

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Toll Free Assignment Modernization)	WC Docket No. 17-192
)	
Toll Free Service Access Codes)	CC Docket No. 95-155

**REPLY COMMENTS OF
1-800 CONTACTS, INC.**

1-800 CONTACTS, Inc. (“1-800 CONTACTS”) hereby responds to the comments that were filed in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) regarding the assignment process for future toll free numbers, including the release of the new 833 toll free code.

Nearly all the parties that filed comments in this proceeding opposed the use of an auction to distribute toll free telephone numbers. Their reasons were varied and persuasive.

Multiple parties concurred with 1-800 CONTACTS that the use of an auction to assign toll free numbers that may be protected by trademark law would conflict with the statutory requirements of the Lanham Act. As explained by Network Telephone Services Inc., “[a] private sector party has rights in an established or recognized vanity toll-free telephone number” which “constitutes a valuable business asset that is recognized by a company’s customers.”¹ M&S Telecom Services also explained “when existing subscribers to a series of toll free numbers demonstrate that those number series have been supported by many years of investments, such

¹ Comments of Network Telephone Services, Inc., WC Docket No. 17-192 and CC Docket No. 95-155, at 2 (Nov. 13, 2017).

subscribers should have a right to a new series number that match.”² Other parties further explained that businesses that “demonstrate a rational reason for specific 833 numbers should be given priority over the ‘highest bidders’ or other intermediaries who would re-allocate them for enormous profit.”³ Absent such a right of first refusal for trademark holders, Tellnet Communications argued that the use of an auction to distributed trademark-protected toll free numbers would make the Commission “complicit” in the trademark civil lawsuits that would inevitably follow.⁴ Instead, M&S Telecom urged the Commission to permit trademark holders the opportunity to secure confusingly similar numbers in new toll free codes, in order to ensure that any auction that is held does not allow “bad actors to undermine existing subscriber investments.”⁵

Other parties, such as major carriers and Responsible Organizations, questioned whether there would be any appreciable benefit from the use of an auction and whether those benefits would justify the substantial administrative and organizational costs involved in converting to an auction.⁶ CenturyLink, for example, observed that using an auction to assign toll-free numbers

² Brief Comments of M&S Telecom Services, WC Docket No. 17-192 and CC Docket No. 95-155, at 1 (Nov. 14, 2017).

³ Comments of Midwest Asset Management, Inc., WC Docket No. 17-192 and CC Docket No. 95-155 (Nov. 14, 2017).

⁴ Brief Comments of Tellnet Communications Inc., WC Docket No. 17-192 and CC Docket No. 95-155, at 1 (Nov. 13, 2017).

⁵ *Id.*

⁶ *See, e.g.,* Comments of Network Telephone Services, Inc., WC Docket No. 17-192 and CC Docket No. 95-155, at 1 (Nov. 13, 2017) (arguing “[a]ny benefit that will be derived in introducing an auction element to the number assignment process will be more than countered by the auction’s costs and the red tape involved in having the FCC implement and administer an auction process for a small number of toll-free number assignments”); Comments of CSF Corp. LLC, WC Docket No. 17-192 and CC Docket No. 95-155, at 2 (Nov. 13, 2017) (observing that moving to an auction process may require every Responsible Organization “to set up an entirely new infrastructure and

“would create more inefficiencies than it would resolve.”⁷ Verizon explained this point further, describing the significant costs involved in converting to an auction, observing

Verizon, for example, would need to, at a minimum, update all of its systems used to control the use and assignment of toll free numbers for retail and commercial customers. These updates would prompt at minimum hundreds of thousands – possibly millions – of dollars in upfront IT costs that include project management, determining the requirements needed, design, coding, testing and deployment across multiple systems.⁸

The Alliance for Telecommunications Industry Solutions (“ATIS”) 800 Service Management System (SMS/800) Number Administration Committee (“ATIS SNAC”) also opposed an auction, observing that the approximately 17 thousand mutually exclusive numbers that are being considered for an auction represents only about 0.2% of the available pool of 833 numbers.⁹ ATIS SNAC explained that, “[g]iven the relatively small number of mutually exclusive requests, ATIS SNAC does not believe that the potential disruption to the toll free industry associated with the introduction of auctions is warranted.”¹⁰ Instead, ATIS SNAC observed that “the existing assignment methodology effectively encourages broad utilization of this resource as evidenced by the continued growth in the quantity of toll free numbers in circulation.”¹¹

cost basis to accommodate auctions without any clear rationale or in response to any clear significant issues today”).

