

ATTACHMENT A

**XCASTLABS INITIAL DRAFT COMPLAINT AGAINST THE FTC
(MARCH 2023)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT

X-CAST LABS, INC., 1880 Century Park E.,)
Los Angeles, California 90067,)
)
Plaintiff,)

Case No. _____

v.)

FEDERAL TRADE COMMISSION, a)
federal administrative agency,)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

and)

(Jury Trial Demanded)

LENA M. KHAN, NOAH JOSHUA PHILLIPS,)
REBECCA KELLY SLAUGHTER,)
CHRISTINE S. WILSON, and)
ALVARO BEDOYA,)
in their official capacity as Commissioners of)
the Federal Trade Commission,)

Defendants.)
_____)

INTRODUCTION

1. Plaintiff XCAST LABS, INC. (“XCAST”) brings this action to stop the Federal Trade Commission (“FTC”) from overreaching its statutory authority. XCAST is a telecommunications company regulated by the Federal Communications Commission (“FCC”). The FTC has no authority to regulate telecommunications. In spite of that fact, the FTC is now attempting to hold FCC-regulated telecom companies liable, and responsible, for the content of messages that pass from telemarketers to consumers through the worldwide communications network.

2. The FTC's actions exceed its authority. No federal statute defines "robocall" or makes a robocall "illegal." The content of a message determines its legality, and only the caller and the called party can know for sure the content. XCAST is neither the caller nor the called party. Privacy laws prevent anyone other than the called party from knowing the content of the caller's message.

3. Through various means, including intelligence and law enforcement assets, the identity and location of scammers, meaning those who use the telecommunications network to transmit illegal robocalls, are known to the FTC, the FCC and the Department of Justice ("DOJ"). However, for political reasons, and/or problems with extra-territorial enforcement, the U.S. Government has not taken action against these scammers or sought foreign government participation in curtailing illegal robocalling. Instead, the FTC chooses to illegitimately and unconstitutionally attack domestic, legitimate telecom companies like XCAST.

THE PARTIES

4. XCAST is a California corporation with its principal place of business at 1880 Century Park East, Suite 612, Los Angeles, California.

5. The FTC is an independent administrative agency of the United States.

6. Lena M. Khan, Noah Joshua Phillips, Rebecca Kelly Slaughter, Christine S. Wilson, and Alvaro Bedoya are Commissioners of the Federal Trade Commission, acting in their official capacity.

JURISDICTION AND VENUE

7. This action arises under the Constitution and laws of the United States, and this Court has federal question jurisdiction over this action pursuant to Article III of the Constitution and 28 U.S.C. § 1331.

8. XCAST's right to immediate judicial review and intervention in this Court with respect to the FTC's alleged conduct is based on the Due Process Clause of the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. The Administrative Procedure Act ("APA") gives courts jurisdiction to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)–(B).

9. Venue is proper under 5 U.S.C. §703 and 28 U.S.C. §1391(c).

FACTUAL BACKGROUND

A. Robocalls

10. A "robocall" is undefined by any statute, rule or regulation. The FTC, the FCC and the DOJ give differing guidance on what a robocall is, but the only guidance on legality of a robocall is whether or not the caller has obtained the recipient's permission to receive the call. And, not all robocalls require permission. XCAST has never been a caller.

11. According to the FTC's website, a robocall is simply a prerecorded message: "[i]f you answer the phone and hear a recorded message instead of a live person, it's a robocall." <https://consumer.ftc.gov/articles/robocalls>.

12. The FTC does not define what is illegal, but only speculates as to, *odds are*, what is *probably* illegal: "[i]f you're getting a lot of robocalls trying to sell you something, odds are they calls are illegal." *Id.*

13. The FCC is more specific than the FTC in broadly defining a robocall as follows: "[r]obocalls are calls made with an auto dialer or that contain a message made with a prerecorded or artificial voice."

https://www.fcc.gov/sites/default/files/stop_unwanted_robotcalls_and_texts.pdf#:~:text=Robocalls%20are%20calls%20made%20with%20an%20autodialer%20or,message%20made%20with%20a%20prerecorded%20or%20artificial%20voice.

