

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Rules and
Regulations Implementing the
Telephone Consumer Protection
Act of 1991

CG Docket No. 02-278

COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITION OF YOUMAIL

Robert Biggerstaff hereby submits these reply comments on the Petition of YouMail, Inc., for a Expedited Declaratory Ruling regarding the Commission's rules under the Telephone Consumer Protection Act (TCPA) (“Petition”).

The first question raised by a review of YouMail’s filings on this docket, is this: What happens if a consumer calls a business to make a do-not-call or do-not-text request, but that business is using YouMail to automatically “reply” to that caller with a prerecorded call or text message? What if a consumer calls from a phone not their own, where they do NOT want to be called back at that number (pay phone, borrowed phone, hotel, etc.) and instead direct in their message that responses should only be directed to another number (which the consumer provides in the message)?¹

This illustrates what is wrong with any system that replies with “automated” calls and messages and indeed one of the foundations of the objections to automated dialing devices in general—they cannot respond to content and context.

¹ YouMail indicates that “half” of callers provide a telephone number when calling YouMail subscribers. Petition at 6. Obviously some non-trivial percentage of such calls likely contain a phone number different than the one from the number showing up in callerID.

YouMail makes the same mistake many filers on this docket make: the erroneous belief that the TCPA is only concerned with “telemarketing” calls. It is not. Specifically, §227(b)(1) is expressly concerned with all automated calls regardless of content.

YouMail’s platform is an ATDS

YouMail’s claim that it only responds “one time” to “a single input” is disingenuous. Petition at 9. Once a YouMail user selects the option(s) to reply to calls with a text message, those messages are automatically sent without further intervention from the YouMail user.

Indeed, YouMail’s system automatically captures callerID from thousands of calls a day and automatically sends thousands of text messages back without any individual human intervention in any of those messages. YouMail’s system is still “the bucket[] enchanted by the Sorcerer’s Apprentice”² moving automatically from one number captured by callerID to the next.

In trying to make their case against the YouMail’s system being within the term ATDS, it admits that “any desktop computer or smart phone [and YouMail’s system] could be modified to store telephone numbers to be called by a sequential number generator and dial those numbers.” Petition at 11. I have over 25 years of experience in computer database applications and computer-telephone interface applications and hardware both in industry and as a testifying expert witness. I have, in my professional capacity, regularly reviewed records, configurations, capacities, and other elements of telephone dialing systems. I am also a certified forensic computer examiner, and have examined such records in many cases for forensic purposes. All dialers have the capacity for expansion

² *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012).

and modification described by YouMail. The Commission was correct in classifying all dialers that dial from a list without human intervention as within the term ATDS.

Unintended consequences

If YouMail's platform is not an ATDS, then no consent at all is required to use YouMail's platform to send text messages. This "unintended consequence" alone is justification to reject the Petition as it would open up millions of cell phones to spam text messages of every type . . . as long as the spammer used YouMail's "non-ATDS" platform.

This is one reason why "current" capacity fails as a distinguishing characteristic for any system that accepts computer-processed numbers. It also shows the wisdom of Congress, that *expressly* intended the term ATDS to be construed broadly. H.R. Rep. No. 633, 101st Cong., 2nd Sess. (1990).

A broad interpretation of ATDS is particularly appropriate "to ensure that the prohibition on autodialed calls not be circumvented."³ The FCC can regulate an entire category of automated devices due to the ease or propensity of misuse, in order to prevent evasions of the FCC rules or to further the purposes of the statute. *See Sid Peterson Memorial Hosp. v. Thompson*, 274 F.3d 301, 313 (5th Cir. 2001) ("It is well within the power of an agency to promulgate prophylactic regulations which are broad in scope in order to effectuate the purposes of the enabling legislation."); *Hosp. of Carbondale v. Heckler*, 760 F.2d 771, 782 (7th Cir. 1985)(same); *United States v. O'Hagan*, 521 U.S. 642 (1997) (upholding SEC regulation that prohibited activity not explicitly prohibited by the underlying statute itself). The Commission is free to adopt any construction not expressly prohibited by the statute. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Train v. NRDC*, 421 U.S.

