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

DIRECTV, LLC'S COMMENTS IN SUPPORT OF UNITED HEALTHCARE'S PETITION FOR DECLARATORY RULING AND/OR EXPEDITED RULEMAKING

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SUMMARY

In this proceeding, United Healthcare seeks an order from the Commission clarifying that the Telephone Consumer Protection Act of 1991 ("TCPA") does not prohibit autodialed calls to a wireless number for which the calling party has valid prior express consent even when, unbeknownst to the calling party, that wireless number has subsequently been reassigned to a different person. DIRECTV believes that the requested clarification is both an appropriate application of the law and a necessary prophylactic against abusive class action lawsuits, and thus urges the Commission to issue an appropriate declaratory ruling.

DIRECTV, with over 20 million subscribers in the United States, offers 24-hour customer service lines and handles millions of inbound calls monthly from its subscribers, who call in for a wide variety of reasons about their ongoing subscriptions to DIRECTV. Many circumstances can arise in which DIRECTV needs to call its subscribers as well, using modern calling technology to reach out efficiently with important account and service information (such as scheduled technician visits, equipment return reminders, pre-disconnect warnings, rebate reminders, weather-related notifications, debt-related calls, etc.). DIRECTV makes those non-telemarketing calls to telephone numbers its customers have provided. Its Customer Agreement requires each subscriber not only to provide at least one telephone number of her choice at which DIRECTV can contact her, but also to update that telephone number promptly if it changes.

DIRECTV provides easy avenues for a customer to alert DIRECTV if her contact information changes, and encourages customers in various ways to do just that. And yet, there are times when a customer changes phone numbers but does not alert DIRECTV, or when her number is inaccurately provided or recorded, and as a result calls intended for that customer may instead reach a non-customer now assigned the number in DIRECTV's records. One would think that the solution would be easy: the call recipient can simply inform DIRECTV that she is

not a customer, so that the number can be removed from the DIRECTV customer account. DIRECTV has policies and procedures in place to remove reassigned numbers from a customer's account when it learns from a call recipient that the telephone number is not accurate.

However, because of a toxic combination of (1) conflicting judicial decisions applying the TCPA and the Commission's interpretations thereof relating to consent, and (2) the brass ring of uncapped statutory damages under the TCPA, nothing is easy. Instead, every time it places informational or transactional calls to a targeted group of customers, DIRECTV finds itself at risk of nationwide class actions brought by the TCPA plaintiff's bar. These actions seek aggregated statutory damages for any and every call placed to a reassigned cellular phone number, regardless of whether anyone heard the phone ring, answered it, or ever attempted to notify DIRECTV that they were not the customer DIRECTV was expecting to reach. The risks and costs to legitimate businesses, merely for trying to communicate business information to their customers, is neither phantom nor remote. DIRECTV is currently defending two nationwide class action lawsuits brought in California federal courts in which the two named plaintiffs (represented by an army of eight law firms, most of whom are responsible for the majority of TCPA class actions filed across the nation) received non-telemarketing calls on their cellular telephones that were intended for DIRECTV customers and placed to telephone numbers provided by such customers.

The primary purpose of the TCPA was to stop invasive and persistent telemarketing, primarily of the "cold call" kind which ensues when telemarketers use dialing technology to randomly or sequentially dial numbers. It was not designed to punish businesses for placing informational or transactional calls to their customers at customer-provided numbers. Well-intentioned companies such as DIRECTV should be able to dial—without fear of TCPA class

actions—telephone numbers provided by customers for their accounts, including wrong numbers if provided or entered as the result of good faith mistake, because the customer provided consent to dial such numbers by electing that number as her point of contact with the company. Conversely, if and when businesses are alerted to the fact that numbers have been reassigned or are incorrect, they should be required to act within a reasonable time to remove the number from customer account records and call lists. Such a common-sense regime would provide the certainty needed by legitimate businesses without undermining the consumer protections provided by the TCPA.

