

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of)
)
Solvable Frustrations, Inc.) RM-11675
Petition to Amend Part 1 of the Commission's)
Rules to Specify Procedures for Class)
Action Complaints)

REPLY TO OPPOSITIONS TO PETITION FOR RULEMAKING

Pursuant to Section 1.405(b) of the Commission’s rules, 47 C.F.R. § 1.405(b), Solvable Frustrations, Inc. (“Solvable Frustrations”) hereby replies to the oppositions to Solvable Frustrations’ Petition for Rulemaking.¹ In its petition, Solvable Frustrations proposed that the Commission modify its regulations to create a specific class action complaint procedure. As demonstrated in the Petition for Rulemaking, such procedures would well serve the public interest by creating an efficient means of compensating customers harmed by carriers’ violations of the Communications Act and Commission regulations.

As explained below, the opponents’ claims that such procedures would be unlawful or unwise are not convincing. Indeed, their strident opposition brings to mind Shakespeare’s quote: “The lady doth protest too much, methinks.”² Based on the record in this proceeding, Solvable Frustrations urges the Commission to grant the petition and initiate a rulemaking to adopt class complaint procedures.

¹ *FCC Public Notice*, EB RM No. 11675 (September 6, 2012).

² *Hamlet*, Act III, Scene II.

The Proposed Rule Addresses a Concrete Problem

As an initial matter, the opponents claim that the proposed rule is a solution in search of a problem.³ The opponents fail to acknowledge the fact that despite the existence of Commission enforcement activities, judicial procedures and administrative complaint procedures, carriers continue to violate the Communications Act and the Commission's regulations. Indeed, as AT&T points out, "[t]he Commission's most recent summary of just the top five complaint subjects shows that in the first quarter of 2012 alone the FCC processed over **89,000** informal complaints and inquiries – and the Commission's report notes that this figure is not inclusive of all of the complaints handled by the FCC."⁴ Moreover, recent Commission enforcement activities demonstrate that unscrupulous carriers keep on ripping off their customers.⁵

The informal complaint process can produce limited relief, but it has several drawbacks, making it less attractive as a means of rectifying carrier misconduct. The process is not transparent – there is no publicly accessible Commission database that would allow consumers to

³ See, CTIA Opposition at p. 4 (“the proposed rule is a solution in search of a problem”); AT&T Opposition at p. 3 (“a flawed ‘solution’ to a non-existent problem”).

⁴ AT&T Opposition at p. 14 (emphasis in original).

⁵ See, e.g., *NobelTel, LLC*, FCC 12-120, released September 28, 2012 (NALF in the amount of \$5,000,000 for deceptively marketing prepaid calling cards to consumers); *Simple Network, Inc.*, 26 FCC Rcd 16669 (2011)(NALF in the amount of \$5,000,000 for deceptively marketing prepaid calling cards to consumers); *Lyca Tel, LLC*, 26 FCC Rcd 12827 (2011)(NALF in the amount of \$5,000,000 for deceptively marketing prepaid calling cards to consumers); *Touch-Tel USA, LLC*, 26 FCC Rcd 12846 (2011)(NALF in the amount of \$5,000,000 for deceptively marketing prepaid calling cards to consumers); *Locus Telecommunications, Inc.*, 26 FCC Rcd 12818 (2011)(NALF in the amount of \$5,000,000 for deceptively marketing prepaid calling cards to consumers); *STi Telecom, Inc.*, 26 FCC Rcd 12808 (2011)(NALF in the amount of \$5,000,000 for deceptively marketing prepaid calling cards to consumers).

easily determine that a carrier was acting unlawfully, or that it was issuing refunds for such conduct.⁶ In addition, the informal complaint process requires each customer to file its own separate complaint, which is unlikely where the injury suffered by any one customer is relatively small. The informal complaint process is thus ineffective in deterring unlawful conduct, because the “bad actor” is highly likely to retain most of its ill-gotten gains.

