

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling or)	
Rulemaking of Paul Armbruster)	

COMMENTS OF CTIA

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I. INTRODUCTION AND SUMMARY.

CTIA¹ respectfully submits these comments in response to the Federal Communications Commission’s (FCC or Commission) Public Notice in the above-captioned proceeding,² which solicits comment on the Petition for Declaratory Ruling or Rulemaking of Paul Armbruster.³ The Petition seeks a ruling “confirming that a cellular phone customer can revoke consent to receive any and all unwanted text messages from their cell service provider.”⁴ The Commission should reject the Petition in order to preserve wireless service providers’ ability to deliver

¹ CTIA® (CTIA) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st Century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling or Rulemaking Filed by Paul Armbruster*, CG Docket No. 02-278 (rel. July 18, 2019).

³ Petition of Paul Armbruster for Declaratory Ruling Or Alternatively A Rulemaking Regarding A Consumer’s Absolute Right to Revoke Consent to Receive Unwanted Text Messages From Common Carriers, CG Docket No. 02-278 (filed July 9, 2019) (Petition).

⁴ *Id.* at 6.

important and timely communications to their customers, free of charge. As discussed in more detail below, the Petition’s request is inconsistent with the framework of the Telephone Consumer Protection Act (TCPA) and long-standing Commission precedent. Further, granting the Petition would weaken an important tool that protects wireless subscribers from “bill shock” and provides other significant consumer benefits.

For nearly 30 years, all calls and texts from wireless service providers to their subscribers have fallen outside the TCPA “prior express consent” requirements, as long as subscribers are not charged for the communications (the Wireless Service Provider Exemption).⁵ The TCPA generally requires callers to obtain prior express consent before placing calls using an autodialer or an artificial or prerecorded voice to wireless customers, unless certain targeted exemptions apply (such as for calls made for emergency purposes).⁶ Communications from wireless providers to their customers, free of charge, are another such exemption. The Commission has repeatedly recognized the unique relationship that providers have with their subscribers as both the sender of the message and the provider of the wireless service, and Congress amended the TCPA to affirm the statutory basis of the Wireless Service Provider Exemption. Because the Petition’s request is contrary to the precedent of the Commission and the intent of Congress, and would frustrate wireless service providers’ ability to deliver messages that help effectuate important public interest and consumer protection objectives, it should be denied.

The Petition’s request is also inconsistent with the language, structure, and intent of the TCPA. The Petitioner asks the Commission to allow consumers to revoke consent to receive text

⁵ *Cf.* 47 U.S.C. § 227(b)(1)(A)(iii) (prohibiting calls made using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular telephone service or other radio common carrier service, among other services, for which the called party is charged for the call).

⁶ *Id.* § 227(b).

messages from their cellular service provider. But where no TCPA “prior express consent” is required (as is the case with free texts from cellular service providers to their customers under the Wireless Service Provider Exemption), there is no TCPA consent to revoke. If consumers could revoke consent from calls and texts placed by wireless service providers, it follows that they could do so with respect to emergency calls and many other communications—such as non-autodialed, non-prerecorded messages—that do not require prior express consent under the TCPA in the first place. Therefore, denying the Petition would not only preserve the integrity of the Wireless Service Provider Exemption, but would also keep the TCPA’s prior express consent requirements harmonized.

II. THE LONGSTANDING WIRELESS SERVICE PROVIDER EXEMPTION FROM TCPA LIABILITY FACILITATES IMPORTANT AND TIMELY COMMUNICATIONS THAT PROTECT CONSUMERS FROM “BILL SHOCK.”

For nearly three decades since the TCPA’s inception, the Commission has repeatedly affirmed the Wireless Service Provider Exemption and supported the benefits that it brings to wireless subscribers.⁷ The Commission has also acknowledged the protections that come from time-sensitive calls and texts from a consumer’s wireless service provider. The courts have similarly consistently applied the Wireless Service Provider Exemption.⁸ The Petition offers no valid legal or policy basis for reversing this long-standing precedent. For these reasons, the Commission should take the opportunity to, once again, affirm the benefits of the Wireless Service Provider Exemption by denying the Petition.

⁷ Importantly, in the Commission’s decisions discussed herein, the Commission has never placed any restrictions on the Wireless Service Provider Exemption, which applies to all calls and texts placed by wireless service providers that are free to the end-user, irrespective of the content of such communications.

⁸ See, e.g., *Warciak v. Subway Restaurants, Inc.*, No. 1:16-cv-08694 (N.D. Ill. Feb. 28, 2019).

A. The Commission Has Repeatedly Affirmed the Consumer Protection and Public Interest Benefits of the Wireless Service Provider Exemption.

