

**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)
)

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

I. Introduction

CTIA – The Wireless Association® (“CTIA”)¹ hereby respectfully submits these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.² CTIA requests that the Federal Communications Commission (“FCC” or “the Commission”) affirm its prior conclusion that wireless carriers need not obtain additional consent from subscribers prior to initiating autodialed calls at no cost to the customer. The FCC should not amend its rules in a manner that would threaten important and beneficial customer service calls that may be used to notify customers of billing alerts, low balance alerts on prepaid phones, and usage alerts informing customers of approaching limits for voice, data or messaging plans. The Commission previously recognized the benefits of such calls between wireless carriers and their customers and recognized that Congress had no intention of hindering these communications.

¹ CTIA – The Wireless Association® (www.ctia.org) is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 (Jan. 22, 2010) (“2010 NPRM”).

In the NPRM, the Commission seeks comment on proposed revisions to the Commission's rules under the Telephone Consumer Protection Act ("TCPA").³ In particular, the Commission seeks comment on proposals for harmonizing its rules with the Federal Trade Commission's ("FTC") recently amended Telemarketing Sales Rule ("TSR").⁴ Of particular concern to CTIA and its members, the Commission proposes to require parties to obtain telephone subscribers' express written consent to receive autodialed or prerecorded calls even when there exists an established business relationship between the caller and the consumer.⁵ Commission precedent has held that a "call," as regulated under the TCPA, includes short message service ("SMS").⁶

CTIA is concerned that this proposed rule change will overturn Commission precedent permitting free-to-the-end-user ("FTEU") autodialed calls or prerecorded messages by wireless carriers to their customers without additional consent.⁷ As the Commission considers additional ways for carriers to provide information to customers, removing the ability to send information directly to them through their devices seems counter to that effort. Accordingly, CTIA urges the Commission not to overturn the

³ 47 U.S.C. § 227 (2005).

⁴ 2010 NPRM at ¶ 1, *citing Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164 (Aug. 29, 2008), *available at* <http://www.ftc.gov/os/fedreg/2008/august/080829tsr.pdf>.

⁵ 2010 NPRM at ¶¶ 2, 16, 20, and 28.

⁶ In the 2003 TCPA Order, the Commission decided that TCPA applies to any call, including SMS. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 165 (2003) ("Both the statute and our rules prohibit these calls, with limited exceptions, 'to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.' This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.')

⁷ The Commission previously concluded that TCPA did not intend to prohibit FTEU autodialed or prerecorded calls or messages on the basis of the plain language of the statute. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 at ¶ 45 (1992) ("1992 TCPA Order"). *See also 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 at ¶ 9 (2008) ("ACA Declaratory Ruling") (holding that the TCPA "provides an exception for autodialed and prerecorded message calls for emergency purposes or made with prior express consent").

precedent establishing the FTEU exemption from TCPA for the sake of both carriers and consumers, for whom these communications are critical. Adoption of such a sweeping rule change would have negative repercussions for consumers and carriers because it would eliminate a customer-friendly, effective line of communication between subscribers and their providers.

CTIA fully supports the goal of preventing telemarketing calls to consumers who do not wish to receive such calls, but believes that the Commission's proposed rule change harms consumers by obstructing carriers' ability to contact their customers. The proposed rules go too far in requiring that carriers must obtain prior written consent for *all* autodialed or prerecorded calls even when a prior existing business relationship exists.⁸

II. The Commission Should Affirm that Wireless Carriers Need Not Obtain Additional Consent From Subscribers Prior to Initiating Autodialed Calls at No Cost to the Customer.

In its 1992 TCPA Order, the Commission concluded that the plain language of the TCPA did not intend to prohibit FTEU autodialed or prerecorded calls or messages.⁹ The Commission should not reverse that conclusion. It should not require prior written consent for autodialed calls from wireless providers to their customers' wireless numbers, including non-telemarketing voice and SMS calls.¹⁰ The Commission proposes to adopt the same requirements for calls governed by Section 227(b)(1)(A) of the

⁸ A prior existing business relationship, such as that between a wireless carrier and its customers, is established upon purchase of prepaid minutes or upon signing a postpaid contract with the carrier. In forming this business relationship, the consumer provides a number at which they can be reached. In so providing this number, the consumer expects to be contacted there with account related inquiries or information. Therefore, obtaining additional consent is unnecessary.

⁹ 1992 TCPA Order at ¶ 45. *See also* ACA Declaratory Ruling at ¶ 9.

¹⁰ *See* 2010 NPRM at ¶ 20. Although less common in recent years, CTIA notes that some carriers may still send welcome messages and roaming instructions via a prerecorded voice call instead of an SMS message. While both communications techniques may be used, we note that SMS is more common today.

Communications Act of 1934, as amended, generally prohibiting automated, artificial or prerecorded message calls without prior consent to emergency lines, health care facilities, and cellular services, as for calls governed by section 227(b)(1)(B), generally prohibiting prerecorded message calls without prior express consent to residential telephone lines.¹¹ The Commission, however, should not adopt such a rule because of the vast array of valid and necessary autodialed and prerecorded messages that are not telemarketing calls and serve important and legitimate purposes.

