



June 3, 2022

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278, DA 22-487, relating to the legality of certain calls under the Telephone Consumer Protection Act, as requested by the U.S. Department of Health and Human Services

Dear Ms. Dortch:

This *ex parte* Notice describes a meeting held between consumer and privacy advocates and staff of the Federal Communications Commission (FCC) in relation to the legality of certain calls under the Telephone Consumer Protection Act (TCPA), as requested by the U.S. Department of Health and Human Services (HHS).¹

The meeting, which occurred on June 1, 2022, was attended by Richard Smith, Mark Stone, and Kristi Thornton of the Commission's Bureau of Consumer and Governmental Affairs; Margot Saunders and Carolyn Carter on behalf of the low-income clients of the National Consumer Law Center (NCLC); and Chris Frascella of the Electronic Privacy Information Center (EPIC). The discussion revolved around the question of whether the government contractors making the calls described by the HHS Letter at the behest of the federal and state governments could be considered not to be the makers of the calls, such that the requirements for consent for automated texts and prerecorded calls would not apply; it supplemented the Reply Comments we filed in this proceeding.²

¹ The docket was initiated by Public Notice, Federal Commc'ns Comm'n, Consumer & Governmental Affairs Bureau Seeks Comment on Request Relating to Enrollment In Medicaid And Other Governmental Health Coverage Programs, CG Docket No. 02-278 (Rel. May 3, 2022), available at <https://docs.fcc.gov/public/attachments/DA-22-487A1.pdf> (inviting comments on the request filed by the U.S. Department of Health and Human Services): Letter from Xavier Becerra, Secretary of Health and Human Services, to Jessica Rosenworcel, Chairwoman of the Federal Commc'ns Comm'n (Apr. 28, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10429695829926>.

² *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Reply Comments of **National Consumer Law Center et al.** Relating to the Request for Clarification Regarding TCPA Application to Robocalls and Automated Text Messages to Encourage Continuation in Governmental Health Coverage Programs, CG Docket No. 02-278 (filed May 24, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/105241963120304>.

In its 2020 Broadnet Order,³ the FCC first noted that contractors are unquestionably “persons” under the TCPA.⁴ It held that the TCPA applies to contractors even when they are acting as agents of the federal government,⁵ although they may qualify for derivative immunity.⁶

Nonetheless, the Broadnet Order allowed that “a federal contractor may be able to avoid liability under the TCPA if it is not the ‘maker of the call.’”⁷ The Commission noted that, in its 2015 Omnibus Order,⁸ it “previously clarified that a caller may be found to have made or initiated a call in one of two ways: first, by **‘tak[ing] the steps necessary to physically place a telephone call’**; and second, by **being ‘so involved in the placing of a specific telephone call as to be directly liable for making it.’**”⁹

Applying these tests to Broadnet, the FCC found that Broadnet was not the maker of the calls for which it provided a platform.¹⁰ The Commission broke down this analysis by examining whether it was Broadnet or the governmental caller that determined a) whether to make the call, b) the timing of the call, c) the identity of the call recipients, d) the content of the call, and e) who took the physical step necessary to initiate the call.

The Commission’s determination that Broadnet was not the maker of these calls was based on Broadnet’s assertions that—

government customers, and not Broadnet, make all decisions regarding **whether** to make a call, the **timing of the call**, the **call recipients**, and the **content of the call**.” It further states that its “**government customer takes the steps physically necessary to initiate a telephone town [hall] call**,” while Broadnet’s role is to “manage the technical aspects of the service and to ensure that its customers do not use the platform unlawfully.”¹¹

Similarly, in its 2015 Omnibus Order, the Commission analyzed a series of factors to determine whether a variety of “persons” under the TCPA were “makers” of the calls with which they were involved. The factors that the Commission used to determine whether there was the requisite connection between the person and the making of the call can be distilled as which party:

³ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Broadnet Teleservices, L.L.C. Petition for Declaratory Ruling et al., Order on Reconsideration, CG Docket No. 02-278 (F.C.C. Dec. 14, 2020), *available at* https://docs.fcc.gov/public/attachments/FCC-20-182A1_Rcd.pdf [hereinafter Broadnet Order].

⁴ *Id.* at ¶ 14 (“We find that a federal contractor is a ‘person’ under section 227(b)(1). The term ‘person’ as used in the TCPA and defined in the Communications Act expressly includes an ‘individual, partnership, association, joint-stock company, trust, or corporation’ ‘unless the context otherwise requires.’ Every federal contractor, including those acting as agents, falls within one of these categories. And, unlike the federal government itself, there is no longstanding presumption that a federal contractor is not a ‘person.’ Nor do we find any ‘context that otherwise requires’ us to ignore the express language of the Communications Act’s definition of the term ‘person’ in this situation. Absent any applicable presumption to the contrary, we find that the express definition of ‘person’ as contained in the Communications Act is controlling.”).

