

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of	:	CG Docket No. 02-278
	:	
Vincent Lucas’s Petition for a Declaratory Ruling	:	
Regarding the Liability of Entities that Provide	:	
Substantial Assistance to Telemarketers While	:	
Knowing that the Telemarketers Are Engaged in	:	
Practices that Violate the Telephone Consumer	:	
Protection Act	:	
	:	
Rules and Regulations Implementing the	:	
Telephone Consumer Protection Act of 1991	:	
	:	

REPLY COMMENTS OF THE PETITIONER

I. The U.S. District Court has referred this matter to the primary jurisdiction of this Commission

I filed a copy of the Order and Opinion of the court (“Referral Order”) with the Commission on Aug. 19, 2014. The Court made the referral in order to benefit from this Commission’s experience and expertise and in order to promote regulatory uniformity. Referral Order at 9-12.

II. The TMC Group Defendants have not filed public comments on the Petition

Remarkably, the TMC Group has not submitted public comments regarding this Petition. I served a copy of the Petition and the Commission’s Public Notice seeking comments on the Petition (DA 14-976) in a timely manner upon their attorney, Helen Mac Murray.¹ On July 10,

¹ The Petition was served on upon her on June 18, 2014 and DA 14-976 was served upon her on July 15, 2014. Service was made using the CM/ECF system of the U.S. District Court for the Southern District of Ohio. Mac Murray is a registered user of the CM/ECF system and has consented to service through the system.

2014, her law firm's website noted that the FCC had requested comments on the Petition.² The TMC Group has no excuse for not filing public comments.

III. Only one commenter, Flowroute, Inc., directly opposes the Petition, and their comments have little merit

A. Flowroute does not care about the impact that their recommendations would have on TCPA enforcement and has a misguided view of legislative intent

Flowroute does not offer any solution for the flood of telemarketing calls made by foreign telemarketers with the cheerful assistance of U.S. companies like the TMC Group. Flowroute's arguments apply only to telecommunications common carriers, but they make no effort to carve out a narrow exception for common carriers. Instead, they request that the Commission entirely deny the Petition and declare that "telecommunications providers" have absolute immunity from TCPA lawsuits.

There is no evidence that Congress intended for vicarious liability principles not to fully apply to the TCPA. Congress certainly was aware of the rule of judicial interpretation that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules."³ Consequently, if Congress has intended for those vicarious liability principles not to apply to the TCPA, it would have said so in the legislation.

Congress's clear legislative intent was to put an end to unwanted telemarketing calls. Without vicarious liability for assisting and facilitating, the TCPA is unenforceable in practice

² <http://mpslawyers.com/fcc-solicits-comments-on-recently-filed-tcpa-petitions/> (accessed July 12, 2014)

³ See, e.g., *Meyer v. Holley*, 537 U.S. 280, 283 (2003)

against calls from foreign telemarketers and Congress's clear intent will be unfulfilled.⁴ Vicarious liability can and should be recognized, especially when vicarious liability is necessary in order to fulfill Congress's goals in enacting the legislation.

Furthermore, there is absolutely no evidence that Congress made a decision to put "assisting and facilitating" liability in the FTC's TSR but not in this Commission's TCPA regulations.⁵ The TSR and this Commission's regulations were written by regulatory agencies, not Congress. The evidence shows only that telemarketing is subject to regulations from two independent federal regulatory bodies, whose jurisdictions do not entirely overlap, and those two regulatory bodies have not yet fully harmonized their regulations, despite "Congress' intent that the Commission harmonize its TCPA enforcement, to the extent possible, with that undertaken by the FTC in connection with its Telemarketing Sales Rule"⁶. The provision of 15 U.S.C. § 45(a)(2) exempting common carriers from the FTC's jurisdiction was written long before the TCPA was written. Although common carriers are exempt from the FTC's jurisdiction, they are subject to certain statutes and regulations that apply specifically to them, 47 U.S.C. §§ 201-231, including § 206⁷:

In case any common carrier shall ... permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, ... such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, ...

