

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

Petition of United Healthcare Services, Inc., for  
Expedited Declaratory Ruling.

CG Docket No. 02-278

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278  
RM 11712

**Supplemental Comments of Robert Biggerstaff on the Petition for Expedited  
Declaratory Ruling filed by United Healthcare Services, Inc.<sup>1</sup>**

**Supplemental Comments of Robert Biggerstaff on the Petitions regarding “wrong  
number” calls to wireless phone numbers.**

There are multiple petitions pending before the Commission that regard the issues of what constitutes an ATDS, and of calls made using an ATDS or prerecorded messages to wireless numbers.

Some of the industry comments claim there may be callers who sincerely want to comply with the existing rules but believe the steps necessary to achieve proper TCPA compliance are too burdensome. However the comments of consumers and simple statistics, make clear there are **large numbers** of these wrong number calls, and there is

---

<sup>1</sup> *United Healthcare Services, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Jan. 16, 2014) (*Petition*).

widespread frustration by innocent consumers receiving these calls to their cell phones, in no small part because callers seem to not give proper consideration to the prospect that they might call a wrong number (and thus do not have a proper response to such an event) and that *the calls continue even after the consumers informs the caller they have reached a wrong number*.

Wrong number calls can (sometimes) happen without “fault” of the caller, but more often are caused by lack of practical and prudent procedures. If every caller who accidentally reached a wrong number was courteous, apologized for the wrong number call, and promptly stopped the calls, most consumers would be satisfied—at least if the call was not charged to them (i.e. free to end user calls and messages (“FTEU”)).

The reality is that many callers using an ATDS, prerecorded calls, and text messages are not prepared to code a call as a “wrong number” and don’t know how to handle it. Many others simply “chose” not to believe they have reached a wrong number (or don’t want to believe it) and continue the calls despite the protestations of the called party.

Some industry filers have asked for a “safe harbor” for wrong number calls to wireless phones, similar to the one created for ported wireless numbers. What has been missing from the discussion, however, is a set of sound principles that should guide the development of any safe harbor or exemptions.

Although I do not believe a safe harbor is warranted, to the extent one is entertained, I have based a proposed safe harbor on four foundational principles:

1. Express consent for calls to a wireless phone number, once granted by a consumer, may be unilaterally revoked by the consumer at any time.
2. Reassigned number are a fact of life. Consumers who receive a new wireless number should expect a few wrong number calls may come, but businesses relying on express consent to call wireless numbers must also expect they may reach some wrong numbers too, so training and procedures must properly

anticipate and handle wrong number calls and effective policies to minimize such calls must be used.

3. Recipients of wrong number calls have a right to expect businesses that are told they have called a wrong number, to efficiently and promptly stop future calls and texts, and for the business to properly identify itself so the recipient can accurately identify any subsequent calls from or on behalf of the same business.
4. Consumers should have a right to not provide a phone number to a business for making automated or prerecorded calls and texts, and that a business cannot claim express consent was obtained to call or text any phone number that was not provided directly to the business by the consumer.

As has become clear in the plethora of recent petitions regarding the Commission's administration of the TCPA, many issues raised by these petitions are interrelated, and a particular resolution of one petition could have unintended consequences in other parts of the TCPA.

A significant number of petitions regard calls made to wireless telephone numbers, and in particular, the "reassigned number" issue. Some address only text messages, some prerecorded calls, and still others address the term "automated telephone dialing system." Still others are concerned only with non-solicitation messages, while others treat solicitation and nonsolicitation messages equally. Some seek exemptions while others seek only interpretive guidance. Almost all at least touch on the issue of reassigned numbers.

When viewed as a whole, I believe this body of petitions can be distilled down to variations of two main issues that are strongly intertwined:

- What constitutes use of an ATDS that violates the TCPA; and
- Liability for calls/messages to reassigned numbers.

I also believe that addressing the ATDS issue first, will greatly clarify the issue of reassigned numbers because permitting certain uses of autodialing technology to call cell phones, will largely resolve key facets in the latter issue of reassigned numbers.

