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

In the matter of:	)	CG Docket No. 02-278
	)	WC Docket No. 07-135
Petition of Mobile Media Technologies for	)	
Declaratory Ruling or, in the Alternative,	)	
Retroactive Waiver	)	

PETITION OF MOBILE MEDIA TECHNOLOGIES FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, RETROACTIVE WAIVER

Pursuant to Section 1.2 of the rules of the Federal Communications Commission (the "Commission" or "FCC") rules, Petitioner Mobile Media Technologies (hereinafter "Petitioner" or "MMT"), respectfully requests that the Commission issue a declaratory ruling clarifying that neither the TCPA nor the Commission's Declaratory Ruling and Order released July 10, 2015 (the "July 2015 DRO") (the latter of which clarified that notwithstanding the statutory text's silence on the issue, under the TCPA consumers have "right to revoke consent [to be texted] using any reasonable method") require a party transmitting a text message to create or make available to consumers a *specific* or *particular* method by which a consumer may revoke prior express consent to be texted, including bilateral reply "STOP" text messaging functionality.[1]

Petitioner further requests a declaratory ruling confirming that a "reasonable method" of revoking consent, which the Commission defined in the July 2015 DRO as one that "clearly

[1] Although the Commission has required the provision of a bilateral reply "STOP" opt-out mechanism for text messages in one instance, it did so only as a condition precedent to receiving an exemption from the TCPA's requirements for a limited category of text messages. *See Cargo Airline* Order, 29 FCC Rcd at 3438 at *5, para 18.

expresses a desire not to receive further messages," must, at a minimum, be a method that actually reaches the texting party.

Alternatively, Petitioner respectfully requests that, pursuant to Section 1.3 of the Commission's rules, the Commission grant Petitioner (and, by extension, its contractual Licensee users of Petitioner's TextCaster Push system) a limited retroactive waiver of its July 2015 DRO to the extent the July 2015 DRO *does* establish that the TCPA requires a texting party to provide consumers bilateral texting functionality as a specific and particular method for revoking prior express consent. Petitioner seeks a limited retroactive waiver up to and including November 7, 2015, a date that represents a modest 120-day period following the July 10, 2015 release of the DRO and period required to permit Petitioner to design, test, and implement (in coordination with dozens of U.S. cellular carriers) a systematic process that (now) allows Petitioner to regularly review and act upon reply messages communicating revocation of consent. Petitioner respectfully submits that a limited retroactive waiver to allow it time to replicate bilateral text-messaging functionality is appropriate in this instance, where Petitioner did not anticipate that it was required to provide a specific and particular method of revocation and where consumers had, at all relevant times, *other* reasonable and functional methods of revocation available.

EXECUTIVE SUMMARY

Petitioner MMT is a Missouri-based small business which, for over ten years, has offered a non-commercial text message broadcasting service called TextCaster Push ("TextCaster").[2] TextCaster is licensed to Petitioner's Licensees, who in turn use it to transmit messages to their subscribers. TextCaster subscribers are, without exception, persons who deliberately sought out,

[2] Petitioner's products also include another text messaging service called TextCaster Interactive; the Interactive service, however, is not at issue for purposes of this Petition.

requested, and provided prior express consent to receive text alerts from one or more of Petitioner's Licensees.

Petitioner and its Licensees presently face the threat of TCPA individual and class action litigation by a small number of former TextCaster subscribers (the "TCPA Claimants"), all of whom are represented by a single law firm – the Manning Law Office.[3] In what appears to be a scheme to manufacture TCPA claims, over a period of several months the TCPA Claimants subscribed to receive TextCaster-transmitted text alerts from dozens of local media outlets (all Petitioner's Licensees) situated across the United States. TCPA Claimants claim Petitioner's Licensees violated the TCPA by continuing to send TextCaster-transmitted text messages even after the TCPA Claimants (purportedly) revoked their prior express consent to receive such messages. Collectively, the individual TCPA Claimants now demand several hundred thousand dollars in statutory damages.