The TCPA is in the same chapter as § 206. The legislation shows that Congress did not intend for telecommunications common carriers to be above the law, but instead Congress intended for

⁴ Petition at 14.

⁵ *Contra* Flowroute comments at 3-4 which claim that "Congress most likely recognized this potential conflict, which is why 'assisting and facilitating' liability is enforced under the jurisdiction of FTC, rather than the FCC"

⁶ Dish Network Declaratory Ruling ¶ 37

⁷ See also Shields's comments at 4-5.

common carriers to be tightly regulated and to give one regulatory body exclusive jurisdiction over common carriers. This Commission is the only regulatory body that has jurisdiction to decide what vicarious liability principles to apply to common carriers.⁸

B. CNAM management service providers do not act as common carriers

Flowroute's arguments simply do not apply to the TMC Group because they were not acting as a common carrier. Not all "telecommunications providers" are common carriers.⁹ In the area of telecommunications, only common carriers are exempt from the FTC's jurisdiction.¹⁰ The term "common carrier" is defined in 47 U.S.C. § 153. "The Commission has repeatedly found in various contexts that the definition of 'telecommunications service' under the Act is equivalent to 'common carrier' service."¹¹ "The Act distinguishes 'telecommunications' from 'telecommunications service.'"¹² "[T]he Commission concluded that the Act's 'information service' and 'telecommunications service' definitions establish mutually exclusive categories of service."¹³ For example, broadband service providers are not common carriers because broadband is considered an "information service" instead of a "telecommunications service".¹⁴

⁸ Guessing at legislative intent from sources other than the legislation itself is a dubious endeavor. The Senate as a whole did not vote on S.Rep. 102-178. Nobody can know whether the President and a majority of the House and Senate would have agreed with every sentence in the Senate Report. Furthermore, the Senate Report was in regards to an early draft of the legislation, which did not contain 47 U.S.C. §227(b)(2) and (c) which grant this Commission broad discretion to promulgate regulations implementing the TCPA. Under that broad discretion, the Commission has already held that common carriers can be liable in limited circumstances for fax broadcasts. See Section E, *infra*.

⁹ Flowroute uses the term "telecommunications provider" which is not defined in 47 U.S.C. § 153.

¹⁰ 15 U.S.C. § 45(a)(2).

¹¹ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC 02-77, at 33 n. 205.

¹² *Id.* at 26, ¶ 40.

¹³ *Id.* ¶ 41

¹⁴ *Id.* The Commission's classification of broadband was affirmed in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005).

Furthermore, a common carrier is exempt from the FTC's jurisdiction only when it is acting as a common carrier.¹⁵

The TMC Group does not act as a common carrier. The TMC Group denies transmitting any of the telemarketing messages.¹⁶ Instead, they lease their telephone numbers to telemarketers, and then the telemarketers arrange some other means for transmitting their calls to consumers. "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." However, the TMC Group does not charge a fee to telemarketers. Instead, the TMC Group pays telemarketers to use their telephone numbers. The CNAM-MS service is correctly characterized as an "information service" instead of a "telecommunications service". The CNAM-MS service allows a telephone company to look up the name associated with a telephone number. The service is not provided "directly to the public" for a fee as required in the definition of "telecommunications service." The service for which the TMC Group charges a fee is provided to telephone companies, not the public.

