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September 23, 2013

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-A325  
Washington, DC 20554

Re: Notice of Ex Parte Presentation  
GC Docket 02-278  
Petition of YouMail, Inc.

Dear Ms. Dortch,

On September 16, 2013, Alexander Burke and Brett Freeman, counsel for Megan Gold, met with Priscilla Delgado Agteris with regard to the petition of YouMail, Inc. In this meeting, Ms. Gold provided an explanation of why the three positions espoused in YouMail's petition should be rejected in all respects, as explained herein.<sup>1</sup>

### **YouMail's Messages Constitute Telemarketing**

Ms. Gold began by explaining that, although YouMail's petition does not reveal this, the text messages that are the subject of these proceedings sent by YouMail constitute unsolicited advertising. The text messages are sent to non-customers, and when one visits the landing pages for the hyperlinks within the text messages, the text there encourage the recipient to become a YouMail customer.

### **YouMail uses an ATDS**

Ms. Gold pointed out that YouMail's systems constitute an ATDS under the standards currently in effect because it has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. She explained that the current definition of ATDS is a bright line rule, and that any changes in the rule would cause a flood of billions of telemarketing messages.

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<sup>1</sup> This notice is being filed electronically in the FCC's docket, pursuant to Section 1.1206(b) of the Commission's rules.

She also explained that insertion of “*current* capacity” into the regulatory definition of ATDS would be contrary to Congress’ intent, and would amount to adoption of language that failed legislatively with the Mobile Informational Call Act of 2011, HR 3035.

### **Calling a YouMail Customer Does Not Constitute “Express Consent”**

Ms. Gold explained that, in her view, “prior express consent” must be meaningful, unequivocal and knowing. For this reason, it is Ms. Gold’s position that YouMail’s position that a mere telephone call to a YouMail user from a unknowing third party cannot possibly constitute consent on any meaningful level.

It was explained that the “auto-reply” is a nonessential part of YouMail’s business, and suggested by Gold that YouMail should obtain an opt-in from persons who wish to receive these return receipt messages. For example, Gold suggested that when someone calls a YouMail subscriber and leaves a message, YouMail could have a prerecorded message played before the opportunity to leave a voice mail, which states something like, “If you would like to receive an automatically generated return receipt text message with advertising from my voice mail provider YouMail, please press 1.”

### **YouMail is More than a Pass-Through**

Finally, Gold explained that YouMail “makes” the text messages that are the subject of its petition, and therefore acts as more than a mere pass-through or common carrier. Most important, YouMail adds self-serving advertising content to these messages. This advertising content is the primary reason the texts are sent. Second, YouMail “turned on” the sending of auto-reply messages by default; most users were likely unaware that persons who called them were subjected to the advertising receipts. Third, these messages are sent automatically by YouMail and without any interaction with the YouMail customer. YouMail sends these auto-reply receipts regardless of whether its customer’s telephones are turned on.

In sum, YouMail “made” these text messages because it created the content for its own self-benefit, it “turned on” the texts by default for all users, without asking them first, and the texts are sent by YouMail’s telephone equipment without any interaction with its customers at all.

### **Conclusion**

Accordingly, Ms. Gold respectfully requested that the Commission reject each of the three portions of YouMail’s petition.

Sincerely,

/s/Alexander H. Burke