Specifically, TCPA Claimants each claim that they revoked their prior express consent by replying "STOP" in response to a text message received from a Petitioner's Licensees. Petitioner's investigation, however, suggests that at the time the Claimants' reply "STOP" messages were purportedly sent, the text messaging protocol employed by the TextCaster system did not provide for bilateral text messaging functionality. Consequently, even assuming the TCPA Claimants did attempt to send "STOP" messages in response to text messages transmitted by way of the TextCaster system, those messages were never received by Petitioner or its Licensees. When Petitioner finally learned of the TCPA Claimants by way of the demand letters sent to its Licensees, Petitioner immediately terminated the Claimants' TextCaster subscriptions.

[3] The Manning Law Office is a well-known predatory plaintiff's lawyer in the TCPA realm. *See, e.g.,* Petition of SUMOTEXT for Expedited Clarification or, in the alternative, Petition for Declaratory Ruling file September 3, 2015.

If litigation commences, Petitioner anticipates that the TCPA Claimants' legal claims will hinge on interpretation of the Commission's July 2015 DRO. The TCPA Claimants currently insist they were entitled to rely on their chosen method of revocation (replying "STOP") because reply messages are a "reasonable method" of revoking consent. Essentially, Claimants contend that they should have been able to revoke their prior express consent provided simply by replying "STOP" regardless of the fact that they had never been invited to rely on such a method notwithstanding the complete absence of any indication that the method of revocation Claimants chose would reach (or did reach) Petitioner or its Licensees.

Although the Commission did clarify (for the first time) in its July 2015 DRO that the TCPA impliedly permits a consumer to revoke consent to be texted "by any reasonable method," neither the DRO nor the TCPA itself require a texting party to affirmatively make available to a texted party any *specific* or *particular* method of communicating revocation, including bilateral texting functionality. Indeed, to the extent Congress *did* intend the TCPA to require a calling (or faxing) party to make available a specific method of revoking consent, the law and/or regulations indicate as much explicitly. But there is no such statutory provision (or regulation) applicable to voice calls or text messages.

Moreover, while the Commission concluded in its July 2015 DRO that texting parties like Petitioner's Licensees may not prescribe the *exclusive* method by which a consumer may revoke consent, neither that DRO nor any other previous Commission ruling or order expressly requires Petitioner or its Licensees to affirmatively provide consumers bilateral text messaging functionality for consumers' use as a specific method of revoking consent. Petitioner is therefore entitled to a declaratory ruling establishing that it was not required to create and make available a

specific method for a consumer to communicate revocation – including bilateral text messaging functionality.

To the extent the Commission's July 2015 DRO clarifies that under the TCPA a consumer may revoke consent to be texted "by any reasonable method," Petitioner also seeks a declaratory ruling establishing that, at a minimum, a "reasonable" method of revoking consent must be one that actually *reaches* the texting party. A non-functional method of revoking consent is neither an effective nor "reasonable" method, and Petitioner is entitled to a declaratory ruling establishing this fundamental principle.

If the Commission declines to issue the declaratory rulings requested, Petitioner respectfully requests a limited retroactive waiver of the July 2015 DRO to the extent that ruling established the TCPA *did* affirmatively establish that Petitioner was required to make available bilateral text messaging functionality. The waiver requested would preclude Petitioner's (or its Licensees) liability under the TCPA to TextCaster subscribers who attempted to revoke their prior express consent by replying "STOP" (or a similar term) in response to a TextCaster-transmitted message before November 7, 2015 (120 days after the release of the July 2015 DRO.

Prior to the release of the July 2015 DRO, Petitioner had no way of anticipating from the text of the TCPA or any existing regulation that it was *required* to provide consumers bilateral text messaging functionality as method of revoking consent. One hundred and twenty days following the release of the July 2015 DRO is fair and reasonable period to permit Petitioner to work with dozens of U.S. cellular carriers to develop, test, and implement the engineered solution that now permits Petitioner to receive and respond to reply "STOP" messages. TextCaster subscribers are not disadvantaged by the granting of a retroactive waiver because

they have, at all times up to and since the release of the July 2015 DRO, have available *multiple* reasonable methods of revoking consent.

INFORMATIONAL BACKGROUND

A. The TextCaster Service

Petitioner's TextCaster service is used by Petitioner's Licensees to transmit non-commercial text alerts to the cell phones of consumers who have affirmatively subscribed and consented to receive those messages. Petitioner's Licensees are most typically media outlets (e.g. local television stations), educational institutions, and non-profit organizations. The Licensees determine both the content and the timing of the non-commercial text messages they choose to send to their subscribers using the TextCaster service.

