

*Before the*  
**Federal Communications Commission**  
Washington, D.C.

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

Petition for Expedited Declaratory Ruling of  
Mammoth Mountain Ski Area, LLC

CG Docket No. 02-278

**COMMENTS OF THE  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

CCIA submits these comments in support of the Petition for Expedited Declaratory Ruling or Forbearance filed by Mammoth Mountain Ski Area, LLC (“Mammoth”).<sup>1</sup> CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ more than 600,000 people and generate annual revenues in excess of \$465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries.<sup>2</sup>

Mammoth’s Petition asks the Federal Communications Commission (“the Commission”) for a ruling that the parts of its 2012 Order<sup>3</sup> requiring “written, signed consent” to receive automated calls improperly interpreted the Telephone Consumer Protection Act, 47 U.S.C. § 227

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<sup>1</sup> *Petition for Expedited Declaratory Ruling or Forbearance*, CG Docket No. 02-278 (filed Feb. 23, 2015) (“Mammoth Petition”).

<sup>2</sup> A list of CCIA’s members is available online at <https://www.ccianet.org/members>.

<sup>3</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report and Order, 27 FCC Rcd. 1830 (2012) (“the 2012 Order”) (codified at 47 C.F.R. § 64.1200 (2012)).

*et seq.* (“TCPA”) by ignoring Congressional intent in using the term “prior express consent”<sup>4</sup> in the TCPA. Mammoth also asks the Commission to clarify that the revised rules in the 2012 Order do not apply retroactively, so contractual consent received before the rules went into effect on October 16, 2013 would be preserved.

CCIA members have and continue to be subjected to burdensome litigation under the TCPA. TCPA litigation is inundating tech companies,<sup>5</sup> and retroactive application of the rules found in the 2012 Order would further open the floodgates. Putative class actions under the TCPA have proliferated due to the availability of statutory damages, which do not require a showing of actual harm and can often proceed after a single, alleged violation. Despite the frivolous nature of some claims, CCIA members must seriously address all TCPA claims because of the possibility of cumulative damage awards.<sup>6</sup>

Businesses and other innovators in the telecommunications and Internet fields require certainty regarding regulatory enforcement, including the TCPA. Retroactive application of rules that substantially reinterpreted the statute they had been relying on has the potential to stifle investment in emerging technologies, heighten uncertainty, and impede the ability of small businesses across the country to communicate with their customers.

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<sup>4</sup> 47 U.S.C. § 227(b)(1)(A) (2012).

<sup>5</sup> *See, e.g., Noorpavar v. MySpace, Inc.*, No. 11-cv-00903 (S.D. Cal. Apr. 28, 2011); *Moss v. Twitter*, No. 3:11-cv-00906 (S.D. Cal. Apr. 28, 2011); *Glauser v. Twilio Inc.*, No. 11-cv-02584 (N.D. Cal. Sept. 15, 2011); *Ball v. Square, Inc.*, No. 3:12-cv-06552-SC (N.D. Cal. Dec. 28, 2012); *In re Jiffy Lube Int’l, Inc. Text Spam Litig.*, 847 F. Supp. 2d 1253 (S.D. Cal. Mar. 9, 2012); *Emanuel v. L.A. Lakers, Inc.*, No. 12-9936-GW, 2013 U.S. Dist. LEXIS 58842 (C.D. Cal. Apr. 18, 2013); *Nunes v. Twitter*, 3:2014-cv-02843 (N.D. Cal. June 19, 2014); *De Los Santos v. Millward Brown, Inc.*, No. 13-80670, 2014 U.S. Dist. LEXIS 88711 (S.D. Fla. June 30, 2014). *See also* Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, U.S. Chamber Institute for Legal Reform (Oct. 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/Final\\_TCPA\\_White\\_Paper-1.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Final_TCPA_White_Paper-1.pdf).

<sup>6</sup> *See* 47 U.S.C. § 227(b) (2012) (allowing for treble damages if the business, using an automated dialer, “willfully or knowingly” violates the statute or regulations).

**I. The 2012 Order Interpreting Express Consent to Mean “Written, Signed Consent” Is Inconsistent with Congressional Intent.**

Congress rejected a requirement of written consent while drafting the TCPA more than two decades ago, which the Commission upheld until its dramatic reversal in the 2012 Order several years ago.<sup>7</sup> In the debate leading up to the passage of the TCPA, the House Committee on Energy and Commerce deliberately excluded written consent from the “prior express consent” required under the statute because it would “unreasonably restrict” consumers and “unfairly expose businesses to unwarranted risk”:

The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but *did not see a compelling need for such consent to be in written form*. Requiring written consent would, in the Committee’s view, unreasonably restrict the subscriber’s rights to accept solicitations of interest and unfairly expose businesses to unwarranted risk from accepting permissions or invitations from subscribers.<sup>8</sup>

This legislative history clearly shows that Congress did not intend for “prior express consent” under the TCPA to require *written* consent. Similarly, although at least one court has held that “‘express’ means ‘explicit’”<sup>9</sup> in the TCPA, that case involved a debt collector’s automated call to a cell phone, which the Commission’s rules treat differently,<sup>10</sup> and the court suggested a way for establishing consent without a written form.<sup>11</sup> Interpreting “prior express consent” to require written consent is inconsistent with the plain meaning and common usage of those words.<sup>12</sup> The

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<sup>7</sup> See Mammoth Petition at 3-6.

