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**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20554**

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Reply of Paul Armbruster for Declaratory
Ruling Regarding a Consumers Right to Revoke
Consent Under the TCPA.

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. **02-278**

REPLY OF PAUL AMRBUSTER FOR DECLATORY RULING OR
ALTERNATIVELY A RULEMAKING REGARDING A CONSUMERS ABSOLUTE
RIGHT TO REVOKE CONSENT TO RECEIVE UNWANTED TEXT MESSAGES
FROM COMMON CARRIERS

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I. INTRODUCTION

Can it really be that the TCPA permits wireless carriers to send an unlimited number of text messages – including unsolicited advertisements – to their customers and there is not a thing a customer can do to prevent it? AT&T says that is exactly what the TCPA permits them to do.

AT&T - a publically traded, billion-dollar, for profit company is asking the Federal Communications Commission (the Commission) to confirm it can send an unlimited amount of unnecessary and redundant text messages to its customers; they seek permission to prevent customers from opting out of receiving such messages; and they seek affirmation to self-regulate their own behavior. Be damned a customer's privacy rights and be damned the TCPA. As Steve Jobs famously said, "customers don't know what they want until you show it to them," likewise, AT&T believes they alone should be the decider of what content is presented to their customers and how that content should be delivered – with no opportunity for their customers to opt out. Certainly, AT&T's competitors - like Dish Networks¹ - would love to have that ability.

The TCPA, however, was designed to prevent this exact behavior - by empowering consumers to decide what information they want to consume and the Commission previously has made this clear by recognizing that **"nothing in the language of the TCPA or its legislative history supports the notion that Congress intended to override a consumer's common law right to revoke consent"**. (2015 TCPA Order at ¶58; emphasis added). As I discuss below, AT&T continue to manipulate an ambiguity in the wireless carrier exemption for their commercial benefit. Petitioner asks the

¹ As discussed below, AT&T hide behind the wireless carrier exemption to send unsolicited advertisements promoting Direct TV services. AT&T's competitors are required to process opt-out requests while AT&T argues they are exempt. See also, <https://www.att.com/directv/directv-vs-the-competition.html>

Commission to confirm that wireless customers can opt-out of receiving ATDS text messages and calls – especially unsolicited advertisements – they do not wish to receive.

II. CONSIDERING THE CONSUMER PROTECTION GOALS OF THE TCPA IT IS ILLOGICAL THAT A CONSUMER CANNOT REVOKE CONSENT FROM UNWANTED ATDS CALLS AND TEXT MESSAGES

AT&T conclude that:

1) Because wireless carriers are exempt from taking the additional step of obtaining prior express consent, the entire notion of consent - and therefore revocation - is statutorily blocked; and because of this,

2) Neither the TCPA or the revocation of consent concepts previously articulated by the Commission apply to *any* communications between a wireless carrier and their customers, and as such,

3) The Commission lacks authority to regulate their behavior (Opposition at 9-11).

This conclusion is misguided. How can it be the intent of the TCPA to preclude consumers from opting out of revenue generating communications that serve little to no benefit to that consumer? In the 1992 TCPA Order the Commission articulated the wireless exemption stating, “Accordingly, cellular carriers need not obtain *additional* consent from their cellular subscribers...”² (Emphasis added). The inclusion of the word “additional” is telling because it

² Report and Order, 7 FCC Rcd 8752 (1992) (“1992 TCPA Order”) ¶ 45.

1 confirms Congress' intention that consent and revocation attach to ATDS calls and text messages.³
2 Wireless carriers are simply exempt from the additional safeguards placed by Congress, that is,
3 the need to obtain prior express consent. If consent exists so too does the right to revoke. As AT&T
4 points out, the 2015 TCPA Order confirms that "the consent revocation framework it established
5 (is) consistent with common law principles." (Opposition at fn. 24). Regardless of the wireless
6 carrier exception as it relates to prior express consent, the "revocation framework" put in place by
7 the Commission is entirely consistent with the TCPA goals of empowering consumers to regulate
8 commercial and unwanted text activity and is applicable to wireless carriers.
9

10 Additionally AT&T claims, "There is no sound policy rationale for the Commission to impose
11 new limits on the ability of a wireless service provider to communicate with its customers."
12 (Opposition at p. 10). The sound policy rationale is the same sound policy rationale encapsulated
13 within the TCPA - that consumer's be able to restrict repetitive, trivial, and commercial text
14 messages by requiring companies, including wireless carriers, to process and execute opt-out
15 requests.
16

