Federal Communications Commission
Washington, D.C. 20554

April 11, 2007

Mr. Thomas Asreen
Acting Clerk of Court
United States Court of Appeals
for the Second Circuit
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York, 10007

Re: *Leyse v. Clear Channel Broadcasting, Inc.*, No. 06-0152-cv

Dear Mr. Asreen:

The Federal Communications Commission respectfully submits this response to the Court's letter of February 6, 2007, asking for the agency's views on several questions that have arisen in the above-captioned case under the Telephone Consumer Protection Act (TCPA) and the Commission's implementing rules and orders.

BACKGROUND

1. TCPA And Its Exceptions.

The Telephone Consumer Protection Act of 1991, Pub. L. 102-243, 105 Stat. 2394, codified as section 227 of the Communications Act, 47 U.S.C. § 227, regulates the use of the telephone system for marketing goods and services. Congress found that telemarketing had grown substantially over the several years prior to 1991 and that calls seeking to sell products and services "can be an intrusive invasion of privacy" as well as a potential risk to public safety. TCPA §§ 2(4), 2(5), 105 Stat. at 2394.[1] The TCPA was intended to regulate the use of telemarketing, particularly calls made using automatic dialers and prerecorded messages.

Congress accordingly prohibited several especially problematic uses of automatic telephone dialing equipment and prerecorded messages. Congress declared it unlawful to use those technologies to make, without prior consent, any non-emergency call to 911 lines and similar public safety numbers; to hotel, hospital, and nursing home rooms; and to wireless pagers and cell phones. 47 U.S.C. § 227(b)(1)(A). Congress also banned most unsolicited advertisements transmitted by means of a telephone facsimile machine. 47 U.S.C. § 227(b)(1)(C). In addition, the TCPA directed the Commission to undertake a rulemaking to consider other mechanisms for protecting telephone subscribers' privacy, including "do-not-call" databases. 47 U.S.C. §§ 227(c)(1) – (4).

[1] Congress's findings are not codified in the Communications Act; the entire TCPA is reprinted at 7 FCC Rcd 2744 *et seq.*

At the same time, however, Congress recognized that "privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." TCPA § 2(9). Congress realized that the FCC "should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment." TCPA §2(13). Thus, with respect to telemarketing calls placed to residential lines, Congress declared it unlawful to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, **unless the call is ... exempted by rule or order by the Commission**." 47 U.S.C. § 227(b)(1)(B) (emphasis added). Congress concomitantly empowered the Commission to exempt from the general prohibition on calls to residential lines "such classes or categories of calls made for commercial purposes as the Commission determines (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b)(2)(B)(ii). Congress defined "unsolicited advertisement" to mean "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5).

The Commission undertook a rulemaking proceeding to implement TCPA in April 1992. In the Notice of Proposed Rulemaking, the Commission proposed to exempt calls made by tax exempt non-profit organizations on the ground that such calls "are not seeking to make a profit on the sale of goods to the called party in a way that the TCPA was attempting to restrict." *TCPA NPRM*, 7 FCC Rcd 2736, 2737 ¶12 (1992). Similarly, after noting that "[s]ome messages, albeit commercial in nature, do not seek to sell a product or service and do not tread heavily upon privacy concerns," the Commission proposed "to exempt by rule from the prohibitions of the statute commercial calls that do not include the transmission of any unsolicited advertisement." *Id.* at 2737 ¶11.

In an ensuing rulemaking order, the Commission exercised its authority under § 227(b)(2)(B) to adopt a rule providing an exemption from the general ban on unsolicited calls to residential numbers using automatic dialers or prerecorded or artificial voices for calls that are "made for a commercial purpose, but d[o] not include the transmission of any unsolicited advertisement." *TCPA Order*, 7 FCC Rcd 8752, 8791 (setting forth new text of 47 C.F.R. § 64.1200(c)(2) (1992)). The Commission promulgated a definition of "unsolicited advertisement" identical to the statutory definition. 47 C.F.R. § 64.1200(f)(5). Under those rules, a telemarketer is permitted to make calls using automatic dialers and prerecorded messages as long as the call does not "advertis[e] the commercial availability or quality of any property, goods, or services." *Ibid.*