⁷ Comments of CenturyLink, Inc., WC Docket No. 17-192 and CC Docket No. 95-155 (Nov. 14, 2017).

⁸ Comments of Verizon, WC Docket No. 17-192 and CC Docket No. 95-155, at 3 (Nov. 13, 2017).

⁹ See Comments of The Alliance for Telecommunications Industry Solutions, WC Docket No. 17-192 and CC Docket No. 95-155, at 3 (Nov. 13, 2017).

¹⁰ *Id.*

¹¹ *Id.*

Many commenters also argued that the use of an auction would not satisfy the Commission's statutory requirement to make "numbers available on an equitable basis"¹² because it would likely preclude small startups and individuals from securing favorable numbering resources.¹³ For example, one small business that uses toll free numbers, Comet Media Inc., explained that "[t]he margins on toll free numbers is very small and moving to an auction would drive costs even higher and make the business costs prohibitive."¹⁴ ATIS SNAC further explained, "toll free auctions would likely favor larger, wealthier RespOrgs/subscribers, could put smaller RespOrgs at risk, and may unintentionally allow RespOrgs/subscribers with deep pockets to hoard and warehouse numbers."¹⁵

Even a party that expressed support for the auction, Vanity International, acknowledged that "imposing an auction on the public would defeat the statutory mandate to make '*numbers available on an equitable basis*,' as only well-funded corporations and the well-heeled need apply."¹⁶ Vanity International also argued that the Commission's auction proposal will accelerate

¹² 47 U.S.C. § 251(e)(1).

¹³ See Comments of Advanced Communications and Technology Infrastructure Services, NA, WC Docket No. 17-192 and CC Docket No. 95-155 (Nov. 13, 2017) (arguing that an auction may be inequitable because "the ability to pay is often a major, if not the controlling factor in successful bids"); *CenturyLink Comments* at 3 (observing that auctions "can create inequities by generally favoring larger entities with deep pockets and greater access to capital").

¹⁴ Comments of Comet Media Inc., WC Docket No. 17-192 and CC Docket No. 95-155 (Nov. 13, 2017).

¹⁵ Comments of The Alliance for Telecommunications Industry Solutions, WC Docket No. 17-192 and CC Docket No. 95-155, at 3 (Nov. 13, 2017).

¹⁶ *Ex Parte* Letter from Loren Stocker, Vanity International, to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: *Ex Parte* Comments of ATFP, WC Docket No. 17-192 and CC Docket No. 95-155, at 3 (Sept. 1, 2017) (*emphasis in original*).

the depletion of toll free telephone numbers, explaining that the publicity regarding the Commission's rulemaking process "may cause a *run on the bank* of available numbers."¹⁷

Many commenters also opposed the Commission's proposal to sanction an open secondary market in toll free number resources, arguing that "it is very clear that the introduction of a secondary market for toll free numbers would not be beneficial as it most certainly would increase hoarding or warehousing."¹⁸ As a result, lifting the restrictions on brokering, warehousing and hoarding "will strain the available numbers in the spare pool – which, in turn, would expedite the exhaust of available numbers and necessitate yet another NPA opening."¹⁹ CenturyLink concurred with this position, observing that, "[b]ecause numbers are a resource with limited supply, it is especially concerning to encourage their overuse and inefficiency by ascribing a value to them in a secondary marketplace."²⁰ Instead, ATIS SNAC argued that the Commission should "enhance its enforcement of the toll free rules" prohibiting warehousing and hoarding, noting that such enforcement could eliminate "some of the existing challenges associated with the existing assignment mechanism."²¹

Wide support was expressed for maintaining the current distribution system combined with heighten enforcement of warehousing and hoarding prohibitions. Although not perfect, the existing system satisfies the statutory requirement to manage numbering resources in an equitable manner. As Verizon explained "the first-come, first-served process for obtaining toll free numbers

¹⁷ *Id.* (emphasis in original).

