BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20552

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In the Matter of	)	
	)	
Paul D. S. Edwards's Petition	)	
for and Expedited Clarification	)	
and Declaratory Ruling Concerning	)	CG Docket No.: 02-278
the Telephone Consumer Protection	)	DA09-542
Act (TCPA) Rules	)	
	)	
Comments Submitted on behalf of	)	
The CBE Group, Inc.		

The CBE Group, Inc.'s Reply and Response to Consumer & Governmental Affairs Bureau's Request for Comments on Paul D. S. Edwards' Petition

Filed March 30, 2009

Michael L. Frost, Esq.
VP & General Counsel
The CBE Group, Inc.
131 Tower Park Dr., Ste. 100
Waterloo, IA 50701

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I. INTRODUCTION

Pursuant to 47 C.F.R. §§ 1.415 and 1.419, Commission's rules, The CBE Group, Inc. ("CBE") hereby files Comments with the Federal Communications Commission ("FCC") in response to Paul D.S. Edwards's ("Edwards") Petition for declaratory ruling.[1] Edwards has requested clarification of whether a creditor may place autodialed or prerecorded message calls to a landline telephone number provided by the consumer that the consumer subsequently "ported" to a wireless cellular telephone service.[2] This response requests that the FCC consider the overall impact that the wireless local number portability rules and the Declaratory Ruling issued by the FCC on or about January 4, 2008 in response to ACA International's request for clarification will have on consumers, creditors, debt collectors and our nation's economy.[3]

II. BACKGROUND ON RESPONDENT THE CBE GROUP, INC.

CBE is a privately held accounts receivable management company located in Waterloo, Iowa. With more than 75 years of experience in the collection industry, CBE provides collection services to a variety of organizations throughout the United States and employs approximately 1000 individuals in five operational centers.

III. PETITIONERS REQUEST FOR CLARIFICATION

On or about January 12, 2009, Paul D. Edwards (Edwards) filed a petition seeking clarification and a declaratory ruling from the Federal Communications Commission

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[1] 47 C.F.R. §1.2 authorizes the FCC on motion to issue a declaratory ruling to remove uncertainty concerning its rules in accordance with section 5(d) of the Administrative Procedures Act.

[2] *See* Petition for Expedited Clarification, filed by Paul D.S. Edwards, January 12, 2009 (Petition).

[3] *See* FCC Declaratory Ruling, released January 4, 2008 in response to ACA International Petition for an Expedited Clarification and Declaratory Ruling filed October 4, 2005, CG Docket No. 02-278.

(FCC) with respect to rules promulgated under the Telephone Consumer Protection Act (TCPA). Said petition specifically seeks to clarify whether a creditor or debt collector may place autodialed or prerecorded message calls to a telephone number associated with wireless service that was provided to the creditor initially as a telephone number associated with landline service.[4]

Edwards assertion appears to conclude that when a consumer provides a landline telephone number to a creditor and subsequently transfers or "ports" calls directed to said landline telephone number to a cellular telephone that any and all exemptions afforded a caller under Section 227 (b)(1)(A)(iii) of the TCPA are rescinded or otherwise not applicable.[5]

IV. REGULATIONS

A. Telephone Consumer Protection Act of 1991

Congress enacted the TCPA on or about December 20, 1991 to address telephone marketing calls and practices that Congress felt were an invasion of the privacy and security of consumers.[6] Section 227(b)(1)(A) prohibits the use of any automatic telephone dialing system to call any telephone number assigned to a cellular telephone service with the exception of, in relevant part, the following: (1) calls made for emergency purposes; (2) calls made with the prior express consent of the called party; or (3) such classes of or categories of calls made for commercial purposes as the

[4] *See* Petition for Expedited Clarification, filed by Paul D.S. Edwards, January 12, 2009 (Petition).

[5] *Id* at 2.