In support of that rule, the Commission noted that "the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities." 7 FCC Rcd at 8773 ¶40. The legislative history of the statute "indicates that commercial calls have by far produced the greatest number of complaints about unwanted calls. Moreover, no evidence has been presented in this proceeding to show that non-commercial calls [a term

the Commission used to include all calls that did not present unsolicited advertising] represent as serious a concern for telephone subscribers as unsolicited commercial calls." *Id.* at 8773-8774 ¶40. The Commission's exemption of calls that did not present unsolicited advertisements was thus based on its determination that such calls did not adversely affect the privacy rights TCPA was intended to protect.

2. Calls Made by Radio and Television Broadcasters.

In April 2000, a member of the public, Robert Biggerstaff, asked the FCC to clarify the Commission's exemption as it applied to prerecorded messages delivered by television and radio stations. Request of Robert Biggerstaff for Clarification, filed April 21, 2000 (JA 45). In support of his request, Mr. Biggerstaff noted that "[s]ome television and radio stations are using recorded messages to solicit consumers to tune into their broadcasts." *Id.* at 1 (JA 45). He contended further that "radio and TV stations are commercial entertainment 'services' and make money from the viewers – even if the consumer is not paying the station directly for the 'service,'" and that "viewers receive advertising when they tune in." *Id.* at 1-2 (JA 45-46).

The FCC addressed Mr. Biggerstaff's request (along with many other matters) in a new rulemaking proceeding undertaken in 2002. *2002 TCPA NPRM*, 17 FCC Rcd 17459 (2002). Although the proceeding was devoted largely to issues surrounding implementation of a national do-not-call list, the Commission also asked for public comment on issues related to the use of "prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity." *Id.* at 17478 ¶32. The Commission asked, "what rules might we adopt to appropriately balance consumers' interest in restricting unsolicited advertising with commercial freedoms of speech?" *Id.* at 17479 ¶32.

Commenters fell into two camps. A number of commenters, including litigants and attorneys for litigants in TCPA cases, expressed the views that calls from broadcasters are inherently commercial because such calls are intended to increase the station's audience to become more attractive to advertisers. *See 2003 TCPA Order*, 18 FCC Rcd 14014, 14101 n.498 (2003) (summarizing comments). For example, one commenter argued that calls "need not offer something for sale to nonetheless still have advertised the commercial availability or quality of a product or service," Comments of Michael C. Worsham at 9 (filed Dec. 9, 2002) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513396734).

Broadcasters took the opposite tack. The National Association of Broadcasters (NAB) argued that "free over-the-air radio and television broadcasts are not consumer products or services that are bought and sold in commercial transactions. Instead, over-the-air radio and television broadcasts are sources of news, information and entertainment programming that are by federal mandate available for free to every person within a station's listening or viewing area." NAB Comments at 5 (filed Dec. 9, 2002) (available at

http://gullfoss2.fcc.gov/prod/ecfs/ retrieve.cgi?native_or_pdf=pdf&id_ document=6513396560). Thus, according to NAB, broadcast programming is "not 'commercially' available to listeners and viewers," and therefore "concepts of 'commercial' availability or quality simply have no applicability to the programming that broadcasters transmit over the public airwaves." *Id.* at 13. As such, "broadcast audience invitation calls, which do not seek to sell a product or service, are not advertisements." *Id.* at 11. *See also* Comments of The Broadcast Team, Inc., filed Dec. 6, 2002) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_ document=6513398025).

