

TABLE OF CONTENTS

Introduction and Summary	3
Discussion	4
I. Text Messages are an Important Political Tool.....	4
II. Given the First Amendment Concerns, the Commission Should Issue an Order Proactively Protecting Political Email-to-Text Messages	8
A. The FCC should create a clear exception for text messages for which the recipient is not charged.....	8
B. The FCC should guarantee that carriers do not use third-party services to block political speech they deem to be “spam.”	10
III. The FCC should broadly preempt state laws that purport to restrict political speech over the telephone.....	13
Conclusion.....	14

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

In the Matter of)	
)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	
)	
Revolution Messaging’s Petition for an Expedited Clarification and Declaratory Ruling)	
)	
)	

REPLY COMMENTS OF CCADVERTISING

INTRODUCTION AND SUMMARY

ccAdvertising submits these Reply Comments with respect to the above-captioned petition for an expedited clarification and declaratory ruling (“Petition”) filed by Revolution Messaging (“Petitioner”). In its Petition, Revolution Messaging asks the Federal Communications Commission (“the Commission” or “FCC”) to stretch the definition of “automated telephone dialing system” (“ATDS”) set forth in the Telephone Consumer Protection Act of 1991 (“TCPA”) to include text messages sent via email. In its initial comments, ccAdvertising argued that the Commission should reject Petitioner’s request because such an interpretation of the TCPA (1) contravenes Congress’s intent when it enacted both the TCPA and, subsequently,

the Controlling Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”) and (2) would not stand up to rigorous First Amendment scrutiny.

ccAdvertising further urges the Commission to take steps necessary to protect political speech against encroachment by wireless carriers and state governments. Specifically, the Commission should issue rules (1) prohibiting the use of spam filtering technology by wireless carriers to block political messages or other messages with which the carriers disagree, and (2) clarifying that the TCPA and its implementing regulations preempt state laws regulating the use of ATDS’s or prerecorded voice messages in interstate political calls or text messages.

DISCUSSION

I. Text Messages are an Important Political Tool.

Many commenters who support the Petition seem to have a disdain for the use of text messages in the political process. They suggest that because the messages are short, they are not useful or informative or are somehow misleading. There is no reason why the length of the message should matter. Other technologies, such as Twitter, have length limitations and yet tweets have played an important role in democratic uprisings and other political movements around the world.¹ And the

¹ See, e.g., Jennifer Preston, *Protestors Look for Ways to Feed the Web*, N.Y. TIMES, Nov. 24, 2011, available at <http://www.nytimes.com/2011/11/25/business/media/occupy-movement-focuses-on-staying-current-on-social-networks.html>; Brad Stone & Noam Cohen, *Social Networks Spread Defiance Online*, N.Y. TIMES, June 15, 2009, available at <http://www.nytimes.com/2009/06/16/world/middleeast/16media.html>.

media and intelligentsia have welcomed these efforts with glee.² Political speech is the most protected form of speech, and it is not subject to the same censorship standards that apply to commercial speech, meaning that if there is ambiguity in a message, the speaker is not held liable in the same way that a commercial speaker could be.³

Finally, there seems to be great concern about anonymous messages. This fear is misplaced for two reasons. First, as the Federal Election Commission has recognized, sometimes, because of space constraints, the full identity of the speaker cannot—and need not—be included in a message.⁴ State legislators and regulators have come to similar conclusions.⁵ Second, readers of messages can evaluate the veracity of the information based on whether the source is disclosed (e.g., through an embedded link or in the header information) or not. Speakers who include more information are more likely to be successful in conveying their messages, and

² See, e.g., L. Gordon Crovitz, *Egypt's Revolution by Social Media*, THE WALL ST. J., Feb. 14, 2011, available at <http://online.wsj.com/article/SB10001424052748703786804576137980252177072.html?KEYWORDS=egypt+revolution>; Bob Samuels, *Facebook, Twitter, YouTube—Democracy*, ACADEME ONLINE, July-Aug. 2011, available at <http://www.aaup.org/AAUP/pubsres/academe/2011/JA/feat/samu.htm>; Malcolm Gladwell, *Small Change*, THE NEW YORKER, October 4, 2010, available at http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell.

³ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴ In Advisory Opinion 2002-09, the Federal Election Commission concluded that political text messages were exempt from the disclaimer requirements because of the limits on both the size and length of the information that can be conveyed in a text message.

⁵ See, e.g., 32 Ky. Admin. Regs. 2:110 (Kentucky); Neb. Rev. Stat., §49-1474.01 (Nebraska); Ala. Code § 17-5-12 (Alabama).

therefore there is an inherent incentive to include more information.⁶ If the Commission determines that anonymous speech is a problem with text messages, then it can impose requirements on the phone numbers and message headers that are used to send the messages.

Many political analysts commenting on the most recent election have said that for all of the money that Super PACs and other independent groups spent trying to influence elections, their reliance on television advertising led to a cacophony of messages that drowned each other out and failed to reach voters.⁷ Pundits and strategists have suggested that a better approach would have been to use technologies to reach out to specific voters with targeted messages.⁸ Text messages and other types of calls provide candidates, advocacy organizations, and political parties the opportunity to reach many voters, in very short time windows at a low cost, to:

- Convey information about late-breaking news;
- Provide targeted information about candidates' positions on issues (e.g., through an embedded link);

⁶ As Justice Brandeis famously articulated in *Whitney v. California*, 274 U.S. 357, 377 (1927) (overruled in part), “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.”

⁷ See, e.g., Matea Gold & Melanie Mason, ‘*Super PAC*’ Impact Proves Less Than Expected, U~T SAN DIEGO, Nov. 9, 2012, available at <http://www.utsandiego.com/news/2012/nov/09/tp-super-pac-impact-proves-less-than-expected/>

⁸ See, e.g., Ed Pilkington & Amanda Michel, *Conservative Super Pacs Turn to Social Media and Internet to Expand Reach*, THE GUARDIAN, June 29, 2012, available at <http://www.guardian.co.uk/world/2012/jun/29/conservative-super-pacs-social-media>.

- Provide links to multimedia presentations to encourage voters to learn about candidates;
- Encourage citizens to lobby candidates on issues (e.g., “call John Smith and tell him to stand up for working families”);
- Encourage voters to vote in the early voting period or the days leading up to the election; or
- Engage in real-time get-out-the-vote efforts on election day.

Thus who shun the use of text messages simply do not appreciate the immense value to the political process.

Moreover, text messages and other calls to wireless phones are becoming more essential as voters move away from landlines. According to a 2011 study conducted by the U.S. Department of Health and Human Services, approximately a quarter of adults and children live in households that did not have a landline telephone.⁹ The study also found that the prevalence of “wireless-only” households significantly exceeds the prevalence of landline-only households and the difference is expected to grow.¹⁰ Only by protecting the mobile phone channel can the Commission ensure that the electorate is engaged in the process and can receive information from candidates and other organizations. Some suggest that this can be accomplished through opt-in. Yet an opt-in approach would disproportionately favor incumbents because incumbents will have the upper hand in getting opt-ins from prior elections.

⁹ U.S. Department of Health and Human Services, *Wireless Substitution: State-level Estimates From the National Health Interview Survey, Jan. 2007-June 2010*, National Health Statistics Reports, April 20, 2011, available at <http://www.cdc.gov/nchs/data/nhsr/nhsr039.pdf>.

¹⁰ *Id.*

Likewise, candidates with large war chests will be able to afford extensive efforts to obtain opt-ins.

