

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Rules and Regulations Implementing) CG Docket No. 02-278
the Telephone Consumer Protection)
Act of 1991)
)
)
Petition for Declaratory Ruling or)
Clarification of Citizens Bank, N.A.)

**Comments of the National Consumer Law Center
On behalf of its low-income clients and the
National Association of Consumer Advocates**

filed March 16, 2015

These comments are submitted by the National Consumer Law Center,¹ on behalf of its low-income clients, and the National Association of Consumer Advocates.² These comments are in response to the Commission’s request for comments³ on the Petition for a Declaratory Ruling and/or Clarification brought by Citizens Bank (“the Bank”).

The Bank asks the Commission to issue a sweeping declaratory ruling, holding that any person who has made their cellular telephone number publically accessible through any medium whatsoever has in effect *expressly* consented to receive *robocalls* on that number regarding *any matter* (except telemarketing) *from any entity* whatsoever.

Such a ruling would conflict with both the plain language of the Telephone Consumer Protection Act (“TCPA”) and the Commission’s prior rulings on the issue of prior express consent.

¹ The **National Consumer Law Center (NCLC)** is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commission and publishes *Access to Utility Service* (5th ed. 2011), *Federal Deception Law* (2012), which includes a chapter regarding the TCPA, NCLC’s *Guide to the Rights of Utility Consumers*, and NCLC’s *Guide to Surviving Debt*. These comments were written with the assistance of Tim Sostrin, of Keogh Law, Chicago, Illinois. For questions, please contact NCLC attorney Margot Saunders, msaunders@nclc.org.

² The National Association of Consumer Advocates (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA’s members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

³ See http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0212/DA-15-209A1.pdf

More importantly, it would unnecessarily expose consumers to nuisance robocalls whenever they release their telephone numbers for a limited purpose in an entirely different context.

In the Bank's "common sense" view, an out-of-work mother who posts a resume containing her cellular telephone number online so that prospective employers can contact her about a job offer has expressly consented to receive "informational" robocalls on her cell phone from FOX about American Idol.⁴ In the Bank's view, she has also consented to receive debt collection robocalls on that number, even if she purposefully did not give the number to the creditor because it is reserved for urgent matters such as childcare and finding employment. And so too has the artist with an Etsy store if she posts her business cellular telephone number online so that customers can contact her about their orders – even if the subject of the robocall has no connection to her Etsy business.

The Bank might as well ask the Commission to delete the word "express" from the TCPA. And even if implied consent were all that the TCPA required, the Bank's view would still require the Commission to completely ignore the context and purpose of a consumer's disclosure of their telephone number. As discussed further below, the Commission has always found context to be an important factor of consent, and particularly in the debt collection context, which is the Bank's primary concern.

The Commission should deny the Bank's petition.

The Requested Declaratory Ruling Conflicts with the Plain Language of the TCPA.

The requested declaratory ruling conflicts with the plain language of the TCPA for two reasons.

First, the TCPA requires a caller to obtain the "prior *express* consent" of the called party before placing non-emergency robocalls to a cellular telephone number. 47 U.S.C. § 227(b)(1)(A) (emphasis added). The Bank's view of consent amounts to implied consent at best, and the Bank does not even pretend otherwise.⁵

Second, Congress expressly exempted from TCPA liability any facsimile advertisements sent to facsimile numbers that the recipient had made available to the public (47 U.S.C. § 227(b)(1)(C)(ii)), but *did not* enact a similar exemption for robocalls. If Congress wanted robocallers to call cellular telephone numbers made available to the public without concern for TCPA liability, Congress clearly knew how to do so. But Congress chose not to, and instead required prior *express* consent for such calls, without exception.

⁴ See *Final Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19330-01, 19335 (April 13, 2005) (2005 Final Rule) (ruling that prerecorded calls placed by radio stations and television broadcasters "merely to invite a consumer to listen to or view a broadcast" do not "include or introduce an unsolicited advertisement or constitute a telephone solicitation.")

