Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Petition for Declaratory Ruling From a Coalition of Mobile Engagement Providers	)	
	)	
	)	
Petition for Forbearance From the Direct Marketing Association	)	
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the above-captioned petitions filed by a Coalition of Mobile Engagement Providers ("Coalition") and the Direct Marketing Association ("DMA").[2] Specifically, NAB agrees with the Coalition that the Commission should clarify that its new "prior express written consent" Telephone Consumer Protection Act ("TCPA") rules for certain mobile telemarketing messages, including automated texts messages to mobile numbers, do not nullify prior express consents obtained in writing under its old TCPA rules. If the Commission declines to take such action, it should retroactively waive the new "prior

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[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Commission and other federal agencies, and the courts.

[2] Coalition of Mobile Engagement Providers Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 17, 2013) ("Coalition Petition"); Direct Marketing Association Petition for Forbearance, CG Docket No. 02-278 (filed Oct. 17, 2013) ("DMA Petition"). *See Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from a Coalition of Mobile Engagement Providers*, Public Notice, DA 13-2118 (CGB rel. Nov. 1, 2013); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Forbearance from the Direct Marketing Association*, Public Notice, DA 13-2119 (CGB rel. Nov. 1, 2013).

express written consent" TCPA requirements in circumstances where consumers had previously provided prior express consent in writing under the old TCPA rules, consistent with the goal of the DMA petition.

BACKGROUND

Many NAB members send automated informational text messages (for example, with news, sports, or weather information) that could be deemed to be telemarketing or advertising text messages, as part of loyal viewer, loyal listener, or similar programs. Promotions, features and other information are delivered for free but may, at times, include advertising support (akin to over-the-air services) to offset the cost of producing and delivering entertainment, news, emergency and other informational services.[3]

Before October 16, 2013, many broadcasters sent such text messages pursuant to prior express written consents obtained under the Commission's previous TCPA rules. Effective October 16, 2013, the Commission revised its TCPA rules to require prior express written consent based on disclosures that (a) calls will be made by autodialers, and (b) inform consumers that their ability to purchase property, goods, or services is not conditioned on providing consent.[4] Many broadcasters are now

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[3] Text information conveyed includes, but is not limited to, news; weather; sports; traffic; school closings; election coverage alerts; programming alerts (including special appearances or special programs); concert club information, remote event and concert updates (where attendees can get up to the minute information on site happenings, such as stage time changes and on-air interviews); text-to-win contests and promotions; message-back information texts (where viewers or listeners text specific keywords or short code requesting information on certain programming, information or advertising that was featured over-the-air); and surveys/votes (viewer/listener initiated text to comment on specific issues or topics covered in news and informational and community-responsive programming).

[4] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830, 1833 ¶¶ 6-7 (2012) ("*2012 TCPA Order*"); 47 C.F.R. § 64.1200(a)(2), (f)(8).

uncertain as to whether the revised TCPA rules require them to secure new prior written consent, with the required new disclosures, before sending new text messages to these same loyal viewers or listeners.

The confusion is amply demonstrated by the fact that the two petitions filed in this proceeding do not agree on the continued effectiveness of pre-October 16, 2013 written consents. The Coalition takes the position that the revised TCPA rules do not "nullify those written express consents already provided by consumers before that date."[5] The DMA, on the other hand, appears to assume that the revised TCPA rules require new written consents and thus seeks relief from portions of the revised rules to allow continued reliance on pre-October 16, 2013 written consents.[6]

The Commission should take action to permit broadcasters to continue to rely on written consents obtained before the revised rules and the attendant new disclosure requirements became effective. Absent either a clarification or a retroactive waiver, broadcasters who in good faith interpreted the new TCPA rules as permitting such continued use could be subject to costly class action litigation, even though stations can prove they have prior express written consents for telemarketing texts and consumers would not benefit as a practical matter from repetitive consent requests.

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[5] Coalition Petition at 1.

