

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
United Healthcare Services, Inc. Petition for)	
Declaratory Ruling Regarding Reassigned)	
Wireless Telephone Numbers)	

COMMENTS OF TIME WARNER CABLE INC.

Steven N. Teplitz
Terri B. Natoli
TIME WARNER CABLE INC.
901 F Street, NW
Suite 800
Washington, DC 20004

Matthew A. Brill
Matthew T. Murchison
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Marc Lawrence-Apfelbaum
Julie P. Laine
TIME WARNER CABLE INC.
60 Columbus Circle
New York, NY 10023

Counsel for Time Warner Cable Inc.

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Time Warner Cable Inc. (“TWC”) submits these comments in response to the Public Notice issued on February 6, 2014, in the above-captioned docket.¹

INTRODUCTION AND SUMMARY

TWC appreciates the opportunity to comment in support of the Petition for Declaratory Ruling filed by United Healthcare Services, Inc. (“United Healthcare”). The Petition seeks urgent clarification regarding an issue of growing importance to businesses across the country: the applicability of the Telephone Consumer Protection Act of 1991 (“TCPA”) and the Commission’s implementing rules to certain “autodialed and prerecorded calls to wireless numbers for which valid prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another.”²

TWC strongly supports United Healthcare’s request for a ruling that the restrictions in the TCPA

¹ See Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from United Healthcare Services, Inc.*, CG Docket No. 02-278, DA 14-149 (rel. Feb. 6, 2014).

² Petition for Expedited Declaratory Ruling at 1, *United Healthcare Services, Inc. Petition for Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Jan. 16, 2014) (“Petition”).

and the Commission’s implementing rules do not apply to such calls when made for “informational, non-telemarketing” purposes.³ Moreover, as discussed herein, TWC believes that the considerations raised in United Healthcare’s Petition support a ruling that the TCPA does not apply to such calls when made for *any* purpose, given the substantial inequity of subjecting legitimate businesses to liability for engaging in communications that they believe, reasonably and in good faith, to be consensual and therefore permitted under the TCPA.

As the Commission is undoubtedly aware, the number of TCPA lawsuits has exploded in recent years, as plaintiffs’ lawyers continue to invent new theories of liability that Congress and the Commission never intended to allow. A recent survey of TCPA litigation found that “TCPA suits [were] up a whopping 70 percent” between 2012 and 2013, and that well over a third of the plaintiffs filing TCPA suits during that period were repeat players that “had sued under consumer statutes before.”⁴ A separate study by the U.S. Chamber of Commerce found that, even as the number of TCPA lawsuits has soared in recent years, “[i]t is rare these days to see TCPA litigation brought against its original intended target—abusive telemarketers.”⁵ Instead, the Chamber’s study explains, “essentially every American business, from large to small, now finds itself at risk of having to defend against a TCPA lawsuit alleging statutory damages thousands of

³ *Id.*

⁴ Patrick Lunsford, *TCPA Lawsuits Really Are Growing Compared to FDCPA Claims*, Inside ARM (Oct. 22, 2013), available at <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/>.

⁵ See U.S. Chamber of Commerce, Institute for Legal Reform, *The Juggernaut of TCPA Litigation: Problems with Uncapped Statutory Damages*, at 1 (Oct. 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

times in excess of any conceivable actual ‘damage’ associated with the mere receipt of a phone call.”⁶

TWC has experienced this rising tide of TCPA litigation firsthand, and is facing a growing number of lawsuits targeting communications that TWC has long understood to be permissible under the TCPA and the Commission’s implementing rules. Several of these lawsuits, including at least putative one class action, involve allegations that the plaintiffs received autodialed or prerecorded calls from TWC for billing/collections or service-related purposes, at wireless numbers for which TWC had obtained valid prior express consent but that, without TWC’s knowledge, had since been reassigned to different wireless subscribers. In these lawsuits, as in the suits faced by United Healthcare, plaintiffs’ lawyers argue that TCPA liability attaches to TWC’s calls to reassigned wireless numbers—notwithstanding the prior express consent obtained by TWC and TWC’s resulting reasonable and good-faith belief that it acted in compliance with the TCPA and the Commission’s rules. These suits, along with any copycat suits that inevitably will arise if plaintiffs are successful, threaten to expose TWC to substantial unwarranted liability under the TCPA’s uncapped, \$500-per-violation damages provision.