¹⁵ *National Ass'n of Reg. Util. Com'rs v. FCC*, 533 F. 2d 601, 608 (D.D.C. 1976) ("[I]t has long been held that 'a common carrier is such by virtue of his occupation,' that is by the actual activities he carries on. Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." (footnote omitted); *FTC v. Verity Intern., Ltd.*, 194 F. Supp. 2d 270, 274-5 (S.D.N.Y. 2002) ("ACL's argument presupposes that once the FCC licenses an entity as a common carrier, it is a common carrier for all purposes and thus entirely beyond the reach of the FTC. But that premise is fundamentally erroneous. An entity that is a common carrier may engage in a broad range of activities, some integral to its functions as a common carrier and some entirely extraneous to them. Even where Congress commits regulation of common carrier activities to a particular agency, it would make little sense to exempt a carrier's extraneous activities from laws of general application affecting the broad sweep of American business. In fact, ACL has conceded that the Communications Act, as amended, specifically states that 'a telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.' Thus, the better considered authorities, as well as the FCC, agree that whether an entity is a common carrier for regulatory purposes depends on the particular activity at issue. In other words, an entity may be a common carrier within the meaning of the Communications Act for some purposes and not for others." (footnotes omitted))

¹⁶ "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received" 47 U.S.C. § 153(50).

C. Common carriers are not permitted to provide CNAM-MS revenue sharing

Under 47 U.S.C. § 203, a common carrier must publish its prices for carrier service. CNAM-MS revenue sharing, if provided by a common carrier, would be a partial refund of charges, which is prohibited by 47 U.S.C. § 203(c)(2).

D. Common carriers are not required to provide service to telemarketers who violate the TCPA

Contrary to Flowroute's comments at 3, common carriers are only prohibited from making "unjust or unreasonable discrimination".¹⁷ It is neither unjust nor unreasonable for a common carrier to deny service to a company when the common carrier has received an unusually high volume of complaints that the company is using the common carrier's service for illegal telemarketing.

E. Flowroute makes ridiculous statements regarding the impact that granting the Petition would have on common carriers

Consider a telecommunications company that provides VoIP service to foreign companies. Illegal calls from foreign telemarketers usually cannot be stopped at the point of origin because the foreign telemarketer is often beyond the practical reach of U.S. courts. If the VoIP provider has no responsibility when faced with a large volume of complaints of illegal telemarketing, then there is no choke-off point at which the illegal calls can be stopped from reaching consumers. When the TCPA was enacted, the high cost of international telephone calls provided a natural barrier to abusive foreign telemarketing. VoIP and other technologies have removed that barrier.

¹⁷ 47 U.S.C. §202(a)

Flowroute argues that if the Petition were granted, telecommunications providers might be required to eavesdrop on their customers' calls or verify that every call recipient had consented to each call.¹⁸ These arguments are ridiculous. In the context of a common carrier, I would expect "consciously avoid knowing" to mean simply that the common carrier cannot turn a blind eye to a large volume of complaints that a client is using their service for illegal telemarketing. The Commission's regulations already provide that a fax broadcaster is liable "if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions."¹⁹ Common carriers are not exempt from this regulation.²⁰ That is consistent with how I would expect "knows or consciously avoids knowing" to be interpreted for a common carrier. Actual notice exists when the carrier receives numerous credible complaints. As noted, 47 U.S.C. § 206 already prohibits a common carrier from "permit[ing] to be done" any act unlawful under the TCPA.

The TMC Group shows why it would be unwise to grant a blanket exemption to CLECs. Although Pacific Telecom is registered as a CLEC, it does not act as a common carrier with respect to the relevant calls. If this Commission determines that an exemption should exist for CLECs (and I see no reason to grant an exemption), such exemption should not apply when the CLEC assigns the telephone number to a company affiliated with the CLEC. Pacific Telecom is acting in concert with two affiliated companies, ITC and TMC, who are not CLECs, in pursuit of a common design to provide the CNAM-MS service to telemarketers. "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [] does a tortious

¹⁸ Flowroute comments at 4

¹⁹ 47 C.F.R. 64.1200(a)(4)(vii)

²⁰ *1992 TCPA Order*, 7 FCC Rcd at 8780, ¶ 54 ("In the absence of 'a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,' common carriers will not be held liable for the transmission of a prohibited facsimile message.")

act in concert with the other or pursuant to a common design.” *Restatement (Second) of Torts* § 876(a).

IV. NSC does not directly oppose the Petition but urges caution

NSC admits that the TMC Group’s actions are “an egregious instance of complicity by parties with respect to facilitating violations”²¹, but urges the Commission to “proceed cautiously” and to conduct, in essence, another round of comment gathering²².