The Commission's proposed rule revisions would disserve subscribers by requiring wireless carriers to obtain prior consent by either initiating an additional consent process with every subscriber and/or seeking new consent from those who already receive automated alerts.¹² Such requirements would limit carriers' ability to communicate with subscribers regarding important account information or burden customers with onerous consent procedures.

III. The Commission's Proposed Rule Change Would Harm Consumers by Obstructing Carriers' Ability to Contact Their Customers.

The narrow reading suggested in the NPRM would inhibit the level of service and transparency wireless carriers can provide to their consumers. Carriers may communicate with their customers via text messages or phone calls to inform them of occurrences that affect their service or subscription plans. Such messages, however, would be prohibited under the Commission's proposed amendments unless sufficient prior consent has been obtained from each and every customer. It is critical that wireless

¹¹ 2010 NPRM at ¶ 20, *citing* 47 U.S.C. § 227(b)(1)(A), (1)(B).

¹² Although CTIA references communications between wireless carriers and their "subscribers," in certain cases a wireless user may receive a FTEU SMS message informing them, for example, how to use dialing codes while roaming. A wireless user, therefore, need not be an actual subscriber, but may receive the SMS message upon turning the phone on and registering on the network as a roamer.

carriers be able to contact their customers regarding service issues, outstanding bills, or other account-related issues. Moreover, hindering carriers' ability to contact subscribers with FTEU messages regarding their subscribership directly contradicts recent Commission efforts to drive additional consumer knowledge.

For example, the Commission has begun a proceeding regarding "Measures Designed to Assist U.S. Wireless Consumers to Avoid 'Bill Shock.'"¹³ In this proceeding, the Commission inquires about steps wireless carriers can take to provide usage alerts and cut-off mechanisms to their subscribers as another way to monitor their usage of wireless communications services and charges they may incur with usage of voice, data and text services.¹⁴ The FCC asks about providing text message alerts for American consumers who are about to exceed their minute, text message, or data allocation.¹⁵ However, the proposed rule revisions in the instant proceeding would actually prohibit such FTEU text message alerts without prior consent of the subscriber.

Additionally, when a business relationship is established, companies regularly use autodialed and/or prerecorded calls sent to the number provided by the customer in the business transaction for routine communications or transactional reminders, such as receipt of goods or payment, billing alerts, low balance alerts on prepaid phones, and usage alerts letting customers know that they are about to go over their subscribed level of voice minutes, data or messaging.¹⁶ When a customer fails to timely fulfill his or her

¹³ Public Notice, *Measures Designed to Assist U.S. Wireless Consumers to Avoid "Bill Shock,"* 25 FCC Rcd 4838 (May 11, 2010).

¹⁴ *See id.* at 2.

¹⁵ *See id.*

¹⁶ Even in cases where a business relationship has not yet been established, but is in process, the FCC's proposed action could have negative consequences. The MMA U.S. Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs ("MMA Best Practices") require a "double opt in" for customers who want to subscribe to a premium message. *See MMA Best Practices* at (May 2010), available at <http://mmaglobal.com/bestpractices.pdf>. Thus, the second message to a prospective customer

contractual obligations to pay for goods or services, it is in both the company's and the customer's best interests that they communicate as quickly and effectively as possible, which is typically via autodialed or prerecorded call or text message. Specifically, it is more likely that customers with overdue accounts prefer to receive reminder messages as opposed to possible service disruptions or other remedies to secure payment on overdue accounts.¹⁷

Because customers typically provide numbers at which they can be reached upon subscribing to wireless service or making a transaction, they expect to be called at these numbers. For example, the Commission specifically clarified that creditors can contact wireless numbers in connection with an existing debt via autodialed and prerecorded messages because the calls are made with prior express consent of the party by supplying their numbers during the transaction.¹⁸ There simply is no need for the Commission to erect barriers to customers receiving calls that are used to relay important information, such as service, payment issues, and state mandated pre-suspension or pre-disconnection notices.

Moreover, many wireless customers do not maintain landline telephones and use their wireless phone as their principal point of contact, so it is critical that wireless providers be able to contact their own customers regarding service issues, outstanding bills, or for other account-related reasons. Autodialing provides the most efficient method of communicating with carriers' subscribers. The NPRM proposal would

asking him or her to confirm their intention to subscribe (*i.e.*, the "double opt in") might run afoul of the proposed TCPA rule. It is difficult to see the consumer benefit in prohibiting the "double opt in" for a customer who has already indicated an intent to subscribe to premium content via SMS.

¹⁷ See Comments of The United States Telecom Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* at 5, CG Docket No. 02-278 (May 21, 2010).

¹⁸ See ACA Declaratory Ruling at ¶ 9.

undermine service providers' ability to send service-related alerts to and engage in normal business communications with their customers and, thus, fundamentally harm consumers. Wireless carriers should continue to be permitted to use autodialed or prerecorded calls to communicate with their customers without additional consent.

IV. Conclusion

For the reasons set forth above, the Commission should continue to permit FTEU account-related calls from wireless carriers to their customers without requiring additional prior written consent.

Respectfully submitted,

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