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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)
	)
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)
	)
Petition of 3G Collect Inc. and 3G Collect LLC for Expedited Declaratory Ruling that TCPA is Inapplicable to the Use of Automated Systems by Operator Service Providers Completing Collect Calls to Telephone Numbers Assigned to Cellular Telephones	)

FILED/ACCEPTED

OCT 28 2011

Federal Communications Commission
Office of the Secretary

PETITION FOR EXPEDITED DECLARATION RULING

3G Collect Inc. and 3G Collect LLC (collectively, "3G COLLECT"), by its attorneys and pursuant to 47 C.F.R. § 1.2 of the rules and regulations of the Federal Communications Commission, hereby respectfully requests that the Commission declare that the Telephone Consumer Protection Act of 1991 ("TCPA")[1] and the Commission's rules and regulations implementing it, are not applicable to the use of pre-recorded messages by operator service providers in the course of connecting collect callers to telephone numbers assigned to cellular telephones.

Background

3G COLLECT provides collect calling services that permit a consumer (the "calling party") to initiate a telephone call to a cellular telephone number of the consumer's choice, and have the charges for the telephone call billed to the call recipient (the "called party"). The calling party provides 3G COLLECT with the telephone number to which he or she wishes to be connected. 3G COLLECT then attempts to connect the telephone call and establish the required

[1] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227.

billing arrangement. If the call is answered, 3G COLLECT provides the called party with information generally required by the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA")[2] and Section 64.703 of the Commission's rules[3] to be disclosed before the called party can be billed. This information includes the identity of 3G COLLECT and how the called party can obtain the total cost of the call, as well as the identity of the calling party.[4] The called party then has the opportunity to accept the call on the terms disclosed or to end the call. If the called party accepts the call, 3G COLLECT connects the parties to speak directly with one another, and bills the called party for the call in the manner disclosed.

In carrying out these activities, 3G COLLECT generally provides the necessary disclosures and connects or terminates calls automatically, without the intervention of a live telephone operator. Because of this, 3G COLLECT has recently been the subject of class action lawsuits alleging that 3G COLLECT violates the TCPA when it uses an automated system to provide cost disclosures before connecting the telephone call initiated by the calling party. In this regard, the TCPA provides:

> (b) Restrictions on the 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.[5]

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[2] Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990) *codified at* 47 U.S.C. § 226.

[3] 47 C.F.R. § 64.703.

[4] See id.

[5] 47 U.S.C. § 227(b)(1)(A).

The Commission's implementing regulations similarly restrict any person's or entity's ability to "initiate" a call using an automatic dialing system or a pre-recorded voice to a telephone number assigned to a cellular telephone service.[6]

3G COLLECT does not believe that its practices contravene the TCPA and that the public interest demands that collect calling services remain available to consumers. A ruling on this issue from the Commission will help assure that frivolous lawsuits do not prevent 3G COLLECT and other service providers like it from providing these vital services.

Argument

Congress passed the TCPA to "address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy."[7] Services like the ones provided by 3G COLLECT, however, are not "marketing calls." In fact, they should not even be considered "calls." Congress and the Commission implicitly understood this. At the time the TCPA was enacted, both Congress and the Commission were aware that operator services existed and that operator services providers utilized pre-recorded voices and automated equipment, as they had just enacted the TOCSIA and its implementing regulations the year before. TOCSIA and its implementing regulations define "operator services" in part as "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call . . . ".[8] (emphasis added).

There are good public policy reasons for the use of an automatic pre-recorded voice in connection with collect call services. Pre-recorded voices are more cost-efficient, which in turn can help hold down the costs of making a collect call. More importantly, though, the use of a

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[6] See 47 C.F.R. § 64.1200(a).

[7] In the Matter of the Rules and Regulation Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rcd 559, 559 (2008) [hereinafter *Declaratory Ruling*].