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INTRODUCTION

Congress enacted the Telephone Consumer Protection Act of 1991 ("TCPA") in order to prevent specific telemarketing and other practices. Over the last two decades, it has been transformed by an active plaintiff's bar into something much more pervasive, threatening significant statutory damages for activities Congress never meant to deter. In this proceeding, United Healthcare Services, Inc. ("United Healthcare") seeks clarification from the Commission that the statute does not apply in one such context: autodialed calls to a wireless number for which the calling party has valid prior express consent but, unbeknownst to the calling party, that wireless number has subsequently been reassigned to a different person. DIRECTV, LLC ("DIRECTV") believes that the requested clarification is both an appropriate application of the law and a necessary prophylactic against abusive class action lawsuits. It would also add that calling incorrect numbers due to erroneous information provided by the customer or recorded by the calling party should not result in liability so long as the calling party acted in good faith

belief that prior consent existed for the informational or transactional call.[1] DIRECTV urges the Commission to issue a declaratory ruling that definitively corroborates these two legal propositions.

DISCUSSION

I. DECLARATORY RULING IS AN APPROPRIATE VEHICLE FOR CLARIFYING THAT CALLS PLACED TO REASSIGNED NUMBERS ARE NOT ACTIONABLE.

United Healthcare has styled its Petition primarily as a request for declaratory ruling, but alternatively as a petition for rulemaking. For the reasons discussed below, DIRECTV submits that the Commission has ample authority to issue the requested clarification through a declaratory ruling, and that it should do so in order to avoid the unnecessary delay that a rulemaking proceeding would inevitably impose.

Over the two decades since the TCPA was enacted, the Commission has both adopted rules to implement that statute[2] and issued a number of declaratory rulings to clarify how the statute and implementing rules apply in certain situations.[3] Of particular relevance to this proceeding, the Commission has interpreted the TCPA as prohibiting the use of an autodialer to make any call to a wireless number in the absence of the prior express consent of the called

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[1] In addition to reassigned numbers, human error may contribute to wrong numbers on accounts. A customer may misspeak, an agent may not hear the number correctly, may "fat finger" or transpose numbers, or in helping to address other service issues for a customer, may inadvertently neglect to update account information. For the same reasons discussed herein, companies should not be harshly penalized under the TCPA for business calls made as a result of inadvertent and good faith error.

[2] *See, e.g.*, 47 C.F.R. § 64.1200.

[3] *See, e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003) ("2003 TCPA Order"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 (2008) ("2008 TCPA Order").

party.[4] United Healthcare seeks further clarification of this rule as applied in one specific context: autodialed calls to a wireless number for which the calling party has valid prior express consent but, unbeknownst to the calling party, that wireless number has subsequently been reassigned to a different person. Because numbers provided or entered inaccurately on accounts present the same issue, DIRECTV would urge clarification that protects companies in that situation as well.

The Communications Act authorizes the Commission to issue a declaratory ruling "to terminate a controversy or remove uncertainty."[5] That is exactly what is requested in this proceeding—a ruling to remove uncertainty as to how the TCPA applies in a very specific situation. "Certainly interpretation of regulations by declaratory ruling is 'well within the scope of the familiar power of an agency.'"[6]

Such a clarifying order does not require a notice and comment rulemaking. "In interpreting and administering its statutory obligations under the Act, the Commission has very broad discretion to decide whether to proceed by adjudication or rulemaking."[7] A declaratory ruling may be used to refine or alter an interpretation, even one that has been in place for many years. "[A]n administrative agency is permitted to change its interpretation of a statute . . . no

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[4] *See* 2008 TCPA Order, ¶ 11; 2003 TCPA Order, ¶ 165.

[5] 5 U.S.C. § 554(e). *See also* 47 C.F.R. § 1.2(a) ("The Commission may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.").

[6] *Viacom Int'l Inc. v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (quoting *Trans Int'l Airlines, Inc. v. Civil Aeronautics Bd.*, 432 F.2d 607, 612 n.9 (D.C. Cir. 1970)).