Commission enforcement activity may create some deterrent effect, but it, too, has drawbacks. The Commission’s enforcement efforts depend on Commission resources, and priority for those efforts may not be centered on protecting consumers. For example, the Commission could decide that enforcement activities should be focused on carrier-carrier conduct, rather than carrier-customer conduct.⁷ Thus, FCC enforcement activity is an imperfect substitute for class complaint procedures.⁸ Moreover, except in rare cases, Commission enforcement action does not result in consumers being compensated for their damages.⁹

⁶ Other agencies have created publicly-accessible, online databases. *E.g.*, Consumer Product Safety Commission (<http://www.saferproducts.gov/Default.aspx>); Consumer Financial Protection Bureau (<http://www.consumerfinance.gov/complaintdatabase/>). The Commission may want to consider such a step as a means of enhancing the utility of the informal complaint process, and as a means of making it easier for consumers to determine which carriers tend to act in an unprincipled manner. Sites like Solvable Frustrations’ also attempt to make such information available to consumers.

⁷ *See*, 47 C.F.R. § 1.730 (accelerated docket handled by the Market Disputes Resolution Division).

⁸ *Cf.*, Verizon Opposition at n. 14 (suggesting that Commission enforcement activity can be brought to bear once a complainant identifies a violation).

⁹ CTIA did identify a few cases where the Commission was able to negotiate customer refunds as part of a settlement (CTIA Opposition at n. 8). However, that is certainly not the customary practice, and moreover, the carriers have opposed the use of such “voluntary” commitments in the analogous case of merger commitments. *See, e.g.*, AT&T support for the

Class action suits in the federal courts are available already, but they may not be best suited to resolving issues that would be better addressed under Commission-applied class complaint procedures. To the extent that issues are raised in a case regarding interpretation of the Communications Act or the Commission’s regulations, then the requisite referral to the Commission of those issues can create delays and can consume Commission resources. The bifurcated handling of such lawsuits creates inefficiencies. There certainly may be instances where class action suits may be the preferred procedure. For example, the consumers may want to include claims in their lawsuit under state law.¹⁰ However, Solvable Frustrations is not proposing exclusive jurisdiction – rather, we are suggesting class complaint procedures that would efficiently offer consumers a real choice in forum as provided for in Section 207 of the Communications Act.¹¹

The Opponents’ Concerns about the Impact on Commission Resources are Invalid

The Opponents also claim that the Commission’s resources are inadequate to handle the proposed class complaint procedures. While the class complaint procedures are likely to require

Federal Communications Commission Process Reform Act of 2011, which limits the FCC’s ability to “extort” “voluntary commitments” in a merger.
<http://attpublicpolicy.com/government-policy/att-on-house-passage-of-fcc-reform-legislation/>.

¹⁰ Cf., CTIA Opposition at p. 14.

¹¹ 47 USC § 207:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

more Commission (and party) resources than an individual formal or informal complaint, they would require significantly fewer resources than would be needed to resolve hundreds or thousands (or more) individual complaints.¹² Thus, these “scale economies” would make class complaint procedures a highly efficient use of those resources. In addition, because such class complaint procedures would supplement and complement the Commission’s enforcement activities, the Commission could redirect resources from its enforcement efforts to the complaint process, if necessary. Likewise, the Commission could use the resources it otherwise expends on

¹² AT&T in its Opposition (at pp. 10-12) discusses the relative demerits of class actions discussed in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), but that discussion was *dicta*, because the case concerned Federal Arbitration Act preemption of a California decision that a contract provision prohibiting class arbitration was unenforceable under the general California law of contracts. In any event, as the dissent more accurately explained, class actions can vindicate numerous, relatively small claims much more efficiently than requiring each injured consumer to pursue his or her own claim:

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. See *ante*, at 15–16 (referring to the “greatly increase[d] risks to defendants”; the “chance of a devastating loss” pressuring defendants “into settling questionable claims”). But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT&T can avoid the \$7,500 payout (the payout that supposedly makes the *Concepcions*’ arbitration worthwhile) simply by paying the claim’s face value, such that “the maximum gain to a customer for the hassle of arbitrating a \$30.22 dispute is still just \$30.22.” *Laster v. AT&T Mobility LLC*, 584 F. 3d 849, 855, 856 (CA9 2009).