As early as the Commission's first TCPA implementing order in 1992, the Commission determined that cellular providers need not obtain additional consent from their cellular subscribers prior to initiating autodialed or prerecorded calls for which the cellular subscriber is not charged.⁹ The Commission found that the consumer benefits of calls made "as part of the subscriber's service," which "monitor service" or "issue warnings to 'roamers' that they are moving out of their providers' service area" outweighed the privacy and consumer protection concerns that the TCPA addresses.¹⁰ As a result, the Wireless Service Provider Exemption has always been grounded in the Commission's consumer protection objectives, taking into account the unique relationship that providers have with their subscribers as both the sender of the message and the provider of the wireless service, and the benefits of facilitating providers' free communications with their customers.

Following the TCPA's enactment and the *1992 TCPA Order*, Congress amended the TCPA and provided the Commission with express authority to exempt from the Section 227(b)(1)(A)(iii) prohibition calls to a telephone number assigned to a wireless telephone service that are not charged to the consumer.¹¹ Thus, the Wireless Service Provider Exception remains

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774 ¶ 45 (1992) (*1992 TCPA Order*) (finding that neither the plain language of the TCPA nor its legislative history indicate that Congress intended to impede communications between wireless providers and their customers regarding the delivery of customer services by barring calls to wireless consumers for which the consumer is not charged).

¹⁰ *Id.* ¶ 45; ¶ 5.

¹¹ See 47 U.S.C. § 227(b)(2)(C). See Telephone Disclosure and Dispute Resolution Act, Pub. L. 102-556, title IV, § 402, Oct. 28, 1992, 106 Stat. 4194 (amending the TCPA to give the FCC express authority to exempt communications for which the called party is not charged).

consistent with the amended TCPA, as it applies only when the wireless subscriber is not charged for the call or text.

In its *2012 TCPA Order*, the Commission reaffirmed the Wireless Service Provider Exemption when updating its prior express consent requirements for certain autodialed and prerecorded messages. In so doing, the Commission explicitly confirmed that no separate TCPA consent was needed for calls or texts from wireless service providers for which subscribers were not charged.¹²

When the Commission again sought comment on the TCPA, CTIA urged the Commission to expressly confirm that the Commission's upcoming TCPA decision would "not change the existing treatment of calls by wireless providers to their customers, for which customers are not charged."¹³ Consistent with CTIA's request, the Commission once again affirmed the Wireless Service Provider Exemption in its *2015 TCPA Order*.¹⁴

Through multiple proceedings and orders, the Commission has recognized the exemption's value in enabling providers to deliver important and timely service-related communications to their customers for free. The Petition provides no rational basis for the Commission to disturb the exemption and undermine the consumer protections that the

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 27 (2012) (*2012 TCPA Order*) ("While we adopt rules to protect consumers from unwanted telemarketing robocalls, we leave undisturbed the regulatory framework for certain categories of calls. Specifically, consistent with section 227(b)(2)(C) of the Act and the Commission's implementing rules and orders, we do not require prior written consent for calls made to a wireless customer by his or her wireless carrier if the customer is not charged.").

¹³ See Ex Parte Letter from Krista Witanowski, CTIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed June 5, 2015).

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 n.13 (2015) (*2015 TCPA Order*), *vacated in part on other grounds*, *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) ("We do not disturb the Commission's earlier decision that the TCPA's restrictions do not cover calls from wireless carriers to their customers.").

exemption enables. Instead, the Commission should take the opportunity to once again affirm the benefits of the Wireless Service Provider Exemption by denying the Petition.

B. The Wireless Service Provider Exemption is a Critical Consumer Protection Tool.

The Wireless Service Provider Exemption is an important tool that enables service providers to empower wireless subscribers; provide timely, account-related updates; and help effectuate the Commission's consumer protection policies. Providers communicate with their customers via text messages or phone calls, for instance, to inform them of developments that may affect their service or subscription plans. Examples of such communications can include data overage notifications, bill reminders, international roaming alerts, payment confirmations, service disruption notifications, and fraud alerts, among others. It is critical that wireless providers be able to contact their customers regarding service issues, outstanding bills, account-related issues, or other matters.

