

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition for Expedited Declaratory Ruling of VoAPPs, Inc.)	CG Docket No. 02-278
)	

PETITION FOR EXPEDITED DECLARATORY RULING OF VoAPPs, INC.

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Summary

VoAPPs hereby requests a declaratory ruling that the delivery of a voice message directly to a voicemail box through the use of VoAPPs' DirectDROP Voicemail technology does not constitute a call that is subject to the prohibitions on the use of an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice that are set forth in the Telephone Consumer Protection Act ("TCPA"). VoAPPs demonstrates that its technology enables its customers to deliver a voice message directly to a consumer's mobile voicemail box, without causing a call to be "made to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service," nor does the delivery of the voicemail result in "the called party [being] charged for the call." Accordingly, the delivery of the voicemail falls outside of the prohibitions in the statute and the Commission's rules on the making of a call to a telephone number assigned to a wireless service using ATDS or artificial or prerecorded voice.

VoAPPs further demonstrates the public interests benefits of its technology both in enabling debt collection and other non-telemarketing businesses and services to use the most efficient and cost-effective means to reach consumers and in enabling them to do so in a manner that does not implicate the consumer privacy concerns that underlie the TCPA. Accordingly, even if the Commission were to determine the relevant provisions of the TCPA might be implicated, there is ample basis for the Commission to exercise its authority to exempt the delivery of voicemails through VoAPPs' DirectDROP Voicemail technology from those prohibitions.

The manner in which voicemails are delivered through VoAPPs' DirectDROP Voicemail technology leaves it entirely to the consumer if, when, how, and where the consumer will review the call, as well as whether, when, and how to return it. Indeed, unlike live calls to wireless or residential numbers, leaving a recorded voicemail directly on a consumer's voicemail box:

- Does not disrupt the consumer's life with a call over dinner, or when with his or her children, or at work, or while driving, or any other time that a call, particularly about an outstanding debt, might be disturbing.
- Does not involve the potential annoyance of dropped or dead air calls.
- Does not run the risk of human error in dialing or in mistakes made by a human dialer in delivering exactly the message required to be delivered, to ensure compliance with applicable laws, including the Fair Debt Collection Practices Act.
- Does not result in an airtime charge to the consumer for the delivery of the voicemail to it.

At the same time, as reflected by statistics which show a significantly greater response rate of consumers to attempts to reach them by debt collection agencies through voicemail than by live calls, the VoAPPs DirectDROP Voicemail technology benefits both businesses and consumers by allowing consumers to consider the message and to consider whether to respond and not just to react to it.

VoAPPs urges that the TCPA does not prohibit, and was not designed to prohibit, the delivery of ATDS and prerecorded voicemails through the kind of technology that VoAPPs has developed and urges the Commission so to rule.

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Pursuant to Section 1.2 of the Commission’s rules,¹ VoAPPs, Inc. (“VoAPPs”) hereby requests that the Commission issue a declaratory ruling that the delivery of a voice message directly to a voicemail box through the use of VoAPPs’ DirectDROP Voicemail technology does not constitute a call that is subject to the prohibitions on the use of an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice that are set forth in the Telephone Consumer Protection Act (“TCPA”) at 47 U.S.C. § 227(b)(1)(A)(iii) or the Commission’s rules implementing that provision at 47 C.F.R. § 64.1200(a)(1)(iii).

I. INTRODUCTION AND SUMMARY

The VoAPPs DirectDROP Voicemail technology enables VoAPPs’ customers to deliver a voice message directly to a consumer’s mobile voicemail box without causing a call to be made to the consumer’s mobile phone. In particular, no call is made “to any telephone number assigned to a paging service, cellular telephone service, specialized

¹ 47 C.F.R. § 1.2.

mobile radio service, or other radio common carrier service,”² (collectively referred to herein as “wireless service”) nor does the delivery of the voicemail result in “the called party [being] charged for the call.”³ Accordingly, the delivery of the voicemail falls outside of the prohibitions in the statute and the Commission’s rules regarding making a call to a telephone number assigned to a wireless service using ATDS or artificial or prerecorded voice.

Further, from a broader policy perspective, leaving a voicemail message in this manner serves an important public purpose, as discussed below, but does not result in the kind of disruption to a consumer’s life – dead air calls, calls interrupting the dinner hour or at other inconvenient times, or charges made to the consumer for such calls – which underlie the TCPA prohibitions. Rather, the DirectDROP Voicemail technology allows businesses to use modern technology efficiently to reach and leave a voicemail message for consumers. Consumers have the freedom to pick up their voicemail or not, to listen to it or not, or to discard it, as and when they see fit, and may do so without incurring any charge for the call that delivered the voicemail. Particularly as more and more consumers employ wireless service as their sole means of voice communications, allowing businesses, indeed allowing the federal government, to reach consumers in an unobtrusive manner is necessary to the efficiency of their operations and the availability of services to consumers.

² See 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

³ *Id.*

While as demonstrated below, the nature of VoAPP's DirectDROP Voicemail technology falls outside of statutory and regulatory prohibitions on the use of ATDS or artificial or prerecorded voice communications, the litigious environment that surrounds the TCPA makes essential the declaratory relief herein requested. Given the proliferation of TCPA class action lawsuits, the cost of defending against such suits, and the risk of a judgment that could overwhelm a small business, potential VoAPPs customers need the assurance of the requested declaratory ruling.

II. THE TCPA AND COMMISSION IMPLEMENTING REGULATIONS AT ISSUE

The TCPA provides, in relevant part:

“(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) **to make any call** (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice —

* * *

(iii) **to any telephone number** assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”⁴

⁴ 47 U.S.C. § 227(b)(emphasis added).