¹⁸ *ATIS SNAC Comments* at 5.

¹⁹ *Verizon Comments* at 7.

²⁰ *CenturyLink Comments* at 4.

²¹ *ATIS SNAC Comments* at 7.

has worked well for customers over 15 years.”²² CenturyLink also argued that “[t]he existing methodology, along with the supporting rules, together create a comprehensive framework that promotes equitable access to and use of numbering resources, while protecting against inefficiencies that attempt to game the system.”²³

In fact, the only parties that seem to support an auction (other than an auctioneer²⁴) appear to be existing and aspiring speculators in toll free telephone numbers. For example, Vanity International filed comments and reply comments favoring of the Commission’s proposal.²⁵ Vanity International represents itself as “the Association of Toll Free Professionals,” but 1-800 CONTACTS is unaware of any such organizations. Instead, Vanity International makes its business approach very clear on its website “TollFreeMarket.com” where it describes itself as “The #1 Trusted Source for Toll-Free/Local Numbers and Internet Domains.”²⁶ Vanity International is a RespOrg that is already marketing itself to potential auction participants, asserting

We have an innovative and comprehensive strategy based on the latest, April 21, 2017 ruling by the FCC. If you submit an early request with us, we'll strategically submit numbers in the Pre-Assignment round on your behalf and guarantee your requests are unique across the Association of Toll-Free Professionals, vanity

²² *Verizon Comments* at 1.

²³ *CenturyLink Comments* at 2.

²⁴ *See, e.g., Comments of Power Auctions LLC*, WC Docket No. 17-192 and CC Docket No. 95-155, at 1 (Nov. 13, 2017).

²⁵ *See Reply Comments of ATFP*, WC Docket No. 17-192 and CC Docket No. 95-155 (Dec. 7, 2017) (“*Vanity International Reply Comments*”); *Comments of ATFP*, WC Docket No. 17-192 and CC Docket No. 95-155 (Nov. 14 2017) (“*Vanity International Comments*”).

²⁶ <https://tollfreemarket.com/> (last visited Dec. 7, 2017).

experts that are most likely to be submitting the same numbers as you, or we will advise you to make adjustments.²⁷

Vanity International filed lengthy reply comments seeking to challenge the position of 1-800 CONTACTS that consumers and trademark holders warrant protection from the misuse of confusingly similar toll free telephone numbers.²⁸ In making these arguments, Vanity International appears to misconstrue Congress' primary intent in passing the Lanham Act, which was to prevent consumer confusion.²⁹ Thus, Vanity International's lengthy analogy to private boats in public docks is irrelevant.³⁰ Granted, telephone numbers are a public resource that exist to enable the correct routing of telephone calls. At the same time, the courts have consistently concluded that telephone numbers must be protected under trademark law when it is necessary to prevent consumer confusion.³¹

Vanity International cites to a few cases involving telephone numbers in which courts concluded that consumer confusion did not exist. Such cases, however, do not undercut the legal principle that telephone numbers can be protected under the Lanham Act. For example, in one cited case, a court concluded that the use of a particular toll free number – 1-800 MERCEDES –

²⁷ <https://Tollfreemarket.com/toll-free-833-numbers/> (*last visited* Dec. 7, 2017).

²⁸ See *Vanity International Reply Comments* at unnumbered pages 1-8.

²⁹ See S. Rep. No. 133, 1946, U.S. Code Cong. Serv. 1274, 1276 (explaining that the Lanham Act was intended “[t]o protect trade-marks, to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and goodwill by preventing their diversion from those who have created them to those who have not”).

