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November 21, 2012

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

In the matter of 3G Collect's Petition for an Expedited Declaratory Ruling	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 12-1706 October 23, 2012
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Gerald Roylance's Comments on 3G Collect's Petition

I. Introduction

In DA 12-1706,¹ the FCC seeks comment about 3G Collect, Inc.'s October 28, 2011 petition.² Generally, 3G Collect's petition wants to use prerecorded voice messages to cellular telephones without gaining the TCPA's prior express consent. The FCC is powerless to grant such a request. 3G Collect mysteriously argues that it is not marketing its services and that its calls should not be considered calls. 3G Collect argues that automated pre-recorded voice can help hold down the price of a collect call, but 3G apparently charges \$12 to \$16 for its services.

The petition parallels the long outstanding Global Tel*Link petition. The FCC should also consider the comments submitted in that matter.

¹ FCC, <http://apps.fcc.gov/ecfs/document/view?id=7022037261>, "Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from 3G Collect"

² 3G Collect, Inc., "Petition for Expedited Declaration Ruling", October 28, 2011, <http://apps.fcc.gov/ecfs/document/view?id=7022037262>

3G Collect has already deployed this technology. Consequently it is now a defendant in court.³ The FCC should refrain from entertaining such petitions; it is forum shopping. The courts have discovery and do not have to rely on the biased presentations of a single party.

3G Collect has clearly laid out the basis of the class action lawsuit against it. 3G Collect uses prerecorded messages. 3G Collect quotes the portion of the TCPA that prohibits its prerecorded messages.⁴ The petition is nothing but a series of unfounded and desperate arguments that try to avoid the clear liability imposed by the TCPA.

“3G COLLECT does not believe that its practices contravene the TCPA and that the public interest demands that collect calling services remain available to consumers.”⁵ This statement is nothing but self-serving stupidity. 3G Collect’s business model is enabling collect calls to cellular telephones. Consequently, 3G Collect knows it is dialing a cellular telephone in the hope the recipient will purchase its services. 3G Collect’s system then delivers a prerecorded message to the cellular telephone without any prior express consent. There is no wiggle room here at all. The TCPA flatly prohibits delivering a prerecorded message to a cellular telephone at 47 U.S.C. § 227(b)(1)(A)(iii). 3G Collect’s claim that it is not telemarketing at that moment is both wrong and irrelevant. Any call using a prerecorded voice to a cellular telephone is prohibited unless 3G Collect had prior express consent. Even calls from tax-exempt non-profit entities.

Although 3G Collect whines that it has been sued, the suit sounds appropriate and well-founded. 3G Collect has been sued for doing precisely what the TCPA sought to prohibit: delivering prerecorded messages to cellular telephones.

The second part of the statement, about the demand of public interest, is nonsensical and irrelevant. Prohibiting prerecorded messages does not prohibit collect calls; it just prohibits the way 3G Collect wants to implement its service; the service may still be implemented with live operators. The public interest statement is irrelevant because the FCC has no delegated authority. The FCC may not exempt automated calls to cellular telephones when the called party is charged for the call. Even if every person in the US wanted the result, the FCC is powerless.

II. 3G Collect is not a good citizen

3G Collect is not a nice company.

³ *Leimbach v 3G Collect*, Southern District of California, <http://dockets.justia.com/docket/california/casdce/3:2010cv01043/323544/>

⁴ Petition, page 2

⁵ Petition, page 3.

3G Collect has an F rating from the Better Business Bureau.⁶ The BBB has closed 106 complaints in the last 3 years; 54 complaints were closed in the last year. Eighty-four of the complaints were about billing or collection issues.

I hope those 106 people submit comments on this docket. It would be an eye opener.