The statute gives the Commission the authority to issue regulations to implement these provisions, including the authority to exempt certain calls that do not compromise consumer privacy rights or result in a charge being made to the called party.⁵ The Commission's implementing regulations are set forth at 64.1200(a)(1)(iii) of the Commission's rules.

Both the legislative history of the TCPA and the Commission's decisions implementing the statute recognize the need to balance consumers' interests with the ability of businesses and other organizations to reach consumers with important information.⁶

As demonstrated below, VoAPPs' DirectDROP Voicemail technology falls outside of the TCPA's prohibitions as well as the Commission's implementing regulations. The service, moreover, provides a necessary balance that is being lost in today's litigious TCPA environment, allowing businesses efficiently to reach and provide information to consumers, many of whom have only wireless service, while doing so in a manner that does not disrupt their privacy or require them to pay for the calls made to them.

⁵ 47 U.S.C. § 227(b)(2)(C); see *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 183055 (rel. Feb. 15, 2012) ("2012 TCPA Order"), at ¶5.

⁶ See, e.g., *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (rel. Sep. 17, 1992) ("1992 TCPA Order"), at ¶3 (discussing legislative history, "task ... is to implement the TCPA in a way that reasonably accommodates individuals' rights to privacy as well as the legitimate business interests..."); Statement of the Hon. Mr. Hollings, 137 Cong Rec S 16204 (Nov. 7, 1991)(describing purpose of legislation to protect privacy of homes and calls to numbers for which recipient is charged for the call); 2012 TCPA Order at ¶4.

Nonetheless, if the Commission were to determine that TCPA's prohibitions applied, the Commission should exercise its discretion under Section 227(b)(2)(C) of the Act to exempt the delivery of voicemails via the DirectDROP Voicemail technology described herein. Such an exemption could be crafted so as not to apply in any circumstance in which the consumer is charged for the delivery of a voicemail to his or her voicemail box. The exemption also could leave in place the strictures of Section 64.1200(b) of the Commission's rules, which would require, among other things, the identification of the company making the call and that the message include a telephone number meeting the requirements of that Section⁷ for a call to the business to be returned. Section 64.1200(b) contains a number of additional restrictions on the use of artificial or prerecorded voice telephone messages for telemarketing purposes, which VoAPPs will observe without question. Indeed, VoAPPs would have no objection to narrowing the relief to exclude voicemails used for telemarketing in any circumstances. VoAPPs also will observe limitations on the time of day during which voicemails may be left as well as limitations on the duration of the voicemail message.

III. ADDRESSING THE CURRENT LITIGATION ENVIRONMENT WITH A SOLUTION THAT MEETS BOTH BUSINESS AND CONSUMER NEEDS

The DirectDROP Voicemail technology would go a long way to address what has become a greater and greater problem of the threat of class action litigation under the TCPA that effectively denies debt collection and other non-telemarketing services the

⁷ Section 64.1200(b)(2) of the Commission's rules provides that "[t]he telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges."

ability to use the latest and most efficient communications technology to reach consumers. As detailed in the pending Petition for Declaratory Ruling filed by Communications Innovators, class action lawsuits just involving autodialers have multiplied by more than 500% over the last few years and predictive dialer cases by at least 800%.⁸ Projections are for the number of TCPA lawsuits to continue to skyrocket, 70% in 2013 alone.⁹

As documented by the U.S. Chamber of Commerce, this increase in TCPA lawsuits, often multi-million dollar claims, does not reflect so much aggrieved consumers as an opportunistic plaintiffs bar, with most cases filed by just very few firms.¹⁰ As pointed out by the Chamber, boilerplate complaints net hundreds of thousands of dollars for plaintiffs' attorneys, with little more than pennies for consumers; one recent case netted \$5.5 million for those administering the settlement.¹¹ Even frivolous lawsuits cost significant sums to defend, with the risk of annihilating damages being so severe that costly settlement is often the only practical choice a company may have.¹²

⁸ Petition for Declaratory Ruling of Communication Innovators, CG Docket No. 02-278 (Jun. 7, 2012) (*Innovators Petition*), at 15.

⁹ Darren Waggoner, *TCPA Lawsuits Projected to Grow 70 Percent in 2013*, Collections&Credit Risk (Dec. 26, 2013), available at <http://www.collectionscreditrisk.com/news/tcpa-lawsuits-protected-to-grow-3016431-1.html> (free registration required) (last accessed Jun. 4, 2014); Patrick Lunsford, *TCPA Lawsuits Really are Growing Compared to FDCPA Claims*, insideARM.com (Accounts Receivable Management), available at <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/> (last accessed Jun. 4, 2014).

¹⁰ Comments of the U.S. Chamber of Commerce on *Innovators Petition*, CG Docket No. 02-278 (Nov. 15, 2012), at 5.

¹¹ *Id.* at 6.

¹² *Id.*

The cost of such litigation goes beyond the pure dollars and cents of the recoveries themselves, even though enormous. It threatens the viability of an important industry responsible for debt collection on behalf of hundreds of thousands of businesses, small and large, throughout this country. The accounts receivable management industry entails numerous small businesses, many owned, in whole or in part, by minorities and women.¹³ That industry's leading trade association, ACA International, points to research showing that debt collection companies were responsible for creating 302,000 jobs.¹⁴ These companies perform a vital service for American business. Again, as documented by the ACA, its members alone have been responsible for the recovery of \$55 billion dollars in debt for goods and services, recovery which is vital to those businesses served.¹⁵

Collection of consumer debts serves an important function in credit markets by reducing the costs of lending.¹⁶ The ability to collect on past debts, and to do so in a cost efficient manner, further allows business to provide more credit to consumers at lower prices.¹⁷ Preventing businesses from using available technology to make more

¹³ See Petition for Rulemaking of ACA International, CG Docket No. 02-278 (Feb. 11, 2014) ("ACA Petition"), at 3.

