Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CG Docket No. 02-278
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	

COMMENTS OF ARBITRON INC.

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INTRODUCTION AND SUMMARY

Arbitron Inc. ("Arbitron") hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") seeking comment on proposed revisions to the Federal Communication Commission's ("FCC" or "Commission") rules under the Telephone Consumer Protection Act ("TCPA"). Specifically, Arbitron comments on the FCC's proposed revision to its rule regulating the use of an automatic telephone dialing system ("autodialer") to call a mobile phone. The proposed rule would replace the existing rule's requirement that a caller have express consent to deliver an autodialed call to a cell phone with the requirement that the caller place such a call only after receiving the recipient's signed written consent.[1] While Arbitron has no concern with the proposed change as applied to telemarketing, the rule as proposed would also affect survey research companies that conduct no telemarketing and would undermine the ability of survey research companies to obtain reliable survey data cost-effectively.

Arbitron is a media and marketing research firm serving the media, including radio and television, advertisers, and advertising agencies. Arbitron's core businesses are measuring and estimating network and local-market radio and television audiences across the United States; surveying the retail, media and product patterns of local market consumers; and providing application software used for analyzing media audience and marketing estimates and data. Arbitron uses samples of the population to elicit trends in radio and television consumption, producing monthly estimates and data about listening and viewing habits as well as

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[1] In particular, the proposed rule would require "an express agreement, in writing, that: (A) [The caller] obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice; (B) [The caller] obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd. 1501, 1523 Appendix A (2010) ("*TCPA NPRM*").

comprehensive quarterly reports depending on whether Arbitron is using its PPM™ or diary methodology. Radio broadcasters, radio networks, cable companies, advertisers, advertising agencies, out-of-home advertising companies, and the online radio industry, among others, use Arbitron audience estimates and data to more effectively serve listeners, consumers, and retailers. As the Commission is aware, particularly in the radio marketplace, both radio stations and advertisers use the Arbitron ratings as "currency" to help them negotiate advertising prices.[2] In addition, broadcasters use Arbitron's audience estimates to determine which programs to provide to listeners.

The NPRM's proposal to require prior written consent for all autodialed calls to cellular telephones – including non-telemarketing survey research calls – would dramatically increase the costs to Arbitron and other survey research companies as they establish statistically valid survey panels and diary data collection, and increase the challenges to obtaining representative survey panels and diary data collection that include individuals or households that have a cell phone, but no landline connection. Today, because of the TCPA's ban on any autodialed calls to a cell phone without express prior permission when the called party is charged for the call, Arbitron mails surveys to potential cell phone-only respondents and asks them to return the survey via mail, Internet, or telephone with their telephone number and other information. Arbitron may then call respondents who completed the survey. The NPRM would add multiple mandatory warnings and require that the returned survey be signed. This would both increase survey research costs and drive down response rates, which would harm both the utility and efficacy of survey research.

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[2] *Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters*, Notice of Inquiry, MB Docket No. 08-187 at 5-6 ¶ 7 (rel. May 18, 2009).

There is no need for survey research to be collateral damage in the FCC's understandable attempt to harmonize its rules for pre-recorded telemarketing calls with those of the Federal Trade Commission ("FTC"). The FTC's Telemarketing Sales Rule applies only to telemarketing, *i.e.*, "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call,"[3] which does not include survey research. Moreover, the FTC's Telemarketing Sales Rule requires signed written consent only for telemarketing calls that deliver a "prerecorded message;"[4] even for telemarketing, it does *not* require signed written consent for calls with a live caller who merely uses an autodialer to place the call, where the caller has received the number directly from the recipient for the purpose of conducting the relationship between the parties. The proposed rule is also overbroad relative to the text of the TCPA, which requires only the "express consent" of the called party,[5] and inconsistent with its legislative history. Previous FCC interpretations of the TCPA have acknowledged the legitimate policy reasons behind allowing autodialed calls to cell phones where express consent is given. The proposed expansion runs counter to that policy and will not facilitate the harmonization of the FCC rules with the FTC's Telemarketing Sales Rule.

Moreover, particularly as applied to non-telemarketing activities such as survey research, the TCPA's ban on using an automatic telephone dialing system to place calls to cell phones is antiquated, reflecting a cell phone market that bears no resemblance to today's marketplace. When the TCPA was enacted, there were only two licensed cell phone providers in every area.

