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

In the matter of YouMail Inc's Petition for an Expedited Declaratory Ruling	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 13-1433 June 25, 2013
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Gerald Roylance's Reply re YouMail's Petition

I. Introduction

In DA 13-1433,¹ the FCC seeks comment about YouMail, Inc.'s April 19, 2013 petition.² Generally, YouMail developed a robot receptionist application that can automatically send text messages to cellular telephones without human intervention. Consequently, YouMail has been sued for violating the TCPA. YouMail seeks declaratory rulings (1) that its automatic dialer is not an automatic telephone dialing system (ATDS), (2) that YouMail does not initiate the calls, and (3) that prior express consent can be implied.

There were several comments. Industry commenters uniformly supported the Petition and consumer commenters uniformly opposed the Petition. The comments by plaintiff Megan Gold are especially devastating to the Petition. Her comments show that the auto reply feature was an advertising campaign by YouMail. In fact, the only reason to send an auto reply seems to be its advertising function: if Alice just left a voicemail for her friend Bob, then why would Alice want a text message telling her that she just left a

¹ FCC, <http://apps.fcc.gov/ecfs/document/view?id=7520925055>, "Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from YouMail, Inc."

² YouMail, Inc., "Petition for Expedited Declaration Ruling", April 19, 2013, <http://apps.fcc.gov/ecfs/document/view?id=7022288462>

voicemail for Bob? The whole auto reply nonsense is just a ruse to advertise YouMail services. Gold's discovery shows that the advertising is quite effective, that YouMail focused its attention and resources on auto reply advertising, and that YouMail did not stop its auto replies when put on notice.

II. Comments

A. Phil Charvat

Phil Charvat's comments³ consider the YouMail and other petitions as attempts to chisel away at the protections of the TCPA.

B. CallFire, Inc.

CallFire, Inc.'s comments⁴ support the petition. CallFire claims that service providers such as YouMail and CallFire do not initiate calls but rather those who use their services initiate the calls. That claim is wrong because it is YouMail – not the client or the caller – who insert content into the auto reply. CallFire is in a much different business and does initiate calls.

CallFire says that it offers a programming platform that its clients can use. CallFire gives the impression that CallFire does much less than YouMail, but closer investigation shows that is not the case.

CallFire claims that it monitors its customers' activities for violations and suspends suspicious accounts. This statement is odd given the claim that CallFire is only a programming platform. It suggests that CallFire is more intimately involved in some parts of its programming platform.⁵

CallFire also claims to be a defendant in a ruinous class action suit. CallFire gives us no details of that suit. Without details, it is impossible to judge the merits of a suit. Joe Shields, in his comments, points out that CallFire was the defendant in an FTC action filed 9 May 2013 and settled.⁶ Reading the FTC complaint suggests that CallFire could reasonably be the subject of ruinous TCPA class actions.

CallFire makes the common carrier/fax broadcaster argument, but without details that argument is a pig in a poke. We don't know if CallFire is inserting its own advertisements in text messages or otherwise controlling the content of a communication.

A visit to <http://www.callfire.com> is not encouraging. The website offers robodialing and text blasting services. The services are "Scalable to hundreds of

³ Phil Charvat, <http://apps.fcc.gov/ecfs/document/view?id=7520933142>

⁴ CallFire, Inc., <http://apps.fcc.gov/ecfs/document/view?id=7520933526>

⁵ This monitoring appears to have been imposed by the FTC in a settlement. See Joe Shields comments and appendices.

⁶ Shields comments and appendices.

thousands of calls”. It describes a “platform” (not just a programming platform). It encourages the use of its platform for lead generation: “Ramp up sales revenue”; “Increase your sales”; “Generate new leads: Keywords and Short Codes make it easy for customers to stay in touch with your business”. CallFire is advertising marketing services. CallFire gives the impression that automated telemarketing is legal.

The “Cloud Call Center” states that it is a “multi-line autodialer”. It appears that CallFire offers its clients a cloud-based predictive dialer. The “SmartDrop” feature suggests that CallFire is doing answering machine detection. CallFire would also be responsible for connecting to one of the hundreds of agents. If CallFire controls the predictive dialer/autodialer, then CallFire should be responsible for any call abandonment violations.

There is a high degree of involvement here.

CallFire offers other services, such as toll free numbers. I don’t know, but CallFire may offer do-not-call request processing. That would also speak to involvement with the content of a message.