14. In 2019, the FCC released a report on robocalling, noting that consumers “frequently associate ‘robocalls’ with annoying calls, and indeed, unwanted calls are a perennial top consumer complaint.” [https:// docs.fcc.gov/public/attachments/DOC-356196A1.pdf](https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf). In the same report, the FCC acknowledged that the term robocall “covers a wide array of calls, many of which are legal, such as school closing announcements and prescription or medical appointment reminders. *Id.* The FCC cautioned that detailed analysis is required to avoid “blur[ring] the lines between legal robocalls, both welcome and unwelcome, and illegal robocalls.” *Id.*

B. The Global Telecom Network And XCAST’s Position

15. The FCC is tasked by Congress with maintaining a consistent and reliable telecommunications network. Congress tasked the FTC with maintain a competitive environment for the good of consumers across all markets. In telecommunications, the FTC was instrumental in the divestiture of AT&T to create more competition.

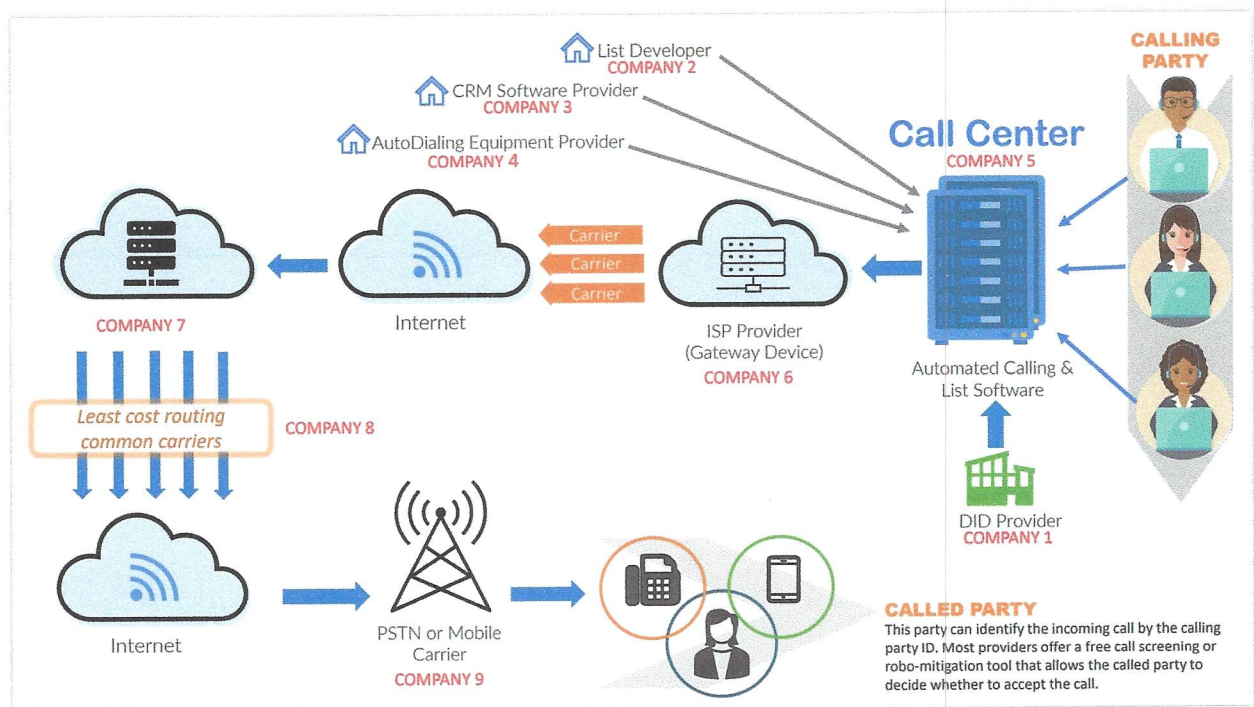
16. The Telecommunications Act of 1996 reinforced the goal of making telecommunications more competitive. The current competitive landscape has evolved into a few large common carriers, like what is now the reincarnation of AT&T, Verizon and T-Mobile, and literally thousands of smaller “intermediate” carriers like XCAST

17. XCAST has three main areas of business: hosted PBX, SIP trunking, and carrier/wholesale. <https://xcastlabs.com>. XCAST is a pioneering technology company whose engineering staff originated some of the basic mechanisms that make Voice Over Internet Protocol (“VOIP”) communications work today. As far back as the early 1990s, XCAST’s

founding engineers demonstrated the power of speech recognition technology, when they introduced the first ever digital personal assistant.

