

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Advanced Methods to Target and Eliminate	)	CG Docket No. 17-59
Unlawful Robocalls	)	

**COMMENTS OF TATANGO, INC.  
IN RESPONSE TO THE SECOND NOTICE OF INQUIRY**

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## SUMMARY

Tatango, Inc. provides easy-to-use, opt-in only, text message marketing software and industry expertise to its clients, which include some of the most well-known brands in the world. Tatango shares the Commission's goal of curbing unwanted text messages and applauds the Commission for considering actions to address the current challenges arising from the Commission's interpretation of the TCPA, which imposes liability for text messages made to reassigned telephone numbers after a single text message.

Tatango encourages the Commission to adopt rules that require the reporting of disconnected wireless and VoIP phone numbers. Currently, many carriers do not provide any reporting for disconnected wireless phone numbers. For those that do, they often combine the disconnected phone numbers with suspended, unsuspended, and ported numbers. The result is an incomplete and difficult-to-assemble patchwork of information that frustrate the Commission's goal of ensuring that consumers utilizing reassigned telephone numbers do not receive unwanted calls or text messages.

Many companies have already invested significant effort to aggregate and report on disconnected phone numbers. For this reason, the Commission should propose and adopt rules that encourage continued competition; competition is the most effective way to spur continued innovation while disciplining costs. Tatango encourages the Commission to create a process for accrediting disconnected number database providers, in lieu of creating a single monopoly provider.

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Tatango, Inc. respectfully submits these comments in response to the Second Notice of Inquiry (“NOI”)<sup>1</sup> released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding, which seeks input regarding potential solutions to address robocalls made to telephone numbers that have been reassigned to a new users.

**I. INTRODUCTION**

Tatango was founded in 2007 with the simple goal of providing easy-to-use, opt-in only, text message marketing software and industry expertise to its clients. Tatango now powers Short Message Service (“SMS”) and Multimedia Messaging Service (“MMS”) marketing campaigns for some of the most well-known brands in the world. Tatango shares the Commission’s goal of curbing unwanted text messages. Towards this end, in 2016, Tatango launched the U.S. Short Code Directory ([www.usshortcodedirectory.com](http://www.usshortcodedirectory.com)), which empowers consumers to identify the owners of over 8,000 short codes used by brands and organizations across the nation, allowing consumers to be more informed about who is communicating with them, and with instructions on how to unsubscribe from these messages.

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<sup>1</sup> *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, FCC 17-90, CG Docket No. 17-59 (July 13, 2017).

Tatango welcomes the Commission’s interest in finding practical solutions to address the flaw in the Commission’s 2015 Declaratory Ruling and Order, which imposes liability for text messages made to reassigned numbers even while recognizing that “callers lack guaranteed methods to discover all reassignments immediately after they occur” and that existing solutions “will not in every case identify numbers that have been reassigned.”<sup>2</sup> The Commission’s 2015 TCPA Order has placed law-abiding businesses across the country, like those served by Tatango, in an impossible position, namely, to ensure that text messages are never made to a reassigned wireless telephone number, even though no existing mechanism captures 100% of the estimated 35 million number reassignments occurring each year.<sup>3</sup> The results of the Commission’s 2015 TCPA Order are seen in the continued rise in TCPA litigation that is flooding our court systems.<sup>4</sup> Tatango urges the Commission to move swiftly to propose and adopt rules to address this problem.

As a platform provider, Tatango is highly interested in helping its customers avoid sending text messages to reassigned wireless telephone numbers. For this reason, Tatango recently completed an exhaustive examination of ways in which it could obtain the data necessary to help its customers avoid sending text messages to reassigned wireless telephone numbers. Tatango’s examination revealed that many of the nation’s largest wireless carriers are currently providing their own reports with information regarding disconnected, suspended,

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<sup>2</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act*, Declaratory Ruling and Order, FCC 15-72, CG Docket No. 02-278, ¶ 85 (Rel. July 10, 2015) (the “2015 TCPA Order”).

<sup>3</sup> See NOI, ¶ 5.

<sup>4</sup> According to analysis by WebRecon, 2016 saw the highest number of TCPA suits with 4,860 cases filed. See <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/>. According to the analysis, this represented “explosive growth” with the number of TCPA plaintiffs in 2016 finishing 31.8% ahead of 2015.

unsuspended, and ported wireless telephone numbers. It is generally not easy to process this information, however, since there is no uniform standard used by all wireless carriers for these reports, and many wireless carriers combine both disconnected and ported wireless telephone numbers into the same reports, without identifying whether the wireless telephone number is disconnected or ported. Tatango also has concerns regarding the accuracy of the disconnect data found in the reports from the wireless carriers. Tatango's analysis also suggests that approximately 36.67% of the nation's wireless carriers, usually smaller carriers, provide no reporting at all on telephone number disconnects or reassignments on their networks. The lack of uniformity, accuracy of the data, or the complete lack of accessible data from certain wireless carriers creates a patchwork of information that has to be stitched together, meaning that many software platform providers are not necessarily obtaining complete data or interpreting it correctly.