Petitioner United Healthcare, and others, asks the Commission to declare that parties are not liable under the TCPA for “informational, non-telemarketing calls, especially healthcare-related calls, to telephone numbers that have been reassigned without the caller’s knowledge—as long as the caller previously obtained ‘prior express consent’ to place calls to that specific telephone number.”<sup>2</sup> The proposed safe harbor described below does precisely that, meeting all three of the stated criteria (non-telemarketing calls; caller had no knowledge of the reassignment; and express consent for calls to that specific number was previously valid). The proposed safe harbor is discussed later in more detail.

### **Computer-based dialers using direct human intervention are permitted**

The Commission’s existing guidance on what constitutes an ATDS is sound. Any device that has the capacity, either alone or when coupled with other hardware or software, to dial from a list of numbers, by automatically proceeding through the phone numbers on that list either sequentially or randomly, is an ATDS.

However, the Commission has long recognized a basic tenant of the TCPA, that it does not restrict certain forms of computer-aided dialing such as speed-dialing. The distinction is that speed-dialing one number at a time or dialing a number by selecting it from an addressbook entry one at a time, is that the device does not make multiple calls proceeding through a list. Each individual call is launched with a separate act of direct “human intervention.” The “human intervention” element has been part of the Commission’s interpretation of the TCPA for over a decade and is a simple and cogent bright-line test.<sup>3</sup> In short, the dialer is an ATDS, but using it with direct human intervention

---

<sup>2</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition For Expedited Declaratory Ruling from United Healthcare Services, Inc.*, DA 14-149, at 1-2 (2014) citing *Petition*, at 8.

<sup>3</sup> *See, e.g., Robert Biggerstaff, Notice of Ex Parte Presentation*, CG Docket No. 02-278 at 2-5 (dated May 2, 2014); *Comments of Noble Systems*, at 6, dated May 7, 2014.

to dial each call is using an ATDS in a way that is not violative of the TCPA. As suggested in other comments, the Commission should make this clearer by identifying the direct human intervention test as an express exemption pursuant to §227(b)(2)(C).

In the world of dialing technology, human intervention dialing one number at a time from a list of numbers is generally known as “agent-initiated preview mode dialing.” However, other forms of preview dialing that dial multiple numbers at once or without human intervention would still be violative. It offers the benefit of reduced calling errors due to misdialed numbers along with automatic recordkeeping of calls, while not resulting in abandons, dead air, or hangup calls to consumers because the call is not dialed until the live agent who intends to talk to the consumer clicks a button to dial that consumer’s number. In short, callers can have the efficiency of computer-based dialing over hand-dialing, while consumers are protected from the abuses of dead air and abandoned hang-up calls, and dialers cannot “run amok” and dial multiple numbers without direct human intervention.

Express approval of agent-initiated preview dialing as an exemption under §227(b)(3)(C) is important to the resolution of the “reassigned number” issue because it gives businesses and effective computer-based dialing ability that can be used both to obtain and confirm express consent, and an efficient alternative method of calling cell phones absent express consent.

**Contours of a safe harbor for calls to reassigned wireless numbers.**

As a threshold issue, I do not believe a safe harbor for calls to reassigned wireless numbers is actually necessary. This is particularly true since callers do not have to “dial manually” to satisfy the TCPA, but can use agent-initiated preview mode dialing.

Furthermore, the industry-based solutions (Neustar) now cover 95% of reassigned numbers<sup>4</sup> and are improving. If all carriers were required to report reassignments in a timely fashion, the issue of completeness and coverage of Neustar-like services would be moot.