[6] DMA Petition at 3-4 (requesting that "the FCC forbear from enforcing, in regard to existing written agreements, that portion of the new rule that requires a disclosure that sales are not conditioned on executing the written agreement and that the seller will use an autodialer.").

I. THE COMMISSION SHOULD DECLARE THAT THE NEW TCPA RULES DO NOT NULLIFY PRIOR EXPRESS WRITTEN CONSENTS OBTAINED UNDER THE OLD TCPA RULES.

A declaration that new prior express written consents based on the new required disclosures do not need to be obtained where prior express consent was obtained in writing under the old rules would be consistent with language in the *2012 TCPA Order*. That order states that the new consent requirements would apply only for *new customers*:

> We find that establishing a twelve month implementation period for the written consent requirement is appropriate because, as noted in the FTC proceeding, it will take time for businesses to redesign web sites, revise telemarketing scripts, and prepare and print new credit card and loyalty program applications and response cards *to obtain consent from new customers*, as well as to use up existing supplies of these materials and create new record-keeping systems and procedures to store and access the new consents they obtain.[7]

Had the *TCPA Order* stopped there, it would have been clear that the new prior written consent rules would not nullify any prior consents, whether written or oral.

The Commission, however, muddied the waters in the very next paragraph. While purporting to provide implementation relief, the *TCPA Order* suggested that the new rules would nullify *oral consents* obtained under the old rules, but was silent regarding whether the new prior consent standards also nullified written consents secured prior to October 16, 2013.[8] This silence could reasonably be read to indicate that the Commission did not intend to nullify these pre-existing written consents – if it

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[7] *2012 TCPA Order*, 27 FCC Rcd at 1857 ¶ 67 (emphasis added).

[8] *Id*. at 1857 ¶ 68 (emphasis added) ("Once our written consent rules become effective, however, an entity will no longer be able to rely on ***non-written forms of express consent*** to make autodialed or prerecorded voice telemarketing calls….").

had meant for the new prior consent standards to nullify both non-written *and* written consents obtained prior to October 16, 2013, the Commission would have said so. Confusingly, however, the *TCPA Order*'s reference to nullifying oral consents was offered by way of an example,[9] which could be read to imply that that the new consent standards nullified both non-written and written consents obtained prior to October 16, 2013.

In short, it is plain that the Commission's discussion of implementation was confusing.[10] As discussed in more detail below, broadcasters should not be penalized or exposed to new class action litigation because they reasonably read the *2012 TCPA Order* as permitting them to continue to rely on prior express written consent obtained under the old TCPA rules. This is particularly the case here where requiring broadcasters to re-visit each and every prior written consent would provide little public interest benefit.[11] The Commission should therefore grant the clarification requested by the Coalition.

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[9] *Id*. ("Because allowing telemarketers to rely on such consent pending the effective date of our new written consent requirement would ease the operational and technical transition for autodialed or prerecorded voice telemarketing calls, we find that it would serve the public interest to permit continued use of existing consents for an interim period. For example, in cases where a telemarketer has not obtained prior written consent under our existing rules, we will allow such telemarketer to make autodialed or prerecorded voice telemarketing calls until the effective date of our written consent requirement, so long as it has obtained another form of prior express consent.").

[10] In addition, in its brief discussion of text messages, the FCC's Small Business Guide makes no reference to any requirement for a small business sender of text messages to secure the new form of written prior express consent for *existing* customers, nor could it be reasonably inferred from the Guide that any rules would be retroactive to any existing customers. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Small Entity Compliance Guide, CG Docket No. 02-278 (rel. May 13, 2013) at 4-5.

[11] *See* discussion *infra* Section II, regarding public interest considerations.

II. ALTERNATIVELY, THE COMMISSION SHOULD RETROACTIVELY WAIVE ITS NEW TCPA RULES TO PERMIT CONTINUED USE OF PRIOR EXPRESS WRITTEN CONSENTS OBTAINED UNDER THE OLD RULES.

