

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

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

**OPPOSITION OF VOICE-MAIL BROADCASTING CORPORATION
TO PETITION FOR RECONSIDERATION**

William B. Baker
WILEY REIN & FIELDING, LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7255

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OPPOSITION TO PETITION FOR RECONSIDERATION

Voice-Mail Broadcasting Corporation (“VMBC”) hereby opposes the petition of Dennis C. Brown for reconsideration of the Report and Order issued in the above-captioned docket.¹ VMBC addresses Mr. Brown’s petition for reconsideration insofar as the petition can be read as urging the Commission to prohibit the use of predictive or automatic dialers, a position it urges indirectly as part for its larger request that the Commission prohibit any abandonment of calls answered by a live person. The Brown petition is inconsistent with the Telephone Consumer Protection Act and incorrectly assumes that predictive or automated dialing machines are incapable of determining whether a call is answered by a person or by an answering machine.

I. Voice-Mail Broadcasting is a Consumer Centric and Effective Form of Customer Communication

VMBC is the leading provider of voice-mail broadcasting services. In brief, commercial clients engage VMBC to deliver targeted and relevant prerecorded messages on their behalf through the public telephone network - to the voice mail machines of their customers and to actual customers when they answer live. Since the company’s inception in 1997, millions of consumers have received prerecorded personal invitations and reminders that contain targeted

¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No. 02-278 (“Report and Order”).

relevant messages. The prerecorded messages were delivered by VMBC on behalf of customer-centric clients who have concluded that these messages represent a valuable communication method to nurture the customer relationship and enhance their customer loyalty. Over the last six years VMBC's clients – which include numerous Fortune 500 companies -- have proven, through detailed analysis of customer feedback covering thousands of campaigns and millions of consumers -- that the vast majority of consumers appreciate relevant prerecorded verbal invitations and reminders, and that it is very easy to identify and prevent delivering prerecorded messages to those who do not.

VMBC's prerecorded voice-mail broadcast messages have proven valuable to a broad range of industries and applications. These prerecorded reminder and invitation messages have been sent by retailers, financial service institutions, medical services providers, delivery and repair companies, utilities, schools, and other organizations with which they have "established business relationships" or express consent as defined by this Commission and by the Federal Trade Commission. Typically, these messages remind the residential customers of an upcoming event or a repair or delivery appointment, notify them of a cancelled or delayed flight, alert them about a late payment, or remind them that it is time to schedule or attend an appointment for health or maintenance purposes. For example, medical and other professionals may call to remind a patient/client that it is time to schedule an appointment. A cable company might call to confirm an installation or to notify about a late payment. Other messages might remind holders of a retailer's credit card of an upcoming customer appreciation event for which cardholders receive special discounts.

VMBC's calls are prerecorded (occasionally featuring a celebrity's voice) and are placed via automated dialing machines that dial numbers provided by VMBC's customer. Company-specific do not call lists are honored, and each message contains a toll-free number is provided

by which the resident can register on a company-specific do not call list. In providing its services, VMBC does not abandon calls. And, consistent with FCC and FTC regulations, VMBC delivers recorded messages to answering machines or live persons alike within two seconds of the greeting.

Voice-mail broadcasting offers a cost-efficient and effective way to maintain and enhance established customer relationships in an unobtrusive way while empowering a much broader segment of population. While one often could easily use a live sales operator to contact the top 2-5% of its customers, such a reminder program for the remaining 95-98% of the existing customers would be cost prohibitive. The prerecorded message allows a broader segment of the population to receive the same timely reminders and not miss out on important appointments, service reminders, or beneficial events. The effectiveness of the medium has been proven by a number of case studies, and voice-mail broadcasting has proven to be a valuable complement to more traditional communication media.

Prerecorded voice-mail broadcasting offers many customer-centric benefits over a call by a live customer service representative. First, the message can be delivered to the customer's voice-mail during the day, avoiding interruption of the dinner hour, and VMBC's customers often prefer delivering the message to a machine rather than a live person. Second, because the messages are prerecorded, there is no opportunity for a telemarketer to "rebut" or "pressure" the called party who is not interested. Third, if the called party is not pleased with receiving the call, current technology allows them to easily add their name to the calling party's do not call list. Fourth, customers experience a call clarity and articulation equal to that of the best live representatives and further benefit from the messages having been carefully reviewed and scripted to insure quality control and disclosure compliance.