In the ensuing *2003 TCPA Order*, the Commission agreed with the NAB. The agency noted that the rules promulgated in the original rulemaking "exempt from the prohibition [on prerecorded voice calls to residential telephone lines] calls that are made for a commercial purpose but do not include any unsolicited advertisement." *2003 TCPA Order*, 18 FCC Rcd at 14100 ¶145 (JA 25). Because broadcaster calls did not advertise the commercial availability or quality of a product or service, they did not include an unsolicited advertisement and thus fell within the existing exemption from the general ban. Moreover, the record compiled pursuant to the *2002 TCPA NPRM* showed that calls that encouraged tuning in at a particular time for a chance to win a prize "do not at this time warrant the adoption of new rules. Few commenters ... described either receiving such messages or that they were particularly problematic," *2003 TCPA Order*, 18 FCC Rcd at 14100-14101 ¶145 (JA 25). Indeed, the Commission noted, comments filed by the New York State Consumer Protection Board indicated that "NYCPB has not received any complaints" about broadcaster calls. Comments of NYCPB at 13 (filed Nov. 22, 2002) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id _document=6513397016), cited at 18 FCC Rcd at n.497 (JA 27). The Commission accordingly concluded "that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as a commercial call that 'does not include the transmission of any unsolicited advertisement,'" *id.* at 14101 ¶145 (JA 25), and would be exempt from the general ban.

For the same reasons, the Commission found that prerecorded radio station calls were consistent as well with its revised rule, which prohibits calls to any residential telephone number using an artificial or prerecorded voice "unless the call ... [i]s made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation." 47 C.F.R. § 64.1200(a)(2)(iii) (2003). "Telephone solicitation" is defined by the statute to mean a call made without consent "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. § 227(a)(3). The Commission found that broadcaster calls are not telephone solicitations for the same reason that they are not commercial advertisements.

The Commission distinguished calls placed by over-the-air broadcasters – whose service is free of charge to the listener – from similar calls placed by a paid-for service, such as satellite or cable television. Prerecorded messages "that encourage consumers to listen to or watch programming ... for which consumers must pay ... would be considered

advertisements for purposes of our rules." 18 FCC Rcd at 14101 n.499. The Commission also distinguished radio and television station calls from calls "about purported 'free offers'" or ... calls that appear only to give information "but are motivated in part by the desire to ultimately sell additional goods or services." *2003 TCPA Order*, 18 FCC Rcd at 14098 ¶¶141, 142. Determining whether a call is prohibited "should turn, not on the caller's characterization of the call, but on the purpose of the message. ... If the call is intended to offer property, goods or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement." *Ibid.*

Applying those principles to broadcaster calls, the Commission determined that "messages [from broadcasters] that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services, are advertisements." *Id.* at 14101 ¶145. In other words, if a broadcaster call were combined with a promotion for a commercially available good or service (including paid programming), it would be prohibited, but a call restricted only to a free over-the-air broadcast station's programming is not prohibited.

No party petitioned for judicial review of the broadcaster calls portion of the *2003 TCPA Order*. One party, Mr. Biggerstaff, who had first raised the issue, asked the Commission to reconsider its decision. He argued that radio and television are just "advertisement delivery service[s]" that are no different from other commercial services and should be treated no differently. Petition for Reconsideration of Robert Biggerstaff, filed August 22, 2003 at 4-5 (JA 53-54). The petition did not, however, provide any evidence that broadcaster calls currently presented a significant intrusion on privacy.

In the *2005 TCPA Reconsideration Order*, 20 FCC Rcd 3788, 3805-3806 (2005), the Commission rejected Mr. Biggerstaff's argument and affirmed its original position. The Commission reiterated its central finding from the original order: "if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the rules as a commercial call that 'does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.'" *Id.* at 3805 ¶42 (JA 35-36). The Commission also again contrasted calls from over-the-air broadcasters with calls from providers of paid programming, which would be considered advertisements because they describe the *commercial* availability or quality of a service. *Ibid.* The Commission thus "decline[d] to reverse [its] conclusion regarding radio station and television broadcaster messages." *Id.* at 3806 ¶44 (JA 36). No party sought judicial review of this aspect of the Order.

3. The Present Case.

This case presents a suit against a radio broadcaster under the TCPA and the Commission's implementing rules and orders. Plaintiff, who seeks to represent both himself and a class of similarly situated people, received a prerecorded telephone message on his residential telephone line from a local radio station. The message said:

> Hi, this is Al "Bernie" Bernstein from 106.7 Lite FM. In case your favorite station went away, I want to take just a minute to remind you about the best variety of yesterday and today at 106.7. Motown, classic 70s from James Taylor, Elton, and Carole King; it's all here. Each weekday, we kick off the workday with an hour of continuous, commercial-free music. This week, when the music stops at 9:20, be the tenth caller at 1-800-222-1067. Tell us the name of the Motown song we played during that hour, and you'll win one thousand dollars. Easy money. And the best variety from 106.7 Lite FM.