³⁰ See *Vanity International Reply Comments* at unnumbered pages 3-5.

³¹ See, e.g. *Dial-A-Mattress Franchise Corp. v. Page*, 880 F.2d 675, 678 (2d Cir. 1989) (federal trademark rights recognized in telephone number that spelled MATTRES (628-8737) for retail mattress dealer); *SODIMA v. Int'l Yogurt Co.*, 662 F. Supp. 839, 852-54 (D. Or. 1987) (common law trademark rights recognized in telephone number 800-YO CREAM).

did not result in customer confusion because the accused infringer did not advertise or otherwise promote the alphanumeric translation of the phone number in connection with services that the public would associate with the auto manufacturer Mercedes.³² The court underscored that its “conclusion is bolstered by those cases granting injunctive relief in favor of mark holders and against those who possess vanity phone numbers corresponding to protected marks.”³³

Numerous other cases exist in which the courts have enjoined the advertising or use of a confusingly similar telephone number to prevent customer confusion.³⁴ With respect to toll free telephone numbers, customer confusion can take many forms. For example, if a person seeking to fill a prescription for contact lenses calls a number that is confusingly similar to 1-800 CONTACTS, the customer will likely be confused even if the call is never answered, potentially leading the customer to believe that its contact lens supplier has gone out of business.

Given the public interest importance that Congress placed on preventing consumer confusion through its adoption of the Lanham Act, it is imperative that the Commission further its

³² *Daimlerchrysler AG v. Bloom*, 315 F.3d 932 (8th Cir. 2003) (observing that the appellee’s use of the number did not qualify as “use in commerce” under the Lanham Act, a threshold determination for federal trademark infringement claims).

³³ *Id.* at 939.

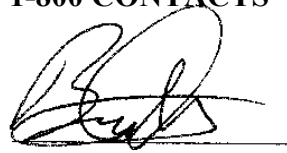
³⁴ See, e.g., *Dial-A-Mattress Franchise Corp. v. Page*, 880 F.2d 675, 678 (2d Cir. 1989) (prohibiting use of 1-800-MATTRESS in light of plaintiff’s use of MATTRESS as a phone number in various other area codes); *American Airlines, Inc. v. A 1-800-A-M-E-R-I-C-A-N Corp.*, 622 F. Supp. 673 (N.D.Ill. 1985) (granting American Airlines injunction against travel agency’s use of telephone number 1-800-263-7422, which defendant promoted as 1-800-AMERICAN); *Kelley Blue Book v. Car-Smarts, Inc.*, 802 F. Supp. 278, 294 (C.D. Cal. 1992) (where defendant’s spelled-out telephone number . . . created a likelihood of confusion with plaintiff’s name, the Court did not prohibit defendant from using the telephone number, but rather enjoined the defendant from advertising [the term BLUE BOOK]); *Chicago World’s Fair - 1992 Corp. v. The 1992 Chicago World’s Fair Comm’n*, Civ. No. 83 C 3424 (N.D.Ill. Aug. 16, 1983) (protecting use of telephone number 444-1992 against use of telephone number 434-1992 in context where “1992” had special significance as a source identifier).

own public interest mandate by refraining from adopting any distribution process for toll free telephone numbers that could allow trademark-protected telephone numbers to be acquired by bad actors. Instead, The Commission should replicate the measures that are employed with respect to other intellectual property rights by employing a right of first refusal process for trademark holders to secure confusingly similar toll free telephone numbers in the 833 and other toll free codes that are protected by federal trademark law.

Respectfully submitted,

1-800 CONTACTS

By:



Cindy Williams
General Counsel
1-800 CONTACTS, Inc.
261 W. Data Drive
Draper, Utah 84020

Bruce A. Olcott
Susan M. Kayser
Allison E. Prevatt
Jones Day
51 Louisiana Ave. NW
Washington, D.C. 20001
(202) 879-3630

Its Attorneys

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