

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**REPLY TO THE OPPOSITIONS TO THE PETITION FOR
RECONSIDERATION OF ROBERT BIGGERSTAFF**

Robert Biggerstaff, who has filed a formal Petition and submitted substantive comments in this docket, files this opposition to the Petition for Stay of American Business Media.

1. Biggerstaff’s Petition with respect to most issues stands unopposed.

The record is clear that with respect to the vast majority of the issues raised by Biggerstaff’s Petition ,that petition stands unopposed. With respect to the issue of telemarketing calls and faxes by radio and television stations, the evidence before the Commission is overwhelming. Every single comment filed in this docket since the Commission announced the flawed policy to exempt prerecorded calls and faxes from radio and television stations, has been in opposition to that policy. Not a single commentator has supported the Commission’s flawed interpretation since it was made public. Instead, there has been a complete rejection of the Commission’s position by every commentator. At least one member of the radio industry itself has filed comments supporting Biggerstaff’s Petition on this erroneous exemption. *See*, Comments of Lee McIntyre filed 09/01/03.

It is abundantly clear that calls and faxes on behalf of radio and television stations are

factually and conceptually “solicitations” and “advertisements.” They are viewed no differently by consumers, as the ample comments filed since the Commission’s flawed interpretation was announced in July.

2. MCI’s arguments with regard to the proper length of time that a do-not-call request must be honored are illogical.

MCI mischaracterizes Biggerstaff’s Petition as claim the Commission’s *rules* are in an “undetermined state” with respect to the length of time that a do-not-call request must be honored. As Biggerstaff clearly stated, what is “undetermined” is the length of time that a do-not-call request made under the *prior* rules must be honored.

When a consumer made a do-not-call request under the old rules, that request by law was at that time required to be honored for 10 years. The Commission’s rules also required that telemarketers must have a policy that required such requests to be honored for 10 years . Former 47 C.F.R. 64.1200(e)(2)(vi). When the consumer made such a request, it was made under the rules in existence at that time, and under the telemarketer’s policy in use at that time. As a condition of making telemarketing calls, the law and the Commission’s rules required the telemarketer to agree to not call an objecting consumer for 10 years. Many consumers requested copies of the telemarketer’s do-not-call policy when making a do-not-call request, and have relied on, and should be able to rely on, the law and the content of those policies received at that time that expressly states the do-not-call request they just made would be honored and enforceable for 10 years.

MCI invokes what can only be described as a talisman of convenience, arguing that a consumer *will be* “confused” if Biggerstaff’s request is granted. But the reverse is actually

true – consumers and telemarketers are *currently* confused as to the length of time that their do-not-call requests made prior to the new rules must be honored. It is clear from MCI’s comments on other petitions that consumer confusion is not high on MCI’s list of values – otherwise, they would support the clarity of having a do-not-call request apply universally, with no opportunity for consumer “confusion” with exemptions for various callers which MCI vigorously supported. This talisman of “confusion” must be rejected for what it is – blatant hypocrisy.

3. The subject matter of Biggerstaff’s petition is properly before the Commission.

MCI is in error in claiming that the subject matter of Biggerstaff’s Petition is outside this proceeding. The Commission made clear in the *NPRM* that “pending Petitions and Requests for Clarification 224 from CC Docket 92-90 will be incorporated into the instant proceeding.” and cited as examples, Petitioner’s requests dated March 14, April 11, April 12, May 1 and May 2, 2000. *NPRM* at ¶ 67. The March 14, 2000 request from Petitioner Biggerstaff stated, in part:

Please accept this letter as a Request for Clarification of the Commission’s rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”).

The Communications Act of 1934 at 47 U.S.C. § 206 provides that as a result of “any such violation of the provisions of this chapter” a common carrier shall be liable for attorney’s fees to the person or persons bringing a civil action against the carrier in violation.

Since the TCPA is part of “this chapter,” does the Commission construe this section to require an award of attorney’s fees to a successful plaintiff who recovers damages from a common carrier for violations of the TCPA? For example, if a common carrier is making telephone solicitations for long distance service, and is found by a court to have violated the TCPA with those

solicitations and damages are awarded to the plaintiff, does the Commission consider § 206 to require an award of attorney's fees?

This matter is thus included in this docket by the terms of the *NPRM*. MCI's protests on this point are thus without merit.

At paragraph 48 of the *NPRM*, the Commission solicited comment on "whether and, if so, to what degree, state requirements should be preempted." Defendants in a number of TCPA cases have argued that state statutes of limitations apply to TCPA actions in contravention of their preemption by 28 U.S.C. 1658.

The Commission has already addressed a number of facets of the consumer's private right of action in the TCPA. *See, e.g., TCPA Order*, 7 FCC Rcd at 8780, ¶ 55; *see also* 47 U.S.C. § 227(b)(3); *NPRM* at ¶ 47. The appropriate statute of limitations is clearly within the purview of the Commission and this docket. Indeed, one of the manifest roles that an administrative agency performs is to promote the uniform application of federal statutes by making such unifying and authoritative interpretations.

I thank the Commission for its time in considering my comments. I remain,

Sincerely,



Robert Biggerstaff

Certificate of Service

The undersigned affirms and states that a copy of the foregoing was mailed via first class mail, with sufficient postage attached, on this the 31th day of October, 2003, to:

Ruth Milkman
Lawler, Metzger & Milkman, LLC
2001 K St., NW
Washington, DC 20006



Robert Biggerstaff