¹⁴ *Id.*, n.5 citing *The Impact of Third-Party Debt Collection on the National and State Economies*, at 2, Feb. 2012, available at <http://www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf> (last accessed Jun. 4, 2014).

¹⁵ *Id.* at 5.

¹⁶ U.S. Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2013* at 9 (Mar. 20, 2013), available at http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf ("2013 FDCPA Annual Report") (last accessed Jun. 4, 2014); U.S. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* at 11 (Jan. 2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf> ("2013 FTC Debt Buyer Report") (last accessed Jun. 4, 2014).

¹⁷ 2013 FDCPA Annual Report at 9.

efficient and reduce the costs of their debt collection activities inevitably affects their costs of lending and those costs, in turn, are borne by the consumer in higher costs and lack of availability of credit. It can also have the unintended result of invading consumer privacy through errors in human dialing which autodialers more readily avoid, as well as calls made directly to wireless and residential numbers at inconvenient times, potential dropped calls, etc.

Indeed, consumers' frustration and sense of invasion of their personal space when they get calls over the dinner hour or at work or perhaps while with children or while driving or at times when the consumer is facing some other emergency or medical condition underlay the protections of the TCPA. That invasion into the consumer's private life, whether the call is live or electronic, is avoided by the DirectDROP Voicemail technology which allows the consumer to choose if, when, where, and how to review the consumer's voicemail messages.

The less intrusive nature of a direct to voicemail message versus a live call to either a consumer's wireless or residential wireline number has a corollary benefit for the business leaving the message as well. For businesses, the very fact that a direct to voicemail message is less intrusive to the recipient allows the recipient to consider the substance of the message and not just react to the intrusion. This behavior is reflected in the experiences of many VoAPPs customers who report higher response rates to debt collection messages left by voicemail versus live debt collection calls. In addition to this increased consumer engagement in the debt collection process, return calls after the

receipt of a direct to voicemail message may be made at the convenience of the consumer. In the experience of VoAPPs' customers, over half of calls that are returned by the consumer tend to occur within 2 hours of the direct to voicemail message delivery and the balance of any returned calls tend to occur within 48 hours. Some VoAPPs customers even report spikes of return calls seen after work and at other times that appear to be more convenient for the consumer to return such a message.

Concern over the impact of restrictions on the use of new technology such as autodialers in the debt collection process extends to the operations of the federal government. Thus, the Financial Management Service (FMS) of the U.S. Department of the Treasury has raised concerns with the Commission that restrictions on its ability to use autodialers can have a significant impact on federal debt collection.¹⁸ FMS points out that billions of dollars of delinquent federal debt are referred to debt collection agencies each year, the use of autodialers significantly increases the efficiencies of the debt collection process, and they "are critical to the success of the [federal government's] efforts to recover the maximum amount of debt on behalf of U.S. taxpayers."¹⁹

The FMS also points out that, far from harmful to consumers, the use of new technology such as autodialers reduces the potential for human error and better enables debt collectors to comply with the myriad of other consumer protection laws, including

¹⁸ Comment of Financial Management Service to Proposed Amendments to the Telephone Consumer Protection Act Regulations, CG Docket No. 02-278 (May 20, 2010) ("*FMS Comments*"), at 2.

¹⁹ *Id.* at 2-3.

the Fair Debt Collection Practices Act (“FDCPA”).²⁰ The FDCPA and other consumer protection laws and regulations, as well as a judicial overlay interpreting them, govern what must, may, and may not be stated in the message. Proceeding by direct automated voicemail makes consistent compliance with these requirements easier to accomplish. The FDCPA also specifies the requirements for all cease communications requests as well as stipulating other provisions for debt collection practices.²¹

While the debt collection industry lies in the bull’s eye of much of today’s TCPA litigation, it is not the only industry that operates under such threat. Global Connect in its Comments on the *ACA Petition* points out that modern predictive dialer technology is used for many beneficial purposes, including delay or cancellation notifications; disaster relief, utility outage, and school closing announcements; federal grant program updates; healthcare notifications; accounts receivable correspondence; and fraud and identity theft prevention alerts.²²

Making matters worse is the fact that the more restrictive nature of the TCPA, as applied to the use of autodialers for calls made to mobile telephone numbers together with disputes over such matters as to what constitutes an autodialer or consent to its use, makes almost any call using any technology beyond the human hand subject to potential challenge. In a world where (as of December 2013) there were over 335 million wireless devices in subscribed use in this country and 39.4% of the households

²⁰ *Id.* at 2. See also *ACA Petition* at 2 and n.3 (examples of laws governing debt collection practices).

²¹ Fair Debt Collection Practices Act, as amended by Public Law 104-208, 110 Stat. 3009 (Sep. 30, 1996), §§ 804, 805 and 806.

²² Comments of Global Connect on *ACA Petition*, CG Docket No. 02-278 (Mar. 24, 2014).

in this country have only wireless communications,²³ such restrictions have an enormous and detrimental impact on the U.S. economy.

