January 28, 2019

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278 & CG Docket No. 18-152

Dear Ms. Dortch:

The purpose of this *ex parte* is to supplement the comments we filed on June 13, 2018[1] and the reply comments filed on June 28, 2018[2] regarding how the Federal Communications Commission (FCC or Commission) should deal with calls to reassigned numbers in two separate time periods: after the full implementation of the reassigned number database as recently ordered by the FCC, and between now and the date of this implementation. This *ex parte* is in furtherance of our primary comments filed on June 13, 2018 in this proceeding on behalf of forty-two national and state public interest groups and legal services organizations, including ourselves.[3]

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[1] Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, CG Dockets 02-278 and 18-152 (June 13, 2018) [hereinafter NCLC Primary Comments], *available at* https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf.

[2] Reply comments of the National Consumer Law Center, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, CG Dockets 02-278 and 18-152 (June 28, 2018), *available at* https://ecfsapi.fcc.gov/file/10628029912509/Final%20Reply%20Comments.pdf.

[3] The national public interest organizations on whose behalf our primary comments were filed on June 13, 2018, were, in addition to NCLC: Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, NAACP, National Association of Consumer Advocates (NACA), National Association of Consumer Bankruptcy Attorneys (NACBA), National Legal Aid & Defender Association, Prosperity Now, Public Justice, Public Knowledge, and US

First, we applaud the Commission's adoption of the reassigned number database, as adopted on December 12, 2018.[4] We also applaud the specific narrow safe harbor limited to those calls that are the direct result of incorrect information from the database.[5]

The order establishing the database and the limited safe harbor defers the question of how to deal with calls made to reassigned numbers during the period before the database is operational.[6] This *ex parte* addresses that question, as well as some details about the rules that should apply once the database is in full operation. These issues include how the term "called party" as used in section 227(b)(1)(A) should be interpreted: whether it should mean the party intended to be called, or the party actually reached. Second, as the Commission's rules establishing a reassigned number database do not take effect for some time,[7] we propose a set of standards if the Commission chooses to adopt a reasonable reliance standard for the interim period. We also address the question of a reasonable reliance standard for reassigned number calls once the database is fully operational.

I. Standards to be Applied

PIRG; the state public interest and legal services programs were Arkansans Against Abusive Payday Lending, Housing and Economic Rights Advocates, California, Public Good Law Center, California, Connecticut Legal Services, Inc., Jacksonville Area Legal Aid, Inc., Florida, Florida Alliance for Consumer Protection, LAF, Illinois, Greater Boston Legal Services, Massachusetts on behalf of its low-income clients, Public Justice Center, Maryland, Michigan Poverty Law Program, Legal Aid Center of Southern Nevada, Legal Services of New Jersey, Public Utility Law Project of New York, Bronx Legal Services, New York, Brooklyn Legal Services, New York, Long Term Care Community Coalition, New York, Manhattan Legal Services, New York, Queens Legal Services, New York, Staten Island Legal Services, New York, Financial Protection Law Center, North Carolina, North Carolina Justice Center, Legal Aid Society of Southwest Ohio, South Carolina Appleseed Legal Justice Center, Texas Legal Service Center, Virginia Poverty Law Center, Washington Defender Association, West Virginia Center on Budget and Policy, Mountain State Justice, West Virginia, and One Wisconsin Now.

[4] In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 Second Report And Order, December 12, 2018, (hereinafter "Second Report and Order") *available at* https://docs.fcc.gov/public/attachments/FCC-18-177A1.pdf.

[5] *Id.* at 54 – 58.

[6] Second Report and Order, note 133: "We acknowledge that the Commission still has before it the question of whose prior express consent it must have under the TCPA. For example, must the caller have the prior express consent of the current subscriber or the subscriber it reasonably expected to reach? We do not need to resolve this question here, however, to find that *whatever standard* we later adopt, use of the database should help callers that reach an unintended subscriber avoid liability for that call."

[7] The effective date will be announced by the Consumer and Governmental Affairs Bureau when the database is operational. Second Report and Order, note 98.