Based on its analysis, Tatango concluded that the Commission's 2015 observation that "callers lack guaranteed methods to discover all reassignments immediately after they occur,"<sup>5</sup> remains equally true today. The current reality is unsustainable. Consumers continue to receive unwanted robocalls, while putting platform providers, like Tatango, and their clients at unnecessary risk of being the subject of TCPA litigation, even though no level of diligence would enable the companies to avoid text messaging every reassigned number. Commission action to require reporting of wireless telephone number deactivations presents a win-win opportunity for both businesses and consumers.

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<sup>5</sup> 2015 TCPA Order, ¶ 85.

## **II. REPORTING NUMBER REASSIGNMENTS**

### **A. Information to be Reported**

As noted above, many, but not all, wireless carriers currently provide reports regarding wireless telephone number deactivations. However, some of those reports intermingle data regarding numbers that have been suspended, unsuspended, or ported to another wireless carrier. Reporting of this nature makes it more challenging for Tatango and other platform providers to differentiate between a number that has been disconnected (and therefore should be unsubscribed from the marketing campaign), and a situation in which a number has been ported to a new wireless carrier, but still controlled by an individual that has given consent (in which case the consumer's prior consent remains valid). Based on its experience, Tatango recommends that the Commission propose and adopt rules that require reporting by all U.S. wireless carriers when telephone numbers have been disconnected and become classified as aging. Tatango also encourages the Commission to impose rules requiring wireless carriers to report disconnected numbers independently of any numbers that are suspended, unsuspended, or ported to a new wireless carrier. Differentiated reporting of this nature will ensure accurate data, thus maintaining consumers that have merely ported their number to a new wireless carrier.

Tatango does not believe that it will be more efficient, or result in a better consumer experience, for wireless carriers to delay reporting until a number has been classified as available for reassignment or is reassigned to a new user. Tatango understands that some of the largest wireless carriers are reassigning disconnected numbers to new users in as few as two days. Given the speed of reassignments, it is not practical to delay reporting significantly past the point of disconnecting of a telephone number. Any delay will increase the likelihood that a consumer assigned a recycled telephone number will receive unwanted text messages intended for the

number's prior user, at least for a limited period of time while the reassignment is being reported by the wireless carrier and a caller's lists are being updated to reflect the reassignment. In other words, if reporting occurs at the time a telephone number is made available or reassigned, it is unlikely to provide sufficient time for a service provider to obtain the wireless carrier's report *and* unsubscribe that telephone number from marketing campaigns before unwanted text messages are sent. Reporting disconnects, therefore, is more appropriately tailored to accomplishing the goal that consumers avoid receiving, and businesses avoid sending, unwanted text messages.

Tatango does not believe that it is desirable for a number that is temporarily disconnected, but that can be reactivated by the same user in the future, to be designated by the wireless carriers as disconnected. Reporting temporary disconnects as disconnects, results in consumers being unsubscribed from all previously opted into marketing campaigns, requiring them to complete the opt-in process again after their telephone number is reconnected for all the marketing campaigns they previously had subscribed to. Such a result would impose undue burdens on consumers and would be inconsistent with their reasonable expectations of receiving their desired content once service is restored.

In sum, reporting at the time the number is permanently disconnected, is the most effective time to notify businesses and service providers that a number is no longer associated with the individual that provided consent and that, as a result, no further automated text messages should be made to that telephone number. This reporting methodology is most reasonably tailored to avoid text messages to reassigned numbers.



## **B. Providers to be Covered**

Tatango's platform is not intended to initiate text messages to wireline telephone numbers. As such, Tatango does not take a position on the question of whether the reassignment reporting requirements should extend to wireline carriers, as well as wireless carriers.

Tatango's platform is capable of initiating SMS and MMS messages to a limited amount of VoIP service providers. The enhanced abilities of some VoIP platforms, including the ability to forward messages to a wireless number, and that certain VoIP services obtain telephone numbering resources indirectly, creates a unique challenge. Because VoIP services are not a "one size fits all" situation, it is more challenging to control what may happen when a text message is sent to a number associated with a VoIP service.