18. XCAST’s engineering team also deployed the world’s first “soft switch” into a major carrier with ground-breaking Session Initiation Protocol (“SIP”) technology. XCAST received many U.S. Patents for its technological developments.

19. The picture below graphically illustrates why the FTC is wrongfully attacking XCAST for making robocalls.



20. XCAST is neither the calling party nor the called party. The calling party is the one who is responsible for the content of the call. No matter the content, the call cannot be a robocall unless it is answered by the called party.

21. XCAST could be one of several possible intermediate carriers (Company 8) whose servers may help carry the call through the Internet to called party. None of these intermediate

carriers know, or could legally find out, the content of the call. Least cost routing means that the intermediate carrier will be selected based on cost. The first intermediate carrier could be Company 7, and XCAST could be that, if XCAST is the first “hop” in the selection of intermediate carriers.

22. An Internet Service Provider (“ISP”) is the one who puts the call into the internet, which in the illustration is Company 6. That company could be a large US carrier like AT&T or Verizon, or a cable company like Comcast, or it could be TaTa in India. Prior to 2020, XCAST could have been a small “originating” carrier for onboarding calls to the Internet, but because XCAST obtained information that over 90% of all bad calls come from overseas, XCAST ceased handling any traffic that originated overseas.

23. At Company 9, the call terminates through either the PSTN (“Publicly Switched Telephone Network,” which is the traditional local area exchange (“LEC”) or a wireless carrier. Company 9 terminates the call, or hands it off to the called party. XCAST is not a terminating carrier. A typical Company 9 would be Verizon.

D. Legislative Efforts To Mitigate Robocalling

24. On December 30, 2019 the President signed into law the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement Deterrence Act, known by the catchy acronym TRACED Act. The law establishes monetary penalties for robocalls, and requires the FCC to mandate telecommunications providers implement call authentication and traceback technology. It also requires the FCC to issue rules, policies or procedures to protect individuals from robocalls and spoofing, including texts, from an unauthenticated number.

25. The TRACED Act required the FCC to issue rules “for the registration of a single consortium that conducts private-led efforts to trace back the origin of suspected unlawful robocalls.”

26. In July 2020, the FCC designated the Industry Traceback Group (“ITC”), a private sector entity formed by the lobbying group US TELECOM as the registered traceback consortium and has re-designated each year since. Voice service providers today are required by law to cooperate with traceback requests from the registered traceback consortium.

27. In late 2020, the FCC formally mandated that all “voice service providers are now legally required to respond to traceback requests” from the ITG. The FCC also has indicated that “contractual provisions that prohibit, delay, or otherwise interfere with a voice service provider’s cooperation with private-led traceback efforts are contrary to the spirit and goals” of the federal TRACED Act.

28. At all times, XCAST has been compliant with all FCC rules and regulations related to both the TRACED Act and has been completely cooperative with the ITG. In fact, XCAST is a member of the ITG’s working group, which was set up to help identify illegal calls.

29. STIR/SHAKEN is a technology framework designed by the FCC to reduce fraudulent robocalls and illegal phone number spoofing. “STIR” is an acronym for “Secure Telephony Identity Revisited,” and “SHAKEN” is an acronym for “Secure Handling of Asserted information using toKENs.” The FCC has adopted rules requiring service providers to deploy a STIR/SHAKEN solution by June 30, 2021 and to certify their compliance in the Robocall

Mitigation Database. However, some small voice service providers that are not facilities-based are required to implement STIR/SHAKEN by June 30, 2022. XCAST has been STIR/SHAKEN (“CID”) compliant within all applicable deadlines and rules established by the FCC.

E. FTC’s Prior Interaction With XCAST

30. In January of 2021, the FTC served XCAST with a Civil Investigative Demand seeking information of extremely broad reach. XCAST has often received subpoenas from law enforcement and intelligence agencies seeking information about people or entities having particular phone numbers or IP addresses. XCAST had in the past received FTC CID’s seeking limited information. The January 2021 CID, however, was different. It sought information that XCAST did not possess.

