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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of Cargo Airline Association's Petition for an Expedited Declaratory Ruling	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 12-1652 October 16, 2012
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**Gerald Roylance's Comments on Cargo Airline
Association's Petition**

I. Introduction

In DA 12-1652,¹ the FCC seeks comment about the Cargo Airline Association's ("CAA") August 17, 2012 petition.² The petition seeks clarification whether cargo carriers may rely on a sender's representation that the recipient consents to autodialed and prerecorded calls. In the alternative, CAA requests that the FCC throw our current system of government into the toilet, ignore the plain language of the statute that CAA quotes, and exempt "autodialed and prerecorded calls and messages to wireless telephone numbers" just because CAA wants it that way.

The petition is horribly confused. Anyone may use agents to acquire consent. That should never have been an issue. CAA wants more. CAA wants some vague statement from the FCC about reliance that it can use as an absolute defense in a TCPA action if a sender lied to the shipper about having consent. Its petition does not argue that aspect, and the FCC should be clear. Yes, carriers may rely on representations from

¹ FCC, <http://apps.fcc.gov/ecfs/document/view?id=7022036228>, "Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from the Cargo Airline Association."

² Cargo Airline Association, "Petition for Expedited Declaratory Ruling", August 17, 2012, <http://apps.fcc.gov/ecfs/document/view?id=7022005132>

senders. If that reliance is misplaced, then the carrier and the shipper are both liable. That's not what CAA wants, but it is all that CAA asked for in its first prong.

The FCC does not have the authority to grant the second prong.

II. Third party consent

Any one may obtain prior express consent via a third party. That is not a real issue. CAA probably wants more – it probably wants immunity from prosecution when the third party did not actually obtain the required consent. That is not how the TCPA should work. If a CAA's member carrier relies on a third party's representations to make an inherently risky call, then that carrier must assume the risk. Contracting to have a package delivered does not imply consent for automated calls. CAA wants all the benefits without any of the obligations. Carriers are free to negotiate indemnity clauses for when their clients make mistakes. This prong of the petition is similar to GroupMe's earlier petition.

CAA argument is not about the law, but rather the benefits of making pre-delivery notifications. It will reduce theft.

CAA quotes some impressive sounding statistics on page 3. "When signatures are required for delivery, one of our member carriers reports making pre-delivery notification calls to residential recipients with wireline service improves the likelihood of a successful delivery by thirty percent." The offered statistic has a number of biases. It is not about ordinary delivery but rather "when signatures are required". CAA mentions that its members deliver millions of packages every day, but CAA does not tell us who the member carrier is, what percentage of packages go to residences, or what percentage of residential packages require signatures. CAA doesn't even give us the actual improvement; it's a thirty percent jump, but from where to where? Did signature-required deliveries improve from 20% to 50%? Or was it from %65 to 95%? One thing is clear: we are not talking about 30 percent of millions of packages. A delivery company could not survive if it failed to deliver 30 percent of its packages every day.

The statistic also has a built-in success bias. Calling a wireline residential number to announce a delivery will only reach someone at the intended delivery site. The resident may delay going to the grocery store during the expected delivery time. Calling a cellular telephone might reach the resident at work – at a time and place where little can be done.

The statement that "sixty one percent of residential recipients that missed a delivery did not know the delivery was coming or when to expect delivery".³ This statistic also sounds impressive, but it is also biased. It is not looking at all the package recipients. It only looks at failed residential deliveries, so we should expect ignorance on the part of the recipient. In fact, this statistic works against CAA's position. It means that 39 percent of recipients knew the package was coming and still managed to fumble

³ Petition, page 3

the delivery. It seems that calling that 39 percent isn't going to help the package get delivered.

I'll give CAA credit for reading Darrell Huff's *How to Lie with Statistics*. CAA has created an impression that it needs to garner consent from millions of recipients every day. In truth, CAA has hidden the actual number. Furthermore, there is the question of repeat deliveries. CAA members are not delivering every package to first-time customers. UPS has delivered hundreds of packages to my home; FedEx has probably delivered dozens. A carrier need only get consent once; it doesn't need to get consent for subsequent deliveries.

CAA has not provided a realistic picture or assessment about the difficulty of acquiring its own consent. Common carriers often provide tracking numbers, and I expect people would make use of those services. When somebody makes an online query about a tracking number, the carrier's website could offer a telephone notification service, ask for telephone numbers, and get written consent to call those numbers. Carriers could painlessly gather permission.

When a carrier gathers such permission, it must be careful about accidental false calls. Imagine that John and Jane Doe live at 123 Elm Street. John orders something, and it is shipped to J. Doe. He provides the carrier with his cellular telephone number and gives prior express consent. Three weeks later Jane orders something, and it is also shipped to J. Doe. If the carrier matches the name and address, it may end up calling John about a package that John doesn't know anything about. It would be best to only match telephone numbers on the bill of lading.

III. The FCC may not grant the requested exemption

The second prong seeks an FCC exemption that permits prerecorded calls to cellular telephones without prior express consent. That's a non-starter. Congress flatly outlawed automated calls to cellular telephone at 47 U.S.C. § 227(b)(1)(A)(iii). The FCC was given a limited power to exempt such automated calls at 47 U.S.C. § 227(b)(2)(C). Such an exemption would require that the telephone subscriber not be charged for the call and that it does not affect privacy rights. CAA acknowledges that the FCC authority is limited by specifically quoting the statutes "that are not charged to the called party",⁴ but then CAA ignores all authority and asks the FCC to "recognize the public interest in receiving time-sensitive package notifications and issue a declaratory ruling clarifying that such notifications made through autodialed and prerecorded calls and messages (including text messages) are not restricted by the TCPA". That is not a well-founded legal argument. It's also nice how CAA slipped in that little bit about text messaging. The problem is the FCC has no authority unless Congress delegates it, and Congress didn't delegate any authority over non-free cellular calls.