While the Commission's NOI suggests that "the TCPA provides greater and unique protections to wireless consumers,"<sup>6</sup> Tatango respectfully submits that this shorthand description masks a more complex and important reality. The heightened consent requirements (i.e. prior express consent) applicable to "wireless" numbers actually apply to calls or texts to any "paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, **or any service for which the called party is charged for the call.**" *See* 47 C.F.R. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii). As shown below, there is case law that reveals that "VoIP services" may be – but are not always – subject to the heightened consent requirements because the called party incurs a charge for the call. Thus, unless and until the Commission clarifies the TCPA's treatment of VoIP services in a more definitive manner, businesses and platform providers may feel compelled to treat VoIP services as though they are subject to the heightened consent requirements. The result is that if the Commission wants to

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<sup>6</sup> NOI, ¶ 12.

fully address the problems created by the one-call safe harbor, reporting VoIP number disconnects is also a necessity.

A survey of that developing case law helps to make this point:

- A 2013 decision from the United States District Court for the District of Maryland granted plaintiff's summary judgment against a party that used an ATDS to make calls to a phone number assigned to a VoIP service. According to the court, summary judgment was appropriate because there was "no dispute" that the defendant had called the phone number without prior express consent and that the plaintiff was charged for the incoming calls by his VoIP service provider. *Lynn v. Monarch Recovery Mgmt., Inc.*, Civil No. WDQ-11-2824 (D. Md. Mar. 25, 2013). The Fourth Circuit affirmed the district court's order in an unpublished and non-binding opinion where it "reject[ed] Monarch's attempt to escape the clear breadth of the call-charged provision. . . ." *Lynn v. Monarch Recovery Mgmt., Inc.*, No. 13-2358 (4th Cir. Oct. 17, 2014).
- In 2015, the United States District Court for District Court of Connecticut ruled that the call-charged provision of the TCPA did not apply to calls made to a plaintiff who utilized a VoIP service that enabled him to simultaneously answer the call on a landline or his mobile phone. First, the court concluded that the plaintiff "produced no evidence that he was charged for calls to his [VoIP] line," and that, as a result, his claim under the "call-charged provision" failed for lack of evidence. Next, however, the court concluded that while there was "little caselaw on how VoIP services fit into" the TCPA, "there is no apparent conceivable reason on the record why the use of a VoIP number to connect to a cell phone

should be treated differently from a direct call to a cell phone,” at least where the caller is aware that the consumer may answer the call on his mobile phone.

Therefore, according to this court, if a customer’s VoIP service is set up to cause multiple phones to ring, prior express consent is required before using an ATDS. *Ghawi v. Law Offices Howard Lee Schiff, P.C.*, Civil No. 3:13-cv-115 (D. Conn. Nov. 10, 2015).

- In 2016, the United States District Court for District Court of Massachusetts declined to grant defendant’s motion for judgment on the pleadings, rejecting an argument that the TCPA did not extend to VoIP services. The court concluded that unless there is “no evidence that the called party was charged for the call, courts generally view VoIP services as a protected technology under the TCPA.” In this case, Plaintiff alleged that he incurred a charge for the calls made to his VoIP service. *Jones v. Experian Info. Sols.*, Civil No. 14-10218-GAO (D. Mass. July 19, 2016).

While none of these cases represent published, binding opinions, they do reveal that courts may, under 47 C.F.R. § 227(b)(1)(A)(iii) and 47 C.F.R. § 64.1200(a)(1)(iii), treat VoIP services in a manner identical to wireless services. Thus, if a consumer establishes that she incurred a charge for incoming calls made to her VoIP service, or if that service caused the call to be answerable on her mobile phone, then potential liability may attach for use of an ATDS without prior express written consent. For this reason, Tatango urges the Commission to require reporting by VoIP Service Providers.

### **C. Indirect Assignment**

With regard to indirect assignment of telephone numbers, Tatango submits that the Commission should impose the reporting requirement on the entity obtaining the numbers from NANPA, consistent with current number utilization reporting requirements. However, Tatango also believes that the Commission should provide flexibility for the parties to those relationships to contractually delegate those reporting requirements to the VoIP Service Provider utilizing the phone numbers. In certain circumstances, particularly for larger VoIP Service Providers, it may be more efficient and less costly for the VoIP Service Provider to directly report when a number utilized on its service has been disconnected, rather than requiring that information be passed to another entity for reporting. Thus, Tatango believes that the Commission should impose the reporting requirements on the entity obtaining the numbers, while allowing the duty to be delegated to a willing VoIP Service Provider.

