Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the	)	
	)	
Rules and Regulations Implementing	)	
	)	**CG Docket No. 02-278**
the Telephone Consumer Protection	)	
	)	
Act of 1991	)	

Reply Comments of Joe Shields on the Petition

For Expedited Declaratory Ruling of United Healthcare Services Inc.

Most if not all of the commentors filing comments in support of the United Healthcare Services Inc.'s petition have blatantly lied to the Commission.

ACA: "There is no public directory of reassigned numbers and consumers may change numbers without notifying callers – accordingly there is no practical way to be completely certain that the number provided by the consumer still remains with that consumer." and "...there is no readily available data source in such number reassignment scenarios."

AFSA: "AFSA members cannot completely avoid calling reassigned wireless telephone numbers because there is no public wireless telephone number directory..."

CTIA: "...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." and "... 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."

Coalition of Higher Education Assistance Organizations: "No currently available tool can prevent all calls to numbers that once belonged to a client, customer, or other contact but have been reassigned unbeknownst to the caller."

Comcast: "Because there is no practical way for Comcast to know that a number a customer has provided subsequently has been reassigned..."

Dominion Enterprises: "...there is no way to know that a wireless number... ...has been reassigned..."

American Bankers Association: "...there is no public wireless telephone directory or tool available to identify numbers that have been reassigned."

Time Warner Cable: "...businesses cannot know for certain whether the wireless numbers they have on file for their customers have been reassigned..." and "No such centralized directory exists, however, for wireless numbers reassigned to other wireless customers."

U.S. Chamber of Commerce: "There is no single, authoritative wireless telephone number directory or currently available tool that can prevent all calls to phone numbers that once belonged to a client, customer, or other contact but have been reassigned without the knowledge of the caller."

Each and every one of the above statements is a lie. Verification that a caller has the right number for an individual is easily accomplished. Neustar provides a service

which is updated every 15 minutes (emphasis added) from over 250 sources. Neustar's service can instantly identify whether a phone number is a wireless or wireline number and further verifies whether the name and phone number go together **or whether the phone number now belongs to a different person** (emphasis added).[1]

Given the fact that Neustar provides a service which identifies the current subscriber to a cell number there is no longer a need for a 15 day safe harbor for ported numbers. But then that is not the issue raised by the petition. The petition seeks to reverse prior Commission and court rulings that there is no "calling someone else" or "inadvertent" call defense for automatically dialed calls to cell numbers.

Voluminous case law debunks each and every commentors claim that there is an uncertainty or that there are inconsistent rulings on whom prior express consent must be obtained from. The plain language of the statute is clear – prior express consent must be obtained from the called party and not some intended called party. The phrase "intended" is **never** mentioned in the statute. As the Commission has already ruled: "…we reject proposals to create a good faith exception for inadvertent autodialed or prerecorded calls to wireless numbers…" *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, ¶ 123, 18 FCC Rcd. 14014, 2003 WL 21517853, 2003 FCC Lexis 3673 (2003). "Indeed, the distinction proffered by AT&T potentially would eviscerate the policy goals of the statute in protecting telephone subscribers from unwanted telemarketing calls by creating a **virtually irrefutable defense** (emphasis added) that the telemarketer was trying to reach 'someone else' at that number. *In the Matter of Consumer.net v. AT&T*, 15 FCC Rcd. 281,

[1] http://www.neustar.biz/resources/whitepapers/understand-tcpa-law-and-mitigate-risk See also: http://www.neustar.biz/resources/product-literature/on-demand-verification-for-credit-and-collections

1999 WL 1256282 (1999). None of the commentors or the petitioner has provided any legal basis for walking back these prior Commission determinations.

This voluminous case law debunks commentor claims for a new "calling someone else" or "inadvertent call' exemption: "Standing to bring a private right of action is recognized for the person who answers a call to their cell phone, even if the caller intended to reach a different person." *Soppet v. Enhanced Recoery Co., L.L.C.*, 679 F3d 637 (7th Cir. 2007) ("called party" means the person subscribing to the called number at the time the call was made; *Kane V. National Action Fin. Servs., Inc.*, 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011) at *7. "Like Kane, Plaintiff has received calls on his own cellular phone from a party using an automated dialing system and intending to reach someone else." *Harris v. World Financial Network National Bank et al*, 867 F.Supp.2d 888 (2012) WL 1110003. "The TCPA is essentially a strict liability statute which imposes liability for erroneous unsolicited [calls]." *Alea London Ltd. v. American Home Services, Inc.*, 638 F.3d 768, 776 (11 Cir. 2011). "...provides for a cause of action for any person who receives an unsolicited fax and does not limit the cause of action to the intended recipient of an unsolicited fax." *Dawson v. Am. Dream Home Loans*, No 06CV000513, 2006 WL 2987104 (Ohio Com. Pl. Oct. 4, 2006). "Accordingly, the Court finds that the "called party" for the purposes of § 227(b)(1)(A)(iii) was not Former Customer, but the Plaintiffs". *Breslow v. Wells Fargo Bank, NA*, 857 F. Supp. 2d 1316 - Dist. Court, SD Florida 2012.