Consumers subscribe to receive text alerts from Petitioner's Licensees by using a link on the Licensee's website to access a secure, customized web-based sign-up page. The TextCaster web-based interface is the *sole and exclusive* means by which text alerts (to be transmitted by the TextCaster system) may be requested. At that sign-up page, a subscriber provides and verifies his cell phone number, selects the categories of non-commercial text messages (alerts) he wishes to receive from the Licensee, agrees to specified and expressly-set forth terms and conditions, and provides prior express written consent to be texted. Given the process required, there is *no* possibility that a consumer could inadvertently or accidentally sign up to receive TextCaster-transmitted text alerts.

B. Revocation of Consent

TextCaster subscribers may change their text alert preferences or cancel their subscriptions at any time. Neither Petitioner nor its Licensees require that a consumer use any particular or exclusive means of communication to revoke prior express consent to be texted. For subscribers' ease, however, they are informed multiple times during the sign-up process that

they may manage their TextCaster text alert subscriptions (including canceling them) at any time simply by returning to the same sign-up page – a web-based portal always accessible via a link from the Licensee's own web page. But the sign-up page is not an *exclusive* means of revoking consent; subscribers may also communicate their revocation of consent to a Licensee by any other reasonable means of the subscriber's choice, including, but not limited to telephone, mail, or email.

The methods of revocation available to consumers, however, are not without certain practical and inherent limits. Before late 2015, for instance, TextCaster subscribers could not communicate revocation of consent by means of a reply text message because, as explained in greater detail at Section C below, the TextCaster system utilizes a messaging protocol not designed to facilitate bilateral (reply) text messaging. Thus, prior to late 2015, even if a TextCaster subscriber typed the word "STOP" (or its functional equivalent) into a reply to a text alert and hit "send," the limitations of TextCaster's messaging protocol prevented the reply message from actually being received directly by Petitioner (or its Licensees).

C. The TCPA Claimants and Their Demands

Because text alerts sent by Petitioner's Licensees using the TextCaster Push system are non-commercial in nature (depending on the category selected by the subscriber, they most frequently contain information like breaking news, emergency weather alerts, school closings, local sports scores, event reminders, and the like), such messages may not even be subject to the requirements of the TCPA. Nonetheless, following the release of the July 2015 DRO, some of Petitioner's Licensees received demand letters seeking statutory damages and threatening individual or class action TCPA litigation from a small group of consumers (the "TCPA Claimants").

The TCPA Claimants are all represented by the Manning Law Office, a plaintiff's firm known for threatening TCPA litigation and using its employees and other associated persons as potential plaintiffs. The TCPA Claimants each demand tens of thousands of dollars in statutory damages from Petitioner's Licensees. With one exception, the TCPA Claimants all admit that they provided prior express written consent to receive text alerts from Petitioner's Licensees. Based on Petitioner's available records, it appears that some of the TCPA Claimants subscribed to receive text alerts from *dozens* of local media outlets all over the United States.

The TCPA Claimants all allege that they received unwanted text alerts after (purportedly) revoking prior express consent by replying "STOP" to a TextCaster-transmitted message. Neither Petitioner nor its affected Licensees, however, ever received the TCPA Claimants' reply "STOP" messages. Petitioner only learned of the TCPA Claimants' purported attempts to revoke consent when its Licensees shared the Claimants' demand letters with it. Once on notice of the TCPA Claimants' desire to revoke consent, Petitioner immediately removed all cell phone numbers known to (or reasonably believed to) belong to the TCPA Claimants from *all* TextCaster Licensees' subscription lists. Remarkably, some of the TCPA Claimants attempted to *re-subscribe* to receive text alerts (from still other Licensees) using new and different cell phone numbers, even after making their initial TCPA demands.

Correspondence received from the TCPA Claimants indicates that they believe the July 2015 DRO *requires* Petitioner (and/or its Licensees) to make bilateral text messaging functionality available to TextCaster subscribers as a specific means of communicating revocation of consent. The TCPA Claimants' also assert that a reply "STOP" message sent in response to a TextCaster-transmitted text message is a reasonable means of revoking prior

express consent regardless of whether that reply message was ever actually *received* by original texting party.

