

Before the  
**Federal Communications Commission**  
Washington, DC 20554

In the Matter of )  
)  
Rules and Regulations Implementing the )  
Telephone Consumer Protection Act of 1991 ) GC Docket No. 02-278  
)  
Petition of YouMail, Inc. For Expedited )  
Declaratory Ruling That YouMail's Service )  
Does Not Violate the TCPA )

**PETITION FOR EXPEDITED DECLARATORY RULING**

**YOUMAIL, INC.**

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## Summary

YouMail is a small, start-up technology company that offers smart phone users a software-based menu of advanced voicemail features. YouMail's service can function in the nature of a "virtual receptionist," responding to calls received by and voicemail messages left for the YouMail subscriber. Both the caller and the YouMail subscriber benefit from the virtual assistant's abilities, such as customizing greetings to different categories of callers, sending a text message in response to a voicemail left for a subscriber letting the caller know that the voicemail message was received and will be acted on, and even managing the types of abusive telemarketing calls from which the TCPA seeks to protect consumers. The virtual assistant empowers consumers and businesses to manage their telephone interactions with features that are highly customizable to best facilitate efficient one-to-one communications between the caller and the called party, ultimately cutting down on the number of misdirected, fruitless, and potentially privacy endangering phone communications consumers and businesses endure. The YouMail service has been embraced by professionals, tradespeople, large and small businesses, and everyday consumers.

However, as was the case in the Commission's recent Soundbite decision, YouMail has been the target of ruinous class action lawsuits premised on three arguments. First, class action plaintiffs' lawyers characterize YouMail's software that enables sending of the optional text confirming receipt of a caller's voicemail message as an Automatic Telephone Dialing System ("ATDS"). Next, these litigants argue that YouMail is the sender of the responsive text messages. Finally, the litigants argue that callers who leave voicemail messages do not consent to receiving a text message in response to their messages.

As the agency with expertise in defining what constitutes an ATDS, YouMail submits that the FCC should declare that YouMail's software, which was specifically designed to provide

only the types of virtual assistant services described here, lacks the current capacity to “store or produce numbers to be called using a random or sequential number generator” and therefore is not an ATDS under the TCPA. Litigants’ focus on whether a system could, under any conceivable circumstance, be modified to be “capable” of randomly or sequentially dialing a telephone number needlessly embroils innovators in crippling class action litigation and retards their ability to provide consumers with the beneficial products made possible by the types of technological advances for which the Commission and Congress have set the stage.

Moreover, the Commission should continue to lead in reaching common sense decisions in interpreting the TCPA, as it did in its Soundbite decision. YouMail’s experience demonstrates that callers who leave voicemail messages almost *universally* request a return communication in their voicemail messages. The text response the caller can receive from a YouMail subscriber is beneficial, providing the caller with valuable information, for example, the fact that a plumber they have tried to contact is at a worksite and will return calls within a certain timeframe. It is precisely the same benefit that the consumer receives from the confirmatory opt-out text at issue in Soundbite and a technological advance that empowers consumers which the Commission should promote. The Commission should recognize as well that YouMail is not the sender of the confirmatory text message. It is a system provider. The text message is part of the private conversation that begins with the caller leaving a voicemail message and the recipient opting to set up a text response to such a voicemail.

Finally, it is respectfully requested that the Commission expedite its consideration of this Petition as the pendency of class action litigation threatens the survival of YouMail, Inc. and the continuation of the many unchallenged services it provides its subscribers.