The BBB does not detail its complaints, but 800notes.com has several complaints about 3G Collect.⁷ That web page suggests that 3G Collect calls are not cheap and apparently contain some undisclosed fees. Dana Ervin accepted a \$12 call, but was billed \$16. Cynthia complains about being harassed to pay her bill. Jonathan makes a claim that a 2 minute call turned into a \$230 bill. Ted complains about a \$12 call from a US soldier going into collection for \$75 when the actual bill was only \$46. Blondie was told the bill would be \$15.99, but she ended up paying \$19.00 for a call less than two minutes; furthermore, Blondie received text messages at odd hours. An apparent company representative, “3G Customer Service” (support@3GCollect.com) stated:

3GCollect is most assuredly a real company. This is not a scam. We keep our prices & our environmental impact low by delivering our invoices via text message. If you received an automated call, you accepted a collect call from our service & you have received 24 daily text messages with instructions to pay your bill. Please visit 3Gcollect.com where you can input your cell phone number, receive your Authorization Code if you've lost it, & listen to your voice accepting the call.

The practice of sending a text every day for 24 days seems a bit extreme.

III. Argument

A. Business model

The 3G Collect website⁸ explains the company’s business model:

3G Collect To Cell (patent pending) was designed as a means to bill collect calls to cellular phones using SMS invoicing. Callers are greeted with a professionally recorded welcome prompt in English or in Spanish. They will then be asked for the number they wish to call and the called party will be given an option to accept the call. The acceptance process includes rates, billing information and a recorded confirmation that is stored in the form of a wave file. These wave files are available on the website for playback allowing callers to access their call information through automation. After the called party has accepted the call, an SMS

⁶ <http://www.bbb.org/new-york-city/Business-Reviews/telephone-communications/3g-collect-llc-in-cross-river-ny-114708>

⁷ <http://800notes.com/Phone.aspx/1-914-873-0749>

⁸ <http://3gcollect.com/>

text message is sent to the number called and the data is stored for future transactions.

This model seems to immediately run afoul of the captured telephone number discussed in the 1992 Report and Order.⁹ In the scenario, caller “Bob” uses 3G Collect to make a call to John Smith’s cellular phone. John Smith did not release his telephone number to 3G Collect – Bob did that. John Smith may have accepted the charges, but where has he provided his telephone number to 3G Collect or said that he consents to further prerecorded calls or SMS dunning messages? The FTC has a nice little line about granting consent cannot be made a condition of service.

B. 3G Collect is marketing its service

3G Collect claims that its prerecorded call is not a “marketing” call, but that claim does not stand the smell test. 3G Collect makes the call to the cellular telephone, it then announces the commercial availability of its collect calling services, and asks the called party to use those services right now. 3G Collect should be viewed as a telemarketer. It is doing the same thing that any telemarketer does: place calls in an effort to sell property, goods, or services.

3G Collect is in the business of chasing hot leads. The calling party reaches 3G Collect and gives it a hot lead: call this cellular phone right now; you can probably sell some expensive telephone services. 3G Collect is only too eager to chase the lead. After all, it’s an opportunity to sell something that costs a dime for about \$16. 3G Collect does not use live operators, so it has no incremental labor costs. Even its collection efforts appear largely automated.

3G Collect shifts some of its advertising costs to the called party. Even if the called party declines, he must still pay his wireless carrier. The TCPA intended to prohibit such cost shifting.

As stated above, even if 3G Collect were not marketing its services, it still violates the TCPA.

C. FCC addressed the TCPA’s impact on operator services

3G Collect claims that the FCC has never “considered or addressed its impact on the ability of consumers to make or receive collect calls”.¹⁰ 3G Collect has not done its research. In the 1992 Report and Order, the FCC addressed the impact of the TCPA on automated operator services:¹¹

Automated Alternate Billing Systems (AABS), used by common carriers to perform operator services with artificial or prerecorded voice prompts,

⁹ Report and Order, FCC 92-443, ¶ 31.

¹⁰ Petition, page 4

¹¹ Report and Order, FCC 92-443, ¶ 47

are exempt from the prohibition against artificial or prerecorded voice calls to residences to the extent they are non-commercial calls. However, voice message calls, as prerecorded messages, would be subject to the prohibitions of § 227(b)(1) and § 64.1200(a) of our rules. Thus, voice message calls could not be directed to an emergency line, a health care facility, radio common carrier services or other services for which the called party is charged for the call except in an emergency or with the prior express consent of the called party.

Consequently, the FCC has already acknowledged that such voice messages to cellular phones are not allowed. Arguably, a prerecorded message pitching a collect call is an unsolicited advertisement, so such a call to a residential line would not meet the exemption described above.

