

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection)
Act of 1991)

**NATIONAL ASSOCIATION OF BROADCASTERS
PETITION FOR RETROACTIVE WAIVER**

Pursuant to the Commission’s rules,¹ the National Association of Broadcasters (NAB)² submits this Petition (Petition) for a waiver of the Commission’s rules to be included in the class of entities eligible for the retroactive and prospective waivers pertaining to the prior express written consent requirement in the recent Telephone Consumer Protection Act (TCPA) Declaratory Ruling and Order.³ As discussed below, as a matter of equity, NAB and its members, who actively participated in this proceeding,⁴ should be availed the same benefits

¹ See 47 CFR § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”); see *also* 47 CFR § 64.1200.

² 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.

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, FCC 15-72 (rel. July 10, 2015) (2015 Order or Order).

⁴ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments of the National Association of Broadcasters, CG Docket No. 02-278 (filed Dec. 2, 2013) (NAB Coalition and DMA Comments); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments of the National Association of Broadcasters, CG Docket No. 02-278 (filed Feb. 21, 2014); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Reply Comments of the National Association of Broadcasters, CG Docket No. 02-278 (filed Mar. 10, 2014).

of the waivers that the Commission granted to a limited class of three Petitioners.⁵ We hereby formally request inclusion in this class.

In the 2015 Order, the Commission recognized that the language in its 2012 TCPA Order,⁶ which established the October 16, 2013 date by which an additional prior express written notification was required for certain mobile telemarketing messages (including automated texts messages to mobile numbers), caused confusion for Petitioners.⁷ The same confusion as to whether the 2012 TCPA Order required an additional prior express written consent was articulated by NAB and other similarly situated commenters. As NAB specifically stated in comments responding to the Coalition and DMA Petitions:

[T]he Commission should clarify that its new “prior express written consent” Telephone Consumer Protection Act (TCPA) rules for certain mobile telemarketing messages, including automated texts messages to mobile numbers, do not nullify prior express consents obtained in writing under its old TCPA rules. If the Commission declines to take such action, it should retroactively waive the new “prior express written consent” TCPA requirements in circumstances where consumers had previously provided prior express consent in writing under the old TCPA rules, consistent with the goal of the DMA petition.⁸

⁵ Petitioners included Coalition of Mobile Engagement Providers Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 17, 2013) (“Coalition Petition”); Direct Marketing Association Petition for Forbearance, CG Docket No. 02-278 (filed Oct. 17, 2013) (“DMA Petition”) and Petition for Declaratory Ruling of the Retail Industry Leaders Association, CG Docket No. 02-278 (filed Dec. 30, 2013).

⁶ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd 1830, 1833 ¶¶ 6-7 (2012) (2012 TCPA Order).

⁷ See 2015 Order at ¶¶ 101-02 (acknowledging “evidence of confusion on the part of Petitioners”). This confusion is further evidenced by the differing positions of two of the three Petitioners (whereby the Coalition took the position that the revised TCPA rules did not nullify express written consents obtained prior to October 16, 2013, and DMA appeared to assume that the revised TCPA rules required new written consent and thus sought relief from portions of the revised rules to allow its members to continue to rely on pre-October 16, 2013 written consents). See NAB Coalition and DMA Comments at 3; Coalition Petition at 1; DMA Petition at 3-4.

⁸ NAB Coalition and DMA Comments at 1-2.

Thus, NAB asked that the Commission either permit broadcasters to continue to rely on written consent obtained before the October 16, 2013 date or allow for a retroactive waiver for broadcasters who, in good faith, interpreted the rules in a manner similar to Coalition Petitioners. Just as the three Petitioners sought relief, we too specifically requested relief on behalf of our members.

Notably, in granting an 89-day prospective waiver to the three Petitioners in its 2015 Order, the Commission stated expressly that it agreed with NAB that a prospective waiver would “enable parties to obtain new consents under the new rule without running the risk of being subjected to pointless and expensive class litigation.”⁹ NAB’s radio and television members, as well as other commenters, are similarly situated to Petitioners based on the 2012 TCPA Order that the Commission itself has recognized created confusion.¹⁰ NAB intended its comments and reply comments to serve as the basis for relief ultimately received by the original three Petitioners in this proceeding.

As a simple remedy, the Commission should declare that all parties to the proceeding, Petitioners and commenters alike, are entitled to the retrospective and prospective waivers articulated in the 2015 Order.¹¹ Alternatively, the Commission could grant relief to this instant Petition and allow NAB and its members to avail themselves of the retroactive and prospective waiver period set forth in the Order to come into full compliance

⁹ 2015 Order at ¶ 102 (citing NAB Coalition and DMA Comments at 7-8).

¹⁰ *Id.* at ¶ 101. Many NAB members send automated informational text messages (for example, with news, sports, or weather information) that could be deemed to be telemarketing or advertising text messages, as part of loyal viewer, loyal listener, or similar programs. Promotions, features and other information are delivered for free but may, at times, include advertising support (akin to over-the-air services) to offset the cost of producing and delivering entertainment, news, emergency and other informational services.

¹¹ *Id.* at ¶ 102.

with the TCPA rules. Time is of the essence, as the 2015 Order states that the 89-day prospective period begins upon release of the Order, rather than its publication in the Federal Register.¹²

The Commission may waive the application of a rule for “good cause” and good cause undoubtedly exists here.¹³ The particular facts and circumstances surrounding implementation of the revised TCPA rule “make strict compliance inconsistent with the public interest,” and waiver “better serves the public interest” than strict enforcement of the rule in this case.¹⁴ Commenters, including NAB, who sought similar relief as the three Petitioners, are entitled to the relief on the same grounds that the Commission already granted to those Petitioners.

Accordingly, for the reasons set forth above, the Commission should declare that either (1) the instant Petitioner (NAB and its members), or (2) all commenters in this proceeding that requested relief from the prior express written consent requirement, are entitled to the retroactive and prospective waivers to allow such entities sufficient time to

¹² *Id.*

¹³ 47 CFR § 1.3.

¹⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)).

come into compliance with the TCPA rules and also avoid unnecessary and costly litigation.

Respectfully submitted,
NATIONAL ASSOCIATION OF BROADCASTERS

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

Rick Kaplan
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