⁵ Black's Law Dictionary defines "express consent" as "[c]onsent that is clearly and unmistakably stated." Black's Law Dictionary 346 (9th ed. 2004). It also defines "express" as "[c]learly and unmistakably communicated; directly stated." *Id.* at 661. By contrast, "implied consent" is defined as "[c]onsent inferred from one's conduct rather than from one's direct expression," or "[c]onsent imputed as a result of circumstances that arise, such as when a surgeon removing a gall bladder discovers and removes colon cancer." *Id.* at 346.

The Requested Declaratory Ruling Conflicts with the Commissions Prior Orders.

Whenever the Commission has ruled on the issue of “prior express consent,” it has taken the context of the consumer’s alleged consent into careful consideration. The Commission has specified that “the scope of consent” is based upon “the facts of each situation.”⁶ Thus, the provision of a telephone number for a “limited purpose” does not necessarily convey consent to receive calls “that go beyond th[at] limited purpose.”⁷

Most importantly to the Bank’s petition, the Commission ruled in the context of debt collection that a person provides express consent to receive autodialed or prerecorded debt collection calls by providing his or her cellular telephone number “to the creditor . . . during that transaction that resulted in the debt owed.”⁸ The Commission reiterated its requirement that the number be provided “during that transaction that resulted in the debt owed” to effectuate consent in a letter to the Second Circuit Court of Appeals on June 30, 2014.⁹ The Commission stated:

Such consent qualifies only if: (1) the cellular number was provided by the consumer to the creditor” and (2) the cellular number was provided during the transaction that resulted in the debt owed.¹⁰

Following this rule, the Commission opined that no prior express consent was given in that case even though the called party provided his cellular telephone number *directly* to the creditor, because it was provided in a later transaction that “is not the transaction that resulted in the debt owed.”¹¹ In other words, the Commission stated, “Nigro’s voluntary provision of his cellular telephone number to National Grid for the limited purpose of service termination did not convey his consent to receive calls that go beyond that limited purpose.”¹²

Thus, context has always mattered for consent. The Bank’s petition asks the Commission to completely ignore context and give carte blanche for robocalls, debt collection and otherwise, to any numbers that were made accessible to the public even for the most limited of purposes. This would be an unprecedented change in the Commission’s view of consent.

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Group Me, Inc. Petition for Expedited Declaratory Ruling, 29 FCC Rcd 3442, 3446, ¶11 (2014).

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1840, ¶ 25 (2012).

⁸ *Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rcd 559, 565, ¶ 10 (2008).

⁹ *FCC Amicus Letter*, re Albert A. Nigro v. Mercantile Adjustment Bureau, LLC, No. 13-1362 (June 30, 2014) (attached hereto as Exhibit A.)

¹⁰ *Id* at p. 8.

¹¹ *Id* at p. 9.

¹² *Id.*

To be sure, the Bank simply does not like the Commission's long standing rules on prior express consent in the debt collection process and is asking the Commission to reverse course now that it has been sued for violating them.

Although the Bank cites to the Commission's 1992 TCPA Order, it reads that order out of context. The Commission stated 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", but did so in direct response to commenters who "express the view that any telephone subscriber that provides his or her telephone number to a business does so with the expectation that *the party to whom the number was given* will return the call. Hence, any telephone subscriber who releases his or her telephone number has, in effect, given prior express consent to be called *by the entity to which the number was released*."¹³

The Bank would read the 1992 TCPA Order to hold that "persons who knowingly release their phone numbers [*to the public*] have in effect given their invitation or permission to be [robo]called [*by anyone and about anything*] at the number which they have given [*to the public*]." But that is not what the order says. As the Commission recently explained in its letter to the Second Circuit Court of Appeals, the 1992 TCPA Order instead holds that consent may be "conferred by the called party's prior provision of his or her telephone number *to the calling party*."¹⁴ The Bank's petition, on the other hand, would seem to require a finding of consent to receive robocalls from *anyone* if, for example, a consumer puts his cellular telephone number on his website about the local chess club that he organized. This stretches the boundaries of consent to the extreme.

The Requested Declaratory Ruling Would Harm Consumers.

Many residential wireless products, especially those used by payment-troubled and poor households, employ the "per minute of use" billing structure. Wireless consumers are often billed for incoming calls in addition to outgoing calls. As a result, these consumers are extremely sensitive to incoming calls – especially calls that they do not want.

