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March 8, 2017

Marlene H. Dortch

Office of the Secretary

Federal Communications Commission

445 12th Street SW

Washington, DC 20554

Re: Comment on Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent Under the Telephone Consumer Protection Act of 1991
*(Public Notice DA 17-144; CG Docket No. 02-278; CG Docket No. 05-338)*

Dear Ms. Dortch:

We appreciate the opportunity to comment on the Federal Communications Commission's (FCC) Public Notice seeking comment on a Petition for Rulemaking and Declaratory Ruling filed by a Craig Moskowitz and Craig Cunningham (Petitioners).

Washington State Employees Credit Union (Credit Union) is a state-chartered, credit union headquartered in Olympia, WA and serves over 200,000 members.

We respectfully submit the following comments to the FCC to assist the FCC in considering Petitioners' requests pursuant to the Telephone Consumer Protection Act (TCPA).

**1. Petitioners' Request is not supported by the TCPA**

Petitioners request that the FCC initiate a rulemaking to (1) overturn the Commission's current position (expressed in previous declaratory orders) that 'prior express consent' may arise from a party's providing a telephone number to the caller; and (2) "uniformly require that for all calls made to cellular and residential lines subject to the TCPA's prohibitions in 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B), 'prior express consent' to such telephone calls must actually be (i) express consent (ii) specifically to receive autodialed and/or artificial voice/prerecorded telephone calls, (iii) at a specified telephone number, and (iv) be in writing." Petitioners additionally request that the FCC "issue a declaratory ruling to remove uncertainty regarding the meaning of 'prior express consent' resulting from the 1992 and 2008 Orders, and from 2012, 2014 and 2015 Commission orders to the extent they reiterate the Commission's positions in the 1992 and 2008 Orders."

These requests are not supported by the TCPA.

The TCPA provisions in question prohibit persons from making a call with an artificial or prerecorded voice to a cellular or residential telephone line without obtaining the "prior express consent" of the called party. *47 U.S.C. §§ 227(b)(1)(A)(iii), 227(b)(1)(B).* The statute contains no requirement that consent be in writing.

Petitioners suggest that the FCC's interpretation of the TCPA consent requirements do not satisfy the *Chevron* test for determining whether an agency has complied with its Congressional mandate (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, (1984)). Specifically, Petitioners take issue with the purported addition by the FCC of the word "*implied*" to the statute based on the FCC's 1992 and 2008 Orders providing that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary" and that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."

Ironically, Petitioners are now requesting the FCC do precisely what they are also arguing against – adding a word to the statute that is not otherwise there. Petitioners are asking the FCC to effectively insert the word "*written*" into 47 U.S.C. §§ 227(b)(1)(A)(iii), 227(b)(1)(B), thereby amending the TCPA in a manner inconsistent with the TCPA's plain language. Congress could have required prior express *written* consent for all artificial or prerecorded calls to a cellular or residential telephone line, but it did not. The FCC should not extend the requirements of the TCPA beyond those which Congress provided.

We additionally do not agree that the FCC impermissibly added an exemption to the statute for "implied consent" by clarifying that prior express consent is given when a person knowingly provides their phone number in connection with a transaction. As restated in the FCC's 2015 Order, "[t]he TCPA and the Commission's rules plainly require express consent, not implied or 'presumed' consent."

Step two of the *Chevron* analysis requires the Court to determine if "the statute is silent or ambiguous with respect to the specific issue. . . whether the agency's answer is based on a permissible construction of the statute." Petitioners specifically acknowledge that "[b]ecause the TCPA does not define the term 'prior express consent,' the Commission arguably has authority to define what constitutes such prior express consent." The FCC's Orders have done just that. For example, the 2015 FCC Order reiterated that prior express consent includes consent demonstrated by the called party intentionally giving his or her wireless number to the person initiating the autodialed or prerecorded call. Petitioners point to nothing that would make the FCC's interpretation of the TCPA impermissible or even unreasonable. Numerous courts have determined that the FCC's current interpretation is supported by the language of the statue.

Conversely, Petitioners' request to add a universal *written* requirement to the statute goes beyond merely defining what constitutes prior express consent and actually adds an additional requirement to that consent.

**2. Petitioners' Requested Rulemaking Would Impede the Credit Union's Ability to serve its Members.**

The effect of complying with Petitioners' request would not be to protect consumers, but rather to prevent consumers from receiving many services they wish to obtain.

In the context of the Credit Union, members join to be a part of a cooperative and receive Credit Union products and services that benefit the members. When joining, or when requesting a specific product or service, members provide a phone number to enable the Credit Union to effectively serve the member. The Credit Union may contact the member for various non-marketing reasons, including notifying the member of a fraud alert or other helpful message services; all of which benefit the member.

Consistent with the FCC's interpretation of what constitutes *prior express consent*, when a member provides a phone number to the Credit Union, it is with the purpose and understanding that the Credit Union will use that phone number to provide services to the member.

Petitioners incorrectly state that prior express *written* consent may be easily obtained "for example, in a credit application that specifies that the debtor is expressly consenting to being called by autodialer and/or with artificial voice/prerecorded messages." A prior express *written* consent standard actually creates a much higher compliance hurdle than Petitioners acknowledge. For example, the FCC's Enforcement Bureau has indicated that, for prior written consent to be effective:

(a) The agreement must be in writing;
(b) The agreement must bear the signature of the person who will receive the advertisement/telemarketing calls/texts;
(c) The language of the agreement must clearly authorize the seller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls/robotexts;
(d) The written agreement must include the telephone number to which the person signing authorizes advertisements or telemarketing messages to be delivered; and
(e) The written agreement must include a clear and conspicuous disclosure informing the person signing about the nature and scope of the communications to be delivered.

Thus, the Credit Union cannot just add language to an application or account agreement to satisfy a written consent standard. The Credit Union would have to obtain a separate signed agreement from all future members, and all current members, in order to provide to those members certain beneficial services such as fraud alerts. Further, requiring that the consent be granted in a document that includes the phone number to which the consent applies means that the consent cannot automatically incorporate any new phone number the member gives later. Therefore, if the member changes their phone number, even if they provide that new phone number to the Credit Union, the member would either lose the benefit of certain Credit Union services, or they would need to execute a new written agreement.

Any rulemaking to increase the consent standard beyond the current TCPA requirement would effectively prohibit the types of beneficial services that credit unions are able to offer their members, or credit unions that continue to provide such member services would be exposed to significant liability for doing so. Ultimately, such rulemaking would be a great disservice to credit union members.

Thank you for the opportunity to comment on this proposal. We appreciate the importance of these issues and the chance to contribute during this rule making process.

Sincerely,

Wilkes Hardin
VP, Lending Compliance
Washington State Employees Credit Union