[7] *Conference Group, LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013) ("*Conference Group*"). As the D.C. Circuit has held, "there is no question that a declaratory ruling can be a form of adjudication." *Qwest Services Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (citing *AT&T v. FCC*, 434 F.3d 329, 332 (D.C. Cir. 2006)).

matter how longstanding."[8] Agency decisions do not harden into "rules" which cannot be altered or reversed except by rulemaking simply due to longevity.[9] Moreover, the fact that a declaratory ruling "'may affect agency policy and have general prospective application' . . . does not make it a rulemaking subject to APA section 553 notice and comment."[10] Rather, "[t]he choice between rule-making or declaratory order is primarily one for the agency regardless of whether the decision may affect policy and have general prospective application."[11]

Accordingly, courts have routinely upheld agency interpretations issued outside of the rulemaking context. For example, in *Bell Aerospace*, the Supreme Court held that the issue of whether certain buyers were managerial personnel, and thus exempt from the coverage of the National Labor Relations Act, need not be decided by rulemaking. That case involved a ruling contrary to the agency's past decisions. The Court nonetheless held that the choice of whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application.[12] Similarly, in *Qwest Services*, the D.C. Circuit upheld the Commission's use of a declaratory ruling to announce that certain types of prepaid calling cards were telecommunications services and that their providers were subject to regulation under the Telecommunications Act of 1996, even

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[8] *Chisholm v. FCC*, 538 F.2d 349, 364 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) (citing cases) ("*Chisholm*").

[9] *Id.* at 365.

[10] *Conference Group*, 720 F.3d at 966 (citations omitted).

[11] *Viacom Int'l Inc. v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974) ("*Bell Aerospace*") and *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

[12] *See Bell Aerospace*, 416 U.S. at 291-95.

though the proceeding had begun as a rulemaking.[13] In *Chisholm*, the D.C. Circuit similarly upheld the Commission's use of a declaratory ruling to determine the application of the Communications Act's equal-time provision to specific types of appearances by political candidates.[14]

United Healthcare's petition has been placed on public notice.[15] All potentially interested parties now have an opportunity to comment on the very narrow question of statutory interpretation it has placed before the Commission. There is no reason to believe that going through the motions of a notice and comment rulemaking would improve the quality of information available to the Commission upon which to base its decision. The only result of pursuing a rulemaking at this point would be unnecessary delay and prolonged uncertainty among regulated parties while the Commission accomplished the same objective under a different label. "Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit" of participation by interested parties.[16] As the Supreme Court has stated, "surely the [agency] has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues."[17]

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[13] *See Qwest Services Corp. v. FCC*, 509 F.3d 531, 536-537 (D.C. Cir. 2007).

[14] *See Chisholm*, 538 F.2d at 364-65.

[15] *See* Public Notice, "Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from United Healthcare Services, Inc.," DA 14-149 (rel. Feb. 6, 2014).

[16] *Chisholm*, 538 F.2d at 365.

[17] *Bell Aerospace*, 416 U.S. at 295.

Accordingly, the Commission should not hesitate to resolve this proceeding through declaratory ruling should it conclude that the clarification requested by United Healthcare is appropriate.

II. DIRECTV'S EXPERIENCE WITH REASSIGNED NUMBERS DEMONSTRATES THE NEED FOR CLARIFICATION.

DIRECTV has extensive experience both with the difficulties of maintaining completely current contact information for over 20 million subscribers, and with the TCPA litigation brought by non-subscriber owners of telephone numbers that had originally been provided by a DIRECTV subscriber as his or her point of contact. As discussed below, that experience vividly demonstrates the need for the clarification requested in this proceeding.

A. DIRECTV Requires Customers To Update Their Contact Information, and Takes Reasonable Steps To Remove Numbers It Finds Are No Longer Associated with A Customer.

DIRECTV makes many different kinds of non-marketing calls to its customers. In order to do so, it uses the numbers those customers have elected to provide (whether a landline or a cellphone). And to do so efficiently, DIRECTV segments and creates call lists of hundreds or thousands (or hundreds of thousands) of customers with similar characteristics and loads their numbers into equipment which can then dial those particular numbers quickly and accurately, in order to contact customers with information, notices, and alerts. These numbers are not randomly or sequentially selected. Calls are placed (with equipment lacking the current capacity

to randomly or sequentially generate numbers[18]) to customer-provided numbers—either the initial number(s) provided by a customer when subscribing to DIRECTV satellite service, or to an updated telephone number(s) provided thereafter by that customer.