Plaintiff claimed that the call violated TCPA and the Commission's rule implementing the statute. Cmplt. ¶¶ 14, 47 (JA 5, 9-10).

The district court dismissed the complaint for failure to state a claim on which relief could be granted. The court found that in the *2003 TCPA Order* the Commission "exempted from § 227 the type of prerecorded call at issue here as neither an unsolicited advertisement nor a telephone solicitation." JA 79. The court deferred to the FCC's determination under *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and dismissed the case. This appeal followed.

DISCUSSION

The Court has asked whether under the Commission's TCPA Orders "a prerecorded telephone message that contains both an invitation to tune into a free radio broadcast at a particular time in order to win a prize and a general promotion for the radio station violates" the TCPA, as interpreted by the Commission. As explained below, the Commission's Orders make clear that a hybrid call that both announces a contest and contains a general promotion for the station is permitted under the Commission's rules. Such a call therefore is not actionable under the TCPA.

The Court has also asked the Commission to reconcile its position with the statute's language and legislative history and to explain why the rule is not arbitrary and capricious. We believe that the Commission's orders are consistent with the TCPA and are otherwise reasonable, but established legal doctrine prohibits this Court from reviewing the Commission's TCPA Orders by way of a collateral attack in a suit between private parties. Congress has specified that judicial review of FCC decisions of the sort at issue here may take place exclusively through the process set forth in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, and under that process, FCC orders may not be collaterally attacked in separate litigation.

A. The Commission's TCPA Orders Adopted The "Broad Rule."

The prerecorded message at issue in this case combines an invitation to listen to a particular broadcast in order to win a prize with a general promotion for the radio station. The Court has asked whether in the *2003 TCPA Order* the FCC intended to exempt from

TCPA restrictions only messages that are limited to particular broadcasts that offer prizes (what the Court termed the "Narrow Rule") or whether the exemption includes general promotional calls as well (what the Court termed the "Broad Rule"). As explained below, the FCC adopted the Broad Rule.

The Commission's rules exempt from the TCPA's restrictions commercial messages that do not contain an "unsolicited advertisement" or a "telephone solicitation." 47 C.F.R. § 64.1200 (1993); 47 C.F.R. § 64.1200(a)(2)(c) (2003). The *2003 TCPA Order* concludes that "if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted" under both the original rule and the amended rule. 18 FCC Rcd at 14101 ¶145 (JA 25). Examined in its full context and in light of the reasoning behind the Commission's conclusion, *2003 TCPA Order* makes clear that neither telephone messages containing general promotional announcements for broadcast stations nor messages inviting the recipient to listen to specific broadcasts are "unsolicited advertisements." Both are thus permitted under the rules.

At the outset, the parties to the Commission's rulemaking proceeding framed the issue broadly. The Biggerstaff petition for clarification, which placed the issue before the Commission, argued that "radio and TV stations are commercial entertainment 'services' and make money from the viewers – even if the consumer is not paying the station directly for the 'service.'" Biggerstaff Petition at 1-2 (JA 45-46). "In addition," Mr. Biggerstaff observed, "the viewers receive advertising when they tune in." *Id.* The petition thus was not limited to the narrow question of contest advertisements, but addressed the broader issue of whether *any* promotional message from a radio or television station could be exempted from TCPA restrictions on the ground that it is not a "commercial advertisement."

The comments submitted by NAB in response to the *2002 TCPA NPRM* likewise addressed that broader issue. NAB argued that because broadcast programming is not commercially available, "concepts of 'commercial' availability or quality simply have no applicability" to such programming. NAB Comments at 13. Viewed in that way, NAB asserted, promotional messages for broadcast stations cannot be "unsolicited advertisements" as defined – and prohibited – by Congress in the TCPA. Instead, such messages fall within the Commission's statutory authority to exempt commercial calls from TCPA restrictions.