D. TOCSIA

3G Collect raises The Telephone Operator Consumer Services Improvement Act of 1990¹² (TOCSIA) as some sort of magic approval for its business model. TOCSIA was enacted before the TCPA. Consequently, Congress is presumed to know about TOCSIA when it wrote the TCPA. The plain language of the TCPA forbids prerecorded calls to cellular telephones. Congress did not carve out an exception for operator services.

TOCSIA is not a statute written to benefit aggregators. It is a statute meant to protect consumers by requiring timely disclosures about costs.

TOCSIA does not create a right to use automated operator services. The act defines operator services and imposes requirements, but it does not state that aggregator has a right to use automated services despite any other statute. In particular, TOCSIA does not obviate the requirement to obey the TCPA.

In addition, TOCSIA requires that operator services “permit the consumer to terminate the telephone call at no charge before the call is connected”.¹³ (Emphasis added.) 3G Collect cannot guarantee that the called party will not be charged for the call by his wireless carrier.

FCC Regulations say the same thing: “(1) Identify itself, audibly and distinctly, before the consumer incurs any charge for the call; (2) Permit the consumer to terminate the telephone call at no charge before the call is connected; (3) Disclose immediately to the consumer, upon request and at no charge to the consumer... (4) Disclose, audibly and distinctly to the consumer, at no charge and before connecting...”¹⁴ (Emphasis added.)

¹² 47 U.S.C. § 226

¹³ 47 U.S.C. § 226(b)(1)(B)

¹⁴ 47 C.F.R. § 64.703(a)

The language is “incurs any charge”, and any charge would include the cost of the cellular call – whether it is billed as a separate cost or a deduction from a bucket of minutes. That condition is easily met in calls to residential telephone lines because the consumer is not billed for incoming calls. That condition is not the case for cellular telephones.

The conclusion must be that 3G Collect is not providing operator services required by TOCSIA. 3G Collect is making a sales call. 3G Collect is not entitled to any privilege under TOCSIA.

The BBB and 800notes.com complaints cited above suggest that 3G Collect is not making a complete disclosure of its fees.

E. The FCC may not exempt calls that are charged

The FCC has a limited power to grant exceptions for prerecorded calls to cellular telephones. The FCC can only exercise that power if (1) the consumer is not charged for the call and (2) the call does not adversely affect a privacy interest.¹⁵ For example, the FCC currently exempts wireless carriers when they contact their subscribers without charging them. 3G Collect is not a wireless carrier, and 3G is not calling its own subscribers, and 3G Collect is not claiming that consumers are not charged for the call. If the consumer is charged for the call, the FCC cannot help with an exemption.

If the FCC were to permit such an exemption, then a perverse method of telemarketing would exist. Acme Products would create a shell company that processes collect calls to cellular phones. Acme Products would then place a collect call to Mr. Roadrunner’s cellular telephone. A recorded message would ask Mr. Roadrunner if he would accept a collect call from Acme Products. If Mr. Roadrunner said no, then the call is over and there would be no violation under the exemption. If Mr. Roadrunner accepted the call, then Acme Products could claim some sort of bizarre prior express consent. After all, Acme Products didn’t get connected until Mr. Roadrunner said he would speak to them. Acme Product could then pitch its safes and anvils without violating 227(b).

3G Collect’s equating a collect call to a “last resort” emergency¹⁶ is both absurd and indicative of the poor logic used in this petition. In a health and safety situation, the caller should dial 911 rather than 3G Collect. The TCPA emergency exception would apply to voice broadcasts about chemical leaks at refineries, forest fires, and school closings. It would not apply to 3G Collect’s interests in selling services. The called party may not have to accept the call, but the called party was subjected to a prerecorded message on his cellular telephone – something that the called party pays for no matter what. Congress has found “residential telephone subscribers consider automated or

¹⁵ 47 U.S.C. § 227(b)(2)(C)

¹⁶ Petition page 4

prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.”¹⁷

F. 3G Collect initiates the call

3G Collect claims that it does not make or initiate the call,¹⁸ but that is contradicted by its own website quoted above. The person wishing to make a call somehow reaches 3G Collect (presumably dialing an 800 number). The person then tells 3G Collect the number he wishes to reach. The only way that 3G Collect can complete the call is to dial the telephone number itself. 3G Collect may dial the number on a caller’s behalf, but 3G Collect is initiating the call to the cellular telephone.

