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	)	

COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

USTelecom provides these comments in response to the Commission's Notice of Proposed Rulemaking,[1] seeking comment on its proposal to make certain changes to the Commission's rules under the Telephone Consumer Protection Act of 1991 (TCPA)[2] to "harmonize" the Commission's rules with the Federal Trade Commission's (FTC) 2008 amendments to the Telemarketing Sales Rule.[3] The Commission's proposed revisions to its rules are not a harmonization, but instead go far beyond the FTC's rule which only applies to any outbound *telemarketing* call "that delivers a *prerecorded* message."[4] Rather, absent prior written consent, the Commission's proposed rule would prohibit all live calls made with an automatic dialer and non-telemarketing prerecorded calls to the specific number a customer provided to reach him or her (i.e., "can be reached number") if that number happens to be a wireless number. USTelecom's members cannot readily distinguish between wireline and wireless "can be reached numbers." Obtaining written (or electronic) consent from millions of existing customers would be extremely costly and difficult. Because customers that provide "can be reached numbers"

---

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278 para. 1 (NPRM).
[2] Telephone Consumer Privacy Act, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227.
[3] *See Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164-01 (2008) (*2008 Final Rule Amendments*) available at http://www.ftc.gov/os/fedreg/2008/august/080829tsr.pdf.
[4] 16 CFR § 310.4(b)(v) (emphasis added).

expect to be called at these numbers, there is no need for the Commission to erect barriers to their receiving calls that are used to relay important information, such as service appointments, payment issues, and state-mandated pre-suspension or pre-disconnection notices. Accordingly, the Commission should join the FTC in limiting its rules to prerecorded telemarketing calls.

DISCUSSION

The Commission's current rules allow entities to make prerecorded or autodialed calls to wireless numbers when the entity has the "prior express consent" of the customer.[5] The Commission has never limited how customers can convey "prior express consent." In fact, the Commission has held that the prior express consent requirement is fulfilled when a customer with whom a company has an established business relationship provides a contact number to the company. According to the Commission, "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."[6] This approach is consistent with the intent of Congress, as the legislative history makes clear: "[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications."[7]

The Commission's prior determination reflects the practical recognition that phone calls or text messages are generally the most effective way of contacting a customer. Accordingly, when a customer provides a *wireless* number with the understanding that the company will use that number to contact him or her for purposes other than marketing, that consent should be sufficient. A requirement that the company obtain written consent before using an autodialer

[5] 47 CFR § 64.1200.
[6] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8769, para. 31 (1992).
[7] H.R. Rep. 102-317 at 17.

and/or prerecorded message to contact that customer is impractical and potentially harmful to the consumer who is most efficiently and effectively contacted at the number he or she provided.

Nonetheless, although not discussed in the NPRM, the effect of the Commission's proposed rule would be to prohibit such calls without prior *written* consent. The NPRM does not acknowledge the inherent differences between and reasons for prerecorded telemarketing calls and non-telemarketing calls. Instead, *sub silentio*, the Commission sweeps under its proposed rules the requirement of section 227(b)(1)(B)(iii) that a business obtain prior express consent *in writing* before using an autodialer to make "any call" to a wireless phone.[8] This rule would have potentially profound and harmful unintended consequences on consumers and businesses alike.

Companies have long relied on their ability to make calls to the number furnished by the customer (i.e., the "can be reached number") for a number of reasons that are beneficial to consumers, necessary to fulfill contractual obligations, and in some cases, required by state law. The use of prerecorded messages and/or autodialers to accomplish these calls improves efficiency and accuracy and substantially reduces costs. Those gains would be lost – or at least severely mitigated – if companies were required to obtain written consent prior to contacting their customers in this manner. Obtaining prior written consent from millions of customers would be very expensive, difficult, and in some cases impractical. It is likely that many customers would be confused by the consent form, ignore it, or refuse to sign it *even when they wish to receive non-marketing calls from the company*. Imposing such a requirement upsets the

[8] *See* 47 U.S.C. § 227(b)(1)(b)(iii): "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States-- (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--…(iii) 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."

balance that Congress sought in the TCPA between protecting consumer privacy and enabling businesses to reach their customers with important information in a cost-effective manner.[9]

Maintaining this balance is particularly important when customers regularly provide wireless "can be reached numbers" so they can be reached wherever they may be. Given that as of the end of 2009, 24.5 percent of households were "wireless only" and an additional 14.9 percent were "wireless mostly," nearly half of all households would be unreachable by phone under the Commission's proposed rule unless the customer had provided prior express written consent to the call, even though the consumer provided the company with a wireless "can be reached number" and by doing so had expressed a preference to being reached at that number.