Thus, the issue presented by the parties posed the question whether *any* promotional message for radio or television programming could be characterized as an unsolicited advertisement. The parties to the rulemaking proceeding seemingly recognized that, with respect to the statutory definition of "unsolicited advertisement," there is no difference between a promotion for a specific contest and one for the station in general. If radio and television programming is not a commercially available product, a message promoting it does not describe the "commercial availability or quality" of "goods or services" and cannot be an "unsolicited advertisement" as defined by Congress, whether or not the message is limited to a particular broadcast.

The Commission's reasoning followed the analytical framework established by the parties. The Commission's conclusion turned entirely on the idea that over-the-air broadcasts inherently are not commercial. Although the Commission did not state explicitly why it held that broadcaster calls are not "commercial advertisements," its reasoning is clear from the pointed contrast the Commission drew between over-the-air programming and paid-for programming such as cable and satellite services. Immediately after declaring that broadcaster calls were exempt from restriction, the Commission warned that telephone messages "that encourage consumers to listen to or watch programming, including programming that is retransmitted broadcast programming **for which consumers must pay** (*e.g.*, cable, digital satellite, etc.), would be considered advertisements for purposes of our rules." 18 FCC Rcd 14101 n.499 (emphasis added) (JA 26, 27). The Commission then "reiterate[d] that messages that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services are 'advertisements' as defined by the TCPA." *Id.* at 14101 ¶145 (JA 26). The *2005 TCPA Reconsideration Order* repeated that rationale to justify retention of the new rule (and indeed, it moved the discussion of paid-for programming from a footnote into the text). 20 FCC Rcd at 3805 ¶42 (JA 36). The reconsideration order also reiterated the Commission's previous statement that messages from broadcasters that are "part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services, are advertisements," *2005 TCPA Reconsideration Order*, 20 FCC Rcd at 3805 ¶42 (JA 36), citing *2003 TCPA Order*, 18 FCC Rcd at 14101 ¶145 (JA 25-26).

The distinction between over-the-air broadcast and a paid-for service thus was the linchpin of the Commission's decision. And it is the only rationale that explains why the Commission treated differently two telephone messages concerning the same programming: a telemarketing message that promotes a free broadcast show is deemed not to address the commercial availability or quality of the programming (and is within the Commission's statutory discretion to exempt it from TCPA restrictions), but a promotion for programming – even the very same programming – provided by a paid-for service is deemed a commercial advertisement that is barred under the statute. Moreover, although the Commission initiated the rulemaking by inviting comment on prerecorded messages encouraging telephone subscribers "to tune in at a particular time for a chance to win a prize or some similar opportunity," 17 FCC Rcd at 17478 ¶32, the Commission ultimately did not determine that promotional messages for broadcast contests or for specific programs have any special characteristics that distinguish them from general promotions for the station. Rather, it relied solely on the distinction between free and paid-for methods of delivery. In light of that rationale, it follows directly that the exemption covers both specific and general promotions for broadcast programming provided without charge to the listener.

That leaves the question whether the Commission exercised its statutory discretion to exempt from TCPA restrictions hybrid calls of the sort at issue here. Again, we believe that it did. In the initial *TCPA Order*, the Commission broadly exempted *all* calls that are "made for a commercial purpose but d[o] not include the transmission of any unsolicited

advertisement." 7 FCC Rcd at 8790-9791; 47 C.F.R. § 64.1200 (1993). That rule, as the Commission held in the *2003 TCPA Order*, 18 FCC Rcd at 14100 (JA 25), covers broadcaster calls on its face. The revised rule, promulgated in 2003, was the same as applied to broadcaster calls. *Ibid.* The Commission adopted that rule on the basis of its finding that commercial messages that "do not seek to sell a product or service ... do not tread heavily upon privacy concerns." *TCPA NPRM*, 7 FCC Rcd at 2737. Nothing in the 2003 TCPA rulemaking proceeding changed that analysis. Quite to the contrary, the administrative record ratified the Commission's original approach: the New York State Consumer Protection Board stated that it had encountered no complaints regarding radio promotional calls, and no commenter provided evidence that non-program-specific promotional calls from broadcast stations presented a serious harm to privacy interests.