Wireless bill shock to consumers is caused by unexpected increases in their phone bills.¹⁵ In a recent examination of the problem, the Commission found that one of the causes of bill shock is when the limits on a subscriber's voice, text or data plans have been exceeded, which in turn causes higher charges at a per-minute rate. Lower-income wireless consumers are especially sensitive to bill shock – as one extra-large cell phone bill can wreck a family's monthly budget. One monthly budget exceeded in a low-income household can cause negative repercussions for many subsequent months.

Pre-paid wireless plans have been growing in popularity.¹⁶ The wireless marketplace targets prepaid, low-end phone service products to low-income consumers and consumers with poor credit

¹³ Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, ¶¶ 30, 31 (1992).

¹⁴ *FCC Amicus Letter*, re *Albert A. Nigro v. Mercantile Adjustment Bureau, LLC*, No. 13-1362 (June 30, 2014) (attached hereto as **Exhibit A**.)

¹⁵ See FCC Consumer and Governmental Affairs Bureau, White Paper on Bill Shock (Oct.13, 2013).

¹⁶ See Sixteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket

profiles.¹⁷ The low-end prepaid wireless products provide a set number of minutes, and often texts, for a set price. Consumers must purchase a package of new minutes periodically to maintain their service.

Over 16 million low-income households maintain essential telephone service through the federal Lifeline Assistance program.¹⁸ The low-end prepaid wireless plans are a popular product for the majority of these assisted consumers. Over three-quarters of Lifeline participants choose a prepaid wireless Lifeline program, which most commonly consists of 250 minutes a month for the entire household.¹⁹

Consumer advocates have argued that 250 minutes a month is not sufficient to meet the basic monthly communication needs of a household. Any policy or practice that would open the door to depletion of these scarce subsidized minutes allowing the receipt of unwanted calls which were not reasonably expected by the consumer will further deplete the scarce minutes available for the entire Lifeline household.²⁰ Lifeline households use their Lifeline phones to find work or a doctor or access necessary services. Loss of subsidized minutes will also jeopardize health and safety, for example the ability to talk to a nurse or doctor or for a school to call a parent about a sick child.

Conclusion

For the reasons explained above, we respectfully request that the Bank's petition be denied.

Respectfully submitted,

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No. 11-186 (Rel. Mar.21, 2013), FCC 13-34 at para.98; *See* Fifteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. June 27, 2011), FCC 11-103 at para.167.

¹⁷ *See* Sixteenth Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, WT Docket No. 11-186 (Rel. Mar.21, 2013), FCC 13-34 at para.159.

¹⁸ *See* 2012 Annual Report, Universal Services Administrative Company at 9.

¹⁹ *See* <http://www.fcc.gov/guides/lifeline-and-link-affordable-telephone-service-income-eligible-consumers>; *see also* *Low Income Support Mechanism Wireless Disbursement as a Percentage of Total Disbursements 3Q2013*, Universal Service Administrative Company.

²⁰ Lifeline is limited to one-per-household. *See* 47 C.F.R. § 54.409(c).

EXHIBIT A



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June 30, 2014

Ms. Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals
for the Second Circuit
Thurgood Marshall United States Courthouse
40 Centre Street
New York, N.Y. 10007

Re: *Albert A. Nigro v. Mercantile Adjustment Bureau, LLC*, No. 13-1362

Dear Ms. Wolfe,

The Federal Communications Commission respectfully submits this response to the Court's letter of May 19, 2014, in which the Court requested the agency's views on the following question:

Does a person, who is not a 'consumer' and is not responsible for the debt, consent to autodialed debt collection calls within the meaning of 23 F.C.C.R. 559 when he agrees to be called in connection with the termination of a deceased debtor's account, and the consent did not occur "during the transaction that resulted in the debt owed."

Court Letter at 3 (quoting *Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rcd 559, 564-55 (¶ 10) (2008)) (*ACA Order*). For the reasons stated in this letter brief, the answer to the Court's question is no.

