

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

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

**REPLY COMMENTS OF ROBERT BIGGERSTAFF TO COMMENTS ON THE
PETITION OF ACA INTERNATIONAL FOR EXPEDITED DECLARATORY RULING
SEEKING CLARIFICATION OF THE RULES UNDER THE TELEPHONE
CONSUMER PROTECTION ACT**

Robert Biggerstaff (“Commenter”) hereby submits these reply comments as timely filed in opposition to the Comments of the ABA and CBA supporting the Petition of ACA International (“ACA”) for Expedited Declaratory Ruling Seeking Clarification of the Rules under the Telephone Consumer Protection Act

The ABA/CBA comments can be summed up in two simple arguments. The first is the same as the ACA petition – that a predictive dialer is not an “Automated Telephone Dialing System” (“ATDS”).

The second argument of the ABA/CBA is more troublesome. They ask for an EBR exemption to be added to the statute’s prohibition on autodialed and prerecorded calls to cell-phones where the recipient is charged to receive the call. This is simply not legally permissible. Congress clearly knew how to put an EBR exemption in the TCPA, and did so in some provisions. Congress did not see fit to put an EBR exemption in the other provisions of the TCPA – specifically such an exemption it is not present in the prohibition on autodialed and prerecorded calls to cell-phones where the recipient is charged to receive the call, and the Commission is not empowered to create such an exemption.

Where Congress created an EBR exemption in the TCPA, it was in the context of telemarketing calls, and the justification was that calls within an EBR are less invasive of residential privacy. As ABA/CBA notes, the purpose of the prohibition on autodialed and prerecorded calls to cell-phones where the recipient is charged to receive the call was cost shifting – not privacy.¹ As a result, an EBR exemption is not only legally impermissible, it is unjustified because an EBR isn't a justification for cost-shifting.

In the 1992 TCPA Order, cell-phone companies themselves asked for permission to make prerecorded calls to their own customers, and the Commission made absolutely clear that such calls could not be made if there was any charge to the customer to receive them. 1992 TCPA Order at ¶ 45. Simply put, an EBR has never been an exemption for making prerecorded calls to a cell-phone.

Respectively Submitted, this the 22nd day of May, 2006.

/s/ Robert Biggerstaff

¹ABA/CBA Comments at note 8.