Although CallFire claims it educates its clients about the TCPA, I don’t get that sense from the website. The quotation above talked about generating new leads; that means there was no prior contact, so there would not be prior express consent. If I click for more information about voice broadcasting, I’m told:⁷

When it’s important that your message gets heard, use Voice Broadcast. Just record a voice message, upload your opt-in customer list and CallFire does the rest! Your message can be sent instantly to thousands of phones. CallFire even leaves a message on answering machines for you.

The message is deceptive. There’s a brief mention of “opt-in customer list”, but I’m not sure that many small businesses would understand what that phrase means. On the same webpage is a set of rotating messages, and one of the messages states:

Smarter Lead Generation

CallFire Voice Broadcast allows interested leads to elect to transfer to your sales teams, so they can answer questions, take orders and process sales. You can take as many or as few of inbound transfers as your sales team can handle by setting maximum simultaneous transfers. Building your company’s sales pipeline has never been easier!

Lead generation does not carry the connotation of selling to existing customers; it means generating new leads.⁸

⁷ <http://www.callfire.com/product/voice-broadcast>

⁸ See also ¶ 29 of the FTC complaint against CallFire in Joe Shields comments.

Leaving an answering machine message also shows that CallFire uses an answering-machine-detection (AMD) algorithm. CallFire is listening to the message and deciding what to do. If CallFire's AMD algorithm makes a mistake (such as hanging up on a live answer), then CallFire should be liable.

CallFire's webpage has a "David's Dry Cleaning" video, and that video is also deceptive. David is announcing a sale; there's no indication that David cannot send his advertising message to everyone in the neighborhood.

The voice broadcast page also includes a testimonial that emphasizes sales:

"There is no way I could achieve my current sales volume without using CallFire. The system is very user-friendly, it is very inexpensive, and I can always reach a live person if I need help very promptly."

Chris Burt, Owner, BrotherLife.

How can Chris Burt increase his insurance sales volume with voiceblasting? If he calls only his existing customers, then his sales volume would stay constant (or decline). It seems unlikely that Burt would voiceblast his existing customers; existing customers warrant a personal touch; it is likely they will renew. Also, it would seem that few policies would be expiring at any one time, so why is robocalling needed? Furthermore, it is unlikely that many of his existing clients expressed consent for prerecorded calls (and EBR hasn't worked under FTC rules for a long time). The clear implication is Chris Burt is voiceblasting for new clients without the necessary consent.

And this is CallFire's website after the FTC settlement.

Strangely, the CallFire FAC page is silent about the TSR or the TCPA.⁹ That CallFire's website is so deliberately vague after the FTC settlement is shocking.

CallFire is in an inherently dangerous business. The possibility of TCPA violations is very high, but the CallFire is not educating its clients but rather being deliberately obtuse so as to lead them astray. CallFire is paid only pennies per call, and CallFire wants to see more calls. Millions of them.¹⁰ CallFire will profit from its obtuseness. I don't see a good citizen here.

The FCC fax broadcaster defense superficially seems like a common carrier: the client uploads the material and a list of numbers, the broadcaster sends the material out. It is not. Fax, voice, and text broadcasting is inherently dangerous. It is not akin to providing ordinary telephone service or package delivery. The common carrier defense should not apply. Even if it does apply, it should not be available to broadcasters who do not provide prominent warnings or otherwise mislead their customers.

⁹ <http://www.callfire.com/help/docs/faq>

¹⁰ The FTC complaint alleges thousands of simultaneous calls. That suggests CallFire wants to make upwards of 0.5 million calls per day. Many years ago, a voice blasters claimed capacities of 1 million and 3 million calls per day.

The fax broadcaster defense was a godsend to the offspring of Fax.com. The guys who owned the broadcasting machinery got a get of jail card from the FCC. All they had to do was set up shop as a broadcasting company and never look closely at their customers. An impersonal website is an ideal interface: no employee ever sees the material before it is broadcast, so there is plausible deniability. Where Fax.com would supply clients with a list of telephone numbers, Fax.com v 2.0 would not. It would, however, point clients to judgment proof consultants who would supply a list of numbers.

The FCC should drop the broadcaster defense. It is a source of abuse.

Compare what CallFire describes to what a legitimate telephone list broker does. I was reading information from a couple of list brokers the other day, and neither would sell a list without a client providing a Subscription Account Number or a signed waiver.¹¹ Selling a list does not involve any “programmable platform” or any actual calls.