Given the broad importance of political text messages, the acute First Amendment concerns, and the weak legal basis to prohibit internet-to-text messages under the TCPA, the Commission should deny the Petition. But that alone will not be enough to make certain that the Commission's regulations will withstand First Amendment scrutiny. Rather, the Commission must take proactive steps to protect this form of political speech. The FCC's consideration of the Petition gives it the opportunity to address several important issues to balance consumer privacy and political speech needs, some of which have been on its plate for many, many years.

II. Given the First Amendment Concerns, the Commission Should Issue an Order Proactively Protecting Political Email-to-Text Messages.

A. The FCC should create a clear exception for text messages for which the recipient is not charged.

As discussed in ccAdvertising's initial comments, the days of being charged per call or per text, or even of having a finite number of minutes or texts, are numbered. The Commission has recognized that "the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customer for which the called party is not charged."¹¹ The TCPA specifically provides that the FCC:

¹¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CC Docket No. 92-90, ¶ 45 (1992).

[M]ay, by rule or order, exempt from the requirements of [the restriction on calls to wireless devices] calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.¹²

To date, the FCC has specifically exempted calls made by wireless carriers to their own customers, because, in the FCC's view, this was the only type of caller that could know, with certainty, that the customer would not be charged for the call.¹³ The FCC based this on the economics prevailing at the time: subscribers either paid by the minute or paid in advance for a large bucket of minutes.¹⁴

As discussed in ccAdvertising's initial comments, the market has changed considerably and consumers are no longer charged by the text or by the minute. Therefore, it is time for the Commission to update its rules to reflect this new reality.

This is not a broad request to allow all calls to wireless devices or all text messages to wireless devices. Rather, it is a request to allow political calls and texts to be made to wireless devices if the consumer will not be charged for them. This can be achieved either by requiring carriers to provide political callers with the ability to determine whether a particular customer has an unlimited plan or by

¹² 47 U.S.C. § 227(b)(2).

¹³ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No. 02-27818 ¶ 165 & n. 610 (2003) ("2003 Report and Order"); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No. 02-278, ¶ 2 & n.3 (2012).

¹⁴ 2003 Report and Order ¶ 165.

creating a reimbursement mechanism for callers. Given the trend toward unlimited calls and texts, either solution would be workable; the list would shrink over time or the reimbursement mechanism would only serve a limited number of customers. The Commission also could include a limited opt-out to avoid calls or texts from specific callers. This would protect consumer privacy and respect the First Amendment concerns that the current broad prohibition raises. It also would mean that consumers would not be charged to receive political calls or text messages.

B. The FCC should guarantee that carriers do not use third-party services to block political speech they deem to be “spam.”

Advertising supports the development and implementation of technology that permits wireless customers to opt-out of receiving unwanted messages. However, the use of blocking services by the wireless carriers to filter messages that the carriers deem to be “spam” is entirely improper. They do so regardless of whether the messages comply with the CAN-SPAM Act and/or the TCPA. Thus, wireless carriers are able to censor the messages that reach their users. Such services operate with little or no supervision and may selectively block messages based on the content. The FCC should prohibit wireless carriers from unilaterally using such services to block political messages.

As CTIA admitted in its comments, wireless carriers have engaged in “comprehensive efforts” to prevent political text messages from reaching voters by, among other things, adopting new filtering and other technological measures:

For example, carriers routinely use robust spam filtering software that detects when a large volume of spam is sent from a single phone number, or identifies texts that invite a customer to click on a link to a website. These actions block hundreds of millions of messages each month.¹⁵

These brazen actions by the wireless carriers are alarming. As licensees of a scarce public asset, mobile broadband spectrum, wireless carriers are given exclusive rights to use the spectrum. In exchange for such exclusive rights, the law imposes certain public interest obligations on licensees. Title III of the Communications Act directs the Commission to consider the demands of the public interest in the course of granting spectrum licenses, renewing them, and modifying them, and section 303(r) specifically empowers the Commission, subject to the demands of the public interest, to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.”¹⁶ For instance, television broadcasters are required to provide educational programming for children,¹⁷ information during states of emergency,¹⁸ and access for the hearing- and sight-impaired.¹⁹ In addition, broadcasters are required to give “reasonable access” to candidates for federal office to purchase airtime for advertisements²⁰ and offer “equal opportunities” for

¹⁵ CTIA Comments at 9-10.