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**PETITION FOR EXPEDITED DECLARATORY RULING**

YouMail, Inc., (“YouMail”), by its attorneys and pursuant to 47 C.F.R. § 1.2 of the rules and regulations of the Federal Communications Commission, hereby respectfully requests that the Commission declare that the YouMail service does not violate the Telephone Consumer Protection Act of 1991 (“TCPA”)<sup>1</sup> and the Commission’s rules and regulations implementing it. YouMail is a start-up technology company offering smart phone users a software-based menu of advanced voicemail features that can function in the nature of a “virtual receptionist” to enable consumers and businesses to manage their telephone interactions across their many personal and professional circles. YouMail offers many consumer-friendly and common sense features, but as was the case in the Commission’s recent Soundbite<sup>2</sup> decision, finds itself the target of ruinous class action lawsuits premised on arguments that callers do not consent to receiving a one-time text confirming receipt of their voicemail message; that YouMail’s software that enables sending of those texts somehow constitutes an Automatic Telephone Dialing System (“ATDS”); and that YouMail is the sender of those texts.

YouMail submits that, as the agency with the expertise in defining what constitutes an ATDS, the FCC must set some boundaries as to when a system or service has the requisite

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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> 27 FCC Rcd 15391 (2012).

“capacity” to “store or produce numbers to be called using a random or sequential number generator.” Without such guidance, innovative and beneficial products and practices which were never intended to be foreclosed by the TCPA will be needlessly prevented from coming to market. YouMail further submits that the confirmatory text messages that its subscribers can choose to send via the service are not initiated by YouMail in the first instance, and, in any event, constitute the same type of common sense, consumer-friendly messages that the Commission deemed consumers to consent to in the Soundbite decision.

Given the pendency of class action litigation addressing these very same interpretations of the TCPA, YouMail respectfully requests that the Commission expedite its consideration of this Petition. As a small start-up, YouMail’s survival and the continuation of the many unchallenged services it provides its subscribers are at risk.

**I. YouMail’s Virtual Receptionist Is the Type of Innovative, Consumer-Friendly Technology Advance that Communications Policy Seeks to Foster**

YouMail provides a service that allows smartphone users to replace the default voicemail options provided by their wireless telephone providers with a fully customizable suite of advanced telephone answering functions. It cannot be stressed enough that, since these functions are inherently answering service functions, they are reactive to the caller’s action of initiating a conversation with the YouMail subscriber by dialing the YouMail subscriber’s telephone number and leaving a voicemail message. YouMail’s features merely facilitate the conversation by serving as a “virtual receptionist.”

**A. YouMail’s Service Benefits Consumers Who Are YouMail Subscribers**

A powerful, and free, function that YouMail offers its subscribers is its “smart greetings” function. This function allows the YouMail subscriber to create multiple personalized answering messages tailored to the calling party. For example, the subscriber can set up the service to greet callers by name when the system can identify the caller from the subscriber’s contact list or the service’s enhanced caller identification functions. In addition, the subscriber can establish multiple personalized outgoing answering messages based on who the calling party is. Thus, the

subscriber can set up a professional answering message for business contacts in its contact list, a very private message to the subscriber's spouse, and yet another message for friends. Smart greetings also empower YouMail subscribers to control threatening or harassing calls. An abusive partner can receive a message that the phone number called is not in service, while phone solicitors can receive a message asking that the subscriber be put on the company's do not call list.

YouMail subscribers can also control how they review voicemails that are left for them. In addition to a standard playback feature on the handset or from a separate call-in phone number, voicemail messages can be forwarded to the subscriber by email or the subscriber can review them by logging in from a computer when they are unable to use their smart phone to do so. Via a paid feature, subscribers can have voicemail messages transcribed into text which they can then access on their handset, by email or SMS text message. YouMail subscribers can also program the YouMail system to create an "extended information page" for each voicemail message they have received. The extended information page contains information such as the calling party's caller identification from YouMail's enhanced caller identification feature.

