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

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

Gerald Roylance's Reply 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.

Noble Systems's comments³ are poorly reasoned. Patent law "capacity" would be narrower than the "capacity" that Congress intended for the TCPA. Congress intended

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>

³ Noble Systems Corporation, <http://apps.fcc.gov/ecfs/document/view?id=7521117168>

the definition of ATDS be broad. (See, for example, Joe Shield's comments at page 3.⁴) Although Noble Systems goes on about "capacity", it never addresses the issue of how number generators are supposed to take part in the TCPA definition of ATDS. It's an argument that uses the phrase "using a random or sequential number generator" as an axiom without any analysis. Noble Systems then uses redirection tactics to suggest that an ATDS definition of "Any electronic device with a processor can be theoretically modified to have the capacity to dial numbers using a sequential or random number generator, though this may require totally redesigning the device to add hardware, replace the software, add telephony interfaces, etc." is too broad, but Noble has misstated the statutory definition of ATDS in its analysis. The ATDS definition is not "to dial numbers using a sequential or random number generator". The problem is Noble does not argue that the number generator phrase necessarily modifies "to store". The FCC has found that predictive dialers store telephone numbers that were not generated by a number generator, and that predictive dialers are ATDS. It is sufficient that numbers are dialed from a database without human intervention. A smart phone contact list is such a database, and dialing it without human intervention is an ATDS. Fine distinctions about "capacity" are not needed; the app has the capacity to do it because it does it.

It makes sense "to store" telephone numbers so a machine can later dial them. It also makes sense for a machine "to produce" telephone numbers using a random or sequential number generator dial them right away. It is also possible "to produce" telephone numbers using a number generator and then "to store" those numbers to dial later. However, it does not make sense "to store" telephone numbers using a number generator.⁵ If I already have a telephone number such as 212-555-1234 and want "to store" it in a database, then how does a random or sequential number generator come into play? Congress intended the number generators be used "to produce" the numbers to be called. As I pointed out in other comments, statutes written before the TCPA (such as California Public Utilities Code §§ 2871⁶) clearly separate the "to store" (no number generator required) and "to produce" (number generator required) prongs.

Noble Systems also wants to take Instant Messaging out of the realm of the TCPA. The TCPA prohibits "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service". If the IM is sent to a telephone number assigned to a cellular telephone

⁴ Joe Shields, <http://apps.fcc.gov/ecfs/document/view?id=7521117719>

⁵ The language of the TCPA suggests the number generators are used for building telephone numbers that are dialed. Number generators can also be used to select items from a set or even to step through all the items in a set. It is doubtful that Congress intended such a technical meaning of using a number generator to select a database index. That technical meaning, however, would defeat the petition: sequentially stepping through the list contacts would be using a sequential number generator.

⁶ 2871. As used in this article, "automatic dialing-announcing device" means any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called.

service, then it should fall under the proscriptions of the TCPA. If the IM uses some other addressing scheme, then the “other radio common carrier service” should apply. Congress was trying to broadly protect consumer privacy; drawing a distinction between texts and IMs would frustrate that goal.

Joe Shields also addresses the issues of commercial advertising and spamviting. Automated calls should not be used for those practices, and that was the intent of Congress.

The comments of the Internet Association⁷ show a profound misunderstanding of the TCPA and common sense. The IA believes a single button push before a text blast is sufficient “human intervention”. The plain intent of “human intervention” is the human is placed between (“inter-”) each call rather than in front of all calls. Such a single-act view of intervention would destroy any reasonable definition of autodialer. The FCC never intended that unleashing an autodialer on a list of numbers was “intervention”. Surprisingly, the IA does perceive that number generators are used “to produce” numbers (rather than “to store” them) when it comments about stepping through a smart phone’s contact list “the numbers accessed are not produced using a random or sequential number generator”. The IA’s view of control or agency is naïve. Say Ted and I hate the Internet Association with a passion. What if I make a pipe bomb (a.k.a, the app), give the bomb to Ted, and suggest that Ted use it to blow up the Internet Association’s offices (a.k.a, spamvite to increase my user base). Ted then uses the bomb to blow up the offices. I cannot avoid liability by saying it was Ted’s free will to light the fuse.

The ex parte comments of the National Consumer Law Center,⁸ whose focus is primarily debt collection abuses, discusses the definition of ATDS at pages 6 and 7. The NCLC reiterates that the FCC only requires a database of numbers. The attempt in HR 3035 to change that definition to require that a number generator be employed failed – and had the opposition of 54 attorneys general.

II. Conclusion

The requests for declaratory ruling should be denied.

⁷ The Internet Association, <http://apps.fcc.gov/ecfs/document/view?id=7521117148>

⁸ National Consumer Law Center,
<http://apps.fcc.gov/ecfs/document/view?id=7521122776>