

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of DentalPlans.com's)
Petition for Expedited Declaratory Ruling)
)
)
In the Matter of Rules and Regulations)
Implementing the)
Telephone Consumer Protection Act)
)

CG Docket No. 02-278
DA 20-540

Comments of

National Consumer Law Center
on behalf of its low-income clients

and

Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
National Association of Consumer Advocates
Public Knowledge
U.S. PIRG

In Opposition to the Petition for Declaratory Ruling
Filed by Assurance IQ, LLC

February 10, 2023

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TABLE OF CONTENTS

I.	Summary and Introduction	1
II.	The FCC should deny the Petition because it requires resolution of disputed facts when there is an ongoing lawsuit that will determine those facts.	3
III.	The prerecorded messages appear both to introduce advertisements and to constitute telemarketing, either of which would require prior express written consent.	4
IV.	The required elements for prior express written consent have not been demonstrated in DentalPlans' online and telephone enrollment process.	8
	A. There is insufficient evidence in the record to determine if the disclosures and agreements were provided to consumers in a <i>clear and conspicuous manner</i> .	8
	B. There is insufficient evidence in the record to determine if consumers actually <i>signed</i> the agreements to receive marketing calls.	9
	C. Prior express written consent can never be provided through a telephone call.	10
V.	The Commission should not retroactively waive these fundamental restrictions on unwanted calls.	11
VI.	Conclusion	13

COMMENTS

I. Summary and Introduction

Pursuant to the Public Notice¹ issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC)² files these comments on behalf of its low-income clients and **Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, Public Knowledge, and U.S. PIRG**, opposing in all respects the Petition filed by **DentalPlans.com**.³ In its Petition, DentalPlans.com (DentalPlans) requests an “expedited declaratory ruling” that (1) “DentalPlans’ renewal notifications do not constitute telemarketing or advertising under the TCPA”; and 2) “the language in its online enrollment forms and the language used by its customer service representatives during telephone conversations with potential DentalPlans customers satisfies the disclosure requirements set forth in 47 U.S.C. § 227(b)(1)(A)(iii)”⁴ The Petition also asks that, if the Federal Communications Commission (FCC or Commission) does not provide the declaratory ruling as requested, it should “waive the application of the rules for the period prior to December 31, 2020.”⁵

We oppose this Petition in all of its particulars on these grounds:

- 1) The determination the Petition asks the Commission to make is highly fact-dependent, but the necessary facts are not in the record, and it is quite likely that if the Petitioner placed its version of the facts in the record those facts would be disputed.⁶ Thus, the Commission

¹ See Public Notice, Federal Commc’ns Comm’n, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by DentalPlans.com, CG Docket No. 02-278 (Rel. Jan. 11, 2023), available at <https://www.fcc.gov/document/cgb-seeks-comment-retroactive-waiver-filed-dentalplanscom>.

² The National Consumer Law Center is a nonprofit 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.

³ Petition for Expedited Declaratory Ruling Regarding the Application of U.S.C. § 227(b)(1)(B) by DentalPlans.com, CG Docket No. 02-278 (filed Jan.3, 2023), available at <https://www.fcc.gov/ecfs/document/101032278712147/1> [hereinafter Petition].

⁴ Petition, *supra* note 3, at 2. Note that the Petition also requests a ruling that the language conforms with the requirements of 227(b)(2)(c). However, there is no such section, and we are unable to tell what section the Petitioner may be referencing.

⁵ Petition, *supra* note 3, at 8.

⁶ These issues include what words were included in the messages at issue, whether disclosures have been

lacks an evidentiary basis to agree to the Petition’s requests. The Commission should not issue a decision based on facts asserted to be true by one party in a contested case. In addition, there is an ongoing proceeding in a federal district court on the very same issues.⁷ When a case is pending in the courts and facts are still in dispute, issues that require an analysis of the unresolved facts⁸ should be left to the courts, in this case the federal district court in which this matter is being litigated.⁹