Finally, the YouMail service provides subscribers with the option of sending a reply text message, called an auto-reply, in response to a voicemail message that has been left for the subscriber by the calling party. As with YouMail's other features, auto-replies can be highly customized and personalized. First, the subscriber can choose whether to send any auto-replies or none. The subscriber can choose to send auto-replies only to some categories of callers, and to send only one auto-reply to a given caller, regardless of how many times they call. Other options allow the subscriber to establish how the subscriber's name appears in the auto-reply and to provide a special message such as indicating exactly when the subscriber will be available to return the call. Finally, the subscriber can provide a link to the extended information page for the call. This link allows the calling party to review information about the call or the subscriber, such as their website URL or email address, and to leave additional information about

themselves that will be helpful to the subscriber in making the return call, if they so desire. As a result of all these options, an auto-reply is only sent by text if all of the following conditions exist: (1) the subscriber has set his or her options to send a text auto-reply to some group of callers; (2) the calling party falls into that group; (3) the calling party has NOT opted out of receiving auto-replies; and (4) sufficient "caller id" information is available to send the text. All of this is determined by the YouMail subscriber; the role YouMail provides is the technology to proceed through the logic described above and carry out the subscriber's settings.

**B. YouMail's Service Benefits Consumers Who Call YouMail Subscribers**

As noted above, the calling party receives many benefits from YouMail's features. For example, the calling party can receive an appropriate and personalized greeting allowing them to be sure their call has been connected to the correct party, as opposed to having dialed a wrong number. The calling party that receives an auto-reply has further confirmation that his or her message has reached the correct party and gains additional information about the YouMail subscriber, to include when he or she will be available to return the call. In addition, calling parties can establish a limited account which, like the vast majority of YouMail's other features is free to the user, and gives the calling party certain controls whenever calling a YouMail subscriber. Specifically, a limited account can be used to create a caller profile so that when calling another YouMail subscriber, the calling party is identified to the YouMail subscriber in the manner the calling party desires, such as only giving a first name or providing a full business title. Through the limited account, the calling party can also control whether and how it receives auto-replies from YouMail subscribers who have elected to offer them. A limited account holder can affirmatively opt-out of receiving ANY auto-replies from ANY YouMail subscriber. Or, the limited account holder can specify that auto-replies should be forwarded by email to a specific address, as well as by text. A limited account holder can also access the "extended information" page for a message that he or she has left and thus has a record of the call made and message left. Where the YouMail subscriber that was called has activated the transcription

function, the limited account holder can access the transcription to verify that it was correctly conveyed through the voice to text transcription process. Given these benefits to the calling party, nearly ONE MILLION people have signed up for such limited accounts solely for the purpose of enhancing their interaction with other YouMail subscribers.

**C. YouMail Benefits a Wide Array of Subscribers Who Use the Service in a Wide Variety of Ways**

YouMail's subscribers come from all walks of life, businesses and industries. From its customer service contacts and attending business conventions such as the National Association of Realtors and CTIA-The Wireless Association, as well as through profile information, such as email addresses and business titles that subscribers provide at the time they sign up for the service, it is evident that YouMail subscribers include professionals such as realtors, lawyers, and loan officers, trades people such as plumbers and electricians, and individuals who have identified themselves as "mom" or "student."

YouMail subscribers come to the service in a variety of ways:

- **Large Business Users:** Some subscribers are individual users within a large enterprise, such as Southern Care, Inc., which have made the service available and encouraged or mandated its use by employees. Others are individual loan officers, mortgage consultants and private bankers within entities like Wells Fargo, Bank of America, and Chase.
- **Small Business Users:** Some subscribers are small business people, such as contractors, design consultants, electricians, plumbers, landscapers, cable and satellite television installers, housekeepers, carpet cleaners, health care professionals, personal trainers, real estate agents, lawyers, and others.
- **Small Wireless Providers:** In some cases, a wireless telephone company has selected the YouMail service to serve as a primary or preferred option for its customers and set it as the default.
- **Personal/Family Users:** As noted, many subscribers identify themselves as "mom" or "student" and have email addresses through services such as Gmail, Hotmail, and the like.

The uses to which YouMail users put the service are as varied as the users themselves. Personal users take advantage of the smart greetings option to have special greetings for their family members and friends. They also share voicemails, such as sung birthday greetings among family and friends or on social media. They even use the smart greetings function to let callers know that they do not listen to voicemail and would prefer to receive text or email messages. Finally, they use the service to manage telemarketing contacts and threatening or dangerous callers. Business users use the service in many of the same ways but with a business focus.