With due respect to NSC, I cannot agree with its request for more comment gathering. The U.S. District Court has strongly urged the Commission to act promptly upon the conclusion of the current comment period. Referral Order at 12. There is no evidence that another round of comment gathering would significantly aid the Commission. The text of the relief requested is clearly spelled out on the first page of the Petition, and the “industry at large” has already had an opportunity to comment on the Petition. NSC claims that the Petition would potentially impose liability on “whole new classes of defendants”.²³ However, except for common carriers, the relief sought imposes no additional legal duty than what the FTC’s TSR already imposes. Key aspects of the TMC Group’s business model have been emulated by several other companies.²⁴ Until this Commission makes a ruling on the Petition, these companies may feel free to be complicit in unlawful telemarketing.

²¹ NSC comments at 1

²² *Id.* at 4

²³ *Id.* at 3

²⁴ For example, a Google search of “CNAM revenue sharing” on Aug. 24, 2014 showed several companies that appear to offer this service.

NSC is concerned that “any Order” by the Commission might have “unintended consequences”.²⁵ However, the consequences of a ruling (by this Commission or a court) that no liability exists are dire. Illegal calls will rise dramatically as more companies emulate the TMC Group’s business model.²⁶

NSC notes an increase in TCPA litigation. However, the FTC notes that “[c]onsumers are getting more robocalls than ever”²⁷. In recent years, some telemarketing companies have become very brazen in either outright violating the TCPA or claiming that their actions are legal because of some (dubious) loophole in the TCPA. Therefore, it is only natural that the number of TCPA lawsuits would increase. The TMC Group is an example of a company that thinks it has discovered a loophole in the TCPA, in which they can profit from illegal telemarketing by willfully assisting telemarketers who violate the TCPA. They claim that what they are doing is perfectly legal because they believe, in their words, that “the Telephone and Consumer Protection Act (‘TCPA’) does not affirmatively prohibit assisting or facilitating violations of that regulation.”²⁸ It is high time to set them straight.

V. Comments supporting the Petition

A. Shields, Roylance, Wood comments

Shields, Roylance, and Wood strongly support the Petition. Shields’s comments demonstrate just how harassing the calls from “Cardholder Services” can be. Wood also has

²⁵ NSC comments at 2

²⁶ Petition at 14-15

²⁷ <http://www.consumer.ftc.gov/features/feature-0025-robocalls> (retrieved Dec. 3, 2013)

²⁸ Defs.’ Reply Memorandum in Support of their Motion to Dismiss (Doc. 79), *Lucas v. Pacific Telecom Communications Group*, at 2.

litigation pending against the TMC Group and provides additional facts in support of my Petition.

B. Comments from typical consumers

During the comment period, the Commission received numerous comments from typical consumers urging the Commission to stop the “Cardholder Services” calls.²⁹ These consumers do not understand why the Commission cannot stop these patently illegal calls. The comments do not specifically mention my Petition, but presumably these consumers want the Commission to do everything in its power to stop these calls, including granting my Petition. One commenter said that these telemarketers are “making a mockery of the law.”³⁰ The TMC Group has been making a mockery of the law too.

CONCLUSION

The Commission should grant the Petition, which is virtually unopposed.

Respectfully submitted,

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²⁹ Comments of Emery Cox III, Thomas Carroll, David Roodman, and Samuel Hills. Carroll notes the harassing nature of these calls, quoting the telemarketer: “we don’t care if you are on the no call list”. Hills says that “providing any equipment, service, or method” to make it appear that the call is “coming from someone other than the actual caller” should be illegal “with very hefty fines for violation”. The TMC CNAM-MS service allows the caller to falsify its Caller ID name information. Many other comments complain about other types of telemarketing calls.

³⁰ Roodman comment. The comment said also “I fully support the proposed interpretation.” I believe he was referring to my Petition.