

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Advanced Methods to Target and Eliminate Unlawful Robocalls)	CG Docket No. 17-59
)	
Call Authentication Trust Anchor)	WC Docket No. 17-97

To: The Commission

COMMENTS OF SIRIUS XM RADIO INC.

Sirius XM Radio Inc. (“Sirius XM”) hereby submits comments in response to the Commission’s Third Further Notice of Proposed Rulemaking (“*Third Further Notice*”) in the above-referenced proceedings.¹

I. INTRODUCTION AND SUMMARY

Sirius XM shares the Commission’s concerns about the urgent need to prevent illegal robocalls. Illegal robocalls not only are an annoyance and a nuisance to consumers but also abuse the telephone network and threaten the continued existence of voice telephony that has served a critical role in worldwide communications for over a century. That threat, along with the increasing lack of trust in the telephone system, presents substantial perils to the operations of legitimate business callers, like Sirius XM, that rely on telephone calls to contact customers in a manner compliant with telemarketing and other applicable laws.

At the same time, callers must be able to trust that the telephone system appropriately delivers lawful calls that they initiate, and that it does so regardless of the caller, content, or

¹ *Advanced Methods to Target and Eliminate Unlawful Robocalls; Call Authentication Trust Anchor*, CG Docket No. 17-59, WC Docket No. 17-97, Declaratory Ruling and Third Further Notice of Proposed Rulemaking, FCC 19-51 (rel. June 7, 2019) (“*Declaratory Ruling*” and “*Third Further Notice*”).

policies of the underlying service providers involved in the carriage and delivery of the call. A telephone system that routinely fails to deliver lawful calls fails the promise of our common carriage telephone network just as much as a system flooded by illegal ones.²

Many legitimate businesses place telephone calls to their customers and the Commission should ensure that these legal calls are not blocked along with illegal calls. Inadvertent blocking of permitted calls will create havoc by reducing consumer confidence in the effectiveness of the telephone system. Having already allowed carriers to significantly broaden their call blocking practices through the *Declaratory Ruling*, the Commission should promptly flesh out the parameters of how carriers can implement call blocking in a manner providing full protection for lawful calls.³

II. THERE IS WIDESPREAD AGREEMENT ABOUT THE NEED TO PROTECT LAWFUL CALLS WHILE STOPPING ILLEGITIMATE ONES

Throughout this proceeding, stakeholders representing the entire calling ecosystem have cautioned against policies that would result in the blocking of lawful calls. They also have expressed concern about whether current tools and mechanisms sufficiently protect legitimate callers and the calls they make.

² See, e.g., *Verizon*, Order and Consent Decree, 30 FCC Rcd 245, 251 (2015) (“permitting blocking or the refusal to deliver voice telephone traffic ... risks ‘degradation of the country’s telecommunications network’”); *Rural Call Completion*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 33 FCC Rcd 4199, 4200 (2018) (“Regardless of how the caller and/or called party experiences a call completion problem, the failures have serious repercussions, imposing needless economic and personal costs, and potentially threatening public safety in local communities.”).

³ As detailed further below, responses to Commissioner Geoffrey Starks’s recent inquiries to major phone and voice providers regarding their plans to roll out default call blocking underscore that the Commission should have established these critical details *before* allowing voice service providers roll out enhanced robocall blocking programs. See also Letter from Michele A. Shuster, General Counsel, Professional Association for Customer Engagement, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, at 1 (May 30, 2019) (“PACE May 30, 2019 Letter”) (the Commission should “avoid broadening carriers’ call blocking authority prior to deciding on and implementing necessary protections”).