⁵ *Id.*

⁶ *Id.* at ¶ 15.

⁷ *Id.* at ¶ 18.

⁸ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-078, WC Docket No. 07-135, 30 F.C.C. Rcd. 7961 (F.C.C. July 10, 2015), *available at* https://docs.fcc.gov/public/attachments/FCC-15-72A1_Rcd.pdf [hereinafter 2015 Order].

⁹ Broadnet Order, *supra* note 3, at ¶ 19 (quoting 2015 Order, *supra* note 7, at ¶ 30 (emphasis added)).

¹⁰ Broadnet Order, *supra* note 3 at ¶ 19.

¹¹ *Id.* at 20 (emphasis added).

- a) Determined whether to make the call.¹²
- b) Decided on the timing of the call.¹³
- c) Determined the telephone number called.¹⁴
- d) Determined the content of the call (although not determinative).¹⁵
- e) Took the steps necessary to physically place each telephone call (including actually dialing the call, or initiating the dialing process).¹⁶

The Commission also stated that “whether a person who offers a calling platform service for the use of others has knowingly allowed its client(s) to use that platform for unlawful purposes may also be a factor in determining whether the platform provider is so involved in placing the calls as to be deemed to have initiated them,”¹⁷ but this factor appears to be irrelevant to the current issues so will not be discussed here.

The Commission then applied these factors to several different “persons” who had requested clarification regarding their potential liability for facilitating texts or prerecorded calls without the prior express consent of the called parties.

- **Use of the YouMail App to send automated text messages:** The FCC determined that YouMail was not the maker of the calls, because the “YouMail app user determines **whether to send the auto-reply text messages, which categories of callers should receive auto-replies, how the user’s name should appear in the auto-reply, and whether to include a message with the auto-reply** (such as when the called party will be available to return the call).¹⁸

¹² 2015 Order, *supra* note 8, at ¶¶ 31, 32 (“YouMail exercises no discernible involvement in deciding **whether**, when, or to whom an auto-reply is sent” (emphasis added)).

¹³ *Id.* at ¶¶ 32 (“YouMail exercises no discernible involvement in deciding whether, **when**, or to whom an auto-reply is sent” (emphasis added)), 37 n.142 (referring to the provision of the example of a seller “giving the third party specific and comprehensive instructions as to **timing and the manner of the call**” in the DISH Declaratory Ruling at *In re* Joint Petition filed by DISH Network et al., Declaratory Ruling, CG Docket No. 11-50, 28 F.C.C. Rcd. 6574, at ¶ 27 (F.C.C. May 9, 2013) (emphasis added) [hereinafter DISH Declaratory Ruling]).

¹⁴ 2015 Order, *supra* note 8, at ¶ 32 (“YouMail exercises no discernible involvement in deciding whether, when, or **to whom** an auto-reply is sent” (emphasis added)).

¹⁵ *Id.* at ¶¶ 26, 32 (“YouMail states that it has ‘no influence over the content of the message selected by the [app user]’”), 33 (“Here, TextMe outlines the steps the app user takes and the choices he or she makes in determining whether to send an invitational message, to whom to send an invitational message, and when that invitational message is sent. These affirmative choices by the app user lead us to conclude that the app user and not TextMe is the maker of the invitational text message. **While we agree with commenters that TextMe’s control of the content of the invitational text message is a reason for concern, and take into account the goals and purposes of the TCPA, we conclude that the app user’s actions and choices effectively program the cloud-based dialer to such an extent that he or she is so involved in the making of the call as to be deemed the initiator of the call.**” (emphasis added)).

¹⁶ *Id.* at ¶¶ 37 (“TextMe is not the maker or initiator of the invitational text messages because it is not programming its cloud-based dialer to dial any call, but ‘merely ha[s] some role, however minor, in the causal chain that results in the making of a telephone call.’”), 38 (referring to “the numbers initially dialed by inmates”), 40 (“We find that a person who dials the number of the called party or the number of a collect calling service provider in order to reach the called party, rather than the collect calling service provider who simply connects the call, ‘makes’ the call for purposes of the TCPA.”).

¹⁷ *Id.* at ¶30. This factor does not appear relevant here, as the government is not promoting fraudulent or illegal calls.

¹⁸ *Id.* at ¶ 31 (emphasis added).