BACKGROUND

1. Statutory and Regulatory Background. The Telephone Consumer Protection Act (TCPA), Pub. L. 102-243, 105 Stat. 2394, prohibits making calls to cellular telephones using an automatic telephone dialing system (also known as an autodialer) or an artificial or prerecorded voice, except for emergency purposes or with the “prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A). The FCC has express authority to prescribe regulations to implement this provision. *Id.* § 227(b)(2); *see also* 47 C.F.R. § 64.1200 (implementing regulations).

Congress enacted this prohibition to protect telephone users “from unwanted communications that can represent annoying intrusions into daily life.” *GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd 3442, 2014 WL 1266074 (¶ 1) (2014) (*GroupMe Ruling*). “Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications.” *Id.* at 3444 (¶ 8). *See* H.R. Rep. 102-317, at 17 (1991). But Congress specifically targeted autodialed and prerecorded calls because it considered such calls to be “a greater nuisance and invasion of privacy than calls placed by ‘live’ persons.” *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed

Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, 17474 (¶ 24) (2002) (citing S. Rep. 102-178 at 2 (1991)). And Congress was particularly concerned about unwanted autodialed or prerecorded calls for which the called party is forced to incur the costs of transmission, such as calls to cellular telephones.¹ *See ACA Order*, 23 FCC Rcd at 562 (¶ 7).

As noted above, the TCPA does not bar calls for which the caller has obtained the recipient's consent. The TCPA does not specify what methods may be used to obtain or demonstrate the "prior express consent of the called party," 47 U.S.C. § 227(b)(1)(A). *See GroupMe Ruling*, 29 FCC Rcd at 3444 (¶¶ 7-8); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1838 (¶ 20) (2012) (*2012 Rulemaking Order*). To take into account "the consumer protection policies and goals underlying the TCPA," the Commission has established different consent criteria for different types of calls. *GroupMe Ruling*, 29 FCC Rcd at 3444 (¶ 8). For

¹ Section 227(b)(1)(A) applies to all calls to cellular phones, and more generally to situations where "the called party is charged for the call." 47 U.S.C. § 227(b)(1)(A). A different provision of the TCPA, 47 U.S.C. § 227(b)(1)(B), similarly prohibits calls using an artificial or prerecorded voice to a "residential telephone line"—again except for emergency purposes or with the express consent of the called party—but authorizes the Commission to create exemptions to that prohibition. Pursuant to that authority, the Commission has granted an exemption for debt collection calls to residences. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12400 (¶ 17) (1995).

example, given the widespread problem of intrusive and unwanted telemarketing calls, the Commission requires telemarketers making autodialed or prerecorded calls to obtain prior consent in written form. *2012 Rulemaking Order*, 27 FCC Rcd at 1838-40 (¶¶ 20-26). *See* 47 C.F.R. § 64.1200(a)(2)-(3). For other types of calls that do not present the same risk of abuse, oral consent may suffice. *2012 Rulemaking Order*, 27 FCC Rcd at 1841 (¶ 28). The Commission has also permitted consent in appropriate circumstances “to be obtained and conveyed via intermediaries,” *GroupMe Ruling*, 29 FCC Rcd at 3445 (¶ 9), or conferred by the called party’s prior provision of his or her telephone number to the calling party, *see Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8769 (1992) (¶ 30) (*1991 Rulemaking Order*).

An individual’s consent, once obtained, is “not unlimited.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling, 27 FCC Rcd 15391, 15397 (¶11) (2012).² The Commission has specified that “the scope of the consent” is based upon “the facts of each situation.” *GroupMe Ruling*,

² The burden to establish consent lies with the calling party. *Richard Gilmore d/b/a Democratic Dialing*, Citation and Order Prerecorded Message Violations, 28 FCC Rcd 1831, 1834 (¶ 7) (2013). *See ACA Order*, 23 FCC Rcd at 565 (¶10).

29 FCC Rcd at 3446 (¶ 11). The Commission has determined, for example, that “[c]onsumers who provide a wireless phone number for a limited purpose”—for service calls only, for example—“do not necessarily expect to receive telemarketing calls that go beyond the limited purpose,” and thus have not given their consent to receive telemarketing calls. *2012 Rulemaking Order*, 27 FCC Rcd at 1840 (¶ 25).