It is important to note that the TCPA is a consumer protection statute, intended to protect consumers' privacy. Congress's findings when it enacted the TCPA repeatedly stress this purpose.[8] It is to be interpreted liberally to promote this purpose.[9] It is not designed to enable callers to make automated calls. As a result, the lens through which the FCC should evaluate proposed actions and interpretations should be whether they result in actually protecting consumers from those unwanted automated calls.[10] Policies that enable responsible callers to develop responsible calling policies that ensure that automated calls are made only to consumers who have provided consent are appropriate, but they must be carefully crafted to promote the TCPA's goals.

II. Repeated and Unstoppable Calls to Reassigned Numbers Are a Serious Problem

It is important to note that the litigation around reassigned number calls is caused by *repeated and unstoppable* calls to the wrong number, not just one or two mistaken calls. Consumers are begging callers to stop the calls, and it is only when they don't that the consumer must resort to seeking legal advice to stop the calls and obtain legal redress. Some recent examples—from many similar cases—include:

1. Allen v. JPMorgan Chase, N.D. 1:13-cv-08285. Sheila Allen received about 80 calls from Chase regarding an auto loan that she did not have. The calls continued despite repeated requests that they stop. The case resulted in a settlement.

2. Goins v. Palmer Recovery Attorneys, M.D. Fl. 6:17-cv-00654. Amber Goins received frequent calls from Palmer Recovery Attys seeking to collect from "Kenya Johnson." Ms. Goins told defendant several times that she was not Kenya Johnson, and defendant repeatedly said that it would remove her number from its calling list; however, the calls continued. The case was settled.

3. Davis v. Diversified Consultants, Inc., D. Mass. 1:13-cv-10875. Jamie Davis received up to three calls a day from Diversified Consultants seeking to collect on a debt owed by "Rosemary." The calls continued even after Mr. Davis had told Diversified that he did not know Rosemary, and they had said they would remove his phone number. The case was settled.

4. Lebo v. Navient, D. Wyo. 2:17-cv-00154. Zachary Lebo received 100 calls over 2 months from Navient for a "Justine Sulia," sometimes as many as 5 calls a day. He had never given permission for Navient to call him, and he revoked permission over the phone; the calls

[8] 47 U.S.C.A. § 227 note.

[9] 137 Cong. Rec. S16204, S16205 (Nov. 7, 1991). *See also* S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973 ("The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.").

[10] As such, the prefatory language in § 227(b)(2), giving the Commission authority to "prescribe regulations to implement the requirements of this subsection," must be read to refer to regulations *which will protect consumers.*

continued. The case was settled.

5. Moseby v. Navient Solutions, Inc., E.D. Ark. 4:16-cv-00654. Terrance Moseby received dozens of calls from Navient for a "Joshua Morris" or "Andrea." Mr. Moseby has never had any relationship with Navient or either of these people. He told Navient that it had the wrong number but the calls continued.The case settled to the parties' satisfaction.

6. Waite v. Diversified Consultants, M.D. Fl., 5:13-cv-00491 Patricia Waite and her daughter Heather received about 166 calls from Diversified Consultants for "Marcy Rodriguez," whom neither of them know. Diversified continued calling multiple times a day despite being told that it had a wrong number. The case was settled.

7. Johnson v. NPAS Solutions, S.D. Fl. 9:17-cv-80393. Charles Johnson received several calls from NPAS seeking to collect from an unknown person. The calls continued after Mr. Johnson repeatedly requested that they stop. This case resulted in a settlement.

8. Swaney v. Regions Bank, N.D. Ala. 2:13-cv-00544. SueAnne Swaney received more than 20 text messages from Regions Bank regarding an account which she had never held. The messages began the day she acquired her cell phone. Ms. Swaney replied at least six times, telling Regions that she had never had an account there and that they were contacting the wrong person, but the messages continued. This case is ongoing.

9. Berstler v. Navient, E.D. Pa., 2:16-cv-01738. Robert Berstler received repeated calls from Navient trying to contact someone else. This case was settled.