But if the Commission is of a mind to explore a limited safe harbor for calls to reassigned wireless numbers in the interim, I propose the following contours of a safe harbor for calls made to wireless telephone numbers that are made with an ATDS or that deliver a message using an artificial or prerecorded voice that are made to a reassigned wireless number:

1. Calls must be made to an intended recipient from whom the caller obtained valid express consent to make an autodialed call or deliver a message using an artificial or prerecorded voice; and
2. Calls must be made to a number provided directly to the caller by the intended recipient of the call; and
3. The caller must have obtained positive confirmation of express consent for that particular phone number as reaching that intended recipient when it obtained that number from the intended recipient; and
4. The caller must use an approved service for identifying reassigned phone numbers at the time of the call, and the number called must not be identified by the approved service within the prior 7 days as having been reassigned subsequent to the date the caller obtained that number from the intended recipient; and
5. Callers must respect any request, including one made verbally, for calls to be stopped. If the answering party indicates that the caller has reached a wrong number, that must be treated as revocation of consent for calls and messages to that number.
6. There must be an automated opt-out on all artificial or prerecorded voice calls and texts..
7. There must be accurate identification of the caller.

---

<sup>4</sup> According to documents circulated by Neustar as of October 22, 2014.

8. Applies only for non-solicitation calls.
9. Applies only for FTEU calls.

I will discuss each principle in turn.

**1. *Calls must be made to an intended recipient from which the caller obtained valid express consent to make an autodialed call or deliver a message using an artificial or prerecorded voice; and***

Obviously the safe harbor would only apply if the call was permitted by express consent had the phone number had not been reassigned. If valid express consent was not obtained to call the intended recipient at that number, than a call to that number is prohibited. Consistent with other provisions of the Commission and FTC rules, express consent extracted as a condition of doing business, or without meaningful disclosures of what is being consented to (ie. Autodialed or prerecorded calls or text messages), is not valid.

**2. *Calls must be made to a number provided directly to the caller by the intended recipient of the call; and***

There is a vile and abusive practice of some businesses to attempt to acquire other phone numbers for a consumer, when that consumer has expressly chosen not to give another number to that business. Even if a consumer has given one phone number to a business and expressly consented to autodialed or prerecorded calls to that number, a business should not be allowed to make such calls to some other number.

**3. *The caller must have obtained positive confirmation of express consent for that particular phone number as reaching that intended recipient when it obtained that number from the intended recipient; and***

As explained in my comments on the CBA Petition<sup>5</sup> there is a serious problem where 1) phone numbers given by a consumer are entered incorrectly into the business's calling

---

<sup>5</sup> Reply Comments of Robert Biggerstaff on the CBA Petition at 5-6 (dated Dec. 1, 2014) (citing illustrations of wrong numbers entered into dialing databases by businesses).

database and 2) a business's own employees enter intentionally false numbers. A third issue arises due to some people that give an incorrect phone number to the business in the first place, either by accident or intentionally. A business that wants to use autodialers or robocalls to cell phones should take the minimal step of making the first call with a live person to confirm they have the right number and that the intended recipient can indeed be reached at that number. Indeed, this simple verification method was widely employed at my suggestion by my clients in the past, and regularly caught incorrect numbers from going into the customer databases.

Alternatively, and consistent with the Commission's handling of the CAA Petition, a business could be permitted to send one, and only one, text message to that cell phone number within 10 days of the business acquiring that phone number from the consumer, to which the consumer must respond affirmatively in order for express consent to be validated. A negative response, or no response at all, is treated as revoking consent.

***4. The caller must use an approved service for identifying reassigned phone numbers at the time of the call, and the number called must not be identified by the approved service within the prior 7 days as having been reassigned subsequent to the date the caller obtained that number from the intended recipient; and***

While I am familiar with offerings from Neustar and other services that use multiple databases and consumer resources to score the continued validity of express consent for calling any particular number, a simple basic algorithm is available. By simply checking the date of the last reassignment of a phone number, a caller can determine if a reassignment has taken place after the date the caller obtained that number for the intended recipient.<sup>6</sup>

---

<sup>6</sup> Neustar does implement this algorithm, along with additional tests, and encourage them to do so as a value-added service. But for purposes of the safe harbor, the test that checks the of date of last reassignment versus date the phone number was obtained and confirmed from the consumer by the caller must be a mandatory minimum standard which can have value-added services layered in addition.