D. Bilateral Text Messaging Functionality and TextCaster

There are two primary protocols used for transmitting text messages to mobile phones: SMTP (Simple Mail Transfer Protocol) and SMPP (Short Message Peer-to-peer Protocol). Petitioner's TextCaster system generally utilizes the SMTP protocol. The SMTP protocol has been widely used for more than twenty years. But unlike the SMPP protocol, it is not designed to facilitate bilateral (two-way) communication. Because the SMTP protocol does not rely on costly Common Short Codes (CSC's), it is generally a more economical messaging protocol, making it an ideal choice for entities like Petitioner's Licensees, who are seeking to be able to communicate non-commercial informational messages to large groups of subscribers.

The TCPA Claimants may not have been aware of the particular messaging protocol utilized by the TextCaster system at the time they attempted to revoke their prior express consent to receive TextCaster-transmitted text alerts by replying "STOP" in response to such a message. But replying "STOP" is an ineffective means of communicating revocation of consent under an SMTP protocol because the "reply" is not transmitted directly to the texting party.[4] More importantly, the TCPA Claimants had no basis for assuming their reply "STOP" would reach Petitioner or its Licensees. They were never expressly invited by Petitioner or its Licensees to reply "STOP" to end terminate their subscription or withdraw their prior express consent to be texted. And even after allegedly sending such a reply, anytime before late 2015 the TCPA

[4] In some instances, and solely at the discretion of the subscriber's own cellular carrier, the carrier may filter for "STOP" message received in reply to text messages sent to the carrier's customer. Then, with no coordination (or even communication with Petitioner), the carrier may independently block future text messages to the revoking party from the original sender. In those instances, the carrier may or may not eventually tell Petitioner that it has taken action to block future TextCaster-transmitted messages from reaching the carrier's (revoking) customer.

Claimants would have received no indication whatsoever that their messages had been received (because they had not been).

After learning of the TCPA Claimants demands upon its Licensees, Petitioner accelerated an already-existing initiative to develop, test, and implement a process that now allows Petitioner to systematically receive the contents of reply messages sent in response to TextCaster-transmitted messages. Upon receipt of the contents of those messages from the carriers, Petitioner reviews them for any indicia of revocation. This engineered solution, while not true real time two-way texting, still approximates bilateral text-messaging functionality and allows Petitioner to promptly remove revoking subscribers from its Licensees' subscriber lists that include that subscriber.

E. Key Aspects of the July 2015 Declaratory Ruling and Order

The existence and scope of a texted party's right of such revocation was only clarified by the Commission for the first time in the July 2015 DRO. There, the Commission:

- definitively interpreted the (otherwise silent) TCPA to "allow consumers to revoke consent if they decide they no longer wish to receive voice calls or texts," *id*. at ¶56;
- clarified that consumers were not only entitled to revoke consent to be sent text messages, but also entitled to revoke consent using "any reasonable method," *id*. at ¶63; and
- clarified that the texting party "may not infringe on that ability by designating an exclusive means to revoke." *Id.*

Nowhere in its July 10, 2015 Order, however, did the Commission require a texting party to make available a *specific* or *particular* method for use by a consumer to communicate revocation of prior express consent to be texted. Fundamentally, the Commission noted, the TCPA requires only that "consumers must be able to respond to an unwanted call—using either a reasonable oral method or a reasonable method in writing—to prevent future calls." *Id*. at ¶64.

ARGUMENT

A. The TCPA Does Not Require a Texting Party to Provide Consumers Bilateral Text Messaging Functionality or any Other *Specific* or *Particular* Method to Communicate Revocation of Prior Express Consent.

1. The TCPA and its associated regulations are silent with respect to what, if any, means of revocation a texting party must make available to text recipients.

As the Commission properly noted in its July 2015 DRO, "the TCPA does not speak directly to the issue of revocation" in relation to text messages. *Id*. at ¶56. Nonetheless, to "provide a reasonable construction" of the statute, the Commission concluded that the TCPA does "allow consumers to revoke consent if they decide they no longer wish to receive voice calls or texts." *Id*. Continuing its "reasonable construction" of revocation, the Commission also concluded that the TCPA prohibits a texting party from infringing on a right to revoke by designating an *exclusive* means to revoke. *Id*. at ¶63. But neither the text of the TCPA, any associated regulation, nor the July 2015 DRO contain any language *requiring* a texting party to make available any specific means of revocation available to consumers. Under the circumstances, it would be improper to impose a legal burden on a texting party to provide a particular method or means of revocation.

