

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	
	)	<b>CG Docket No. 02-278</b>
Petition of 3G Collect Inc. and 3G Collect LLC	)	
for Expedited Declaratory Ruling that TCPA is	)	
Inapplicable to the Use of Automated Systems by	)	
Operator Service Providers Completing Collect	)	
Calls to Telephone Numbers Assigned to Cellular	)	
Telephones	)	

REPLY COMMENTS OF AT&T, INC. ON PETITION FOR DECLARATORY RULING

AT&T Services, Inc., on behalf of AT&T, Inc. and its subsidiaries (“AT&T”), files these reply comments in support of the petition for a declaratory ruling (“the Petition”) captioned above. Petitioner 3G Collect (“3G”) seeks a declaration from the Federal Communications Commission (the “Commission” or “FCC”) that the Telephone Consumer Protection Act of 1991 (“TCPA”)<sup>1</sup> and the Commission's rules and regulations implementing it, are not applicable to the use of pre-recorded messages by operator service providers in the course of connecting collect callers to telephone numbers assigned to wireless telephones.

The majority of commenters supported 3G’s petition, noting that (1) 3G Collect (and others) are using prerecorded voices to process collect calls and are not “making” calls in the manner forbidden by the TCPA; (2) the third-party caller has the consent of the cell phone user to seek acceptance of a collect call; and, (3) 3G Collect’s interpretation of the TCPA is consistent with Congressional intent<sup>2</sup>.

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<sup>1</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227.

<sup>2</sup> Comments of AT&T (“AT&T Comments”), Docket No. 02-278 (filed November 23, 2012) at 3 *et seq.*

However, a few commenters<sup>3</sup> maintain that the TCPA's requirement of "prior express consent" means that the express consent of a called party to the use of prerecorded voices cannot be inferred from the circumstances of the communication, and that the call using prerecorded voices is made by 3G Collect and not the third-party caller. These claims are wrong.

First, because there is no public directory of wireless telephone numbers, it is reasonable to assume that wireless customers who receive collect calls from third-party callers gave their wireless telephone numbers to those callers. The prohibition on using a prerecorded voice to a cell phone user does not apply when the cell phone user has given his/her "prior express consent." Implicit in the collect call process is that consent has been granted by the cell phone user. The cell phone user has obviously made the cell phone number known to the third-party caller so that the third-party can make a call, and the third-party caller has an expectation that the call will be accepted by the cell phone user. Both Congress and the FCC have determined that a person who provides a telephone number to a caller has expressly consented to receiving calls on that number from the calling party. For example, in the context of debt collection, the FCC found that a debtor's "express consent" to receive prerecorded, autodialed messages from the creditor is inferred from the debtor's having given the creditor his wireless telephone number as part of the credit application.<sup>4</sup> Furthermore, the House Report on the TCPA confirms that "[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications." H.R. Rep. 102-317 at 17.

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<sup>3</sup> Comments of Joe Shield, Docket No. 02-278 (filed November 23, 2012) ("Shield"); Comments of Robert Bigerstaf, Docket No. 02-278 (filed November 23, 2012) ("Bigerstaf"); and Comments of Gerald Roylance, Docket No. 02-278 (filed November 23, 2012) ("Roylance")<sup>0</sup>.

<sup>4</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559 at ¶ 9 (*Collection Order*). ("We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.")

In spite of the strenuous objections these commenters make to finding express consent in a called party's behavior, the principle of inferring express consent from behavior is well settled.<sup>5</sup> No violation of the TCPA occurs when a calling party, initiates a collect call through 3G Collect to a party who has given the caller his cell phone number.

The commenters nonetheless maintain that 3G Collect – and not the calling party initiates the collect calls rather than simply transmitting or facilitating them.<sup>6</sup> That is incorrect as a matter of well settled law. Specifically, the Commission and court decisions have long held that the boundaries of a call are determined with reference to its end points and without regard to intermediate switching points. In *Teleconnect*, the defendants argued that the service configuration at issue there was actually comprised of two calls. According to these defendants, the first call originated with the calling party and terminated at Teleconnect's intermediate switch. Under the defendants' analysis, the calling party then initiated a second call, which originated at the Teleconnect switch and terminated at the called party's line. In finding that a caller using Teleconnect's service is making a single call, the Commission noted

In general, all of the defendants' arguments ignore the fact that ACA service conveys a single communication from the caller to the called party. Indeed, from the caller's point of view, any

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<sup>5</sup>Aside from the two instances noted above, the Commission recently concluded that “a consumer's prior express consent to receive text messages from an entity can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, FCC 12-278 (November 29, 2012) at ¶ 7. *See also*, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (adopted October 16, 1992) at ¶ 31 (“We emphasize that under the prohibitions set forth in § 227(b)(1) and in §§ 64.1200(a)-(d) of our rules, only calls placed by automatic telephone dialing systems or using an artificial or prerecorded voice are prohibited. If a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”).

<sup>6</sup> *See, e.g.*, Bigerstaf at 1-2. “It is the carrier (3G or AT&T) that determines (1) the content of the recording and (2) whether or not to use a prerecorded message.” Both of these points are irrelevant to the question of who initiates the call.

intermediate switching during the call is, as Teleconnect claims, "transparent." The record reflects that the user of ACA service intends to make a single call terminating not at the Teleconnect intermediate switch, where the Megacom link ends, but at the telephone line of the called party. Thus, from the caller's perspective, ACA service is identical to ReadyLine, regardless of whether that caller must dial a second number at some point before the call is completed.<sup>7</sup>

A collect call made using 3G Collect's facilities is, like the call in *Teleconnect*, defined by its beginning and end points; 3 G Collect's facilities are no more significant to this analysis than the intermediate switch is to the calls in the *Teleconnect case*. Obviously, the collect call's beginning point is the calling party; it is not, for any purpose, 3 G Collect's facilities. Moreover, there is but one call, which begins with the calling party and ends with the wireless customer receiving the call. Commenters' attempts to create two calls out of one are misguided and contrary to existing law.<sup>8</sup>

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<sup>7</sup> *Teleconnect* at ¶ 14.

<sup>8</sup> This result - that 3G Collect is not the party "initiating" the collect calls under section 227 - is consistent with other interpretations of the TCPA. For example, courts and the FCC have held that liability under the TCPA for improper facsimiles falls only on the person who initiated the transmission of a junk facsimile, not the facsimile broadcaster (like Kinko's) who actually transmitted the facsimile. *See, e.g., Kaufman v. ACS Systems, Inc.*, 110 Cal. App. 4th 886, 910 (2003) (upholding FCC ruling that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and the fax broadcasters are not liable for compliance with this rule").

## CONCLUSION

For the foregoing reasons, AT&T Corp. respectfully requests that the Petition of 3G Collect be granted.

Respectfully submitted

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