The auto-reply feature allows subscribers to provide an even more personalized response to the called party. For example, a plumber on a job site can program an auto-reply to send a text message to a caller who has left a voicemail message and advise the caller that the plumber is on a job site and will take a break to return messages every half hour. In this way, the caller can know that their message went to the correct party and that it is not likely to simply sit unanswered until the end of the day or over a weekend while the consumer deals with the emergency. The plumber can also include in the auto-reply a link to the extended information page and ask the caller to provide additional information about their issue so that both the plumber and the caller can move quickly to the substance of the conversation when the plumber makes the return call. And, again, this feature is triggered by the recipient of the auto-reply initiating the call to the YouMail subscriber and leaving a message.

#### **D. Calling Parties Benefit From YouMail's Features**

A blind database search of transcribed YouMail voicemail messages, while not a comprehensive record of all messages, nevertheless shows that more than 75% of callers speak the following words: "return [my] call," "hear back," "call [me] back," or provide a specific telephone number. In fact, half of all the messages contained a telephone number. Some messages also use the term "text" or "TXT" indicating a specific desire by the caller to be contacted by text. In addition to leaving messages that indicate a desire for a response, calling parties who are offered a link to the extended information page in an auto-reply will click on it to

see information about the message they have left, see how their caller id information appears, verify that a message that has been transcribed was transcribed correctly, or to opt out of the receipt of future auto-replies from any YouMail user.

**E. YouMail's Auto-reply Technology Empowers Consumers**

YouMail developed the software that enables all of the YouMail functions as a "home grown" program tailored to the specific functions that the service offers. The software runs on generic hardware according to the specific protocol of the software program and the user's settings. When an auto-reply is sent, it is done in response to a caller having left a voicemail message for a subscriber and only when the subscriber has set its settings to do so.

To physically accomplish delivery of an auto-reply, the service must navigate a variety of paths, depending on the wireless carrier through which the recipient has his or her cellular service. Where a wireless provider has enabled the YouMail service for its customers, YouMail's system delivers the text message to the wireless carrier, which generally delivers the message as if it came from the telephone company itself, at no charge. Where the recipient is the customer of one of the large national carriers, YouMail must generally deliver the message to that company's "email gateway." The carrier then forwards the auto-reply to its customer identifying the YouMail subscriber as the sending party. Finally, other wireless carriers require YouMail to deliver the auto-reply to an SMS gateway provider. In these cases, YouMail delivers the message to OpenMarket, which forwards it as an SMS message to the telephone company for delivery to its customer.

In these operations, You Mail acts in the role of a common carrier, simply delivering the message that was triggered by the caller leaving a message and the subscriber directing that an auto-reply be sent to the caller. The system does not store or produce any telephone numbers randomly or sequentially, or dial them from any database or list. It only sends a single text response, when instructed to do so by a subscriber's settings, to a single recipient who previously contacted the subscriber and initiated a conversation by leaving a voicemail message.

Despite the single request-single response design of YouMail's auto-reply function, the vast array of contexts in which YouMail subscribers opt to send auto-replies, the personalized content of those messages, and the myriad pathways through which an auto-reply must travel, YouMail has become the object of various class action lawsuits alleging that its service constitutes an ATDS. Moreover, despite all the indicia of consent to receive a response to their voice messages and the benefits to consumers of receiving that response, these litigants claim that YouMail auto-replies are "unsolicited." As a result, these lawsuits seek enormous damages for asserted violations of the TCPA, and the cost simply to respond to these lawsuits is crippling.

## **II. YouMail's Auto-Reply Feature Does Not Violate the TCPA**

Congress passed the TCPA to "address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy."<sup>3</sup> In Section 227(b)(1), Congress specifically addressed the use of some types of automated telephone equipment, providing:

(b) Restrictions on the use of automated telephone equipment.