If so, then the caller must accept that express consent to call that number no longer exists as of the date of reassignment. This algorithm also has the benefit that the reassignment service provider does not need to use the name of the subscriber or user of the wireless number. This follows the same paradigm of the Do-Not-Call Improvement Act of 2007 ("2007 DNCIA").<sup>7</sup>

- 5. Callers must respect any request, including one made verbally, for calls to be stopped. If the answering party indicates that the caller has reached a wrong number or requests the calls stop, that must be treated as revocation of consent for calls and messages to that number.**

This provision is self explanatory. Callers can make live calls if consent is revoked by either a wrong number result or a DNC request. If the claims of industry filers are correct, the legitimate intended recipients like receiving these calls and will not request that they stop.

- 6. There must be an automated opt-out on all artificial or prerecorded voice calls and texts.**

This provision is self explanatory and consistent with the CAA Order. Callers should also maintain records of all opt-out requests to endure if new numbers are erroneously added to a database, scrubbing against opt-out requests will effectively prevent calls to those numbers.

- 7. There must be accurate identification of the caller, including accurate callerID.**

This provision is self explanatory and consistent with the CAA Order. The Commission must make clear that this provision equally applies to all calls and messages, including those made for debt collection.

- 8. Applies only for non-solicitation calls.**

---

<sup>7</sup> Pub. L. No. 110-187, 122 Stat. 633 (2008).

This provision is self explanatory and consistent with the CAA Order.

**9. *Applies only for FTEU calls***

This provision is self explanatory and consistent with the CAA Order.

***Further considerations***

The FCC must also do what it can to facilitate completeness and accuracy of compliance services like Neustar's by ensuring reassignments are promptly reported by carriers and made available to Neustar and that any vendor which wishes to utilize the reassignment data has reasonable access to it. Prompt reporting of reassignment data by carriers (reassignment date and phone number, without name or other personal identifiers) should be seen as a direct benefit to the carriers' subscribers since such reporting should prevent wrong number calls to their subscribers.

Also, the safe harbor should exist only for 3 years, in order to evaluate the effectiveness of the safe harbor and to give Neustar-type services time to mature and respond to the developing needs of the industry and technological changes. This pending sunset will also give the industry a vested interest in the success of Neustar-type services

**Conclusions**

These safe-harbor provisions are the minimum necessary to protect consumers. The benefits of permitting agent-initiated preview mode dialing coupled with these principles of a safe harbor for calls to reassigned cell phone numbers is clear. No one has to make a "manually-dialed call" before an autodialed call to verify consent still exists. As long as the criteria for the safe harbor are met, the call will not be violative. Consent is easy for the consumer to revoke (as it should be) but if consent is withdrawn, businesses can still use efficient computer-based dialing, as long as they use agent-initiated preview mode rather than "predictive" dialers with the intentional hangups and dead-air from predictive dialers that consumers hate (and that cost consumers money).

If the petitioners and industry commenters on this docket are taken at their word, many consumers want to receive these calls and messages on their cell phones. But the same industry filings show that many consumers do not.<sup>8</sup> Neither group of consumers should be ignored.

The industry-based solutions, such as provided by Neustar, are adequate to the task. But if the Commission determines that such services need additional time to mature, a safe harbor ***for a limited time*** that is consistent with these principles is a balanced approach to span the interim until Neustar and other services are deemed adequate.

Respectfully submitted, this the 19<sup>th</sup> day of December, 2014.

*/s/ Robert Biggerstaff*

---

<sup>8</sup> See, e.g., *Comments of Nobel Systems*, at 3-4 (dated Dec. 8, 2014). (“Stated another way, about 40% of consumers do not prefer to be contacted on their mobile telephones concerning fraudulent activity and about two in three consumers do not prefer to receive those notifications by means of text messaging.”)