

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

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

Comments of Joe Shields on the Petition

For Expedited Declaratory Ruling of Santander Consumer USA

The Commission is seeking comments on the Santander Consumer USA Petition for Declaratory Ruling. The petition asks the Commission to issue a ruling that prior express consent cannot be revoked or alternatively that prior express consent can only be revoked by a method chosen by the caller. The petition seeks a draconian interpretation of the TCPA. Such a draconian interpretation is not supported by the statute, Congressional intent or any prior Commission determinations.

The petition is based on the assumption that non-telemarketing ATDS calls deserve radical different treatment than telemarketing ATDS calls to cell numbers. As has been pointed out repeatedly to the Commission, the TCPA is content neutral in its regulation of ATDS calls to cell numbers. The TCPA regulates the method not the content of ATDS calls.

Contrary to petitioners claim, there is no constitutional right for debt collectors to communicate with debtors via ATDS calls to cell numbers. The TCPA is after all a consumer protection statute and not a business protection statute. The TCPA was enacted in response to the changes in technology that allow increased access to consumers. Today, the effectiveness of the TCPA can be measured by how effectively the TCPA

protects consumers' cell phones. The greater number of calls received on a cell phone increases the likelihood that those calls will be received at a dangerous time (e.g., while driving a car). Therefore, draconian interpretations such as the Santander petition that wants to limit protections under a consumer protection law are highly disfavored and properly discarded.

Oral Revocation

The TCPA regulates communication by telephone. The first section of the TCPA deals with robocalls and junk faxes. 47 U.S.C. §227(b). The second section deals with telemarketing calls. 47 U.S.C. §227(c). Both sections deal with communications via telephone. Consequently, it would be asinine to suggest that if consent can be orally given during a telephone call that consent cannot be orally revoked during a telephone call. Petitioner cannot rely on oral consent then reject oral revocation of consent.

As an example one can apply for credit over the phone. During the oral credit application the applicant provides their cell number. According to the Commission the oral provisioning of a cell number is evidence of prior express consent to receive ATDS calls. Consequently, since prior express consent can be provided orally, then it is only reasonable to accept that prior express consent can be orally revoked. *Gutierrez v. Barclays Group*, No. 10-CV-1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, at *11-12 (S.D. Cal. Feb. 9, 2011) (determining that because the FCC indicated that prior express consent need not be in writing, a consumer could revoke consent orally. “[C]onsumers have the right to revoke consent to receive autodialed calls under the Telephone Consumer Protection Act and ... **they may do so orally** or in writing. *Beal v. Wyndham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962 - Dist. Court, WD Wisconsin.

See also *Gager v. Dell Financial Services, LLC*, 727 F. 3d 265 - Court of Appeals, 3rd Circuit 2013 holding that "...the FCC stated several times that a consumer may "fully revoke[]" her prior express consent..."; See also: "[R]evocation of consent under § 227(b) does not operate to stop all debt collection calls, it operates to stop only **auto dialer calls** (emphasis added) to a cellular phone." *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 752 (W.D. Tex. 2011).

The *Adamcik* court issued a well-reasoned decision addressing the *Starkey*¹ case and subsequent courts that followed *Starkey* on holding that the FDCPA somehow "overrides" the TCPA.

"Of the four cases holding a written revocation is required under the TCPA, the most recent three simply followed the holding of the first, *Starkey v. Firstsource Advantage, LLC*. See Moore, 2011 WL 4345703, at * 11; Moltz, 2011 WL 3360010, at *5_6 (applying *Starkey*, and holding when a case is "primarily a debt collection dispute" the "FDCPA overrides the TCPA."); Cunningham, 2010 WL 3791104, * 5 (citing *Starkey*, and finding its holding is "consistent with the protections of the FDCPA"). Therefore, the Court addresses *Starkey* in some detail, but will say no more about the other opinions, because they do not add any reasoning beyond that found in *Starkey*." *Id.*

The *Adamcik* court went on to find that:

"Like this case, *Starkey* involved both FDCPA claims, and TCPA § 227(b) claims. See *Starkey*, 2010 WL 2541756, at *34 In deciding *Starkey*, the magistrate judge of the Western District of New York declared "This is a debt collection case, not a telemarketing case." *Id.* at *4 By doing so, the court effectively held compliance with the FDCPA excuses a debt collector from compliance with the TCPA. **This result is contrary to both the language of the statutes in question, and by the FCC's guidance in various orders and rulings.** (emphasis added) A further reason the Court declines to follow *Starkey* is the *Starkey* court also appears to have conflated the autodialer and telephone

¹ Petitioner relies on the *Starkey* court and those courts (for example Moore and Moltz) that followed the *Starkey* court reasoning all of which was disproved by the *Adamcik* court. Simply put the FDCPA does not and cannot override the TCPA.

solicitation causes of action. This is problematic because, while the FCC has made clear debt collection calls are generally not telephone solicitations under subsection (c) of the TCPA, the FCC has equally made clear the autodialer prohibitions found in subsection (b) do apply to debt collectors.”