(1) Prohibitions. - It shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.<sup>4</sup>

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<sup>3</sup> In the Matter of the Rules and Regulation Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rcd 559 (2008) at ¶ 2 [hereinafter ACA Declaratory Ruling].

<sup>4</sup> 47 U.S.C. §227(b)(1)(A)(iii).

The Commission's implementing regulations similarly restrict initiating a call using an ATDS or a pre-recorded voice to a telephone number assigned to a cellular telephone service. The FCC has interpreted the term "call" as used in this section to include text messages.<sup>5</sup>

As a result, class action litigants have attempted to cast the system by which YouMail's subscribers can send auto-replies in response to voicemail messages as constituting an ATDS. An ATDS is defined as: [E]quipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.<sup>6</sup>

**A. YouMail's System Is Not An ATDS**

As noted above, YouMail developed its system to provide the specific functions that it currently provides. That is, it was designed to respond one time, to a single input, and only when instructed by a user's settings to do so and when adequate caller id information is available in the system to complete the text delivery. It was not created to store or produce or dial telephone numbers in any random or sequential manner or even to call them from a list or database, all of which have been found to be problematic. Not surprisingly, since it was not designed to do any of these things, it does not.

In adopting its rules implementing the TCPA, the FCC recognized early on that an essential element of the definition of an ATDS was random or sequential dialing. For example, debt collectors were concerned that the Commission's provisions requiring identification of the calling party at the beginning of an automated call placed for debt collection purposes would conflict with requirements of the Fair Debt Collection Practices Act, which prohibit debt collectors from disclosing the debt collection nature of their call. The Commission responded that the identification provisions did not apply to debt collection calls because they "are not

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<sup>5</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd 14014 (2003) at ¶ 165 [hereinafter 2003 TCPA Order].

<sup>6</sup> 47 U.S.C. §227(a)(1).

autodialer calls (i.e., dialed using a random or sequential number generator).”<sup>7</sup> In response to concerns about the impact of the new rules on voice messaging services, the Commission similarly stated that “the prohibitions of § 227(b)(1) clearly do not apply to functions like ‘speed dialing,’ ‘call forwarding,’ or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion.”<sup>8</sup>

Later, however, in considering whether predictive dialers constitute ATDS equipment under the TCPA, the Commission noted that in most cases, predictive dialers are programmed with a list of numbers to be called.<sup>9</sup> Accordingly, the FCC narrowed its focus, saying that the “statutory definition contemplates autodialing equipment that either stores or produces numbers”<sup>10</sup> and which “need only have the ‘capacity to store or produce telephone numbers . . .’”<sup>11</sup> to be considered an ATDS.

Courts ruling on allegations of TCPA violations similarly focus on the equipment’s capacity rather than its actual use. For example, the Ninth Circuit in its decision in Satterfield v. Simon & Schuster, Inc.,<sup>12</sup> ruled that when determining whether a system is an ATDS, the relevant inquiry is to focus on whether the system has the capacity to store or produce telephone numbers to be called via a random or sequential number generator. As a result, the focus of litigants’ attention has become whether a system could ever, under any circumstances, be modified to undertake the activities associated with an ATDS. This focus then devolves into a detailed factual analysis that can only be completed after long and expensive discovery and

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<sup>7</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752 (1992) at ¶ 39 [hereinafter 1992 TCPA Order]; see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995) at ¶ 19 (Debt collection calls are not autodialed calls because they “are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for debtors.”)

<sup>8</sup> 1992 TCPA Order at ¶ 47.

<sup>9</sup> 2003 TCPA Order at ¶ 131.

<sup>10</sup> Id. at ¶ 132.

<sup>11</sup> Id.