- **Use of the Glide App to send automated text messages:** The FCC determined that Glide was the maker of the calls because “[u]nder the first scenario, Glide automatically sends invitational texts of its own choosing to every contact in the app user’s contact list with little or no obvious control by the user. In this scenario, **the app user plays no discernible role in deciding whether to send the invitational text messages, to whom to send them, or what to say in them.**”¹⁹
- **Use of the TextMe App to send automated text messages:** The FCC determined that TextMe was not the maker because the app user determines **whether to send the message and to whom to send the message.** “An app user must: (1) tap a button that reads ‘invite your friends’; (2) choose whether to ‘invite all their friends or [] individually select contacts’; and (3) choose to send the invitational text message by selecting another button.”²⁰
- **Use of the GTL and 3G calling services to send prerecorded messages.** Both calling services maintained that the prerecorded messages they use in connecting collect calls only provide information to the called party to facilitate call completion and are not separate calls. Citing the DISH Declaratory Ruling,²¹ the Commission found that the calling services were not the makers of the calls, largely because “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and **generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.**”²²
- **Use of the Broadnet platform for government calls.** In the 2020 Broadnet order, the Commission determined that Broadnet simply provided the platform on which the calls were made by government callers: “Broadnet states that its ‘government customers, and not Broadnet, make all decisions regarding **whether to make a call, the timing of the call, the call recipients, and the content of the call.**”²³

Government contractors making the HHS calls. It has been suggested that the government contractors making the calls described in the HHS Letter might not be considered the makers of the calls for TCPA purposes, presumably because the government instructions to the contractors would be so specific that only the government would be considered the maker.

However, at this juncture, there are many details that are not known about the calls proposed to be made by the government contractors. Some of these unknown details include:

1. The terms of the contracts between the government and the contractors.
2. Whether the government or the contractors determine the telephone numbers to be called, particularly telephone numbers which were not provided by the persons to be called.
3. Whether the government or the contractors determine when the calls are to be made, how often they are repeated, or whether the calls will stop if the recipient so requests.
4. The extent to which the government will dictate the contents of the prerecorded calls and texts.

¹⁹ *Id.* at ¶ 35 (emphasis added).

²⁰ *Id.* at ¶ 36.

²¹ DISH Declaratory Ruling, *supra* note 13.

²² 2015 Order, *supra* note 8, at ¶ 40 (quoting DISH Declaratory Ruling, *supra* note 13, at ¶ 26) (emphasis added).

²³ Broadnet Order, *supra* note 3, at ¶ 20 (emphasis added).

5. Whether the prerecorded calls will include an option to speak to a live representative and, if so, what the live representative will be authorized to say and do in the calls.
6. Whether automated texts will include a link for the recipient to click on, and what the link will lead to.
7. Whether and to what extent the government will monitor compliance with the contractual terms by the contractors.
8. Whether any calls will be made that are not authorized by the terms of the contracts.

As a result, it would be entirely inappropriate for anyone, let alone the FCC, to determine that government contractors subject to terms of yet unknown contracts may not be makers of the proposed calls.

Moreover, the situation contemplated for the contractors to make the HHS calls is very different from the Broadnet, YouMail, and TextMe relationships with the other parties involved in the calls. In all of the situations in which the Commission determined that these petitioners were not the maker of the calls, others, not the app itself or the platform, took the **steps necessary to physically place** each telephone call, determined **whether to make** the call, and determined **who to call**.

Even though the app or platform appears to have determined the **content of the call** in the GTL and 3G calling services context, part of the content of YouMail's automated text messages, and possibly the content of the TextMe messages, that was not sufficient to make the app or platform the makers of the calls. Instead, the FCC stated that the most critical determinant appears to be **who physically dials the calls, or causes the call to be placed**:

We find persuasive the logic in our DISH Declaratory Ruling analysis that “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.” **We find that a person who dials the number of the called party** or the number of a collect calling service provider in order to reach the called party, rather than the collect calling service provider who simply connects the call, “makes” the call for purposes of the TCPA.²⁴

While the Commission has never said that who places the call is the sole factor or the determinative factor, it would be a significant departure from the Commission's prior application of these standards to hold that an entity that had nothing to do with the physical placement of the call was the “maker.” Such a ruling would also open the door to claims by many other callers—including many problematic callers—that they are not “makers” of the calls and are not subject to the TCPA. The Commission should not go down this path without carefully considering all the potential consequences.

The only calls at issue in this proceeding are those calls for which there is no prior express consent. These are the calls in which it is unclear whether the telephone number being called actually belongs to the enrollee that the caller is attempting to reach. The telephone numbers used to reach these enrollees will be harvested from data brokers and other sources. It will—presumably—be up to the contractors to determine how to find the telephone numbers, how to evaluate the reliability of those numbers, and whether to call those numbers. That will require a degree of discretion and judgment that indicates a significant difference between the contractors making those decisions and the platforms the FCC's prior orders have held not to be makers.

