

Gerald Roylance
1168 Blackfield Way
Mountain View, CA 94040-2305
May 7, 2014

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

In the matter of TextMe Inc's Petition for an Expedited Declaratory Ruling and Clarification	CG Docket No. 02-278 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 DA 14-468 April 7, 2014
---	--

Gerald Roylance's Comments on TextMe, Inc.'s Petition

I. Introduction

In DA 14-468,¹ the FCC seeks comment about TextMe Inc.'s March 18, 2014 petition.² Generally, TextMe has an application that can automatically send text messages to cellular telephones without human intervention. In particular, "TextMe states that a currently-disabled function allows users to invite friends to use the TextMe App by sharing a message about TextMe via third-party social networks, by email, or by text message." Consequently, YouMail has been sued for violating the TCPA. The FCC seeks comment on (1) the meaning of "capacity" in the definition of an automatic telephone dialing system (ATDS), (2) whether the sender of the texts is TextMe or the application user, and (3) whether prior express consent can be gathered from an intermediary.

Overall, the TextMe petition is yet another example of defendants forum shopping. The FCC should turn down petitions that have made their way into the courts. Petitions rarely disclose all the relevant facts, so an FCC petition is not a reasonable

¹ FCC, <http://apps.fcc.gov/ecfs/document/view?id=7521097121>, "Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling filed by TextMe, Inc."

² TextMe, Inc., "TextMe, Inc.'s Petition for Expedited Declaration Ruling and Clarification", 18 March 2013, <http://apps.fcc.gov/ecfs/document/view?id=7521093550>

venue. There is no discovery, so there is no discussion of whether the petitioner knew about the TCPA's proscriptions and thought he could avoid them. Although petitions often claim there are lawsuits, they seldom identify the actual cases or even the number of cases. The plaintiffs often do not comment on the FCC docket, so I wonder if some of these petitions are done without informing the plaintiff. Also, the FCC pace on petitions is glacial. Petitioning is good defense strategy.

On the merits, the three requests for declaratory ruling should be denied.

For the first issue, the TextMe request about "capacity" echoes many other pending petitions about the definition of ATDS, so the FCC should consider those comments for this petition.³ The TextMe user's smart phone stores telephone numbers and, with the aid of TextMe's app, dials those numbers without human intervention. Once the user presses the last button, the app will dial the entire contact list. Therefore, it is an ATDS. There's no issue about needing any modifications or new code here: as it stands, TextMe's app is an ATDS and it is used as an ATDS. The issue of numbers being randomly or sequentially dialed is a red herring. If the system can store telephone numbers, then it need not generate telephone numbers with a random or sequential number generator. I've brought this argument up in several yet-to-be-decided petitions.⁴ There are some simple questions. Does the system store telephone numbers to be dialed? Yes. Does the system dial those telephone numbers? Yes. Was there any human intervention? No. What TextMe wants to do is require number generators, and even the statutory definition of ATDS does not require that. The number generator requirement modifies "produce"; it does not modify "store". TextMe is throwing the spaghetti against the wall.

For the second issue (who is the sender), TextMe (as well as the TextMe user) is the sender of the invitations. That is not a hard argument at all. TextMe prepared the invitation portion of the application. TextMe presumably controls the content of the invitation. TextMe benefits from the invitations. One view of the process is that the user acts as an agent of TextMe when he does the invitation process. TextMe is liable.

For the third issue (third-party consent), it is possible for a third-party (the TextMe user) to obtain consent on behalf of TextMe. It is also OK for TextMe to rely on that consent. But there are perils – if the appropriate consent was not actually obtained, then TextMe is liable for the errors of its agent. TextMe can protect itself through an indemnity agreement with its user/agent. That does not appear to be what is happening here. TextMe asks its user if it is OK to blast an invitation to every contact in the list. TextMe has not asked its user to obtain consent beforehand: the invitation is the means for consent. The TextMe app grabs all the contacts and starts dialing without having any consent in place. Nowhere does TextMe ask its user if it has obtained prior express consent.

³ For example, the YouMail petition.

⁴ For example, the GroupMe petition: Roylance Comments 8/30/2012 and Roylance Reply 9/10/2012

Bottom line: TextMe is dead in the water.

TextMe's petition is wrong on other points, too.

TextMe claims that many parts of its service are free, so it should be viewed as a non-commercial venture. TextMe wants its users to watch videos or complete promotional offers (a barter arrangement); users can also purchase credits. (Petition p. 4.) TextMe may monetize its services in still other ways such as including advertisements. TextMe is a commercial enterprise, and something that advertises the quality of its service would be an unsolicited advertisement. (47 U.S.C. § 227(a)(5).)

TextMe asks its users to violate the user agreement. The user agreement prohibits a TextMe user to “[g]enerate, download, upload or transmit any kind of advertisement or solicitations of commercial activities.” (Petition p. 6.) However, the “Invite Your Friends” button does precisely that: it is an advertisement of TextMe's services.

TextMe also fails to distinguish the difference between TCPA subsections (b) and (c). “Rather than discourage the abusive marketing practices that Congress and the Commission found harmful to consumers, these lawsuits stifle innovation and threaten the development of novel tools for communication. Commission action is necessary to prevent the TCPA from being read so broadly as to deprive consumers of access to innovative products and services.” (petition page i-ii.) TCPA subsection (c) is primarily concerned solicitations and privacy. TCPA subsection (b) is largely content neutral with respect to cellular telephones; (b)(1)(A) prohibits autodialing “any call” without consent. One goal of the subsection is limiting automated calls that may incur charges for the recipient. Although TextMe claims its users receive free texts, TextMe does not claim the invitations are received free.

The TextMe petition is also a consumer disaster. If TextMe's “capacity” position is adopted, then anyone could broadcast texts (commercial or otherwise) using a list of telephone numbers as long as those numbers were not produced with a number generator. TextMe is fighting a lawsuit; it is not really interested in what is right or wrong.

II. Conclusion

The requests for declaratory ruling should be denied.