While many of the current issues before the Commission and the courts relate to what constitutes an autodialer, as set forth below, the DirectDROP Voicemail technology solution avoids these issues because it allows for a voicemail message to be left without a call being made to the consumer's mobile telephone number. Thus, like autodialers, the DirectDROP Voicemail technology allows the use of modern technology efficiently to deliver messages to consumers, but unlike autodialers, TCPA restrictions on calls made to wireless numbers are not implicated. Further, because of the manner by which the voicemail is delivered, concerns underlying the TCPA with respect to calls coming at all hours, dropped calls, or calls for which the consumer is charged, are not an issue. The consumer chooses when or if to retrieve his or her voicemail and the manner in which the consumer will do so. At the same time, the DirectDROP Voicemail technology allows debt collection and other information providers to bring their messages to consumers using the latest in cost-efficient modern communications technology.

²³ CTIA, *Your Wireless Life: Annual Wireless Industry Survey (2014)*, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey> (last accessed Jul. 18, 2014).

IV. HOW VoAPPS DIRECTDROP VOICEMAIL TECHNOLOGY WORKS

The DirectDROP Voicemail technology enables VoAPPs customers to deliver a voice message directly to a consumer's mobile phone voicemail, without making a call to the consumer's mobile phone. After the message has been delivered to the consumer's mobile voicemail box, the consumer typically receives a Message Waiting Indicator ("MWI") via the consumer's mobile service provider that there is a new voicemail message waiting for the consumer.

VoAPPs' Adapti-Sig technology operates within the telephone signaling network. The network signaling events initiated by Adapti-Sig result in a call being made to a number assigned to the voicemail service provider's enhanced service platform (the voicemail computer or server). Often (but not always) the voicemail platform is owned and operated by the wireless service provider. This call accesses the voicemail platform over a business wireline (a landline servicing the voicemail provider) via a telephone number that is assigned to an enhanced information service (voicemail). Once the call has been received by the voicemail provider, the voicemail message is delivered to the server space associated with the consumer. Then, after the voicemail has been deposited on the voicemail service provider's server, the consumer generally will receive a MWI from his or her wireless service provider alerting the consumer of a voicemail. No call appears on the consumer's telephone bill.²⁴

²⁴ A more detailed technical showing as to the method by which this voicemail delivery is accomplished is attached as Appendix A to this Petition.

As with all voicemails, a consumer may, at his or her discretion, separately make a call to retrieve the voicemail. While a call retrieving a voicemail would be a separate, consumer-initiated call event, as set forth in Section VII below, consumers have a variety of options available to them for receiving their wireless service voicemails without incurring a charge. VoAPPs is aware of no instances when a consumer incurs a charge merely through the activation of the MWI.²⁵

V. DIRECTDROP DOES NOT INITIATE A CALL TO A NUMBER ASSIGNED TO A WIRELESS SERVICE

The TCPA prohibits only ATDS and prerecorded message calls made to a telephone number assigned to wireless services. “Rather than prohibiting calls to a telephone, § 227(b)(1)(A)(iii) prohibits a person from making a ‘call’ ‘to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call’.”²⁶

The Commission has clarified when a number is “assigned to” a cellular telephone service.²⁷ In acting upon a Petition for Clarification filed by Verizon

²⁵ See, e.g., AT&T’s Wireless Support, *How Calls to Voicemail are Billed*, available at <http://www.att.com/esupport/article.jsp?sid=KB63170#fbid=uVvjWVzxjsZ> (“AT&T Voicemail Billing Primer”)(last accessed Jul. 18, 2014).

²⁶ *Lozano v. Twentieth Century Fox Film Corp.*, 702 F.Supp.2d 999, 1005 (N.D. Ill, 2010) (emphasis in original); see also *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014 (rel. Jul. 3, 2003) (“2003 TCPA Order”), at 14115, ¶ 165 (noting that the restriction on calls using automatic dialing system including voice calls and text calls, “**provided** the call is made **to a telephone number assigned to such service.**”) (emphasis added), accord, 2012 TCPA Order at ¶ 4.

²⁷ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Second Order on Reconsideration, 20 FCC Rcd. 3788 (rel. Feb. 18, 2005) (“Second Reconsideration Order”), at 3806-07, ¶¶ 45-48.

Wireless, the Commission “affirm[ed] that a telephone number is assigned to a cellular telephone service, for purposes of TCPA, if the number is currently being used in connection with that service.”²⁸ The Commission further concluded that “a call placed to a wireline number that is then forwarded, at the subscriber’s sole discretion and request, to a wireless number or service, do[es] not violate the ban on autodialed and prerecorded message calls to wireless numbers.”²⁹ In other words, the TCPA addresses only calls made to the telephone numbers assigned directly to the cellular telephone itself.

Here, the numbers to which DirectDROP completes a call are not “currently being used in connection” with a cellular telephone or other wireless service. Standard telecommunications protocols are used to instruct the local telephone landline switch to place a business-landline call to a business class telephone number assigned to the voicemail service provider’s platform. The call is paid for by VoAPPs. This business class telephone number is used exclusively by the voicemail service provider to facilitate the delivery of voicemail messages. In order to retrieve the communication, the consumer must take a separate and distinct action – placing a call to the voicemail service provider’s voicemail server.³⁰

²⁸ *Id.* at 3807, ¶ 47 (emphasis added).

²⁹ *Id.*, ¶ 48.

³⁰ We note that some Smartphone users elect to pay for an added service – “visual” or “enhanced” voicemail service – by which a voicemail is delivered to them over a data channel, in which case they could also make the decision whether to listen to the copy of the message that has been forwarded or to discard it without listening to it. This reflects the fact that the choice of voicemail features, including how it is accessed, is very much within the consumer’s control.