CallFire treats the FCC just like CallFire treats its customers. CallFire wants a get out of jail free card. In order to get that card, it will keep the FCC in the dark.

Perhaps more significantly, CallFire isn't even in the same business as YouMail. YouMail auto replies are going to a single caller. CallFire is in the blast one message to hundreds of thousands of recipients. That CallFire wants to support the YouMail Petition suggests that something is rotten in Denmark.

C. Gerald Roylance

My comments¹² oppose the petition. Roylance repeated his ATDS argument that the FCC should retain the broad definition of “capacity” to avoid abuses, reaffirm the Congressional observation that incorporating a computer implies the device is an ATDS, reaffirm that dialing from a database of numbers without human intervention is an ATDS, and make clear that Congress (and statutory construction) never required that a random or sequential number be used. There should be some common sense. A person should be able to use preview dialing (speed dialing) programs to reach a single recipient without being liable under the TCPA.¹³

¹¹ <http://www.promarketingleads.net/registration/> says, “Before we output any scrubbed consumer phone numbers on a telemarketing list, we obtain our client’s SAN (Subscription Account Number) as required by the FTC.” In other words, an honest list vendor does not sell a list without obtaining the client's SAN.

<http://www.ajfconsultants.com/DoNotCall.html> will not sell a list with phone numbers without a relevant SAN or a signed waiver that claims an FTC exception.

¹² Gerald Roylance, <http://apps.fcc.gov/ecfs/document/view?id=7520933667>

¹³ But monkey dialing (a third party person presses a speed dial button) should not be allowed. For the last two days, I’ve received calls for “Drake”. Somebody entered Drake’s number incorrectly on their contact list and continues to call me. I’ve told the caller it’s a wrong number. If they continue to call, I may change my view about preview dialing.

Although Roylance disagrees with the FCC's recent clarification of initiate, that definition ensnares YouMail. YouMail's servers notice the incoming call, and YouMail's servers make the decision to auto reply. YouMail composes the message, does the voice to text translation, and inserts its own advertisement. YouMail initiates the call and should be liable under the TCPA. YouMail's clients may also be liable for damages. Under the FCC's recent view, YouMail could be both an agent of its client and the initiator. The client could be jointly liable under the TCPA if the client directed YouMail to send auto replies. However, if the client did not order the auto replies, then the client's liability is murkier or even absent.

Roylance also argues that there is no prior express consent. That someone leaves a voicemail message for a friend on YouMail's servers and has his telephone number captured through Caller ID does not imply that person wants to receive automated replies from the friend or from YouMail. Admittedly, some recipients may not object to the texts or even welcome them, but that does not mean that prior express consent has been given. YouMail wants to turn a strict opt-in requirement into a looser opt-out requirement: we will call without consent until you tell us not to. Furthermore, YouMail wants to co-opt/borrow/steal the dubious implied consent of its client for its own purposes. YouMail wants to be able to call cellular telephones and leave YouMail's advertising message based not on consent directed to YouMail but rather implied consent directed to YouMail's client. What would the FCC think of AT&T's voice mail service doing that? Imagine if AT&T texted an invitation to sign up for AT&T Wireless to every person who left voicemail for an AT&T customer. That's what YouMail is doing with its auto replies.

Roylance also opposes the FCC entertaining forum shopping petitions. The petitioners often spin their story to advantage, there is no discovery, no cross-examination, and plaintiffs often do not comment. The current comments are different from the usual petition: the plaintiff has commented, and those comments show that the FCC should not decide these petitions in the dark. Megan Gold's comments attack YouMail's spin and provide some devastating discovery results. YouMail has attempted to mislead the FCC, and that alone should be enough to deny this Petition.

D. Communication Innovators

Communication Innovators comments¹⁴ repeat the argument that an ATDS must actually employ a random or sequential number generator rather than have some abstract capacity of being able to use such a generator. CI's interpretation requiring the actual use of a number generator would gut 47 U.S.C. § 227(b). Today, essentially all automated calls use a database of numbers. A database must be used to be compliant with do-not-call lists and avoid calling healthcare facilities. CI's definition of ATDS would allow anyone to blast text message advertisements to cellular telephones. Texts are not prerecorded or artificial voice messages, so there is no other restriction upon text messages in 47 U.S.C. § 227(b).