Importantly, where Congress (and/or the Commission, through its implementing regulations) intended to require a calling party to make available a specific means or method by which a consumer could contact the calling party to revoke consent and/or "opt out" of receiving further communications, that direction has been made perfectly clear. For instance, in the case of advertisements sent to a telephone facsimile machine, 47 CFR 64.1200(a)(4)(iii)(D) requires a faxing party to place a notice on the first page of the fax itself containing:

> (1) A domestic contact telephone number and facsimile machine number for the recipient to transmit [an opt-out] request to the sender; and

> (2) If neither the required telephone number nor the facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number.

The regulations with respect to faxing under the TCPA even set timing/access requirements for the method to be made available for revoking consent to be faxed: "[t]he telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week." 47 CFR 64.1200(a)(4)(iii)(E).

Similarly, in the case of calls made utilizing an artificial or prerecorded voice, the TCPA-related regulations dictate a specific method to be made available to a called party for the purpose of revoking consent. Specifically, the regulations mandate that a caller must "provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism" within a prescribed time period. *See* 47 CFR 64.1200(b)(3). That same regulation further requires that the prescribed opt-out mechanism provided by the caller:

> must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

Id.

No such regulation establishing particularized means of revocation exist in connection with text messages. And while the Commission has concluded that text messages should be

treated as telephone "calls," text messages plainly do not involve an artificial or prerecorded voice, making 47 CFR 64.1200(b)(3) inapplicable.

2. The July 2015 DRO precludes a texting party from defining an exclusive method of revocation, but does not require it to make available any specific or particular method of revocation.

In its July 10, 2015 DRO, the Commission noted that "although the TCPA does not speak directly to the issue of revocation, the Commission can provide a reasonable construction of its terms." *Id.* at ¶56. The Commission further clarified that under the TCPA, "consumers may revoke consent in any manner that clearly expresses a desire not to receive further [text] messages, and that callers may not infringe on that ability by designating and exclusive means to revoke." *Id*. at ¶63. No particular means is specified.

Thus, while the Commission recognized an implicit right of revocation under the TCPA for texted parties, it did not go so far as to require a texting party to create and provide a texted party a *particular* means of revocation. Its guidance concerning a consumer's right to revoke consent is easily summarized:

- consumers "must be able to respond to an unwanted call – using either a reasonable oral method or a reasonable method in writing – to prevent future calls," July 10, 2015 DRO at ¶64;
- a revoking consumer need only "clearly express his or her desire not to receive further calls," *id.* at ¶67;
- a consumer "is not limited to using only a revocation method that the caller has established as one that it will accept," *id*. at ¶70; and
- the revocation methods available to consumers must not "materially impair" the consumer's right of revocation. *Id.* at ¶66.

In the case of TextCaster, neither Peitioner nor its Licensees ever attempted to dictate an exclusive means by which a subscriber could terminate his subscription or otherwise change his requests. Petitioner's Licensees have always provided consumer subscribers a web-based portal

(the same portal used by the subscriber to sign up in the first instance, and one always available by way of a link at the Licensee's own website) to manage their subscriptions. But at the same time, consumers were not bound to use the web-based portal. They remained free to choose any other available and functional method to express their desire to not receive further texts, including phone, email, mail, or even in-person request to the Licensee.

3. Bilateral text messaging functionality is not required under the TCPA.

Petitioner should be entitled to the declaratory ruling requested based on the absence of any requirement to provide a specific or particular means of revocation in the TCPA, regulations, or the Commission's July 2015 DRO interpreting the statute. But given the nature of the TCPA Claimants' threatened litigation against Petitioner's Licensees, it also bears noting that nothing in the TCPA, the regulations, or the Commission's TCPA-related Orders establishes that a texting party must provide two-way (bilateral) texting as a means by which a texted party can communicate with the sender of a text.