<sup>12</sup> 569 F.3d 946 (9th Cir. 2009).

litigation, substantially burdening innovative service providers trying to provide beneficial and efficient products to the marketplace.<sup>13</sup>

Moreover, one can appreciate the endless rabbit trails associated with evaluating whether a device could be reprogrammed in the future to meet the definition of an ATDS. Much like any ordinary computer could (with a complete overhaul) be transformed into a device to launch nuclear missiles, any desktop computer or smart phone could be modified to store telephone numbers to be called by a sequential number generator and dial those numbers. However, the need for future modification, by definition, means those devices (and YouMail's system) do not meet the definition of ATDS presently. Thus, while YouMail appreciates the need to have a flexible definition of an ATDS so that the TCPA and the FCC's rules implementing it can remain current with technological developments,<sup>14</sup> without some guidance, the evolution of the definition of the term ATDS is limited only by class counsel's imagination, or worse yet, will come to encompass every type of telephonic device in existence, thereby preventing anyone from calling a cellular phone number without express consent or except in an emergency. Accordingly, YouMail submits that the Commission affirmatively state that only equipment that has a current capacity to store and produce telephone numbers to be called using a random or sequential number generator—and is currently being used for that purpose—should be considered an ATDS.

#### **B. YouMail Does Not Initiate A Call Within The Meaning of the TCPA**

The TCPA prohibits a person from “mak[ing]” a “call” to a cell phone using an automatic telephone dialing system or an artificial or prerecorded voice.<sup>15</sup> The Supreme Court has employed the definition of the word “make” as “to cause to exist, appear or occur.”<sup>16</sup> Akin to a

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<sup>13</sup> In Satterfield, the court remanded the case to the lower court for a factual determination as to what the equipment in use was capable of doing.

<sup>14</sup> 2003 TCPA Order at ¶ 132 (“It is clear from the statutory language and legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.”) (citation omitted).

<sup>15</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>16</sup> United States v. Giles, 300 U.S. 41, 48 (1937).

telephone service provider (exempt from TCPA liability), which provides the infrastructure to connect the call initiated by the calling party, YouMail does not “make” calls because it does not cause the call to occur.<sup>17</sup> Rather, the initiating party—in this case the YouMail subscriber who has requested that an auto-reply be sent—is the party “making” the call because the subscriber causes the call to exist by setting its YouMail preferences to request auto-replies. Without the initiating party, there would be no call at all.

YouMail is a startup technology company that provides a software-based service. YouMail does not dictate whether any call is made, the time a call is made, or the telephone number to which a call is made or an auto-reply is sent. You Mail has no influence over the content of the message selected by the subscriber. The sending of an auto-reply begins with the calling party dialing the YouMail subscriber’s telephone number and leaving a voice message. As shown above, such messages almost universally request a return communication from the YouMail subscriber. That request is only acted on, though, if the YouMail subscriber directs that it should be through his or her settings, AND if the intended recipient of the auto-reply has not previously opted out of receiving auto-replies. YouMail’s software simply applies logic decisions upon request from the subscriber to confirm that the recipient can receive an auto-reply, and apply the message pre-selected by the subscriber. It no more “makes” a call under the TCPA than does the provider of telephone lines or cellular networks. YouMail is merely the service by which execution of the subscriber’s call is arranged.

The above described mechanics of the YouMail system provide for private parties’ ability to communicate with one another in an efficient and consumer-friendly manner. Congress did not intend to limit such communications or limit the telephone numbers by which they do so, and the Commission has acknowledged that liability for any violation of the TCPA would fall on the subscriber of the service used to make the calls, not carriers providing the services.<sup>18</sup>

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<sup>17</sup> See also Black’s Law Dictionary 784 (6th ed. 1990) defining “initiate” as to “commence; start; originate; introduce; inchoate.”

