

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991) FCC 23-49

Comments of

National Consumer Law Center, on behalf of its low-income clients, and
Electronic Privacy Information Center
National Association of Consumer Advocates,
Public Knowledge
U.S. PIRG

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April 4, 2024

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Comments

I. Summary and Introduction

These comments are submitted by the **National Consumer Law Center** on behalf of our low-income clients, and **Electronic Privacy Information Center, National Association of Consumer Advocates, Public Knowledge, and U.S. PIRG**. We commend the Federal Communications Commission (FCC or Commission) for its latest Further Notice of Proposed Rulemaking¹ (FNPRM) addressing ways to reduce the number of unwanted and invasive robocalls. In this FNPRM, the Commission seeks to answer two questions. The first is whether wireless providers should continue to enjoy a partial or a full exemption from compliance with the consent requirements for automated calls and texts to its customers. As we explain below, we see no legal or policy justification for this exemption, and we urge the Commission to eliminate any exemption for wireless providers. The second question is whether the requirement in 47 C.F.R. § 64.1200(b)(3) that some calls to residential lines using an automated or prerecorded voice (prerecorded voice calls) provide an automated opt-out mechanism should apply to *all* prerecorded voice calls covered by the Telephone Consumer Protection Act (TCPA).

II. There is no legal or policy basis to treat wireless providers differently from any other utility companies.

A. Nothing in the TCPA justifies special treatment for wireless providers.

The statutory language in the TCPA does not include any language to justify a special exemption for wireless providers. Simply because the Commission issued an order in October 1992 that allowed this exemption² does not in itself justify the continuation of that exemption. Indeed, an amendment to the TCPA regarding exemptions, passed by Congress a few weeks after the FCC's

¹ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 02-278 (Rel. Feb. 16, 2024), *available at* <https://docs.fcc.gov/public/attachments/FCC-24-24A1.pdf> [hereinafter FNPRM]; Federal Comm'n Comm'n, Strengthening the Ability of Consumers To Stop Robocalls, Proposed Rule, CG Docket No. 02-278, 89 Fed. Reg. 15,802 (Mar. 5, 2024), *available at* <https://www.govinfo.gov/content/pkg/FR-2024-03-05/pdf/2024-04586.pdf>.

² The FCC's 1992 TCPA Order was adopted on September 17, 1992, released on October 16, 1992, and published in the Federal Register on October 23, 1991 at 57 Fed. Reg. 48,333, and is available at <https://www.fcc.gov/document/rules-and-regulations-implementing-telephone-consumer-protection-0>.

order,³ undermines any inference that Congress approved of this exemption. First, Congress did not codify any exemption for wireless providers. Second, it gave the Commission only limited, discretionary authority to make exemptions to the restrictions on autodialed or prerecorded calls to cell phones. By adding 47 U.S.C. § 227(b)(2)(C), it limited the Commission’s exemption authority to calls that are not charged to the called party and required any such exemption to be “subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights [the TCPA] is intended to protect.”

As a result, we agree that the Commission has the authority to exempt calls from wireless providers to its customers. But we disagree that the Commission is under any legal mandate to provide such an exemption.

Section 227(b)(1)(A)(iii) provides that prior express consent to receive ATDS or prerecorded calls is required for a call to a telephone number assigned to a cellular telephone service, certain other types of telecommunications services, “or any service for which the called party is charged for the call.” The use of the word “or” indicates that the final phrase is separate and independent from the other types of calls listed. It does not logically apply to numbers assigned to “cellular telephone service.”⁴ Referring to an opinion by the Court of Appeals for the Eleventh Circuit, the Commission noted that “[t]he rule of the last antecedent requires the phrase “for which the called party is charged for the call,” [in section 227(b)(1)], “to be applied to the words or phrase immediately preceding (i.e., “any service”), and not to be construed as extending to or including others more remote.”⁵ We agree with the statutory interpretation of the FCC, and the Eleventh and Third Circuit: the statute does not support the blanket exemption from the prior express consent requirement that the wireless providers seek.⁶

Moreover, there is a danger that interpreting the statute in the way sought by the wireless providers could be used to eradicate the requirement for prior express consent for virtually all calls

³ Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, § 403, 106 Stat. 4181 (Oct. 28 1992), *available at* <https://www.congress.gov/102/statute/STATUTE-106/STATUTE-106-Pg4181.pdf>

⁴ FNPRM, *supra* note 1, at ¶ 38; 89 Fed. Reg. 15,802, 15,803 ¶ 4.

