

# Calls to Current Customers are not "Telephone Solicitations" under the TCPA, FCC Says

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Even though this blog covers telecom litigation and enforcement, this is the first post about a formal complaint brought before the FCC. Among the reasons are that the FCC does not handle many formal complaints these days (it had only 10 docketed cases in all of 2009), and decisions on the merits are few and far between. But a decision issued last week caught our attention. In the decision, the FCC's Enforcement Bureau took a narrow view of the Telephone Consumers Protection Act ("TCPA").

The Enforcement Bureau held that unsolicited calls to a consumer were not TCPA violations because the messages were intended for current customers, not as solicitations to obtain new customers. Moreover, the telemarketer's mistake in directing the calls to a non-customer did not make the calls actionable. This decision will make it harder for a consumer to prove a violation when communications are intended for current customers.

In the case, [Consumer.net, LLC v. Verizon Communications, Inc.](#), a consumer contended that Verizon's long distance and wireless entities made unlawful telephone solicitations to him on at least three occasions. It was uncontested that three unsolicited calls were made to the consumer. With respect to all three calls, the FCC concluded that the consumer failed to show that the content of the calls violated the Act. The decision turned on whether the calls were "telephone solicitations" under the TCPA.

Section 227 defines a "telephone solicitation" as the initiation of a telephone call "for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services." (Calls with the customer's permission or calls where an established business arrangement exists are exempted). It is not enough to show that a call was unsolicited; the complainant also must show that the purpose was to encourage a purchase of goods or services.

Two of the calls in the case were "special reminders" to Verizon Long Distance customers about free long distance calling available on upcoming holidays. The calls stated that the recipient "will receive 60 free domestic long distance minutes" during an upcoming holiday, stating that the free minutes "will automatically [be] applied to your account." The Complainant, however, was not a Verizon Long Distance customer at the time he received the calls. The FCC excused Verizon from liability, finding that the calls were not telephone solicitations under the Act. Instead, the calls were "good will" calls intended to be sent only to current Verizon customers "rather than the general public or potential new customers." The Bureau also excused Verizon's error in contacting the consumer, finding that the evidence was more consistent with a mistake than an attempt to solicit a new customer. In other words, Verizon mistakenly called the consumer - twice, and five months apart. But because the

content of the message did not ask the consumer to purchase anything, this mistake was not a “solicitation” in violation of the Act.

The third call began “This is Verizon Select ...” but was then cut off. The FCC concluded that the consumer failed to meet his burden of proof, because he could not identify the purpose of the call or whether a product or service was being advertised.