The Commission's order states that "if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules." 18 FCC Rcd at 14101 (JA 25). The "merely" limitation in the Commission's formulation serves to distinguish telephone messages that promote only programming from those calls (which would be prohibited) that promote some other good or service in addition to the programming. In short, under the Commission's rules, a broadcaster is allowed to place telephone calls that combine a general promotional announcement with an invitation to listen to a particular program – the "Broad Rule" identified by the Court.[2]

B. The 2003 TCPA Order Is Not Subject To Collateral Attack In This Proceeding.

The foregoing discussion demonstrates that the district court was correct when it held that the complaint failed to state a claim on which relief could be granted because the telephone message at issue was permissible under the Commission's rules. The Court has also asked whether the FCC's determinations under the TCPA properly interpret the statute or are otherwise arbitrary and capricious. We believe the orders to be a lawful exercise of the Commission's broad authority under the TCPA to exempt commercial calls from the statute's restrictions. That said, the law is clear that the Commission's TCPA Orders are not subject to collateral attack in this lawsuit. As we explain below, district courts may not review FCC orders, and appellate courts may not review FCC orders on appeal from a district court judgment. Rather, Congress has set forth an exclusive mechanism for judicial review of FCC orders of the type at issue in this case that requires a petition for review to be filed directly in the court of appeals within 60 days of publication of the agency order. That mechanism precludes review here, and the FCC's interpretation of the TCPA must be regarded as binding law for purposes of this litigation.

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[2] If the Court were to disagree with our interpretation of the TCPA Orders, however, the proper course would be to refer the question to the Commission for the agency to formally resolve the matter under the doctrine of primary jurisdiction. *See Ellis v. Tribune Television Co.*, 443 F.3d 71, 81-83 (2d Cir. 2006).

Challenges to orders of the FCC are governed by section 402 of the Communications Act of 1934, which states that "**[a]ny proceeding** to enjoin, set aside, annul, or suspend **any order** of the Commission under this chapter ... **shall be brought as provided by and in the manner prescribed in** chapter 158 of title 28, United States Code." 47 U.S.C. § 402(a) (emphasis added).[3] Chapter 158, which is known as the Hobbs Act and is codified at 28 U.S.C. §§ 2341 *et seq.*, provides in relevant part that "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1). The statute specifies that "[a]ny party aggrieved by the [FCC's] final order may, **within 60 days after its entry**, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

The Communications Act and the Hobbs Act thus specify the precise procedure for obtaining judicial review of FCC orders and vest exclusive jurisdiction in the courts of appeals. "[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] appeal to the Court of Appeals **as provided by statute**." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (emphasis added).

This Court has recognized and applied that principle repeatedly, both with respect to the FCC and in similar contexts involving orders of other federal agencies. For example, the Court held that a bankruptcy court could not enjoin the effects of an FCC order or declare that order to be void. Not only did the Court recognize that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals," but it held that a litigant may not challenge the validity of an FCC order as a defense to an action against it. Rather, the Court of Appeals' exclusive jurisdiction over FCC action "extends as well to collateral attacks: A defensive attack on [an FCC decision] is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." Thus, "[t]he jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise." *In re FCC*, 217 F.3d 125, 139-140 (2d Cir.) (quotation marks and citations omitted), *cert. denied*, 531 U.S. 1029 (2000); *accord In re NextWave Personal Communications*, 200 F.3d 43, 54 (2d Cir. 1999) (because "jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals," a district court "lack[s] jurisdiction to decide" cases involving FCC regulatory matters); *see also Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d. 130, 142-49 (D.C. Cir. 2001), *affirmed on other grounds*, 537 U.S. 293 (2003).

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[3] Judicial review of FCC licensing decisions, of which this case is not one, is governed by 47 U.S.C. § 402(b), which vests exclusive jurisdiction in the D.C. Circuit.