- 2) Contrary to the assertions made in the Petition, the text of the prerecorded calls in question here—available in the public record of the underlying federal district court case—show that they are “advertising” and “telemarketing,” as defined by the Commission’s regulations,¹⁰ necessitating prior express written consent.¹¹
- 3) There is insufficient information either in the public record or the record before the Commission to determine whether the disclosures provided to consumers who enrolled online were provided in a “clear and conspicuous” manner, as required by the regulation,¹² or were actually signed by the consumers.¹³
- 4) It is clear from the Petition that the prerecorded calls made to consumers who enrolled with DentalPlans over the telephone were made without valid prior express written consent, as the only disclosures provided were delivered orally.
- 5) There is no justification for a retroactive waiver of these rules. The FCC’s requirements for express written consent for prerecorded calls with advertising or telemarketing messages, and E-Sign’s requirements that consumers must explicitly consent to agree to receive writings electronically, have all been clear written requirements for many years. Granting

provided in a “clear and conspicuous” manner, and the presence of indicators that the consumer actually intended to sign the agreements to be called.

⁷ Bradley v. DentalPlans.com., ___ F. Supp. 3d___, 2022 WL 2973979 (D. Md. July 27, 2022).

⁸ These issues include what words were included in the messages at issue, whether disclosures have been provided in a manner that satisfies the requirement for “clear and conspicuous,” and the presence of indicators that the consumer actually intended to sign the agreements to be called. In addition, the Petition implies that Petitioner made prerecorded calls just to current policyholders, while in the federal court litigation the plaintiff alleged that she was not a subscriber when Petitioner called her.

⁹ Bradley v. DentalPlans.com., ___ F. Supp. 3d___, 2022 WL 2973979 (D. Md. July 27, 2022).

¹⁰ 47 C.F.R. § 64.1200(f)(1) and (13), respectively.

¹¹ As required by 47 C.F.R. § 64.1200(a)(2).

¹² 47 C.F.R. § 64.1200(f)(9)(i).

¹³ 47 C.F.R. § 64.1200(f)(9)(ii).

such a request would be contrary to the law, and would unquestionably encourage more unwanted robocalls to plague consumers' telephones.

II. The FCC should deny the Petition because it requires resolution of disputed facts when there is an ongoing lawsuit that will determine those facts.

DentalPlans has requested that the Commission issue a declaratory ruling in the midst of pending litigation¹⁴ on a matter that requires the application¹⁴ of the legal requirements of the TCPA to a set of facts that are either absent from the record altogether or are in dispute. For example:

- 1) The Petition does not include the substance of the messages—which makes it impossible for the Commission to form an opinion about whether they introduced advertisements or constituted telemarketing. While the Commission can access allegations about the content of the messages by reviewing information in the record of the underlying district court case, there is no evidence in the public record that the message described there is the only message that the Petitioner used.
- 2) There is no information in either the record before the Commission or in the public record relating to the ongoing litigation that gives the Commission a factual basis to determine whether the disclosures that must be provided in the written consent agreement were clear and conspicuous, as required by 47 C.F.R. § 64.1200(f)(9)(i).¹⁵
- 3) There is no information before the FCC, or in the public record, relating to the manner in which consumers applied their signatures to electronically provided agreements to receive these messages, making it impossible for the Commission to determine whether those agreements have been signed, as the regulations require.¹⁶

The FCC does not have an evidentiary record that would enable it to determine these key underlying facts. And, where the facts are not even fully developed, as in the current case, the FCC cannot fairly arbitrate the issues raised in this Petition. An adversary process, in which all the parties in interest have the opportunity to present evidence and cross-examine witnesses, is necessary before the key questions in this case can be resolved. The FCC should decline to grant the Petitioner's requests, and should allow the underlying federal court litigation to take its course.

¹⁴ Bradley v. DentalPlans.com., ___ F. Supp. 3d ___, 2022 WL 2973979 (D. Md. July 27, 2022).

¹⁵ See also section IV(A), *infra*.

¹⁶ See also section IV(B), *infra*.

In any event, the facts presented in the petition and publicly available also require denial of the petition, as explained in the following sections.

III. The prerecorded messages appear both to introduce advertisements and to constitute telemarketing, either of which would require prior express written consent.

It is telling that the Petitioner has not provided the Commission with the text of any of the prerecorded calls it made. As argued in section II, *supra*, this is reason in and of itself for the Commission to decline to make the very fact-specific determination of whether the calls introduce advertisements or constitute telemarketing. But, more fundamentally, the evidence that can be gleaned from other sources about the content of the calls affirmatively demonstrates that they *were* telemarketing calls.