While TWC believes that the growing abuse of the TCPA and the Commission’s implementing rules by plaintiffs’ lawyers warrants a broader rulemaking proceeding to reexamine and reform the regulatory regime, the Commission can and should take prompt action in response to United Healthcare’s Petition to address the uncertainty regarding the status of reassigned wireless numbers under the TCPA. Specifically, TWC urges the Commission to clarify that the TCPA and the implementing rules do not impose liability for autodialed or prerecorded calls to wireless numbers for which the caller has obtained the necessary prior

⁶ *Id.*

consent, but that are subsequently reassigned without the caller’s knowledge. The Commission should ensure that this relief extends to *all* such calls, as the principal equitable justification for such a ruling—the inherent unfairness of punishing legitimate businesses for engaging in what they justifiably believe to be consensual communications—applies regardless of the purpose of the call. At a bare minimum, the Commission should grant such relief with respect to “informational” and other “non-telemarketing” calls, given the significant public interest benefits and constitutional importance of ensuring that such communications are not unreasonably restricted.

DISCUSSION

I. THE COMMISSION SHOULD MAKE CLEAR THAT THE TCPA AND THE COMMISSION’S IMPLEMENTING RULES DO NOT IMPOSE LIABILITY FOR CALLS TO REASSIGNED WIRELESS NUMBERS

The Commission should issue a ruling making clear that the TCPA and its implementing rules do not impose liability for autodialed or prerecorded calls to wireless numbers for which the caller has obtained the necessary prior consent, but that are subsequently reassigned without the caller’s knowledge, until a reasonable time after the caller has been made aware that the number at issue has been reassigned. The Commission plainly has the authority to grant such relief. The TCPA gives the Commission wide latitude to exempt certain “calls to a telephone number assigned to a cellular telephone service” from the general restrictions on autodialed and prerecorded calls.⁷ Indeed, the Commission had adopted rules allowing autodialed and prerecorded calls to wireless numbers for non-telemarketing purposes when “made with the prior express consent of the called party,”⁸ and allowing such calls for any purpose when “made with

⁷ 47 U.S.C. § 227(b)(2)(C).

⁸ 47 C.F.R. § 64.1200(a)(1).

the prior express written consent of the called party.”⁹ The Commission also has broad authority to “issue a declaratory ruling terminating a controversy or removing uncertainty,”¹⁰ and in light of the significant controversy over the applicability of the TCPA and the Commission’s rules to calls to reassigned wireless numbers, the Commission would have strong grounds to issue the declaratory ruling requested here.

Granting such relief is necessary not only to terminate the controversy surrounding calls to reassigned wireless numbers, but also to avoid the profound inequities that would result from applying the TCPA’s restrictions under these circumstances. As United Healthcare’s Petition correctly points out, businesses cannot know for certain whether the wireless numbers they have on file for their customers have been reassigned, because “[t]here is no public wireless telephone number directory, and individuals may change their phone numbers without notifying callers beforehand.”¹¹ As a result, businesses using autodialers or prerecorded messages “would be exposed to significant class action litigation *regardless* of their efforts” to obtain the necessary consents, and notwithstanding their reasonable, good-faith belief that they are calling parties that have provided such consent.¹² Such an outcome would be inherently unfair, and cannot be what Congress and the Commission intended when establishing this regulatory regime.

The Commission has granted similar relief in analogous circumstances in past—most notably in 2004, when it established a safe harbor from the restrictions on autodialed or prerecorded calls for calls made to wireless numbers that had recently been ported from wireline

⁹ *Id.* § 64.1200(a)(2).

¹⁰ *Id.* § 1.2(a).

¹¹ Petition at 3.

¹² *Id.* at 5 (emphasis added).

service.¹³ Under the safe harbor, a caller cannot be held liable under the TCPA for an autodialed or prerecorded call “made to a wireless number ported from a wireline service within the previous 15 days, provided that number is not already on the national do-not-call registry or the caller's company-specific do-not-call list.”¹⁴ The Commission explained that such relief was designed to “ensure that callers have a reasonable opportunity to comply with our rules while continuing to protect consumer privacy interests,”¹⁵ and that absent such relief, “the statute would demand the impossible” of callers.¹⁶

The same considerations warrant relief here. As noted above, plaintiffs’ lawyers have argued that a caller should be held *strictly liable* for autodialed or prerecorded calls to wireless numbers for which the caller has obtained consent but that have been reassigned *without the caller’s knowledge*. Such a rule would require callers to conform their behavior (or face significant liability) based on facts that are manifestly not in their possession—thus depriving those callers of a “reasonable opportunity to comply” with the Commission’s rules and “demand[ing] the impossible” of callers.¹⁷ In order to provide callers with a reasonable opportunity to comply with the restrictions on autodialers or prerecorded messages for calls to wireless numbers, the Commission should make clear that TCPA liability does not attach to calls

¹³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004).

¹⁴ *Id.* ¶ 1.

¹⁵ *Id.*

¹⁶ *Id.* ¶ 9 (internal quotation marks and citations omitted).