DIRECTV's Customer Agreement, which each customer accepts in order to receive service, has long required customers to provide to DIRECTV at least one valid telephone number. For example, the Customer Agreement requires as a condition of service that customers "**must notify us immediately of any change in** your name, mailing address, residence address **or telephone number**."[19] It also provides that customers "agree to provide true, accurate, current and complete contact information about yourself, **and maintain and promptly update your contact information to keep it true, accurate and complete**. If you or an Authorized User choose to provide a cellular telephone number on your account, you and/or such Authorized User acknowledge and consent that we may place calls to such cellular phone for business purposes, including collections calls."[20] DIRECTV has made updating a telephone number easy; for example, a customer can call DIRECTV's toll free number, available 24 hours a day, and provide an agent with her new information.

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[18] The TCPA imposes liability for certain calls made with an "automatic telephone dialing system" ("ATDS"), defined by the statute as "equipment which has the *capacity* (A) to store or produce telephone numbers to be called, *using a random or sequential number generator*; ***and*** (B) *to dial* such numbers." 47 U.S.C. § 227(a) (emphasis added). In comments filed previously in this docket, DIRECTV supported a request for clarification that targeted calls made using equipment that lacks any current "capacity" to randomly or sequentially dial telephone numbers are not calls made by an ATDS as defined by the TCPA. *See* Comments of DIRECTV, LLC, CG Docket No. 02-278 (filed Dec. 19, 2013). DIRECTV submits that the Commission could address many of the problems with TCPA litigation abuse by issuing such a clarification.

[19] DIRECTV Customer Agreement, Section 1(m) (available at http://www.directv.com/DTVAPP/content/legal/customer_agreement) (emphasis added).

[20] *See id.*, Section 3(b) (emphasis added).

DIRECTV also takes active steps to assist customers in keeping their telephone numbers up to date. Representatives verify phone numbers with subscribers when setting up upgrade services, new equipment deliveries, mover's packages, and so on, and prompt subscribers to provide their most current telephone numbers. The telephone number fields can then be updated in the Subscriber Transaction Management System, which feeds that new information to other databases so that they can begin to be updated as well, and so that discontinued numbers can be removed as soon as possible from call lists. In addition, when customers have empty telephone fields on their account and call into DIRECTV from a phone number that the automated system does not recognize, the system will query whether the customer wants to add the number to the account.

Further, DIRECTV has policies and procedures in place to aid representatives in updating phone number fields when they learn that a customer account phone number has become a "wrong number" that belongs to someone else. For example, all representatives handling outbound collections calls made by DIRECTV or a first-party debt collector are instructed that if they reach someone who states that he or she is ***not*** the DIRECTV subscriber that DIRECTV is attempting to reach, then the "Wrong Number Complaint Process" is to be followed and the number is to be removed. Similarly, if a person calls into DIRECTV (whose 1-800-DIRECTV toll free telephone number is readily available) to complain about receiving calls, representatives have instructions on how to find and remove the phone number from the customer account to which it is linked.

DIRECTV has no desire to call non-customers with transactional, business or informational content intended to reach its own customers; indeed, it would make no sense for DIRECTV, or any company, to place such calls. Yet there are undoubtedly times where a customer fails to comply with the Customer Agreement's requirements to update his or her

telephone number, or where human error results in a wrong number on an account, and therefore, calls placed by or on behalf of DIRECTV instead reach a non-customer.[21] This is not the type of situation that the TCPA was intended to redress, much less expected to punish with $500 per call statutory damages.[22] If DIRECTV is informed that the number was reassigned/recycled or wrong, and does not within a reasonable time implement a change, then a plaintiff would have the argument that subsequent calls were made without consent. But if DIRECTV does not receive notification (either from its customer or from the new owner of the telephone number) that a number provided by the customer is no longer accurate information, it is left in the dark and will continue to place non-telemarketing calls in the good faith belief that the number is accurate and that consent to call it exists.

It does not serve the purpose of the TCPA, nor is it in the best interest of consumers, to inhibit non-marketing communications from DIRECTV to its customers at numbers provided by those customers, including cellular telephones if that is the number the customer elects to

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[21] Identifying who might get such a call is an impossible task, as is imposing on businesses a strict liability duty to always identify when customer numbers change, as certain courts seem to suggest. DIRECTV and other businesses that do not provide cell phone service to their subscribers simply do not have that kind of visibility into customer phone numbers, which is why DIRECTV requires notification from customers when they choose to change numbers. Suggesting that companies "regularly" contact customers to confirm information previously provided is an impractical and counterintuitive solution, as United Healthcare points out.