The Court has taken the same approach to other statutory schemes that similarly vest the courts of appeals with exclusive review of agency action. It held that the plain terms of a statute similar to the Hobbs Act "preclude[e] federal district courts from affirming, amending, modifying, or setting aside any part of [the agency's] order." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001). The Court went on to hold that "statutes ... that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inescapably intertwined' with review of such orders. A claim is inescapably intertwined in this manner if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order." *Ibid.* (citation omitted).

Merritt relied heavily on the Supreme Court's opinion in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), which also construed a statute similar to the Hobbs Act and held that "[i]t can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. ... So acting, Congress ... prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." 357 U.S. at 336 (citations omitted). "Hence, upon judicial review of the Commission's order, all objections to the order ... must be made in the Court of Appeals or not at all." *Ibid.* In *Merritt*, this Court "read *City of Tacoma* as holding that [an exclusive review provision] precludes (i) de novo litigation of issues inhering in a controversy over an administrative order, where one party alleges that it was aggrieved by the order, and (ii) all other modes of judicial review of the order." 245 F.3d at 188.

All other federal courts of appeals to have addressed the issue have likewise ruled that the Hobbs Act divests district courts of jurisdiction over FCC orders. *Qwest Corp. v. Public Utils. Comm'n of Colorado*, No. 06-1132 slip op. at 17 n.6 (10th Cir. March 5, 2007); *Vonage Holdings Corp. v. Minnesota* PUC, 394 F.3d 568, 569 (8th Cir. 2004) ("[n]o collateral attacks on the FCC order are permitted" in private party litigation); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-397 (9th Cir. 1996); *Telecommunications Research & Action Center*, 750 F.2d at 75; *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1412-1422 (11th Cir. 1993); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (describing challenge to FCC rule in private party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").

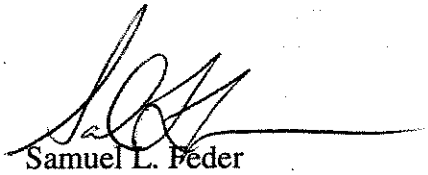
The rule against collateral attacks on FCC orders is reinforced by the structure of the TCPA. As relevant here, the statute permits private parties to collect damages when they receive certain pre-recorded calls, unless that type of call "is exempted by rule or order by the Commission." 47 U.S.C. § 227(b)(3) & (b)(1)(B). Accordingly, the pertinent question in a private case where the Commission has exercised its exemption authority in an arguably relevant way is the scope of the exemption, not its validity. If the call has been "exempted by rule or order by the Commission," that is the end of inquiry.

The district court in this case applied the TCPA Orders to the message at issue and correctly determined that the Commission had exempted such messages. It then deferred to the FCC's interpretation of the TCPA. Plaintiff-appellant spends much of his brief arguing that "[t]he FCC's opinion is not entitled to deference" (Br. 9-12), that the FCC's orders were arbitrary and capricious (Br. 12-15), and that this Court should therefore reverse those orders. But that inquiry is precisely what Congress forbade when it established an exclusive method for judicial review of FCC rulemaking orders. The proper route for judicial review of those orders was a petition for review filed in an appropriate court of appeals within 60 days of the order's publication in the Federal Register. After that time period has elapsed, should any party wish to effect a change in the law, the proper procedure is either to petition the FCC for a declaratory ruling, 47 C.F.R. § 1.2, or to initiate a new rulemaking proceeding, 47 C.F.R. § 1.401. *See ITT*, 466 U.S. at 468 n.5, *City of Peoria*, 690 F.2d at 121. Any resulting order would then be reviewable under the Hobbs Act in the ordinary course. But at this point, and in this lawsuit, the FCC's orders may not be "enjoin[ed], set aside, annul[led], or suspend[ed]." 47 U.S.C. § 402(a). Instead, they must be regarded as binding law.

CONCLUSION

In its TCPA Orders, the Commission adopted the "Broad Rule" exempting messages that contain promotions for both specific programs and for the station in general. The Commission's orders are not subject to review in this proceeding.

Respectfully submitted,



Samuel L. Feder
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cc: all parties