²⁴ 2015 Order, *supra* note 8, at ¶ 40.

Applying the Commission’s analysis in its previous rulings to the government contractor calls contemplated by HHS makes it clear that the government contractors—not the government agencies that hire the contractors—will be the makers of the calls. All of the factors identified in the Commission’s rulings, except possibly the determination of the content of the automated text or the prerecorded call, point to the contractor as the maker:

- a) Whether the government entity takes the **steps necessary to physically place** each telephone call: *the contractor will be dialing the calls.*
- b) Whether the government entity determines **when to make** the call: *the government may set some broad parameters about the staging of the calls or the overall deadline for completing them, but it is very likely that the contractor will determine when to make each individual call.*
- c) Whether the government entity determines **who is called**: *for the calls in question—the ones for which the number originally provided by the called party has been reassigned to someone else—the government will not be able to give the contractor the numbers to call. The government will give the contractor the name of the enrollee, as well as other identifying information. It will be up to the contractor to determine whether it has other reliable sources for the enrollee’s current phone number, or whether a data broker might be able to supply a new number for the enrollee. The contractor is also likely to be the entity that will evaluate whether the information supplied by data brokers and others is sufficiently reliable to use for these telephone calls. If telephone numbers cannot be found for some enrollees, or the information produced by data brokers does not appear reliable, the contractor will not even attempt to reach those enrollees. If a data broker produces an incorrect number, the contractor may call that number, but again will not reach the enrollee identified by the government agency. Thus, to a substantial extent, “who to call” will be determined at the contractor level.*
- d) Whether the government entity determines the **content of the calls**: *the extent to which the government will dictate the content of the calls and messages is currently unknown, but it is possible that the government will exercise considerable control over their content. However, while the content of the prerecorded call may be mandated by the government, any live conversation between the enrollee and the contractor that is triggered by the call is unlikely to be closely controlled.*

The calls at issue here are fundamentally different from the calls in which the Commission has developed and applied the question of who is the “maker” of a telephone call. The Broadnet Order and all of the scenarios addressed in the 2015 Omnibus Order involved entities that provided *platforms* that others used to send messages or place calls. The platforms had various levels of automation, and only in the most extreme case,²⁵ where the platform itself actually sent messages to everyone in the user’s contacts list, did the Commission rule that the platform was the “maker.” Here, the government entities are not providing a calling platform, much less one that has automated features. Instead, the government entities are contracting with other entities to make calls on their behalf, using the contractors’ calling systems, with whatever features those systems provide. In the DISH Network Declaratory Ruling, the Commission readily dismissed the contention that an entity that hired a contractor to make calls (telemarketing calls) could be considered the “maker” of the calls.

Reassigned number database. The meeting also included discussion of whether it would be costly or burdensome for the government or the callers to have to use the reassigned number database (RMD) before making the calls. The use of the RMD is essential if HHS is to accomplish the purpose of these

²⁵ See *id* at ¶ 35 (discussing Glide).

calls. If it does not mandate use of the RMD, callers will call or text a large body of numbers that have been reassigned to someone other than the enrollee—and *the caller will have no way of knowing which enrollees did not receive the calls or texts*. Thus, the effort will fail to reach all the enrollees whose telephone numbers have changed. Since changing a phone number is often a function of financial instability, the enrollees who are struggling most, and therefore most in need of continued health insurance, will likely be a disproportionately large percentage of those who are not reached.

The only way to know which numbers are still good, and for which enrollees it is necessary to engage a data broker, is to run the numbers through the RMD. While there is a charge for using the RMD, the cost of using the RMD will likely be less than the cost of asking a data broker to find numbers for all enrollees (rather than just the enrollees whose numbers have been reassigned, who can be determined by using the RMD).

The FCC has made the RMD easy to use. Failing to take advantage of it in these circumstances, where it will help the government re-enroll people in important health insurance programs, would be a symptom of dysfunctional government.

Conclusion. Everyone agrees that calls to encourage families and individuals to maintain or renew their enrollment in Medicaid and similar health insurance programs are critically important. We represent many of the people who will benefit from the information HHS wants the calls to provide, and we seek to ensure that the greatest number of enrollees receive the information. At the same time, we are concerned that the FCC's decision in this important proceeding does not open the floodgates to treatment of all kinds of other calls by government contractors as not covered by the TCPA. Such an order would surely be appealed and subject to protracted litigation. The sought-after certainty and safety would not be gained, and the calls would not be safe from TCPA liability.

We urge the Commission to simply provide an exemption for the covered calls as set out in our Reply Comments. That would allow these calls to be made safely, protecting the recipients of the calls and maintaining essential constructs of the TCPA.

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you for your consideration.

Sincerely,

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