⁵ FNPRM, *supra* note 1, at ¶ 38 n.6 (citing *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1257 (11th Cir. 2014) (“We therefore presume that Congress did not intend the phrase ‘for which the called party is charged for the call’ to apply to cellular telephone services.”)).

⁶ FNPRM, *supra* note 1, at ¶ 38 n.88 (citing *Susinno v. Work Out World Inc.*, 862 F.3d 346, 349 (3d Cir. 2017) (“If it were the case (as WOW suggests) that cell phone calls not charged to the recipient were not covered by the general prohibition, there would have been no need for Congress to grant the FCC discretion to exempt some of those calls.”)).

to cellular telephone lines. As most plans for cell phone service offered these days provide unlimited calls and texts,⁷ if the Commission were to apply this justification to calls from providers to their customers, it could provide a basis for callers to argue that their prerecorded calls are also legal without prior express consent.

B. There are substantial policy reasons to require full compliance with the TCPA requirements for consent—and revocation of consent—by wireless providers.

No different from other utilities. There is no doubt that wireless providers deliver a valuable service to their subscribers. But it is no more valuable than the services delivered by other utility companies providing electricity to power our lives, and gas to warm our spaces. Indeed, Congress has provided for several special protections to ensure uninterrupted connection to other utilities,⁸ which it has *not* provided for wireless providers. And, Congress could have codified the regulatory exemption provided by the Commission in 1992 when it amended the statute that year, yet it did not. These other utilities are governed by the requirement for prior express consent, and there is no reason to treat wireless providers differently.

Wireless providers need to be accountable for their unwanted calls. Consumers do not like to be the recipients of unstoppable automated calls and texts, regardless of who they are from. That intense dislike of prerecorded calls is the driving cause of most TCPA cases. Because of the current exemption for wireless providers, there are few reported TCPA decisions involving their calls, but the decisions that do exist show that consumers object to these calls just as they object to other unwanted calls. Some examples of these cases include:

1. *Persichetti v. T-Mobile USA, Inc.*, 479 F. Supp. 3d 1333 (N.D. Ga. Aug. 17, 2020). Despite several requests for the telemarketing text messages to stop, the texts kept coming.
2. *Dominguez v. T-Mobile USA, Inc.*, 2017 WL 8220598 (C.D. Cal. Jan. 18, 2017). After the plaintiff complained about texts received day and night, on weekends, and sometimes every day of the week about an overdue bill, T-Mobile informed the plaintiff that it was not possible to stop the text messages. Plaintiff alleged that over 100 messages were sent after asking that they stop, rising to the level of harassment.

⁷ See, e.g., Tommy Tindall, Nerdwallet, *How to Find the Best Cell Phone Plan for You* (Feb. 16, 2024), available at <https://www.nerdwallet.com/article/finance/cell-phone-plans>.

⁸ For example, the Low-Income Home Energy Assistance Act of 1981, provides annual funding of over \$2 billion a year to assist low-income households afford their home energy bills, see 45 C.F.R. § 96. Also see, the requirement for written notice before disconnection of “water, heat, and power” in E-Sign at 15 U.S.C. § 7003(b)(2)(A).

3. Stewart v. T-Mobile USA, Inc., 124 F. Supp. 3d 729 (D.S.C. Aug. 28, 2015). Plaintiff alleged that numerous automated calls were made to collect a debt, even though she had attempted to revoke consent repeatedly.
4. Whaley v. T-Mobile, USA, Inc., 2013 WL5155342 (E.D. Ky. Sept. 12, 2013). The plaintiff received numerous automated calls that continued for weeks about a debt owed by someone else, even though he had repeatedly requested the calls to stop.
5. Berg. v. Verizon Wireless, 2013 WL 8446598 (W.D. Wis. June 21, 2013). The plaintiff received four to five automated debt collection calls each day, totaling 393 calls, even after he had revoked consent for these calls.