The CAA believes package recipients would welcome status calls about their shipments, and the CAA quotes the FCC's *Report and Order* that claims such calls are

⁴ Petition, pages 6-7

“highly desirable”.⁵ The FCC actually stated that “wireless services offer access to information that consumers find highly desirable.”⁶ When the FCC commented about package delivery services, it was in a paragraph that still required prior express consent.⁷ CAA is twisting the comment to usurp the express consent requirement. If there is an exemption, then carriers would be free to blast as many messages as they want. Such calls may not be welcome on cellular telephones. Pew Research says that only 10 percent use their cellular phones for status updates; 42 percent are irritated by calls that interrupt them.⁸ The CAA may find these calls desirable from a business perspective, and some cellular subscribers may want them, but there is no evidence that companies should have a right to send such messages to a cellular telephone.

CAA makes a poor argument that the messages would not be charged.⁹ CAA claims an evolution away from per-minute charges, but it does not cite any authority that unlimited calling plans are now prevalent. The claimed trend is dubious. According to a New York Times article, concern about the high cost of cellular service has brought consumers back to per minute plans.¹⁰ MetroPCS only sells prepaid plans. CAA also misinterprets the bucket of minutes. A consumer may have a bucket of minutes, but using a minute from that bucket means the consumer now has one less minute to use elsewhere. The FCC has previously held that a deduction from a bucket of minutes is a charge. CAA has made a fantasy argument.

Even if the calls were not charged, the argument is a slippery slope. Permitting any free call to a cellular telephone opens up the Free-To-End-User (FTEU) nightmare. Neither did CAA address privacy concerns. People carry cellular telephones everywhere, and calls can come at inconvenient or awkward times. Does getting a package delivery notification trump a notion of peace and quiet? Turning the package delivery message into a right is also troubling. A delivery is coming. A delivery failed. How many calls will there be, and how important are they? I hate getting endless delivery notifications from Express Scripts, a pharmacy by mail.

Another point on the privacy scale: CAA anticipates millions of calls per day: “it would be impossible for delivery companies to provide millions of package notifications

⁵ Petition, page 6

⁶ *Report and Order*, FCC 12-21, ¶ 29

⁷ *Report and Order*, FCC 12-21, ¶ 21

⁸ Aaron Smith, Pew Research presentation, *Trends in mobile phone usage*, <http://www.slideshare.net/PewInternet/cell-phone-ownership-and-trends>. National survey of adults over 18. Page 8, only 10 percent of all adults use their phone for a status or update service. Page 10, 57 percent receive unwanted or spam text messages. Page 11, 42 percent were irritated by calls or texts interrupting them.

⁹ Petition, page 8

¹⁰ Jenna Wortham, *More Customers Give Up the Cellphone Contract*, New York Times, February 20, 2009, http://www.nytimes.com/2009/02/21/technology/21prepaid.html?_r=1&partner=rss&emc=rss.

each day if they first had to obtain consent independently from each package recipient.”¹¹ Deliveries to businesses are usually not a problem: they are open 8 to 5. Deliveries to residences are the problem here. That’s where the millions of calls would go, and those recipients are more sensitive to privacy. People are not home, but rather at work.

Don’t forget that Congress made a finding in the TCPA that people dislike getting any prerecorded call: “Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.”¹² Of course, the FCC has a long history of ignoring that finding and deciding that something isn’t a problem yet.¹³

Some delivery companies already charge a premium for residential delivery. They should use some of that premium to obtain prior express consent.

CAA members have another alternative: get the prior express consent directly from the recipient. That way they need not rely on inept shippers. In fact, CAA members already use that method.¹⁴ If CAA members are worried about getting sued but still want to use automated calls to cellular telephones, then that is the way to go.

CAA members can even employ a little technology. Have shippers encourage their customers register at the carrier’s website. Everybody ends up happy. Those who want the shipping notification go to the website. Those who don’t want to give out their cell phone number won’t. If a delivery fails, then the carrier can leave a piece of paper with instructions that include registering at a website. The paper can even have a QR Code that the recipient can scan with their smart phone to land on the right page.

Although the CAA mentions the debt collector exemption, courts that have looked at the exemption have taken a dim view of the FCC’s logic that implies consent when the statute requires express consent. See, for example, *Leckler v CashCall; Thrasher-Lyon v CCS Commercial*.

IV. Conclusion

Although I can be sympathetic with CAA members wishing to lower their costs by improving successful deliveries, those costs must be balanced with consumer privacy and the current law. Carriers can use automated calls to cellular telephones if they get prior express consent. Just get the consent and then everybody is happy.

Carriers may “rely” on consent obtained from third parties, but they are jointly liable if consent was not obtained. The FCC may not grant the requested exemption.

¹¹ Petition, page 8

¹² Public Law 102-243 § 2(10)

¹³ 47 C.F.R. § 64.1200(a)(2)(ii), (iii), (iv) [December 24, 2007]

¹⁴ Petition, footnote 10, page 3, stating “some consumers have provided their wireless telephone number to a CAA member as part of an account with that member.”