[22] Notably, telemarketers violating Do Not Call provisions are only liable for statutory damages if more than one call is made within a twelve month period, and telemarketers are also able to use error or mistake as a complete defense to a Do Not Call violation claim, provided they generally have compliance mechanisms in place. *See* 47 U.S.C. §227(c)(5). The damages for violating the Do Not Call provisions are also set at an amount "up to $500" rather than the flat $500 damages per call for violations of Section 227(b), originally intended to apply to telemarketers knowingly using pre-recorded messaging, or random or sequential dialing. *See* 47 U.S.C. §227(b)(3). It is unfathomable that Congress intended greater liability for companies attempting in good faith to place business calls to their customers at numbers provided by such customers.

provide.[23] And yet the very active TCPA Plaintiff's bar is pursuing DIRECTV and many other companies with claims brought by non-customers who receive calls at a customer-provided number.

B. Current Class Action Lawsuits Brought Against DIRECTV For Non-Marketing Calls Made To Customer-Provided Numbers.

Because of the current uncertainties swirling around the TCPA, together with the unintended use of the TCPA as a class action vehicle to sue for millions if not billions of dollars in statutory damages,[24] DIRECTV and other businesses face the risk of being forced to defend TCPA lawsuits every time they reach out to their customers, simply because some unascertainable recycled or wrong numbers may be associated with customer accounts. DIRECTV currently is named as a defendant in two putative nationwide class actions in which each lead Plaintiff alleges to have received a call that was meant for a DIRECTV customer. In both cases, the called number had been provided by a customer when opening a DIRECTV account. However, calls made to the numbers rang to non-DIRECTV customers now represented by class counsel.

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[23] More and more consumers, in fact, have opted to drop their landlines and to use their cellular phones as their primary contact point for companies with whom they do business. The Center for Disease Control, which tracks cell phone usage rates in its National Health Interview Survey, tracked results from its surveys between 2003 and 2011 and saw an increase in adults using cell phones for all communications from less than 5% of adults in 2003 to over 30% of adults by late 2011. *See* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201112.pdf. By late June 2012, the CDC released data showing that 34% of adults had severed landline service, using only cell phones for telephone communications. http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.pdf

[24] Congress expected that private rights of action for TCPA violations would be pursued in small claims courts without the need for an attorney, not in high stakes class action litigation. *See* 137 Cong. Rec. 30821-30822 (1991) (remarks of Senator Hollings). Therefore, the statutory damages were set at $500 (and a potential for trebling) in an effort to be "fair" to both consumers AND telemarketers. An attorneys fee provision and damages cap were not included as neither was deemed necessary. This balance of fairness has been completely thrown off track.

In the first case, *Jenny Brown v. Credit Management, LP* (Central District of California Case No. 13-cv-01170-DMG), the calls in question were placed by an independent third-party debt collector regarding a debt on a DIRECTV account. Plaintiff's recycled wireless number was the one originally provided in connection with a DIRECTV customer account. If the calls had reached the customer who provided the number, there would be no question that they were not actionable under the TCPA.[25] However, because the number was reassigned to Plaintiff with no word to DIRECTV from its customer (or from Plaintiff, who did not even answer the call attempt), DIRECTV now finds itself defending a nationwide class action lawsuit where five law firms from around the country have joined together to represent Plaintiff in making TCPA claims against DIRECTV for an unanswered call that they know DIRECTV did not place.[26] The other pending class action[27] involves calls made in a first-party context to a new customer who had failed to remit payment on his initial month's bill. In that case, the customer signed up for

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[25] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, ¶ 9 (2008) ("the provision of a cell phone number to a creditor, e.g., as a part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt").

