National Association of NAB BROADCASTERS

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VIA ELECTRONIC FILING

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of Ex Parte Communication
CG Docket No. 02-278 and CC Docket No. 92-90

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on May 29, 2003, David Kennedy and Edwin Jackson of Susquehanna Radio Corp.; Scott Dailard and Anne Swanson of Dow, Lohnes & Albertson; and Jack N. Goodman and the undersigned of NAB met with Bryan Tramont, George L. Hanbury, III and Brad Doline to discuss comments and reply comments that NAB filed in the above-referenced proceedings.

We urged the Commission to expressly acknowledge in its Report and Order in this proceeding that telephone calls by broadcasters that seek no more than to attract an audience for their free over-the-air programming are exempt from the prohibitions against prerecorded message calls in the Telephone Consumer Protection Act (TCPA). If, however, the Commission concludes that prerecorded calls encouraging audiences to listen to free broadcast programs should be restricted under the TCPA and its implementing rules, it should unequivocally acknowledge that such calls are permissible under its existing regulations, and only effect such restrictions prospectively through a new or modified rule.

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, one electronic copy of this letter is being submitted for each of the above-referenced dockets. At this meeting the enclosed attachment was also discussed and distributed. Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,

Ann West Bobeck

Attachment
cc w/o attachment:
Bryan Tramont, Esquire
George L. Hanbury, III, Esquire
Mr. Brad Doline

TELEPHONE CONSUMER PROTECTION ACT
PRERECORDED MESSAGE CALLS BY BROADCASTERS

INTRODUCTION

- In its September Notice, the Commission asked whether it should specifically address prerecorded messages sent by radio or television broadcasters to encourage audiences to tune in to broadcasts at a particular time for a chance to win a prize or similar opportunity. The Commission also sought comment on whether it should adopt new rules with respect to such calls, and if so, asked what rules it might adopt to appropriately balance consumers' privacy interests with broadcasters' freedom of speech. Notice at ¶ 32.

- The Commission's resolution of these questions could be dispositive of putative class action lawsuits pending in Georgia state courts against Susquehanna Radio Corp. and Cox Radio, Inc. These suits allege that prerecorded telephone messages inviting people to listen to a free over-the-air radio broadcast are unlawful prerecorded solicitations under the TCPA. The lawyers prosecuting these suits have stated that if they are successful, they intend to bring similar actions against other broadcasters on a nationwide basis.

- Under the legal theories advanced in these lawsuits (and assuming arguendo that private claims are amenable to class adjudication), individual stations could face judgements for many millions of dollars in aggregated statutory damages. If class action plaintiffs prevail on the theories advanced in these suits, large networks and multiple station groups could be exposed to potentially enormous liability.

- ***NAB respectfully urges the Commission to acknowledge that calls by broadcasters that seek no more than to attract an audience for their free over-the-air programming are exempted from the prohibitions against prerecorded message calls. This conclusion is mandated by the language of the statute and rules, and by unequivocal statements by the Commission and Congress that prerecorded messages prohibited by the TCPA must seek to sell a product or service to the called party and must constitute "commercial speech," which is defined as speech that "does no more than propose a commercial transaction." Over-the-air broadcasts are not bought and sold in commercial transactions; they are universally available for free to anyone with a television or radio receiver. Broadcasters do not stand in commercial relationships with their audiences, and restrictions on messages encouraging people to listen to protected speech implicate very different First Amendment values than restrictions on commercial solicitations to purchase consumer goods and services.***

- ***Alternatively, if the Commission determines that it can and should restrict the prerecorded calls at issue, it should do so only prospectively. The Commission should make very clear that the calls at issue are exempt under its existing regulations and that any prospective restrictions on such calls are created solely by amendments to its rules. Due process considerations 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 past conduct and decisions based on reasonable, good faith interpretations of***

the applicable regulations. Such an action would impermissibly punish members of the broadcast industry for making reasonable interpretations of the Commission's rules.

LEGAL ANALYSIS

THE BROADCASTER CALLS DESCRIBED IN THE NOTICE ARE PERMISSIBLE UNDER TWO EXEMPTIONS CREATED UNDER THE COMMISSION'S EXISTING RULES.

- The TCPA prohibits many types of prerecorded message calls to residential telephone lines. 47 U.S.C. § 227(b)(1)(B). As implemented by the Commission, however, the statute permits any prerecorded "call or message by, or on behalf of, a caller that is not made for a commercial purpose" or that "is made for a commercial purpose but does not include the transmission of any unsolicited advertisement." 47 C.F.R. § 64.1200(c) (emphasis added).

A. Calls Encouraging Individuals To Listen to Radio Broadcasts Are Not "Made For a Commercial Purpose" in The Constitutional Sense Intended by Congress and Therefore Are Exempt from The TCPA's Prohibitions.