The DirectDROP technology never makes a call to the number assigned to the consumer's mobile phone (*i.e.*, the number assigned to the cellular telephone service). Rather, after the call to the voicemail server has been completed, the consumer's handset displays whatever MWI may be enabled on the consumer's handset (something that the consumer can generally control). Moreover, no content is deposited on the consumer's handset through the DirectDROP technology; instead the content is delivered to the voicemail service provider's server.

For the foregoing reasons, DirectDROP does not make a call to any telephone *number* assigned to any enumerated service and should be determined to be outside of the boundaries of the statutory reach of the TCPA or the Commission's implementing regulations.

VI. VOICEMAIL IS NOT A CELLULAR TELEPHONE SERVICE OR OTHER RADIO COMMON CARRIER SERVICE

As discussed above, the TCPA restricts ATDS and prerecorded voice calls to the telephone numbers of specific types of services, including, *inter alia*, "cellular telephone service" and "other radio common carrier service."³¹ DirectDROP completes a call to a voicemail service, which is neither a "cellular telephone service" nor a "radio common carrier service." Rather, voicemail is an enhanced or information service provided by the wireless carrier or other voicemail service provider.³²

³¹ 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

³² To be clear, the method of delivery does not involve a call made to a wireless service number that then reverts to voicemail, but a call made to the wireline number of the voicemail service provider so as to allow a voicemail message to be placed upon the voicemail service provider's voicemail server.

Cellular telephone and other radio common carrier (now known as public mobile) services are common carrier services. Rules specifically governing cellular telephone and other public mobile services are contained in Part 22 of the Commission's rules.³³ Notably, the Commission's rules governing such services do *not* govern the provision of voicemail by cellular telephone or other public mobile service providers, because voicemail is not provided as a common carrier service.

Rather, because of its "store and forward" nature, voicemail has been classified as an Enhanced or Information Service since the FCC's Computer Inquiry II was finalized in 1980.³⁴ Accordingly, here too, because DirectDROP does not make a call to a common carrier service number, but rather to a voicemail server, it is outside of the scope of the TCPA and the Commission's implementing regulations.

³³ 47 C.F.R. § 22.1 *et seq.*

³⁴ *See, e.g., Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, Order, 10 FCC Rcd 13758, 13770-74 (1995); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, Access to Telecommunications Service, Telecommunications, Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6452 (1999).

The Commission imposes certain requirements on providers of voicemail to ensure that the product is designed to be accessible to individuals with disabilities. Those requirements are imposed pursuant to Title I of the Act, and the regulations are not among those imposed as a common carrier regulation. *See* 47 C.F.R. §§ 7.1-7.23; 47 U.S.C. §255.

VII. DIRECTDROP DOES NOT CALL A SERVICE FOR WHICH THE CALLED PARTY IS CHARGED FOR THE CALL

Just as DirectDROP does not make a call to a “telephone number assigned to” a wireless service, it also does not make a call to a “telephone number assigned to” a “service for which the called party is charged for the call.”³⁵

The statutory language unambiguously focuses on whether or not a call “using any automatic language telephone dialing system or an artificial or prerecorded voice” results in “the called party [being] charged *for the call*.”³⁶ Here, that is not the case.

As discussed above, DirectDROP, at its own expense, makes a call to the business class, wireline telephone number that is assigned to the voicemail service provider’s voicemail system. It deposits the message on that provider’s server (and not on the telephone handset of the consumer). Thereafter, generally, a MWI indicator will be activated on the consumer’s handset by the wireless service provider. Consumers are not charged for the activation of the MWI.³⁷ Accordingly, because a consumer is not charged for “the call” made by DirectDROP, DirectDROP does not call a “service for which the called party is charged for the call” and is outside of the boundaries of this element of the TCPA and the implementing Commission regulations.

³⁵ 47 U.S.C. § 227(b)(1)(A)(iii).

³⁶ *Id.* (emphasis added).

³⁷ See, e.g., *AT&T Voicemail Billing Primer, supra*.

Even if a wireless subscriber may choose to make a call to retrieve a DirectDROP voicemail, that fact does not bring the DirectDROP service within the ambit of the TCPA. And, in any event, wireless subscribers have many ways to retrieve voicemail messages without incurring charges.

After DirectDROP completes its call to the voicemail service provider's server, the consumer is notified of the presence of a voicemail through the activation of the MWI. Thereafter, the subscriber, in his or her sole discretion, may make a separate telephone call to retrieve the message. Consumers, however, have several options available to retrieve their voicemail messages, including the messages deposited by DirectDROP, without incurring a "charge[] for the call," including:

1. Make a call from a landline telephone to the voicemail access number to retrieve voicemail messages;
2. Call the mobile number from another number that does not incur airtime charges and allow the phone to go to voicemail, then press * or # and enter the voicemail password to access the messages;
3. Call the mobile phone number or the voicemail access number from the mobile handset using a Free calling app (Fring, Truphone, Viber, Tango, etc.), press * or # and enter the voicemail password to access messages; or

4. Call the mobile phone number or the voicemail access number from any of the PC based Free calling apps (Gmail, GoogleVoice, WePhone etc.), press * or # and enter the voicemail password to access messages.

Given the many ways in which consumers can access voicemail, if they so choose, including many in which the consumer incurs no charge, it is not the case that DirectDROP Voicemail technology calls a number assigned to “a service for which the called party *is charged* for the call.” The fact that some consumers may voluntarily make a separate call through their wireless service, and, depending on the wireless service plan they elected, possibly incur a charge to retrieve the message, does not change the clear meaning of the operative statutory language or the Commission’s implementing regulations.

