



April 2, 2009

Via electronic filing: <http://www.fcc.gov/cgb/ecfs>

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, DC 20554

Re: DMA's Comments on the Petition for Expedited Clarification and Declaratory Ruling, filed by Paul D.S. Edwards, CG Docket No. 02-278

Dear Secretary Dortch:

The Direct Marketing Association ("DMA") has participated in numerous proceedings regarding the *Rules and Implementation of the Telephone Consumer Protection Act*, CG Docket No 02-278 and appreciates this opportunity to provide comments on Paul D.S. Edwards' ("Petitioner") Petition for Expedited Clarification and Declaratory Ruling concerning the application of the Telephone Consumer Protection Act ("TCPA").¹ The DMA is concerned that the Petitioner's interpretation of the Federal Communications Commission's ("FCC" or "Commission") January 2008 Declaratory Ruling does not respect a consumer's choice and ignores a significant shift in the market.

The DMA (www.the-dma.org) is the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques. DMA advocates industry standards for responsible marketing, promotes relevance as the key to reaching consumers with desirable offers, and provides cutting-edge research, education, and networking opportunities to improve results throughout the end-to-end direct marketing process. Founded in 1917, DMA today represents more than 3,600 companies from dozens of vertical industries in the U.S. and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

The DMA supports honoring the expressed preference of a customer. We understand the importance respecting and adhering to the choices of customers has to

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, FCC 07-278 (released January 4, 2008) (hereinafter "Declaratory Ruling").

building trust between marketers and consumers. Understanding the value standards and best practices have in building consumer confidence, DMA, working with its members, developed and adopted standards for telephone marketing and making calls, for any purpose, to wireless devices as part of our *Guidelines for Ethical Business Practice* (“Guidelines”).² From our experience, and that of our members, we understand that consumer expectation is a critical element to their relationship with the business community. We are concerned that the Petitioner’s interpretation of the TCPA and of the Commission’s 2008 Declaratory Ruling unnecessarily upsets this relationship. The Petitioner’s reading of the Commission’s rule disregards a consumer’s choice and the realities of the marketplace. We believe a business should be permitted to call a consumer at a number designated by the consumer regardless of the underlying telecommunications service involved.

A consumer’s preference to receive calls at a designated number should be honored and preserved when a number is “ported”

It should not be assumed that when consumers port their telephone number, they have chosen to negate all their choices concerning that number. Instead, a consumer’s preference and desire to receive calls at a number designated by the consumer should be preserved when that number is “ported.” Such a policy honors a consumer’s choice to receive calls, and preserves a consumer’s expectation that they will receive calls, at the telephone number provided by the consumer. As the Commission determined in its 1992 TCPA Order, “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”³

The Petitioner “contends that when the creditor is initially provided a ‘landline’ telephone number, and subsequently that ‘landline’ number is ported to a cellular telephone, an established business relationship, ‘prior express consent,’ or other exemption from section 227(b)(1)(A)(iii) of the TCPA is not created.”⁴ The Petitioner concludes that for a call to be permissible under the TCPA, the “consumer must have provided the creditor a telephone number assigned to a wireless service.”⁵

Changing the underlying telecommunications service used by the consumer should not destroy a consumer’s expectation, or desire, that a business will continue to call the consumer at the telephone number provided by the consumer. The critical issue is whether the consumer consented to be contacted at a particular number, instead of focusing on a particular telecommunications service employed by the consumer. Contrary to the Petitioner’s position, the consumer’s expectation in this instance should

² *Direct Marketing Association’s Guidelines for Ethical Business Practices*, Restricted Contacts, Article #46, available at <http://www.dmaresponsibility.org/Guidelines/>.

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, at 8769, para. 31 (1992) (hereinafter “1992 TCPA Order”).

⁴ *Consumer and Government Affairs Bureau Seeks Comment on Paul D.S. Edwards Petition for Expedited Clarification and Declaratory Ruling Concerning the Telephone Consumer Protection Act*, 74 Fed. Reg. 11581, 11582 (March 18, 2009).

⁵ *Id.*

be paramount to other factors or considerations, particularly trumping any consideration given to the type of underlying telecommunications service used by the consumer. This policy would foster consumer welfare and respects consumer choice instead of the Petitioner's position, which puts a rule before consumer interest.

Consumers have choices to express their preference regarding how they are contacted

Consumers have the ability to choose who contacts them and how they are contacted. If a consumer wishes not to be contacted at a number assigned to their wireless service, they can communicate that preference to a business. For example, when contacted, a consumer can simply inform that caller that they prefer to receive calls at a different number. To presume that consumers do not want to be contacted at a particular number after it has been ported denies a consumer the choice with respect to and control over their communications. The appropriate policy would be to preserve a consumer's choice to be contacted absent instructions by the consumer to the contrary. In addition, consumers likely would be unaware that a business that has a consumer's consent to contact a particular number would not be able to do so once that telephone number is "ported." This would be problematic if the "ported" number is the only telephone number the consumer made available to the business. A consumer could risk missing important or critical information, such as calls from their credit card provider alerting the consumer to unauthorized activity on their account or from a lender notifying the consumer of missed payment on their mortgage.

The Petitioner's interpretation would also undermine the Commission's telephone number portability policy because it would discourage consumers from switching telecommunications services. Number portability was introduced to increase competition among telecommunications service providers.⁶ The Commission, in its 1996 *Order and Further Notice* recognized that "customers are reluctant to change service providers due to the absence of number portability."⁷ Consumers sought the ability to port their numbers when transferring among telecommunications services to avoid the hassle of updating their contact information. The Petitioner's position would impose a significant burden on consumers that switch telecommunications services; requiring consumers to provide notification to all their business contacts. Such a requirement would act as a barrier to switching telecommunications services and is in direct opposition to what the Commission sought to accomplish in its telephone number portability policy.

A significant shift in the market requires a consumer's consent to be preserved when a telephone number is "ported"

Changes in consumer uses of telecommunications services necessitates a ruling that finds a consumer's consent to receive calls at a particular number is preserved when

⁶ *In the Matter of Telephone Number Portability*, Third Report and Order, FCC 98-82, CC Docket No. 95-116, at para. 3 (1998).

⁷ *In re Telephone Number Portability*, First Report and Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, at 8367-68 (1996).

that telephone number is “ported.” Consumers are increasingly using their cellular phone as the sole household telephone. Prohibiting businesses from calling customers at the number provided to them, whether a wireless or landline number, would prevent businesses from communicating with consumers and delivering relevant information to them. In addition, consumers are purchasing wireless service on a flat rate basis. Concerns with consumers being charged for receiving calls are becoming less burdensome. The benefit and necessity to receiving information related calls at a telephone number assigned to a wireless service has surpassed any cost associated with such calls.

* * *

I thank you for the opportunity to submit these comments. We look forward to continuing to work closely with the Commission on these important issues. Please do not hesitate to contact me with any questions at 202/861-2423.

Sincerely,

Jerry Cerasale
Senior Vice President, Government Affairs
1615 L Street, NW Suite 1100
Washington, DC 20036

Cc: Stuart Ingis, Venable LLP
Michael Signorelli, Venable LLP