If the Commission declines to clarify the rules as requested by the Coalition, it should retroactively waive the new rules to permit prior express consents obtained in writing to continue to be relied upon. The Commission may waive the application of a rule for "good cause" and good cause undoubtedly exists here.[12] Indeed, the particular facts and circumstances surrounding implementation of the revised TCPA rule "make strict compliance inconsistent with the public interest," and waiver "better serves the public interest" than strict enforcement of the rule.[13]

Nullifying prior express consents provided in writing under the old rules would open up broadcasters who relied in good faith on their understanding that the new rules did not nullify such consents to the possibility of multi-million dollar class action suits. While such class action suits might provide windfalls to class action litigators, they would impose substantial costs on broadcasters while doing nothing to further the public interest in "increased protection from unwanted telemarketing robocalls…."[14]

There is no reason to believe that broadcast viewers and listeners who provided prior express consent in writing under the old rules to receive texts from broadcast stations did not know what they were doing and need additional protections. And, because the consents were in writing, just as under the new rules, broadcasters will

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[12] 47 C.F.R. § 1.3.

[13] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)).

[14] *2012 TCPA Order*, 27 FCC Rcd at 1837 ¶ 19.

have a “paper or electronic record,” that can be “more readily verified and may provide unambiguous proof of consent.”[15]

If the Commission determines that new written consents are required from those who previously provided written consents, broadcasters would be required to stop sending desired texts to members of loyal viewer and listener programs and the like until the new consents are obtained at substantial cost. The only alleged benefit of such new consents would be that such consents would be based on notification that the texts will be automated and that no purchase is required. But viewers and listeners who have been receiving such texts already know that they are automated (by their very nature, no one could imagine that they are individually typed), and will know that no purchase is required because they previously were not required to make any such purchase. Any minimal benefits of applying the new rule in these circumstances would be outweighed by the risk of class action litigation; the confusion and inconvenience caused if viewers and listeners who have been receiving text messages for months or years stop receiving them unless they provide what will appear to be unnecessary, duplicative consent; and the needless and substantial costs of obtaining new written consents from those who have already provided written consents.

Under these circumstances, the public interest would best be served by retroactively waiving the new prior express written consent rules in situations where prior express written consent was already obtained under the old rules and providing that such waiver shall continue until any consumers revoke their consents.[16]

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[15] *Id*. at 1840 ¶ 26.

[16] The Commission has retroactively waived rules in numerous circumstances. *See, e.g., Reconrobotics, Inc.*, 26 FCC Rcd 5895 (WTB/PSHSB/OET 2011); *Federal-State*

Alternatively, the waiver should continue for some reasonable period of time – *e.g.*, 90 days – that will enable broadcasters who acted in good faith reliance on their understanding that prior express consents in writing would continue to be valid to obtain new consents under the new rules without running the risk of being subjected to pointless and expensive class action litigation.

CONCLUSION

Accordingly, for the reasons set forth above, the Commission should declare that prior express consents obtained in writing under the old TCPA rules remain valid or, alternatively, retroactively waive the new TCPA rules to permit such consents to remain in effect.

Respectfully submitted,
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Joint Board on Universal Service; Sagebrush Cellular, Inc., 22 FCC Rcd 15139 (WCB 2007); *Advanced Communications Solutions, Inc*., 21 FCC Rcd 1627 (WTB 2006); *Federal-State Joint Board on Universal Service; Petition of the Public Service Commission of the District of Columbia for Waiver*, 15 FCC Rcd 21996 (CCB 2000). The Commission has also granted blanket (i.e., non-party-specific) waivers in numerous circumstances. *See, e.g.*, *Amendment of Part 101 of the Commission's Rules to Accommodate 30 Megahertz Channels in the 6525-6875 MHz Band*, 24 FCC Rcd 9620 (2009); *National Exchange Carrier Association Petition to Amend Section 69.104 of the Commission's Rules*, 19 FCC Rcd 13591 (2004); *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, 16 FCC Rcd 5946 (2001).