

April 6, 2015

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act: Petition for Expedited Declaratory Ruling or Forbearance of Mammoth Mountain Ski Area, LLC, CG Docket No. 02-278*

Dear Ms. Dortch:

On behalf of the U.S. Chamber of Commerce¹ and U.S. Chamber Institute for Legal Reform² (collectively referred to as “Chamber”), we respectfully submit these comments to the Federal Communications Commission (“FCC”) in response to its Public Notice³ requesting comment on the Petition for Expedited Declaratory Ruling filed by Mammoth Mountain Ski Area, LLC (“Mammoth Mountain”)⁴ in the above-referenced docket.

The Chamber strongly urges the Commission to grant Mammoth Mountain’s petition and find the Commission’s Report and Order from February 15, 2012⁵ (“2012 Order”), does

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all size, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting and defending America’s free enterprise system.

² The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

³ Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling filed by Mammoth Mountain Ski Area, LLC.*, CG Docket No. 02-278, DA 15-300 (rel. Mar. 9, 2015).

⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act: Petition for Expedited Declaratory Ruling or Forbearance of Mammoth Mountain Ski Area, LLC*, CG Docket No. 02-278 (filed February 23, 2015) (“Mammoth Mountain”).

⁵ *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, FCC 12-21, Report and Order, 27 FCC Rcd. 1830 (2012).

not require companies to obtain new “prior express written consent” from their customers if the customer’s prior express consent was previously granted prior to October 16, 2013 under the rules then in effect. To find otherwise would subject legitimate companies reaching out in good faith to their customers to further abusive trial lawyer tactics and frivolous litigation under the outdated⁶ Telephone Consumer Protection Act (“TCPA”).⁷

I. The Plain Language of the FCC’s 2012 Order Does Not Void Previous Written Consent

The TCPA itself is silent on the issue of what form of express consent is required for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message. On February 15, 2012, the FCC provided clarification on this issue by releasing a Report and Order that altered years of prior regulations by defining a new type of consent that would apply to autodialed or prerecorded telemarketing calls to cellular telephones: prior express written consent.⁸ Under the ruling, the FCC evaluates which calls do and do not fall under this rule and lays out standards to evaluate whether the consumer received sufficient information to know he or she was opting into receiving future marketing calls from the company. The new rule for prerecorded marketing calls to cellular phones went into effect on October 16, 2013.

The plain language of the Order discusses steps that the FCC knew that companies would need to take before October 16, 2013, in order to prepare their systems and records in order to ensure that **new** consents from **new** customers would meet the heightened consent requirements for marketing calls to cellular phones, and that companies could continue to use their old applications and other materials (gathering consent under old standards) before creating new materials:

We find that establishing a twelve month implementation period for the written consent requirement is appropriate because, as noted in the FTC proceeding, it will take time for businesses to redesign web sites, revise telemarketing scripts, and prepare and print new credit card and loyalty program applications and response cards **to obtain consent from new customers**, as well as to use up existing supplies of these materials and create

⁶To put into context how long ago the TCPA was enacted, in 1991, POGS were the top-selling holiday gift, parachute pants were considered fashionable and the Chicago Bulls won their first NBA Championship.

⁷The Chamber notes that earlier petitions asking for similar clarification are still pending before this agency. *See, e.g., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act: Petition for Expedited Declaratory Ruling or Forbearance of A Coalition of Mobile Engagement Providers*, CG Docket No. 02-278 (filed October 17, 2013) (asking for clarification that the rules effective October 16, 2013, do not nullify those prior express consents already provided by consumers before that date).

⁸It should be noted that while 2012 Order require prior express written consent for autodialed or prerecorded telemarketing calls to cellular phones, it maintains flexibility in the form of consent needed for purely informational calls to cellular phones, and for autodialed calls to landlines. *Supra* note 5, at 1.

new record-keeping systems and procedures to store and access **the new consents they obtain.**⁹

It would make no sense for the FCC to have permitted companies to continue to use up materials acquiring prior express consent under the earlier standards if those companies were not to be permitted to rely upon the consent acquired through such continued methods after October 16, 2013.