<sup>18</sup> 1992 TCPA Order at n. 83 (“We emphasize that where [speed dialing, call forwarding or public telephone delayed message services] are used for the purpose of telephone solicitation in violation of our rules and the

### C. Callers Consent to Receiving Responsive Texts When Leaving Voicemail Messages

Finally, it must be remembered that the entire process that leads to the sending of an auto-reply is set into motion because the calling party wanted to communicate with the YouMail subscriber. To do so, the caller secured that subscriber's telephone number, dialed it, listened through a greeting message that could alert the caller if he or she has called the wrong person, and finally left a voicemail message. As detailed above, YouMail's experience (as common sense suggests) shows that the leaving of a message almost universally signifies that the caller wishes to receive a return communication. Indeed, Congress recognized the day to day reality of such interactions and said "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."<sup>19</sup>

The Commission also has acknowledged that "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>20</sup> Based on this common sense approach, the Commission has held that debtors who provide a cellular telephone number during a transaction which gives rise to a debt provide the required "prior express consent" to receive auto-dialed and prerecorded calls from debt collectors in connection with that debt.<sup>21</sup> Similarly, in its recent Soundbite decision, the Commission found that there was sufficient indicia of consent in the context of "unsubscribing" to a text service, to conclude that consumers consent to the receipt of a text message confirming their opt-out election.<sup>22</sup>

The auto-reply feature at issue here is no different from the confirmatory text message in Soundbite. The sending of an auto-reply is a common courtesy and smart business practice akin

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TCPA, the users of the services, not the carriers providing the services, would be held liable, consistent with Congress' policy that carriers not be held responsible for the content of messages transmitted through the network.") (citation omitted).

<sup>19</sup> House Report 102-317, 1st Sess., 102nd Cong. (1991) at p. 13.

<sup>20</sup> 1992 TCPA Order at ¶ 31 (citing *id.*).

<sup>21</sup> See ACA Declaratory Ruling at ¶ 9.

<sup>22</sup> 27 FCC Rcd 15391 (2012).

to an out-of-office reply email message. It is only sent in response to the caller's action of leaving a voicemail message and provides benefits to the consumer by confirming receipt of the message and providing additional information about the consumer's interaction with the called party. Further, the sending of an auto-reply is a one-time event that occurs in close proximity to the calling party leaving a message for a You Mail subscriber. The debt collection calls that the Commission approved in the ACA Declaratory Ruling, in contrast, may not occur until long after the debt was contracted. In the case of a revolving credit account, the debtor may remain current on the account for a long period of time before defaulting and triggering a debt collection call. In addition, debt collection calls may be repeated and occur over a long period of time, depending on the severity of the default.

### **Conclusion**

The Commission has acknowledged that "the overall intent of Section 227 is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy."<sup>23</sup> That intention is being subverted by aggressive class action lawsuits that thwart the development of beneficial telephone communication services and products. These technological advances, rather than unleashing an onslaught of unsolicited marketing messages that tie up phone lines and disturb consumers at home and at all hours, are facilitating more efficient one-to-one communications between parties, ultimately cutting down on the number of misdirected, fruitless, and potentially privacy endangering phone communications consumers and businesses alike endure.

Given the history of telemarketing abuses that have led to the enactment of the TCPA, establishment of the Do Not Call list, and passage of other laws at the state level, it is clear that there is great sensitivity to the potential that a system or service might bulk dial consumers and deliver an irrelevant, generic message to them. In 2011, the Attorney Generals of all 50 states

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<sup>23</sup> In the Matter of the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 FCC Rcd 2736 (1992) at ¶ 9.

and four territories implored Congress to reject H.R. 3035, which they claimed would have revised the definition of an ATDS and permit callers to contact consumers at a telephone number the consumer provided at any time and in any manner. The results the Attorney Generals envisioned were “that a wireless subscriber could be subjected to any number of robotic ‘informational’ follow-up calls just because he or she visited a store or website. Consumers will not even be able to opt-out of receiving these robo-calls under the proposed legislation.”<sup>24</sup> They went on to say that, since most modern equipment uses preprogrammed lists of telephone numbers, the revision to the definition of ATDS would “effectively allow telemarketers to robo-dial consumers just by avoiding already antiquated technology.”<sup>25</sup> However, none of the concerns raised by the Attorney Generals even come into play with the YouMail service.