[6] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA)

Commission determines will not adversely affect the privacy rights that the TCPA is intended to protect and that do not include the transmission of any unsolicited advertisement.[7] Section 227(b)(1)(A)(iii), in relevant part, further restricts the use of automated telephone equipment from being used to make a call to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.[8]

Legislative intent suggests that the TCPA was enacted to regulate telemarketing activities and protect consumers from solicitations that cost the consumer money or imposed upon the consumers at peculiar or inconvenient times. Furthermore, the legislative intent included provisions that would exempt certain calls from the regulatory schema that do not invade upon the privacy rights of consumers and may potentially be of value to or in the best interest of the consumer to receive.[9] Take for instance, Representative Norman Lent's statement regarding the TCPA enactment where he suggests that the TCPA "explicitly recognized that there are certain classes and categories of calls that consumers do not mind, and in fact would probably like to receive. Calls informing a consumer that a bill is overdue, or a previously unstocked item is now available at a store are clearly not burdensome, and should not be prohibited."[10]

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[7] 47 U.S.C. §§ 227(b)(1)(B) and (b)(2)(B)(ii)

[8] 47 U.S.C. § 227(b)(1)(A)(iii)

[9] 137 Cong. Rec. H11307-01 at H11312 (1991); 137 Cong. Rec. S18781-02, S18784 (1991).

[10] *Id.*

Likewise, Senator Fritz Hollings stated, "some debt collection agencies use automated or prerecorded messages for outstanding bills. The FCC should consider whether these types of calls should be exempted and under what conditions such an exemption should be granted either as noncommercial call or as a category of calls that does not invade the privacy rights of consumers."[11]

In 1992, the FCC adopted rules implementing the TCPA and concluded that an express exemption for debt collection calls to residences was unnecessary as such calls fall with the exemptions adopted for commercial calls which do not transmit an unsolicited advertisement and for established business relationships.[12] It is clear that prior FCC interpretations and legislative intent with respect to the enactment of the TCPA was to protect the privacy rights of consumers by restricting the use of automatic telephone dialing systems for solicitations and at the same time providing clear exemptions for calls placed by automatic telephone dialing systems concerning issues related to an established business relationship. Said exemptions consider the consumer's best interests and ensure that personal or business matters are not constrained by TCPA restrictions.

B. FCC Declaratory Ruling Regarding Autodialed and Prerecorded Message Calls to Wireless Numbers

On October 4, 2005, ACA International, Inc. (ACA) filed a Petition with the FCC requesting an expedited clarification and declaratory ruling regarding the prohibition against autodialed or prerecorded calls to wireless telephone numbers and the

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[11] *Id.*

[12] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90 (1992).

applicability of said prohibition as it relates to creditors and debt collectors when calling wireless telephone numbers in an effort to recover delinquent payments for goods and services received by consumers.[13] On January 4, 2008, the FCC released a declaratory ruling which addressed ACA's petition.[14] The FCC concluded in said declaratory ruling that prior express consent is deemed to be granted by the consumer when the wireless number is provided by the consumer to the creditor during the transaction that resulted in the debt owed and that calls made by debt collectors via automated dialing systems are permissible when such prior express consent is deemed to be granted.[15] In said declaratory ruling, the FCC pointed out a prior order submitted by the FCC in a 1992 TCPA Order, wherein the FCC determined that "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."[16] The same holds true in the current dialogue stemming from Edwards's request for clarification and declaratory ruling. When a consumer has provided a telephone number where they can be reached by the creditor or by a subsequent third party debt collector, absent instructions to the contrary, it is absolutely reasonable to assume that a consumer who has ported the number provided to the creditor and/or third party debt collector would

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[13] ACA International Petition for an Expedited Clarification and Declaratory Ruling filed October 4, 2005. CG Docket No. 02-278

[14] FCC Declaratory Ruling, released January 4, 2008 in response to ACA International Petition for an Expedited Clarification and Declaratory Ruling filed October 4, 2005, CG Docket No. 02-278.

[15] FCC Declaratory Ruling, CG Docket No. 02-278, Section III, A, 10.