31. From January of 2021 to July of 2021, XCAST attempted to respond to the CID, but the FTC was not satisfied. In October of 2021, the FTC filed an enforcement action in the U.S. District Court for the Central District of California, seeking a court order to compel XCAST to produce more documents.

32. In January 2022, the Court found XCAST to be non-compliant and ordered XCAST to produce more documents within 20 days.

33. At no time between January 2021 and January 2022 did the FTC indicate that XCAST was itself under investigation for violation of any rules, regulations or laws.

32. After the Court’s January 2022 ruling, XCAST engaged an e-discovery vendor to bates stamp all previously produced documents and provide them to the FTC on a secure web portal. A

relatively small number of additional documents were produced, including additional subpoenas that had not been produced before, primarily because XCAST's office in Los Angeles had been locked down due to covid.

33. Of the approximately 50 subpoenas demanded by the FTC, not one related to robocalling. Most contained highly sensitive personal information related to crimes, and some related to intelligence.

34. Throughout the spring of 2022, XCAST assured FTC staff attorneys that XCAST was in full compliance with the CID, per the Court's order. The FTC staff finally admitted that XCAST had fully complied in July of 2022.

35. XCAST heard nothing further from the FTC until December 15, 2022 when the FTC gave XCAST a copy of a draft complaint the FTC intended to file in the U.S. District Court for the Central District of California, alleging violations related to robocalling, including (1) delivering a prerecorded message, (2) that was on the Do Not Call Registry, (3) failing to identify the seller, (4) falsely claiming affiliations, (5) making false and misleading statements to induce purchases, and (6) transmitting false or deceptive caller ID numbers.

36. The December 15, 2022 draft complaint was the first time XCAST was put on notice of any alleged violations of any rules or regulations. A letter from the FTC accompanying the draft complaint stated that XCAST could not negotiate the charges, but only the remedy, which included injunctions against action that XCAST had not taken, and fines that would put XCAST out of business.

37. The allegations of the draft complaint represent what an illegal robocaller may have done, but XCAST has done none of the actions itemized above. The draft complaint, with slight modifications, was filed in the U.S. District Court for the Central District of California on May 12, 2023, civil action no. 2:23cv03646.

**COUNT I VIOLATION OF THE APA 5 U.S.C. § 706
(Regulation Exceeding the Agencies' Statutory Jurisdiction and Authority)**

38. Plaintiff incorporates the preceding paragraphs by reference as if fully set forth herein.

39. Under 5 U.S.C. § 706(2)(c), “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]”

40. The FCC may “prosecute any inquiry necessary to its duties in any part of the United States, 15 U.S.C. § 43, and is authorized to “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions...Federal Credit Unions...and common carriers[.]” 15 U.S.C. § 46(a).

41. Since XCAST’s carrier business qualifies XCAST as a common carrier, the FTC has no authority or jurisdiction to investigate and prosecute XCAST.

42. The FTC’s imposition of a call duration requirement for determining robocall content is an ultra vires application of law, rule or regulation.

**COUNT II - VIOLATION OF THE APA 5 U.S.C. § 706
(Arbitrary, Capricious, and Not in Accordance with Law)**

43. Plaintiffs incorporate the preceding paragraphs by reference as if fully set forth herein.

44. Under 5 U.S.C. § 706(2)(A), “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” The FTC’s action against XCAST, without prior notice and prior administrative review, is arbitrary, capricious, and not in accordance with law.

45. The FTC’s action against XCAST is based on a misunderstanding of basic, underlying facts due in part because the FTC is beyond its expertise. XCAST is a regulated common carrier, subject to FCC regulation. The FTC’s actions are onerous, unlawful and unconstitutional in attempting to hold a telecom company liable for a message that passes through its portion of a multi-component telecommunications network. XCAST has violated no laws, rules or regulations.

46. The APA requires federal agencies, including the FTC, to (a) give general notice of proposed rulemaking in the Federal Register and thereafter (b) “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. § 553(c). The FTC’s action against XCAST presumes XCAST to have knowledge of the content of messages passing through its portion of the telecommunications network, when in fact such knowledge would violate privacy laws of call senders and call recipients.