17 18 **III. COMPANIES THAT ARE NOT WIRELESS CARRIERS HAVE OVERCOME** 19 **THE SAME CHALLENGES THAT AT&T COMPLAIN OF**

20 AT&T complain that the technical and financial challenges are prohibitive to implementing an
21 opt-out program. (Opposition at p. 13-14) AT&T have the same industry specific technical and
22 financial challenges as say, a bank, a department store, a debt collection agency or a hardware
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26 ³ See 47 U.S.C 227(2)(B)(ii)(II) for example. The Commission is not permitted to exempt
unsolicited advertisements, so naturally, unsolicited advertisements are subject to TCPA compliance – including
consent and revocation.

1 store – all industries that have successfully implemented opt-out programs. AT&T’s complaints
2 about the “hefty cost” should simply be ignored. AT&T’s 2018 revenues were over \$170 billion
3 and their CEO was compensated \$25.6 million for the 12-month period.⁴ They can afford the cost
4 of compliance with the TCPA.

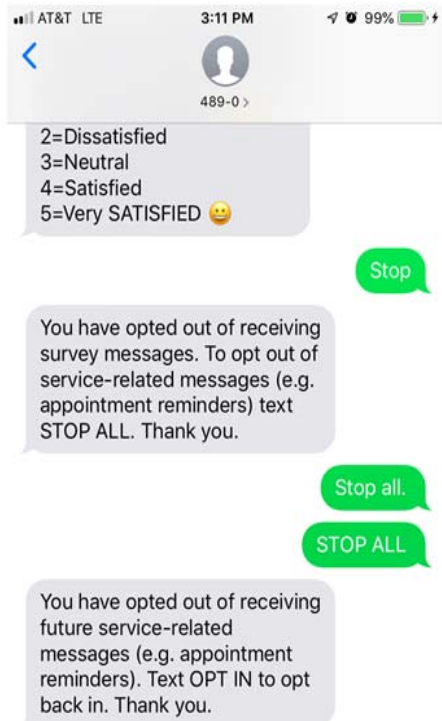
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7 What is truly baffling, however, is why AT&T make representations to the Commission that
8 are demonstrably inconsistent with what they represent to their customers, what they have
9 represented to Petitioner, and with what they actually do. AT&T suggest that, “implementing an
10 opt-out mechanism for voice and text calls to a wireless customer’s device also would be unduly
11 burdensome and costly.” (Opposition at p. 13) and that “any requirement to allow customers to opt
12 out of receiving messages from AT&T regarding its wireless services would require significant
13 system development work – all at a hefty cost (Opposition at p. 14). This is entirely confusing –
14 AT&T have already built and deployed opt out technology.

15
16 Below is a screenshot of a text message received from AT&T on August 5, 2019 that
17 *supposedly* allows Petitioner to opt out of survey messages. Petitioner responded Stop. AT&T then
18 sent another message informing Petitioner that he can opt out of “service-related” messages – to
19 which he responded “STOP ALL”.⁵ At this point Petitioner believed he had opted out of all future
20 service-related and survey text messages.⁶ Yet still they come!

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25 ⁴ [https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/annual-](https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/annual-reports/2018/complete-2018-annual-report.pdf)
26 [reports/2018/complete-2018-annual-report.pdf](https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/annual-reports/2018/complete-2018-annual-report.pdf)

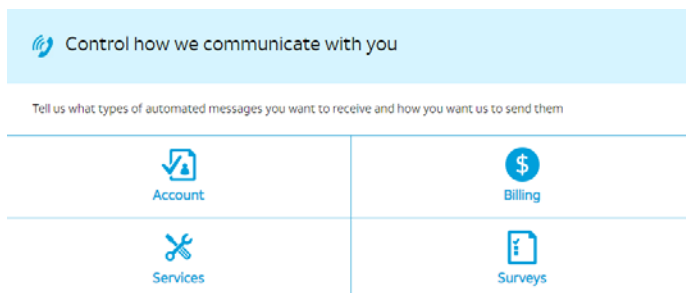
⁵ It is somewhat bewildering why AT&T would make the opt-out “STOP ALL” case specific.

⁶ Petitioner had actually been in contact with AT&T’s customer service department, their Office of the President, as well as counsel some months earlier and was assured he was opted out of all optional communications. This apparently, was not true.