<sup>8</sup> H.R. REP. NO. 102-317, 102d Cong., 1st Session (Nov. 15, 1991), at 13 (emphasis added).

<sup>9</sup> *Edeh v. Midland Credit Mgmt.*, 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010).

<sup>10</sup> See *Meadows v. Franklin Collection Serv.*, 414 F. App’x 230 (11th Cir. 2011) (asserting that the exemptions in 47 C.F.R. § 64.1200(a)(2)(iii)-(iv) “apply where a third party places a debt collection call on behalf of the company holding the debt”).

<sup>11</sup> See *Edeh v. Midland Credit Mgmt.* at 1038 (D. Minn. 2010) (suggesting that in a case where defendant debt collector placed an automated call to plaintiff debtor, whose debt defendant “bought,” “explicit” consent could be fulfilled if plaintiff “said to [defendant] . . . something like this: ‘I give you permission to use an automatic telephone dialing system to call my cellular phone.’”) (emphasis added).

<sup>12</sup> See Mammoth Petition at 11-12.

2012 Order’s new definition of “prior express consent” should be reconsidered because it was improper, too narrow, and inconsistent with Congress’ stated intent in enacting the TCPA.

## **II. Retroactive Application of the 2012 Order Runs Afoul of Decades of Precedent.**

Applying the 2012 Order’s rules to consent received before the October 16, 2013 effective date would be counter to established Supreme Court and Commission precedent. The Court in *Bowen v. Georgetown University Hospital* held: “Retroactivity is not favored in the law. . . . [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”<sup>13</sup> Furthermore, the Commission has previously emphasized *Bowen*’s limitations: “Generally, rules adopted by administrative agencies may be applied prospectively only.”<sup>14</sup> The TCPA authorizes Congress to “prescribe regulations to implement the requirements” of the law;<sup>15</sup> however, there is no language expressly authorizing retroactive application of regulations. In fact, that authorization only contains specific, forward-looking language.<sup>16</sup>

## **III. Applying the 2012 Order Retroactively Will Harm Businesses and Consumers.**

Retroactive application of the rules found in the 2012 Order has the potential to dramatically affect longstanding relationships between customers and businesses. Indeed, the Commission, in its 1992 Order implementing the TCPA, sought to “balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business

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<sup>13</sup> 488 U.S. 204, 208 (1988).

<sup>14</sup> *High-Cost Universal Serv. Support*, Report and Order, 25 FCC Rcd. 3430, 3434, ¶ 11 (2010).

<sup>15</sup> 47 U.S.C. § 227(b)(2) (2012).

<sup>16</sup> *See id.* at § 227(b)(2)(D)(ii) (allowing notices in unsolicited advertisements if they let recipients request that the sender halt “any *future* unsolicited advertisements”) (emphasis added); *id.* at § 227(b)(2)(E) (authorizing the Commission to promulgate a rule regarding “a request not to send *future* advertisements”) (emphasis added); *id.* at § 227(b)(2)(F) (permitting the Commission to “take action” when non-profits send unsolicited ads without proper notice if “the Commission determines that such notice . . . is not necessary . . . to stop such association from sending any *future* unsolicited advertisements”) (emphasis added).

services.”<sup>17</sup> As the Commission acknowledged in the 2012 Order, once the rules come into effect, businesses “will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.”<sup>18</sup> This substantial change will unduly burden businesses.

Retroactive application may also prevent companies from embracing new technology and trends, which will restrain business nationwide. Mobile phone usage is becoming ubiquitous,<sup>19</sup> and as consumers increasingly use their mobile devices for commercial transactions, businesses will need to maintain contact with their users via voicemail or SMS. Applying the 2012 Order’s rules to consent received prior to the October 16, 2013 effective date could lead to substantial administrative headaches, lost productivity, and lost sales as businesses attempt to reestablish the consent of thousands of customers.

In addition, retroactive application could subject Internet-based retailers and startups, as well as brick and mortar small businesses, to a myriad of baseless lawsuits. Many companies choose to broaden their customer bases by communicating deals to customers via text message. If the Commission decided to apply the rules to communications that occurred before the October 16, 2013 effective date, millions of such communications could form the basis for class action lawsuits. Small businesses would be wary of sending marketing messages that could help them build loyal customer bases. Startups would be forced to focus their limited resources on

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<sup>17</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report and Order, 7 FCC Rcd. 8752, 8754, ¶ 5 (1992).

<sup>18</sup> 2012 Order at 1857, ¶ 68.

<sup>19</sup> See Pew Research Center, *Mobile Technology Fact Sheet*, <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited Apr. 6, 2015) (finding that as of January 2014, 90% of American adults owned a cell phone); CTIA, *Wireless Quick Facts*, <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts> (last visited Apr. 6, 2015) (stating that 45 million Americans access the Internet primarily with their cell phones).

frivolous litigation, rather than concentrating on delivering the kind of innovative new products and services that have contributed billions of dollars to the U.S. economy.

#### **IV. Conclusion**

For the reasons described above, CCIA respectfully urges the Commission to clarify that “prior express consent” does not require “written, signed consent” because that is counter to Congressional intent in drafting the TCPA. In the alternative, the Commission should determine that the consent provisions of its 2012 Order do not apply retroactively to consumer consent received before the rules became effective on October 16, 2013.

April 6, 2015

Respectfully submitted,

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