

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Declaratory Ruling of the Retail Industry Leaders Association	)	

**COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits these comments in response to the above-captioned petition (the “Petition”) filed by the Retail Industry Leaders Association (“RILA”).<sup>2</sup> NAB urges the Federal Communications Commission (“Commission”) to clarify that the Telephone Consumer Protection Act (“TCPA”) and the Commission’s rule requiring prior express consent to receive automated text messages<sup>3</sup> do not apply to one-time responses to consumer-initiated requests for a text offer (*i.e.*, an “on-demand text offer,” “on-demand text message,” or “on-demand text”) because such text messages are initiated by the consumer, not the offeror. To the extent the Commission believes that on-demand text offers are initiated by the offeror—despite the fact that the consumer affirmatively makes the initial request for the message—the Commission should confirm that on-demand texts are informational messages that

---

<sup>1</sup> 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.

<sup>2</sup> Petition for Declaratory Ruling of the Retail Industry Leaders Association, CG Docket No. 02-278 (filed Dec. 30, 2013) (“Petition”); *see also Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Retail Industry Leaders Association*, Public Notice, DA 14-75 (CGB rel. Jan. 22, 2014).

<sup>3</sup> 47 C.F.R. § 64.1200(a)(1).

require only prior express consent and not prior express written consent.<sup>4</sup> Clarification is needed to allow retailers, broadcasters, and other businesses to continue to send these one-time messages, which are requested and highly desired by consumers, without fear of costly TCPA lawsuits.<sup>5</sup>

## **BACKGROUND**

Broadcasters, like retailers, may send automated text messages in response to a consumer-initiated request for a text offer. Broadcasters also conduct contests in which consumers send a text message (*i.e.*, initiate a call or conversation) to a number provided by a radio or television station in order to attempt to win a contest. In response and consistent with consumer expectations, broadcasters will send a one-time text response indicating only whether or not the consumer won the contest. In both circumstances, broadcasters' on-demand text messages are: (1) proactively initiated by the consumer, not a telemarketer; (2) isolated, one-time only messages sent immediately in response to a consumer's specific request; and (3) contain only the specific information requested, or otherwise expected, by the consumer.<sup>6</sup> Without Commission action, however, the current uncertainty regarding the application of the Commission's prior express consent rule (or even prior express written consent rule) to on-demand text messages threatens these consumer-desired messages, particularly in light of an exploding number of opportunistic TCPA class action lawsuits.<sup>7</sup>

---

<sup>4</sup> *Id.* § 64.1200(a)(2).

<sup>5</sup> See Petition at 2.

<sup>6</sup> See *id.* at 1-2; see also *id.* at 10-11.

<sup>7</sup> See *id.* at 9-10.

## DISCUSSION

### I. THE COMMISSION SHOULD CONFIRM THAT THE TCPA DOES NOT APPLY TO ON-DEMAND TEXT MESSAGES

On-demand text offers are “consumer-friendly communications that are specifically requested, expected, and desired by consumers.”<sup>8</sup> They do not implicate Congress’s concerns regarding invasive telemarketing when it enacted the TCPA and, as described by RILA, are not—and should not be—subject to the Commission’s TCPA rules.<sup>9</sup> On-demand texts are sent exclusively in *response* to consumer-initiated requests and are akin to phone calls in which a customer “takes the steps necessary to physically place a telephone call.”<sup>10</sup> Just like with a phone call, in the on-demand text message context, the consumer “takes the steps necessary” to initiate a text message conversation with the retailer or broadcaster. Thus, retailers and broadcasters that send responsive on-demand text messages do not “[i]nitiate, or cause to be initiated”<sup>11</sup> a call under the TCPA.<sup>12</sup> Indeed, consumers expect, request, and in fact highly desire on-demand text offers.<sup>13</sup> On-demand text messages—whether as part of a contest or

---

<sup>8</sup> *Id.* at 10.

<sup>9</sup> *See id.* at 1-2, 7-8, 10.

<sup>10</sup> *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd 6574, 6583 ¶ 26 (2013).

<sup>11</sup> 47 C.F.R. § 64.1200(a)(2).

<sup>12</sup> Petition at 4.