### **D. Costs and Benefits**

Tatango agrees with the Commission's assertion that requiring comprehensive reporting of disconnected telephone numbers will greatly benefit both consumers and business sending text messages.<sup>7</sup> Consumers will benefit not only from reducing unintended text messages, but also benefit financially by not having to pay their wireless carrier for those unwanted text messages. Businesses sending text messages to consumers will also benefit, as they'll have a reliable method to ensure that they only send text messages to consumers that have consented to receiving them, reducing the likelihood of litigation.

To further reduce the potential for wasteful litigation, Tatango urges the Commission to propose and adopt a safe harbor for callers who use a comprehensive and accredited

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<sup>7</sup> See NOI, ¶ 14.

disconnected number resource. With regard to the specifics of the safe harbor, while the Commission's safe harbor for ported numbers<sup>8</sup> provides a useful model, it should not be applied without modification. More specifically, the text of the safe harbor indicates that it is limited to "voice calls." Any safe harbor created to address disconnected numbers should include SMS, MMS and over the top (OTT) messaging, such as RCS messaging.

The safe harbor contained in 47 CFR § 64.1200(c)(2), while closer, is also not fully compatible. The Do-Not-Call list safe harbor imposes training requirements and a requirement to maintain a company-specific DNC list that have no application to the reassigned number context.

With this in mind, Tatango proposes the following adapted version of the safe harbor for the Commission's consideration:

Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made), whether via voice call, SMS, MMS, or other technology, will not be liable for violating the requirements of 47 C.F.R. § 64.1200(a)(1)(iii) if:

(i) It can demonstrate that it has prior express consent to call the number, and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to avoid making calls or sending messages to disconnected telephone numbers;

(B) Removing disconnected numbers based on data from an accredited aggregator. It uses a process to prevent telephone solicitations to any telephone number reported as having been recently disconnected, by verifying, based on data obtained from a Commission-accredited reassigned number aggregator no more than 15 days prior to the date any call is made, that it has removed all numbers listed as recently disconnected, and maintains records documenting this process.

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<sup>8</sup> 47 CFR § 64.1200(a)(1)(iv).

Tatango believes that this safe harbor includes the necessary elements to meet the Commission's objective of protecting consumers, without imposing unnecessary burdens on wireless carriers, platform providers, or callers.

### **III. REPORTING ALTERNATIVES**

#### **A. The Commission Should Propose Rules that Retain the Role of Aggregators**

In the NOI, the Commission proposes a series of alternative mechanisms that could be used for collecting number reassignments, including (1) reporting to an FCC-established database, (2) reporting to number aggregators and robocallers, (3) requiring carriers to operate a queryable database, or (4) requiring carriers to provide public reports.

In light of the existing efforts already made to address the issue of telephone number reassignments, and because of the inherent benefits of competition, Tatango urges the Commission to propose and adopt rules that allow Commission-accredited aggregators to access reports from wireless carriers and make the aggregated data available to robocallers and platform providers, such as Tatango. This approach will allow data aggregators to (1) benefit from the significant investment already made towards creating comprehensive disconnect databases, (2) avoid creating a monopoly service provider, and (3) help promote continued innovation.

In order to ensure that any safe harbor is matched with increased accuracy, the Commission should consider creating an accreditation process for aggregators and apply any safe harbor only to companies that obtain telephone number disconnect data from an accredited aggregator. The Commission has done something similar in the context of approved testing laboratories that are empowered to certify that manufactured devices meet the Commission's RF emission standards and that process has allowed multiple companies to compete for business, while maintaining precision. Tatango submits that a similar market-based approach will promote

innovation and ensure that appropriate incentives remain in place to keep costs for obtaining the telephone number-disconnect data in check.

**B. The Other Alternatives Are Inferior**

Tatango discourages the Commission from creating an FCC-established database. Creating a monopoly provider for handling local number portability was necessary and appropriate for telecommunications networks to be operable and properly route a call after a number is ported to a new carrier. No similar issue is present here, where edge users that initiate text messages merely need to know whether or not to remove a consumer from their contact lists. For this reason, Tatango is unable to envision a compelling reason for the Commission to create a government-sanctioned monopoly. Rather, consistent with a pro-competitive telecommunications market, the Commission should allow companies that have already been working hard to create solutions to the challenge created by the 2015 TCPA Order to compete to provide aggregated data services to businesses, robocallers, and platform providers across the country.