[16] FCC Declaratory Ruling, released January 4, 2008 in response to ACA International Petition for an Expedited Clarification and Declaratory Ruling filed October 4, 2005, CG Docket No. 02-278.

presume that the creditor and/or third party debt collector could reach them at the ported telephone number unless the consumer has instructed otherwise. Consumers understand and should reasonably presume that if the consumer chooses to port a telephone number they have previous provided to family members, friends and business acquaintances that they will continue to receive calls on the telephone number where his or her calls are being ported to from family members, friends and business acquaintances who were provided the number prior to it being ported. Furthermore, there is no way that the caller would know or be informed that the telephone number has been ported by the consumer to a cellular telephone or otherwise absent prior notice of the same.

C. FTC Position on Autodialed and Prerecorded Message Calls to Wireless Numbers

In October of 2007, the Federal Trade Commission ("FTC") convened a public workshop to evaluate the necessity for change in the Fair Debt Collection Practices Act ("FDCPA") and other regulations that govern the debt collection industry.[17] Following the public workshop, the FTC concluded that the law needs to be modified to provide better consumer protections without unduly burdening the debt collection process.[18]

The FTC concurred with the FCC's declaratory ruling on the petition filed by ACA in 2005 which sought clarification that the prohibition against autodialed and prerecorded calls to mobile phones does not apply to creditors and collections when calling wireless telephone numbers to recover payments for goods and services received

[17] FTC Workshop Report: *The Challenges of Change*, February 2009.

[18] *Id* at i.

by consumers.[19] The FTC stated, "the Commission believes that the law should allow collectors to call consumers on their mobile phones if they have give prior express consent to such calls."[20] The FTC further stated, "If a debt collector has a consumer's prior express consent to contact the consumer's mobile phone, then it should be free to communicate with the consumer via that method so long as the debt collector has reason to believe that the consumer who provided the prior express consent can be contacted at that phone number, and so long as the collector complied with all other FDCPA provisions."[21]

Edwards' petition suggests that where a consumer has provided a landline telephone number to a creditor and subsequently ports or forwards the number provided to the creditor or debt collector to a different number and that the creditor and/or debt collector should be prohibited from contacting the consumer via the number provided by the consumer.[22] The FCC and FTC have both provided clear guidance on the legality of a creditor and/or debt collector placing automated dialing system generated phone calls to a consumer's cellular telephone where the consumer has provide express prior consent to be contacted on their cellular telephone.[23]

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[19] *Id.* at 40.

[20] *Id.* at 41.

[21] *Id.* at 42.

[22] *See* Petition for Expedited Clarification, filed by Paul D.S. Edwards, January 12, 2009 (Petition).

[23] *See* FCC Declaratory Ruling, released January 4, 2008 in response to ACA International Petition for an Expedited Clarification and Declaratory Ruling filed October 4, 2005, CG Docket No. 02-278; *See also* FTC Workshop Report: The Challenges of Change, February 2009.

Methods of communication afforded debt collectors are not limited by the FDCPA with the exception of a prohibition of contacting consumers by postcard.[24] The law does not restrict the available use of technology by debt collectors when communicating or attempting to communicate with consumers.[25] The debt collection industry maximizes efficiency of communication through the utilization of predictive dialers and other new technologies thereby reducing the cost of collection. Edwards's petition makes suggestions that would limit the availability of consumers to be reached and informed of alternatives to resolve deficiency obligations. Further limiting available means of communication between business entities and their consumers will: (1) increase the amount of debt that is uncollectable; (2) increase interest rates for all consumers; (2) reduce the availability of credit; (3) pass the increased costs of collection to consumers; and (4) increase debt that is written off by credit and lending institutions. The overall impact is an exacerbation of economic financial despair that will have a looming effect on the US economy.

The FTC believes that debt collectors generally should be allowed to use all communication technologies, including new and emerging technologies, to contact consumers.[26] We agree with the FTC and FCC and believe that where a consumer has provided a telephone number to be reached or where the debt collector has a consumer's prior express consent to contact the consumer's mobile phone that the debt collector

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[24]FTC Workshop Report: *The Challenges of Change*, February 2009.

[25] *Id.*

[26] *Id.* at 36.

should be free to communicate with the consumer via that method.[27] Edwards's petition suggests that the FCC further restrict available means of communication that otherwise comply with all other regulations governing the collection industry. On its face, Edwards' petition contradicts the rules promulgated by the FCC and FTC.