<sup>13</sup> *See id.* at 8 (“[T]he Commission explicitly recognized that not all calls to wireless numbers are problematic, and that instead some calls ‘offer access to information that consumers find highly desirable.’ On-demand texts fall squarely into the category of calls to wireless numbers that contain ‘highly desirable’ information.”) (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830, 1841 ¶ 29 (2012) (“2012 TCPA Order”)). Similarly, consumers expect a

not—therefore do not impact consumers’ privacy and are by no means “unwanted” or “unexpected.”<sup>14</sup> These messages are not the type of messages that the TCPA and the Commission’s TCPA rules are intended to reach.

Despite Congress’s and the Commission’s intentions, however, current uncertainty regarding the application of the TCPA and the prior written consent rule threatens the provision of such pro-consumer offerings. The uncertainty and continued rise of opportunistic TCPA class action litigation serves as a disincentive to offer these consumer-desired on-demand text offers.<sup>15</sup>

The Commission therefore should act expeditiously to ensure that retailers, broadcasters, and other businesses can continue to provide the offers and messages that consumers want and affirmatively request. The Commission can do so by confirming that the TCPA does not apply to one-time on-demand text offers and that prior express consent therefore is not required for these messages.<sup>16</sup>

---

one-time text message stating whether they won or lost a contest that they entered via an initial text message.

<sup>14</sup> See Petition at 6-8; see *2012 TCPA Order*, 27 FCC Rcd at 1839 ¶ 24 (“[R]equiring prior express written consent for telemarketing calls utilizing autodialed or prerecorded technologies will further reduce the opportunities for telemarketers to place *unwanted* or *unexpected* calls to consumers.”) (emphasis added).

<sup>15</sup> See Petition at 9-10 (noting that clarification is needed to eliminate uncertainty over how the new TCPA rules impact on-demand texts and to foreclose the risk of frivolous class action law suits).

<sup>16</sup> The Commission also should apply this ruling to text messages that alert a consumer whether he or she won a contest that the consumer entered via text message.

**II. ALTERNATIVELY, THE COMMISSION SHOULD CONFIRM THAT ON-DEMAND TEXT OFFERS ARE INFORMATIONAL MESSAGES THAT REQUIRE ONLY PRIOR EXPRESS CONSENT, NOT PRIOR EXPRESS WRITTEN CONSENT**

Although the Commission should conclude that retailers, broadcasters, and other businesses do not initiate calls when they send responsive text offers and that such texts thus are not covered by the TCPA, in the alternative, the Commission should confirm that on-demand text offers are informational messages for which prior express consent, and not prior express written consent, is required. In 2012, the Commission recognized that requiring prior express written consent for all automated calls to wireless numbers “would serve as a disincentive to the provision of services on which consumers have come to rely.”<sup>17</sup> Requiring prior express written consent for on-demand text offers is far more than a disincentive to provide consumers this service—it could effectively bar on-demand text offers as retailers and broadcasters have no practical way to obtain prior express written consent as currently defined by the Commission and still provide instantaneous, responsive text offers.

The Commission’s prior express written consent rule should not apply to on-demand text offers because such messages are informational, and not telemarketing, messages. As RILA describes, on-demand messages do not constitute advertising as they do not “call[] something to the attention of the public.”<sup>18</sup> Instead, in the case of retailers, “the material ‘calling something to the attention of the public’ is found in ... for example, a newspaper, magazine, billboard or store display.”<sup>19</sup> In the case of

---

<sup>17</sup> 2012 TCPA Order, 27 FCC Rcd at 1841 ¶ 29.

<sup>18</sup> Petition at 5 (quoting Merriam-Webster Dictionary Online, Advertising, <http://www.meriam-webster.com/dictionary/advertising> (last visited Feb. 11, 2014)).