The plaintiff in the underlying lawsuit alleged that she received the following message on multiple occasions:

Renew your plan today and get 25% off when you mention the Special code "Secret25". This offer won't last long so please call our DP at your service team back at 1-844-371-2316 between the hours of 8:30 a.m. and 10:00 p.m. Eastern Standard Time. Again, don't forget to mention the code "Secret25" to get your special 25% discount. Thank you and we look forward to speaking with you soon.

This is a renewal offer. Please call us back today at 855-217-3939 between the hours of 8:30 a.m. and 10:00 p.m. to take advantage of this limited time offer. Thank you and have a wonderful day.¹⁷

In 47 C.F.R. § 64.1200(a)(2) and (3), the FCC has prohibited, without prior express written consent, a prerecorded call to a cell phone or a residential line that “includes or introduces an advertisement *or* constitutes telemarketing.” The word “or” in this prohibition is significant: a prerecorded call requires prior express written consent if it *either* includes or introduces an advertisement *or* constitutes telemarketing. It is also obvious that “telemarketing” must include calls that are not encompassed by the term “advertisement,” because otherwise there would have been no need to use both terms.

Under the Commission’s rules, an advertisement is “any material advertising the commercial availability or quality of any property, goods, or services.”¹⁸ Telemarketing is “the initiation of a

¹⁷ Bradley v. DentalPlans.com., 2022 WL 2973979, at *2 (D. Md. July 27, 2022).

¹⁸ 47 C.F.R. § 64.1200(f)(1) (emphasis added).

telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”¹⁹ Notably, the definition of “telemarketing” appears to be broader than the definition of “advertisement,” in that a call can be telemarketing if it is merely intended to encourage a purchase, even if it never mentions the commercial availability or quality of property, goods or services.

Assuming that the allegation in the district court case accurately conveys the text of the calls at issue here, it is clear that those calls introduce an advertisement and constitute telemarketing. They include much more than just the information that the recipient can renew enrollment; they contain specific directions about how to renew, and offer a special discount if the recipient wants to take advantage of a “limited time offer.” The language shows that the intent of these messages is to promote “the availability of . . . [a] service,” which means they include an advertisement, and to encourage the “purchase of . . . services,” such that they are telemarketing and not just informational. Indeed, this short recorded message is laden with the sort of insistent pleas and come-ons—even a Special “Secret25” code!—that characterize telemarketing: “Renew your plan today . . . get 25% off . . . mention the Special code ‘Secret25.’ This offer won’t last long . . . please call. . . don’t forget to mention the code ‘Secret25’ to get your special 25% discount. . . Please call us back today . . . take advantage of this limited time offer.”

It is not even clear that the calls involved renewal of the same plan. The offer of a 25% discount is a significant difference in and of itself, and the caller’s ability to offer such a substantial discount suggests that it may have reduced the plan’s benefits (or that the discount is illusory).

As the Petition notes, the Commission has ruled in the past that a fax that included a subscription renewal notice did not count as advertising.²⁰ However, this ruling has little relevance to the Petition before the Commission. First, the prerecorded calls here, which include a secret code as a come-on and insistent encouragement to call “today”—go far beyond a “subscription renewal

¹⁹ 47 C.F.R. § 64.1200(f)(13) (emphasis added).

²⁰ See Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, Final Rule, 71 Fed. Reg. 25,967 (May 3, 2006). See also *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order and Third Order on Reconsideration, CG Docket No. 02-278, 21 F.C.C. Rcd. 3787 (Rel. Apr. 6, 2006). As an example of such communications, the Commission points to a subscription renewal notice, noting that if “the recipient is a current subscriber and had affirmatively subscribed to the publication,” then the fax would not qualify as an advertisement. “In order for such messages to fall outside the definition of ‘unsolicited advertisement,’ they must relate specifically to existing accounts and ongoing transactions.” *Id.* at 3813.

notice.” Second, the restriction relating to faxes only prohibits unsolicited advertisements,²¹ while the regulations applicable to prerecorded calls to residential and cellular telephone lines restrict messages with either advertisements or telemarketing.²² Thus, even if the Commission’s fax ruling resolved the question whether the prerecorded call to the plaintiff in the underlying case included an advertisement, it would have no bearing on whether that call constituted telemarketing. Third, the Commission specifically limited its fax ruling to notices sent to existing customers,²³ while the plaintiff in the underlying case alleged that she received the prerecorded calls after her plan had expired.²⁴