As Commissioner Michael O’Rielly explained in his statement on the *Declaratory Ruling and Third Further Notice*,

Completely legitimate organizations and businesses regularly engaged in so-called “robocalling” to provide consumers with critical and time-sensitive information, such as fraud alerts, flight schedule changes, school closures, delivery window delays, prescription notices, appointment reminders, public safety alerts, and—yes—anti-delinquency notices. Efforts to attack illegal and fraudulent calls should not restrict or prevent these beneficial robocalls.⁴

Similarly, Free Press cautioned that “[i]f the Commission merely empowers carriers to make choices on behalf of their customers instead, without providing complete or ensuring sufficient accountability for such decisions, then even if the framework is a net positive it may lead to the wrong outcomes more often than it needs to.”⁵ Public Knowledge likewise warned that robocall blocking “should not, and does not have to change the [telephone network’s] fundamentally open nature....”⁶ And INCOMPAS indicated that “embracing unknown and untested call blocking features as a default treatment amounts to an overcorrection that will actually further undermine consumer confidence in the value and seamless ubiquity of voice communications.”⁷

Sirius XM has previously raised these same concerns to the Commission. In response to the Commission’s August 10, 2018 Public Notice refreshing the record on the blocking and

⁴ *Declaratory Ruling and Third Further Notice*, Statement of Commissioner Michael O’Rielly.

⁵ Ex Parte Letter from Matthew F. Wood, VP of Policy & General Counsel, Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, WC Docket 17-97, at 2 (May 31, 2019).

⁶ Ex Parte Letter from John Bergmayer, Senior Counsel, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, WC Docket 17-97 (May 30, 2019).

⁷ Ex Parte Letter from Christopher L. Shipley, Attorney & Policy Advisor, INCOMPAS, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, WC Docket 17-97, at 2 (May 30, 2019).

labeling of robocalls, including the potential for false positives that result in blocking lawful calls,⁸ Sirius XM noted that there already has been a significant amount of blocking and mislabeling of legitimate calls, including by the carriers themselves and by third-party app providers.⁹ The evidence of blocking and mislabeling likely represents the tip of the iceberg of the overblocking harm that can be expected under the expanded call blocking regime permitted in the *Declaratory Ruling*. Sirius XM also observed that the Commission’s robocalling docket (*i.e.*, the same docket that includes this *Third Further Notice*) was rife with claims from multiple sectors that legal calls were being blocked and mislabeled.¹⁰

Voice service providers themselves have raised concerns about blocking legitimate calls, doing so as recently as this month in response to Commissioner Starks’ inquiries about their default call blocking plans.¹¹ CenturyLink, for instance, emphasized that “[a]ll voice service providers need to be sensitive to the hazards of over-blocking as not all robocalls are illegal,”

⁸ Public Notice, *Consumer and Governmental Affairs Bureau Seeks to Refresh the Record on Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, at 3 (rel. Aug. 10, 2018) (“Aug. 2018 Public Notice”). The comments and reply comments in response to the Aug. 2018 Public Notice remain relevant and should be considered by the Commission in any action taken pursuant to the *Third Further Notice*.

⁹ Comments of Sirius XM Radio Inc., CG Docket No. 17-59, at 2, 5 (Sept. 24, 2018) (“Sirius XM Sept. 24, 2018 Comments”); *see also* Comments of Sirius XM Radio Inc., CG Docket No. 17-59, at 5-6 (Jan. 23, 2018) (“Sirius XM Jan. 23, 2018 Comments”) (explaining that call labeling can be tantamount to blocking, is inherently discriminatory, and providers should be required to display only a company’s true Caller ID (in our case, “SiriusXM”), as the sole label associated with calls from that number.

¹⁰ Reply Comments of Sirius XM Radio Inc., CG Docket No. 17-59, at 3 (Oct. 9, 2018) (“Sirius XM Oct. 9, 2018 Reply Comments”) (citing Reply Comments of Colonial Penn Life Insurance Company, CG Docket No. 17-59, at 1-4 (Jan. 23, 2018); Comments of National Association of Federally-Insured Credit Unions, CG Docket No. 17-59, at 1 (Jan. 23, 2018); Comments of the Electronic Payments Association, CG Docket No. 17-59, at 2 (Jan. 23, 2018); Comments of the Retail Energy Suppliers Association, CG Docket No. 17-59, at 3 (Jan. 23, 2018); Sirius XM Jan. 23, 2018 Comments at 2).