VIII. IN THE ALTERNATIVE, THE COMMISSION SHOULD EXERCISE ITS AUTHORITY UNDER SECTION 227(b)(2)(C) OF THE ACT TO EXEMPT THE DIRECTDROP VOICEMAIL TECHNOLOGY FROM TCPA RESTRICTIONS.

The Commission has the authority, “by rule or order,” under Section 227(b)(2)(C) of the Act to exempt businesses from the ATDS and artificial voice restrictions set forth in Section 227(b)(1)(A)(iii) of the Act for calls made to a telephone number that is assigned to a wireless service when the recipient is not charged for the call and subject to such other conditions as the Commission may prescribe to protect the privacy rights intended to be protected by the TCPA.³⁸ While VoAPPs believes that it has demonstrated that the manner in which the DirectDROP Voicemail technology leaves a voicemail does not result in a call to the telephone number of a wireless service and is therefore exempt from the operation of Section 227(b)(1)(A)(iii) of the Act (and Section 64.1200(a)(1)(iii) of the Commission’s rules), if the Commission were to determine otherwise, it could provide the necessary relief through the exercise of its authority under Section 227(b)(2)(C).

As set forth herein, the DirectDROP Voicemail technology does not result in a charge to the recipient for the delivery of the voicemail to the recipient’s voicemail box, so the first prong for the exercise of the Commission’s authority under Section 227(b)(2)(C) is met.³⁹ With regard to privacy concerns, as set forth above, the fact that it

³⁸ The Commission recently exercised this authority to exempt autodialed or prerecorded package delivery notifications made to consumers’ wireless numbers. See *Cargo Airlines Petition for Declaratory Ruling*, Order, 29 FCC Rcd 3432 (2014) (“*Cargo PDR Order*”).

³⁹ As set forth above, even if one considered a separate call that might be made by a consumer to retrieve a voicemail as covered under the TCPA, the consumer has many options to make such a call without charge. We note in this regard that the *Cargo PDR Order*, while “exempting notifications that count

is the recipient who determines if, when, and how to retrieve a voicemail message addresses the kind of concerns over the disruption of consumers' lives that lay the foundation for the TCPA. Further, the manner in which the voicemail is delivered eliminates any concern for dropped or dead air calls. Voicemails are simply left for the consumer to retrieve; there is no waiting for the consumer to pick up a "call" – there is no call to receive.

To protect consumers further, the Commission could craft the exemption to apply the strictures of Section 64.1200(b) of the Commission's rules, which would require, among other things, the identification of the company making the call and provide a telephone number meeting the requirements of that Section⁴⁰ for a call to the business to be returned. While Section 64.1200(b) contains a number of additional restrictions on the use of artificial or prerecorded voice telephone messages for telemarketing purposes, VoAPPs would have no objection to the further narrowing of the relief herein sought so as not to apply to voicemails left for telemarketing under any circumstances. The relief sought herein would allow debt collection and other non-telemarketing business and informational voicemail messages to be delivered in an efficient and cost-effective manner.

against the recipient's plan minutes or texts" and requiring "toll-free" numbers for voicemail calls to be returned, does not require that the wireless airtime taken to listen to a voicemail from a cargo delivery service or to call a toll-free number would also be required to be free from wireless airtime charges, if incurred, or, if so, how that might be accomplished.

⁴⁰ Section 64.1200(b)(2) of the Commission's rules provides that "[t]he telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges."

Finally, should the Commission deem it necessary, VoAPPs would have no objection to limiting the time period during which voicemails may be left and the duration of the voicemail message. With regard to the time period of delivery, Section 64.1200(c)(1) of the Commission's rules restricts the time period for artificial or prerecorded calls made for telephone solicitations to residential telephone subscribers to between 8 a.m. and 9 p.m. local time. While by its terms that provision would not apply to the DirectDROP technology, if determined to be necessary to protect consumers' privacy, an exemption issued under Section 64.1200(b) could make this a condition for the timing of delivery of all voicemails operating under the exemption.

Should the Commission also deem necessary a time limit on voicemails made under the requested exemption, VoAPPs recommends a limit of 80 seconds. The reason for this request is that many of those using the DirectDROP Voicemail technology will be those in the collection industry whose messages must provide certain information under the other federal and state laws under which they operate. Potential changes in consumer regulation could expand those informational requirements substantially making a shorter limit on the length of the message, *e.g.*, 60 seconds, difficult or impossible to implement.⁴¹

While several of the restrictions identified above would parallel those set forth in the *Cargo PDR Order*, certain of the conditions in that Order, particularly as to opt-out provisions, would not be appropriate given the nature of voicemail technology and

⁴¹ *In the Matter of Debt Collection (Regulation F)*, Advance Notice Of Proposed Rulemaking, 78 FR 67848 (Nov. 12, 2013).

the differences in the businesses involved. The voicemail message by the very nature of its manner of delivery technically would not allow an interactive opt out function. In addition, the debt collection industry is subject to other and more detailed opt-out conditions under the FDCPA.⁴² A communication of these lengthy and detailed cease communications instructions would not be practical. Yet, failure to provide anything short of a full recounting of the FDCPA cease communications provisions could create confusion as to the conditions under which a debtor might still be contacted.

Furthermore, requiring such a message would undercut the value of the voicemail contact, to encourage the debtor to make contact with the creditor to address the debtor's situation, not to suggest that with a simple call all contact regarding the debt will disappear.

