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September 19, 2024

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

**RE: Advanced Methods to Target and Eliminate Unlawful Robocalls – CG Docket No. 17-59**  
**Targeting and Eliminating Unlawful Text Messages – CG Docket 21-402**

Dear Ms. Dortch:

The Voice on the Net Coalition (VON)<sup>1</sup> hereby submits these comments in response to the draft order released in the above-referenced proceedings and scheduled for consideration at the Commission’s September 26 Open Meeting.<sup>2</sup> Specifically, VON objects to the authorization of an \$11,000 base forfeiture for voice service providers failing “to comply with the requirement to take affirmative, effective measures to prevent new and renewing customers from using its network to originate illegal calls, including knowing its customers and exercising due diligence in ensuring that its services are not used to originate illegal traffic.”<sup>3</sup> The Commission does not provide any guidance on what it considers “affirmative, effective” know your customer (“KYC”) measures. Both the U.S. Constitution and the Administrative Procedure Act (“APA”) require the Commission to issue guidance, subject to notice and comment rulemaking, before imposing high civil forfeitures. To do otherwise would violate Due Process and run afoul of recent Supreme Court precedent. *Cf. Jarkesy* (holding that administrative agencies cannot impose civil forfeitures absent constitutionally required due process).

In comments, VON and others recommended that the Commission should impose the forfeiture only when a voice service provider has actual knowledge of illegal traffic or

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<sup>1</sup> The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of internet communications. See [www.von.org](http://www.von.org).

<sup>2</sup> Eight Report and Order in CG Docket No. 17-59 and Third Report and Order in CG Docket No. 21-402 (rel. September 5, 2024).

<sup>3</sup> *Id.* at para. 31.

intended to allow the traffic onto the network.<sup>4</sup> The Commission rejected this position, stating that the rule does not include a knowledge or intent requirement, and that while it does not expect perfection it does require that providers exercise due diligence.<sup>5</sup> The Commission further noted that it made changes to its original proposal such that the “base forfeiture is applied appropriately and does not necessarily punish providers acting in good faith.”<sup>6</sup>

VON respectfully submits that even providers acting in good faith could be subject to these high forfeitures because it is unclear what standards the Commission will apply to determine whether a provider took “affirmative, effective measures” to prevent its customers from originating illegal calls, including know your customer requirements and exercising due diligence.<sup>7</sup> The rule simply states the obligation.

More troubling and confounding is that in a recently issued Consent Decree, the Commission required Lingo Telecom, a voice service provider, to adopt enhanced KYC measures. However, these measures cannot serve as KYC guidance to the industry unless and until they are subject to notice and comment rulemaking. Imposing these requirements broadly as-is would violate the APA and Constitutional due process. In addition, these obligations are rigid and lack the flexibility to allow providers to apply appropriate KYC vetting processes for different services and classes of customers. While Lingo may have agreed to adopt these measures, they should not be foisted on other voice service providers in violation of the APA.

What is more, even if a provider voluntarily complied with the KYC obligations in the Lingo Consent Decree, it may not be protected from the Commission’s proposed forfeiture. In the Consent Decree, the Commission warned that

The following provisions are not a comprehensive robocall mitigation plan and are designed to supplement, rather than replace, existing caller ID authentication and robocall mitigation measures Lingo Telecom currently has in place or may implement in the future. Compliance with these measures is not a defense to future violations of state or federal law or Commission Rules.<sup>8</sup>

Service providers are thus left with no indication of how to comply with the Commission’s rules unless they strive for the “perfection,” which the Commission claims not to require.

For these reasons, the Commission’s draft order runs afoul of recent Supreme Court precedent that administrative agencies violate due process when a) they do not

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<sup>4</sup> *Id.* at para. 33

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at para. 32.

<sup>7</sup> See, 47 CFR § 64.1200(n)(4).

<sup>8</sup> See, Order, File No.: EB-TCD-24-00036425, Consent Decree, Attachment 1, Operating Procedures (rel. August 21, 2024).

give adequate notice of what conduct may be penalized<sup>9</sup> and b) they do not give regulated entities the opportunity of notice and hearing before imposing significant financial penalties.<sup>10</sup>

Accordingly, the FCC should refrain from imposing the base forfeiture as it is related to 47 CFR § 64.1200(n)(4) unless and until the Commission proposes guidance on what it considers “affirmative, effective measures” and publishes that flexible KYC guidance as part of a notice and comment rulemaking. This guidance should not mandate specific KYC processes given the differences among voice service providers and their customers, but the Commission can provide more information than “we will know it when we see it” before proposing substantial fines on providers who otherwise thought they were in compliance with the rules.

Please contact the undersigned if you have any questions.

Respectfully submitted,



Glenn S. Richards  
Counsel to the Voice on the Net Coalition

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<sup>9</sup> See *Ohio et. al., v. Environmental Protection Agency*, No. 23A349, 603 U.S. \_\_ (2024) (agency decision must be reasonably explained, and the agency must offer an explanation for its action including a rational connection between the facts found and the choice made and cannot simply ignore an important aspect of the problem.)

<sup>10</sup> See *SEC v. Jarkesy*, No. 22-859, 603 U.S. \_\_ (2024) (holding that the Seventh Amendment entitled the defendant to a jury trial in a securities fraud proceeding seeking civil penalties in the form of monetary relief before the Securities and Exchange Commission).