[26] The *Brown* action is indicative of the lengths to which the TCPA Plaintiff's bar will go to seek TCPA statutory damages from the deepest pocket it can find. The action began in May 2012 by another Plaintiff, Cheryl Swope, pursuing TCPA claims against third party debt collector, Credit Management, Inc. ("CMI") in the Eastern District of Missouri, for calls not related to DIRECTV. In November 2012, Swope's counsel moved to add Jenny Brown as a party to the action against CMI and Plaintiff Cheryl Swope voluntarily dismissed herself soon thereafter. Jenny Brown, who had received several call attempts placed by CMI the previous year, found out from CMI in discovery that at least one attempt was made in relation to a debt on a DIRECTV account. Upon learning that a call was related to a DIRECTV account, Brown's counsel transferred the action to the Central District of California in order to join a then-pending TCPA class action naming both CMI and DIRECTV as defendants. In December 2013, Brown voluntarily dismissed CMI—the entity that actually called her—and is now pursuing her claim solely against DIRECTV on a vicarious liability theory. Brown never picked up the calls she received or informed the third-party caller that she was not the intended recipient.

[27] *Miller v. DIRECTV, LLC*, Case No. 3:13-cv-02073-L-WMC (S.D. Cal.).

service with an independent third party retailer who processed his information (including his preferred phone number) and installed his satellite receiving equipment. When DIRECTV called the number that the customer had very recently provided to open his account, it instead reached Plaintiff, who is pursuing nationwide class claims along with her three law firms that specialize in TCPA class actions.

Such lawsuits demonstrate the risks that DIRECTV and other businesses face every time they must reach out to their own customers, even brand-new customers whose contact information would not be expected to be inaccurate or already recycled. As detailed below, the conflicting judicial applications of the TCPA makes the situation even worse, as DIRECTV and other companies do not know what to expect from one courtroom to the next.

III. CLARIFICATION BY THE COMMISSION WOULD PROVIDE BOTH COURTS AND BUSINESSES WITH MUCH-NEEDED GUIDANCE.

A. Courts Are Issuing Confusing And Conflicting Decisions About Whether "Prior Express Consent" Encompasses Calls To A Reassigned Number, Or Whether "Called Party" Is The "Intended Recipient".

The Commission has clarified that collections calls are deemed to have been made with "prior express consent" (and are thus exempt from TCPA liability) when made to a number provided by a customer in association with the indebted account. Unfortunately, there has been no comparable guidance from the Commission with respect to calls made to such numbers that have been reassigned or, for one reason or another, were recorded inaccurately. This has resulted in inconsistent rulings on the issue from courts throughout the country. Companies are unable to assess where and when they may face a challenge based on calls made to reassigned phone numbers, because courts are addressing such questions piecemeal, and in conflicting decisions.

For example, in *Meadows v. Franklin Collection Service, Inc.*, the Eleventh Circuit held that auto-dialed calls made by a debt collector to a residential number ***did not*** violate the TCPA

where they were received by an individual who did not owe the debts triggering the calls.[28] In reaching this decision, the court relied on two regulatory exemptions created by the Commission: 1) the exemption of prerecorded calls "made to any person with whom the caller has an established business relationship at the time the call is made"; and 2) calls "made for a commercial purpose but [that do] not include or introduce an unsolicited advertisement or constitute a telephone solicitation."[29] The court further noted that the FCC has made clear both "that these two exemptions 'apply where a third party places a debt collection call on behalf of the company holding the debt'" and "that 'all debt collection circumstances involve a prior or existing business relationship.'"[30] Based on these findings, the *Meadows* court held that the calls were not actionable because the caller had an established business relationship with the ***intended recipients*** of the calls (the actual debtors) and the calls were made for a commercial, non-solicitation purpose. In doing so, the court rejected the plaintiff's argument that because she was a non-debtor, the debt-collection exemptions do not apply because she did not have an established business relationship with defendant.[31]

The *Meadows* decision thus provided companies with assurance that consent from the "intended recipient" of the call would prevent TCPA liability. Further, several other courts in various districts have also found that only the "intended recipient" of a call has standing to

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[28] *Meadows v. Franklin Collection Service, Inc*., 414 Fed.Appx. 230 (11th Cir. Feb. 11, 2011). In that case, the debts were allegedly owed by Plaintiff's daughter, as well as the persons who previously owned her phone number.

[29] *Id.* at 235 (citing 47 C.F.R. 64 .1200(a)(2)(iii) and (iv)).

[30] *Id.* (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, ¶¶ 36, 39 (1995)).