Courts have treated calls and messages like the ones at issue here as telemarketing. For example, in *Flores v. Access Ins. Co.*,²⁵ the defendant sent text messages stating “Your Access Auto Insurance policy cancels 01/26/2015. To avoid cancellation, make a payment at [this website]. Reply STOP to Opt-out.” The court refused to dismiss the consumer’s claim that prior express written consent was required, holding that “the communications had both informational *and* telemarketing purposes because plaintiff was informed about the status of his policy *and* was encouraged to purchase services from defendant.”²⁶ The calls at issue here, with their insistent admonition that the consumer call “today” and their other come-ons, are even more clearly telemarketing. Notably, since the text message sent in *Flores* refers to a future cancellation date, it is clear that the plaintiff there was a current customer when the text message was sent.

The Ninth Circuit has also characterized far less insistent text messages as telemarketing. The plaintiff in *Van Patten v. Vertical Fitness Group, L.L.C.*,²⁷ a former short-term customer of Gold’s Gym, received text messages stating “Golds [sic] Gym is now Xperience Fitness. Come back for

²¹ 47 C.F.R. § 64.1200(a)(4).

²² 47 C.F.R. § 64.1200(a)(2).

²³ 47 C.F.R. § 64.1200(a)(4), (f)(6).

²⁴ *Bradley v. DentalPlans.com.*, ___ F. Supp. 3d ___, 2022 WL 2973979, at *1 (D. Md. July 27, 2022) (“Deborah Bradley is a Maryland resident who received several of these familiar ‘robocalls’ after her Cigna dental discount plan expired.”). Note that the Petition implies that the Petitioner made prerecorded calls to consumers only while their plans were still in effect—yet another factual issue that should prevent the Commission from issuing an opinion here. “When a member’s plan is *about to expire* DentalPlans will generally contact the member using a prerecorded voice message.” Petition, *supra* note 3, at 3 (emphasis added).

²⁵ 2017 WL 986516 (C.D. Cal. Mar. 13, 2017).

²⁶ *Id.* at *8 (emphases in original).

²⁷ 847 F.3d 1037 (9th Cir. 2017), *aff’g* 22 F. Supp. 3d 1069 (S.D. Cal. 2014).

\$9.99/mo, no commitment. Enter for a chance to win a Nissan Xterra! Visit Myxperiencefitness.com/giveaway.” Regarding these messages, the court stated: “the *telemarketing* text messages at issue here, absent consent, present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA.”²⁸

It is true that the FCC has excluded from the definition of telemarketing calls that relate to the renewal of governmental health insurance, but that is generally when the calls are solely informational in nature and do not include telemarketing. The recent Declaratory Ruling²⁹ issued in response to a request from the U.S. Department of Health and Human Services confirmed that entities covered by the TCPA may make calls with only prior express consent (not requiring a prior express *written* consent) to recipients of governmental health insurance benefits “reminding [recipients] to contact their program to ensure their contact information is up to date,” and “reminding them to respond to their program.”³⁰ The Commission clarified that the calls discussed by HHS, made with a prerecorded voice message, would not be considered telemarketing—

because these calls appear to simply inform enrollees about the state of their benefits and how to ensure they do not lose such benefits. Nothing in HHS’s request suggests that these communications will advertise a particular insurance product or any other product or service, and thus they do not appear to be advertising or telemarketing.³¹

By basing the ruling that the calls would not be telemarketing on the fact that they would not “advertise a particular insurance product,” this ruling supports the position that the calls made by Petitioner *are* telemarketing calls. The sole focus of Petitioner’s calls is to sell a particular product—its own dental insurance plan.

²⁸ *Id.* at 1043 (emphasis added). The text message was sent before the Commission imposed the requirement of prior express written consent for telemarketing texts, so while the court referred to the message as telemarketing, it had no need to make a formal finding to that effect.

²⁹ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling, GC Docket No. 02-278 (Rel. Jan. 23, 2023).

³⁰ *Id.* at ¶ 6.

³¹ *Id.* at ¶ 23. *See also* Smith v Blue Shield of California Life & Health Ins. Co., 228 F. Supp. 3d 1056, 1066 (C.D. Cal. 2017) (“Simply stated, the text of Blue Shield’s telephone call is informational. It notified recipients that they should have received information about changes to their insurance plan, encouraged them to seek out information about their plan by examining the information packet and visiting Blue Shield’s website, and directed them to call the member service number (as opposed to the sales department) to resolve any questions or issues.” (emphasis added)).