See also: "Defendant's position that only the intended recipient has standing to bring a claim under the TCPA **<u>has been squarely rejected in no less than twenty cases</u>**, (emphasis added) cases that are factually similar to the instant case." "Adopting

Defendant's position would shift responsibility from a business making automatic and prerecorded calls to individuals receiving them." *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014). "Instead, the Court is persuaded by Plaintiffs' argument that the TCPA is intended to protect the telephone subscriber, and thus it is the subscriber who has standing to sue for violations of the TCPA." *Gutierrez v Barclays* Case No. 10cv1012 DMS (BGS) WL 579238 (S.D. Cal. Feb. 9, 2011). "The use of 'called party' to unambiguously refer to the actual recipient in another section of the TCPA is compelling evidence that the term carries the same meaning in other provisions." *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1321 (S.D. Fla. 2012).

At least two commentors want the Commission to include all calls including telemarketing calls to the requested exemption. Comcast states that the sought exemption: "...should apply not just to informational calls (let alone just health-care related informational calls), but also to collection and telemarketing calls." On the other hand Comcast admits that: Section 227(b)(1)(A)'s prohibition applies to "any call" made without prior express consent and does not distinguish in this regard between informational, collection, and telemarketing calls." Similarly Time Warner Cable wants to extend the requested exemption to "all" calls or calls "for any purpose" to cell numbers.

As Comcast readily admits non-telemarketing calls to cell numbers do not deserve any special treatment. Thus, Comcast and Time Warner Cable squarely forces the Commission into a constitutional question: are automatically dialed healthcare calls to cell numbers the only ones entitled to an exemption. Exempting one class of calls based on content clearly raises a constitutional question. There currently is no constitutional

question as all automatically dialed calls to a cell number require prior express consent. The TCPA addresses a method and not content. The petition is not content neutral and subsequently, cannot be granted by the Commission.

Commentors believe that there is a notification requirement when someone changes their telephone number. The responsibility of determining who the subscriber is to a cell number does not rest with the consumer; it is the responsibility of those that want to make automatically dialed calls to cell numbers. Commentors like DirecTV should verify the number belongs to their subscriber before unleashing their automatic dialer on inaccurate numbers.

The Commission should treat each and every comment that supports the petition as suspicious; cited cases are taken out of context or mixed and mashed with landline cases. As an example citations to the Lyse case, which dealt with a call to a landline number where the roommate answered and sued for the call, are not on point. More examples are the citations to several *Cellco Partnership* cases which dealt with standing of the carrier to sue on behalf of its customers. Yet another example are citations to *Chyba v. First Fin. Asset Mgmt., Inc* where the case dealt with a cell number listed on a credit application as the "Home" telephone number. This mix and mash is clearly seen in DirecTV's comments concerning the *Meadows v. Franklin Collection Service, Inc.* case yet another case dealing specifically with debt collection calls to a **landline** (emphasis added) and not cell numbers. Continuing, DirecTV's citation to the Kopff is also misplaced. In that case the judge clearly stated that the owner of the business not the

employees have standing to sue for junk faxes[2]. Not surprisingly the term “intended” was never used in the courts decision!

This behavior is typical of the many commentors that seek to neuter the TCPA for their self-centered purposes. These commentors believe the FCC can protect them from what they irrationally claim are frivolous, harassing and abusive law suits. If all these TCPA case were truly frivolous, harassing and abusive law suits the courts would have dismissed the claims. The fact that few if any have been dismissed based on claims that the law suits are frivolous, harassing and abusive law suits speaks loudly to the fact that commentors making such claims are misrepresenting material facts to the Commission.

One commentor, DirecTV, even has the gall to suggest that they should be allowed to continue to call a cell number they know has been reassigned for 30 days after they find out about the reassignment. In the context of debt collection calls this would subject a consumer that does not owe the debt to hundreds of automatically dialed calls to their cell number in that 30 day period.

Typically, debt collectors never obtain prior express consent. “We don't see collectors seeking consent at all. I've never seen a case where a collector has sought consent, not one.”[3] DirecTV is suggesting that a consumer that has never provided prior express consent to a debt collector has to tell that debt collector (that typically refuses to comply with identification requirements) to stop calling his cell number and then can be and most likely will be subjected to 30 more days of harassing debt collection calls.

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[2] “For example, if the undersigned were to be sent unsolicited facsimiles, in violation of the TCPA, at the fax machine in chambers addressed specifically to "the Honorable Paul L. Friedman," it cannot be that the Court's judicial assistant, law clerks and interns would each have a cause of action by virtue of walking by the machine and picking up the facsimile.” *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 42 (D.D.C. 2008)

[3] From FTC Debt Collection Hearings 2.0 Apr 28, 2011 Donald A. Yarbrough Comments http://www.ftc.gov/sites/default/files/documents/public_events/debt-collection-2.0-%E2%80%93-protecting-consumers-technologies-change/transcript.pdf

DirecTV's position is so ridiculous that it suggests that the Commission legitimize telephonic harassment and theft! Such an exemption would conflict with the FDCPA requirement that a debt collector must stop calling a number once they receive notice via certified mail. There is no 30 day safe harbor for debt collectors under the FDCA and the Commission cannot create one for debt collectors under the TCPA. If the Commission were to create such an exemption the Commission would be legitimizing telephonic harassment!

The United Healthcare Services Inc. petition and supporting comments are unsound. The petition and supporting comments are all based on false claims of not knowing when a cell number has been reassigned and placing the blame on the consumer. Further, the petition and comments falsely claim that non-telemarketing automatically dialed calls to cell numbers deserve preferential treatment.

Based on the foregoing, the petition must be denied.

Respectfully submitted,

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