¹⁴ Communication Innovators, <http://apps.fcc.gov/ecfs/document/view?id=7520933767>

CI does point out that YouMail's system uses a database of numbers – something that even YouMail does not acknowledge.¹⁵

E. Joe Shields

Joe Shields' comments¹⁶ oppose the Petition and emphasize that Congress intended a broad definition of ATDS: "The Committee is aware of concerns that this broad definition could cover the mere ownership of office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages." The Committee didn't require those office computers to actually use a number generator. The mere existence of a computer in a dialing system could be enough to term the system an ATDS. Shields further points out that Congress did not include the word "current" in its definition of ATDS.

Shields states the FTC receives about 200,000 automated call complaints per month. That level of complaints suggests that many ruinous class actions are warranted. Many people receive such calls and simply hang up rather than file a complaint; their rights are also violated. The FTC recently sponsored a \$50,000 competition for ways to stop the infamous Rachel with Cardholder Services prerecorded calls.

Shields points out that CallFire, one of the commenters on this Petition, is being sued by the FTC.¹⁷ Furthermore, CallFire entered into a stipulated judgment with the FTC; Shields provides a copy of the complaint and the settlement.

Shields also points out that express consent cannot be implied by actions. It must be explicit. YouMail's system does not acquire express consent for auto replies. Shields suggests that YouMail include a "press 1 option" to gain the caller's consent for subsequent automated calls. That method should pass muster.¹⁸

F. Megan Gold

Megan Gold's comments¹⁹ understandably oppose the Petition, are an eye opener, and show why the FCC should reject forum shopping petitions.

The innocuous sounding auto replies were actually part of a deliberate advertising campaign by YouMail. YouMail was inserting its own advertising message into the text

¹⁵ Communication Innovators, page 7, stating "Like predictive dialers, YouMail's service relies on a list or database of numbers to be reached."

¹⁶ Joe Shields, <http://apps.fcc.gov/ecfs/document/view?id=7520933778>

¹⁷ Shields, page 3: *FTC v SKYY Consulting dba CallFire*, 4:13-CV-2136

¹⁸ There is an upsell issue that can run afoul of FTC regulations. I'd call my bank, and they'd ask for my account number. Then they'd put me on hold and force me to listen to an advertisement while they "accessed my records". Of course, the records would come up in an instant.

¹⁹ Megan Gold, <http://apps.fcc.gov/ecfs/document/view?id=7520933768>

replies. (“Reasons to join YouMail” on page 3.) YouMail (not its clients) made auto-replies the default. The decision to send the text messages is squarely at YouMail’s door.

YouMail did not send the auto replies for a brief interval of time and then stop when the question of legality arose. YouMail started sending them and continued sending them even after Gold’s class action was filed.²⁰ Gold is not being unreasonable: she is only seeking class damages for calls made after notice.²¹ She also has no quarrel with YouMail’s other services.²²

Gold’s discovery efforts show that the motivation for sending the text messages was not to provide value to its clients or those who called but rather to sell its own services.²³ The advertising aspect was so effective that YouMail wanted to drop everything else and focus on auto reply advertising.²⁴ That included investing in more equipment.

Gold characterizes the YouMail petition as deceptive.

Gold’s arguments are clear and sensible. Alexander Burke is an impressive attorney. The class action lawsuit does not appear to be “meritless”.

G. Nicor Energy Services Company

Nicor Energy Services Company’s comments²⁵ support the Petition but confuse many issues. Nicor states, “For example, by applying different rules and consent standards based upon whether a business manually dials a consumer or uses an “automatic telephone dialing system” or a “prerecorded voice,” the Commission unnecessarily regulates the technologies available to businesses engaged in legitimate practices like those described in the YouMail Petition, while doing little to curb the abusive marketing tactics that Congress sought to address in the TCPA.” The statement shows a fundamental lack of understanding. Congress, not the FCC, laid down many of these distinctions, and the FCC is powerless to overrule Congress. Furthermore, Congress sought to address more than just “abusive marketing tactics” in the TCPA. The TCPA restricts prerecorded voice calls to cellular telephones no matter what the content of the message on privacy and cost-shifting grounds. Moreover, Megan Gold’s comments suggest that YouMail’s Petition is in furtherance of an abusive marketing tactic.

Nicor also claims that “Unfortunately, the Rules as currently written inadvertently harm legitimate business practices by defining ATDS and prerecorded voice messages in

²⁰ Megan Gold, page 5

²¹ Megan Gold, pages 9-10.

²² Megan Gold, page 2, footnote 4.

²³ Megan Gold, page 5.

²⁴ Megan Gold, page 6.