The Wireless Service Provider Exemption also facilitates the Commission's longstanding efforts to inform consumers and support meaningful consumer choice. In 2010, for example, the Commission initiated a proceeding to help consumers avoid unexpected bill overages, or "bill shock."¹⁵ In that proceeding, the Commission inquired about steps that wireless providers can take to provide usage alerts and cut-off mechanisms to their subscribers as another way to monitor their usage of wireless communications services and charges they may incur with voice,

¹⁵ Public Notice, *Measures to Designed to Assist U.S. Wireless Consumers to Avoid "Bill Shock,"* 25 FCC Rcd 4838 (rel. May 11, 2010) (*Bill Shock Public Notice*); see also 2009 Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services, Notice of Inquiry, 24 FCC Rcd 11380 (2009) (noting that advances in technology, including usage alerts delivered via text message, offer "new opportunities to improve the kind and degree of information available to consumers").

data, and text services.¹⁶ The Commission specifically asked about providing text message alerts for American consumers who are about to exceed (or have exceeded) their minute, text message, or data allocation.¹⁷

In response, CTIA and the signatory wireless companies added provisions to the *CTIA Consumer Code for Wireless Service* that responded to the Commission's "bill shock" concerns.¹⁸ As part of this voluntary framework that has been applauded by the Commission, wireless providers have committed to provide consumers with free notifications for voice, data, and messaging usage, as well as international roaming. Signatory wireless providers have committed to provide, at no charge:

- For consumers of currently offered and future domestic wireless plans that include limited data allowances, a notification when consumers approach and exceed their allowance for data usage and will incur overage charges;
- For consumers of currently offered and future domestic voice and messaging plans that include limited voice and messaging allowances, a notification when consumers approach and exceed their allowance for those services and will incur overage charges; and
- A notification to consumers without an international roaming plan/package whose devices have registered abroad and who may incur charges for international usage.¹⁹

Importantly, as the *CTIA Consumer Code for Wireless Service* makes clear, wireless consumers do not have to affirmatively sign up for these notifications.²⁰ Limiting the Wireless Service Provider Exemption could jeopardize those consumer protections. Absent the exemption, wireless providers would be unable to automatically send these important notifications to

¹⁶ See *Bill Shock Public Notice* at 2.

¹⁷ See *id.*

¹⁸ See *CTIA Consumer Code for Wireless Service*, <https://www.ctia.org/the-wireless-industry/industry-commitments/consumer-code-for-wireless-service>.

¹⁹ *Id.*

²⁰ *Id.*

consumers. In turn, consumers would be deprived of information that would help them avoid incurring unexpected charges and prevent “bill shock.”

As the Commission has recognized, “timely and easily accessible usage information” is key to preventing “bill shock” and charges that result in “significant expenditures of time, effort and money for many American consumers each year.”²¹ The Wireless Service Provider Exemption empowers consumers to better understand their wireless service, and take advantage of important safeguards against bill shock. For these reasons as well, the Commission should affirm the Wireless Service Provider Exemption and deny the Petition.

III. DENYING THE PETITION WOULD PRESERVE THE TCPA’S FUNDAMENTAL STRUCTURE OF CONSENT AND AVOID AN IMPROPER EXTENSION OF TCPA LIABILITY TO EMERGENCY AND OTHER CALLS FOR WHICH NO CONSENT IS REQUIRED.

The Commission should reject the Petition’s request that the Commission allow consumers to revoke consent that was never required by the TCPA in the first place. As the Commission has observed, the TCPA does not expressly provide for the revocation of consent.²² When a consumer revokes her consent and then subsequently receives a call, the statutory basis for any legal action is that the caller lacked the requisite “prior express consent” to place the call. Thus, any right to revoke consent is wholly derived from the TCPA’s “prior express consent” requirements. If no TCPA consent is required, it logically follows that there is no TCPA consent to revoke.

The Wireless Service Provider Exemption is grounded in Section 227(b)(1)’s clear language, which states that the “prior express consent” requirements only apply to autodialed or

²¹ *Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure*, Notice of Proposed Rulemaking, 25 FCC Rcd 14625, 14625-26 ¶¶ 1-5 (2010).

²² *See 2015 TCPA Order* ¶ 56.

prerecorded calls or texts to wireless numbers “for which the called party is charged.”²³ In that regard, calls and texts subject to the Wireless Service Provider Exemption are no different from “emergency purposes” communications and non-autodialed, non-prerecorded calls and texts, which also do not require consent under the TCPA (and for which no revocation right exists). Accordingly, accepting the Petition’s proposal would improperly extend TCPA liability to a whole host of calls and texts that expressly fall outside of the TCPA’s prior express consent requirements.

This conclusion is consistent with longstanding contract formation and consumer protection law. In recognizing the right to revoke, courts have invoked the “common law concept of consent” and the interplay between the provision of TCPA consent and the right to revoke it. The Third Circuit noted, for example, that “Congress did not intend to depart from the common law understanding of consent because the [TCPA] does not treat the term differently from its common law usage.”²⁴ And as the Second Circuit held, revocation of consent is subject to the ordinary rules of contract modification—where a consumer has provided “prior express consent” by way of a bilateral contract, that contract can stipulate the reasonable means for withdrawing consent.²⁵ The Petitioner is therefore incorrect in stating that the right to revoke consent is “entirely distinct ... from the need to obtain prior express consent under the TCPA.”²⁶

The two concepts are inextricably intertwined and necessarily work in tandem.

