

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

TextMe, Inc.  
Petition for Declaratory Ruling

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 TextMe, Inc.<sup>1</sup>**

There are multiple petitions pending before the Commission that regard the construction and application of the definition of “automated telephone dialing system” (“ATDS”) and “capacity” as used in that definition.<sup>2</sup> For brevity, I will not restate the numerous comments already made on these related petitions, but rather ask that the Commission include all comments regarding “capacity” as used in the TCPA and construction of “automated telephone dialing system” on these related petitions as applying to all relevant petitions.

I commend TextMe for disabling the feature from their app whereby it mines contacts from the users address book and then prompts the user to send a message authored by TextMe to the contacts selected by the user. This feature violates the TCPA in several important ways.

The author of the content of the “invitation” message is TextMe, and not the user.

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition For Expedited Declaratory Ruling Filed by TextMe, Inc.*, DA 14-468 (FCC, April 7, 2014).

<sup>2</sup> E.g., Petitions of Communication Innovators, Inc., Professional Association of Customer Engagement (PACE), ACA International, GlideTalk, Ltd., and TextMe, Inc.

As explained in previous comments, a provider that would otherwise be a passive conduit to a user's personal messages becomes an active participant when it becomes a content author such as by appending its own message to a user's message, or creating the message content for the user to send.<sup>3</sup> In these situations, the app developer or service provider becomes a participant and should be considered the "sender" for the content it either authored or provided the user to send.

Imagine if when you left a voice mail for someone, your own telephone company jumped on the line after you finished leaving the voice mail, and added its own additional message to the end of your voice mail. The phone company would no longer be a passive conduit in such an instance.

**TextMe's invitation messages are commercial advertisements.**

The claim that "the services provided by the TextMe App are not marketing tools" reveals a substantial failure to grasp the context of the TCPA on multiple levels,

First, the TCPA's restrictions on ATDS apply equally to marketing and non-marketing messages, as the recent NAL issued to Dialing Services<sup>4</sup> regarding political calls will attest. In order to do what TextMe asks, the Commission would have to engraft a

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<sup>3</sup> As pointed out in other comments, some app developers even pay users for sending out such invitations, which clearly demonstrates that the app developer or platform operator is a participant. These are nothing more than paid advertisements. For example, the app developer ShopKick provides such compensation to users who "use the link within the ShopKick app to invite a friend -- when 3 friends join, you will receive 2,000 kicks and each friend will receive 50 kicks! "Now you can redeem all these kickbucks for great rewards such as iTunes gift cards, Gift Certificates to stores such as Best Buy, Target, Sports Authority, Toys R Us and Macy's, a 3D 55" Sony Bravia HDTV, a Gas Card, Movie Tickets, and more!"

<sup>4</sup> *In the Matter of Dialing Services, LLC, Notice of Apparent Liability for Forfeiture*, May 7, 2014.

content-based distinction on to the content-neutral definition of ATDS. This is a radical and unwise shift of policy, and unsupported in the text and legislative history of the TCPA.<sup>5</sup>

Second, the TextMe application is an advertisement delivery application. It displays ads (which it charges the advertisers) to the users. It is a commercial, for-profit, advertising venue.<sup>6</sup>

Third, TextMe offers additional features *if users pay for them*. This is a commercial service squarely within the definition of “material advertising the commercial availability of any property, goods or services” in the TCPA.

The Commission has long-standing guidance in the contexts of phone calls and faxes, that a call or message offering a free product or service as part of an overall marketing campaign, is itself an advertisement. Experience shows that some businesses—particularly developers of “free” smart phone apps or social media services—fail to consider that their unsolicited text messages promoting their “free” apps or services, are themselves advertisements under the Commission's rules. It would benefit everyone if this guidance was reiterated specifically in the context of text messages.

### **The GroupMe Order Is Dispositive of the TextMe Petition**

The Commission’s GroupMe Order<sup>7</sup> regarding intermediary consent squarely addresses the remaining concerns of the TextMe Petition.

### **Comments of Comments of Noble Systems Corporation**

Noble Systems suggest that:

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<sup>5</sup> See, *Notice of Ex Parte Presentation of Robert Biggerstaff*, CG Docket No. 02-278, pp, 1-6, dated May 2, 2014.

<sup>6</sup> TextMe will graciously let users pay to remove the ads. See <https://textme.zendesk.com/hc/communities/public/questions/200289327-Pay-to-remove-ads->

<sup>7</sup> *In the Matter of GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling* (March 27, 2014) (declaratory ruling).

“[I]f such a text [using a click-to-send mechanism causing a single message to be sent] is sent only because of human intervention, then sending the text should not fall within the Commission’s regulatory prohibition of using an ATDS. To alleviate concerns regarding abuse, the Commission may choose to limit such operation to only informational SMS texts (e.g., precluding the sending of texts comprising solicitations or advertisements).<sup>8</sup>

This suggestion is closely aligned with the suggested exception already made to the Commission. However the description by Noble Systems also leaves out an important element—who is the author of that click-to-send message? If the sender of the message is the one taking the human intervention and is the author of the content of the message, then such a *non-solicitation* message would be appropriately exempted as a permissible use of an ATDS, if the other criteria were satisfied..

However, the description used by Noble systems departs from the fact pattern of the TextMe app. With TextMe, *the app developer composed the contents of the invitation message* that the user then “clicks-to-send.” Additionally, the TextMe invitation is itself a solicitation so the exception proposed by Noble Systems would not apply.

To achieve what Noble Systems suggests, an exception under 47 U.S.C. § 227(b)(3)(C) is more appropriate rather than a cumbersome engrafting of a content-based provision onto the definition of an ATDS. The device is still an ATDS (which is necessary to prevent abuse) but the exception (consisting of the 6 criteria set out in prior filings<sup>9</sup>) allows that particular use of an ATDS.

The Commission must remain mindful that if any device is not an ATDS, then that device can be used without restriction to place calls and text messages to cell phones... and to emergency lines, hospital patient rooms, and other sensitive destinations. The abuse potential of such a device is self evidence, and demonstrates why the Commission’s existing

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<sup>8</sup> *Comments of Noble Systems*, p.6, dated May 7, 2014.

<sup>9</sup> *See, Notice of Ex Parte Presentation of Robert Biggerstaff*, CG Docket No. 02-278, pp, 3-4, dated May 2, 2014.

broad interpretation that any device that has the ability (including abilities that are enabled with additional software or equipment) to dial calls from a list of numbers is the appropriate test for an ATDS.

Noble Systems suggests that service providers “that allow others to ‘take the steps necessary to physically place a telephone call’ are similar to common carriers, in that the cloud-based service provider offers a service allowing others to make calls.” This defense of the dialing platform operator was squarely rejected in the recent NAL to Dialing Services.

Cell phone are special when it comes to intimacy and privacy. As recognized in the NAL to Dialing Services, Congress said they must receive the highest degree of protection.

Respectfully submitted, this the 22<sup>nd</sup> day of May, 2014.

*/s/ Robert Biggerstaff*