²⁵ Nicor Energy Services Company,

<http://apps.fcc.gov/ecfs/document/view?id=7520933763>

an overly-broad manner”.²⁶ Although the ATDS definition is frequently challenged, Congress intended a broad definition. I am not aware of any dispute over the definition of “prerecorded voice messages” being overbroad. Is it live or is it Memorex? What legitimate business practices is Nicor talking about? Yes, automated calls are inexpensive compared to a postage stamp and businesses have legitimate reasons to communicate with their customers, but that does not mean business interests must trump Congressional concerns about consumer privacy and cost shifting.

Nicor asks the FCC to “focus upon whether the consumer consents to the message rather than upon the technology used to deliver the message so that the Rules do not discourage, or even prohibit, businesses from implementing new technologies that benefit consumers”.²⁷ Under the TCPA, if the consumer has given prior express consent, then the calls are legal no matter what technology is used and no matter what the destination. If YouMail had obtained consent from the recipient, then Gold would not have sued.

Nicor’s second point, “ensure that businesses can send a consumer informational messages about goods or services he or she has already purchased by using the telephone number that the consumer provided at the time of purchase without needing to obtain any additional form of consent”,²⁸ is not on point. The auto replies are not informational messages being sent to those who have purchased goods or services from YouMail. Auto replies are advertisements that YouMail is sending to the friends of its clients.

Apparently, Nicor wants innovative technologies and corporate desires to trump a statute. Nicor wants to distance itself from telemarketers trying sell; instead Nicor claims it wants to inform its customers about appointment changes. Many of the things Nicor claims it wants to do are permissible to landlines but not to cellular telephones.²⁹ The fix is easy to make: all Nicor need do is “focus upon whether the consumer consents to the message”. With that consent, Nicor may use predictive dialers, prerecorded voice messages, and text messages to the 56% of its customers who use smartphones. However, the FTC and FCC have made it clear that such consent may not be a condition of service. Smartphone subscribers have a right to their privacy and a right to avoid cost shifting. Nicor may not impose its economic communications practices upon its customers without their prior express consent.

I’m leery of Nicor’s so-called “information”. Nicor states, “Nicor Services, like YouMail and many other legitimate businesses, often places outbound phone calls or

²⁶ Nicor, page 4

²⁷ Nicor, page 1.

²⁸ Nicor, page 1.

²⁹ A better way to fix this landline/cellular telephone rule disparity is to prohibit prerecorded calls to residential telephone lines. Congress believed that was the right thing to do in 1991, but Congress let the myopic and out-of-touch FCC make some stupid exceptions that marketers continue to exploit. I get many prerecorded surveys that are ruses to sell. I get automated calls from sham nonprofits: 85% of the donations go to the telemarketer; the pittance left for the “charity” is burned up in the president’s salary, his healthcare coverage, and office expense.

messages to consumers to notify them of important information, including service and warranty options, changes in service terms, and other items of interests to consumers.”³⁰ I don’t know what that statement means. It just sounds odd. What is a “warranty option”? If Nicor has sold a service, then how can the terms of that service change? If Nicor sold a product, then the warranty should be included on a piece of paper rather than transmitted by phone later. Has Nicor sold an energy product and is now “informing” its customer about the availability of a warranty for it? Is Nicor trying to sell improved or additional warranties? Is Nicor trying to renew existing warranties? Those activities would take us into telemarketing territory – the same territory that Nicor claims it wants to exclude. This “information” is not something that the FCC should try to puzzle out in the dark. We have courts with evidence and discovery for that.

Nicor bemoans ruinous class action lawsuits, but Nicor is not clear about its criticism. Nicor seems to imply that any class action lawsuit must be bad on its face, but that does not make sense. Class action lawsuits make sense when there are small injuries inflicted upon a large class. Frankly, it does not make economic sense for most people to sue even when the statutory damages are \$500. My estimates are that fewer than one in one million illegal calls result in a lawsuit. The FTC sued ADT for telemarketing violations;³¹ the case was settled with ADT paying \$2 million and promising to keep tabs on its telemarketers. That was not a class action. Fast forward a few years and ADT is the target of a class action TCPA suit. ADT settled for \$10M.³² Is that a bad result? Philip Charvat, one of the commenters above, was a named plaintiff in that case.

