

**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)

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS COMMISSION**

The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits its comments in response to the Notice of Proposed Rulemaking issued by the Commission in the above-captioned proceeding.² Although we generally support the Commission’s efforts to harmonize its rules applicable to telemarketing calls with the Federal Trade Commission’s (FTC’s) rules, some of the proposed changes actually reach far beyond the FTC’s rules. As reflected in an overwhelming number of the initial comments filed in this proceeding, if adopted, the new rules would have a significant – and presumably unintended – impact on *all* calls that businesses make to cellular telephone numbers.

In providing high quality service, cable operators, like many other businesses represented in this proceeding, provide informational/non-sales messages to their customers via either pre-recorded messages or auto-dialed live calls to customers at cellular telephone numbers, provided by the customer as their “contact number.” For instance, cable operators may send messages to their customers about local service outages, television channel line-up changes, and service

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of high-speed Internet service (“broadband”) after investing over \$160 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to over 20 million customers.

² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 (2010) (“*Notice*”).

appointment confirmations. The proposed rules would upend this routine aspect of high quality customer care services and cause significant operational and customer relationship disruption.

According to the *Notice*, the Commission’s goal is to conform its rules applicable to prerecorded telemarketing calls under the Telephone Consumer Protection Act to the FTC’s Telemarketing Sales Rule.³ In part, the *Notice* proposes to do so by “requiring sellers and telemarketers to obtain telephone subscribers’ express written consent (including electronic methods of consent) to receive prerecorded telemarketing calls even when there exists an established business relationship between the caller and the consumer.”⁴ Specifically, the Commission seeks comment on whether to “revise Sections 64.1200(a)(1) and 64.1200(a)(2) of [its] rules to provide that, for all calls, prior express consent to receive prerecorded telemarketing messages must be obtained in writing.”⁵

Although the rules proposed in the *Notice* are by and large consistent with the Commission’s intent to reconcile the two federal regulatory regimes governing pre-recorded telemarketing calls, the record makes plain that portions of the *Notice* go much further – reaching calls to cellular phones that do not have any sales purpose whatsoever. One commenter speculates that, although it was likely unintentional, the Commission’s proposal “could be a

³ See *Notice* ¶¶ 1-2.

⁴ *Id.* ¶ 2; *id.* (seeking comment on whether the Commission’s proposed rules “would benefit consumers and industry by creating greater symmetry between the two agencies’ regulations”).

⁵ *Id.* ¶ 16; see also 47 C.F.R. § 64.1200(a)(1) (prohibiting any non-emergency telephone call, other than with the prior express consent of the called party, using an automatic telephone dialing system or an artificial or prerecorded voice to an emergency telephone line, a health care facility, or a number assigned to a cellular telephone service); 47 C.F.R. § 64.1200(a)(2) (prohibiting any non-emergency telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party or unless otherwise exempted). The revisions proposed in the *Notice* would cover calls delivering pre-recorded messages, regardless of whether the calls are for sales or other purposes, and calls made using automatic or predictive dialers, whether such calls are pre-recorded, delivered by a live agent, or delivered by text message.

disastrous oversight.”⁶ Another commenter notes that “the proposed language threatens unintended consequences outside the telemarketing context;” thus, it “strongly urges the Commission to ensure that any changes to its rules do not create new inconsistencies with the FTC’s rules and that any new rules designed to tighten telemarketing restrictions do not have the deleterious effect of disrupting informational and business communications with consumers.”⁷

In general, the Commission’s current rules only require “prior express consent” to make informational/non-sales calls to cellular telephones that are either pre-recorded or made using an auto/predictive dialer. The proposed revisions would require “prior written signed consent” evidencing the customer’s willingness to receive the calls at the phone number provided, after clear and conspicuous disclosure. As the Newspaper Association of America explains:

[U]nder the proposed rule, businesses would continue to be able to make prerecorded *informational calls* to their *residential* customers without needing “prior express consent” in writing or otherwise. However, in cases where an existing customer has provided a cell phone number as his or her contact number, under the proposed rule the business could not make a prerecorded or autodialed live-agent informational call to the customer’s cell phone unless the customer had previously consented in *writing* with a signature.⁸

⁶ Newspaper Ass’n of America (“NAA”) Comments at 14.

⁷ DIRECTV Comments at 1; *see also* U.S. Telecomm. Ass’n (“USTelecom”) Comments at 1 (explaining that “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’”); NAA Comments at 14 (“Prior ‘written’ consent to receive such informational calls has never been required, either for residential lines or for wireless devices – but under the proposed rule would be required for, but only for, prerecorded and autodialed live-agent calls to wireless devices.”); DIRECTV Comments at 3 (“A new rule that would require DIRECTV to obtain prior written consent under Section 227(b)(1)(A) for non-telemarketing messages to customers’ provided numbers could cause confusion and could have the effect of precluding communications customers want, need, and have come to expect.”); Letter from ACA Int’l *et al.*, to Marlene H. Dortch, Secretary, FCC, CG Dkt. No. 02-278 at 1 (June 17, 2010) (“As the comments filed by many of the undersigned and their members in that proceeding explain in greater detail, the NPRM proposes a change to the Commission’s present regulations that, if adopted, will interfere drastically with the ability of businesses to send valuable messages, including *non-telemarketing* messages, to the increasing numbers of consumers who have agreed to be contacted at wireless devices.”) (emphasis in original).