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[3] 16 C.F.R. § 310.2(cc).

[4] 16 C.F.R. § 310.4(b)(1)(v)(A)(*iv*).

[5] 47 U.S.C. 227(b)(1)(A).

Cell phones charged all calls by the minute – at an average of 45 cents per minute[6] – with no "bucket" plans. Only approximately seven million Americans had cell phones – virtually all of whom also had landline phones.[7] Today, by contrast, 285 million Americans have cell phones,[8] and nearly one in four Americans relies on a cell phone exclusively to make and receive telephone calls.[9] In addition, consumers have many more carriers from which to choose, with cell phone rates averaging approximately five cents per minute,[10] and most consumers purchasing "bucket" plans such that the incremental cost to the consumer of a survey call is at or near zero. In recognition that the world has changed since 1991, the Commission should exempt survey research entirely from the TCPA's ban on autodialed calls to cell phones. At a minimum, the Commission should not extend its new proposed written consent requirements to non-telemarketing autodialed calls to cell phones for survey research.

For these reasons, we strongly urge the Commission to decline to adopt the proposed rule. If the Commission decides to adopt the proposed rule, then we respectfully urge the Commission to exempt survey research from its requirements.

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[6] Thomas J. Sugrue, Federal Communications Commission, Fifth Annual CMRS Competition Report: Thomas J. Sugrue Opening Remarks at 8 (Aug. 3, 2000), http://wireless.fcc.gov/statements/Sugrue_slides3.ppt ("*Sugrue PowerPoint*").

[7] CTIA – The Wireless Association®, Background on CTIA's Semi-Annual Wireless Industry Survey (2010), http://files.ctia.org/pdf/CTIA_Survey_Year_End_2009_Graphics.pdf.

[8] *Id.*

[9] Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2009 (2010), http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf ("*Wireless Substitution*").

[10] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Wireless*, Fourteenth Report, WT-Docket No. 09-66, at 112 Table 19 (2010) ("*2010 CMRS Competition Report*").

I. AS APPLIED TO CALLS FOR SURVEY RESEARCH, THE PROPOSED CHANGES TO THE AUTODIALER RULE FOR CALLS TO CELL PHONES WILL NOT ACHIEVE THE COMMISSION'S STATED GOAL OF HARMONIZING FCC RULES WITH THE FTC'S TELEMARKETING RULES.

A. The Proposed Change is not Necessary to Harmonize the FCC's Telemarketing Rules with the FTC Rules, and Would be Arbitrary and Capricious.

The FCC's stated goal for its proposed revisions to its rules under the TCPA is to "harmonize those rules" with the FTC's "recently amended Telemarketing Sales Rule."[11] In its NPRM, the FCC explains that the change is intended to "remove certain differences" in the treatment of telemarketing calls between the FTC's rules and those of the FCC with respect to pre-recorded calls.[12] Without any analysis, however, the Commission tentatively concluded that "express written consent" should be required not just for pre-recorded telemarketing calls to, *inter alia*, cell phones, as in the FTC's Telemarketing Sales Rule, but also to autodialed calls made to a cell phone for any purpose.[13] There is no analytical predicate laid anywhere in the NPRM for this proposed addition of express written consent to the TCPA's autodialer provisions, particularly with respect to non-telemarketing calls. The Commission is addressing a non-existent problem.

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[11] *TCPA NPRM*, 25 FCC Rcd. at 1502 ¶ 1.

[12] *Id.*, 25 FCC Rcd. at 1502 ¶ 2.

[13] *Id.*, 25 FCC Rcd. at 1510 ¶ 20. In particular, the proposed rule would require "an express agreement, in writing, that: (A) [The caller] obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice; (B) [The caller] obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature." *TCPA NPRM*, 25 FCC Rcd. at 1523 Appendix A.