Exempting telemarketing messages would be illegal. The Commission also asks whether the “unique relationship” that wireless providers have with their subscribers also justifies allowing “robocalls and robotexts that contain telemarketing or advertisements” without compliance with the TCPA rules for those messages. In our view, such an exemption would be illegal. Congress has clearly articulated the conditions for such permission in 47 U.S.C. § 227(b)(2)(C)—requiring a determination that the exemption be subject to conditions “in the interest of the privacy rights” protected by the TCPA. That condition could not plausibly be met for telemarketing messages from wireless providers.

It should be an accepted truth in 2024 that most American telephone subscribers abhor unsolicited telemarketing messages. The Commission’s recent, laudable efforts to provide more control over unwanted telemarketing calls in the “lead generator rule”⁹ support that point, as do the hundreds of express comments filed by individuals and small businesses in support of the Commission’s action.¹⁰ There are no conditions that the Commission could impose that would prevent unwanted telemarketing calls—from wireless providers or any other source—from violating consumers’ privacy.¹¹

⁹ *In re* Targeting and Eliminating Unlawful Text Messages; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Report and Order, Second Further Notice of Proposed Rulemaking in CG Docket Nos. 02-278 and 21-402, and Waiver Order in CG Docket No. 17-59, CG Docket Nos. 21-402, 02-278, & 17-59, (Rel. Dec. 18, 2023), *available at* <https://docs.fcc.gov/public/attachments/FCC-23-107A1.pdf>; Targeting and Eliminating Unlawful Text Messages; Implementation of the Telephone Consumer Protection Act of 1991, Proposed Rule, CG Docket Nos. 02-278, 21-402, 89 Fed. Reg. 5177 (Jan. 26, 2024), *available at* <https://www.govinfo.gov/content/pkg/FR-2024-01-26/pdf/2023-28833.pdf>.

¹⁰ This is the list of Express Filings in Docket 02-278, on the FCC’s electronic website, filed since December 28, 2023: [https://www.fcc.gov/ecfs/search/search-filings/results?q=\(express_comment:\(%221%22\)+AND+proceedings.name:\(%2202-278%22\)+AND+date_received:\[2023-12-18%20TO%202024-03-11\]\)](https://www.fcc.gov/ecfs/search/search-filings/results?q=(express_comment:(%221%22)+AND+proceedings.name:(%2202-278%22)+AND+date_received:[2023-12-18%20TO%202024-03-11])).

¹¹ 47 U.S.C. § 227(b)(2)(C).

III. All prerecorded calls should be required to include an automated opt-out mechanism.

We very much appreciate the codification of the revocation of consent requirements recently issued by the Commission.¹² We appreciate the additional clarity regarding how callers must deal with revocations of consent for unwanted calls. We ask that the Commission close one more gap in its regulations: clearly apply the requirement for an automated opt-out mechanism to all prerecorded calls.

The Commission has required that all prerecorded *telemarketing* calls to cell phones and other sensitive numbers or to residential lines must include an automated opt-out mechanism since 2012.¹³ In 2022, when the Commission established the rules for exempt calls to residential subscribers—as required by the TRACED Act¹⁴—the Commission amended its regulation at 47 C.F.R. § 64.1200(b)(3) to require that *non-telemarketing* prerecorded calls made without consent to cell phones or residential lines pursuant to an exemption must also include an automated opt-out mechanism.¹⁵

As a result, automated opt-out mechanisms are now required for:

- Prerecorded *telemarketing* calls made to cell phones and other sensitive numbers (calls defined in § 64.1200(a)(2)), which require prior express written consent.¹⁶
- Prerecorded *telemarketing* calls made to residential lines (calls defined in § 64.1200(a)(3)), which require prior express written consent.
- Prerecorded *non-telemarketing calls* made to residential lines “made pursuant to an exemption under” section 64.1200(a)(3)(ii) through (v), which do not require prior express consent.

However, section 64.1200(b)(3)’s requirement for an automated opt-out mechanism does not appear to apply to:

¹² *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 02-278 (Rel. Feb. 16, 2024), *available at* <https://docs.fcc.gov/public/attachments/FCC-24-24A1.pdf>.

¹³ Federal Commc’ns Comm’n, Telephone Consumer Protection Act, Final Rule, CG Docket No. 02-278, 77 Fed. Reg. 34,233 (June 11, 2012), *available at* <https://www.govinfo.gov/content/pkg/FR-2012-06-11/pdf/2012-13862.pdf> (hereinafter June 11, 2012 Final Rule).

¹⁴ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, § 8, 133 Stat. 3274 (2019).