²³ 47 U.S.C. § 227(b)(1)(A)(iii). The Wireless Service Provider Exemption is reinforced by Section 227(b)(2)(C), which allows the Commission to exempt from the Section 227(b)(1)(A)(iii) consent requirements calls made to a wireless customers by his or her wireless carrier if the customer is not charged. See 47 U.S.C. § 227(b)(2)(C).

²⁴ *Gager v. Dell Fin. Svcs., LLC*, 727 F. 3d 265, 270-71 (3d Cir. 2013).

²⁵ *Reyes v. Lincoln Automotive Fin. Svcs.*, 861 F. 3d 51, 56 (2d Cir. 2017).

²⁶ Petition at 2.

The Petitioner is also mistaken in claiming that the *2012 TCPA Order* “expressly recognized a consumer’s right to revoke consent under a common carrier exemption scenario.”²⁷ The *2012 TCPA Order* said no such thing. In the passage referenced in the Petition, the Commission was characterizing the position of another commenter.²⁸ Nowhere in the *2012 TCPA Order* did the Commission state that consumers had the right to “revoke consent” for messages that are subject to the Wireless Service Provider Exemption—nor would the Commission be expected to state as such, because no consent would have been required.

Granting the Petition would also lead to other untenable outcomes that would fundamentally alter the TCPA’s structure. For example, if consumers had the right to pursue class-action TCPA claims over consent revocation for calls that did not require consent, TCPA liability could extend to emergency calls and place first responders at significant legal risk. The TCPA’s statutory text makes clear that no consent is required for prerecorded or autodialed emergency calls under any situation (and, as with the Wireless Service Provider Exemption, is silent on consent revocation).²⁹

Granting the Petition would also be contrary to the Commissions’ own TCPA decisions. For example, in 2016, the Commission clarified that certain communications from schools qualified under the “emergency purposes” exception to the TCPA. The Commission reiterated, “consumers have a right to revoke prior consent, using any reasonable method including orally or in writing. Schools, therefore, must be prepared to honor revocation requests from

²⁷ *Id.* at 4-5.

²⁸ *2012 TCPA Order* ¶ 27.

²⁹ 47 U.S.C § 227(b)(1)(A)-(B). The Commission’s rules define “emergency purposes” to mean “calls made necessary in any situation affecting the health and safety of consumers.” *See* 47 C.F.R. § 64.1200(f)(4).

parents/guardians or students who no longer wish to receive non-emergency calls and texts from the school.”³⁰ As this passage illustrates, the Commission recognized that the right to revoke consent does not extend to emergency calls. The position articulated in the Petition implies that individuals have an unqualified right to opt out of emergency calls, and that callers could face TCPA liability for placing such calls. But that result finds no basis in the Commission’s precedent or the TCPA’s statutory text.

Likewise, because the TCPA requires “prior express consent” for, *inter alia*, (non-emergency) autodialed or prerecorded calls and texts to wireless numbers,³¹ non-autodialed, non-prerecorded calls to wireless numbers currently fall outside the TCPA’s consent requirements. If individuals could “revoke consent” for calls that are subject to the Wireless Service Provider Exemption, they presumably could also have the ability to “revoke consent” (and thereby bring TCPA claims) for calls that were not placed using an autodialer or prerecorded voice. As a result, granting the Petition would potentially bring all calls and texts within the ambit of the TCPA, regardless of whether they rely on the applicable triggering technologies (*i.e.*, autodialers and prerecorded voice). That result would dramatically expand the statute beyond the bounds Congress put in place and effectively nullify the existing TCPA exemptions.

IV. CONCLUSION.

The Commission should deny the Petition because the time-tested Wireless Service Provider Exemption facilitates important and timely communications and supports the Commission’s consumer protection priorities, including by helping to prevent “bill shock.”

³⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling and Edison Electric Institute & American Gas Association Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 31 FCC Rcd 9054 ¶ 25 (rel. Aug. 4, 2016).

³¹ *See* 47 U.S.C. § 227(b).

Denying the Petition would also help ensure that the TCPA's underlying framework of consent, and revocation of consent, remains harmonized. CTIA respectfully asks the Commission to act consistent with the plain language of the TCPA and its legislative intent, and the Commission's goals of consumer protection and deny the Petition.

Respectfully submitted,

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