The FTC's Telemarketing Sales Rule, as its name suggests, applies only to telemarketing. That rule defines "telemarketing" as "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call."[14] With respect to telemarketing calls using a prerecorded message – but not telemarketing calls by a live person even if placed from an autodialer – the FTC's Telemarketing Sales Rule requires the seller to obtain a signed, written consent to the receipt of prerecorded telemarketing calls.[15] Accordingly, while these restrictions parallel the Section 227(b)(1)(A)(iii) requirements with respect to *pre-recorded* telemarketing calls to cell phones, none of these FTC requirements applies with respect to *autodialed* live calls placed by survey research companies, both because such calls are not "telemarketing" and because the FTC's rule does not require express written consent prior to placement of such calls using an autodialer even if they were telemarketing.

Nonetheless, even though there is no parallel provision of the FTC's Telemarketing Sales Rule necessitating any harmonization, the NPRM tentatively concludes that the Commission's rules requiring "prior express consent" for calls to cell phones using autodialers should be

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[14] 16 C.F.R. § 310.2(cc).

[15] The FTC's Telemarketing Sales Rule prohibits any telemarketer or seller from:

> Initiating any outbound telephone call that delivers a *prerecorded message* ... unless: (A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:
>
> (*i*) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;
>
> (*ii*) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;
>
> (*iii*) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and
>
> (*iv*) Includes such person's telephone number and signature[.]

16 C.F.R. § 310.4 (emphasis added).

changed to require "prior express written consent" with a signature and detailed disclosure requirements, whether or not the call is a telemarketing call.[16] The NPRM contains no discussion as to why it is necessary or desirable to extend the "prior express written consent" requirement to non-telemarketing calls or to autodialed rather than pre-recorded calls. The Commission cites no history of consumer complaints with respect to non-telemarketing, autodialed live calls. The change appears to be proposed solely as a matter of inartful drafting because Section 227(b)(1)(A)(iii) applies both to the prerecorded telemarketing calls subject to the Telemarketing Sales Rule's requirements, as well as to other calls. Indeed, the NPRM appears to be proceeding from the incorrect assumption that there are no calls that would be subject to its proposed "prior express written consent" requirements that are not already subject to the FTC's requirements.[17]

As such, the proposed "prior express written consent" requirement would be arbitrary and capricious if imposed on non-telemarketing calls, or even non-prerecorded, autodialed telemarketing calls. It is a fundamental requirement that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[18] In addition, "an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation...that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

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[16] *TCPA NPRM*, 25 FCC Rcd. at 1510 ¶ 20.

[17] *See TCPA NPRM*, 25 FCC Rcd. at 1508 n. 53 ("As a practical matter, the proposed written consent requirement, if adopted, would affect only those sellers and telemarketers that: a) are not subject to the FTC's Telemarketing Sales Rule; and b) wish to place prerecorded telemarketing calls to residential subscribers whose numbers are not listed on the do-not-call registry.")

[18] *Motor Vehicle Mrfs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

expertise."[19] Moreover, courts will not "overlook the absence of record evidence . . . simply because the Commission cast its analysis as a prediction of future trends."[20] Here, with no basis and no record evidence, the proposed "prior express written consent" requirement would be arbitrary and capricious as to non-telemarketing and non-prerecorded calls.

B. The Proposed Rule is Overbroad Relative to the Text and Legislative History of the TCPA and Counter to FCC Policy.

The proposed rule's requirement that autodialed calls could be placed to cell phones only after receiving the called party's signed written consent would establish a signed writing requirement that runs counter to the plain language of the TCPA, the Congressional intent behind the TCPA, and the FCC's own orders interpreting and applying the TCPA over the years.

The TCPA's legislative history indicates that the requisite "express consent" does not require a signature. Specifically, the House Report explains that the restriction on placing autodialed calls to cell phones

> "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. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid."[21]

Longstanding FCC rules and determinations reinforce the policy advanced by Congress that cell phone numbers may be used for normal business communications – including via autodialed calls – when those numbers are supplied for such purposes whether or not there is a signed written consent. The fact that a number is autodialed does not mean that the call is not a

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[19] *Motor Vehicle Mrfs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[20] *BellSouth Telecoms., Inc. v. FCC*, 469 F.3d 1052, 1060 at 13 (D.C. Cir. 2006) ("We cannot overlook the absence of record evidence . . . simply because the Commission cast its analysis as a prediction of future trends.").