That class actions involving autodialed calls increased almost 600% in 3 years does not say anything good or bad about such actions. Maybe the increase is due to unscrupulous lawyers, but maybe people are fed up enough to finally take action. Maybe some attorneys learned enough about the law that they are now comfortable pursuing a TCPA class action. We could look at other statistics such as the number of FCC and FTC telemarketing complaints and the dearth of FCC TCPA citations or substantial prosecution.³³ A better complaint would be if the FCC were more proactive then there would be fewer violations and fewer class actions. Yes, there are going to be some bad class action lawsuits, but there are also going to be plenty of good ones. Megan Gold’s comments do not suggest that her suit against YouMail belongs in the bad category at all. Her attorney seems eminently reasonable.

On page 5, footnote 6, Nicor suggests that *Meyer v Portfolio Recovery Associates* out of the Ninth Circuit is a ruinous class action. Maybe it will be ruinous, but that does not mean the action is not without merit. A preliminary injunction is granted only if it is likely that the plaintiff will succeed on the merits. The preliminary injunction and class certification have been affirmed by the appellate court; a request for an en banc hearing was denied. That hardly suggests an unfounded case. The judicial system is happy with the results so far. *Meyer* does not seem to be an outrageous case at all. In particular,

³⁰ Nicor, page 7.

³¹ <http://www.ftc.gov/os/caselist/0423091/adtsecurity.shtm>

³² <http://robocallsettlement.com/>

³³ The GAO has taken a dim view of FCC TCPA complaint processing.

Meyer stands for collection agencies being able to autodial debtor cellular numbers that were provided on the underlying credit application but not being able to autodial cellular numbers that were skip-traced or otherwise data mined. PRA knew or should have known it was taking a risk with those numbers. Collection agency advocates have long cautioned against using data-mined numbers. PRA has commented on this docket.

Nicor actually makes a case against YouMail. On page 9, Nicor states,

These clarifications can be made without fear of encouraging abusive practices. Because non-telemarketing calls must necessarily exclude any sales, advertising, or telemarketing efforts, businesses are unlikely to engage in abusive practices when making such calls. In addition, consumers may always revoke consent to receiving non-telemarketing calls from a business in the future, further mitigating the potential for abuse. Further, both the Commission and consumers would still have the capability to prosecute abusive calling practices -- if a call includes a sales element, is made after consent has been revoked, or if the consumer never provided the number during a purchase, the FCC or the called party could still pursue an action under the TCPA. As such, consumers would retain nearly identical protections to those they currently enjoy, while providing calling parties with much greater certainty as to the acceptability of their calling practices.

The problem for YouMail is that the auto replies include “a sales element” and the caller never provided YouMail with a telephone number or consent.³⁴ Consequently, Nicor should approve of Gold’s lawsuit.

H. Robert Biggerstaff

Robert Biggerstaff’s comments³⁵ oppose the Petition and are on point. Biggerstaff points out some unusual problems with some basic assumptions of the YouMail system; capturing Caller ID or ANI has problems. Biggerstaff emphasizes that the TCPA is not just about telemarketing calls; YouMail’s assumptions are wrong.

Biggerstaff describes the YouMail system and shows that it is an ATDS. He also argues why a broad interpretation is both intended and needed.

He points out that YouMail’s system is onerous even for those who do not want to use it. To stop the auto replies, one must create a limited account, and that subjects the user to YouMail’s terms and conditions, submits to arbitration, and places venue in Los Angeles.

³⁴ YouMail’s Petition claims that many messages include a telephone number, but those messages were directed to YouMail’s clients and not YouMail directly.

³⁵ Robert Biggerstaff, <http://apps.fcc.gov/ecfs/document/view?id=7520933797>

Biggerstaff points to the creeping involvement of companies such as YouMail and suggests they do not deserve common carrier protections.

Biggerstaff attacks the Petition on its consent claims. He distinguishes the SoundBite petition in both the action (SoundBite's narrow reply to a STOP request versus YouMail's continuing auto replies to incoming calls) and broad industry association recommended practices (SoundBite followed industry recommendations; YouMail found a new way to advertise). Even the FCC issued text replies to STOP messages; where is the FCC issuing auto replies to incoming voicemail?

Biggerstaff also predicts that YouMail will want to sell ad insertions in its auto replies. YouMail is the camel's nose.

Biggerstaff also reminds the FCC of its own unintended consequences argument – which is probably the biggest reason to avoid a pro-business/consumer-unfriendly modification of the ATDS definition.

III. Conclusion

The requests for declaratory rulings should be denied. The Petition is a disaster for consumers, and the underlying auto reply feature is an advertising campaign rather than a legitimate service.