What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim? See, e.g., *Carnegie v. Household Int’l, Inc.*, 376 F. 3d 656, 661 (CA7 2004) (“The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30”).

judicial referrals to supplement its complaint handling capabilities.¹³ Thus, adoption of the proposed class complaint procedures should not overly burden the Commission's resources.¹⁴

And certainly the Commission has the expertise to deal with not only the communications law issues that will arise in class action complaint procedures, but also with the procedures that accompany complex complaints as evidenced by its history with interconnection disputes. Likewise, the Commission has experience with supervising refunds to large numbers of customers.¹⁵ The Commission is fully capable of resolving class complaints.

Solvable Frustrations also rejects the claim that class complaints would “divert Commission resources away from its core statutory duties.”¹⁶ The role of the Commission in today's dynamic world of communications should be to develop broad policies that encourage and accelerate the proliferation of services, technologies and facilities to provide Americans with greater interaction and access to knowledge. Given the limited resources of the Commission, it

¹³ Cf., Verizon Opposition at pp. 9-10.

¹⁴ CTIA in its Opposition at pp. 8-9 alludes to the vastly larger resources of the federal judicial system, but that comparison is false, because those judicial assets deal with all federal judicial activity, not just class actions.

¹⁵ See, e.g., *COMSAT*, 3 FCC Rcd 2643 (1988); *New England Telephone & Telegraph CO. V. FCC*, 826 F.2d 1101 (D. C.-Cir. 1987)(upholding \$101 Million refund for exceeding authorized rate of return). In addition, as noted by CTIA in its opposition (at n. 8), the Commission has extracted “voluntary” customer refunds in a few settlements.

¹⁶ CTIA Opposition at p. 11. Cf., USTelecom Opposition at p. 2:

Given the limited resources of the Commission, it would not serve the public interest for it to expend the time and resources necessary to adjudicate class action complaints, particularly when such complaints would rarely implicate policies that forward the Commission's broader goals.

serves the public interest for the Commission to consolidate thousands (if not millions) of potential substantially similar abuses into a single proceeding, rather than to expend the time and resources necessary to adjudicate individual complaints, particularly since such consolidated complaints would implicate policies that advance the Commission's broader goals.

The Commission has Authority to Adopt Class Complaint Procedures

The opponents additionally claim that the Commission lacks the authority to adopt class complaint procedures.¹⁷ However, as USTelecom acknowledges, “the FCC retains broad discretion under sections 4(i) and 4(j) of the Act to decide not to establish class action procedures.”¹⁸ But, that same “broad discretion” would allow it to adopt class complaint procedures, because Congress has given the Commission wide authority to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”¹⁹ Both from an efficiency standpoint (“the proper dispatch of business”) and to best serve the ends of justice, certain telecommunications-specific class actions may prove best suited to an expert resolution through class complaint procedures utilized by the Commission.

As Solvable Frustrations explained in its Petition for Rulemaking, the Commission had indicated that it lacks authority to implement class action procedures, but those statements were based on an incorrect reading of earlier decisions, and contained no analysis of the

¹⁷ AT&T Opposition at pp. 4-10; USTelecom Opposition at p. 5; Verizon Opposition at pp. 3-7; CTIA Opposition at pp. 4-8.

¹⁸ USTelecom Opposition at p. 6.

¹⁹ 47 U.S.C. § 4(j).