¹⁷ *Id.* ¶¶ 1, 9.

to reassigned wireless numbers until a reasonable time after the caller has been made aware that the number at issue has been reassigned.¹⁸

II. AT A MINIMUM, THE COMMISSION SHOULD CLARIFY THAT INFORMATIONAL, NON-TELEMARKETING CALLS TO REASSIGNED WIRELESS NUMBERS ARE NOT SUBJECT TO TCPA LIABILITY

While TWC believes that the equitable considerations discussed above warrant relief for calls made for *any* purpose, the Commission should, at a minimum, grant such relief with respect to calls made for “informational, non-telemarketing” purposes, as requested in United Healthcare’s Petition.¹⁹ Such calls include not only the “healthcare-related” calls mentioned in the Petition,²⁰ but also calls informing customers of past-due payments, planned service outages, and channel lineup changes, as well as calls made to schedule and confirm service appointments with customers.

As United Healthcare points out, the Commission consistently has taken the position that the TCPA should be interpreted and implemented in a manner that avoids “unnecessarily restrict[ing] consumer access to information communicated through purely informational calls.”²¹ Indeed, the Commission’s *2012 TCPA Order* expressly “acknowledge[s]

¹⁸ Notably, in adopting the 15-day safe harbor period for calls to wireless numbers recently ported from wireline service, the Commission appeared to conclude that 15 days would provide enough time for parties to look up whether the number “appears in Neustar’s ‘Intermodal Ported TN Identification Service’ as a wireless number.” *Id.* ¶ 7. No such centralized directory exists, however, for wireless numbers reassigned to other wireless customers. Accordingly, the “reasonableness” standard articulated herein and in United Healthcare’s Petition is more appropriate in this context than the fixed time period adopted in the wireless-wireline porting context.

¹⁹ *See* Petition at 1.

²⁰ *See id.* at 3.

²¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 21 (2012).

that wireless services offer access to information that consumers find highly desirable” and explains that, as a policy matter, the Commission “do[es] not want to discourage purely informational messages” in the wireless context.²² Such an approach is consistent with the legislative history of the TCPA, which makes clear that the statute was not intended to impede purely informational calls.²³ The Commission’s policy of avoiding unnecessary restrictions on informational calls also comports with the First Amendment; the Supreme Court has long held that, while intermediate scrutiny applies to restrictions on speech that does “no more than propose a commercial transaction,”²⁴ strict scrutiny generally applies to restrictions on noncommercial speech.²⁵

The public interest justifications for the requested declaratory ruling are particularly strong in the context of informational, non-telemarketing calls to reassigned wireless numbers. A growing number of Americans rely *exclusively* on wireless service; according to recent studies, roughly 38 percent of adults in the U.S.—and over 60 percent of adults aged 25 to 29—live in wireless-only households.²⁶ Accordingly, for a large number of TWC’s subscribers, the

²² *Id.* ¶ 29.

²³ *See, e.g.*, 137 Cong. Rec. H1132 (daily ed. Nov. 26, 1991) (statement of Rep. Lent) (“Calls informing a customer that a bill is overdue, or a previously unstocked item is now available at a store are clearly not burdensome, and should not be prohibited.”).

²⁴ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. Pharmacy Bd. v. Va. Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 562 (1980) (setting forth framework for analyzing restrictions on “speech proposing a commercial transaction”).

²⁵ *See Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988); *see also Mattel, Inc. v. MCA Records*, 296 F.3d 894, 906 (9th Cir. 2002) (“If speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.”).

²⁶ *See* Steven Shepard, *Americans Continue to Drop Their Landline Phones*, National Journal, Dec. 18, 2013, available at <http://www.nationaljournal.com/hotline-on-call/americans-continue-to-drop-their-landline-phones-20131218>; Remarks of Sean Lev,

only way TWC can provide important service or billing information over the phone is by using the wireless number that the subscriber has provided to TWC. Such communications often are instrumental in informing subscribers that they have overdue charges and advising them of the prospect of interrupted service (among other adverse consequences of non-payment)—thereby enabling subscribers to take steps to ensure that they remain current with their payments, continue to receive service without disruption, and avoid damaging their credit rating. Similarly, TWC’s use of automated calls to schedule and confirm service appointments benefits its customers significantly, both by allowing customers to book appointments sooner (thus speeding the resolution of any issue with the service) and by enabling TWC to narrow service appointment windows (thus reducing the wait time for customers). A ruling subjecting businesses to significant statutory damages for calls to reassigned wireless numbers would chill TWC’s delivery of these important informational, non-telemarketing messages to its subscribers—and thereby undercut the clear public interest benefits associated with these communications.

