

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Petition for Expedited Declaratory Ruling of)	
United Healthcare Services, Inc. (“United”))	
)	
)	

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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

To: The Commission

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”)¹ hereby submits these comments in response to the FCC’s request for public comments and in support of the United Healthcare Services, Inc. (“United”) Petition for Expedited Declaratory Ruling in the above captioned proceeding.²

The Telephone Consumer Protection Act (“TCPA”)³ is an important enforcement tool for protecting consumers from annoying and harassing telemarketing calls, and other potential harm, including various types of fraud. CTIA and its members support strong enforcement of the

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization includes Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² United Healthcare Services, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 16, 2014) (“United Petition” or “Petition”); *see also, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from United Healthcare Services, Inc.*, Public Notice, CG Docket No. 02-278, DA 14-149 (rel. Feb. 6, 2014)(“Public Notice”).

³ 47 U.S.C. § 227.

TCPA, and routinely work with federal and state law enforcement agencies to help bring cases against violators - and in some cases, initiate TCPA lawsuits themselves. However, while the Commission should not limit the ability of consumers to hold bad actors accountable for illegal calls, the Commission should grant narrowly tailored relief designed to reduce the current onslaught of frivolous litigation against companies that otherwise act in good faith to comply with both the letter and the spirit of the TCPA.

In addition to the healthcare scenarios, as detailed by United, wireless customers also have demonstrated a desire to receive certain types of communications from their wireless carrier or provider related to things such as data usage alerts, roaming alerts,⁴ bill readiness, shipping and order status information, free service upgrades, and notices of payments received and credits applied, and have benefitted by receiving notifications of service offerings in emergency situations. A recent example of desirable proactive outreach by wireless carriers to wireless customers occurred when typhoon Haiyan hit the Philippines in early November of 2013. As part of the relief effort, several wireless carriers, including the four largest, offered free international calling and texting to and from the Philippines for a period of time after the devastating storm. To ensure that potentially impacted customers could take advantage of the offer, and freely connect with friends, relatives, and relief workers, the carriers needed to quickly and efficiently send automated text message communications to such customers.

⁴ Including the “Bill Shock” alerts endorsed by President Obama (“Far too many Americans know what it’s like to open up their cell-phone bill and be shocked by hundreds or even thousands of dollars in unexpected fees and charges. But we can put an end to that with a simple step: an alert warning consumers that they’re about to hit their limit before fees and charges add up.”)(Oct. 17, 2010).

CTIA supports the United Petition and respectfully urges the Commission to expeditiously clarify that:

- The TCPA and the Commission's rules⁵ do not create liability for callers who make informational and other non-telemarketing calls, using autodialers and prerecorded voices, to wireless numbers for which prior express consent has been obtained, where such wireless numbers have been reassigned to another consumer, particularly if the caller has no knowledge of the reassignment.
- The Commission should also take the additional narrow step of confirming that where a consumer explicitly consents to receive non-telemarketing autodialed or pre-recorded calls, but provides an incorrect number, a caller does not violate the TCPA by calling the number that the consenting consumer provided.

By making these explicit clarifications, the Commission can disincentivize frivolous class action litigation against companies that make every attempt to comply with the TCPA, in good faith, while avoiding any relief that could weaken TCPA enforcement against bad actors. Without explicit guidance from the FCC, especially in today's climate of increasingly frivolous, costly, and expansive lawsuits under the TCPA, companies will likely be discouraged from sending useful and consumer-desirable communications, as described herein and by United, in its Petition.

⁵ 47 C.F.R. § 64.1200.

I. TCPA LIABILITY SHOULD NOT ATTACH WHEN CALLERS, IN GOOD FAITH, MAKE INFORMATIONAL AND OTHER NON-TELEMARKETING CALLS TO WIRELESS NUMBERS FOR WHICH PRIOR EXPRESS CONSENT HAS BEEN OBTAINED, WHERE SUCH NUMBERS HAVE BEEN REASSIGNED WITHOUT THE CALLER’S KNOWLEDGE.

Under the Commission’s rules, it is unlawful to “initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice” to a wireless number.⁶ In the context of informational and other non-telemarketing calls for which prior express consent has already been obtained, there is no incentive for abuse – there is no benefit to the caller to contact anyone but the intended recipient.⁷

As United explained, there is no reasonable means for companies that make informational and other non-telemarketing calls to wireless numbers for which they have obtained prior express consent, to know if such numbers are actually assigned to someone other than the consenting party or if they have been reassigned.⁸ Consumers may provide the wrong number initially, and they are not obligated under the law to notify companies that an initially-provided correct number has been reassigned. And, consumers are not otherwise likely to notify all of the companies with which they have contact of such a reassignment. Additionally, there is no reasonable means for companies to determine when a wireless subscriber allows another

⁶ 47 C.F.R. § 64.1200(a)(1).

⁷ *See also*, United Petition at 2 (describing targeted informational calls for which there is no incentive or benefit in contacting anyone other than the intended recipient). For example, a company seeking to collect a debt has no interest and derives no benefit from contacting someone other than the person who owes the debt.

⁸ *See, e.g.*, United Petition at 3 (noting that there is no single national database regarding reassignments that companies can rely upon for timely information).

person, such as a friend or relative, to use the subscriber's wireless phone (and number) without actually reassigning the number.

