Published on *The National Law Review* https://natlawreview.com

FCC Responds In Consolidated Appeal From Its July 2015 Omnibus Ruling

Article By:

Laura H. Phillips

Justin O. Kay

Michael P. Daly

On Friday, January 15, 2016, the ***Federal Communications Commission*** filed its response to the arguments of the joint Petitioners in the consolidated appeal from its July 10, 2015 Omnibus Ruling. The Commission's brief addresses the scope of its statutory authority, the definition of an "*automatic telephone dialing system" ("ATDS")*, the meaning of "called party" and the potential liability for calls to recycled numbers, the ability to revoke consent, healthcare-related calls and the emergency purpose exception, and First Amendment challenges to the Commission's interpretations of the statute. Its main arguments are summarized below.

The Commission's Statutory Authority

The Commission asserts in its brief that its Omnibus Order is "consistent with the text of the statute." For each of the four substantive arguments raised on appeal—the definition of an ATDS, treatment of reassigned numbers, revocation of consent through any reasonable means, and the agency's refusal to exempt all healthcare-related calls—the Commission maintains that its ruling was a "reasonable exercise of its delegated authority to interpret and administer the TCPA."
To the extent that the statute itself fails to provide a single, unambiguous answer to a question of interpretation, the Commission states that it is entitled to reasonable deference in its authority to administer the TCPA so long as its determinations are not "arbitrary or capricious." It then argues that this standard is met with respect to each substantive determination challenged on appeal.

The Definition of an ATDS

Defending its broad and amorphous definition of an ATDS, the Commission first stakes out the position that its 2003 Order interpreting the statutory definition to include predictive dialing systems is settled law that cannot be reviewed on appeal because no one challenged it in 2003—a full decade before litigation under the statute exploded. The Commission thus puts the proverbial rabbit in the hat, arguing that the Petitioners are bound by an ATDS definition that encompasses any system that dials numbers from a stored list, rather than from a randomly or sequentially generated list (as the

statute squarely requires).

The Commission goes on to defend its interpretation of “capacity” to include capabilities achievable only with modifications or enhancements that are not “too attenuated” or “theoretical,” whatever these terms may mean. In language reminiscent of the July Order, it argues that the word “capacity” necessarily suggests “a sense of futurity or unrealized potentiality.” The briefing on both sides is a model of linguistic jousting common in administrative law. Responding for example to the argument that the “capacity” of Lambeau Field in Green Bay is actually what it is, and not what it could be after remodeling to increase seating, the Commission argues that Lambeau’s “capacity” doesn’t increase or decrease with the attendance of wheelchair-bound fans because “the ‘capacity’ to seat people in spaces designated for wheelchairs exists even when no wheelchairs are present.” Of course, the “capacity” of Lambeau Field includes actual, existing spaces designated for wheelchair access—not just a theoretical possibility that such spaces might be added in the future. The Commission’s self-styled “counterexamples” attacking the common sense examples in the Petitioners’ brief generally fall flat.

On the statutory language itself, the Commission argues that the words “using a random or sequential number generator” cannot fairly be read to require that an ATDS generate numbers to be called in this fashion alone. Rather, the Commission argues, for example, that the subject words can be read to modify only the word “produce,” and not the word “store,” such that the definition would encompass systems which “store” numbers (whether or not from a “random or sequential number generator”) and have the capacity to dial those numbers automatically (or without human intervention). (Recall that ATDS “means equipment which has the capacity — (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”) In defending its expansive and amorphous interpretation of this language, the Commission also argues that its interpretation has been effectively endorsed by Congress since 2003 by the failure of Congress to adopt legislation seeking the reverse the Commission’s creeping expansion of the ATDS definition.

“Called Party” and Calls to Reassigned Numbers

The Commission’s Omnibus Ruling stated that the TCPA requires the consent of the “current subscriber” or “the non-subscriber customary user,” and declined to interpret “called party” as the “intended recipient.” It created a “one call exemption” and pointed to existing “solutions in the marketplace” that companies could rely on to partially identify reassigned numbers.

In its brief, Commission now acknowledges that: (1) there is no perfect solution for detecting reassigned numbers; and (2) its Order relies on an array of inadequate strategies and a mere hope that the marketplace will react to its Order by devising a comprehensive solution at some future date. The Commission also downplays the impossible burden that its interpretation of “called party” places on business and suggests that parties have exaggerated the litigation risk when it comes to liability for calls to reassigned numbers. The Commission appears to be oblivious to the true litigation climate, suggesting that “petitioners’ unsupported claim of catastrophic liability is . . . overblown.” Notably, the Commission states in a footnote that “[i]t is not evident . . . that a class of nonconsenting recipients of calls to reassigned numbers could satisfy class-certification requirements such as ascertainability.”

The Commission maintains that its conclusion that called party (whose consent is required) refers to the current subscriber or current customary user of the phone number “comports with other provisions of the statute, which “discuss whether the ‘called party’ is charged for the call, implying

that ‘called party’ means the current subscriber (or someone connected to them).” In rejecting the intended recipient approach to called party urged by numerous parties (which the Commission calls “an unnatural reading of the statute”), it argues that the statute nowhere suggests that the intent of the caller is relevant. It further argues that the interpretation of called party as intended recipient would unfairly put the burden on new subscribers to inform callers that they are the wrong parties and that they do not consent to such calls.