[31] *Id.*

pursue claims under the TCPA as the "called party", so that calls unintentionally placed to reassigned or wrong numbers would not result in TCPA liability or damages.[32]

However, not all courts considering such issues have reached this same commonsense conclusion. Most notably, in *Soppet v. Enhanced Recovery Co.*, the Seventh Circuit held that a debt collector *could* be liable under the TCPA for calls made to reassigned cell phone numbers, because the current subscriber of the number had not provided his or her prior express consent to be called.[33] The court focused on the fact that the TCPA prohibited calls to cell phones unless made with "prior express consent of the *called party*," and concluded that the "intended recipient" arguments provided no protection. And although the *Soppet* court recognized that users are "moving in droves from landline to cell service," which would make this provision of the TCPA come into play more often, it nonetheless held that courts should not make "substantive changes" that are "designed to make the law 'better'" or otherwise "try to keep a statute up to date."[34]

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[32] *See Leyse v. Bank of Am*., 2010 WL 2382400, at *4 (S.D.N.Y. June 14, 2010) ((holding that only the intended recipient of a telemarketing call could pursue TCPA claim); *Cellco P'ship v. Wilcrest Health Care Mgmt. Inc*., 2012 WL 1638056, at *7 (D.N.J. May 8, 2012) (with respect to calls made to cellular phones, holding that the "called party" under the TCPA meant intended recipient); *Cellco P'ship v. Dealers Warranty, LLC*, 2010 WL 3946713, at *9 (D.N.J. Oct. 5, 2010) (vendors did not sufficiently allege they had standing; i.e., they did not allege that they—and not their employees/subscribers—were the "intended recipients" of the calls); *see also Kopff v. World Research Grp*., LLC, 568 F. Supp. 2d 39, 42 (D.D.C. 2008) (holding that the unintended recipient of unsolicited fax lacked standing to sue for violation of the TCPA).

[33] *See Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 640 (7th Cir. 2012).

[34] *Id*. at 642. Indeed, a central problem with the TCPA and how it is now being abused in litigation, is that the statute is from 1991, when technologies were far different from those currently in use, and when cellular telephones were for the most part used as emergency lines and were not a consumer's primary point of contact. In 1991 not only were there no smartphones; there were no unlimited minutes calling plans for cellular telephones or features such as call blocking.

Instead, with no indication that it had conducted any analysis of business realities for companies such as DIRECTV with millions of customers, the *Soppet* court suggested several ways that it believed businesses could protect themselves, such as by having a live person make the first call, then switch to a predictive dialer after verifying that cellular number still is assigned to the customer.[35] But this suggestion is not practical or cost effective, particularly for companies like DIRECTV that need to contact millions of customers on a regular basis. Indeed, it would not be economically or temporally feasible to use live operators to check if a number still belongs to a customer before any other call is placed to hundreds of thousands of customers at a time (such as for service disruptions). Moreover, under the *Soppet* reasoning, the live-operator "check" would need to be conducted ***each time*** before an autodialed or prerecorded non-marketing call is placed to verify that the number remains accurate, which again would not be economically or temporally feasible (particularly if no one picks up the phone to verify that the number remains accurate).[36]

Judicial inconsistency on this issue is so severe that even courts in the same judicial district have issued contradictory opinions on whether there should be liability for a call made in a good-faith effort to reach a customer at a number provided by that customer. For example, one court in the Southern District of California recently held that a good faith belief in consent to call a number for collections purposes is a complete defense to liability under the TCPA when the

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[35] *Id*.

[36] A second suggestion by the *Soppet* court was that companies could use some sort of "reverse lookup" to identify the current subscriber to cell number. *Id.* However, even if such technology existed and could work with DIRECTV's systems, if DIRECTV was to call "new" numbers for customers it had looked up, those would not be customer-provided numbers for which prior express consent had been granted. Thus, following the *Soppet* court's advice would likely lead to additional lawsuits under the TCPA

call is inadvertently made to someone else.[37] The court concluded that "it would be incongruous with the larger statutory and regulatory scheme to interpret TCPA to require that a debt collector be liable for acting where it had a good-faith basis for doing so."[38] Just two months later, however, another court in the same district essentially adopted the approach taken in *Soppet* in rejecting a motion to dismiss a class action where the defendant made debt collection calls, to numbers provided by the debtors, that were received by unintended recipients.[39] Thus, even within the same federal district, courts disagree on the proper application of the TCPA and companies have no certainty.