Indeed, to infer that bilateral text messaging functionality is *required* by the TCPA would contradict the Commission's conclusion that consumers who wish to revoke consent must be able to respond to an unwanted text using either a reasonable oral method OR a reasonable method in writing. *See* July 2015 DRO at ¶64. If a consumer has access to both a reasonable oral method and a reasonable (non-text) method in writing to revoke consent, then bilateral text messaging functionality would not be necessary to meet the standard established by the July 2015 DRO.

And to the extent the Commission's July 2015 DRO refers at all to "a reply of 'STOP'" as a means direct opt-out mechanism for text messages, that reference was to an exemption to the

TCPA granted by the Commission in its *Cargo Airline Order*[5] based on the petitioning party's *own* proposal. *See id.* at ¶64. In its Petition for Exemption, Cargo Airline had offered to provide bilateral reply STOP text messaging functionality as a specific opt-out means in exchange for the particular exemption it sought from the Commission. The Commission's acceptance of Cargo Airline's proposed bilateral (reply STOP) messaging functionality as a condition of receiving the exemption sought further confirms that the provision of such specific means was a negotiated element, and *not* a present legal requirement of the TCPA.

For the Commission to conclude that the TCPA requires texting parties to provide bilateral text messaging functionality would be to ignore that there are alternative messaging protocols available to – and being used by – texting parties. A texting party's choice among those alternatives depends on their particular needs and what they are willing to pay. Under one protocol, for example, the Cellular Telecommunications & Internet Association (CTIA) administers common short codes (CSC's)[6] for a group of U.S. wireless carriers. The CTIA leases CSC's to prospective users. Bilateral text message functionality is routine and expected under CTIA guidelines.

But TextCaster offers a particular service to a particular client base – namely entities seeking to send *non-commercial* text messages to large groups of subscribers at a value-based price. As described at Section II.D., *supra*, the TextCaster system utilizes an SMTP messaging protocol, which is less expensive (and also slightly slower) than the SMPP protocol. But for certain users, including TextCaster's Licensees, SMTP messaging is a preferred choice. Were the Commission to interpret the TCPA to require bilateral text messaging functionality, it would

[5] Cargo Airline Order, 29 FCC Rcd at 3438 at *5, para. 18.
[6] CSC's are short strings of numbers that are used to address wireless messages. *See* https://www.usshortcodes.com/info/.

largely foreclose use of this (SMTP) messaging protocol that has been in wide use for decades now.

There is no bilateral text messaging functionality requirement under the TCPA today, and no need for the Commission to create one simply to provide a texted party one more reasonable means of "clearly express[ing] a desire not to receive further messages." *See* July 2015 DRO at ¶63.

B. To Be "Reasonable," a Method of Revocation Employed by a Texting Party Must, at a Minimum, Reach the Original Texting Party.

Implicit in the Commission's Order requiring a party revoking consent to "clearly express his or her desire not to receive further calls" using any reasonable method (July 2015 DRO at ¶67), is that to be reasonable, a method of revocation must actually reach the original texting party (i.e., the one to whom the texted party provided consent). If the method chosen to communicate revocation does not reach the texting party, it will not "express" the consumer's desire to anyone.

Although this idea is firmly rooted in common sense, the TCPA Claimants assert that they were entitled to rely on a reply "STOP" message to revoke consent, and that simply by typing "STOP" into a reply text message box and hitting "send," they had done all they needed to do to revoke consent -- regardless of whether the reply was successfully transmitted to Petitioner or its Licensees.

Reliance on a non-functional method of communicating consent cannot, under any reading, be reasonable. Imagine, for instance, the same issue in the context of consent, rather than revocation of consent. Say a retailer made available on its website an electronic form for interested persons to provide written consent to receive coupons and other sale information by text. A customer then found and filled out the form on line, checking all the necessary boxes to

provide consent to receive texted information, but ultimately failed (for some reason) to complete the process by hitting the "submit" button. Even if the retailer has visibility to the form on its own website, if it did not actually *receive* the completed consent form from the customer, it could not reasonably claim to have consent. After all, the retailer would have no way of knowing whether the customer *intended* to submit the completed form but got distracted, or actually changed her mind and decided *not* to consent.