A copy of the well-reasoned *Adamcik* decision is included with my comments addressing the petition.

Common Law Right To Revoke Consent

The right to revoke consent is a common law right. *Restatement (Second) of Torts* §892A, cmt. i (1979). "...consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.” See *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (determining from the TCPA's silence regarding the means of providing or revoking consent that Congress sought to incorporate the common law concept of consent allowing oral and written revocation).

Petitioner’s comparison to laws with limited revocation doesn’t support petitioner’s argument that the TCPA’s silence on revocation means revocation is prohibited. Congress’ omission of a limited form of revocation means that Congress intended for broad common law concepts of consent and revocation of consent to apply. ”Our holding that the TCPA allows consumers to revoke their prior express consent is consistent with the basic common law principle that consent is revocable. *Gager v. Dell Financial Services, LLC*, 727 F. 3d 265 - Court of Appeals, 3rd Circuit 2013.

Implied Versus Express Consent

Petitioner claims that the JFPA of 2005 supports their contention that the caller can determine how revocation can be made. Yet the JFPA entirely missed the mark on

protecting consumer privacy and cost shifting. Congress overlooked well-established consumer protection policies of privacy and cost-shifting by amending the TCPA with the JFPA in 2005.² The JFPA was a lobbyist bill not a consumer protection bill.

Petitioner's reliance on prior Commission orders is equally misplaced. The Commission's 1992³ and 2005 orders created an implied consent which fails the requirement for prior **express** consent. Legitimate companies that relied on those orders lost their argument in the courts. As an example listing of a phone number in the white pages is implied not express consent. See *Shields v. Voice Power Telecommunications Inc.*⁴, *Charvat v. Voice Power Telecommunications Inc.*, *Strang v. Voice Power Telecommunications Inc.*, and *Biggerstaff v. Voice Power Telecommunications Inc.*

“The FCC has issued numerous orders and opinions clarifying various aspects of the TCPA including its directive defining prior consent as it relates to the act. The FCC ordered that the Act does not apply to calls made to persons who knowingly release their phone numbers reasoning that persons with publicly listed numbers have knowingly released their numbers and have in effect given their invitation to be called at that number.” Kerry Spradley for Voice Power Telecommunications Inc.

The defendant *Voice Power Telecommunications Inc* lost that argument in every court the argument was tried. See also *Kaplan v. First City Mortgage*, 701 N.Y.S.2d 859 (N.Y.City Ct. Dec. 8, 1999); “The Court rejects defendants' claim that plaintiff may be deemed to have given his express consent merely by the fact that his telephone number is published in the telephone directory.”

² Jennifer A. Williams, *Faxing It In*, 72 BROOK. L. REV. 345, 383 (2006).

³ In the 1995 order resolving issues in the 1992 order the Commission contradicted itself: “We do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements...”

⁴ *Shields v. Voice Power Telecommunications Inc.* Cause No. 47,773, County Court No. 2, Galveston County, Texas

In regards to the 2005 Commission Order, providing a cell number on a credit application is also implied consent. See *Mais v. Gold Coast Collection Bureau, Inc.*, F.2nd 2013 WL 1899616 (S.D. FLA. May 8, 2013) “the FCC is not talking about “express consent,” but is instead engrafting into the statute an additional exception for “implied consent” – one that Congress did not include. The FCC’s construction is inconsistent with the statute’s plain language because it impermissibly amends the TCPA to provide an exception for “prior express *or implied* consent.””

Increased Use of Cell Phones, Class Actions and Lack of Enforcement

Petitioner laments the massive surge in TCPA litigation. Most of the criticism is levied on the impact of the class action mechanism in TCPA litigation. The prospect of a large class action suit provides a significant deterrent, especially given the FCC’s limited enforcement efforts. Class actions also bring attention to the TCPA and the illegality of certain conduct. Increased attention to the statute increases compliance by industry members and increases awareness by consumers, which is important where enforcement is lacking.

