

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

To: The Commission

REPLY COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association (“RILA”), through counsel, submits these reply comments in support of its Petition for Declaratory Ruling in the above referenced proceeding.¹ Fundamentally, the ruling requested by RILA is based on the basic premise that if a consumer sends a request to a retailer via text message asking to receive a specific offer or other information through a text message, the retailer should be able to send a one-time response to the consumer with the information requested, without triggering liability under the Telephone Consumer Protection Act (“TCPA”). More specifically, RILA asks the Commission to confirm that the TCPA rules effective October 16, 2013, requiring a written agreement with particular disclosures in advance of initiating

¹ Retail Industry Leaders Association, *Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Dec. 30, 2013) (“RILA Petition” or “Petition”); *see also*, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Retail Industry Leaders Association*, Public Notice, CG Docket No. 02-278, DA 14-75 (rel. Jan. 22, 2014)(“Public Notice”).

telemarketing messages or advertisements to a wireless number² do not apply to isolated, immediate, one-time responses to consumer-initiated requests for text offers (“on demand text offers” or “on demand texts”), where such communications: (1) are proactively initiated by the consumer, not a telemarketer; (2) consist of an isolated, one-time only message sent immediately in response to a consumer’s specific request; and (3) contain the specific information requested by the consumer.³ The Commission has ample authority to clarify the rules in this regard, and can do so under a number of theories. As discussed in further detail below, the Petition has received overwhelming support in the record, and even the limited opposition suggests agreement under the narrow circumstances outlined by RILA.

I. THE COMMISSION OR THE BUREAU MAY GRANT THE PETITION UNDER A NUMBER OF THEORIES.

As RILA detailed in its Petition, Comments, and Ex Parte filing, on demand text offers are only sent as a one-time, immediate response to a consumer-initiated request – with the retailer providing the consumer with the content specifically requested by the consumer. Under these narrow circumstances, the Commission, as well as the Bureau on delegated authority, has authority under the following theories to confirm that the prior express written consent rules are inapplicable to on demand texts:

² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 12-21, ¶ 20 (rel. Feb. 15, 2012) (“2012 TCPA Order”); see also 47 C.F.R. § 64.1200(a)(2) and (a)(3) (“prior express written consent rules”).

³ See Comments of Retail Industry Leaders Association, Petition for Declaratory Ruling Filed by the Retail Industry Leaders Association Regarding Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (Feb. 21, 2014) (“RILA Comments” or “Comments”); Retail Industry Leaders Association, *Ex Parte Notice*, CG Docket No. 02-278 (Feb. 27, 2014) (“RILA Ex Parte”).

1) Consent can be reasonably construed by virtue of the consumer’s specific request for information.⁴ In the on demand text context, the consumer has proactively requested, in writing via a text message, that the retailer send the consumer a specific text offer or other information via a text message. The retailer immediately sends a one-time response containing the information that has been requested. The information sent by the retailer is both expected and desired by the consumer. Because the consumer has proactively sent a text message requesting the retailer to send particular information, consistent with Commission precedent, consent to receive the requested information can be reasonably construed under these narrow circumstances.⁵

2) The retailer is not “initiating” the text communication.⁶ The prior express written consent rules apply to the “initiation” of an advertisement or telemarketing message.⁷ In the on demand text context, the consumer initiates a request via a text message sent through a number specifically designated for this particular purpose, asking a retailer for particular information to be sent back to the consumer via a text message. The retailer then immediately responds through a text message with the information requested. Consistent with Commission precedent, under these circumstances the consumer is not “initiating” the communication and therefore the prior express written consent rules are not applicable.

⁴ RILA Ex Parte at 2.

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd 15391 (2012) at ¶¶ 1, 8 (the “Soundbite” decision); RILA Ex Parte at 2-3.

⁶ RILA Comments at 2-3; Petition at 3-4.

⁷ 47 C.F.R. § 64.1200(a)(2).