The same standard of certainty – requiring not just expression of intent, but also completed communication of that expression – should be required for revocation of consent. While there may remain room for court interpretation concerning whether a particular method of revoking prior express consent to be texted was reasonable, logic requires that, as a minimum threshold, a reasonable method of revoking consent be one that actually *reaches* the texting party. Petitioner is entitled to a declaratory ruling establishing that fundamental requirement.

C. A Limited Retroactive Waiver of TCPA Liability Is Warranted If the Commission's July 2015 DRO Established that the TCPA Requires a Texting Party to Provide Bilateral Text-Messaging Functionality as a Means Consumers May Use to Revoke Consent.

If, despite the arguments set forth above, the Commission declines to issue the declaratory rulings requested, Petitioner respectfully requests that, in the alternative, the Commission grant Petitioner and its Licensee users of the TextCaster Push system a limited retroactive waiver of the July 2015 DRO insofar as that Order clarified that the TCPA requires Petitioner to make bilateral text messaging functionality available to consumers for the purpose of their communicating revocation of consent to be texted.

The waiver as requested would bar Petitioner (and its Licensees) from liability for statutory damages under the TCPA to subscribers who attempted to revoke their prior express

consent by replying "STOP" (or a similar term) in response to a TextCaster-transmitted message before November 7, 2015 (120 days after the release of the July 2015 DRO).

The granting of a waiver of the requirement that Petitioner and its Licensees provide bilateral text messaging functionality is warranted because prior to the release of the July 2015 DRO, Petitioner had no way of anticipating from the text of the TCPA or any existing regulation or Commission Order that it would be *required* to provide consumers bilateral text messaging functionality as method of revoking consent. The TCPA is silent with respect to revocation in the context of text messaging, and there was no regulation specifying any specific or particular requirement concerning accommodations to be offered to consumers seeking to opt out or withdraw their prior express consent to be texted. That said, even before the release of the July 2015 DRO, Petitioner and its Licensees already had mechanisms in place by which TextCaster subscribers could manage and/or cancel their TextCaster subscriptions, and never required that an exclusive method of revocation be used.

Petitioner could not have anticipated that the Commission would not only clarify that a consumer could revoke consent by "any reasonable method," but also announce that "any reasonable method" must include bilateral text message functionality, particularly when Petitioner has been providing text broadcasting service via TextCaster using an SMTP messaging protocol for years.

Extending the retroactive waiver by 120 days following the release of the July 2015 DRO is both warranted and fair in order to relieve Petitioner and its Licensees of the risk of liability for the time period during which it worked, in conjunction with dozens of U.S. cellular carriers to rapidly develop, test, and implement the engineered solution that now permits Petitioner to receive and react appropriately to reply "STOP" messages.

Notwithstanding the Commission's clarification of the law regarding revocation of consent to be texted, TextCaster subscribers will not be prejudiced by the granting of a limited retroactive waiver because those subscribers have at all times, including up to and since the release of the July 2015 DRO, had available *multiple* reasonable methods of revoking consent to be texted – and complete freedom to choose from among those methods.

CONCLUSION

Consistent with the foregoing, the Commission should grant this Petition and provide a declaratory confirming: (1) that neither the TCPA nor any related regulation requires a texting party to create or make available to consumers any *specific* or *particular* means or method – including bilateral text messaging – by which a consumer may revoke prior express consent to be texted; and (2) that a "reasonable method" of revoking consent to be texted, which the Commission defined in the July 2015 DRO as one that "clearly expresses a desire not to receive further messages," must, at a minimum, be a method that actually reaches the texting party.

Alternatively, the Commission should grant Petitioner (and, by extension, its contractual Licensee users of Petitioner's TextCaster Push system) a limited retroactive waiver of its July 2015 DRO to the extent that Declaratory Ruling and Order established that the TCPA requires a texting party to provide consumers bilateral text messaging functionality as a specific and particular method for revoking prior express consent. The limited retroactive waiver granted should preclude TCPA liability against Petitioner and its Licensees for TextCaster subscribers

who attempted to revoke consent by replying "STOP" (or a similar term) in a text message sent in response to a TextCaster-transmitted message at any time up to and including November 7, 2015, or such relief as the Commission may find appropriate.

Dated: April 5, 2016

Respectfully submitted,

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