

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Advanced Methods to Target and) CG Docket No. 17-59
Eliminate Unlawful Robocalls)

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Comments of
National Consumer Law Center, on behalf of its low-income clients
and
American Association for Justice
Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
Public Citizen
U.S. PIRG

May 29, 2018

These comments are respectfully submitted to the Federal Communications Commission (FCC) by the **National Consumer Law Center** on behalf of its low-income clients and American Association for Justice, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, Public Citizen, and U.S. PIRG. We strongly support the FCC's consideration of the creation of a reassigned number database,¹ and we very much appreciate the leadership shown by this Commission in addressing the escalating problem of unwanted robocalls.

I. Introduction

We heartily commend the Federal Communications Commission for its creativity and leadership evidenced in this proceeding to consider a reassigned number database. An effectively created and managed database will significantly reduce the number of unwanted calls to consumers,

¹ In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Further Notice of Inquiry, FCC 17-90, CG Docket No. 17-59 (Rel. Mar. 22, 2018) [hereinafter Second Further Notice of Proposed Rulemaking], *available at* <https://ecfsapi.fcc.gov/file/032399073325/FCC-18-31A1.pdf>.

and will reduce liability under the Telephone Consumer Protection Act² (TCPA) for callers. Callers that use the reassigned number database will also significantly reach their intended recipients more successfully. However, *it is essential, for the success of this database, to maintain liability for robocalls to cell phones made without consent.* Without this liability, callers will not have sufficient incentive to use the database, and all of the good work by the FCC will be for nothing. Liability for making wrong-number calls gives callers reason to spend the time or the money to check the database to ensure that they are calling only numbers for which they still have consent.

As we have previously articulated,³ a reassigned number database is an essential tool in combating robocalls. Unwanted robocalls—and consumer complaints about them—are increasing at an alarming rate:

- *12.2 billion robocalls* were made during the first four months of 2018.⁴
- This number represent an *increase of more than 28%* in the number of calls received by consumers during the same four-month period in 2017.⁵
- In 2017, there were over *seven million complaints* about unwanted calls filed with the Federal Trade Commission,⁶ increasing from over five million complaints in the previous year.⁷
- Unwanted calls are the *leading cause of complaints to the FCC*, triggering over 200,000 complaints yearly.⁸

² 47 U.S.C. § 227.

³ Comments of the National Consumer Law Center to the FCC on behalf of its low-income clients and Consumer Action, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, Public Citizen, Public Knowledge and U.S. PIRG on Proposal to Develop a Reassigned Number Database, CG Docket No. 17-59 (Aug. 28, 2017), *available at* <https://ecfsapi.fcc.gov/file/10828610503710/Comments%20by%20NCLC%20and%20others%20on%20Reassigned%20Numbers%20Database.pdf>.

⁴ Data compiled from YouMail Robocall Index is available at <https://robocallindex.com/>.

⁵ *See id.*

⁶ *See* Federal Trade Commission, National Do Not Call Registry Data Book, FY 2016 (Dec. 2016), *available at* https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dnc_data_book_fy_2016_post.pdf.

⁷ *See* Federal Trade Commission, National Do Not Call Registry Data Book, FY 2015 (Dec. 2015), *available at* <https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2015/dncdatabookfy2015.pdf>.

There is one more essential point that we must continue to emphasize. One of the claims that robocallers cite most pressingly when they request relief from liability under the TCPA is that they have no way of reasonably knowing that numbers for which they obtained consent have since been reassigned to another person.⁹ This claim was also the theme of the multiple requests for relief to the D.C. Circuit Court of Appeals in the *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) appeal from the 2015 Omnibus Order.¹⁰ Therefore it is truly disingenuous that many of these same petitioners/robocallers are now saying that it would be too much trouble to check a database that would allow them to avoid these unconsented-to calls—and to avoid the resulting TCPA liability for making them.¹¹

Robocallers often complain about the strict liability standards in the TCPA that can lead to the imposition of damages for multiple violations of this consumer protection law. Congress, however, enacted this liability standard to ensure that robocallers will actually have the consent of

⁸ See Federal Communications Commission, The FCC's Push to Combat Robocalls & Spoofing, available at <https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing>.

⁹ See, e.g., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8006-10 ¶71, CG Docket No. 02-278 (F.C.C. July 2015), available at <https://ecfsapi.fcc.gov/file/60001120392.pdf>.

¹⁰ See, e.g., Joint Brief for Petitioners ACA International et al. for Review from the Federal Communications Commission's TCPA 2015 Declaratory Ruling and Order, at 17 (D.C. Cir. filed Nov. 25, 2015).