[21] H.R. Rep. No. 102-317 at 17 (1991) ("*1991 House Report*").

normal business communication. As the FCC determined in 1992, "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."[22] In making this determination, the Commission relied on Congressional statements that "in such instances 'the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.'"[23] The Commission relied on a similar rationale in a 2007 declaratory ruling, in which it determined that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."[24]

II. THE PROPOSED RULE WOULD IMPOSE SIGNIFICANT COSTS ON SURVEY RESEARCH WITHOUT REAL BENEFIT TO CONSUMERS.

A. The Proposed Rule Would Impose Significant Costs on Survey Research.

The proposed rule requiring signed written consent for the use of an autodialer would impose significant burdens on survey researchers such as Arbitron with no apparent countervailing benefit to consumers. For Arbitron, the proposed rule would also seriously threaten its ability to conduct valid, non-biased survey research representative of the listening and viewing habits of all demographics, which is critical to helping radio and television stations present relevant programming.

Arbitron conducts its primary business of estimating network and local-market radio and television audiences across the United States by building a survey panel and tracking the usage

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[22] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, 8769 ¶ 31 (1992) ("1992 Order").

[23] *See* 7 FCC Rcd. at 8769 ¶ 31 n.57 (citing 1991 House Report at 13).

[24] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd. 559, 564 ¶ 9 (rel. Jan. 4, 2008) (quotation and citation omitted) ("*2007 Declaratory Ruling*").

of its respondents. Arbitron begins to build its panel of survey respondents by compiling phone numbers and addresses for cell-phone households. Arbitron recruits respondents by mailing an initial request for survey information to a large number of demographically representative individuals, many of whom do not have landlines, or who primarily use cell phones. Approximately 30% of those who receive the written request respond to Arbitron's survey and provide their phone number and other contact information. Arbitron randomly selects potential respondents from among that group and then contacts them by phone at the number they provided.

Obtaining the participation of cell phone households has become critical to Arbitron. One in four households now have only a cell phone, with no landline, and an additional 15% of homes with landlines "now receive almost all of their calls on their wireless phone[s]."[25] Moreover, cell phone only households tend to skew towards younger adults and minority groups: the CDC found that almost half of adults aged 25–29 years (48.6%) live in cell phone only households, while more than one-third of adults aged 18–24 or 30–34 (37.8% and 37.2%, respectively) live in cell phone only households.[26] The CDC also found that "Hispanic adults (30.4%) were more likely than non-Hispanic white adults (21.0%)" to live in a cell phone only household, and one-fourth of non-Hispanic black adults (25.0%) were living in households with only wireless telephones.[27] Moreover, Arbitron has found that cell phone households are particularly prevalent in the southern and western United States.[28] Arbitron has been continually working to improve the inclusion of cell phone households in its pool of respondents,

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[25] *Wireless Substitution* at 1.

[26] *Id.* at 3.

[27] *Id.*

[28] Arbitron, Inc., *Cell-Phone-Only Household Penetration in Arbitron Radio Metro Areas: Homes with cell phone service but without traditional landline service – Fall 2009* (2010), http://www.arbitron.com/downloads/cell_phone_penetration_map.pdf.

notwithstanding the difficulties already presented by the TCPA's ban on autodialed calls to cell phones without prior express consent.[29]

The proposed rule, however, would dramatically increase Arbitron's costs in establishing its survey panel and gathering the data needed to produce the audience and market estimates and data so valuable to its own customers. First, a signed written consent requirement would likely reduce Arbitron's response rate to its initial mailing seeking expressions of interest and contact telephone numbers from respondents by as much as two-thirds. Under the proposed rule, Arbitron would need to add a signature line to its initial survey materials in order to use an autodialer to call an individual who supplied a telephone number – that may be a cell phone number – on his or her response card. This signature requirement would likely prevent some individuals from returning the survey (if, for example, they have not heard of Arbitron, fear that their signatures could be used fraudulently, or are unaccustomed to providing a signature in connection with surveys), reducing Arbitron's response rate to the initial mailing from 30% to possibly as low as 10%. Notably, not even the United States Census – whose responses affect political apportionment as well as the distribution of federal funds – requires respondents to sign the response.[30] This will mean that in order to recruit the same number of cell phone households, Arbitron would have to mail many more surveys or use alternative methods of contact, such as in-person recruitment. While Arbitron is introducing multimodal recruitment, including an in-person component, to target households that do not return a response card and assist in the

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[29] Press Release, Arbitron, Inc., *Arbitron and PPM Coalition Settle Outstanding Disputes – Both Groups Commend Leadership of House Oversight Committee Chairman Towns* (Apr. 22, 2010), http://arbitron.mediaroom.com/index.php?s=43&item=684.