The remaining options offered by the Commission, including requiring each carrier to provide a queryable database or issue public reports, are unlikely to yield the desired result of ensuring that callers have the tools available to avoid sending text messages to reassigned numbers. These piecemeal approaches are far more likely to result in a particular robocaller or telemarketer not obtaining a full and comprehensive list of disconnected numbers. Accredited aggregators would undertake the effort of ensuring that they provide a comprehensive solution, and an accreditation process would allow the Commission to verify that an aggregator obtains data from all relevant wireless carriers.

#### **IV. ADDITIONAL MATTERS RAISED BY THE NOI**

##### **A. Compensation for Voice Service Providers**

Many voice providers are already making information regarding number disconnects available to aggregators and the Commission should not disturb that process. To the extent that wireless carriers are compensated for providing this information, the compensation should be established pursuant to commercial contracts. The Commission should require all wireless carriers to provide the data on a non-discriminatory basis to any accredited aggregator in order to prevent larger wireless carriers from extracting price premiums or creating a *de facto* monopoly provider by refusing to provide the data except to a single entity.

##### **B. Format of Reassigned Number Information**

At a minimum, Tatango encourages the Commission to require wireless carriers to provide the data in a structured, consistent file type, such as a CSV or similar file type, which makes the information more easily accessible and useable without imposing any additional costs on the wireless carriers providing the data, or the platform software provider processing the data.

Tatango also encourages the Commission to avoid imposing any rules that would prohibit aggregators from negotiating to obtain data from wireless carriers through API or other automated processes. While it is unnecessary to impose an obligation on wireless carriers to provide an enhanced service, aggregators should be permitted to contract with wireless carriers to obtain services that may make the process of aggregating data more efficient and cost effective.

##### **C. Frequency of Updates**

Tatango believes that the frequency of updates should be dependent on the frequency with which a particular carrier reassigns numbers to new users. For example, carriers like AT&T



and T-Mobile that put numbers back in service after only two days of aging, should be required to provide daily reports on numbers that are disconnected. Daily reporting would ensure that an aggregator and its customers have time to process the disconnects before the number has been returned to service.

Many wireless carriers age numbers for a much longer period of time. For those carriers, the Commission should not require reporting to occur as frequently. Rather, for any carrier that ages numbers for at least 45 days, the Commission should allow reporting to occur on a monthly basis, rather than a daily basis. This would appropriately balance the need of aggregators to ensure that the data is available in a timely fashion, with the Commission's reasonable desire to avoid imposing undue burdens on smaller wireless carriers.

**D. Tracking Access to Reassigned Number Information**

Tatango does not foresee a need for the Commission to impose specific rules requiring aggregators to track how information regarding disconnected numbers is accessed. To the extent that the Commission creates a safe harbor, the safe harbor will impose an obligation on the party seeking its protections to prove that it cross-referenced the list of disconnected telephone numbers before sending the text message in question. This obligation will provide sufficient incentive for the aggregator and/or robocaller to maintain records regarding who accesses the data and when. No further Commission rule appears necessary.

**E. Fees for Access to Reassigned Number Data**

Tatango submits that allowing accredited aggregators to assemble and sell access to disconnected numbering information on a commercial basis is the best way to avoid having costs undermine the ability of robocallers, including schools and other nonprofit organizations, to obtain the information. Because Tatango envisions a competitive, rather than a monopolistic

market, it does not encourage the Commission to adopt rules restricting the ability of aggregators to adapt and respond to market conditions in real time and to provide discounts and incentives to attract and retain customers.

**F. CPNI and Eligibility to Access Reassigned Number Information**

Tatango believes the Commission should declare that the fact a person has discontinued using a telecommunications service is not protected by the Commission's CPNI rules. The CPNI rules are intended to protect a consumer's privacy, including information regarding the services that she subscribes to. However, there is no reason to believe that the consumer has an interest in protecting the fact that she *stopped* subscribing to whatever service she previously acquired. For this reason, Tatango does not believe that it is necessary for the Commission to require aggregators to verify that they will only use disconnected number information for purposes of complying with the TCPA.

**CONCLUSION**

Tatango appreciates the Commission's interest in finding a resolution to the problem of reassigned telephone numbers, which has contributed to the needless proliferation of TCPA litigation since the FCC's 2015 TCPA Order. Tatango looks forward to cooperating with the Commission in its search for commonsense solutions and encourages the Commission to act expeditiously. Tatango hopes that the Commission will implement rules that are consistent with a competitive telecommunications landscape, rather than picking winners and losers by selecting a single database administrator. In either case, however, the Commission's rules should include a safe harbor for companies that scrub their robocalling and text message contact lists using data provided by an authorized source.

Sincerely,



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