

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Rules and Regulations Implementing the ) CG Docket No. 02-278  
Telephone Consumer Protection Act of 1991 )  
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 )

**COMMENTS OF JOINT BROADCASTERS IN SUPPORT OF PETITION FOR  
RETROACTIVE WAIVER OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

Joint Broadcasters<sup>1</sup> hereby submit these Comments in support of the Petition for Retroactive Waiver filed by the National Association of Broadcasters (“NAB”) in the above-captioned proceeding.<sup>2</sup> In its July 2015 Declaratory Ruling and Order regarding the Telephone Consumer Protection Act (“TCPA”),<sup>3</sup> the FCC granted a retroactive and prospective waiver of the prior express written consent rules to a limited number of participants in the proceeding.<sup>4</sup> As

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<sup>1</sup> The Joint Broadcasters consist of the following broadcast companies: Alpha Media LLC; Cedar Rapids Television Company; Gray Television Group, Inc.; Mission Broadcasting, Inc.; Nexstar Broadcasting, Inc.; and Radio One, Inc.

<sup>2</sup> National Association of Broadcasters Petition for Retroactive Waiver, CG Docket No. 02-278 (filed Aug. 18, 2015) (“NAB Waiver Petition”). The FCC established October 26, 2015 as the deadline for comment on the NAB Waiver Petition, along with two other similar waiver petitions, in a Public Notice dated September 25, 2015. *See Consumer and Governmental Affairs Bureau Seeks Comment on Petitions for Retroactive Waiver Filed by the National Association of Broadcasters, F-19 Holdings, LLC, and Kale Realty, LLC*, Public Notice, DA 15-1074 (rel. Sept. 25, 2015).

<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, FCC 15-72 (rel. July 10, 2015) (“2015 Order”).

<sup>4</sup> *Id.* at ¶¶ 98-102 (discussing petitions for waiver filed by the Direct Marketing Association and a Coalition of Mobile Engagement Providers and stating that a waiver was granted to “Petitioners (including their members as of the release date of this Declaratory Ruling)”).

explained in the NAB Petition and further elaborated on below, the Commission should grant the same relief to NAB's members and all parties to the proceeding, including all parties filing comments in support of the instant waiver request.

The prior express written consent rules that became effective in October 2013 require entities sending automated telemarketing calls or texts to disclose that marketing messages will be sent using auto-dialer equipment and that consent to received autodialed marketing messages is not a condition of purchasing any good, product, or service.<sup>5</sup> They also require consumers to consent in writing to receiving such messages.<sup>6</sup> These rules represented a change from the previous regulatory regime, under which consent to receive automated telemarketing calls or texts required only prior express consent that did not need to be written or contain the required disclosures. The new rules apply to some broadcasters, who may send automated text messages for a number of purposes (including breaking news, weather, and traffic alerts, as well as in connection with contests and promotions) that could be deemed to include telemarketing, if they contain marketing or advertising information.

As the 2015 Order acknowledges, the order adopting the new prior express written consent rules "could have reasonably been interpreted to mean that written consent obtained prior to the [October 2013] rule's effective date would remain valid even if it does not satisfy the current rule."<sup>7</sup> Although the FCC clarified in its 2015 Order that entities could not rely on consents obtained before the October 2013 rule became effective unless those consents satisfied the new "prior express written consent" requirements, it recognized that a waiver was

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<sup>5</sup> 47 C.F.R. § 64.1200(a)(2), (f)(8)(i); 2015 Order ¶ 98.

<sup>6</sup> 47 C.F.R. § 64.1200(a)(2), (f)(8)(i).

<sup>7</sup> 2015 Order ¶ 101.

appropriate given the confusion arguably created by its 2013 Order adopting those rules. NAB and other commenters indicated in their comments that they and their members may have been subject to the same confusion that impacted the parties requesting the waivers.<sup>8</sup> In addition, NAB specifically requested relief on behalf of its members.<sup>9</sup>

Nevertheless, in the July 2015 Order, the Commission granted a waiver only to the Direct Marketing Association and Coalition of Mobile Engagement Providers, along with their members as of the release date of the Order.<sup>10</sup> That waiver extended retroactively to the effective date of the prior express written consent rules, through a period of 89 days from the release date of the July 2015 Order. The Commission recognized that a prospective waiver was appropriate to “enable parties to obtain new consents under the new rule without running the risk of being subjected to pointless and expensive class litigation.”<sup>11</sup>

As a matter of logic and equity, the Commission’s decision to limit the applicability of the waiver to the two requesting parties and their members appears arbitrary and capricious. To the extent that the order adopting the October 2013 prior express written consent rules “could reasonably have been interpreted” to suggest that consents obtained under the previous rules remained valid, such an interpretation would have been equally reasonable if adopted by NAB, its members, any party to the proceeding and, indeed, any party that sought to comply with its

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<sup>8</sup> NAB Waiver Petition at 2.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> July 2015 Order ¶ 102. The Direct Marketing Association appears to be a membership organization, although a list of its members is not readily available. *See* <http://thedma.org/>. The Coalition of Mobile Engagement Providers consists of 4INFO, Inc.; ePrize; Genesys; Hipcricket; Mobile Commons; Mobile Marketing Association; pavia; Tatango; Tetherball; Vibes; and Waterfall. *See* Petition for Declaratory Ruling of a Coalition of Mobile Engagement Providers, CG Docket No. 02-278 (filed Oct. 17, 2013).

<sup>11</sup> July 2015 Order ¶ 102 (citing NAB’s comments).

obligations under the TCPA. Similarly, these entities are just as entitled to a prospective period within which to obtain new consents without exposing themselves to unnecessary and costly litigation. Moreover, by granting a waiver to members of the Direct Marketing Association and Coalition of Mobile Engagement Providers, which include third-party text messaging platforms that provide services to clients, the Commission presumably intended to permit clients of such platforms to rely on the waiver as well. The Commission should clarify this fact in the course of acting on the NAB Waiver Petition. Further, because the July 2015 Order's prospective waiver covered only the members of the two petitioning organizations, an additional prospective period of similar length should be granted following action on the NAB Waiver Petition. Simply put, there is no basis for denying other parties relief similar to that ultimately granted to the two parties that initially sought waivers of the prior express written consent rules.

For the foregoing reasons, the Commission should grant the requested waiver and extend it, at a minimum, to NAB, its members, and any party to the proceeding, including parties that commented on the NAB Waiver Petition. Parties newly entitled to a waiver should have a period of 89 days following the grant of the waiver to obtain new consents in compliance with the Commission's rules.

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Respectfully submitted,

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