D. Wireless Number Portability Rules

Wireless local number portability ("LNP") enables wireless subscribers to maintain their telephone number when changing telephone service providers. The intent of LNP is to eliminate barriers to full competition between wireless telephone services and between landline and wireless telephone services.[28] Portability rules enable consumers to switch to new providers of telephonic services based on service, quality, and price without fear of losing their then current telephone number.[29] In the first twelve months following the enactment of the LNP rules, more than 8.5 million consumers utilized portability options and approximately ten percent (10%) or 850,000 consumers moved a landline telephone number to a wireless telephone service provider.[30]

In 2007, more than 255.4 million American's subscribed to wireless telephone communication services, an astonishing 84% of the total United States population.[31] Of

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[27] *Id.* at 42.

[28] FCC New Release: *FCC Observes First Anniversary of Wireless Local Number Portability*, November 24, 2004.

[29] *Id.*

[30] *Id.*

[31] CITA (International Association for the Wireless Telecommunications Industry), *Wireless Substitution: Early release of estimates from the National Health Interview Survey*, January-June 2007, National Center for Health Statistics, December 10, 2007, available at www.citashow.org.

the 255 million subscribers, approximately 34.68 million American's or 13.6% of United States households are exclusive wireless telephone subscribers and have forgone the use of traditional landline telephonic services.[32] This presents a growing challenge for the efficient use of technology as well as communication challenges for creditors to provide consumer's notification of a delinquent obligation before it reaches levels that could negatively affect the consumer's financial stability or credit score. It is clear that the wireless community is changing the means by which consumers communicate. When the TCPA was enacted, the use of cellular telephones was not common place and the cost for said use was substantially greater that compared to the rates charged today.

There are more wireless phones than landlines in the United States today.[33] As of December 2004, U.S. landlines totaled 178 million, and landline growth has been negative since 2001.[34] "In 1991, users of mobile phones tended to be mostly yuppies and executives. Now, prepaid cards make mobile phones cheap and convenient enough even for children to use."[35] Regulatory interpretation of the TCPA needs to account for these differences so that the privacy rights of consumers are not adversely affected simply by technological changes in societal means of communication. When the TCPA was enacted, Congress clearly intended to minimize the cost that consumers would bear by calls being made through an automated dialing system to the consumer's cellular

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[32] *Id.*

[33] FCC Release: *Statistics on Communication Common Carriers*, Nov. 7, 2005.

[34] *Id.*

[35] International Herald Tribune, The Global Edition of the New York Times, *"Cell-Phone Revolution? Europe's Been There."* October 29, 2001.

telephone. Today, the cost of a cellular telephone is analogous to the cost of landline telephones in the late 1980's and early 1990's therefore the protection afforded by Congress to consumers regarding the cost to accept automated dialing system generated calls has been reduced or eliminated over the past 18 years through the general economics of supply and demand.

V. ANY TELEPHONE NUMBER PROVIDED TO THE CREDITOR WHETHER PORTED OR NOT SHOULD BE EXEMPT ACCORDING TO THE TCPA

While the LNP rules alone have many protections that foster healthy competition amongst service providers and maintains stability and efficiency for consumers, the LNP rules coupled with the TCPA prohibitions, as suggested in Edwards's petition, seem to, work in opposition to the intent of LNP rules and the TCPA protections which were both developed to provide adequate protection to consumers with regard to their respective prohibitions.

In accordance with 47 U.S.C. §227 (b)(2)(B)(ii), the FCC by rule or order may exempt classes or categories of calls made for commercial purposes as the commission determines, (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement.[36] Calls made for business related purposes that do not transmit unsolicited advertisements, including calls made to recover an unpaid obligation, do not adversely affect the privacy rights of consumers. To the contrary, it would be to the consumer's detriment to forbid automated dialing system calls to be made by or on behalf of a creditor that concern the default of a monetary obligation. To remove the efficient ability of the creditor or third

[36] 47 U.S.C. § 227(b)(2)(B)(ii)

party debt collector to attempt to reach the consumer to provide alternative means to resolve the account will cost the consumer more money in the end to resolve their delinquent obligation or save their home from foreclosure.