Commission's broad authority to establish its complaint procedures.²⁰ And while Verizon and AT&T point to the several occasions where the Commission has repeated this (mis)statement of its authority under the Communications Act,²¹ mere repetition does not make it true. Class complaint procedures are not at all inconsistent with the Commission's broad flexibility to address complaints under Sections 207 and 208 of the Communications Act.²²

Several of the opponents also raise specific concerns regarding the rule proposed by Solvable Frustrations in its Petition for Rulemaking.²³ As Solvable Frustrations indicated in its Petition for Rulemaking, we offered EEOC class complaint rules as a template for the Commission.²⁴ The opponents have suggested some refinements or improvements to the proposed rules, including additional notice provisions, specific opt out provisions, review of

²⁰ Solvable Frustrations Petition for Rulemaking at pp. 4-8.

²¹ AT&T Opposition at pp. 4-7; Verizon Opposition at pp. 5-6

²² USTelecom makes an additional claim that the language in Section 208 refers to "any person" filing a complaint, not "a class of persons." USTelecom Opposition at p. 5. USTelecom's argument ignores the fact that an elementary rule of statutory construction is that the singular includes the plural, and vice-versa. The Dictionary Act provides that "unless the context indicates otherwise," "words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular." 1 U.S.C. § 1.

²³ AT&T Opposition at p. 13; CTIA Opposition at pp. 6, 15-19; Verizon Opposition at pp. 10-14.

²⁴ Solvable Frustrations Petition for Rulemaking at p. 8 and Attachment. Alternatively, the Commission could model class complaint procedures on FRCP Rule 23, or the class arbitration procedures used by the American Arbitration Association.
http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004129&_afLoop=1543032126358589&_afWindowMode=0&_afWindowId=gx54wlx05_1#%40%3F_afWindowId%3Dgx54wlx05_1%26_afLoop%3D1543032126358589%26doc%3DADRSTG_004129%26_afWindowMode%3D0%26_adf.ctrl-state%3Dgx54wlx05_53

settlements, expanded discovery options and sanctions for bringing baseless class complaints.²⁵ Solvable Frustrations welcomes the suggestions, but believes that such issues are best addressed in the rulemaking itself. Solvable Frustrations looks forward to working with the carriers in the context of the rulemaking proceeding to further refine the proposed rule so as to develop procedures that best balance the desire for a streamlined, efficient procedure with the needs and requirements of carriers and customers.

As demonstrated in its Petition for Rulemaking and this reply to the opponents, Solvable Frustrations believes that the public interest and the ends of justice would best be served by providing complainants with the opportunity, in appropriate cases, to pursue complaints at the

²⁵ Solvable Frustrations was somewhat surprised (but glad) to see CTIA seeking to vindicate consumers' rights to a trial by jury, claiming that such rights were not provided for in the proposed class complaint procedures. (CTIA Opposition at p. 18). That was certainly not the position CTIA was advocating as an *amicus* in *AT&T Mobility v. Concepcion case*. See, Brief of Amicus Curiae on Petition for Writ of Certiorari, No. 09-893, filed February 25, 2010, where it supported individual arbitrations in lieu of class arbitration or litigation with jury trials. In any event, Under the Commission's current complaint procedures, no such right to a jury trial exists, and Solvable Frustrations did not believe it was useful or necessary to create such a right in the case of class complaints. If a class of complainants wants to present its complaints to a jury, they would still have the right to file their claims in a lawsuit in a federal district court under Section 207 of the Communications Act.

Commission on a class basis. Solvable Frustrations thus urges the Commission expeditiously to grant the petition and initiate a rulemaking proceeding.

Respectfully submitted,

/s/

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Dated: October 24, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2012, I caused true and correct copies of the foregoing Reply to Oppositions of Solvable Frustrations, Inc. to be filed with the Commission via ECFS and served on all parties by first class mail or in the manner as shown on the Service List below.

Dated: October 24, 2012
Washington, D.C.

/s/

Leo I. George

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