The Commission concedes that, “at present, it is not always possible for callers to discover all reassignments immediately after they occur,” but notes that there are a “number of options . . . that may permit [callers] to learn of reassigned numbers,” (specifically referencing Neustar’s capabilities) and asserts that its Order “creates strong incentives for the telemarketing industry to perfect those tools [to identify reassigned numbers.” Thus, in short, the Commission is compelling companies to bear TCPA liability risk in *any* calling or texting outreach program using automated technology until the marketplace finds a way to catch up to the law.

The Commission’s endorsement of imperfect solutions continues with its argument that the one-call rule “strike[s] an appropriate balance between the interests of callers and consumers” and will “often, though not always, allow the caller to learn of the reassignment,” if someone answers a call and notifies the caller or if the voicemail message contains a name other than that of the intended recipient. The Commission does not address where calls go unanswered or when a text message recipient elects not to reply “STOP” or otherwise notify the texting party. The Commission equates the challenge to the one-call rule to “looking a gift horse in the mouth,” and states that it could have chosen to offer no relief at all. It argues that the exemption is not arbitrary and capricious because it is reasonable and appropriate for businesses to bear the risk until a perfect solution is created.

Revocation of Consent

Petitioners made two key arguments regarding the Commission’s ruling that called parties may revoke consent by any reasonable means: first, they argued that the ruling was arbitrary and capricious because of its practical unworkability; and second, they argued that it improperly precluded callers and call recipients from contractually agreeing to methods of revocation.

The Commission responded by noting its broad authority under *Chevron* to fill in statutory gaps. While the Commission indicates that its Omnibus Order did not specifically address whether parties may contractually select revocation procedures, it argues that Congress’s silence on the issue of waiver permits it to provide the methods of revocation as it sees fit—a position that seems to be at odds with existing law that provides that parties are free to contractually waive their rights unless Congress has affirmatively precluded such a waiver, which it did not do here.

Second, the Commission argues that Petitioners have exaggerated the consequences of a basically unfettered right of revocation. The Commission takes refuge in its adoption of a “reasonable” standard, which it describes as a “familiar concept in law.” It argues that because it cannot possibly determine all reasonable means, it should not limit the rights of consumers. Remarkably, in a footnote that seemed to underscore the point made by Petitioners, the Commission states that callers should adopt “easy and convenient” mechanisms for revocation that would make it “unlikely” for consumers to use “unusual or aberrant” means. Of course, it offers no specific protection for callers when consumers deliberately choose that “unlikely” route.

Healthcare-Related Communications and the Emergency Purpose Exception

As we noted here, Rite Aid Hdqrtrs. Corp. ("Rite Aid") filed a short separate brief focusing on the healthcare-related portions of the Omnibus Order (Rite Aid was limited to 2,500 words, compared to 14,000 words for the joint petitioners). Specifically, Rite Aid argued that the Omnibus Order, inconsistently and impermissibly imposed different rules applicable to different kinds of healthcare communications depending on their form and content, impermissibly interpreted and applied the TCPA in a manner that conflicts with HIPAA, and failed to consider the "emergency purposes" exception in imposing such restrictions.

The Commission responds to the first argument by asserting that its exemption for certain healthcare calls to wireless numbers is consistent with the 2012 Order because nothing in the 2012 Order or the attendant regulations exempted healthcare calls to wireless numbers from the statutory consent requirement, and that statutory consent requirement for calls to wireless numbers also justified any disparate treatment for calls to wireless numbers as compared to calls to residential landlines.

As for the second argument regarding HIPAA, the Commission argues that just because certain calls are permissible under HIPAA (e.g., non-treatment calls related to billing) does not mean such calls must automatically be exempted from the TCPA since such the timely delivery of such non-treatment calls is not critical to the called party's healthcare. The Commission further argues that HIPAA and the TCPA are different statutes with different purposes, and that Rite Aid's argument claiming that the TCPA is being interpreted in conflict with HIPAA should not be addressed by the court because it was not presented to the Commission.

As for the third argument regarding the emergency purposes exception, the Commission argues that this argument, too, was not properly before the court because "[n]either the underlying petition nor any other party asked the Commission to address that exception," but that in any event, "parties can rely on the emergency-purposes exception on a case-by case basis." The Commission fails to note, however, that it was the ***Commission*** that chose not to address in its Order the two fully briefed petitions raising this very issue. (See our prior coverage of these petitions here.)

First Amendment Challenges to the Commission's Rulings

The Commission dismisses the Petitioners' First Amendment challenge as a "red herring" that is not "serious' enough to overcome the deference to which it believes its interpretations are entitled. It argues that the constitutional-avoidance doctrine does not apply because "there is nothing to avoid," as there is "no serious doubt, much less grave doubt, about the constitutionality of the TCPA's time, place, and manner restrictions . . . ." It then cites a number of decisions that rejected challenges to the TCPA itself, and defends the TCPA's requirements as reasonable time, place and manner restrictions that "serve a significant governmental interest," are "narrowly tailored" to serve that interest, and "leave open ample channels for communication."

Apart from acknowledging it, the Commission has remarkably little to say in response to the Petitioners' assertion that they are not "directly challeng[ing] the TCPA's constitutionality," but instead the Commission's "interpretations of the statute." In response, it merely notes that its interpretations are consistent with two judicial opinions from 2012 and 2013, and offers the empty assurance that its reading of the statute will not prevent Petitioners from being "able to communicate effectively" with consumers.

Next Steps In The Appeal

The joint brief for intervenors supporting the Commission is due on January 22, the reply briefs of the Petitioners and the intervenors supporting them are due on February 16, the joint appendix is due on February 19, and final briefs are due on February 24. We will continue to monitor the docket and report on any significant developments.

National Law Review, Volume VI, Number 18