2. ACA Order. In 2005, an association of debt collection companies petitioned the Commission for a declaratory ruling that the TCPA and the Commission’s implementing rules do not prohibit creditors and debt collectors from making autodialed or prerecorded calls to cellular telephone numbers for purposes of debt collection. *ACA Order*, 23 FCC Rcd at 563 (¶ 8). The Commission granted the petition in part and denied it in part. *Id.* at 568 (¶ 17). The Commission held that a person provides express consent to receive autodialed or prerecorded debt collection calls by providing his or her cellular telephone number “to a creditor in connection with an existing debt.” *Id.* at 559 (¶ 1). The Commission further determined that such consent applies to calls made both by the creditor and by a “third party collector [acting] on behalf of that creditor.” *Id.* at 565 (¶ 10). The Commission “emphasize[d],” however, that “prior express consent is deemed to be granted only if the wireless number was provided by the consumer

to the creditor, and that such number was provided during the transaction that resulted in the debt owed.” *Id.*

3. Factual Background. In September 2008, Petitioner-Appellant Albert Nigro contacted Niagara Mohawk/National Grid (National Grid) by telephone to request the discontinuance of electric service in the apartment of his recently deceased mother-in-law, Joan Thomas. District Court Order at 2 (A-233). During that call, Nigro provided National Grid with his personal cellular telephone number. *Id.*

Approximately a year and a half later, Mercantile Adjustment Bureau, LLC (MAB), which had been hired by National Grid to collect an outstanding balance of \$67 due on Thomas’s account, began calling Nigro’s cellular telephone using an automated dialing system. District Court Order at 2 (A-233). Each message was the same, and stated:

Message is for Joan Thomas. If you are not Joan Thomas, please disconnect this call. By continuing to listen to this message you acknowledge that you are Joan Thomas. This is (unintelligible) at Mercantile Adjustment Bureau. Please contact me about an important personal business matter at 800-466-5059. This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

Id. MAB transmitted this message to Nigro’s cell phone 72 times over a nine month period. *Id.*

In December 2010, Nigro filed a complaint against MAB in federal district court, alleging that MAB had violated the TCPA by transmitting autodialed and prerecorded messages to his cellular telephone without his consent. *Id.* at 1 (A-232).

In an order dated March 11, 2013, the district court granted summary judgment to MAB and dismissed the complaint. *Id.* at 9 (A-240). The court held that Nigro's knowing release of his cellular telephone number to National Grid was express consent to being called at that number. *Id.* at 6-7 (A-237-38). According to the court, when providing his telephone number in connection with the account's termination, Nigro was aware "that there might be a surplus or debt on Thomas' account that would need to be addressed as part of the termination process." *Id.* at 9 (A-240). The district court thus held that Nigro "consented to calls regarding the subject of the transaction, namely the termination of Thomas' account." *Id.*

This appeal followed.

ARGUMENT

MAB VIOLATED THE TCPA BY MAKING DEBT COLLECTION CALLS TO NIGRO'S CELLULAR TELEPHONE WITHOUT OBTAINING HIS PRIOR CONSENT TO RECEIVE SUCH CALLS.

Under the TCPA and the FCC's implementing regulations, Nigro's provision of his cell phone number to National Grid does not qualify as consent to receive autodialed or prerecorded debt collection calls to that number.

1. In the *ACA Order*, the Commission held that an individual's provision of his or her cellular telephone number conveys express consent to receive autodialed or prerecorded calls by creditors or third party debt collectors only if the telephone number was supplied "in connection with an existing debt." *ACA Order*, 23 FCC Rcd at 559, 563 (¶¶ 1, 9). Such consent qualifies "only if": (1) the cellular number "was provided by the consumer to the creditor," and (2) the cellular "number was provided during the transaction that resulted in the debt owed." *Id.* at 564-65 (¶ 10).