“3G COLLECT has no control over whether a call is even initiated – this requires the independent action of the calling party.”¹⁹ 3G Collect does have control over initiating the call; 3G Collect need not place the call to the cellular phone; 3G Collect has control.

G. Called party consent

3G Collect is correct that automated calls to cellular telephones are permitted if prior consent has been obtained. The FCC’s logic is wrong, but the FCC has **implied** prior express consent. 3G Collect gives the appropriate summary: “In connection with debt collection calls, the Commission has concluded that consent to receiving autodialed and pre-recorded messages calls on cellular phone numbers **can be assumed** to have been given **when the debtor provided the creditor with his or her telephone number** in the context of the business transaction by which the debt was incurred.”²⁰ (Emphasis added.)

Courts have taken a dim view of this implied express consent. See *Leckler v Cashcall*. Courts have also narrowly interpreted the implication. See *Thrasher-Lyon v CCS Commercial*.

In any event, 3G Collect has not met the threshold of the exemption. The called party did not provide the telephone number to 3G Collect; 3G Collect got the number from the calling party. This issue was raised above. If the called party becomes a debtor in the transaction, there is no implication of express consent.

3G Collect makes some fantastic arguments that since the calling party knows the cellular telephone number of the called party, then the called party must have provided express consent.²¹ I can give a friend a cellular telephone number and expect to receive live calls. Giving out a cellular number does not suggest consent for automated calls.

¹⁷ Public Law 102-243 § 2(10)

¹⁸ Petition, page 5

¹⁹ Petition, page 5

²⁰ Petition, pages 5-6

²¹ Petition, page 6

The company responsible for placing the automated call needs to produce clear and convincing evidence of prior express consent. The supposed implication does not cut it.

H. More dubious emergencies

3G Collect knows that its argument is weak, so it again raises the specter of some dire emergency. “A child who has not been picked up as expected”. No responsible parent will her child in daycare that cannot afford to make a telephone call. Schools may be on hard times, but I suspect their telephones still work. “[A] good Samaritan encountering a confused elderly person and contacting the phone number on his or her emergency bracelet” does not sound like an everyday occurrence. In the given scenario, the good Samaritan is not dialing the number on the bracelet; the Samaritan is dialing 3G Collect. Does 3G Collect have a cadre of bad Samaritans beating the bushes for confused elderly people so it can bilk relatives? I’d expect a good Samaritan to just call the number directly. If the good Samaritan is worried about long distance charges, then she can call 911 and let the police figure out what to do. The emergency scenario argument is all supposition. In fact, 3G Collect has told us that it is just a common carrier and should not listen in to the calls.²² These stories are just fairy tales invented in the cunning mind of an imaginative lawyer.

My mother has gotten lost a few times. She’ll be driving somewhere, take a wrong turn, and it will get dark. What does she do? She calls someone on her cellphone. No collect call required.

She has depended upon good Samaritans. I talked with one who used Mom’s cellphone to tell me where she was. She has GPS navigation now. Another time mom parked her car in a city lot to go to the Post Office, but she couldn’t find the car when she was done. She walked around a bit, got tired, and then a good Samaritan showed up. He whipped out his phone and called me. He didn’t call collect. He didn’t use her cellphone. And he waited around until I showed up.

Frankly, I’d be pissed if an alleged good Samaritan found my mother walking around lost, got my phone number from her, and then hit me with a \$20 collect call. For \$20, she could take a cab home.

One Saturday I was driving over the hill to a party. I rounded a corner on the mountain road only to see the aftermath of a bicycle accident. The mangled bicycle was in the middle of road; the bicyclist was walking around; his Styrofoam helmet had exploded into tiny pieces that were now scattered all over the road. His eyes were normal, and he was lucid. I asked him what happened, and he had hit something and gone over the top of his bicycle. He was bleeding, so he needed treatment. I told the guy I would drive him to the emergency room. A resident came down from a long driveway and offered to look after the bike. The bicyclist didn’t have his wallet/insurance card, so I took him home first. He thought nobody would be home, but his son was there and could

²² Petition, page 5

take him to the hospital, so I got to go on my way. I was way late for the party, but I was happy to play good Samaritan.