[8] 47 U.S.C. § 226(a)(7). See also 47 C.F.R. § 64.708(i).

pre-recorded voice (1) assures that cost disclosures are made to each and every called party, (2) assures that cost disclosures are made in a uniform manner from call to call so that no one individual called party is at a disadvantage, (3) can permit the called party to have the disclosures repeated in a uniform manner as many times as is necessary until they are understood, and (4) can permit the called party to choose from among options as to the language in which he/she would like to hear the disclosures.

The fact that neither Congress, nor the Commission in the numerous times it has sought to implement faithfully the requirements of the TCPA, ever considered or addressed its impact on the ability of consumers to make or receive collect calls leads inexorably to the conclusion that neither Congress nor the Commission believed that the TCPA's prohibitions restricted the use of pre-recorded voices in connection with collect calling services. There are many reasons they would not. First, in the context of a collect call, the operator services provider does not "make" or "initiate" a "call." The calling party makes or initiates the call. The operator services provider merely establishes a billing arrangement that permits the call, already initiated, to continue. Second, the making of a collect call is an unusual event. It carries with it a considerably higher cost than almost any other way of completing a telephone call, such that it is collectively understood that such a call is only made as a last resort, and may well relate to an "emergency."[9] Because the circumstances under which such a call would be made are unusual, it is collectively understood that called parties consent to receiving such calls to have notice that someone is trying to contact them. This is especially true given the protection that the called party does not have to accept the charges and be connected to the calling party, but can refuse them.[10] For all these reasons, TCPA does not apply to 3G COLLECT.

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[9] The Commission's rules define "emergency purposes" in connection with the TCPA as "calls made necessary in any situation affecting the health and safety of consumers." See 47 C.F.R. § 64.1200(f)(3).

[10] 47 C.F.R. § 64.703(a)(2).

I. 3G COLLECT Does Not "Make" or "Initiate" a "Call"

As the Commission's definition of "operator services" makes clear, 3G COLLECT assists the calling party in making a telephone call by establishing the payment mechanism for the call. The calling party, however, "initiates" this process by providing the telephone number to which he or she wishes to be connected. Neither Congress nor the Commission intended to prevent private parties from contacting one another; nor did they intend to restrict the telephone numbers by which such parties can do so. This is especially true where the called party has given the calling party consent to use a cellular telephone number and/or in the case of an emergency.

3G COLLECT cannot know the cellular phone number of the called party to connect to absent the action of the calling party inputting it in 3G COLLECT's system. 3G COLLECT has no control over whether a call is even initiated -- this requires the independent action of the calling party -- let alone the time at which it is initiated, the telephone number to which the call is made, or the content of the call once the calling and called parties are connected. 3G COLLECT is certainly not the telemarketer that Congress sought to target, randomly dialing large quantities of telephone numbers at the time and date of its own choosing. Rather, 3G COLLECT functions more like the common carrier itself. Congress concluded that it did not want common carriers listening in on calls to determine whether they were proper to connect or not. It surely did not intend to force 3G COLLECT to do so, either.[11]

II. Called Parties Consent to the Use of Pre-Recorded Voices to Receive Collect Calls

Telephone calls using automated systems and pre-recorded voices do not fall into the TCPA's prohibitions where the called party has given consent to receiving such calls or where

[11] S. Rep. No. 178, 102th Cong., 1st Sess. 2, 1991 U.S. Code Cong. & Admin. News 1968, 1969.

the calls are made for emergency purposes.[12] In connection with debt collection calls, the Commission has concluded that consent to receiving autodialed and pre-recorded messages calls on cellular phone numbers can be assumed to have been given when the debtor provided the creditor with his or her telephone number in the context of the business transaction by which the debt was incurred.[13]