In 1992, the FCC adopted rules implementing the TCPA and concluded that an express exemption for debt collection calls to residences was unnecessary as such calls fall with the exemptions adopted for commercial calls which do not transmit an unsolicited advertisement and for established business relationships.[37] The vast majority of U.S. households today have either "cut the cord" or have or will "port the cord" making landline telephone communications all but obsolete. [38] Technological advancements and LNP rules have changed the complexity of the TCPA. Current restrictions set forth by the TCPA coupled with the change in viable means of communication, in addition to the LNP rules, adversely affect the rights of consumers and the free flow of information. The FCC should adopt rules that conclude that an express exemption for debt collection calls to residence and/or cellular telephone service, whether or not the telephone number has been ported by the consumer, as such calls fall within the exemptions adopted for commercial calls which do not transmit an unsolicited advertisement, are for an established business relationship and will not adversely affect the privacy rights of consumers.

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[37] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90 (1992).

[38] FCC News Release, *FCC Observes First Anniversary of Wireless Local Number Portability*, November 24, 2004.

VI. CONCLUSION

The suggestions set forth in Edwards' petition for clarification and declaratory ruling would further limit the available means for a consumer to receive important information from the creditor or its third party debt collector regarding changes to the consumer's agreement, a delinquency of the consumer's obligation or other vital information concerning the consumer's line of credit or other type of account. This inability to reach the consumer by the means by which most consumers choose to communicate in today's wireless community further exacerbates the current economic troubles that our lending institutions, consumers and the overall U.S. economy are currently experiencing.

Against this backdrop, the FCC should enter a declaratory ruling and order of clarification of the issues presented by Edwards by providing an express exemption for creditors and third party debt collectors that would allow calls generated through an automated dialing system and other means to a consumer's residence telephone number, the consumer's cellular telephone number or a consumer's telephone number that has been ported to or from one or the other. All such calls fall within the exemptions adopted for commercial calls which do not transmit any unsolicited advertisement and instead are placed based upon an established business relationship that does not adversely affect the privacy rights that the TCPA was intended to protect in accordance with 47 U.S.C. §227 (b)(2)(B)(ii).[39] Ruling any other way will create a detrimental impact on the consumer,

[39] 47 U.S.C. § 227(b)(1)(A)(iii)

creditors and debt collectors, alike. A consumer that is unreachable via telephone communication, whether wireless or landline, will increase the potential of default, may increase the potential of a negative reporting of a debt to the credit repositories that may limit the ability of the consumer to obtain reasonable financing or may escalate the necessity for creditors and third party debt collectors to pursue legal action to protect the creditors' rights under the agreement. In any of the aforementioned scenarios, the unfavorable result may have been remediated if the creditor and/or third party debt collector was afforded the opportunity to reach the consumer to provide alternative resolutions to the matter through an automated dialing system or otherwise. Not affording consumers the same may adversely affect the privacy rights of the consumer. It further restricts and ultimately reduces the availability of an amicable resolution. In the end it costs the consumer more money, costs the creditor more money, and burdens the judicial system with increased demand for small claims hearings all premised upon the interpretation of an antiquated law that does not provide for proper notification of issues that would ultimately provide protection to the consumer.

A faltering economy coupled with limiting access to acceptable means of communication with consumers provides a heightened awareness to this rapidly emergent problem for the consumer as well as the credit and collection industry. With that said, it is in the best interest of consumers, creditors, debt collectors, commercial business and the economy in general for the FCC to accept these guiding principals by effectuating a reasonable resolution through a declaratory ruling that recognizes the TCPA exemptions afforded creditors and debt collectors.

Respectfully submitted,

THE CBE GROUP, INC.

Michael L. Frost, Esq.
Vice President and General Counsel
131 Tower Park Drive
Suite 100
Waterloo, IA 50701
ATTORNEY FOR RESPONDENT