¹¹ *See* Press Release, *Commissioner Geoffrey Starks Seeks Details About Industry Plans to Offer Free Robocall Blocking By Default* (June 10, 2019), <https://docs.fcc.gov/public/attachments/DOC-357891A1.pdf>.

noting that a lack of authentication cannot be an exclusive basis for blocking calls.¹² Likewise, Frontier expressed concern about blocking legitimate calls without customers affirmatively accepting that risk¹³ – *i.e.*, the Commission’s initial approach to robocall blocking from which it has now departed.¹⁴ And Sprint observed that “it is inevitable that legal calls will occasionally be falsely identified as illegal robocalls.”¹⁵ These concerns underscore the impropriety of, at this point in time, basing a blocking safe harbor solely on SHAKEN/STIR authentication,¹⁶ without at least incorporating additional protections as described in Section III below.¹⁷

¹² See Letter from Andrew J. Dugan, Chief Technology Officer, CenturyLink, to Hon. Geoffrey Starks, Commissioner, Federal Communications Commission, at 2-3 (July 10, 2019), <https://www.fcc.gov/document/commissioner-starks-releases-free-robocall-blocking-responses>; see also Letter from Charles W. McKee, Vice President of Government Affairs, Sprint, to Hon. Geoffrey Starks, Commissioner, Federal Communications Commission, at 2 (July 10, 2019) (“Sprint Starks Response”), <https://www.fcc.gov/document/commissioner-starks-releases-free-robocall-blocking-responses> (SHAKEN/STIR data will be only one factor in deciding whether a given call is illegal or unwanted); Letter from Kathleen O’Brien Ham, Senior Vice President, T-Mobile, to Hon. Geoffrey Starks, Commissioner, Federal Communications Commission, at 2 (July 10, 2019), <https://www.fcc.gov/document/commissioner-starks-releases-free-robocall-blocking-responses> (not all robocalls are bad).

¹³ Letter from Daniel McCarthy, President and CEO, Frontier, to Hon. Geoffrey Starks, Commissioner, Federal Communications Commission, at 1-2 (July 10, 2019) (“Frontier Starks Response”), <https://www.fcc.gov/document/commissioner-starks-releases-free-robocall-blocking-responses>.

¹⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7691 ¶ 160 (2015) (the fact that current call-blocking technology is not perfect does not prevent carriers from offering such services to consumers, “[s]o long as providers of call-blocking services provide accurate disclosures to consumers when they sign up for these services that certain calls they want to receive may be blocked” and “consumers can decide for themselves whether to risk the disruption of those calls”).

¹⁵ Sprint Starks Response at 2.

¹⁶ See *Third Further Notice* ¶¶ 49-58.

¹⁷ Further, voice service providers do not appear to agree on the scope of the risk of overblocking, particularly regarding which technologies pose greater risks than others. Compare Sprint Starks Response at 2 (Sprint expects application-based blocking to be more accurate) with Frontier Starks Response at 1-2 (customer call blocking tools, *i.e.*, app-based tools, have a higher risk for erroneous blocking than network blocking).

In sum, callers, carriers, and even the Commission itself have repeatedly acknowledged the risk (and seriousness) of overblocking. The Commission therefore must ensure that its actions in response to the *Third Further Notice* adequately protect against and mitigate the potential of false positives and overblocking.

III. THE COMMISSION MUST ESTABLISH SUFFICIENT PROTECTIONS FOR LAWFUL CALLS, INCLUDING FROM COMMERCIAL BUSINESSES

A. Clear Notice, Complaint and Redress Mechanisms, and Other Processes Are Essential

Adopting rules preventing overblocking is especially critical because many business calls are requested by consumers, desired by consumers, and may be critical to them, yet those calls often will come from phone numbers unfamiliar to consumers and not on their contact lists. By way of example, businesses that routinely need to call consumers include pharmacies with refill reminders, alarm companies providing security notifications, credit card companies with fraud notices, electric utilities regarding service outages, consumer product companies regarding urgent recalls, and hospitals alerting a patient’s family to an emergency, among many others.¹⁸ The Commission must protect the continued ability of these and other lawful business callers to rely on the voice telephone system to reach the public.