Moreover, the proposed rule would impact calls to all "can be reached numbers" – wireline and wireless. Businesses face a substantial burden to discover whether a "can be reached number" is wireless. Employing or developing screening systems for each internal system used to generate calls to determine whether millions of "can be reached numbers" are wireless or wireline would be both costly and time-consuming. These substantial costs may deter companies from making non-marketing phone calls to their customers unless the calls are absolutely necessary, which will reduce the flow of important and useful information now provided to consumers.

As a result, the Commission's proposed change to its rules would fundamentally alter how a company may communicate with its customers about a variety of issues important to both the customer and the company. One such issue is the basic obligations under the contract. The company has the obligation to deliver the goods or services for which the customer contracted and to perform whatever other services are required under the contract. Autodialed and/or prerecorded calls to "can be reached numbers" are often used to confirm receipt of goods, to

[9] NPRM at para. 18 and n. 58.

schedule service calls, to remind customers of their appointments, and to confirm repairs. In fact, the "can be reached number" is the only possible way for our members to reach the customer to arrange the installation of new phone service.

Similarly, the customer has the obligation to pay the contractual amount for those goods or services. When a customer has failed to timely fulfill his or her contractual obligation to pay for goods or services, it is in both the company's and the customer's best interest that they communicate as quickly and effectively as possible. For example, the company may need to contact the customer to inform him or her that an auto-pay request failed to work; that the company was unable to process the last payment; that the payment was incomplete; or that the customer has fallen behind on payments. In these cases, the customer's credit or access to services could be adversely affected. To avoid these consequences, it is in the customer's best interest to receive prompt notification of any issue and to be able to work with the company to favorably resolve the issue.

With respect to debt collection, the Commission has held just over *two* years ago that "autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party."[10] The Commission recognized that when "the wireless number was provided by the consumer to the creditor, and … such number was provided during the transaction that resulted in the debt owed" the prior express consent requirement was satisfied.[11] Further, the Commission specifically clarified that "calls solely for the purpose of debt collection are not telephone solicitations and do not constitute

[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-278 (2008) (Declaratory Ruling) at para. 1.
[11] *Id.* at para. 10.

telemarketing." We are aware of no changes in the past two years – and the NPRM provides none – that would support overturning the Commission's well-reasoned decision with respect to these calls. In fact, the NPRM's clearly stated purpose is to "harmonize" the Commission's rules with the FTC's 2008 amendments to the Telemarketing Sales Rule which covers only "telemarketing" calls. The Commission has not provided notice and a reasoned discussion that would support making any changes in its current rules beyond those governing "telemarketing calls."

Finally, important statutory or regulatory requirements are often most effectively met by a prerecorded and/or autodialed call to the customer's "can be reached number." For example, in cases of a breach in the security of data held by a company, federal law and the laws of many states typically require that the customer be informed. Companies will also contact customers to ensure that changes to a customer's account that may expose CPNI were made intentionally, to contact the customer about unusual patterns of use, or to notify the customer of any other changes that could indicate possible fraud or theft. It is only logical that these important calls be made to the number the customer has provided without delay. As noted earlier, the use of a prerecorded message and/or an autodialer is the most efficient way to reach these customers.

Similarly, there are state-law requirements that are best fulfilled by texting or calling a "can be reached number" provided by the customer. For example, under New York law, a company offering "free trials" is required to provide advance notice well before the trial period ends.[12] Under that law, for example, when AT&T offers a free 30-day trial of its Navigator service, it notifies its customer by text message of the expiration of the trial period. Additionally, many states require a number of call attempts prior to the company suspending or

[12] *See* NY CLS Gen. Bus. § 396-mm, Unlawful trial offers (Consol. 2010).

disconnecting service. Many times these calls are made to "can be reached numbers," using an autodialer to place the calls or using a prerecorded message.

CONCLUSION

The Commission should not make any changes to its rules that would obstruct calls from a company to its customer that are not prerecorded telemarketing. Such a sweeping change in its rules would harm customers and go far beyond the statute and the legislative history that underlies Congressional intent in this instance.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: _____

Jonathan Banks
Genie Barton

Its Attorneys

607 14th Street, NW, Suite 400
Washington, D.C. 20005

May 21, 2010