3) An on demand text offer is not an “advertisement” or “telemarketing” under the Commission’s rules.⁸ The prior express written consent rules apply to the initiation of an “advertisement” or “telemarketing” message.⁹ The Commission has defined “advertisement” as “material advertising the commercial availability or quality of any property, goods, or services,”¹⁰ and “advertising,” in turn, is defined as “the action of calling something to the attention of the public especially by paid announcements.”¹¹ In the context of an on demand text, the consumer has seen or heard an “advertisement” (the material calling to the attention of the public the availability of a particular property, good or service) in an entirely separate context, and is following the instructions in the advertisement by proactively requesting further information via a text message to a retailer. Only after receiving that consumer’s specific request is an on demand text containing the requested information sent by the retailer to the consumer in response. The Commission defines “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging a purchase or rental, or investment in, property, goods, or services.”¹² Under these circumstances the on demand text response by the retailer is neither an “advertisement” nor “telemarketing” and the prior express written consent rules do not apply.

⁸ RILA Comments at 4-5; RILA Petition at 4-6.

⁹ 47 C.F.R. § 64.1200(a)(2).

¹⁰ 47 C.F.R. 64.1200(f)(1).

¹¹ 47 C.F.R. 64.1200(f)(1); *see* also Petition at 5, fn. 12 (citing dictionary definitions of “advertising”).

¹² 47 C.F.R. 64.1200(f)(12).

4) The Commission did not intend to apply the prior express written consent rules in the context of a one-time response to a consumer-initiated request:¹³ The Commission appeared to contemplate application of the prior express written consent rules in the situation of ongoing calls, or at least more than one call, as reflected in the references by the Commission in the 2012 TCPA Order to the receipt of future “calls.”¹⁴ The Commission’s very definition of “prior express written consent” also suggests applicability in situations where there are ongoing messages (authorization to receive “advertisements” in the plural, and “telemarketing messages” in the plural).¹⁵ And the rule language describing the required elements of a written agreement also refers specifically to the plural, “calls”.¹⁶ Accordingly, it does not appear that the Commission intended the prior express written consent rules to apply in the context of a one-time on demand text response.

5) Common sense dictates a grant of the Petition:¹⁷ Consistent with various court decisions addressing TCPA litigation, the Commission should take a common sense approach in evaluating the applicability of the TCPA in this context.¹⁸ Common sense dictates that if a consumer asks a

¹³ RILA Ex Parte at 4-5.

¹⁴ 2012 TCPA Order at ¶¶ 32, 33.

¹⁵ 47 C.F.R. § 64.1200(f)(8).

¹⁶ 47 C.F.R. § 64.1200(f)(8)(i)(A) (“By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice”).

¹⁷ Petition at 7-9; RILA Comments at 7-8; RILA Ex Parte at 4.

¹⁸ *See, e.g.,* Gragg v. Orange Cab Co., 2014 U.S. Dist. LEXIS 16648 at *3-4 (W.D. Wa. Feb. 7, 2014)(adopting the 9th Circuit’s “common sense” approach to reviewing TCPA claims, and citing Chesbro v. Best Buy Stores, L.P., 11-35784, 705 F.3d 913 (9th Cir. Dec. 27, 2012)). *See also,* Ryabyshchuck v. Citibank (S.Dakota) N.A., 2012 U.S. Dist. LEXIS 156176 at *8-9 (S.D. Cal.

retailer to send a text with a specific offer or coupon, the retailer should be able to send a one-time response to that specific request without being subject to TCPA liability. In enacting the TCPA, Congress sought to combat annoying, invasive and unwanted automated telemarketing calls that threaten consumer privacy, and did not intend for the TCPA to apply to “expected or desired” business communications to wireless numbers.¹⁹ On demand texts do not implicate any of the important concerns raised by Congress in enacting the TCPA or the Commission in connection with adopting the prior express written consent rules. Equally important, on demand texts do contain information that is specifically desired by the consumer. Accordingly, common sense dictates that the Commission grant the Petition.

II. THERE IS OVERWHELMING SUPPORT IN THE RECORD FOR GRANTING THE PETITION.

A wide range of commenters, representing hundreds of thousands of entities, overwhelmingly support granting the Petition. For example, organizations such as CTIA – The Wireless Association (the international organization of the wireless communications industry for both wireless carriers and manufacturers), the National Federation of Independent Business (representing 350,000 independent business owners), the National Association of Broadcasters (representing local radio and television stations and broadcast networks), the National Association of Chain Drug Stores (representing traditional drug stores and supermarkets and mass merchants

2012) (“context is indisputably relevant to determining whether a particular call is actionable under the TCPA”).