The other primary distinction between the relief sought here and in the *Cargo PDR Order* is that the relief sought herein would apply only to voicemail messages delivered without a call to the wireless number ever being made. That fact, more than any other, gives the recipient of the message, the control over the situation and the

⁴² Section 805(c) of the FDCA provides:

“(c) CEASING COMMUNICATION. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except --

- (1) to advise the consumer that the debt collector's further efforts are being terminated;
- (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
- (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.”

ability to protect his or her own privacy. The consumer can pick the time, place, and facility to review the voicemail message if the consumer does so at all.

IX. CONCLUSION

The TCPA does not prohibit, nor was it designed to prohibit, debt collection and other businesses from using the most efficient technology available to them to deliver information directly to their customers' voicemail without making a call to those customers' wireless service or causing such customers to incur a charge for the delivery of such voicemail message. That is what VoAPPs DirectDROP Voicemail technology does. Accordingly, VoAPPs' respectfully requests the Commission to issue a declaratory ruling that the use of VoAPPs' DirectDROP by its customers as described herein does not violate the TCPA or implementing Commission regulations.

Respectfully submitted,



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Technology Overview

The DirectDROP Voicemail service utilizes a technology we call Adaptive Signaling (Adapti-Sig) to establish a call directly to the voicemail platform that serves a mobile telephone subscriber. Unlike the traditional delivery of voicemail messages, Adapti-Sig does not make a call to the mobile handset. Rather, Adapti-Sig causes the mobile switch to make a call to a voicemail platform as described below.

As the name implies, Adapti-Sig operates in the signaling layer of the Public Land Mobile Network (PLMN). The signaling layer is a separate data network used for inter-switch communication and control. Adapti-Sig is compliant with all applicable international telecom and signaling standards including: ITU-1204, ITU-1214, ITU-1224, GR 586-CORE, RFC-3398 and RFC-3261.

As depicted in Figure 1, the mobile telephone network fundamentally consists of two parts: the Radio Access Network (RAN) which controls the transmission and reception of radio signals; and the Public Land Mobile Network (PLMN) which is the land-based portion of the network that provides switching and transport for the mobile network. (Newton, 2013)

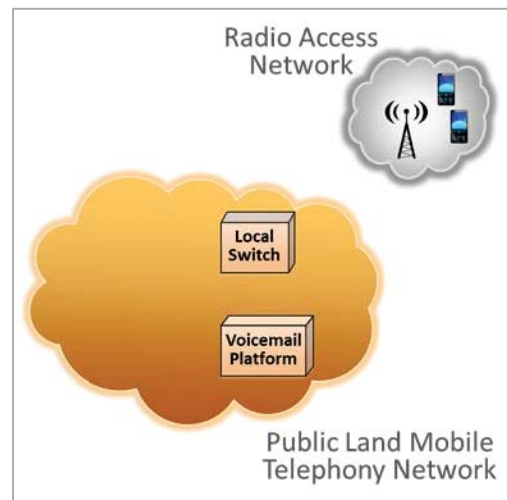


Figure 1. The Mobile Telephone Network

Two components of the PLMN that are germane to the DirectDROP Voicemail service include the Local Switch (technically referred to as a Mobile Telephone Switching Office or MTSO) and the Voicemail Platform. MTSOs and Voicemail Platforms are most often located in a central office or data center of a facilities based wireless service provider.

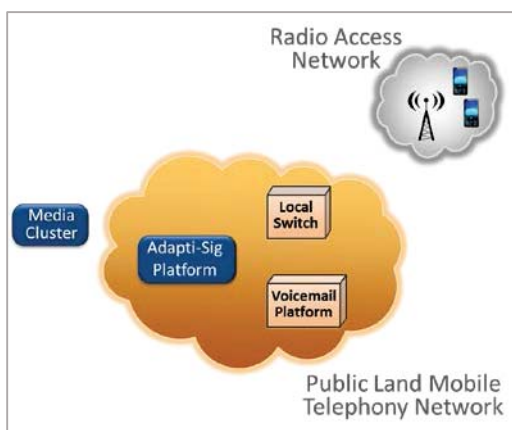


Figure 2. The Mobile Telephone Network with Adapti-Sig Components

Figure 2 depicts the architectural components of the Adapti-Sig platform. The Adapti-Sig platform itself is a group of rack-mounted servers located 'inside' the telephone network. They are directly connected to the PLMN signaling network. These servers are equipped with business telephone lines, which are assigned a set of business class telephone numbers. VoAPPs is charged for any calls originating from these telephone numbers.

Additionally, pre-recorded messages are stored either in the cloud or at a customer site and are referred to architecturally as the Media Cluster.

The International Telecom Union (ITU) defines the way that telephone calls are processed within the MTSO. (ITU Q.1204, 1993) (ITU Q.1214, 1993) (ITU Q.1224, 1997). To deliver a pre-recorded message directly to the voicemail platform, Adapti-Sig creates and transmits a series of Network Signaling Events into the PLMN signaling network. These events cause the MTSO to make a call to the telephone number that is assigned to the voicemail service provider’s platform. It is a business landline -to- business landline call, made by the MTSO to the Voicemail Platform, which is contained within the Public Land Mobile Network. No call is made to the mobile handset.