As these cases illustrate, to protect consumers, it is imperative that the pressure be maintained on callers to ensure that they are calling the correct number: the number that belongs to the consumer from whom they have consent to call. Mistakes do happen. But these lawsuits are not about a single mistake. These lawsuits are about callers who persist in calling numbers about which they have received repeated notice do not belong to the person who provided consent. These cases are brought against callers who clearly did not have enough of a financial incentive to make sure that they stopped calling—and harassing—consumers with whom they had no relationship, who had not provided consent, and who begged the callers to stop the calls.

Moreover, there is another group that needs to be protected: that is the group of people who have signed up for calls or texts to alert them to certain events, such as a low-balance in a bank account, an overdraft, or a health care reminder. If the calls or texts are being sent to the wrong person, then the person who wants to receive them is not receiving them. For all parties involved, it is important that the callers know who they are reaching, and that they stop calling or texting when they reach the wrong party. It would be entirely inappropriate, and potentially seriously harmful, for one person to receive personal financial or health information intended for another person. This danger swings both ways:

> If Mary Jones receives information that Cindy Smith's account is overdrawn, that is a breach of Cindy Smith's privacy. Yet if the information is provided without mentioning Cindy Smith's name, such that Mary Jones, the recipient of the call, believes it is about *her own* account, that would lead Mary Jones to be alarmed and to

> waste time, money, and emotional effort to deal with something that has nothing to do with her.

Failing to ensure that these calls are actually reaching the intended recipient could lead to potentially dire financial results.

> If Mary Jones receives the call saying that Cindy Smith's account is overdrawn—that means that Cindy Smith does not receive that notification. Yet, the financial institution considers that it has fulfilled its obligation to inform Cindy Smith of the needed course of action.

For these reasons, it becomes even more important to ensure that callers take the utmost care to reach the intended recipient. Having the actual consent of the intended party is the best way to ensure that the intended recipient actually receives the call, and it is the best way to ensure that these calls do not result in a significant invasion of privacy for the intended party, or an unnecessary amount of trouble and worry for the party reached who is not the intended party.

III. "Called Party" Means the Subscriber Reached

We strongly urge the Commission *not* to change its interpretation of the definition of "called party" in one part of the statute in a way that would be inconsistent with its clear meaning in other parts of the same statute. The court in *ACA International* reviewed two issues relating to calls to reassigned numbers: 1) the definition of the "called party," and 2) whether the one-call safe harbor was arbitrary. The court held that the 2015 Order's definition of "called party" as the actual recipient of the call comported with precedent from the Seventh Circuit.[11]

> The D.C Circuit, quoting from this precedent, noted:
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> The Seventh Circuit explained that the phrase "called party" appears throughout the broader statutory section, 47 U.S.C. § 227, a total of seven times. 679 F.3d at 640. Four of those instances "unmistakably denote the current subscriber," not the previous, pre-reassignment subscriber. *Id.* Of the three remaining instances, "one denotes whoever answers the call (usually the [current] subscriber)," and the other two are unclear. *Id.* By contrast, the court observed, the "phrase 'intended recipient' does not appear anywhere in § 227, so what justification could there be for equating 'called party' with 'intended recipient of the call'?" *Id.* For those and other reasons, the court concluded "that 'called party' in § 227(b)(1) means the person subscribing to the called number at the time the call is made," not the previous subscriber who had given consent. *Id.* at 643; *see also* Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1250-52 (11th Cir. 2014).[12]

The D.C. Circuit held that this analysis by the Seventh Circuit was "persuasive" support for the conclusion that the FCC could define "called party" to mean the person actually called, even when

[11] Soppet v. Enhanced Recovery Co., 679 F.3d 637 (7th Cir. 2012); *see also* Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1250-52 (11th Cir. 2014).

[12] ACA International v. F.C.C., 885 F.3d 687, 706 (D.C. Cir. 2018) (emphasis added).

the telephone number had been reassigned.[13] However, the *ACA International* court also held that the Commission's creation of a one-call safe harbor was arbitrary. Since the court could not be sure that, without the safe harbor, the FCC would have adopted the interpretation of "called party" to mean the person reached, the court set aside both parts of the FCC's treatment of reassigned numbers.[14]

The Seventh Circuit's analysis is not just persuasive, but compelling. There is no justification for defining "called party" as the "intended recipient"; its only effect would be to provide callers a way to avoid liability for calling the wrong number.