47. An agency action is not reasonable if the agency “entirely failed to consider an important aspect of the problem.” See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463

U.S. 29, 43 (1983). The FTC has failed to consider that XCAST is not a telemarketer, and has no actual knowledge of the content of messages sent by others through XCAST equipment.

48. “An agency must consider and respond to significant comments received during the period for public comment.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015). The FTC claims that XCAST should have known that messages, numbering in “billions,” were illegal because of call duration. No rule or regulation issuing from the FCC or the FTC imposes a call duration requirement on carriers to block calls suspected of being robocalls.

49. Without prior investigation, without notice or a prior finding that X-Cast violated any orders, rules or regulations of the FTC, the FTC recently sued X-Cast in the U.S. District Court for the Central District of California, alleging that X-Cast knowingly facilitated the delivery of “billions” of illegal robocalls.

50. The Complaint was then massively covered by FTC press releases, generating negative publicity that will have a potentially crippling effect on X-Cast’s business, the majority of which is to provide IP PBX systems for businesses, police departments, local governments, law enforcement, and hospitals.

**COUNT V VIOLATION OF THE APA 5 U.S.C. § 706
VIOLATION OF THE U.S. CONSTITUTION U.S. CONST. AMEND. V
(Taking Without Due Process of Law)**

51. Plaintiff incorporates the preceding paragraphs by reference as if fully set forth herein.

52. “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

U.S. CONST. AMEND. V.

53. The FTC's actions against XCAST assume strict liability of intermediate carriers for the content of messages passing through the vast, complex multi-national network that includes traditional wired telephone components and Internet implemented VOIP components.

54. The FTC's actions against XCAST wrongfully assume that XCAST, and any other similarly situated carriers, knew or should have known the content of messages, based on metrics that are unproven and controversial. XCAST has had no chance to be heard on the issue of its knowledge of message content and the FTC's metrics for determining message content.

55. The FTC's actions are ruinous to XCAST's business since the mere accusation of facilitating illegal robocalls is enough for most telecom companies like XCAST to lose customers on a massive scale. XCAST is informed that one telecom company accused of facilitating robocalls has received death threats directed at employees. The value of XCAST as a company is in direct proportion to its customer base. XCAST began losing customers immediately after the FTC announced the filing of its lawsuit against XCAST.

56. The FTC's lawsuit was filed without prior notice, and is based on inaccurate allegations. XCAST was informed that suit would be filed, without giving XCAST an opportunity to rebut allegations of knowingly sending illegal robocalls. XCAST.

57. The FTC's actions are ultra vires in that no law, rule or regulation authorizes the FTC to manage or control the flow of calls through the telecommunications network. Such regulation was authorized by Congress to be in the hands of the FCC. The FTC's actions are without the authority of law. The selection of XCAST as a target of unlawful activity was arbitrary and capricious.

PRAYER FOR RELIEF

Plaintiff request the following relief from this Honorable Court:

1. Holding unlawful the filing of Civil Action No. 2:23cv03646 in the U.S. District Court for the Central District of California.
2. Ordering a stay of Civil Action No. 2:23cv03646 until Plaintiff's constitutional and APA challenges alleged herein are decided.
3. Issuing preliminary and permanent injunctive relief enjoining the FTCs from using call duration as a metric for holding XCAST liable for robocalls.
4. Declaring the FTC has no authority to regulate, prosecute, and punish FCC regulated carriers for the content of messages without having actual knowledge of the content of the message.
5. Issuing preliminary and permanent injunctive relief enjoining the FTC from forcing XCAST to defend a lawsuit filed by the FTC with no statutory authority, no prior investigation, no notice to XCAST and no opportunity to be heard.

6. Awarding XCAST the costs of this action and reasonable attorney's fees; and
7. Awarding XCAST such other legal and equitable relief as is just and appropriate.

Respectfully submitted,
/s/ Edward A. Pennington, DC Bar NO. _____
Edward A. Pennington
PENNINGTON OLIAK, PLLC
1055 Thomas Jefferson Street, NW Ste. L35
Washington, DC 20007
epennington@pennoliak.com
Tel: (202) 897-2725

Attorneys for Plaintiff XCAST LABS, INC.