Another decision holding that prerecorded calls intended to ensure that Medicaid recipients renew their eligibility were not telemarketing calls also illustrates the distinction.³² The court held:

[T]he aim of the call is not to retain the recipient as a customer, but rather to ensure that they remain a beneficiary of Medicaid. And as the court pointed out in *Williams [v. National Healthcare Review]*, “[p]rivate entities ... do not and cannot sell Medicaid because Medicaid is a government program that is not sold.” 2017 WL 4819097, at *4. This is categorically different than if Amerigroup [the company hired by the state to administer its Medicaid plans] was calling because a customer’s plan was expiring and Amerigroup wanted them to purchase more coverage.³³

This decision also supports our position, as it clearly indicates that prerecorded calls by a company to encourage customers whose plans were expiring to purchase more coverage *would be* telemarketing—exactly the situation presented by Petitioner’s calls.

IV. The required elements for prior express written consent have not been demonstrated in DentalPlans’ online and telephone enrollment process.

A. There is insufficient evidence in the record to determine if the disclosures and agreements were provided to consumers in a *clear and conspicuous manner*.

The FCC’s regulations specifically define the requirements for prior express written consent. One requirement is that there must be a written agreement that makes certain disclosures in a clear and conspicuous manner.³⁴

The Petition includes an allegation of the language provided on the online portal through which applicants for DentalPlans’ program can enter their signatures, to “agree” to receive the

³² See *Dennis v. Amerigroup Washington, Inc.*, 2020 WL 618472 (W.D. Wash. Feb. 10, 2020).

³³ *Id.* at *5.

³⁴ 47 C.F.R. § 64.1200(f)(9)(i) (emphasis added) states:

(9) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that . . .

(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; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

marketing messages from DentalPlans.³⁵ But no information is provided to illustrate whether the required disclosures are made in a clear and conspicuous manner.³⁶ Without uncontradicted evidence of the manner in which the disclosures were presented, the Commission does not have a basis for ruling whether the Petitioner’s online forms met the requirements for prior express written consent.

B. There is insufficient evidence in the record to determine if consumers actually signed the agreements to receive marketing calls.

The FCC’s regulations clearly permit the signature required to be provided for prior express consent to be provided electronically, but only “to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.”³⁷ The Electronic Signatures in Global and National Commerce Act (E-Sign) is the applicable law governing the replacement of a signature with an electronic signature.³⁸ E-Sign’s definition for an “electronic signature” includes several features, each of which must be met in order for an electronic click to be considered an electronic signature:

(5)Electronic signature.

The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.³⁹

In other words, the consumer must “execute or adopt” an “electronic sound, symbol, or process” which was “attached to or logically associated” with the agreement indicating consent to receive the telemarketing calls. Additionally, for such a signature to be valid, the signer must do something affirmative to indicate an “intent to sign” that agreement. This does not require a fact specific inquiry into every consumer who is alleged to have signed an agreement to receive these

³⁵ Petition, *supra* note 3, at 3.

³⁶ The Federal Trade Commission (FTC) staff has a practical analysis of how it would expect electronic advertisements and disclosures to meet conspicuousness requirements. Fed. Trade Comm’n, .Com Disclosures, How to Make Effective Disclosures in Digital Advertising (Mar. 2013), *available at* www.ftc.gov. *See also* Press Release, Fed. Trade Comm’n, FTC Looks to Modernize Its Guidance on Preventing Digital Deception (June 3, 2022), *available at* www.ftc.gov.

³⁷ 47 C.F.R. § 64.1200(f)(9)ii (“The term ‘signature’ shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.”).

³⁸ 15 U.S.C. § 7001(a).

³⁹ 15 U.S.C. § 7006(5).

marketing calls. It requires only that DentalPlans show how each of the distinct features of an electronic signature were met through its online enrollment process, particularly the process that demonstrates that the signer *intended* to apply the electronic signature. In other words, the process must include a way to show that the signer applied the click “with an intent to do a legally significant act.”⁴⁰ This requirement is illustrated in the Ninth Circuit case *Berman v. Freedom Fin. Network, L.L.C.*, in which the court determined an enforceable agreement to arbitrate was never formed. The court held that the defendant’s reliance upon the consumers’ act of clicking on large green “continue” buttons on its website as manifestation of their assent was insufficient, since “merely clicking on a button on a webpage, viewed in the abstract, does not signify a user’s agreement to anything. A user’s click of a button can be construed as an unambiguous manifestation of assent only if the user is explicitly advised that the act of clicking will constitute assent to the terms and conditions of an agreement.”⁴¹

There is no such showing included in DentalPlans’ Petition to the FCC.