<sup>19</sup> *Id.*

broadcasters, the material “calling something to the attention of the public” typically is part of radio or television broadcast programming or advertisements. The one-time on-demand text messages, however, only contain the material requested or expected by the consumer. They are not “the initiation of a ... message for the purpose of encouraging a purchase or rental, or investment in, property, goods or services”<sup>20</sup> and therefore are not telemarketing. Instead, on-demand text offers are best considered informational messages, and thus do not require prior written consent.<sup>21</sup>

Moreover, if applied to on-demand messages, the prior written consent rule would undermine consumer choice and convenience and cause consumer confusion, if not effectively bar on-demand messages altogether.<sup>22</sup> Despite consumers’ affirmative request for the message, under the written consent rule, before sending the requested message, broadcasters and others would need to either direct consumers to a website so that each consumer can provide (additional) written consent or, in the alternative, send a text message requesting (additional) consent that includes the disclosure language required by the Commission’s rules.<sup>23</sup> Even if practical, both approaches would inconvenience and likely confuse consumers who would need to take additional affirmative steps to effectuate their consent. Consumers also mistakenly may think they are consenting to more than the on-demand text messages.<sup>24</sup> As RILA notes, “[t]he Commission could not have intended to, at best, inconvenience consumers by requiring

---

<sup>20</sup> 47 C.F.R. § 64.1200(f)(12) (defining telemarketing).

<sup>21</sup> See Petition at 5-6.

<sup>22</sup> See *id.* at 8-9.

<sup>23</sup> See 47 C.F.R. § 64.1200.

<sup>24</sup> See Petition at 9.

them to take several steps to receive a specific, desired, one-time text offer, and at worst, confuse consumers by muddying the waters of the consent they ‘clearly and unmistakably’ provided by proactively submitting the identified short code.”<sup>25</sup> NAB agrees.

In addition to confirming that on-demand texts are informational, not advertising or telemarketing, messages, the Commission should confirm that consumers provide prior express consent to receive on-demand text messages when they make the initial request for the offer. As noted above, on-demand text offers neither are “unwanted” nor “unexpected.” To the contrary, when a consumer makes the initial request, the consumer expects the on-demand text message in response, and therefore has provided the requisite consent to receive such a message.<sup>26</sup> A finding otherwise would require the consumer to provide a second indication that he or she actually desires the on-demand text offer, inconveniencing and potentially confusing the consumer.<sup>27</sup> This result is inconsistent with consumer expectations, past Commission decisions, and the

---

<sup>25</sup> *Id.* at 9 (quoting *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009)).

<sup>26</sup> In *SoundBite*, the Commission noted that it “would expect consumers to complain about receiving confirmation texts if they had not consented to them as part of providing their original express consent to receive text messages.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd 15391, 15395 ¶ 9 (2012) (“*SoundBite*”). The Commission, however, did not observe complaints about such confirmation texts. *Id.* Similarly, the Commission should expect consumers to complain about receiving on-demand text message if they had not consented to them as part of providing their initial request for the offer or request to participate in the contest. NAB expects that the Commission has received few, if any, complaints from consumers regarding on-demand texts.

<sup>27</sup> See text accompanying note 23 *supra*. In the contest context, without a message confirming that a consumer won or lost the contest, the “consumer may be uncertain whether his or her request” to participate in the contest “was successfully processed and unnecessarily spend time and resources trying to find out.” *SoundBite*, 27 FCC Rcd at 15396 ¶ 10.

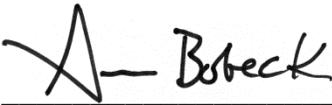
TCPA. Accordingly, to the extent that the Commission inappropriately declines to confirm that consumers initiate on-demand text offers when they request the offer, it should confirm such messages are informational and that a consumer's request constitutes prior express consent to receive the on-demand text message.<sup>28</sup>

### CONCLUSION

For the reasons set forth above, the Commission should declare that the TCPA and the Commission's prior express consent rule do not apply to one-time on-demand text messages. In the alternative, the Commission should confirm that on-demand text messages are informational messages that require only prior express consent, not prior express written consent, and that the original consumer text itself provides the requisite prior express consent.

Respectfully submitted,

NATIONAL ASSOCIATION OF  
BROADCASTERS

By:   
Jane E. Mago  
Jerianne Timmerman  
Ann West Bobek

National Association of Broadcasters  
1771 N Street, N.W.  
Sixth Floor  
Washington, DC 20036  
(202) 429-5430

February 21, 2014

---

<sup>28</sup> For the same reasons, the Commission should include text messages that alert a consumer whether he or she won a contest that the consumer entered via text message in any declaratory ruling on these grounds.