Currently, the only way for a company to completely ensure that it does not run afoul of the law is to avoid calling wireless numbers all together. Such a practice is impractical given the increasing number of individuals who rely on their mobile devices as their primary means of communication. For instance, according to a recent Centers for Disease Control and Prevention study, more than one-third of American homes are wireless-only households.⁹

As United described in its Petition, as a result of an unknown reassignment, a caller may reach the wrong consumer, despite having made every reasonable effort to comply with the TCPA and the FCC's rules, including having obtained proper prior express consent.¹⁰ The requested clarification would comport with the FCC's recognition of the challenges related to companies' identifying when a number's status has changed,¹¹ and would also be consistent overall with the FCC's existing TCPA safe harbor for calling numbers that have been recently ported from wireline to wireless service.¹²

⁹ Stephen J. Blumberg, Ph.D. and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2012*, Centers for Disease Control and Prevention (CDC), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.PDF> (last visited Mar. 3, 2014).

¹⁰ United Petition at 2-3.

¹¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004) ("2004 TCPA Order") at ¶¶ 7, 10 (describing the "reasonable opportunity" afforded to "persons, including small businesses" by the Commission's safe harbor for calling numbers recently ported from wireline to wireless service, in light of the information available to industry and disseminated to callers).

¹² See 2004 TCPA Order at ¶¶ 7-13. See also ACA International, Petition for Rulemaking of ACA International, CG Docket No. 02-278 (filed Jan. 31, 2014) ("ACA Petition") at 15-17 (seeking an expansion of the existing TCPA safe harbor for recently ported numbers to extend to wrong number calls).

The Commission has different options for issuing a narrow declaratory ruling confirming that TCPA liability does not attach when callers, in good faith, make informational and other non-telemarketing calls to wireless numbers that have been reassigned. For example, the Commission could declare that “prior express consent” obtained regarding a particular wireless telephone number applies until the caller learns from either the new or old wireless subscriber that the number is incorrect, or that it has been reassigned or informally transferred to another person. Alternatively, the Commission could recognize a good faith exemption for informational and other non-telemarketing calls made where the consenting party provided an incorrect number or where the number provided has been reassigned or informally transferred, until the caller learns of the wrong number or reassignment.

Finally, the Commission could establish a safe harbor by adding a new section 64.1200(a)(v):

A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when, despite the calling party’s good faith efforts, a non-telemarketing call is unknowingly placed to (a) a wireless number which the party providing consent no longer maintains, or (b) to a number for which the called party is charged, such as, for example, a call to a residential line that incurs a separate charge.

II. THE REQUESTED CLARIFICATION IS CONSISTENT WITH CONGRESSIONAL INTENT TO PROTECT CONSUMER PRIVACY.

CTIA supports the important privacy and consumer protection goals underlying the TCPA. Providing explicit clarification that TCPA liability does not attach in the reassignment scenario described by United, when the calling party has acted in good faith, will not undermine those goals and is consistent with Congressional intent in enacting the TCPA. Indeed, Congress did not express any intent to expose callers to TCPA liability when callers, in good faith, make informational and other non-telemarketing calls, using autodialers and prerecorded voices, to

wireless numbers for which prior express consent has been obtained, but where such numbers have been reassigned without the caller's knowledge.

Moreover, because there was no ability to port numbers when the TCPA was enacted in 1991, the statute did not contemplate the problems that can result when a number is ported from a wireline to a wireless carrier.¹³ At that time, the statutory distinction did not pose any problem because it was easy to identify wireless telephone numbers, because wireless carriers assigned numbers from their own allocated 10,000 block(s) of numbers, identifiable via the NPA-NXX. The inability to readily distinguish became an issue after the FCC mandated local number portability (LNP) and allowed customers to port their existing number from a wireline to a wireless carrier ("inter-modal porting").¹⁴ This same issue arises when numbers are ported from one wireless carrier to another – there is no practical way for one carrier to know if a number associated with another carrier has been reassigned to a different subscriber within that other carrier's network. The Number Portability Administration Center (NPAC) data that is currently available only identifies the carrier to which the number is assigned; it does not identify the user associated with the line.¹⁵

¹³ The Commission released the Local Number Portability *First Report and Order* in 1996. Telephone Number Portability, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996).

¹⁴ See e.g., The Commission discusses the history of Wireless Local Number Portability (WLNP) at <http://www.fcc.gov/encyclopedia/wireless-local-number-portability-wlnp> (last visited Feb 14, 2014), including its *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 95-116, FCC 03-284 (Rel. Nov. 10, 2003), which the Commission describes as "Clear[ing] [the] Way for Local Number Portability Between Wireline and Wireless Carriers."

¹⁵ Information regarding the Number Portability Administration Center (NPAC), the data it manages, and permitted uses is available at <http://www.npac.com/>.

As stated above, there is simply no incentive for callers to make informational and other non-telemarketing calls to other than their specific, intended recipient. As the number and expansive nature of TCPA lawsuits, such as the one to which United has been named a defendant, continue to increase, and in light of the costs associated with defending even frivolous actions, it is critical for the FCC to make the requested clarification.¹⁶

III. CONCLUSION

To ensure that consumers continue to receive important, timely information from companies to whom they have provided prior express consent, CTIA joins United in urging the Commission to expeditiously declare that TCPA liability does not attach when callers make informational and other non-telemarketing calls using autodialers and prerecorded voices to wireless numbers for which prior express consent has been obtained where, unbeknownst to the caller the consenting party provided the wrong number or the number has been reassigned or informally transferred to another customer, or would otherwise unknowingly result in a charge.

¹⁶ United Petition at 2-3. *See also* Darren Waggoner, *TCPA Lawsuits Projected to Grow 70 Percent in 2013*, *Collections&CreditRisk*, Dec. 26, 2013, available at <http://www.collectionscreditrisk.com/news/tcpa-lawsuits-projected-to-grow-3016431-1.html> (free registration required)(last accessed Mar. 3, 2014).

Respectfully submitted,
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