Mammoth Mountain is not arguing that it should be exempt from conforming with the FCC's dictates that customers whose telephone numbers were provided to it on or after October 16, 2013, should not be contacted on their cellular telephones with pre-recorded marketing calls absent prior express written consent, as that term was defined by the FCC. What Mammoth Mountain is asking to be clarified – and what the Chamber is concerned about for its multitude of business members – is that companies that had a customer's prior express consent (oral or written) prior to the trigger date for the new standards should be able to rely on that earlier-provided consent as a complete defense to a TCPA action.

Indeed, it would make no sense for the FCC to now say otherwise. If the agency had wanted to invalidate these earlier agreements establishing consent, it would have included clear language within the discussion of what is required to obtain adequate consent from consumers and would have instructed companies to contact all of their customers and acquire the new "prior express written consent" described by the order before October 16, 2013. Instead, the order allows companies to continue using up their old forms acquiring consent under the old standards, and gives companies time to update their websites and other materials so that **as of** October 16, 2013, new customers coming onto their platforms (or previous customers providing a new telephone number) would be prompted to give consent at the heightened level before any telemarketing calls would be made to a newly-provided telephone number.

Consistent with this 2012 Order, the FCC should thus clarify that if consent obtained by a business from a consumer prior to October 16, 2013 met the standards for "prior express consent" that were valid up through that date, that consent should not arbitrarily be invalidated. Such a clarification will help to stem the onslaught of TCPA litigation brought against well-intentioned companies such as Mammoth Mountain, reaching out only to customers for whom it has a good faith belief that prior consent exists because consents were collected before the new standards of consent came into being.

A. Exposing Companies to Liability Under These Impractical Circumstances Also Runs Contrary to the TCPA

Failing to provide the requested clarification would allow litigation to continue that runs counter to the very purpose of the TCPA, which was to protect the privacy interests of

⁹ *Supra* note 5, at ¶ 67 (emphasis added).

everyday consumers. If a customer provided prior express consent to a company prior to October 16, 2013 (consent that could be oral or written), the FCC's 2012 Order nowhere states that all pre-existing consents as of October 13, 2013 would be **revoked** because of the standards that would apply to new customers or new contacts provided after that date. Indeed, if such a far-reaching effect was intended, then the FCC would have alerted companies in its 2012 Order that they would need to re-contact all customers for whom they had prior express consent, and establish in some manner that the heightened "prior express written consent" was in place before continuing to contact that customer in the manner in which the company had previously interacted with those customers.¹⁰ The FCC nowhere provides such a warning, and instead (as noted above) specifically permitted companies time to craft mechanisms for recording "**new** consents" that would meet the new standard.¹¹

Moreover, it would be nonsensical for a statute aimed at reducing unwanted communications to require all companies to contact their customers, whom they have already received written consent from, in order to ask for the same written consent once again. Thus, the clarification requested by Mammoth Mountain should be made: the agency should make clear that its 2012 Order did not nullify prior express consents lawfully obtained prior to October 16, 2013.

B. Mammoth Mountain Serves as Another Example of Stretched Limits Beyond the Purpose of the TCPA

Mammoth Mountain, unfortunately, has become another company just trying to reach its customers that has become subject to an abusive TCPA lawsuit. For a small business, the litigation conceivably is putting a huge, unnecessary, strain on the company's time, staff and resources and subjecting it to the risk of tens of millions of dollars in statutory penalties. It is within reason that such a large judgment could have a crippling effect on a company of Mammoth Mountain's size. Businesses should not have to fear that every time they pick up the phone to contact their own customers that they are going to get slapped with a class action lawsuit that could shut their doors.

In this instance, Mammoth Mountain does not purchase third party lists of contact information and only contacts customers who have indicated their continued interest in Mammoth's products.¹² Their website allows customers to provide their telephone numbers on an optional basis when purchasing the company's product.¹³ Mammoth Mountain, in

¹⁰ If a customer, like the plaintiff suing Mammoth Mountain (a season pass holder for many years who had presumably received such calls in years past notifying him that the next year's pass was available) had not wanted to receive telemarketing calls at the telephone number he had provided to that company, he could have asked the company to put him on its Internal Do Not Call list. But there are no allegations in the plaintiff's complaint that he made any such request, let alone that Mammoth Mountain called him after he had withdrawn any prior express consent.

¹¹ *Supra* note 5, at ¶ 67.

¹² *Supra* note 4, at 10.