¹¹ See, e.g., Comments of ACA International, CG Docket No. 17-59, at 4 (Aug. 28, 2017) available at <https://ecfsapi.fcc.gov/file/1082873823450/Comments%20of%20ACA%20Intl-Reassigned%20Numbers%20NOI-8-28-17-FINAL.pdf> (database would create “enormous burdens”); Comments of Noble Systems Corporation, CG Docket No. 17-59, at 9-10 (Aug. 28, 2017), available at https://ecfsapi.fcc.gov/file/10828929621881/Noble_System_Comments_FCC_17-90.pdf (complaining that a database will be “complicated, expensive, and time consuming”); Comments of the Professional Association for Customer Engagement (received Aug. 28, 2017) available at [https://ecfsapi.fcc.gov/file/108281750504055/PACE%20Comments%20in%20FCC%2017-90%20\(Final\).pdf](https://ecfsapi.fcc.gov/file/108281750504055/PACE%20Comments%20in%20FCC%2017-90%20(Final).pdf) (“Simply stated, a reassigned number database would impose additional obligations upon callers that may not be needed depending upon the outcome of the PACE Appeal. PACE recommends the Commission hold any action on a reassigned number database in abeyance until the PACE Appeal has concluded.”).

the person being called before they make the call. This burden may be inconvenient for robocallers because it adds a step to their automated calling. But the burden on consumers from unwanted robocalls is far worse. For low-income telephone users with limited minutes, every call costs them money.¹² And for any cell phone user, every call interrupts her day, requires her attention, is an invasion of her privacy, and is likely to interrupt work tasks or driving, or to interfere with precious personal or family time.

The point of the proposed database is to cut down on unwanted calls to cell phones. The reduction in unconsented-to calls to cell phones will reduce liability for callers, and thus callers will save considerably in compliance expenses. Use of the database should be its own reward.

Importantly, the database should be a tool for callers only to assist them in complying with the TCPA. It should not be considered a mechanism for callers to avoid liability for making unwanted robocalls to consumers that can be avoided. Therefore, as the FCC moves forward with designing the database, it is essential that the FCC maintain incentives for callers to comply with the TCPA and to avoid making unconsented-to calls. Experience has demonstrated that, without proper incentives, too many callers see no reason to go to the trouble of maintaining and updating their records to make sure they are robocalling only those consumers who have provided consent.¹³ Ensuring vigorous enforcement of the TCPA provides those incentives.

¹² Approximately one quarter of the population in the United States has cell phone plans with limited minutes. *See* CTIA-The Wireless Association, CTIA's Wireless Industry Summary Report, Year-End 2013 Results, 2014, Prepaid Connections Make Up 23.4 Percent of Wireless Market, available at <http://www.ctia.org/industry-data/facts-and-infographics-details/factand-infographics/prepaid-connections-make-up-23-4-percent-of-wireless-market> (accessed Jan. 29, 2017) .

¹³ *See, e.g.*, Settlement Agreement and Release at ¶¶ 28, 29, Johnson v. Navient Solutions, Inc., Case No. 1:15-cv-00071-LJM-MJD and Toure v. Navient Solutions, Case No. 1:17-cv-00071-LJM-TAB (S.D. Ind. filed Dec. 23, 2016), available at <https://johnsontcpasettlement.com/Portals/0/Documents/Settlement%20Agreement%20and%20Release1.pdf> (Navient paid over \$17 million to settle a class action case alleging that it had *continued*

If designed correctly, the database should provide an efficient means for callers to protect themselves from committing unnecessary violations and incurring TCPA liability by checking the database. But use of the database should not shield callers from liability for other violations of the TCPA.

II. Comments on Questions Posed in this Rulemaking

There are a number of principles that are essential for the FCC to incorporate into a reassigned number database.

1. **All carriers must participate.** The database must require that all carriers of voice telephone services participate (and text providers, to the extent the two groups may not overlap). As the FCC has noted in this Notice of Proposed Rulemaking, there are already a number of private providers of compliance solutions that provide assistance to callers seeking to avoid calling numbers for which they no longer have consent.¹⁴ The problem with these private compliance providers—as recognized in the Notice—is that they are not considered sufficiently reliable, because their datasets are not complete and there is no guarantee that these datasets are updated on a timely basis. There is no reason for the FCC to mimic the imperfect solution already available. This admirable effort by the FCC to create a database for reassigned numbers will be wasted unless *all carriers of telephone services are required to provide information on a timely basis to the reassigned number database.*

2. **Timely and accurate information is essential.** The value of the database rests entirely on the reliability of its information. If outdated information is included in the database, and callers are permitted to rely on that outdated information to make their calls, the value of the database as a method of reducing the number of unwanted (and illegal) calls is completely undermined. If callers are to be allowed to “reasonably rely” on the data gathered and provided by the database in order to

to call over 350,000 cell phone owners repeatedly, even after it had noted in its own records that the numbers were wrong).

¹⁴ Second Further Notice of Proposed Rulemaking, at 2 ¶5 n.7.

avoid liability for an unwanted call to a reassigned number,¹⁵ then that data must be objectively accurate -- and accuracy requires timely information. Moreover, callers should only be permitted to avoid liability because they relied on the data if they have checked the database in a timely manner.

3. Carriers must provide updated information daily. Carriers should be required to *provide a list of disconnected numbers every 24 hours* as a batch data-dump to the reassigned number database. The telephone industry already populates and deletes subscriber data relating to the porting of telephone numbers in real time through the North American Numbering Plan.¹⁶ There is no reason that information about disconnected numbers cannot be shared with the reassigned number database in the same way.