C. Prior express written consent can never be provided through a telephone call.

As explained, the “prior express written consent” required before making telemarketing calls requires that a writing be provided to the consumer, with a clear and conspicuous disclosure of several important rights.⁴² DentalPlans maintains in its Petition that some of its calls are legal because of agreements entered into over the telephone.⁴³ This means that the disclosures and the agreement required to be provided in writing to the consumer were provided verbally, and there is no “agreement, in writing, bearing the signature of the person called,” as required by 47 C.F.R. § 64.1200(f)(9). Verbal consent is not written consent. If the Commission were to rule otherwise, it

⁴⁰ E-Sign’s definition of an electronic signature is identical to that in the uniform version of the Uniform Electronic Transactions Act (UETA). *See* Unif. Elec. Transactions Act § 2 cmt. 8; *Berman v. Freedom Fin. Network, L.L.C.*, 30 F.4th 849 (9th Cir. 2022); *J.B.B. Inv. Partners, Ltd. v. Fair*, 232 Cal. App. 4th 974 (Cal. Ct. App. 2014) (printed signature at end of email could be but is not necessarily a signature within meaning of UETA; it is necessary to look to circumstances surrounding the exchange); *Sims v. Stapleton Realty, Ltd.*, 739 N.W.2d 491 (Wis. Ct. App. 2007) (emails constitute signed, written documents under UETA provided that they are electronically signed; signature must be shown to have indicated an intent to sign; here, requirement is satisfied by an email with a typed name at the bottom); Jane K. Winn & Robert A. Wittie, *Electronic Records and Signatures Under the Federal E-Sign Legislation and the UETA*, 56 Bus. Law. 293, 294–340 (2000).

⁴¹ *Berman v. Freedom Fin. Network, L.L.C.*, 30 F.4th 849, 857 (9th Cir. 2022).

⁴² 47 C.F.R. § 64.1200(f)(9)(i).

⁴³ Petition, *supra* note 3, at 3-4.

would amount to a repeal of the requirement of prior express written consent.

V. The Commission should not retroactively waive these fundamental restrictions on unwanted calls.

There is no justification for a retroactive waiver of these rules, and granting one would undermine the goals of the Telephone Consumer Protection Act (TCPA). The Commission may waive its rules only “for good cause shown,”⁴⁴ and only if (1) the waiver would better serve the public interest than would application of the rule; and (2) special circumstances warrant a deviation from the general rule.⁴⁵ Neither requirement is present in this case.

The public has an interest in the full application of the protections of the TCPA to stop unconsented-to telemarketing calls. The FCC’s specific requirements for prior express written consent for those calls have been on the books since October 2013,⁴⁶ and E-Sign’s specific requirements allowing an electronic act to serve as a signature has been the law since 2000.

Previously, retroactive waivers have been allowed only when the FCC found callers’ confusion about the requirements for written consent to be reasonable. For example, in 2015, the FCC clarified that consent obtained before the effective date of the new rule did not protect calls made after that date unless the consent complied with the new rule.⁴⁷ However, the FCC also acknowledged that its announcement of the new rule might have been confusing about whether *written* consent that was obtained before the effective date of the new rule, but did not satisfy all of the requirements of the new rule, would continue to be effective. It therefore granted an application—filed by a telemarketing association on behalf of its members—for a period of ninety more days in order to bring pre-amendment written consents into compliance with the new rule.⁴⁸

⁴⁴ 47 C.F.R. § 1.3.

⁴⁵ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission’s Prior Express Written Consent Requirement, CG Docket No. 02-278, 34 F.C.C. Rcd. 4851, 4855 ¶ 12 (Rel. June 13, 2019).

⁴⁶ *See* 77 Fed. Reg. 63,240 (Oct. 16, 2012) (setting effective date for the requirement for written consent).