¹⁹ See House Report 102-317, 1st Sess., 102nd Cong. (1991), at 17.

with pharmacies), and the American Financial Services Association (representing members of the consumer credit industry) all filed comments supporting the RILA Petition.

These and other commenters agree that neither the letter nor the spirit of the TCPA and associated Commission rules would suggest the application of the prior express written consent rules in the narrow context outlined by RILA.²⁰ Some commenters note that requiring prior express written consent in this context would likely increase consumer confusion and frustration.²¹ And commenters point to the stunning rise in frivolous TCPA litigation, underscoring the need for Commission clarification regarding this issue.²²

²⁰ *See, e.g.*, Comments to Petition filed by the National Association of Broadcasters (Feb. 21, 2014) at 3 (on demand texts “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”); Vibes Media, LLC (Feb. 21, 2014) at 1 (the TCPA “was enacted to protect consumers from abusive and potentially fraudulent telemarketing activities—not from expected contact by marketers with information the consumers specifically requested”); and CTIA – The Wireless Association (Feb. 21, 2014) at 2 (“the “Commission’s intent could not have been for the [prior express written consent] rules to apply when a consumer has specifically requested a particular message be sent, as is the case with on demand texts”).

²¹ *See, e.g.*, Comments to Petition filed by Brandtone, Inc. (Feb. 21, 2014) at 1-2 (“In this context, where communication with an interested consumer is typically only through his or her mobile device, the [prior express written] consent requirements would, as a practical matter, be met through the exchange of several text messages between the company and the consumer, all before the company could send the offer that the consumer requested. This exchange would almost certainly both inconvenience and confuse the consumer, all before the company could send the offer that the consumer requested.”); and Vibes Media, LLC at 3 (“requiring prior express written consent for on demand text offers will actually increase consumer frustration and confusion, by requiring them to consent in writing to receiving messages that they expressly request”).

²² *See, e.g.*, Comments to Petition filed by AFSA (Feb. 21, 2014) at 2 (“TCPA lawsuits were up 116 percent in September 2013 compared to September 2012. ... Even when companies prevail, the cost of defending a TCPA class action most often exceeds \$100,000, which may be devastating for small and mid-sized companies.”); and National Federation of Independent Business at 2 (describing the TCPA as a “catalyst for frivolous litigation” and noting that “Retailers should not have to fear

As detailed in RILA's Ex Parte, even opposing comments agree that under the strict parameters suggested by RILA, on demand texts do not trigger the prior express written consent rules.²³ For example, Gerald Roylance stated, "If the [on demand] text was sent in response to a consumer's inquiry, then the response text is never a violation."²⁴ Further, in his comments, Joe Shields noted, "[t]he Commission has already ruled that a one-time confirmation text sent in response to a consumer's opt out request does not violate the TCPA requirement of prior express consent provided however that there was prior express consent for the text messages the consumer is opting out from. . . . The text message(s) at issue in the petition, on the surface, appear to be no different."²⁵ And, Robert Biggerstaff also apparently recognizes the limited nature of the messages described in RILA's Petition, commenting that "If a responsive text message constitutes only content expressly consented to by the consumer, then a text from the consumer requesting that information be sent to the consumer by text might satisfy the burden that written consent must be obtained, as long as the appropriate documentation of the consent was maintained."²⁶

TCPA liability or a lawsuit for texting a consumer with a specific offer or coupon that he or she requests.").

²³ RILA Ex Parte at 3.

²⁴ Comments to Petition filed by Gerald Roylance (Feb. 21, 2014) at 3.

²⁵ Comments to Petition filed by Joe Shields (Feb. 21, 2014) at 2.

²⁶ Comments to Petition filed by Robert Biggerstaff (Feb. 21, 2014) at 2.

III. CONCLUSION.

RILA respectfully requests that, in light of the arguments set forth above, the Commission or the Bureau of delegated authority clarify that the prior express written consent rules do not apply to on demand texts under the narrow circumstances outlined in the Petition.

Respectfully submitted,



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