4. Callers must make timely requests for the data. It is important that the caller have checked the database in a timely fashion so that its information on reassigned numbers is current. The time frame for this process will depend, in part, on how quickly a disconnected number can be reassigned. To protect the privacy of telephone subscribers, as well as the business-related information of the telephone carriers, the only information that needs to be reported to the database by the carriers is the date that a particular number is disconnected. As noted by the FCC, there is currently no minimum “aging period” before a disconnected number can be reassigned.¹⁷ If all carriers are required to age their numbers for a specific, minimum amount of time, then callers could reasonably assume that calls would not reach a new subscriber during the period between disconnection and the end of that minimum aging period. But since there is no minimum aging

¹⁵ As noted by the D.C. Circuit in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018): “[P]roposals [such as this] would naturally bear on the reasonableness of calling numbers that have in fact been reassigned, . . .” *Id.* at 709.

¹⁶ See, e.g., Second Further Notice of Proposed Rulemaking, at 11 ¶36 n.59.

¹⁷ Once a number is disconnected, a service provider can designate it as an “aging number” for a period of time and subsequently reassign it to a new subscriber. See 47 C.F.R. § 52.15(f)(ii) (“Aging numbers are disconnected numbers that are not available for assignment to another end user or customer for a specified period of time. Numbers previously assigned to residential customers may be aged for no more than 90 days.”).

period, a caller that has checked the database on a particular date, and determined that a particular number has not been disconnected as of that date, cannot reasonably assume that the number has not been reassigned to a new consumer for any set number of days after that date.

We leave it to the FCC to decide whether to impose a minimum aging period for telephone numbers. Requiring a minimum aging period would allow callers to check the database less frequently, yet still rely on it. On the other hand, smaller telephone service carriers might be placed at a disadvantage if they are required to age their numbers, because they have a much smaller batch of numbers to use for their customers. But the FCC's decision on a minimum aging period applicable to disconnected numbers should also govern the FCC's articulation of when a caller has acted reasonably to rely on information from the database in making automated calls.

If a minimum aging period is imposed, then callers will know that, for the number of days of the minimum aging period, it is safe to call a number that was reported on a certain date not to have been disconnected. For example, assume the minimum aging period is established as 60 days. If a caller checks the status of a particular number on May 1 and finds that it has not been disconnected since the date consent was obtained, the caller would be acting reasonably if it continued to make calls to that number for 60 days after May 1, without rechecking the database. This is because even if the number were to be disconnected on May 2, or even later on May 1, because of the 60-day minimum aging period, the number would not be reassigned within 60 days from May 1.

However, if no minimum aging period is required, the subscriber who had provided consent could have disconnected the number on May 1, and the provider could have reassigned it on May 2 to a new subscriber who has not provided consent to be called. So the caller would be able to reasonably rely on having checked the database only for the one day, and would have to re-check it each day.

For these reasons, whichever decision the FCC makes regarding a minimum aging period, *callers' reliance on the information provided by the database callers should be considered reasonable only if the caller calls a number it has checked on the database either on the same day the caller has checked the database or within the number of days after checking the database that carriers are required to age disconnected numbers.*

5. Any safe harbor should be carefully limited. To incentivize the use of the reassigned number database, and thus reduce the number of unwanted and illegal robocalls, we agree that a limited safe harbor might not be inappropriate, as long as it is carefully written and will reinforce incentives to comply with the consumer protection purposes of the TCPA. If there is a safe harbor, it should not be extended as a “get out of jail free” card to everyone who uses the database. It should be applicable only to the question of whether the caller was reasonable in relying on the information obtained from the database, and nothing else. As a result, a showing that the caller has complied with all other requirements for making automated calls under the TCPA must be a prerequisite to taking advantage of the safe harbor. Specifically, we would propose that a safe harbor a caller could use to avoid liability for a call made to a reassigned number would apply only when *all* of the following conditions apply:

- a) The caller must have checked the database *before* making the call to the reassigned number, and must have made the call within the number of days for which the database provides reliable information based on any minimum aging period.¹⁸
- b) The call was made to the reassigned number as the result of a mistake made either by the database or by the telephone company making the report about the disconnection date of the phone number, or as a result of a mistake made by the telephone company in reassigning the number before the aging period expires.

¹⁸ See discussion at section II.4, *supra*.

- c) The caller must show that it had the consent of the prior subscriber of the telephone number.
- d) The safe harbor would not shield the caller from any other TCPA violations (such as calling after a revocation, or after the called party has told the caller that it had reached the wrong party).
- e) The caller must show that it took affirmative steps to correct its internal records and report any discovered mistakes regarding the number mistakenly reported to the database administrator.
- f) *The FCC must strictly enforce the participation requirements of the database by telephone carriers.* The value of this database is based entirely on the reliability and accuracy of the information that it gathers and disseminates. Telephone carriers should be closely supervised to ensure that they report accurate and timely information. Constructing a program with weak compliance and messy protocols that is unreliable for the callers would be a waste of the FCC's time and effort and the taxpayers' money, and would not help callers or consumers.

Respectfully submitted, this the 29th day of May, 2018.

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