The Commission issued five Notices of Apparent Liability, resulting in only two forfeiture orders addressing Do-Not-Call violations between 2003 and 2009⁵. If the FCC continues to proceed at this pace, its enforcement of the TCPA will be almost entirely ineffective. The TCPA’s private right of action serves as an effective deterrent in curtailing the illegal conduct of legitimate companies⁶.

⁵ Since 2009 (the last five years) not one NAL or Forfeiture Order has been issued by the Commission for Do-Not-Call violations.

⁶ *Heidtke, Daniel B. and Stewart, Jessica and Waller, Spencer Weber, The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology* (September 17, 2013). Loyola University Chicago School of Law Research Paper No. 2013-016.

In the year since federal courts were opened to private TCPA litigants, the number of TCPA cases filed increased by 34%. However, relative to other consumer protection statutes (e.g., FDCPA and FCRA), TCPA litigation remains a relatively low proportion of a federal court's docket⁷.

The TCPA is more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through an EBR or similar exemption would drastically increase the amount of calls a consumer could receive. The heightened cost-shifting, privacy, and safety concerns for cell phones justify a continued strict consent scheme with respect to such communications.⁸

Oral Versus Written Revocation

In furtherance of petitioner's goals to frustrate TCPA consumer protection, petitioner suggests that revocation must meet the caller's requirements. It is obvious that the petitioner, if given the chance, will create an impossible hurdle for revocation. In *Nelson v. Santander Consumer USA*⁹ the petitioner intentionally ignored both oral and written demands to cease ATDS calls to Nelson's cell number. Santander Consumer USA made 1,174 ATDS calls to Nelson's cell number!

After Nelson's partial Motion for Summary Judgment was granted the parties settled the matter, the court vacated its order on request of the parties and issued a dismissal order all on the same day. This sequence of events and petitioner's reluctance to honor any revocation request, oral or written, paints a dramatic picture of how the debt

⁷ *Id*

⁸ *Id*

⁹ *Nelson v. Santander Consumer USA Inc.*, No. 11-CV-307-BBC, W.D. Wis. Mar. 8, 2013

collection industry wants desperately to be given carte blanche to harass consumers with hundreds if not thousands of ATDS calls to cell numbers.

Petitioners request that the Commission agree that only the caller can determine how prior express consent can be revoked follows on the heels of the many petitions that seek an “intended” called party exemption and/or safe harbor. It clearly follows that if prior express consent cannot be revoked then reassigned numbers will lose the protection of the TCPA. And it also clearly follows that if consent can be revoked then the petitioner will make it impossible to revoke consent.

As an example, one can make a do not call demand during a telemarketing call. But instead of being more protective of cell numbers petitioner suggests the Commission prohibit revocation during a cell call. The Commission in its 2003 Report and Order¹⁰ stated: “We believe that wireless subscribers should be afforded the same protections as wireline subscribers.” If a do not call request can be made orally then a revocation of prior express consent can be made orally. The Commission should provide more not less protection to cell numbers than wireline subscribers.

The only court to address the draconian interpretation of the TCPA petitioner espouses was an appealed small claims case.

“Defendant's interpretation of the Telephone Consumer Protection Act is intolerably restrictive. Requiring a consumer to specifically ask to be added to the "do not call" list in order to stop these calls is inconsistent with the stated philosophy of the Act, which is "to protect residential telephone subscribers' privacy rights." Expressions of "not interested" and "do not call" are simple clear statements that as a matter of law should have been enough to stop repeated phone calls.”

¹⁰ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14014, (Jul 03, 2003)

Wylder v DialAmerica Marketing Inc., No. CV810946 (Super. Ct. Ca. Nov.20, 2002). Clearly, given the petitioners proclivity to ignore oral and written revocation the petitioner will surely require some “magic words” for revocation that most consumers will not have any knowledge about.

Petitioner has clearly stated they want an identity verification process requirement, account number and phone number. If petitioner requires revocation of consent from a reassigned cell number two of petitioner’s three requirements cannot be met and revocation would become impossible to accomplish.

The Commission should adopt a common sense approach to revocation¹¹. The Commission should allow consumers, not the caller, to choose how they want to make the revocation. The Commission should clarify that revocation can be made orally during a phone call, via text message, via faxed letter or via written letter with attendant costs. There should be no caller restriction on how revocation can be made. If any disputes arise on revocation it is up to the courts to decide if revocation was made. That’s how it is now and how it should be in the future. After all, courts are fully capable of determining as the trier of the fact whether revocation was or was not made.

