



Consumer Federation of America

consumer action
Education and advocacy since 1971

March 7, 2016

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 2055

Re: Petitions of Blackboard Inc. and Edison Electric Institute, and other pending petitions, CG
Docket No. 02-278,

Dear Ms. Dortch:

Today, on behalf of the low-income clients of the National Consumer Law Center, as well as Consumer Action, Consumer Federation of America, Consumers Union, the National Association of Consumer Advocates the National Consumers League, and U.S. PIRG,¹ I spoke to several staff of the Commission, including Mark Stone of the Consumer Affairs Bureau, Travis Litman and Jennifer Thompson of Commissioner Rosenworcel's office, and Gigi Sohn of Chairman Wheeler's office.

Previously the above-named consumer groups submitted an *ex-parte* letter relating to the Petitions for a Declaratory Ruling filed by Blackboard, Inc.,² and Edison Electric Institute and American Gas Association (Edison).³ Both petitions ask the Federal Communications Commission

¹Descriptions of these national consumer advocacy organizations are included at the end of this letter.

² See, Petition for Expedited Ruling, Blackboard, Inc. <http://apps.fcc.gov/ecfs/comment/view?id=60001020430>.

³ See Petition for Expedited Ruling, Edison Electric Institute and American Gas Association. <http://apps.fcc.gov/ecfs/comment/view?id=60001016327>.

(Commission) to allow automated and prerecorded calls and texts to cell phones without prior express consent under the broad rubric of emergency calls.⁴ In our previous comments we expressed support for very limited exceptions to be articulated by the FCC for calls relating to a variety of emergency situations from schools and utility providers.⁵

Subsequently, Hubbard Broadcasting, Inc. submitted an *ex parte* letter requesting that the Commission allow broadcasters to provide additional unconsented-to calls and texts relating to these same emergencies.⁶ Although we continue to support the specific kinds of exceptions we supported previously, as an important means of helping ensure parents are informed regarding actual emergency situations, **we strongly oppose this new proposal.** It would likely lead to a multiplicity of calls to each parent relating to the same event. If Hubbard Broadcasting's request were granted, nothing would prohibit several broadcasters in a particular area from sending their own repetitive messages to every parent.

1. Privacy Issues and Too Many Calls

We understand that companies like Blackboard will contract with schools to provide messages from schools directly to parents who have provided their cell phone number to the schools, just for the purpose of being notified of emergencies, and other important school matters. We do not object to the schools' use of an agent, who specifically and directly delivers these emergency messages pursuant to the direction of the school. Hubbard Broadcasting's proposal is of a distinctly different nature. These messages would be *in addition* to those from the school, and would not be limited to the parents or guardians who provided their numbers to the schools.

Because the broadcasters would not have received the parents' phone numbers directly from the parents, it is highly likely that there would be a significant number of wrong-number calls and texts – to people who have nothing to do with the school or the event. Moreover, if the schools are providing parents' phone numbers to broadcasters, this raises serious privacy concerns.

These messages are really telemarketing messages masquerading as emergency calls. This is illustrated by the copy of the text message at the end of Hubbard Broadcasting's letter.

2. Hubbard's Example Illustrates that the Messages Are Telemarketing

Hubbard's purpose in sending these messages would be to encourage recipients of its messages to tune in to their broadcasts; that purpose makes them telemarketing messages. The "telemarketing" inquiry focuses on the purpose of the call, rather than its content. *See Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 820 (8th Cir. 2015). TCPA's implementing regulations define "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging the

⁴ As the Consumer and Governmental Affairs Bureau noted in its Request for Comments on Blackboard's Petition: Blackboard argues that Congress intended for the emergency purposes exception to be interpreted broadly, and that "all school-initiated informational messages should be considered sent for 'emergency purposes.'" <https://www.fcc.gov/document/cgb-seeks-comment-petition-filed-blackboard-inc>.

⁵ <http://apps.fcc.gov/ecfs/comment/view?id=60001299950>.

⁶ *See Ex Parte* letter from Hubbard Broadcasting to Ms. Dortch, February 8, 2016. <http://apps.fcc.gov/ecfs/comment/view?id=60001393852>.

purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(12). While the content of the calls controls whether they are "advertisements," their purpose controls whether they are "telemarketing." *See Golan* at 820.

The TCPA does not "'require an explicit mention of a good, product or service,' where the implication of an improper purpose is 'clear from the context.'" *Id.* (quoting *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012)); *Dolemba v. Ill. Farmers Ins. Co.*, 2015 U.S. Dist. LEXIS 104314, *10 (N.D. Ill. Aug. 10, 2015).