- **The On-line Portal**

On August 28, 2019, Petitioner was able to access his on-line AT&T account where he found a portal that again, *supposedly*, permits a customer to “control how (AT&T) communicate(s) with you”. This portal indicates that a customer can control whether or not they want to receive billing, surveys, services, or account information.



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2 Notwithstanding prior communications with AT&T employees requesting to opt out of all
3 communications; notwithstanding responding to AT&T's opt-out text message – and receiving
4 confirmation from AT&T that Petitioner had successfully opted out - on August 28, Petitioner
5 remained **opted in** to all on-line portal communication options.⁷
6

7 Petitioner remained **opted in** to surveys.

8 Petitioner remained **opted in** to services and service alerts

9 Service Alerts
Turn installation, repair, and outage alerts on or off.

10 480.840.4278 (Call: On/Text: On)

11 Call me ☒ On

12 Text me ☒ On

13 ✂ Services ✕

14 Control whether you receive service updates and privacy notices via phone and text.

15 Contact Numbers Phone Text

16 480.840.4278 Yes Yes

17
18 Petitioner remained **opted in** to billing

19 💰 Billing ✕

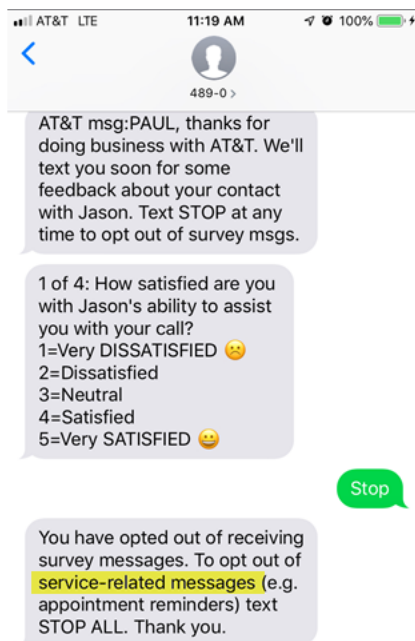
20 Control whether you receive billing updates and privacy notices via phone and text.

21 Contact Numbers Phone Text

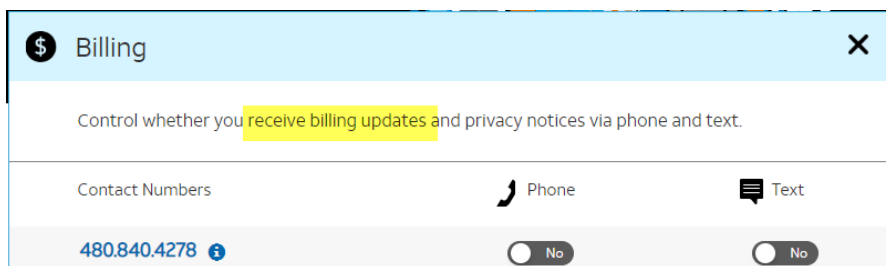
22 480.840.4278 Yes Yes

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⁷ Petitioner has since opted out of all communications via the online portal.

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2 In their Opposition AT&T provides “examples of **service-related** messages that a customer
3 may receive” and cannot opt out of (Opposition at p. 4; emphasis added). Yet, as seen below,
4 AT&T tell their customers they have successfully opted out **service-related** messages. Which is
5 it AT&T?
6



18 AT&T tells the Commission that customers are unable to opt out of “Billing/Payment-related
19 updates” (Opposition at p. 5), yet their online portal uses the exact same language to *supposedly*
20 allow customers to opt out. Which is it AT&T?
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2 **IV. AT&T SENDS UNSOLICITED ADVERTISEMENTS IN VIOLATION OF THE**
3 **TCPA**

4 The TCPA defines an unsolicited advertisement as “any material advertising the commercial
5 availability or quality of any property, goods, or services which is transmitted to
6 any person without that person’s prior express invitation or permission, in writing or otherwise”⁸.
7 Section 227(2)(B)(ii)(II) prohibits unsolicited advertisements from any exemption the
8 Commission might grant under the authority given in 227(2)(B). The mere existence of
9 227(2)(B)(ii)(II) establishes that Congress envisioned opt-outs would apply to commercial purpose
10 exemptions. AT&T cites the Commission saying “the TCPA restrictions *do not cover*” calls from
11 wireless carriers to their customers (Opposition at p. 8). How does AT&T reconcile this with
12 227(2)(B)(ii)(II)? The Commission cannot exempt, for example, unsolicited advertisements from
13 the TCPA, as such; customers are permitted to opt-out of unsolicited advertisements they receive
14 via ATDS from AT&T.
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17 On July 23, 2019 AT&T sent Petitioner the below text message.