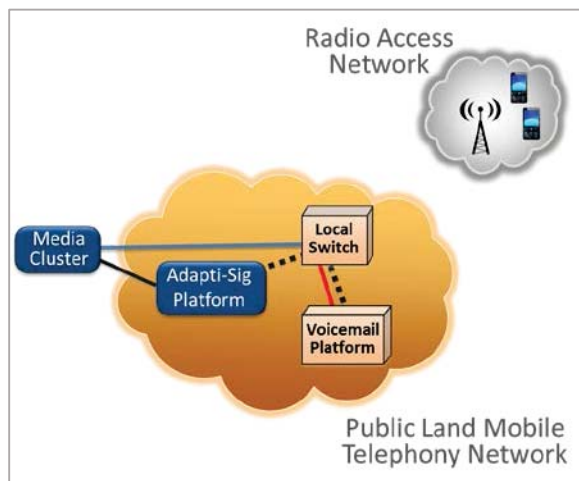


Figure 3. The Mobile Telephone Network with Adapti-Sig Components and Signaling & Call Paths

Figure 3 depicts the signaling and call path flows between the components of the Public Land Mobile Network involved with DirectDROP Voicemail. The dotted black lines depict the previously described signaling message flows between Adapti-Sig, the MTSO and the Voicemail Platform.

The red line in Figure 3 represents the call made by the MTSO to the voicemail platform as a result of its interaction with the Adaptive Signaling technology.

Once this call is established, a voice path between the Media Cluster and the MTSO is initiated and connected to the existing call. This is the path over which the recorded message is played. The blue line in Figure 3 represents this voice path.

After the voicemail has been deposited on the voicemail providers’ server, the consumer will usually receive a Message Waiting Indicator (MWI) via their wireless service provider alerting the consumer that they have a new voicemail waiting for them. The MWI is a feature of voicemail that is generally controllable by the consumer. No call appears on the consumer’s telephone bill because no call was made to the mobile telephone number assigned to the consumer.

In summary, the DirectDROP Voicemail technology platform called Adapti-Sig is a direct-to-voicemail, signaling-based, message delivery technology that uses standard telecommunications protocols to instruct the local telephone switch to make a business-landline call to a business class telephone number assigned to the voicemail service provider’s platform. Then, once this call is established, a voice path is directed to the call and the pre-recorded message is played into the voice mailbox from the media cluster.

DirectDROp Voicemail Architecture

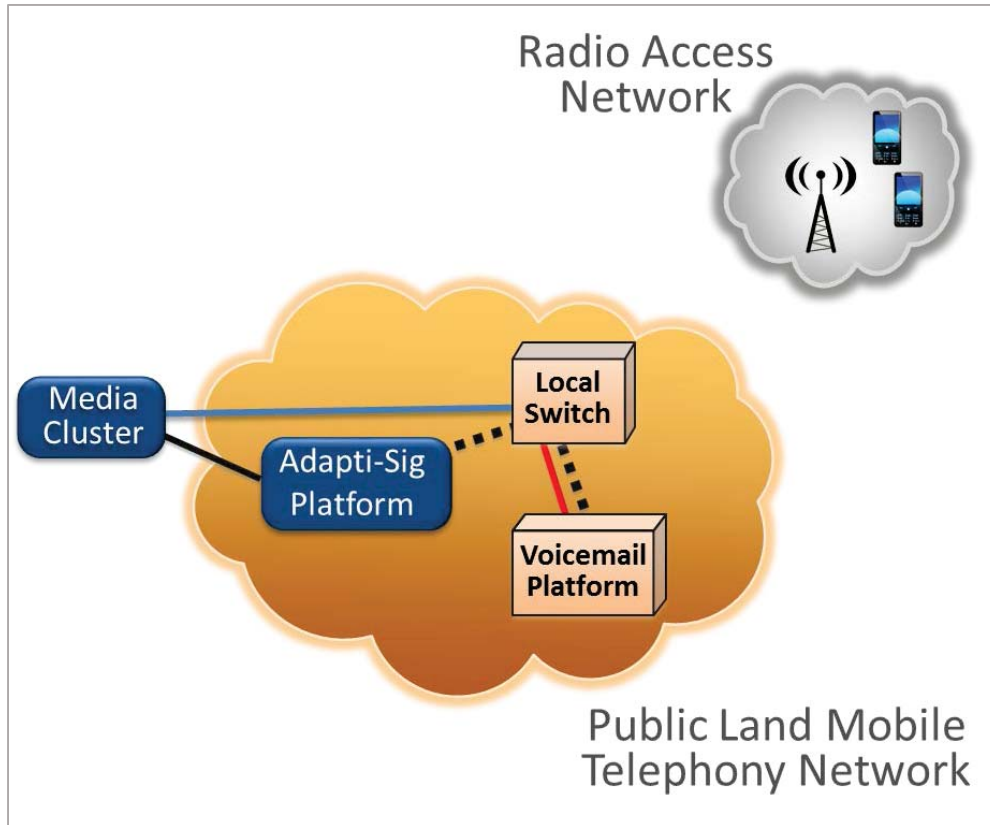


Diagram Definitions

Media Cluster	A repository of recorded messages that may be cloud-based or resident at a customer's site
Adapti-Sig Platform	Short for "Adaptive Signaling", Adapti-Sig is a proprietary signaling technology developed by VoAPPs.
Public Land Mobile Telephony Network	A technical term for the ground-based mobile telecommunication network. Also referred to as the "core network" or just the "core".
Local Switch	A component of the Public Land Mobile Telephony Network representing any of the Mobile Telephone Switching Offices (MTSO) owned by a facilities based wireless carrier
Voicemail Platform	A component of the Public Land Mobile Telephony Network providing voicemail service. Third parties may provide Voicemail service, but the wireless carrier typically provides it. Voicemail Platforms are usually located in the wireless carrier's central office or data center. They are often collocated with the MTSO. Voicemail is an Enhanced Information Service.
Radio Access Network	The part of the mobile carrier network that controls transmission and reception of radio signals

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