⁸ NAA Comments at 14 (emphasis in original); *see also* USTelecom Comments at 1 (“[A]bsent 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.”); Letter from Sandra Braunstein, Director, Division of Consumer & Community Affairs, Board of Governors of the Fed. Res. Sys., to Marlene H. Dortch,

Such rule changes would have substantial impact because, as established in the record, it is commonplace for individuals to provide their cellular telephone number as their primary contact number to businesses that provide services to them.⁹ Indeed, as Sprint Nextel explains, a recent report from the Centers for Disease Control and Prevention indicates that “twenty-five percent, or one in four American homes have only wireless phones.”¹⁰

Numerous cable operators communicate informational/non-sales messages to their customers via either prerecorded messages or auto-dialed live calls to customers at cellular telephone numbers. These communications provide information such as: television channel line-up changes; new service features; customer surveys; service notifications and service appointment confirmations; pre-installation appointment confirmations; service interruption calls; debt collection calls, and bill payment information and reminders.

Secretary, FCC, CG Dkt. No. 02-278 at 1 (June 8, 2010) (“Board staff is concerned that the proposal’s broad requirement to obtain a consumer’s written ‘prior express consent,’ before any autodialed and/or prerecorded calls may be made to the consumer’s wireless or cellular phone may have unintended consequences.”).

⁹ See Letter from John Muller, Vice President, Legal, PayPal, Inc., to Chairman Julius Genachowski, FCC, CG Dkt. No. 02-278 at 2 (May 21, 2010) (“PayPal believes that this proposal does not acknowledge the reality of today’s telecommunications and the increasing consumer preference for, and reliance on, only cell phones to conduct both personal and business matters.”) (emphasis in original); Wells Fargo Comments at 8 (“A growing percentage of customer service calls must be placed to wireless devices. The number of Wells Fargo customers who use mobile devices as their primary means of personal and business communication has grown dramatically in recent years. On average, 25% to 35% of our customers provide only cell phone numbers as a means of contact.”). The proposed rules would also impose additional and unnecessary burden and expense on businesses including: postage and printing for paper consent; resources to process the paperwork; storage costs for record retention; potential system enhancements for both paper tracking and/or electronic consents; capacity for electronic storage; and integration with existing systems and databases. It is unclear whether advances in technology and the implementation of the E-SIGN Act might ease the potential burden of a written consent regime, since not all customers have a computer or Internet access.

¹⁰ See Sprint Nextel Corp. Comments at 5; see also USTelecom Comments at 4 (reporting that “as of the end of 2009, 24.5 percent of households were ‘wireless only’ and an additional 14.9 percent were ‘wireless mostly’”); U.S. Dep’t of Education Comments at 3 (reporting that 32% of 18 to 24 year olds do not have landline service and only use a cell phone and 14% of the population at large do not have landline service); American Teleservices Ass’n Comments at 6 (“The use of cell phones continues to increase dramatically year over year as consumers give up their traditional landlines.”); Letter from Michael A. Resnick, Associate Director, Nat’l School Boards Ass’n, to Chairman Julius Genachowski, FCC, May 21, 2010, CG Dkt. No. 02-278 at 1-2 (“The growing number of students, parents and other caretakers using wireless devices for either primary or secondary contact makes it all but inevitable that notifications about schedules, parent engagement activities, and school events will be issued to wireless devices.”).

Moreover, certain customer care communications and service features that cable subscribers currently enjoy would be frustrated or impossible if a customer has provided a cellular telephone number to a cable operator for contact purposes but has not provided written consent. Examples include out-bound dialing programs regarding service such as so-called “on the day of the job” service calls that give customers the opportunity, during the call, to cancel, confirm, or transfer for a reschedule; calls providing an appointment reminder that a technician will be visiting the premises the next day or two days later (which also provide an opportunity during the call for a customer to cancel, confirm, or transfer for a reschedule); installation calls and installation appointment reminders; calls providing customers an opportunity to give feedback on recent services performed by technicians; and ad-hoc programs where a message needs to be sent to a large group of customers, such as severe storm notifications where a cable operator may need to postpone service and/or installation calls.

We agree with USTelecom that:

[b]ecause customers that provide ‘can be reached numbers’ 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.¹¹

Moreover, we agree with the Newspaper Association of America who urges the Commission to “clarify that prior express consent need not be in writing for an informational call to a wireless device *when the customer provides that number to the business*, whether orally or in writing.”¹²

In sum, the Commission should not adopt new requirements that frustrate delivery of *informational* messages to consumers, particularly when its goal is to harmonize existing federal

¹¹ USTelecom Comments at 1-2.

¹² NAA Comments at 15 (emphasis in original).

regulatory regimes applicable to *telemarketing* messages. As explained above, the proposed rules risk creating a confusing regulatory regime that potentially precludes communications that consumers desire and expect from their service providers, as well as imposes additional and unnecessary costs and burdens on businesses.

Respectfully submitted,

/s/ Loretta P. Polk

Loretta P. Polk
Stephanie L. Podey
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W.
Washington, D.C. 20001-1431
(202) 222-2445

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