18
19 AT&T Free Msg: You've got 35+
20 live tv channels & an entire on-
21 demand library just waiting to
22 be watched! Go to
attwatchtv.com/verify to cash
in on all this entertainment, it's
yours at no extra charge with
your AT&T Unlimited &More
plan. Gotta love that.

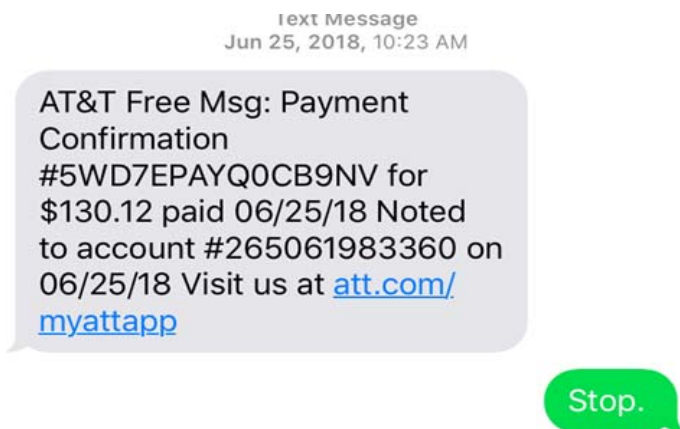
23 The link in the above text message takes a consumer to the below website – an obvious
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⁸ 47 U.S.C 227(A)(5)

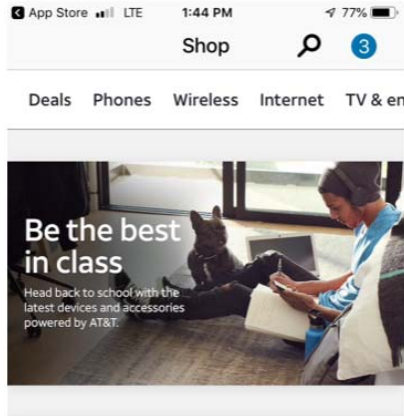
1 unsolicited advertisement. Regardless of whether this service is “free” to petitioner, simply using
2 these services generate advertisement and other revenue for AT&T. Section 227(2)(B)(ii)(II)
3 makes it clear that the Commission cannot exempt such content. Revocation of consent is the only
4 way to enforce compliance with the TCPA imposed restrictions on such content.



10 Since June 2018 AT&T sends Petitioner a text message every single month informing him his
11 credit card has been debited (see below). Petitioner cannot opt out. Included in that text is a link
12 to download the AT&T mobile app. The link to the mobile app has no nexus to the purpose of the
13 text message – a message that is *supposedly required* (see Opposition at p. 5) yet there is an
14 obvious commercial benefit for including the link.



23 The message encourages consumers to “visit us at att.com/myattapp. Once in the app
24 consumers are inundated with unsolicited advertisements like the one below. The inclusion of this
25 link is an unsolicited advertisement.



AT&T continue to hide behind the wireless carrier exemption in order to send unsolicited advertisements and for this reason alone consumers must be able to opt out of ATDS messages. 227(2)(B)(ii)(II) mandates it.

V. CONCLUSION

The TCPA empowers consumers by establishing a framework that allows them to reduce repetitive and redundant communications and at the core of that framework is a consumers right to revoke consent. If the Commission were to adopt AT&T's position - that any free communication they send to a consumer is outside the scope of the TCPA – what is the mechanism for preventing AT&T from sending unsolicited advertisements dressed up as “service-related” messages? There is none. How does a consumer stop AT&T sending unsolicited advertisements that promote Direct TV services? They cannot. AT&T say they do not need to be regulated because they are a good actor – the text messages discussed above show that they are not.

Without a way to opt out of content the ubiquitous nature of commercial marketing and the way companies advertise in today's world make the intent of 47 U.S.C. 227(2)(B)(ii) worthless. AT&T have proven this by sending a link to their app to every one of their customers each month

1 under the guise of a required bill notification and by sending presumably millions of text messages
2 promoting Direct TV services (see IV above). For all of the above reasons the Commission should
3 confirm that consumers can opt out of unwanted communications received from wireless carriers.
4 To decide otherwise would be a breach of the limits placed on the Commission by 47 U.S.C.
5 227(2)(B)(ii).
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10 /s/ Paul Armbruster

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16 Date: September 3, 2019.
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