Sirius XM appreciates the *Declaratory Ruling*’s acknowledgment that “a reasonable call-blocking program instituted by default would include a point of contact for legitimate callers to report what they believe to be erroneous blocking as well as a mechanism for such complaints to

¹⁸ See, e.g., Letter from Jonathan Thessin, Senior Counsel, American Bankers Association, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, WC Docket No. 17-97, at 1 (May 31, 2019) (inadvertently blocked calls “could harm consumers by resulting in the erroneous blocking of lawful, and often urgent, calls affecting consumer health, safety, and financial well-being”); Petition for Clarification or Reconsideration of the Alarm Industry Communications Committee, CG Docket No. 17-59, WC Docket No. 17-79, at 2 (July 8, 2019) (alarm companies may contact customers to prevent false alarms, provide alerts of suspicious activity, or give proactive security alerts).

be resolved” and encouragement of service providers “to develop a mechanism for notifying callers that their calls have been blocked,”¹⁹ but these statements are not enough. Through the *Third Further Notice*, the Commission must go farther to provide unequivocal direction to voice service providers and callers.²⁰ Consistent with PACE’s recommendations prior to adoption of the *Declaratory Ruling and Third Further Notice*, the Commission should provide clear, nationwide standards as to how carriers should distinguish between wanted and unwanted calls (or rather, legal and illegal calls, as discussed in note 33 below) and ensure that carriers have suitable tools to mitigate and remediate blocking calls from legal callers, among other things.²¹

In addition to having a point of contact and complaint mechanisms as generally required in the *Declaratory Ruling*, an un-blocking process *must* – not just as a mere encouragement – include a mechanism for callers to be immediately notified in instances where their calls are blocked.²² Carriers also should have clear procedures governing how they respond to complaints, including dedicating employees to promptly addressing and resolving overblocking complaints and ensuring a predictable and reasonable response time.²³ As Sirius XM previously

¹⁹ *Declaratory Ruling* ¶ 38.

²⁰ Congress is also attempting to address the overblocking issue with generalized language in the Stopping Bad Robocalls Act, H.R. 3375, which passed the House of Representatives today. That bill requires that the Commission “ensure” robocall blocking services “are provided with transparency and effective redress options” for both consumers and callers. The Commission must implement these broad statements with specific, enforceable obligations in order to protect lawful calls and lawful business callers.

²¹ PACE May 30, 2019 Letter at 2; *see also* Public Knowledge May 30, 2019 Ex Parte Letter (“a mechanism whereby blocked callers as well as users can challenge and correct mistakes must be baked into the FCC’s rules at the outset”).

²² *See, e.g.*, Sirius XM Oct. 9, 2018 Reply Comments at 10-11 (discussing call intercept messages or codes).

²³ *See, e.g.* Sirius XM Sept. 24, 2018 Comments at 11-12; Sirius XM Oct. 9, 2018 Reply Comments at 11-12; Ex Parte Letter from James C. Falvey, Sirius XM, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 17-59, at 5-6 (June 7, 2018).

explained, upon notification that lawful calls are being blocked, “[t]o minimize the harm being done to legitimate businesses, voice service and app providers should promptly cease blocking such calls and then investigate the basis for blocking those calls.”²⁴ Sirius XM also suggested that concerns about the blocking of lawful calls should be investigated and remedied within two business days.²⁵ Sirius XM reiterates these proposals.

B. Any Blocking-by-Default Program Should Exclusively Target Illegal Calls

In addition, although Sirius XM appreciates the concern underlying the *Third Further Notice*’s proposed protections for critical calls – namely, that certain emergency calls understandably must never be blocked²⁶ – the proposed protections are unduly limited and do not protect nearly enough calls. The Commission should prohibit blocking of all lawful calls – whether for an emergency, or from a school vendor providing a school alert, a pharmacy about a prescription reminder, or a business reminding its customer about an expiring service. To the extent that blocking of such calls occasionally occurs, the Commission’s policies should ensure that sufficient mechanisms are in place to immediately and on an ongoing basis stop such blocking – and carriers that act in good faith to adopt and implement such procedures should be entitled to a safe harbor from liability for any blocking mistakes that they make. But the notion of special protections for certain calls based on their content waters down the importance of protecting all other lawful calls, and also raises First Amendment concerns.²⁷

²⁴ Sirius XM Sept. 24, 2018 Comments at 11.

