

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

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham	)	
	)	

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**I. INTRODUCTION AND SUMMARY**

The National Association of Broadcasters (NAB)<sup>1</sup> hereby files these reply comments concerning the above-captioned Petition for Rulemaking and Declaratory Ruling (the “Petition”),<sup>2</sup> which requests that the Commission modify its longstanding interpretation of the “prior express consent” standard in the Telephone Consumer Protection Act of 1991 (the “TCPA” or “Act”). The issues raised by the Petitioners are well-settled, and there is no legal or factual basis for the reversal they seek.

Specifically, the Petition urges the Commission to apply its consent standards for calls involving telemarketing or advertising to virtually all calls. However, as the Commission has repeatedly found, the TCPA established different treatment for these categories of calls, so the Petitioners’ request to subject all calls to the heightened standards applicable to calls

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<sup>1</sup> NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

<sup>2</sup> Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham, CG Docket Nos. 02-278 and 05-338 (Jan. 22, 2017).

with marketing or advertising lacks any sound legal basis. The rule changes requested by the Petitioners also offer no public interest benefits, are contrary to consumer expectations, and would hinder broadcasters' ability to interact with their viewers and listeners, potentially interfering with their access to vital emergency news and weather alerts. Because the rule changes proposed by the Petition would make it more difficult for broadcast listeners and viewers to receive messages that they want to receive and would impose undue burdens on broadcast licensees, NAB urges the Commission to expeditiously dismiss the Petition.

## II. PETITIONERS MISAPPREHEND THE MEANING OF "EXPRESS" CONSENT

The Commission has long held that that a person's provision of his or her phone number, without limiting instructions, constitutes his or her prior express consent to be called under the TCPA.<sup>3</sup> Thus, current law allows companies to place autodialed or pre-recorded calls or texts to wireless numbers after they have received prior express consent, and requires prior express *written* consent only if a call or text contains advertising or telemarketing.<sup>4</sup> Petitioners would have the Commission reverse this longstanding determination and now hold that provision of a phone number constitutes only "implied" consent.<sup>5</sup>

The Commission should reject Petitioners' request. As the Joint Broadcast Commenters explain, Petitioners are "simply incorrect that an individual can manifest

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<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, ¶ 30 (Oct. 16, 1992) ("1992 Report and Order") (holding that "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. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.").

<sup>4</sup> 47 C.F.R. § 64.1200(a)(2).

<sup>5</sup> Petition at 3-4, 17-22.

express consent only in writing.”<sup>6</sup> Rather, the Commission’s determination that provision of a phone number constitutes prior express consent is a reasonable interpretation of the TCPA, and one well-grounded in consumer expectations. The Petition presents no legal or factual basis for claiming that provision of a phone number is merely “implied” consent. To the contrary, courts overwhelmingly have held that provision of a phone number constitutes express consent.<sup>7</sup>

### **III. PETITIONERS’ PROPOSALS WOULD IMPEDE CONSUMERS’ ACCESS TO COMMUNICATIONS THEY WANT TO RECEIVE**

The TCPA was intended to prevent unwanted, intrusive telemarketing calls—not informational calls that consumers request, expect and want to receive.<sup>8</sup> The Commission’s interpretations of the statute have sought to effectuate Congress’ intent by striking a balance between protecting consumers from unwanted communications and enabling entities to reach individuals that wish to be contacted. As the Joint Broadcast Commenters explain, broadcasters and others have “built compliance models around this scheme for the past 25 years.”<sup>9</sup> An about-face at this time would “add undue burden to legitimate business

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<sup>6</sup> Comments of Alpha Media, LLC, Emmis Communications Corporation, Entercom Communications Corp., iHeartMedia, Inc., Minnesota Public Radio, and Radio One, Inc. (Joint Broadcast Commenters) in CG Docket Nos. 02-278 and 05-338 (Mar. 10, 2017) (Joint Broadcast Comments) at 3. See also *id.* at 2-8.

<sup>7</sup> See, e.g., *Emanuel v. Los Angeles Lakers, Inc.*, No. CV 12-9936-GW 2013 WL 1719035, at \*3 (C.D. Cal. Apr. 18, 2013) (agreeing with the “many federal courts” that “have concluded that when a customer provides a company his or her phone number in connection with a transaction, he or she consents to receiving calls about that transaction”); *Saunders v. NCO Fin. Sys.*, 2012 WL 6644278, \*3 (E.D.N.Y. 2012) (“the authorities are almost unanimous that voluntarily furnishing a cellphone number to a vendor or other contractual counterparty constitutes express consent”).

<sup>8</sup> See *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 370 (2012) (“Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.”).

<sup>9</sup> Joint Broadcast Comments at 11.

communications and ‘unnecessarily imped[e] consumer access to desired information,’” which the Commission has consistently and correctly refused to do.<sup>10</sup>

As NAB and other broadcasters have explained in this and in prior TCPA proceedings, broadcasters frequently use modern calling technology to communicate with their viewers and listeners, providing breaking news, traffic and weather alerts to persons who have consented to receive them.<sup>11</sup> Such communications also allow individuals who want to do so to participate in surveys about stations’ programming, providing licensees with valuable, direct information about how to meet the needs and interests of their local communities. The rule changes proposed in the Petition would disrupt these lawful, desired communications, impeding access to critical information for broadcast listeners and viewers, and hindering stations’ ability to best serve their audiences. This result would be contrary to the purpose of the TCPA, as well as arbitrary and capricious,<sup>12</sup> and should be rejected.

#### IV. CONCLUSION

For the foregoing reasons, NAB urges the Commission to dismiss or deny the Petition.

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<sup>10</sup> *Id.*, citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, ¶ 21 (Feb. 15, 2012) (“2012 Report and Order”).

<sup>11</sup> See, e.g, Joint Broadcast Comments at 11-13.

<sup>12</sup> The Petition failed to provide any reasoned explanation to justify a reversal of course by the Commission, particularly given the serious and long-standing reliance interests engendered by the FCC’s existing interpretation of the TCPA. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (when changing course, an agency need not always provide a more detailed explanation than what would suffice for new policy created on a blank slate, but must do so “when its prior policy has engendered serious reliance interests” because “[i]t would be arbitrary and capricious to ignore such matters”). *Accord Encino Motorcars*, 136 S.Ct. at 2125-26 (agency’s explanation for a changed regulation failed to meet its “duty to explain why it deemed it necessary to overrule its previous position,” emphasizing the “decades of industry reliance” on the prior policy).

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

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Rick Kaplan  
Erin Dozier  
Jerianne Timmerman

March 27, 2017