Davis Wright Tremaine LLP

Suite 800
1919 Pennsylvania Avenue N.W.
Washington, D.C. 20006-3401

Christin McMeley
202-973-4264 tel
202-973-4464 fax

christinmcmeley@dwt.com

February 8, 2016

Via ECFS

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("TCPA"); CG Docket No. 02-278**

Dear Ms. Dortch,

On February 4, 2016, Stephanie Podey, Vice President & Associate General Counsel of the National Cable & Telecommunications Association ("NCTA"); Jerianne Timmerman, Senior Vice President & Senior Deputy General Counsel of the National Association of Broadcasters ("NAB"); and I met with Mark Stone, Deputy Chief of the Consumer and Governmental Affairs Bureau ("CGB"); Kurt Schroeder, the Chief of CGB's Consumer Policy Division & Information Access & Privacy Office; Nancy Stevenson, the Deputy Division Chief of CGB's Policy Division; and Robert Finley and Christina Clearwater, Attorney Advisors in CGB.

At the meeting, we discussed the outstanding petitions of NCTA and NAB that seek to have their members included in the class of entities eligible for retroactive waivers of the rules relating to prior express written consent for autodialed and/or prerecorded telemarketing and informational calls and texts to cell phones, as granted in the Declaratory Ruling & Order in this docket on June 18, 2015, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015) (the 2015 Order). *See FCC, Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Waiver Filed by the National Cable & Telecommunications Association*, 30 FCC Rcd. 12337 (2015); *FCC, Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions for Retroactive Waiver Filed by National Association of Broadcasters, et al.*, 30 FCC Rcd. 10207 (2015).

In the 2015 Order, the Commission recognized that language in its 2012 TCPA Order, which established an October 16, 2013, date by which additional prior express written consent was required, caused confusion as to the specifics of the writing requirement. *See* 2015 Order ¶ 101 (discussing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order, 27 FCC Rcd. 1830 ¶ 68 (2012) (the 2012 TCPA Order)). The

Commission granted limited waivers to certain entities who had raised this confusion in petitions addressed in the 2015 Order, acknowledging that those petitioners needed time "to obtain new consents under the new rule without running the risk of being subjected to pointless and expensive class action litigation. *Id.* ¶ 102. The NCTA and NAB petitions seek to have their members included in the class of entities eligible for such retroactive waivers.

During the meeting, we discussed the uncertainty NCTA and NAB members face with respect to compliance issues and litigation arising under the TCPA when a company had written prior express consent that, due to the confusion recognized in the 2015 Order, may not have met all of the requirements for a "writing" as specified in the rules as amended by the 2012 TCPA Order. Indeed, TCPA litigation has increased 37.5% over the past year, and continues to grow. *See* WebRecon, *Out Like a Lion... Debt Collection Litigation & CFPB Complaint Statistics, Dec 2015 & Year in Review*, *at* https://dev.webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/ (last visited Feb. 5, 2016).

We also discussed the fact that the NCTA and NAB petitions have been pending for a number of months, have seen the comment and reply deadlines pass, and remain unopposed. We stressed that NCTA and NAB are similarly situated with the petitioners to whom the 2015 Order granted waivers, that NCTA and NAB actively participated in this proceeding prior to the 2015 Order, and that they are seeking only the same waiver as was previously granted therein. During the meeting, NCTA and NAB also noted how courts have begun placing special significance on a company's having actually received a retroactive waiver from the Commission, as opposed to merely being in the same posture of confusion that arose from the 2012 TCPA Order. *See Lennartson v. Papa Murphy's Holdings, Inc.*, 2016 WL 51747, at *3 (W.D. Wash. Jan. 5, 2016).

NCTA and NAB accordingly urged that the Commission act expeditiously on NCTA's and NAB's waiver petitions to address the confusion that prevailed under the 2012 TCPA Order, to remove the uncertainty which their members are currently experiencing, and to afford them the same relief the Commission already afforded similarly situated parties in the 2015 Order.

Respectfully submitted,

Davis Wright Tremaine LLP

Christin McMeley