In this case, "the transaction that resulted in the debt owed," *id.* at 564-65 (¶ 10), was Thomas's purchase of electric service from National Grid. Nigro did not give National Grid his cellular telephone number in the transaction in which Thomas made or arranged for that purchase. Instead, Nigro provided his telephone number to National Grid *after* Thomas had incurred that debt, and indeed after

Thomas had passed away. Moreover, the later transaction in which Nigro sought the discontinuance of Thomas' electric service is not the transaction that "resulted in the debt owed"—Thomas's request for electric service. No debt was incurred by Nigro's request to have service *discontinued* at Thomas's residence. Indeed, MAB's messages appear to reflect MAB's own recognition that the debt was Thomas's alone: They specifically instructed persons to "disconnect this call" if they were not "Joan Thomas." District Court Order at 2 (A-233). Nigro's voluntary provision of his cellular telephone number to National Grid for the "limited purpose" of service termination did not convey his consent to receive calls "that go beyond th[at] limited purpose." *2012 Rulemaking Order*, 27 FCC Rcd at 1840 (¶ 25).³ See Nigro Reply Br. at 8.

2. In finding that Nigro had consented to MAB's debt collection calls, the district court relied upon the Commission's statement in the *1991 Rulemaking Order* 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

³ Because Nigro did not supply his cellular telephone number during "the transaction that resulted in the debt owed," *ACA Order*, 23 FCC Rcd at 564-65 (¶ 10), his provision of that number to National Grid did not convey consent under the standard set forth in the *ACA Order*. Thus, there is no need for the Court to address Nigro's separate argument (Nigro Reply Br. at 7) that this case does not involve the provision of a cellular number "by the consumer to the creditor." *ACA Order*, 23 FCC Rcd at 564-65 (¶ 10).

given, absent instructions to the contrary.” District Court Order at 6, 8 (A-237, A-239). *See* 7 FCC Rcd at 8769 (¶ 30). *See also* MAB Br. at 7, 10, 11, 14, 15. That analysis is incorrect. Although Nigro presumably consented to receive calls regarding the termination of service to the Thomas residence by providing his cell phone number to National Grid in connection with his request to terminate that service, under the *ACA Order* that consent did not extend to debt collection calls with respect to debts that did not arise “during the transaction” in which Nigro provided his number. 23 FCC Rcd at 564-65 (¶ 10).

3. The provision of a telephone number is not the only method of conveying prior express consent to receive debt collection calls. An individual may, for example, provide such consent by means of a written or oral communication. *See 2012 Rulemaking Order*, 27 FCC Rcd at 1841 (¶ 28). There is no evidence, however, of any such written or oral communication here.

Nor is there any evidence that Nigro was acting as the representative of Thomas’s estate in his dealings with National Grid or otherwise had responsibility for Nigro’s debt. *See* Nigro Dep. at 20 (A-80) (Thomas “didn’t have a will and she did not have an administrator of an estate”); *see also* Nigro Aff. at 1 (A-52) (“Ms. Thomas died without a will, and therefore, there was no official executor or administrator of her estate.”). The Commission takes no position on whether there

would have been consent had National Grid been furnished with the telephone number of the administrator or other formal representative of a decedent's estate regarding a previously incurred, but currently pending, bill against the estate.

* * * * *

In sum, Nigro did not supply his cellular telephone number in the course of “the transaction that resulted in the debt owed,” *ACA Order*, 23 FCC Rcd at 564-65 (¶ 10), and thus under the standard the FCC set forth in the *ACA Order*, the mere fact that Nigro provided his number to National Grid did not convey his consent to be called regarding that debt. Nor is there any other evidence showing that Nigro had consented to the debt collection calls at issue in this case. Thus, MAB's calls violated the TCPA.

CONCLUSION

The Court should reverse the district court's ruling that Nigro consented to MAB's debt collection calls by furnishing his cellular telephone number to National Grid.

Respectfully submitted,

/s/ Jonathan B. Sallet

Jonathan B. Sallet
General Counsel

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Albert A. Nigro,)	
Plaintiff-Appellant,)	
)	
v.)	No. 13-1362
)	
Mercantile Adjustment Bureau, LLC)	
Defendant-Appellee.)	
.)	

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on June 30, 2014, I electronically filed the foregoing Amicus Curiae Letter Brief for the Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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