YouMail auto-replies are not sent via any prohibited ATDS technology. The system provides a one-time message, when directed to do so by the subscriber, in response to a voicemail message left for the subscriber -- which message almost universally seeks a return communication from the subscriber.<sup>26</sup> The content of the auto-reply is dictated by the subscriber and can be personalized to maximize the efficiency of communication between the caller and the subscriber. YouMail’s service would have to be substantially transformed to even begin to have the capacity to fulfill the feared functions of an ATDS, such as bulk delivery of a uniform message to large numbers of unaffiliated households. Sadly, this fact does not matter in today’s litigation environment. The devastating litigation costs involved in merely establishing what a system’s capabilities are or could be have proven to be ruinous to YouMail, and, it appears, to other companies facing class action lawsuits under the TCPA as well.

Given this sorry state of affairs, the FCC, the agency with expertise in this area, should provide guidance as to how today’s advanced technologies, which are so often privacy-

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<sup>24</sup> See Letter to Members of Congress, GC Docket 02-278 (December 7, 2011) at 2.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> This is a far cry from the indiscriminate bulk dialing of numbers “without human intervention” which the FCC now considers to be the “basic function” of an ATDS. See 2003 TCPA Order at ¶ 132.

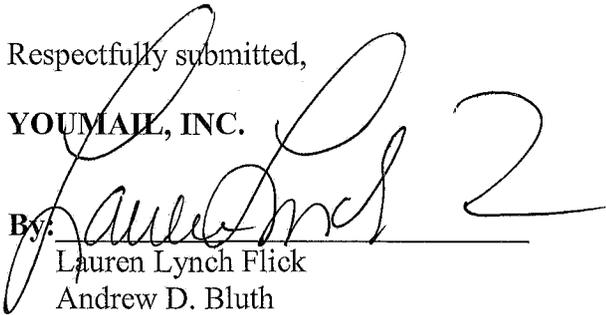
enhancing, can be deployed without running afoul of the TCPA. To YouMail, the solution is simple. End the endless factual inquiry into the equipment's potential future capabilities by holding that only its current capabilities, as currently in use, matter for purposes of the definition of an ATDS in the TCPA.

Finally, the benefits of YouMail's auto-replies are at least as substantial as the benefits of the confirmatory text messages at issue in the Soundbite case. The YouMail service gives consumers and businesses more control over their telephone communications, including providing effective tools to manage the same types of abusive telemarketing calls that the TCPA seeks to protect consumers against. The service that YouMail provides is highly customizable. The auto-reply feature is an option that subscribers can choose to use or not use. YouMail has no control over how subscribers use it, but YouMail's experience, and common sense, dictate that consumers consent to receiving auto-replies from the service. As such, the Commission should apply the same common sense rationale to an auto-reply from a YouMail subscriber that it does to a confirmatory text message of the type in the Soundbite case.

For all the foregoing reasons, YouMail, Inc., by counsel, respectfully requests that the Commission take expedited action to issue a Declaratory Ruling establishing that (a) the YouMail auto-reply system is not an ATDS, (b) YouMail does not “initiate” the sending of auto-replies, and (c) calling parties consent to the receipt of auto-replies within the meaning of the TCPA.

Respectfully submitted,

**YOUMAIL, INC.**

By: 

Lauren Lynch Flick  
Andrew D. Bluth

Its Attorneys in this Matter

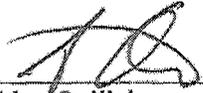
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(202) 663-8000

Dated: April 19, 2013

DECLARATION

I, Alex Quilici, Chief Executive Officer of YouMail, Inc., hereby declare under penalty of perjury that I have reviewed the foregoing "Petition for Expedited Declaratory Ruling," and, except for (a) matters cited therein contained in the FCC's records, (b) matters for which other support is provided, and (c) matters of which the Commission may take official notice, the facts set forth therein are true and correct to the best of my personal knowledge, information and belief.

Respectfully submitted,



Alex Quilici

Dated: April 19, 2013