Clarification Is Not Warranted

Petitioner claims clarification is needed because “...businesses must struggle to defend against costly litigation for calling their existing consumers who provided “prior express consent” to be called in connection with their account(s) but later allege to have orally revoked consent without any evidence supporting that claim.” The petitioner is

¹¹ See, e.g.,. “...unwillingness may be manifested to the actor **by any words or conduct** (emphasis added) inconsistent with continued consent....”); RESTATEMENT (SECOND) OF CONTRACTS §42 cmt. d (1981) (“**Any clear manifestation of unwillingness** (emphasis added) to enter into the proposed bargain is sufficient [to achieve revocation].”).

suggesting that plaintiffs are lying to the courts! No evidence has been presented to the Commission that such a condition does now or has ever existed. Obviously, courts are able to discern whether proper evidence of revocation including oral revocation exists.

But then it is not consumer's oral revocations that are at issue here. It is the debt collection industry intentional refusal to comply with oral revocations that creates the issue petitioner claims needs clarification. For example in *Adamcik* the debt collector claimed that: "*Adamcik's* TCPA claim be dismissed with prejudice, because there was no evidence *Adamcik* made a **written** revocation." The jury did not agree and stated: "However, **she also adamantly requested that CCS stop the automatic calls**, particularly after she received yet another such call **while on the phone** (emphasis added) with the CCS representative. The jury accordingly found *Adamcik* had revoked her consent to receive autodialer calls under §227(b), and duly calculated how many such calls CCS made to her after the revocation." *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 752 (W.D. Tex. 2011).

See also: "Davis stated that he was not Pagan, did not know her, and had never heard of her, **and asked the collectors to stop contacting him.**" *Davis v. Diversified Consultants Inc.*, Case No.: 1:13-cv-10875, (District Court MA); "...she called Diversified to inform them that she was not Magda Molano and to request **that she not receive any further calls.**" *Echevarria v Diversified Consultants Inc.*, Case No.: 1:13-cv-04980, (S.D. NY); "Plaintiff answered **a phone call** from Alliance and stated to an Alliance representative that **it should stop calling him** because they were calling the wrong number. *Harris v. World Financial Network National Bank*, Case No.: 2:10-cv-14867, (E.D. MI). Clearly, the courts accept oral revocation as verifiable revocation.

An oral revocation during a telephone call is immediate. It is also easy to comply with. An automated button press can easily accomplish that goal (if revocation is necessary). Automated calls that connect to a live caller can be dispositioned as a revocation through a function key. On the other hand, a written revocation requirement will cause a delay in the revocation taking effect. It takes time for a letter to be mailed and delivered. Then it must be opened and read by someone who must then process the revocation. Any written revocation requirement will be fraught with possible errors in addressing, delivery and processing.

Debt collectors have come to the Commission to get their written revocation requirement since they have lost that argument in the courts. Clearly, the courts do not have a problem with oral revocation. The real reason why debt collectors have a problem with oral revocation is they can't ignore oral revocation. Debt collectors want not only the delay written revocation will ensure they also want to be able to require "magic words" for revocation which consumers will not be aware of. Debt collectors never provide their identification so why should anyone believe that debt collectors will provide consumers with the "magic words" debt collectors require for revocation.

Conclusion

Simple because the TCPA is silent on revocation does not mean that the TCPA prohibits revocation. Silence does not mean that businesses can read any exemption they can think of into the TCPA's silence¹². Further, revoking prior express consent should be as easy as giving prior express consent. Demanding that consumers use "magic words" or

¹² "Intended" called party and "current" capacity are just a few of the creative attempts to insert language into the TCPA.

some draconian method determined by the caller to revoke consent runs afoul of the protections guaranteed by the TCPA.

Nothing in the TCPA prohibits revocation of consent. The TCPA's silence on how consent can be given or revoked is a clear indication that Congress intended for common law principles of giving and revoking consent to apply. Since common law principles of giving and revoking consent apply then it follows that consent and revocation of consent can be made in any manner the consumer chooses. Letting the caller dictate how consent may be revoked is letting the fox guard the hen house. Consent should be as easily revoked as it can be given. It should not be limited by the caller or the Commission. Oral revocation, when recorded, is irrefutable evidence of revocation. Since most calls today are recorded why should oral revocation be prohibited?

Clearly, prior express consent can be revoked. And clearly, any method including an oral method provides a provable record of revocation of consent¹³. Consequently, the petition must and can only be denied.

Respectfully submitted,

_____/s/_____

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¹³ The Commission accepts recordings of calls as evidence of TCPA violations. Why then would the Commission reject recorded oral revocation of consent as evidence of TCPA violations?