- The TCPA's Senate sponsor explained that the phrase "'not made for a commercial purpose' is intended in the constitutional sense" and is intended to be consistent with United States Supreme Court decisions discussing the distinctions between commercial and noncommercial speech. Senator Hollings also expressly stated that this phrase "is intended to allow the FCC to design rules to implement this bill that are consistent with the free speech guarantees of the Constitution if it finds that a distinction between commercial and noncommercial calls is justified . . . ." 137 Cong. Rec. at S18784.

- The United States Supreme Court has consistently recognized that a mere economic motivation for speech does not make it "commercial" in nature. Rather the "critical feature of commercial speech is that it does no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

- Consistent with its Congressional authorization to limit the scope of the TCPA's prerecorded restrictions to commercial speech, the FCC stated that its "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." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8774 (1992).

- As defined by the Commission's rules, a "telephone solicitation" is the "initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services . . . ." 47 C.F.R. § 64.1200(f)(3); 47 U.S.C. § 227(a)(4).

- Although intended to increase a station's audiences, the calls described in the Notice are "not made for a commercial purpose" in the constitutional sense intended by Congress because they do not solicit any form of commercial transaction or otherwise invite listeners to purchase, rent or invest in any property, goods, or services.

B. The Broadcaster Calls At Issue Also Are Exempt Because They Do Not Transmit "Unsolicited Advertisements."

- The Commission's rules independently exempt prerecorded message calls that are made by commercial enterprises but do not transmit an "unsolicited advertisement," which is defined as "any material advertising 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 permission." 47 U.S.C. § 227(a)(4).

- The legislative history of the TCPA emphasizes that a prerecorded message qualifies as a prohibited "unsolicited 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. H.R. Rep. No. 101-633, at 8. Congress incorporated the TCPA's definition of an "unsolicited advertisement" verbatim from a predecessor version of the legislation known as the "Telephone Advertising and Regulation Act" introduced in the 101st Congress. H.R. 2921, 101st Congress (1990). By restricting the prerecorded message prohibition to "advertisements," the House Committee openly acknowledged that it was "not attempting to eliminate every phone call consumers may find intrusive." H.R. Rep. No. 101-633, at 8. Moreover, 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 call recipients. Id. at 7-8 (emphasis added).

- Consistent with this directive from Congress, the Commission has expressly stated that its exemption for prerecorded message calls 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." In the Matter of The Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, 2737 (1992) (emphasis added).

- Similarly, the FCC 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. (emphasis added).

- The calls at issue do not promote the commercial availability or commercial quality of property, goods or services and therefore do not transmit any "advertisements" within the meaning of the Commission's rules. Free-over-the-air broadcast programming is not a consumer product or service that is bought and sold in commercial transactions, and radio and television stations do not make their broadcasts "commercially available" to their listeners.

- As the Commission and the courts have frequently acknowledged, broadcasters relate to their audiences in ways that differ fundamentally from the commercial relationships between sellers and consumers. As one federal court has explained, "there is a basic difference between broadcasters and other producers" in the economy. Walt-West Enters., Inc. v. Gannett Co., 695 F.2d 1050, 1061 (7th Cir. 1982). This difference stems from the fact that "[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." Pathfinder Communications Corp. v. Midwest Communications Co., 593 F. Supp. 281, 283 (N.D. Ind. 1984). Broadcasters

are commercial enterprises by virtue of their sale of commercial airtime to advertisers. However, broadcasters do not stand in commercial relationships with their audiences and a call encouraging someone to listen to a free broadcast says nothing about the "commercial" availability or quality of a station's advertising.

- Messages encouraging prospective listeners to tune-in to a free over-the-air radio broadcast cannot be said to promote the "commercial availability of property" simply because they include information about free "listen and win" contests and identify the prizes offered in such giveaways. The Commission's rules expressly require broadcasters to identify the nature of the prizes offered in licensee-conducted contests. 47 C.F.R. § 73.1216, Note 1. Moreover, a reference to an opportunity to win a prize in a free contest giveaway is even more attenuated than an incidental "reference to a potential sale, rental or 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 by the call recipients. H.R. Rep. No. 101-633, at 8. Although some messages by broadcasters may invite audience members to tune-in for a chance to win a prize or similar opportunity, this consideration does not change the fact that the principal purpose of the call is to attract an audience, and not to generate a purchase from the called parties.

- In the similar context of regulating children's programming, the Commission has already supplied precedent for drawing a distinction between self-promotional announcements by broadcasters and advertisements for consumer products and services. There, the Commission 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. 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.") The Commission explained that this distinction was rooted in "marketplace realities" and was crafted carefully to avoid encompassing noncommercial speech. The same considerations mandate a conclusion that the calls described in the Notice do not constitute prohibited advertisements.