The recent Eighth Circuit holding in *Golan* is a perfect illustration. The Eight Circuit held that a short voicemail message was not an "advertisement" because it "did not mention property, goods, or services." *Id.* at 819. But it held that the message was "telemarketing" because the purpose of the call was to encourage consumers to purchase tickets to see a movie. *Id.* at 820 ("Here, the context of the calls indicates that they were initiated for the purpose of promoting the Last Ounce of Courage.")

Likewise, in *Chesbro v. Best Buy Stores, L.P.*, the defendant sent the plaintiff a prerecorded message informing him that his "Best Buy Reward Zone" certificates would expire soon. 705 F.3d 913, 916 (9th Cir. 2012). The defendant later sent a second prerecorded message to the plaintiff telling him about changes to the Reward Zone program, and encouraging him to "go to MyRewardZone.com for details and to update your membership." *Id.* The Ninth Circuit rejected Best Buy's argument that the calls were "purely informational".

Hubbard Broadcasting's sample text message prominently features the website of KSTP.com. As in *Chesbro*, the purpose of including this website is to encourage persons to go to the website. Like all news stations, KSTP survives on advertising dollars. In fact, if the Commission were to go to the website, it would see a variety of advertisements on the home page as well as on the pages the story is on. The more people Hubbard can draw to its website, the more it can charge to advertise on it. It is apparent that Hubbard Broadcasting wants to be able to send these text messages to all cell phones in the area without obtaining consent or checking its list for reassigned numbers as reputable businesses do.

Allowing the relief requested in Hubbard Broadcasting's *ex parte* letter would legalize many more automated and prerecorded phone calls to cell phones and would adversely impact low-income households who rely on low-end, pay-as-you-go, limited minute prepaid wireless products. These wireless consumers are generally billed for incoming calls and texts. These consumers are extremely sensitive to these incoming calls and texts – especially messages that they do not want.

In addition, unwanted calls are a safety concern, which distract drivers. Just imagine getting a message from every local news station, radio station or Internet news station for every news story that is deemed an "emergency." Even a fraction of these calls would be overwhelming in small news markets and would be unmanageable in any large news market.

3. Procedural Irregularity

Finally, we note that the request in the Hubbard Broadcasting letter seems to go far beyond the issues that have been previously discussed in the Blackboard proceeding. Extending the exception for emergency calls to broadcasters has come up at the last minute, without adequate notice to interested parties about all of the issues involved in the request. This seems irregular, at best. We hope that if the Commission considers these points, it will do so only after proper notice of all of the issues has been provided.

Summary

In summary, we urge the Commission to reject the request from Hubbard Broadcasting, for the following reasons:

1. Emergency messages from anyone other than the schools to parents or guardians regarding a school emergency should be limited only to those companies who are operating as an authorized agent of the school (or board of education), under the specific direction of the school, who is only calling parents or guardians who have provided their numbers for that purpose. Further, these messages should not advertise the sender's services, or direct recipients to a website that contains advertising or telemarketing material.
2. Messages from broadcasters would likely be duplicative of the messages from the schools, and that is unnecessary, intrusive, and burdensome, and for many recipients, costly. These duplicative messages would be multiplied again when numerous news agencies send the same message, which multiplies the expense especially to low-income households who have limited usage plans.
3. Messages from broadcasters such as is proposed by Hubbard Broadcasting are telemarketing messages in disguise, and allowing them would set a dangerous precedential exception that would be counter to the case and the regulations of the Commission.

Thank you for your consideration of these views. If you have any questions, please contact me.

Sincerely,

Margot Saunders
Of Counsel
National Consumer Law Center
1000 Connecticut Avenue, NW
Washington, D.C. 20036
202 452 6252, extension 104
msaunders@nclc.org

Descriptions of National Organizations On Behalf of Which Our Comments Were Filed

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

The **National Association of Consumer Advocates** (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

National Consumer Law Center (NCLC) is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commissions and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*. This comment letter is filed on behalf of NCLC's low-income clients.

National Consumers League provides government, businesses, and other organizations with the consumer's perspective on concerns including child labor, privacy, food safety, and medication information. The mission of the National Consumers League is to protect and promote social and economic justice for consumers and workers in the United States and abroad.

U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our research and advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending and rent-to-own, credit reporting and credit scoring and opposition to preemption of strong state laws and enforcement. On the web at www.uspirg.org.