¹³ *Id.*, at 2.

good faith, obtained prior express consent from their customers to contact them. The company should not be subject to staggering statutory fines or even hundreds of thousands of dollars in legal fees over two calls to a long-time season pass holder who had given prior express consent before October 16, 2013, to receive marketing calls at the cellular number he opted to provide to the company.¹⁴

II. An Adverse Ruling or Non-Action by the Commission will Only Exacerbate Current TCPA Litigation Abuse

TCPA litigation has grown exponentially over the past several years—560% between 2010 and 2014.¹⁵ This trend will continue on its current trajectory unless, among other things, the FCC acts favorably on the current and other related pending petitions.

The issue raised by Mammoth Mountain was brought to the FCC's attention through petitions filed on October 17, 2013—the day after the heightened consent rules were effective—but has yet to be clarified by the agency.¹⁶ The Chamber respectfully notes that prompt action on the ski resort's petition is necessary, as courts are beginning to lose faith in the FCC's guidance on ambiguities under the TCPA. At the end of March, Judge Yvonne Gonzalez-Rogers in the U.S. District Court for the Northern District of California refused to stay a TCPA class action lawsuit against Bebe Store's Inc.¹⁷ Bebe filed the motion to stay the case pending a ruling from the FCC based on a Petition for Expedited Declaratory Ruling filed on May 27, 2014, seeking clarification on the term “autodialer.”¹⁸ Part of the court's reasoning for declining the motion to stay was based on “efficiency grounds,” as the FCC has not established a specific timeline for ruling on the petition.¹⁹

Over 10 months and the petition still has not been answered. Other petitions (including petitions asking for a similar clarification as that sought by Mammoth Mountain) have been sitting with the FCC on TCPA matters for a much longer time. While these petitions sit unanswered, ambiguities continue to arise. Circuit courts continue to be split, as they try to grapple with fitting modern technology under language that did not even conceive of the idea of smartphones. Businesses ultimately suffer the consequences.

¹⁴ *Id.*, at 3.

¹⁵ *Debt Collection Litigation & CFPB Complaint Statistics, December 2014 & Year in Review*, WebRecon LLC (Jan. 22, 2015), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/>.

¹⁶ *Supra* note 7.

¹⁷ *Myer v. Bebe Stores*, No. 14-cv-00267-YGR (N.D. Cal. Mar. 17, 2015).

¹⁸ *Petition for Expedited Declaratory Ruling on Autodialer*, CG Docket No. 02-278 (filed May 27, 2014). The FCC issued a Public Notice regarding the petition on July 9, 2014, seeking comment on the issues in the petition.

¹⁹ Order Denying Defendant's Motion to Stay Litigation at 5, *Myer v. Bebe Stores*, No. 14-cv-00267-YGR (N.D. Cal. Mar. 17, 2015).

The Commission should act decisively and swiftly to limit these abuses that are stemming from the confusion around the retroactivity of prior express consents received from consumers prior to October 16, 2013. To do otherwise will, at best, preserve the *status quo*, in which companies will have no practical way to properly comply with the TCPA, and, at worst, encourage more abusive TCPA litigation in this country.

III. Conclusion

When the TCPA was passed in 1991, it served a legitimate purpose. The autodial/prerecorded message sections of the TCPA were meant to curtail aggressive telemarketers that were randomly and sequentially dialing numbers of persons with whom the marketer had no relationship. Twenty-four years later, the TCPA has essentially become a question on a law school exam, allowing lawyers throw to arbitrary causes of action against it to see what sticks. As FCC Commissioner Michael O’Rielly stated on April 1, 2015, “[w]e can’t paint all legitimate companies with the brush that every call from a private company is a form of harassment.”²⁰

The FCC should act swiftly to ensure its 2012 Order is not manipulated into another abusive cause of action under the TCPA. By making the clarification requested by Mammoth Mountain about the ability to rely on consents provided before October 16, 2013 in accordance with the rules then in effect, along with the clarifications requested 31 other pending petitions²¹ sitting before the agency, the FCC can modernize a statute that debuted the same year as “Seinfeld” and “provide clear rules of the road that will benefit everyone.”²²

Respectfully Submitted,



Harold Kim
Executive Vice President
U.S. Chamber Institute for Legal Reform

²⁰ Michael O’Rielly, Fed. Comm. Comm’n, Keynote Address at the Association of National Advertisers Law & Public Policy Conference (Apr. 1, 2015).

²¹ This number is calculated as of March 10, 2015.

²² *Supra* note 21.



William Kovacs
Senior Vice President
Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce