemption for "calls that are made for a commercial purpose," but do not transmit an "unsolicited advertisement." Messages that seek an audience for our nation's only universal, free over-the-air broadcast system are permissible under this rule because they promote neither the commercial availability, nor the commercial quality, of property, goods or services.⁶

II. The Broadcaster Calls Described in the *Notice* are Permissible Pursuant to The Exemption for Calls That Do Not Transmit an "Unsolicited Advertisement."

The messages at issue in this proceeding are not prohibited by the FCC's rules because they do *not* advertise broadcasters' single commodity – the commercial air time that stations sell to advertisers. Instead, these messages do no more than encourage potential audience members to tune-in to free broadcasts. Broadcast programs are not sold to consumers in commercial transactions but are available universally for free to any person with a television or radio receiver. Because broadcasters do not stand in commercial relationships with their audiences, the concepts of "commercial" availability and quality are not applicable to messages described in the *Notice*.

The opposing commenters' conclusory arguments to the contrary ignore both the plain language of the controlling statutory definition and the legislative history expressly construing the meaning of the term "unsolicited advertisement." Specifically, the opposing commenters note that broadcasters operate "commercial" radio or television stations, sell "commercials" to

⁶ 47 C.F.R. § 1200(c)(2).

advertisers,⁷ and provide a broadcast “service” to the public.⁸ They further observe that broadcasters compete for audience share and assert that calls encouraging listeners to tune-in to a particular broadcast seek to influence individual’s choices among competing broadcast programs.⁹ Although these assertions may be true, none supports the conclusion that calls encouraging a listener or viewer to tune-in to a free broadcast program constitute prohibited “advertisements” within the meaning of the TCPA and the Commission’s rules.

While many of NAB’s members are “commercial” broadcast stations, this fact is of no consequence in this proceeding. The “commercial” nature of the caller’s business is not the test for liability under the Commission’s rules, which expressly contemplate that recorded messages may be lawfully sent by speakers motivated by a “commercial purpose.”¹⁰ The critical consideration is not that commercial broadcast stations sell airtime to advertisers, it is that they do not sell their broadcast services to listeners. Similarly, it is irrelevant whether radio or television broadcasts are characterized as services because free over-the-air broadcast “services” are not made available to listeners and viewers on a commercial basis.

The competitive nature of the broadcast industry does not change this fact. A listener does not engage in a commercial transaction by changing channels on a television or radio receiver, and a message encouraging someone to listen to one broadcast over another therefore says nothing about the *commercial* availability or *commercial* quality of property, goods or services. The opposing commenters’ arguments to the contrary merely demonstrate that they fail

⁷ Shaw Reply Comments at 8; Strang Reply Comments at 13; Reply to the Comments of the NAB by Marc B. Hershovitz, Michael Jablonski, Ned Blumenthal and C. Ronald Ellington (hereinafter, “Plaintiffs’ Lawyers Reply Comments”) at 10-11.

⁸ Plaintiffs’ Lawyers Reply Comments at 10.

⁹ *Id.* at 11.

to grasp what one federal court described as “a basic difference between broadcasters and other producers” in the economy.¹¹ This difference stems from the fact that there is no commerce between broadcast stations and audience members by virtue of broadcasts over the public airwaves. 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.”¹² The plaintiffs’ lawyers weakly attempt to distinguish these cases by noting that they involved trademark disputes unrelated to the TCPA. These decisions, however, obviously were not cited for their substantive holdings on trademark law. Rather, they are important for their judicial recognition that there is no commercial marketplace for free over-the-air broadcast programs.

In this case, both the plain language of the controlling definition and the legislative history mandate a conclusion that the broadcaster calls at issue are permissible as prerecorded messages that do not contain a prohibited “advertisement.” As the NAB previously explained, the statutory definition of an “unsolicited advertisement” was incorporated verbatim from a predecessor bill, the Telephone Advertising and Regulation Act.¹³ This predecessor legislation was accompanied by a House Report that explained precisely and in detail the legislative purpose underlying the term “unsolicited advertisement.” Specifically, the House Report stated that a prerecorded message does not transmit an “unsolicited advertisement” if the “principal purpose

¹⁰ 47 C.F.R. § 64.1200(c)(2).

¹¹ *Walt-West Enters., Inc. v. Gannett Co.*, 695 F.2d 1050, 1061 (7th Cir. 1982).

¹² *Pathfinder Communications Corp. v. Midwest Communications Co.*, 593 F. Supp. 281, 283 (N.D. Ind. 1984).

¹³ NAB Comments at 10,13-14, n.34.

of the call was not to generate a purchase” from the called party.¹⁴ The Report clarified that a “call made principally for a 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.”¹⁵

In their reply comments, the plaintiffs’ lawyers claim that this legislative history is irrelevant because it was issued by a different Congress in connection with a predecessor version of the statute that was not enacted.¹⁶ The Supreme Court has squarely rejected an identical argument, however, and has not hesitated to rely upon committee reports on predecessor legislation to resolve questions of statutory construction.¹⁷ The Court recognized that such reliance is especially appropriate when, as in this case, “the exact language to which the quoted portion of the House Report refers was enacted into law.”¹⁸

Consistent with the legislative history surrounding the definition of an “unsolicited advertisement,” the Commission’s own pronouncements regarding the scope and purpose of the applicable TCPA exemption similarly equates “advertisements” with messages that seek to sell a product or service. When the Commission first proposed this exemption, it reasoned that an exemption for commercial messages that do not contain “advertisements” was appropriate

¹⁴ *Id.*; H.R. 2921, 101st Congress (1990) at 7-8.

¹⁵ *Id.*

¹⁶ Plaintiffs’ Lawyers Reply Comments at 9.

¹⁷ *Begier v. IRS*, 496 U.S. 53, 59, 67 n.6 (1990).

¹⁸ *Id.* at 67 n. 6.

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.”¹⁹

As the Commission recognized in the *Notice*, some prerecorded messages by broadcasters may invite audience members to tune in at a particular time for a chance to win a prize or for a similar opportunity. References to free listen-and-win or watch-and-win opportunities do not change the fact that the sole purpose of such calls is to attract an audience, and not to sell goods or services to the call recipient. Nor can such calls reasonably be deemed to be “unsolicited advertisements” for the prizes offered in such promotions. The prizes offered in a typical broadcast promotion cannot be purchased from the station at any price. Moreover money or items made available only as a contest prize, to be distributed free of charge and by chance through a random drawing, plainly are not offered on a commercial basis.

The plaintiffs’ lawyers’ argument to the contrary rest almost entirely on the proposition that the time and effort involved in participating in a broadcast promotion constitutes “consideration.” The only authority cited in support of this argument is an old New Jersey decision holding that the effort of traveling to a sponsor’s business location can constitute “consideration” for lottery law purposes.²⁰ However, as the NAB has already noted, this case was long ago repealed by statute and it addressed a theory of consideration unrelated to the act of tuning-in to a free broadcast program.²¹ The Supreme Court foreclosed this latter theory of consideration by expressly ruling that the act of tuning-in to a free broadcast program does *not*

¹⁹ In the Matter of The Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking*, 7 FCC Rcd 2736, 2737 (1992) (emphasis added).

²⁰ Plaintiffs’ Lawyers’ Reply Comments at 13, *citing Lucky Calendar v. Cohen*, 117 A.2d 487 (1955).

²¹ NAB Comments at 15-16.

constitute consideration for purposes of transforming a broadcast promotion into an illegal lottery.²²

More so than lottery law cases, the FCC's limits on commercial matter in children's programming supplies a useful context for appreciating the distinctions between self-promotional announcements by broadcasters and advertisements for consumer products and services. As NAB previously explained, the Commission has concluded that for purposes of construing the commercial limits in children's programming, a station's self-promotional announcements do not constitute "commercial matter" and that the mere identification of a product as a prize during a station promotion will not transform the announcement into commercial advertising.²³ The Commission explained that this distinction was rooted in "marketplace realities" and was crafted carefully to avoid encompassing noncommercial speech.²⁴ The same considerations apply in this proceeding, and the Commission should likewise acknowledge the reality that there is no "commercial marketplace" either for over-the-air broadcast programming. Whatever the Commission's ultimate decisions in this proceeding, it should recognize that they will have direct implications in pending and future lawsuits, and craft its conclusions carefully to avoid exposing

²² *FCC v. American Broad. Co.*, 347 U.S. 284, 294 (1954). Moreover, even assuming *arguendo* that the relationship between contestants and sponsors of free promotional giveaways can involve an exchange of consideration and "mutuality of obligation" sufficient to create some type of enforceable contractual rights and obligations, the plaintiffs' lawyers do not and cannot explain why the formation of these rights and duties would amount to a commercial transaction. See Plaintiffs' Lawyers' Reply Comments at 13.

²³ NAB Comments at 17-18; In re Policies and Rules Concerning Children's 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.")

²⁴ In re Policies and Rules Concerning Children's Television Programming, *Report and Order*, 6 FCC Rcd 2111, 2112 (1991).

broadcasters to potentially devastating liability for their good faith reliance on the agency's past statements regarding the scope and applicability of its rules.

III. Conclusion.

For all the reasons above, the Commission should confirm that the broadcaster prerecorded messages described in the *Notice* are permissible under its existing rules. Such messages do not solicit the sale of products or services or otherwise promote the availability or quality of property or services that can be purchased in a commercial transaction. Instead, these messages seek only to attract an audience for a free over-the-air broadcast service, and therefore are not prohibited by the TCPA.

Respectfully Submitted,

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A handwritten signature in black ink, appearing to read "Ann W. Bobeck". The signature is written in a cursive style with a large, stylized initial letter. Below the signature is a horizontal line.

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

January 31, 2003

CERTIFICATE OF SERVICE

I, Joan Flowers, Legal Secretary for the National Association of Broadcasters, hereby certify that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent the 31st day of January, 2003, by first-class mail, postage prepaid, to the following:

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