[30] *See* United States 2010 Census, *The Questions on the Form* (2010), http://2010.census.gov/2010census/how/interactive-form.php.

effective recruitment of cell phone households in selected larger markets, the need to increase reliance on in-person recruiting would greatly increase recruiting costs.

Second, respondents may return the survey without the signature, in which case Arbitron would have to incur the expense to implement measures to determine whether the phone number provided is a landline or cell phone, and therefore subject to the proposed rule requiring written consent. Moreover, Arbitron would then have to replace its cost-effective outbound dialing systems with completely manual processes when calling cell phone numbers. Arbitron estimates that the costs associated with this change would increase its survey panel outreach costs fivefold.

In addition to the increased costs and demand on resources, suppressing participation from persons in cell phone households, as the proposed rule would tend to do, would needlessly introduce potential bias into survey research generally, whether conducted by the U.S. government or any other survey researcher. Cell phone households heavily skew to younger and minority populations, so erecting obstacles to participation by them adversely affects researchers' efforts to ensure that those groups are fairly and proportionately represented in all types of survey research. Such representation in survey research is critical to producing reliable estimates and data on which organizations and government agencies that rely. In the case of Arbitron, the ability to reach young and minority groups in representative numbers is crucial to ensuring that their listening and watching practices and preferences are adequately conveyed to radio stations and media companies. The proposed rule would make this mission much more difficult. As the Commission weighs whatever unspecified benefits it sees from requiring signed, written consent for autodialed survey research calls, it should also consider the public interest costs of potential skewing important survey data that the broadcasting and advertising industries – as well as the Commission itself – use.

B. The Proposed Rule Change is Not Necessary to Protect Consumers.

The proposed rule appears unnecessary to remedy harm to consumers, particularly in the survey research context. First, a person who does not want to receive a call on his or her cell phone from a business or other entity may simply choose not to supply it with that number. Second, any arguments for requiring more robust consent are weaker than when the TCPA was first enacted in 1991, when each incoming call imposed much more significant costs than today on the recipient. Finally, the proposed signed, written consent requirement cannot be justified as a targeted means of limiting telemarketing calls, because it also applies to non-telemarketing calls.

Consistent with the Commission's rules, many survey researchers and businesses use an autodialer to call parties that have already manifested their consent to receiving such calls on their cell phones by providing that number directly to them. In this situation, in which consent to the call is manifested by the individual's voluntary provision of his or her number to a company or other entity with which he or she has chosen to interact, the proposed added requirement of a signed writing serves only to limit communication, rather than providing meaningful additional evidence of consent. As discussed above, the Commission itself has repeatedly recognized that a less stringent standard of consent is appropriate and sufficiently protective of consumers in this context.

Moreover, given the proliferation of "bucket" calling plans and the reduction in prices for cellular service generally, the cost to consumers of incoming cell phone calls, to which they have agreed, is minimal. In 1991, when Congress adopted restrictions on calls made to cell phones, it did so for the purpose of preventing marketers from imposing their own marketing costs on consumers, in the form of high-priced cell phone minutes: the Senate history on the bill that became the TCPA noted that "unsolicited calls placed to fax machines, and cellular or paging

telephone numbers often impose a cost on the called party (. . . cellular users must pay for each incoming call . . .)."[31] When the TCPA was passed, the average cost of cell phone minutes was very high—approximately 45 cents per minute.[32] But in the almost 20 years since the TCPA was passed, as cell phone subscribership has mushroomed from approximately seven million to approximately 285 million, the average cost of cell phone minutes has fallen by almost 90%, to approximately $0.05 per minute.[33] Furthermore, in 1991, no cellular company offered the one-rate plans with buckets of included minutes that are common today.[34] Today, for users on monthly plans who are not exceeding their monthly allotment of included minutes, the marginal cost of each incoming calling minute is actually zero. Therefore, even if a cellular customer feels that an autodialed call – even though previously consented to – was unwanted, the cost of that call to the consumer is practically nothing, eliminating the primary reason for the original rule. Beyond that, Arbitron currently pays an incentive to those who respond to the survey, which easily covers the cost of minutes used in requesting participation in a later survey. Certainly, these developments in the cellular marketplace do not support making the ban on autodialed calls to cellular phones more stringent than they currently are.