¹⁵ 47 C.F.R. § 64.1200(b)(3) referring to calls defined 47 C.F.R. § 64.1200(a)(3)(ii) through (v).

¹⁶ 47 C.F.R. § 64.1200(b)(3) refers to prerecorded telemarketing calls to the lines or telephone numbers described in § 64.1200(a)(1)(i) through (iii). Those calls are separately regulated by § 64.1200(a)(2).

- Prerecorded *non-telemarketing* calls to cell phones and other sensitive numbers (§ 64.1200(a)(1)), which require prior express consent.
- Prerecorded *non-telemarketing* calls to residential lines that are made with consent. This appears to be the case because section 64.1200(b)(3) requires an automated opt-out mechanism only for prerecorded non-telemarketing calls that are “made pursuant to an exemption” to section 64.1200(a)(3). Since prerecorded non-telemarketing calls to which the called party has consented can be made without relying on one of those exemptions, it appears that those calls are not “made pursuant to an exemption,” so the requirement of an automated opt-out mechanism does not apply. However, the language is not perfectly clear.
- Prerecorded *non-telemarketing* calls made to landlines that are not considered residential lines, which do not require prior express consent.

These distinctions do not make sense. The Commission first recognized the value of the automated opt-in mechanism in stopping unwanted calls in 2012 when it required that all prerecorded telemarketing calls to residential lines and to cell phones or other sensitive numbers must include the mechanism.¹⁷ The Commission corroborated the importance of this mechanism in 2022 when it required that unconsented-to prerecorded calls that do not include telemarketing messages must include the opt-out mechanism as a condition of allowing those calls to be made.¹⁸

The Commission explained the value of the opt-out mechanism when adopting the initial requirement in 2012. The Commission noted –

The Commission believes that the automated, interactive opt-out mechanism adopted will empower consumers to revoke consent if they previously agreed to receive autodialed or prerecorded telemarketing calls and stop receipt of unwanted autodialed or prerecorded telemarketing calls to which they never consented. **The record developed in the FTC proceeding includes an industry analysis showing, among other things, that consumers are four times more likely to opt out of a prerecorded call that has an automated, interactive opt-out mechanism as opposed to opting out of a prerecorded call that provides a toll-free number for the consumer to call during business hours. This analysis suggests that consumers are reluctant to use toll-free numbers to end unwanted telemarketing calls.** The majority of commenters in this proceeding who address this issue support an automated, interactive optout mechanism for telemarketing calls.¹⁹

¹⁷ June 11, 2012 Final Rule, *supra* note 13.

¹⁸ 47 C.F.R. § 64.1200(a)(3) (“ . . . A telephone call to any residential line using an artificial or prerecorded voice to deliver a message requires no consent if the call: . . . (iii) and honors the called party’s request to opt out of future calls as required in paragraphs (b) and (d) of this section; . . . ”).

¹⁹ June 11, 2012 Final Rule, *supra* note 13, at ¶ 31 (emphasis added).

In 2012, the Commission considered whether to require the automated opt-out mechanism for non-telemarketing calls, but found that “the record does not reveal a level of consumer frustration with non-telemarketing calls that is equal to that for telemarketing calls.”²⁰ However, at this point in time, twelve years later, the plethora of cases that consumers have filed about unstopable prerecorded, non-telemarketing calls²¹ should be sufficient proof that the automated opt-out mechanism should be applicable to all prerecorded calls.

The confusion that continues to exist between callers and called parties regarding whether the consumer actually said or did something adequate to revoke prior consent should be sufficient grounds to require the automated opt-out mechanism in all prerecorded calls. Call recipients often have to go to court to force callers to stop calling them, and then the callers often claim that they did not receive the message. Just a few of the many reported cases illustrate this dynamic:

1. Barnett v. First Nat’l Bank of Omaha, 2022 WL 627028 (W.D. Ky. Mar. 3, 2022). Whether the plaintiff revoked consent was a disputed issue of fact where plaintiff alleged that, over a seven-month period, the bank repeatedly contacted him about his credit card debt via phone calls and text messages.
2. Jenkins v. Bank of Am., N.A., 2023 WL 2939349 (S.D. Cal. Apr. 13, 2023). Motion to dismiss denied after plaintiff alleged receiving twelve prerecorded debt collection calls even after her attorney faxed a letter to “multiple fax numbers belonging to Defendant” stating “[p]lease cease further communication with me.”
3. Franklin v. Hollis Cobb Assocs., Inc., 2022 WL 4587849 (N.D. Ga. Sept. 29, 2022). Summary judgment denied where plaintiff alleged that, on three different occasions, once via a letter and twice via phone call, he revoked consent that he had previously given to the creditor, and that, after these revocations, the debt collector called him eleven times using a prerecorded message.