I came across a father and son in a parking lot. The teenager's car would not start, so he'd called a friend to drive over and jump the car. The jump didn't work, so the friend left and the son called his father. His father had come, but they couldn't get the car started either. A fourth person happened by, and he started looking the car over and finding lots of problems with the wiring, but nothing that would get it to work. I was number five in this little drama. I came by just as the father was on his cellphone talking to the tow company. The company was busy, wouldn't get there for 90 minutes, and would charge \$200 for the tow. Number four told me what had happened so far. I asked number four if he'd actually seen the jump, and he said no. So number four and I jumped the car, and it started right up. As I was removing the jumper cables, the father called the tow company to cancel. I left to go about my business, but the kid ran after me to give me a twenty. I declined. When you help somebody, you don't expect to be paid.

Well, 3G Collect's business model is to find people who are in trouble, and then gouge them. When I was growing up, I heard about loan sharks and usury laws. Anything over 14 percent was usury. Then credit cards came along, and I wondered how they could charge 18 percent. I was appalled when I first heard about pay day loans. Then my bank told me its ATMs provided pay day loans – with an annual percentage rate of 100.

When I was growing up, I had the sense that the government was protecting its citizens. I don't have that sense anymore. At some point the government may pass a reasonable law – such as a usury law or the TCPA. Down the road, the game changes. Somebody convinces the government that while gambling is illegal, it should be OK to have a state lottery. Gambling remains illegal, but “card rooms” are now permitted. Then a deal is cut that Indians can buy some land, annex it to the tribal government, and turn it into a full-blown Las Vegas style casino. The usury law is still on the books, but there's now an exception for pay day loans. Shylocking is now legal. The government is not protecting the people but rather enabling predators.

Today, 3G Collect wants its medieval indulgence. Not only does 3G Collect want to gouge the down-and-out, it wants to do it with impersonal machines. That way the company can handle lots of transactions without live operators who detest what they are doing and quit. Machines do not require benefits, holiday pay, or expensive health insurance. They don't go on strike, and they are happy as long as they get electricity.

3G Collect sounds like it is hiding its true customers from us. Global Tel*Link was preying on prison inmates. 3G Collect's customers are probably also hard luck cases.

I. 3G Collect's agency argument fails because the caller is not trying to make an automated call

3G Collect makes a confused agency analogy.²³ If a caller has an exemption, then the caller's agent has the same exemption. For example, an agent of a non-profit organization may make the same kind of calls that the non-profit may make. The caller wants to call a cellular telephone, so 3G Collect should be able to call that same cellular phone. The analogy breaks down because the caller is not trying to play an automated message to the cellular phone but is trying to place a live call. The caller makes no representation that he has any right to place an automated call to the called party. 3G Collect can assume it can make a live operator call to the cellular telephone, but it may not assume it has the right to make an automated call to that phone.

IV. Conclusion

3G Collect's petition is absurd on its face. 3G Collect is not offering a reasonable service, but rather preying on desperate individuals. Instead of extracting cash from those individuals (who have none), 3G Collect goes after their friends and relatives (who do). 3G Collect apparently charges \$16 or \$19 for a 2 minute telephone call. Maybe that is the market rate for such services, but it looks like any cost saving from automated technology is destined for the shareholder's pocket rather than reduced rates to the called party.

Congress, when it thought about calls to cellular telephones, decided to prohibit them unless there is prior express consent. Congress, when it thought about automating operator services, certainly was not thinking about making life easy for predatory companies who have earned an F-rating from the Better Business Bureau.

The FCC has already looked at the using prerecorded messages for operator services. There's no problem with using prerecorded messages that tell a caller that a number has been disconnected or that all circuits are busy. The FCC said the technology was not appropriate when it ran afoul of 47 U.S.C. § 227(b)(1).

Although 3G Collect claims it is not marketing its service, its prerecorded messages make an offer of those services to the called cellular telephone, and 3G Collect no doubt hopes that offer will be accepted.²⁴

²³ Petition, pages 6-7

²⁴ Petition, page 2.