Since there is no generally available consumer directory to look up cellular telephone numbers the way there is for most landline numbers, in the context of a collect call, it can be assumed that the called party gave the calling party the number at which he or she wished to be contacted within the context of their relationship. Even if that explicit consent is not given, the circumstances under which a collect call is placed are so unusual -- a child who has not been picked up as expected, a good Samaritan encountering a confused elderly person and contacting the phone number on his or her emergency bracelet -- that it can be assumed that the called party would rather have the opportunity to receive the call and know of the calling party's circumstances than to be left in the dark. Moreover, given the greater cost of a collect call over a directly-dialed call, it can be assumed that the calling party would only choose to call the telephone number of someone he or she believed to consent and would accept the charges. These indicia of consent to receive collect calls, which are likely of high importance to the called party and may constitute true emergencies, are at least as strong if not stronger than those at play in connection with debt collection calls that many called parties would likely prefer to avoid.

3G COLLECT should be entitled to rely on these indicia of consent. As noted above, 3G COLLECT facilitates telephone calls that, were it not for the lack of a payment mechanism, would be carried out directly between two individuals without TCPA prohibition. Where the TCPA permits certain parties to make particular calls, the Commission has assured that those

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[12] 47 U.S.C. § 227(b)(1)(A).

[13] *Declaratory Ruling* at 564.

operating on their behalf are shielded from liability. Non-profit entities are specifically entitled to make certain calls that would otherwise be prohibited under TCPA. The Commission, recognizing that most non-profits operate their fund-raising telephone campaigns through professional fund-raising companies, specifically ruled that these entities were covered under the same provisions that permit the non-profits themselves to make those calls.[14] Similarly, the Commission explicitly stated that those calls that it permitted in the *Declaratory Ruling* to be made by creditors can also be made by debt collection agencies operating on behalf of creditors.[15] Given this, there should be no doubt that 3G COLLECT is permitted to rely on the indicia of consent inherent in the making of a collect telephone call to use a pre-recorded message in its efforts to establish the billing arrangement for the call.

Conclusion

The TCPA and the Commission's regulations promulgated pursuant to it seek to establish a balance between "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade."[16] Neither Congress nor the Commission anticipated the passage of the TCPA as having any impact on the operations of a collect calling services provider. Providers of such services do not make or initiate the collect calls, they merely facilitate the billing arrangements necessary for the calling party to complete the call he or she initiated. Moreover, the public at large benefits from the availability of such services, and consents to the use of pre-recorded voices in connection with them, as a means of assuring that they can be reached when the need arises. As the number of households without landlines grows, it is increasingly important to avoid any action that would have the effect of foreclosing collect calling services to cellular telephone numbers, as that may be the only means by which certain

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[14] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (1995).

[15] *Declaratory Ruling* at 565.

[16] TCPA at § 2(9).

households can be reached. The filing of class action lawsuits alleging a violation of the TCPA threatens the continued availability of this service. For this reason, 3G COLLECT urges the Commission to act expeditiously on its Petition as a stand alone matter. However, a copy of this Petition is also being filed in CG Docket No. 02-278 for consideration in connection with the FCC's on-going rulemaking proceeding.

For all the foregoing reasons, 3G Collect Inc. and 3G Collect LLC, by its attorneys, respectfully requests that the Commission issue a Declaratory Ruling on an expedited basis confirming that the TCPA and the Commission's rules and regulations implementing it, are not applicable to the use of pre-recorded messages by operator service providers in the course of connecting collect callers to telephone numbers assigned to cellular telephones.

Respectfully submitted,

3G Collect Inc.
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Dated: October 28, 2011

DECLARATION

I, Salvatore Louis Mercogliano, President of 3G Collect LLC, hereby declare under penalty of perjury that I have reviewed the foregoing "Petition for Expedited Declaratory Ruling," and, except for (a) matters cited therein contained in the FCC's records, (b) matters for which other support is provided, and (c) matters of which the Commission may take official notice, the facts set forth therein are true and correct to the best of my personal knowledge and belief.

Salvatore Louis Mercogliano

Salvatore Louis Mercogliano

Dated: October 25, 2011

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