Nor can the proposed signed, written consent requirement for autodialed non-telemarketing calls be justified as a means of preventing telemarketing. There are plenty of consumer protections that specifically include telemarketing and exclude non-telemarketing calls. The Do Not Call Registry, for example, and the current FCC and FTC telemarketing rules (including company specific do-not-call lists) already protect wireless subscribers from receiving

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[31] S. Rep. No. 102-178 (1991).

[32] *Sugrue PowerPoint* at 8.

[33] *Id.*

[34] AT&T introduced the first digital one-rate plan in 1999.

unwanted telemarketing calls.[35] Furthermore, the current FCC already provides more than adequate protection for consumers, as explained above: autodialed calls may legally be made only to recipients who have already granted their "express consent" to receive such calls on their cell phones. In light of existing consumer protections against unwanted telemarketing calls, it is not necessary to erect the additional walls envisioned by the proposed rule in order to protect consumers.

III. IF THE FCC ADOPTS THE PROPOSED RULE REGARDING AUTODIALERS, IT SHOULD EXEMPT SURVEY RESEARCH.

A. The FCC Should Exempt Survey Research from the Section 227(b)(1)(A)(iii) Autodialer Ban in Light of Market Changes.

Given the changes in the market and the fact that costs of incoming calls to cell phone users are now largely nonexistent, rather than further expanding restrictions against autodialed non-telemarketing calls, the FCC should exempt survey research from Section 227(b)(1)(A)(iii) of the TCPA. As explained above, the intent behind the cell phone ban of Section 227(b)(1)(A)(iii) was to shield consumers from unwanted and unsolicited calls.[36] As also explained above, extraordinary reductions in the cost of cell phone minutes and changes in how consumers purchase these minutes have reduced the cost of unwanted cellular calls to virtually nothing, making the primary purpose of the autodialer ban obsolete. Particularly because of its social utility, survey research warrants a special exception. The continued imposition of the autodialer ban results in enormous costs for companies and other organizations that conduct survey research, which also burdens users of survey data. The FCC could facilitate such socially beneficial survey research by adopting a conclusive presumption that consumers are effectively

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[35] 47 U.S.C. § 227(b)(1)(A)(iii); 16 C.F.R. 310.4(b)(1)(iii)(B). Consumers may place cell phone numbers on the Do Not Call Registry. Federal Trade Commission: Protecting America's Consumers, *FTC Consumer Alert: Q&A: The National Do Not Call Registry*, available at http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt107.shtm.

[36] S. Rep. No. 102-178 (1991).

not being charged for these calls because of the prevalence of "bucket" plans, especially where survey researchers compensate survey participants. Section 227(b)(2)(C) permits the Commission to exempt from the ban on autodialed calls to cell phones any calls for which the called party is not charged.

B. The FCC Should Exempt Survey Research from Its Requirement that Callers Using Autodialers Obtain Signed Written Consent for Such Use.

If the Commission decides to adopt its proposed rule requiring signed prior express written consent for the use of autodialers to place calls to cell phones, it should exempt survey research companies from the scope of the new requirement. As explained above, survey research directed at individuals who have already agreed to be contacted for that purpose is completely different in character from the intrusive prerecorded telemarketing calls that the FCC explains in the NPRM that it intends to target. If subjected to the proposed rule, Arbitron and other survey companies, who provide a valuable service, would face extraordinary challenges in terms of both financial costs and the costs to the integrity of their research. Affordable means by which to reach cell phone only households, which now represent a quarter of all American adults and disproportionately represent minority groups, are crucial to the mission of Arbitron and other companies conducting survey research.

IV. CONCLUSION

The Commission should not enact its proposed rule requiring signed written consent for the use of autodialers. The proposed rule is unnecessary to harmonize the Commission's rules with the FTC rules, and will impose serious costs on businesses without real benefit to consumers.

Respectfully submitted,

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