Given the split in authority and the irrational conclusions that some courts have reached when attempting to interpret the statute and prior Commission rulings, it is clear that the Commission needs to provide clarification so that courts—and companies making calls—can have clear guidance.

B. The Commission Should Clarify That There Is No TCPA Liability For Non-Telemarketing Calls Made In Good Faith To Telephone Numbers Provided by Customers.

To best fulfill the purposes and intent of the TCPA, and to curb abusive litigation being brought for non-telemarketing calls made by a company in good faith, the Commission should clarify that non-marketing calls made to numbers provided by customers are not actionable under the TCPA when the company had prior express consent to call the number. Such clarification should apply where the number provided has been subsequently reassigned without the caller's knowledge, where the customer inadvertently provides an incorrect number, or where the caller

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[37] *Chyba v. First Fin. Asset Mgmt., Inc.*, 12-CV-1721-BEN WVG, 2013 WL 6880237, at *12 (S.D. Cal. Nov. 20, 2013).

[38] *Id*. at *11.

[39] *See Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014).

inadvertently records the number incorrectly, so long as the caller updates its records within a reasonable time after receiving notice that the number is no longer valid. Without such clarification, DIRECTV and other companies making non-marketing telephone calls in the United States will continue to face putative classwide litigation brought by plaintiffs' lawyers who have turned TCPA litigation into a fee-generating machine, even though the TCPA lacks a provision for attorneys' fees and was specifically designed to provide customers with sufficient incentive, of $500 per call, to encourage proceeding without an attorney.[40]

DIRECTV needs assurance that it can continue to reach out to its own customers at the mobile phone numbers those customers elected to provide as their points of contact without fear that every call could generate a lawsuit where the number provided was reassigned, without DIRECTV's knowledge, to a non-subscriber. The need for clarification is amply demonstrated by the two pending nationwide class action lawsuits brought against DIRECTV based on these very circumstances, which are likely just the first wave of such lawsuits, if history is any indication.

In its Petition, United Healthcare suggests that the Commission issue a narrow declaratory ruling to confirm that parties are not liable under the TCPA for informational, non-marketing autodialed and pre-recorded calls to wireless telephone numbers that have been reassigned without the caller's knowledge—as long as the caller previously obtained prior express consent to call that number.[41] DIRECTV agrees, but adds that calls to numbers provided by a customer that were inaccurate (i.e., digits transposed) should also be deemed to have prior express consent as "customer-provided numbers", unless and until the recipient of the calls

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[40] *See* 137 Cong. Rec. 30821–30822 (1991) (remarks of Senator Hollings).

[41] *See* United Petition, p. 3.

provides notice that it is a wrong number and the company has an opportunity to update its files. Thus, rather than focus only on reassigned calls, the Commission should clarify that informational/transactional calls made to a customer-provided number, with a good faith belief that prior express consent exists, were indeed made with prior express consent.

In addition, DIRECTV believes that the Commission should provide guidance permitting a reasonable amount of time to act on notice that a number is not connecting to a customer. Because such notice could come in a variety of ways (*e.g.*, directly via telephone, email, or letter, or indirectly via a first-party representative who needs to transfer data from its internal systems), it will not always be possible to update account records immediately. In the context of Do Not Call requests, telemarketers are given a 30-day window to implement fully a DNC request.[42] DIRECTV believes a similar timeframe would be appropriate here.

CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling to clarify that non-telemarketing autodialed and prerecorded calls are deemed to be made with prior express consent when they are made to a customer-provided telephone number (including numbers that are provided or recorded incorrectly), so long as the company stops calling the number within a reasonable time after it learns that the number is no longer valid. Alternatively, and as noted by United Healthcare, the Commission could clarify that "called party" under the statute encompasses both the consenting party and a new subscriber to the reassigned number (until a company is provided with information that the two are not the same, and has a reasonable opportunity to update its records), or could confirm that a good faith belief in prior express

[42] *See* 47 C.F.R. §64.1200(d)(3) ("Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request.")

consent based on the earlier provision by a customer of a telephone number provides a valid affirmative defense to TCPA liability. Clarifying the rule in this manner will help to stem the tide of TCPA lawsuit abuse and will provide courts and companies with much-needed guidance that the Commission is uniquely qualified to render.

Respectfully submitted,

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