²⁵ *Id.* Sirius XM explained that it is willing to fully cooperate with any inquiry when a spoofing issue has been identified, noting also that the fact that spoofing occurs is not enough reason to allow blocking to continue while a spoofing incident is being investigated. *Id.* at 12.

²⁶ See *Third Further Notice* ¶¶ 63-70.

²⁷ See, e.g., *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (content regulation must be narrowly tailored to achieve a compelling government interest).

The *Third Further Notice*'s approach also further complicates the Commission's already complicated – and never fully defined – categories of calls that can and cannot be blocked. In 2018, the Commission sought comment on (but never resolved) how providers can distinguish between “illegal calls” and legal ones,²⁸ and in doing so, the Commission was explicit that it was focused on the “identification of *illegal* calls, not other calls, *e.g.*, those that are unwanted but legal.”²⁹ But rather than provide clarity on that question, the *Declaratory Ruling and Third Further Notice* and previous Commission actions create a complicated landscape that includes:

- (i) “calls that are highly likely to be illegal” that can be blocked automatically;³⁰
- (ii) “unwanted calls” that can be blocked through unspecified “reasonable analytics” on an opt-out basis, including but not limited to illegal robocalls;³¹ and
- (iii) “critical calls” that must never be blocked.³²

The regime by implication also includes a fourth category: wanted calls that carriers can block sometimes, but not all the time (and again, without any clear guidance as to when and why).³³

²⁸ Aug. 2018 Public Notice at 2.

²⁹ *Id.* at 2 n.6 (emphasis in original).

³⁰ *See Declaratory Ruling* ¶ 16.

³¹ *Id.* ¶ 34.

³² *Id.* ¶ 63

³³ The Commission's repeated use of the term “robocall,” including in the title of this docket, adds further layers of confusion. Although it uses the term over 100 times, the *Declaratory Ruling and Third Further Notice* never explains whether the term is limited to calls made by a robot (*i.e.*, automatically without human intervention), using a prerecorded or artificial voice, or both. Worse, neither the *Declaratory Ruling* nor *Third Further Notice* bind their respective findings and proposals to calls that actually have a “robo” element. Rather, they seek to address so-called “illegal robocalls” by applying policies broadly to virtually all calls. These incomplete and imprecise distinctions are further compounded by the uncertainty regarding the definition of an automatic telephone dialing system, which still awaits further Commission action following the decision by the Court of Appeals for the D.C. Circuit in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

Beyond creating unnecessary complexity, it should not be up to the voice service providers to decide which legal but “unwanted” calls should be blocked and which should get through.³⁴ Rather than maintaining this convoluted, content-based approach, with regard to opt-out-based blocking, the Commission should focus exclusively on blocking illegal calls and protecting legal ones.³⁵

IV. CONCLUSION

The urgent need to find mechanisms to stop illegal calls shouldn’t diminish the requirement that our telephone network continue to serve its primary function of allowing lawful calls to reach their intended recipient. Ultimately, establishing clear guidance on the calls that may and should be blocked and providing effective guardrails regarding excessive call blocking will best ensure that the telephone system meets its time-honored promise as a neutral, trustworthy, and predictable communications mechanism for callers and called parties alike.

Respectfully submitted,

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³⁴ See, e.g., *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (“[t]he common law requirement of holding oneself out to serve the public indiscriminately” is “the basic characteristic that distinguishes common carriers”) (citations and quotations omitted); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“[A] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”) (citation omitted).

³⁵ See, e.g., Sirius XM Sept. 24, 2018 Comments at 2-4 (discussing need for clear distinctions between legal and illegal calls).