⁴⁷ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 8014 ¶¶ 99 (Rel. July 10, 2015). *See also* *Larson v. Harman Mgmt. Corp.*, 2016 WL 6298528 (E.D. Cal. Oct. 27, 2016) (text message advertisements sent in 2014 and 2015 must comply with 2013 requirement of written consent; pre-2013 provision of cell phone number insufficient); *Snyder v. iCard Gift Card, L.L.C.*, 2016 WL 7507994 (S.D. Fla. May 16, 2016) (applying this principle and finding written consent ineffective because it did not include the disclosures required by the 2013 rule).

⁴⁸ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 8014 ¶¶ 101–102 (Rel. July 10, 2015). *See* *Rosales v. Heath*, 2019 WL 7586541 (D. Neb. June 27, 2019) (explaining this

Additionally, in 2019, the Commission granted two waivers to petitioners who demonstrated that they were “similarly situated to the petitioners granted relief in the 2015 order.”⁴⁹

In this case, the basis for Petitioner’s request for a retroactive waiver is a 2006 FCC order on faxes sent to participants reminding them to renew subscriptions. As explained in section III, *supra*, the notices addressed in that order were subject to different rules from those that are applicable to the telemarketing calls made by the Petitioner.

As noted by the court in the underlying case, the petitioner is a multi-national corporation that provides insurance as well as dental discount plans, among other health-related services, with numerous affiliates and subsidiaries.⁵⁰ The marketing calls at issue were allegedly made to the plaintiff sometime in 2019, as well as to thousands of other consumers.⁵¹ There is no excuse for a caller making telemarketing robocalls to thousands of people in 2019 not to know the rules for prerecorded telemarketing calls that were implemented in 2013.

Despite the clear language of the FCC’s rules requiring consent, just last month—in January 2023—over a billion telemarketing calls plagued American telephone lines.⁵² The complaints about unwanted, invasive, and generally illegal robocalls continue to be made to the Commission.⁵³ In 2022, the Federal Trade Commission received over three million complaints about unwanted telemarketing calls.⁵⁴

history); *Lennartson v. Papa Murphy’s Holdings, Inc.*, 2016 WL 51747 (W.D. Wash. Jan. 5, 2016) (consent for test messages sent after date of 2013 rule must meet that rule’s requirements where defendant did not seek waiver from FCC).

⁴⁹ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission’s Prior Express Written Consent Requirement, CG Docket No. 02-278, 34 F.C.C. Rcd. 4851 (Rel. June 13, 2019) (granting petition of two stores—bebe stores, inc. and ViSalus, Inc.—for waiver of requirement that express written consent include the disclosures that were required as of October 16, 2013, where caller had obtained written consent prior to that date; waiver covers period from October 16, 2013 through October 7, 2015).

⁵⁰ *Bradley v. DentalPlans.com*, ___ F. Supp. 3d ___, 2022 WL 2973979, at *1 (D. Md. July 27, 2002).

⁵¹ *Id.*

⁵² P.R. Newswire, US Consumers Received 4.5 Billion Robocalls in January, According to YouMail Robocall Index (Feb. 3, 2023), *available at* <https://www.pnewswire.com/news-releases/us-consumers-received-4-5-billion-robocalls-in-january-according-to-youmail-robocall-index-301738106.html>.

⁵³ *See* Federal Comm’n’s Comm’n, Robocall Response Team: Combating Scam Robocalls & Robotexts, *available at* <https://www.fcc.gov/spoofed-robocalls>.

⁵⁴ Federal Trade Comm’n, National Do Not Call Registry Data Book for Fiscal Year 2022, *available at* <https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2022>.

Allowing a retroactive waiver of liability in this case would be equivalent to promising a “Get out of jail free” card to telemarketers. Granting such a request would be contrary to the law and would unquestionably encourage more unwanted robocalls to plague consumers’ telephones.

As Chairwoman Rosenworcel has said—

"We're not going to stop until we get robocallers, spoofers, and scammers off the line."⁵⁵

Yet if the Commission were to grant the Petition in this case, the result will be the further escalation of unwanted, unconsented-to telemarketing calls to the American public. All of these unconsented-to calls intrude on our privacy.

VI. Conclusion

We urge the Commission to deny the Petition in its entirety.

Respectfully submitted, this the 10th day of February, 2023, by:

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⁵⁵ Federal Commc'ns Comm'n, Robocall Response Team: Combating Scam Robocalls & Robotexts, *available at* <https://www.fcc.gov/spoofed-robocalls>.