Because VMBC delivers these messages only to residents with whom its client has an established business relationship, the calls are lawful under the FCC's call abandonment rules.

Those rules provide:

A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who either has granted prior express consent for the call to be made or has an established business relationship with the caller shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

47 C.F.R. §64.1200(a)(6)(i). For the reasons explained above, the Commission's rules properly allow the use of prerecorded messages to recipients with whom the caller has an established business relationship, and voice-mail broadcasting has provided consumers and businesses with many benefits.² However, if the Brown petition were granted, consumers might not be able to continue to benefit from relevant prerecorded calls.

II. The Brown Petition Is Legally Infirm And Factually Mistaken

The Brown petition contends that this Commission's call abandonment rule is unreasonable because:

the telemarketer cannot know whether its call was answered live by a person or dead by an answering machine or voicemail machine. To know whether the call was answered live by a person, the telemarketer's live person would have to hear the live consumer answer Because the telemarketer which abandons an answered call cannot know whether a call was answered mechanically or live by a person, the rule is unreasonable and unenforceable on its face.

² VMBC notes that, in some scenarios, FCC and FTC regulations conflict regarding the ability to use prerecorded messages when calls are answered live. *See* "Report on Regulatory Coordination," DA-03-2855 at ¶18-26; "Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws Submitted by The Federal Trade Commission at pp. 33-35. VMBC believes that the FCC's approach is both legally correct and preferable as a policy matter, and appreciates the FCC's recognition of the usefulness of prerecorded messages.

Brown Petition at 4. Similarly, the Brown petition later asserts: “Rather obviously, the only way that the telemarketer can know when the called person has completed his greeting is for the call to be connected to a live sales representative; a machine can’t know.” Brown Petition at 5-6.

VMBC submits this opposition to make two points. First, the petition conflicts with the Telephone Consumer Protection Act, under which prerecorded messages via automated dialing machines are clearly permissible. Second, the Brown petition is based upon the fundamentally mistaken premise that a live operator is required in order to tell whether a greeting is a live person or an answering machine. That is simply untrue.

First, as a legal matter, the petition in effect asks the Commission to ban the use of prerecorded messages. However, Congress in the TCPA expressly authorized their use, subject to certain conditions. 47 U.S.C. § 227(b)(1)(B). The Commission may not, consistent with the Act, take actions that would, in fact, prohibit the use of this cost-effective medium that Congress has expressly authorized.

Second, the Brown petition is based on a premise that is simply incorrect as a factual matter. In fact, telemarketing machines can detect whether a call has been answered by a live person or by a machine. VMBC, for example, uses machines that are designed with a proprietary algorithm that considers some sixteen different factors such as tonality, cadence and noise in determining whether the call was answered by a live person or an answering machine. VMBC has conducted extensive testing and refining of their proprietary algorithms and have demonstrated over thousands of calls an error rate (that is, the number of incorrect determinations) of less than one percent.

In short, a machine CAN know whether a recipient’s greeting is live or recorded. That fact fatally undermines the Brown petition, which assumes that only a live person can make that determination and, based on that (faulty) premise, concludes that the presumed need for a live

sales representative renders the 3% call abandonment rate unnecessary. The ability of modern sophisticated technology to detect whether a greeting is live or recorded provides telemarketing companies with operating efficiencies that help to make telemarketing an affordable, successful medium.

III. Conclusion

For the foregoing reasons, Voice Mail Broadcasting Corporation respectfully requests the Commission to deny the Brown petition – both as a matter of law and of fact -- insofar as it would have the effect of outlawing the use of automatic dialing machines with prerecorded messages.

Respectfully submitted,

VOICE-MAIL BROADCASTING CORP.

By: 
William B. Baker
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7255

October 14, 2003

Certificate of Service

I hereby certify that I today caused a copy of this Opposition to be served, pursuant to First-Class Mail, postage prepaid, on:

Mr. Dennis C. Brown
126/B N. Bedford Street
Arlington, Virginia 22201



William B. Baker