

**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

Reply Comments of Robert Biggerstaff on the Petition of RILA

In its comments, Vibes Media (“Vibes”) mixes the proverbial apples and oranges, attempting to analogize text messages to “live” telephone calls. This is improper as the restrictions on calls and texts to cell phones apply regardless of the content of the message.

Furthermore, a reply text message is made to a phone number captured via the technological equivalent of callerID, and the Commission has declared that capturing a consumers number does not constitute express consent to call that number.

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 considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.¹

But even excusing this fatal flaw, Vibes still misses the boat. Vibes suggests that:

if retailers must obtain prior express written consent for on demand text offers, they must also obtain prior express written consent for “on demand” voice calls. No one, though, believes that is the case for voice calls; it similarly should not be the case for text messages.

Actually, that is exactly what it expected if the return “voice” call is a telemarketing call made using an autodialer to a cell phone—but in reality, a return voice call will not be subject to the prohibition on autodialed calls to a cell phone because it will be an individual

¹ *Id.*, at ¶31.

personal call dialed with direct human intervention, so no written consent is needed. If, on the other hand, some company was to capture the callerId of all the incoming calls, and then blast away with autodialed calls to those captured numbers, they would need express consent where those are cell phone numbers.

The more appropriate question is whether a text message sent in accordance with instructions of an action message can constitute “express consent.” If the sender can properly document the affirmative defense of express consent to a clear and convincing standard—including documenting the contents of the action message and the contents of the reply message sent to the consumer—express consent may exist. I am quite skeptical, however, that such a scenario could constitute express *written* consent, and I question the wisdom of doing so due to the vast opportunities for fraudulent claims of consent this would enable. The record in this docket revealed a need for written consent for telemarketing calls and messages to cell phones in large part due to tenuous claims that consent was obtained. Allowing a text message, without more, to satisfy the standard for express *written* consent, would be a step backwards.

CONCLUSION

Two important facts are critical to the issue raised by this Petition—what did the “action message” say and what was sent in reply to the consumer? Those two facts determine whether the TCPA or the Commission’s rules were violated and such a determination should be left to a trier of fact.

Respectfully submitted, this the 10th day of March, 2014.

/s/ Robert Biggerstaff