²⁰ *Id.* at ¶ 31.

²¹ *See, e.g.* Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014). *Accord* Schweitzer v. Comenity Bank, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked); Faucett v. Move, Inc., 2023 WL 2563071 (C.D. Cal. Mar. 17, 2023) (fact that consumer may have given written consent to receive prerecorded telemarketing calls does not preclude him from orally revoking that consent); Chatman v. Miramed Revenue Grp., 2022 WL 832642 (N.D. Ill. Mar. 21, 2022); Tillman v. Hertz Corp., 2018 WL 4144674 (N.D. Ill. Aug. 29, 2018); Cartrette v. Time Warner Cable, Inc., 157 F. Supp. 3d 448 (E.D.N.C. 2016); King v. Time Warner Cable, 113 F. Supp. 3d 718, 726 (S.D.N.Y. 2015) (applying FCC’s 2015 declaratory ruling; consumer’s revocation, communicated to caller, was effective), *vacated and remanded on other grounds*, 894 F.3d 473 (2d Cir. 2018); Conklin v. Wells Fargo Bank, N.A., 2013 WL 6409731 (M.D. Fla. Dec. 9, 2013); Munro v. King Broad. Co., 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013); Adamcik v. Credit Control Servs., Inc., 832 F. Supp. 2d 744 (W.D. Tex. 2011) (holding that consent is revocable and relying on common law meaning of “consent”).

4. Coleman v. Humana, Inc., 2023 WL 3485242 (E.D.N.C. May 16, 2023). Case dismissed where plaintiff alleged that he repeatedly asked to be removed from the caller's lists but could not remember the dates he revoked consent.
5. Franklin v. Cenlar F.S.B., 2022 WL 2388598 (N.D. Ga. Mar. 30, 2022), *adopted*, 2022 WL 2388600 (N.D. Ga. May 26, 2022). Requiring trial on question of whether letter plaintiff sent to revoke consent for prerecorded calls was clear enough.
6. Allen v. First Nat'l Bank of Omaha, 2021 WL 2654630 (M.D. Pa. June 28, 2021). Plaintiff's motion for summary judgment denied on the ground that his revocation of consent was not clear enough; he alleged that the defendant placed 594 automated calls, 236 of which were prerecorded, to his cell phone after he had revoked consent.

Unstoppable prerecorded debt collection calls are particularly annoying when they are attempts to collect debts from someone completely unknown to the recipient of the calls. In a case currently pending in the Eleventh Circuit on whether arbitration should be compelled, the plaintiff filed suit after receiving multiple wrong-number prerecorded calls from Synchrony Bank.²² She was unable to opt out via telephone because the bank did not have an automated opt-out mechanism and, when she called the bank, it required her to enter the account number to proceed to an operator. She eventually mailed the bank a letter indicating that it had the wrong number. The bank ignored that and kept calling her number. Had an automated opt-out mechanism been included on those calls, the bank would have had a way of knowing immediately that the recipient wanted the calls to stop.

Requiring an automated opt-out mechanism to be included in all prerecorded calls covered by the TCPA will not resolve all of these cases. But it will eliminate a lot of these arguments, which will help stop many unwanted prerecorded calls.

We urge the Commission to rewrite 47 C.F.R. § 64.1200(b)(3) as follows:

(3) In every case where the artificial or prerecorded-voice telephone message is delivered pursuant to an exemption under paragraphs (a)(3)(ii) through (v) of this section or includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism must automatically record the called person's number to the caller's do-not-call list and immediately terminate the call. When the artificial or prerecorded-voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free

²² Runzi v. Synchrony Bank, First Amended Class Action Complaint, Case No. 3:23-cv-00129 (N.D. Ga. Aug. 14, 2023).

number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the caller's do-not-call list.

IV. Conclusion

We very much appreciate the Commission's consideration of our request and our views.

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