

Wisconsin District Court Stays TCPA Suit Pending Review of the FCC's July 10 Order

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On October 20, 2015, the U.S. District Court for the Eastern District of *Wisconsin* granted defendant Performant Technologies, Inc.'s ("Performant") motion to continue a stay pending judicial review of the FCC's [July 10 TCPA order](#) "in the interest of judicial economy." [Gensel v. Performant Technologies, Inc.](#), No. 13-C-1196 (E.D. Wis. Oct. 20, 2015).

In this case, plaintiff Gensel alleges, among other things, that Performant repeatedly called her cell phone number in an attempt to collect on another person's debt, in violation of the TCPA. Gensel's cell phone carrier had previously reassigned the debtor's number to her. On January 28, 2015, the court [granted](#) Performant's motion to stay the case based on the primary jurisdiction doctrine, pending a ruling from the FCC on two petitions relating to the application of the TCPA to debt collection calls, the construction of the term capacity in the ATDS context, and reassigned numbers.

The FCC issued its order in July, the judicial review of which is currently pending. In relevant part, the FCC ruled that the TCPA's use of the term "capacity" in the ATDS context includes not only current, but also potential capacity. It also found that the term "called party" refers to the subscriber or the non-subscriber customary user of a telephone number included in a calling plan and created a very limited safe harbor for certain calls to reassigned numbers.

Relying on the court's inherent power to manage its docket, the court granted Performant's motion to continue the stay. In doing so, the court noted that it is unlikely that the FCC will be overruled on the number reassignment/safe harbor issue. The court also noted, however, that the contrary result on the meaning of the term "capacity" is much more likely. Citing at length to the statements of the dissenting Commissioners in the July order, the court stated that "it seems to the Court, as it seemed to the dissenting Commissioners, that the FCC majority's interpretation of the term 'capacity' contradicts the plain language of the statute. If so, then the FCC's ruling on this issue is not entitled to deference on appeal." Furthermore, the construction of the term "capacity" is central to the Gensel case. Accordingly, the court found that a stay pending the outcome of judicial review is in the interest of judicial economy.

Given that the issues [currently on appeal](#) are at the center of so many pending TCPA cases, it would not be surprising to see other courts taking a similar approach, continuing to stay proceedings pending the conclusion of judicial review of the FCC's order.

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