³ 2003 TCPA Order, 18 FCC Rcd 14014, ¶134 (2003).

60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921).

YouMail limited accounts are not a solution

YouMail's discussion of "limited accounts" as a mechanism for consumers to block messages from YouMail subscribers, leaves out some very important facts. To use such an account, someone who has no desire to interact with YouMail has to create an account and surrender personal information. They must consent to YouMail's terms of use⁴, which are subject to unilateral change at any time by YouMail. It imposes arbitration (and requires disclosures of even more personal information to opt-out of arbitration). It requires waiver of important rights, and subjects the user to venue in the "City of Los Angeles" regardless of where they live.

All of this, just to stop unwanted text messages.

YouMail System Topology

Based on YouMail's representations, and my own experience in both packet-switched and circuit-switched networking topologies and operations, I agree that YouMail appears to be principally executing directives on behalf of their customer, similar to a common carrier. YouMail does not appear to be responsible for any portion of the *content* of the message.⁵ YouMail does, however, "determine" the destination by "capturing" the

⁴ <http://www.youmail.com/termsfuse.html>

⁵ This is in contrast to entities like GroupMe and 3G Collect. Obviously, YouMail's practices could change, and it could unilaterally begin appending solicitation messages to the client's texts, similar to how YouTube can embed a short ad in a YouTube user's video.

CallerID⁶ and attempting to “identify” the calling party. Other than capturing and interpreting the incoming callerID and attempting to “identify” the calling party, YouMail’s actions appear principally concerned (at least currently) with determining the destination phone number, route, and process of the response message. YouMail’s role appears, at present, to be more akin to a conduit (albeit a dynamic and active conduit rather than passive one) than a party to the message. The Commission’s existing guidance related to similar conduits (presence of either a “high degree of involvement” or actual knowledge of the unlawful activity and failure to take steps to prevent such violations imputes liability to the conduit) would militate against liability of YouMail, based solely on the current information set out in the representations of YouMail in the Petition.⁷ This would not, however, exculpate the YouMail user who is obviously responsible for any violations of laws or regulations that their automatic reply message creates. As noted by YouMail, “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.”⁸

With regard to whether YouMail “initiates” the messages, that question is complicated by the topology and by the Commission’s conclusions in the recent DISH

⁶ Were I counseling YouMail as to potential liabilities and best practices in their model, I would caution them to implement some system to effectively deal with callerID “spoofing.” Indeed, someone could intentionally subject a victim to a flood of text messages, simply by spoofing the victim’s cell phone number as the callerID when making calls to YouMail subscribers.

⁷ Obviously, facts in any particular instances could be different, and of course YouMail’s practices may change or their representations may prove to have relevant shortcomings or omissions.

⁸ Petition, citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752 at n. 83(1992).

Order.⁹ In one sense, the YouMail user determines “if” a message will be sent in response to a voice mail. But YouMail itself determines “when” that message will be sent. Because there is no human action by any sender to send the message (the *sin qua non* of an ATDS) I construe “initiate” in light of the DISH Order, to be the person who placed the dialing device in operation—which would be YouMail. On the other hand, common English parlance and usage would indicate that the person who “set in motion” the chain of events, and on whose behalf the message was sent should be construed as the person who “initiated” the message. Someone “initiates” a telegram by dictating it to the Western Union clerk—not by tapping out Morse code on a key. A person “makes” bulk robocalls and texts when they pick up the phone or go to a website and orders the calls or texts through a vendor. This “plain English” construction seems to run counter to the DISH Order, so I suggest that the Commission should reconsider this particular issue in the DISH Order.

