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Late Comments of Gerald Roylance on State Preemption

First, I'd like to complain about the snail's pace at the FCC – we've hit the two year mark. The FCC has had several petitions about the TCPA, but it takes forever to act on them. The FCC appears to be much less interested in enforcement than the FTC. From a consumer perspective, the FTC has been much more visible. For example, the National Do-Not-Call list is an FTC effort even though the basis is in the Communications Act. The FCC continually ducks questions rather than address them. Express Consolidation, for example, submitted a petition about preemption while fighting a lawsuit in Florida. The FCC let Express Consolidation withdraw the petition when it settled in Florida. Mark Boling petitioned about a California law, but the Commission sat on it for a long time before requesting comments – and then continues to sit.

Second, I like to call the FCC's attention to some recent developments.

The FTC has recently charged Express Consolidation with illegally telemarketing millions of consumers.¹ The FTC also challenged Express Consolidation's claim to be a tax-exempt nonprofit². Express Consolidation is selling a debt consolidation service using prerecorded telephone messages.

Where is the FCC in this debate? Congress, via the TCPA, forbids initiating prerecorded telephone messages to residential subscribers. 47 U.S.C. § 227(b)(1)(B). That would be the end of it except that Congress permits the FCC to make some limited exemptions. The Commission exempted all tax-exempt nonprofit organizations. 47 C.F.R. § 64.1200(c)(4). However, the Commission exceeded its authority: Congress does not allow the FCC to exempt ANY prerecorded telephone message that includes an unsolicited advertisement. 47 U.S.C. § 227(b)(2)(B)(ii)(II). The FCC failed to comprehend Congress.

Instead, the FCC permits consumer misery on a grand scale despite Congressional instructions to the contrary. The FCC thumbed its nose at a Congressional finding: "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the

¹ FTC Charges Express Consolidation Misleads Consumers, January 9, 2007, http://www.consumeraffairs.com/news04/2007/01/ftc_consolidation.html.

² The IRS is also examining the TENP status of several debt consolidation companies. http://www.irs.gov/pub/irs-tege/cc_initiative_faqs.pdf. See also <http://www.consumerfed.org/releases2.cfm?filename=040903ccreport.txt>

initiator of the message, to be a nuisance and an invasion of privacy.”³ Congress knew a prerecorded message trying to sell something was obnoxious even if the initiator were a tax-exempt nonprofit. That’s why Congress wrote 47 U.S.C. § 227(b)(2)(B)(ii)(II).

The FCC should not have dismissed Express Consolidation’s petition. Express Consolidation was advertising a debt consolidation service. Express Consolidation should never have been able to claim its calls were legal. For reasons that are beyond comprehension, the FCC permits Express Consolidation to transmit millions of prerecorded calls advertising its services. If the FCC had bothered to look at Express Consolidation, it would have learned that Randall Leshin is the boss. It would also have learned that Express Consolidation turns its clients over to Randall Leshin’s for-profit business. Some of Express Consolidation’s filings are interesting. Its primary expense is advertising.

Today there is more embarrassment for the FCC. The FTC and the Department of Justice reached a \$1M settlement with The Broadcast Team⁴. The Broadcast Team was accused of abandoning 64 million telephone calls and making 1 million calls to people on the National Do-Not-Call list. These are violations on a mammoth scale.

As it turns out, The Broadcast Team, Robert Tuttle, and Mark Edwards have submitted many comments in support of TCPA preempting state laws⁵. The FCC, by its deliberate delay, is helping these and other voice broadcasters. The Broadcast Team’s business is voice broadcasting, and they wanted to do as much broadcasting as they can.

Looking back, some of The Broadcast Team’s comments now have more context:

“We have been in business since 1992 and we have always endeavored to comply with all laws applicable to our services. Our dialers are programmatically restricted from placing any intrastate call which is the heart of question to the FCC. Does the FCC have exclusive rulemaking authority and jurisdiction over interstate telephone calls and does that authority preempt state law?”^{6 7}

³ Public Law 102-243, “Telephone Consumer Protection Act”, Section 2, Finding (10).

⁴ Telemarketer Fined \$1 Million, February 2, 2007, http://www.consumeraffairs.com/news04/2007/02/ftc_broadcast_team.html,

⁵ Docket 02-278 comments 12/06/2002 6513398025 [arguing prerecorded messages that do not contain an unsolicited advertise should be permitted], 11/04/2004 6516792996 [preemption], 2/22/2005 6517313699 [preemption – TSA Stores], 6/08/2005 6517627642 [preemption], 6/08/2005 6517627643 [preemption – conflict of TCPA with California Civil Code § 1770(a)(22) – Mark Boling’s petition], and 1/13/2006 6518309389 [preemption].

⁶ Docket 02-278, The Broadcast Team, 11/04/2004, http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516792996.

Voice broadcasters want federal preemption because it minimizes their litigation risk and losses. Some state laws carry heavy penalties for violations. The California law, for example, allows arbitrary punitive damages in a *consumer* lawsuit. Some states impose \$5,000 per call penalties. By comparison, the TCPA statutory damages run \$500 to \$1500. Coupled with the low rate of lawsuits, federal preemption makes illegal calling economic. The telemarketer saves more in labor costs than he would pay out in litigation costs. The direct labor cost of a 30-second live call will be at least 5 cents – and more likely 15 cents because telemarketers get substantially more than the minimum wage. Assuming only 1 in 100,000 consumers sue and win \$500 in TCPA statutory damages, the litigation risk per call is only 0.5 cents – an order of magnitude savings.

Although the FTC has a good record of getting reasonable settlements (e.g., Braglia Marketing), the FCC has gone for peanuts. For example, Warrior Custom Golf has been hit with several small settlements for illegal telemarketing. The FCC counts those people who complained and charges up to \$11,000 per violation. Perversely, the FCC does not look for other violations. The FCC clearly lacks initiative or understanding. Maybe the FCC wants to protect telephone company call revenue.

Even after the FCC issued its Notice of Apparent Liability against Warrior, I received a prerecorded call at a number on the National Do-Not-Call list. The call offered a custom golf club if I would make a \$5 donation to a tax-exempt nonprofit. Even Warrior jumped on the nonprofit exemption. After some state lawsuits, many private lawsuits, an FCC citation, and an FCC NAL, violators continue to ignore the TCPA. The FCC is toothless.

It astounds me that many companies openly advertise using prerecorded telephone messages (aka “voice broadcasting”) for new sales leads. Googling (“voice broadcasting” leads) gets about 42,100 hits.

Get your act together. This issue is not difficult and your delay is hurting millions of people.

⁷ Docket 02-278, The Broadcast Team, 2/22/2005, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517313699.