¹⁶ 47 U.S.C. §§ 303(r), 307(a), & 309(a); *see also Cellco Partnership v. FCC*, No. 11-1135, 2012 WL 6013416 (D.C. Cir. Dec. 4, 2012).

¹⁷ 47 C.F.R. § 73.671.

¹⁸ 47 C.F.R. § 11.1, et seq.

¹⁹ 47 C.F.R. § 79.1, et seq.

²⁰ 47 C.F.R. § 73.1944.

candidates to air political advertisements.²¹ Similarly, wireless carriers are subject to regulations adopted by the FCC that are designed to serve the public interest. Just this month, the Circuit Court for the District of Columbia upheld a rule that requires mobile-data providers to offer roaming agreements to other providers on “commercially reasonable terms,” concluding that the FCC was authorized to promulgate the rule pursuant to Title III of the Communications Act, which affords the Commission broad authority to manage spectrum in the public interest.²²

The use of spam filtering software and other tools by wireless carriers to censor political text messages is a serious affront to the First Amendment and our system of spectrum allocation, which treats spectrum as a public good—not private property. As the U.S. Supreme Court articulated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969),

[T]he First Amendment confers no right on licensees to prevent others from broadcasting on their “their” frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

Id. at 391. In the same way, absent restriction imposed by the Commission, wireless carriers now have “unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.” *Id.* at 392.

²¹ 47 C.F.R. § 73.1941.

²² *Cellco Partnership*, 2012 WL 6013416, **12-13.

ccAdvertising urges the FCC to carry out its Title III mandate and issue a rule prohibiting wireless carriers from censoring text messages that are permissible under the TCPA and the CAN-SPAM Act. Such a rule would preclude the wireless carriers from using these services unless there are safeguards in place that can identify political text messages and allow them through or that have robust and expeditious white-listing procedures with appropriate safeguards to ensure that any political texts that are blocked quickly are allowed through. Many of the services that carriers use for these blocking functions are located overseas and proclaim their immunity from U.S. law.²³ Therefore, it is essential that the FCC issue clear and strong rules that the carriers must follow, so that they cannot argue that they were simply using service providers over which the FCC does not have jurisdiction.

III. The FCC should broadly preempt state laws that purport to restrict political speech over the telephone.

Finally, the Commission has yet to resolve the preemptive effect of the TCPA and its implementing regulations. The Commission raised the issue without resolving it nearly ten years ago. Shortly thereafter, ccAdvertising asked the Commission to resolve the issue definitively.²⁴ Although the Commission has issued many orders in the intervening years, it has never issued a clear statement of

²³ For example, the British non-profit The Spamhaus Project Ltd., which maintains several spam-blocking databases, has taken the position that U.S. courts have no jurisdiction over the organization and has refused to comply with orders issued by U.S. courts. See Spamhaus, *Case Answer: e360Insight v. The Spamhaus Project*, <http://www.spamhaus.org/organization/statement/003/case-answer-e360insight-vs.-the-spamhaus-project> (last visited December 6, 2012).

²⁴ See ccAdvertising's Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Sept. 13, 2004).

preemption. For the reasons ccAdvertising articulated in its 2004 petition, the Commission should rule that more restrictive state efforts to regulate interstate calling that is lawful under the FCC's rules are preempted.

CONCLUSION

For the foregoing reasons, the Commission should reject the Petition and clearly state that political text messages sent using internet-to-text technology are not subject to the TCPA. Moreover, the Commission should go further and issue clarifications to protect the use of political messages or begin the proceedings necessary to craft rules that would allow political text messages to be sent to those who do not pay for their messages.

Respectfully submitted,

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December 10, 2012