However, YouMail’s claim that it is no more involved than “the provider of telephone lines or cellular networks” carrier is false. Petition at 12. YouMail does much more than a carrier. The Commissions should be wary of creeping levels of involvement by conduits like YouMail. The general principles that shield true common carriers for direct liability, should not automatically become a shield for intermediaries that have higher levels of involvement than common carriers.

One thing is certain however—the caller who calls the YouMail customer cannot be considered the person who “initiates” the text message sent back to themselves.

⁹ *The Joint Petition Filed by DISH Network, LLC, FCC 13-54* (April 17, 2013) (Declaratory ruling) (“DISH Order”).

Implied consent versus express consent.

YouMail confuses a caller's request in a voice mail to "call me back" with express consent to "send me a text message that has nothing to do with the content of my call." Petition at 8. YouMail then conflates "implied" consent with "express" consent. Such an interpretation does great violence to the words of the statute, by making the word "express" superfluous or worse—conflating it with its own antonym of "implied." Such an interpretation would likely incur challenge from an array of consumer groups as arbitrary and capricious. Courts have already rejected similar constructions of the term "express consent" in the TCPA.¹⁰

Reliance on the *Sounbite* decision is inapposite. In *Sounbite*, the issue was a confirmatory text message in response to a "STOP" text message. This is not unexpected given standardized practices of the Mobile Marketing Association.¹¹ However a text message in response to a telephone call, is in no way "expected" and is no part of any industry standard's document.

Furthermore, in order to accomplish YouMail's stated goal, the caller's callerID has to be "captured" by YouMail. The Commission expressly rejected capture of phone numbers by callerID as a legitimate tactic on which to base invitation or permission:

However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be

¹⁰ See, e.g., *Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 WL 1899616 (S.D. Fla. May 8, 2013) ("The FCC's construction is inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express or implied consent.' Congress could have written the statute that way, but it didn't. And because it didn't, the FCC's contrary construction is not entitled to deference.")

¹¹ At least in the contest of the reply message being sent to someone who actually consented to the original text messages in the first place. If there was never consent for the original text message, by definition there would be no consent for the "confirmation" message.

considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.¹²

Construing merely calling a phone number as express consent to receive a text message in return, would violate the Commission's robocall order requiring express consent to be set forth in writing, with a signature (including electronic signature).

CONCLUSION

Perhaps the Next-Big-Thing will be advertisers who pay YouMail users (or YouMail itself) to include an ad in the text messages sent in response to incoming voice calls. This would be particularly attractive if YouMail mined the demographic information provided by subscribers about the callers in their addressbook. Such advertising would be permitted under the TCPA if YouMail's petition were granted.

If either YouMail's system is not an ATDS, or if merely calling someone from your cell phone is equated to express consent for an unsolicited text message in return, you can bet some creative advertiser will start putting ads in those messages.¹³

The Commission should carefully scrutinize the one-sided presentations of digital highwaymen who consider consumers' pervasive connectivity with cell phones as part of "the new oil" to be exploited.¹⁴ The Commission should protect consumers from exploitation of their privacy that is considered simply a raw material by others.

¹² *Id.*, at ¶31.

¹³ I note that a similar petitioner, GroupMe, revealed its plans to include advertising in its messaging system. This was disclosed, however, only *after* its initial filings with the FCC seeking a carve-out from the TCPA where it repeatedly claimed its system was only for non-commercial messages.

¹⁴ *Is Data The New Oil?*, Forbes, <<http://www.forbes.com/sites/perryrotella/2012/04/02/is-data-the-new-oil/>> (last visited Oct. 18, 2012).

Beware of unintended consequences

I also caution the Commission to beware of unintended consequences. Any change in the administration of the TCPA regarding an ATDS will not be limited to predictive dialers or YouMail—it will also apply to SMS text messages and potentially other message platforms. In particular, text message senders (and text spammers) have more options than predicative dialers for designing purpose-built devices to avoid any technical definitions.

I encourage the Commission to deny the Petition of YouMail.

Respectfully submitted, this the 25th day of July, 2013.

/s/ Robert Biggerstaff