To treat "called party" in section 227(b)(1)(A) as the person the caller intended to reach would be inconsistent with the way the term is used elsewhere in the statute. And the implications of such a ruling with respect to revocation of consent would be staggering. If the original subscriber is the person whose consent is necessary, then a logical corollary is that the original subscriber—who may have died, left the country, gone to jail, or disappeared, and who certainly has no interest in revoking consent to receive calls that he or she is no longer actually receiving—would also be the only person who has the authority to revoke that consent. This interpretation would leave millions of consumers trapped—barraged by unwanted calls, with no way to escape. As long as *any* subscriber, regardless of how far back in the chain of assignments, had given consent, that number would be permanently and irrevocably open season for unrestricted robocalling.

Callers' exposure to liability for making wrong-number calls provides the effective incentive to spend the time and money to engage in business practices designed to limit—to the maximum extent possible—wrong number calls. Once the reassigned number database is operational, using it correctly will be the best way to ensure that callers are not calling reassigned numbers. If the Commission were to change the definition of "called party" to mean "intended recipient" there would be no reason for callers to use the database. They would always have the consent of the person they meant to reach, and it would not matter who they actually reached.

The Commission has expended a considerable amount of effort and resources protecting consumers in adopting the carefully crafted reassigned number database. Moreover, establishing and maintaining the database will be no small task for the service providers and others involved. However, if the definition of "called party" is changed to "intended recipient," all that work developing and implementing the database will be for nothing: as callers will only need to show that they had the consent of the person they intended to call to avoid liability.

We strongly urge the Commission to maintain the current definition of "called party" to mean the person reached. To do otherwise would fly in the face of logic, precedent, and the clear meaning of the words in the TCPA.

IV. Reasonable Reliance

[13] *Id.*

[14] *Id.* at 708-09.

The Commission's order on the database mentions "reasonable reliance" as a legal standard to be considered in evaluating a caller's liability for making wrong number calls.[15] And it notes that the D.C. Circuit Court in *ACA Int'l v. FCC*[16] appears to have approved of this standard. However, in the *ACA* opinion the court neither blesses the use of a reasonable reliance standard, nor rejects it. It just notes that the Commission used such a standard. Of course, the court then rejected the framework in which the Commission had used the standard, noting that the logic upon which the standard was based was flawed.[17]

Allowing callers to defend themselves from lawsuits challenging calls to consumers using a "reasonable reliance" approach to prior express consent is rational *only if* the Commission maintains the incentive for callers to act reasonably in the circumstances. The Commission should clearly articulate this requirement. Some examples of acting reasonably when placing repeated automated calls would be helpful, as would some examples of actions that would clearly be unreasonable.

A. Reasonable Reliance Before the Database is Functional

It may be a year or more before the database is fully functional. In this interim period, if the FCC determines that some protection is needed for callers who inadvertently call reassigned numbers, we urge it to adopt standards that require the caller to prove the following:

> 1. **It had consent from the person it intended to call.** A prerequisite to any claim of reasonable reliance must be that the caller prove that it had consent from the person it intended to call. Otherwise, the reasonable reliance standard would become a cover for calls made in bad faith without any claim of consent.
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> 2. **It stopped calling once the person reached said to stop**. As shown by the examples above, many callers continue to place wrong-number calls even after being told to stop. [Whether the caller views these stop requests as revocations of consent, or only as demands that the calls stop because the person is not the person intended to be reached,] all calls should stop once the request is made.

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[15] *Id.* at 58.

[16] 885 F.3d 687, 705-06 (D.C. Cir. 2018): "The Commission acknowledged that even the most careful caller, after employing all reasonably available tools to learn about reassignments, "may nevertheless not learn of reassignment before placing a call to a new subscriber." *Id.* at 8009 ¶ 88. The Commission observed that it nonetheless "could have interpreted the TCPA to impose a traditional strict liability standard on the caller: i.e., a 'zero call' approach under which no allowance would have been given for the robocaller to learn of the reassignment." *Id.* at 8009 ¶ 90 n.312. But the Commission declined to interpret the statute "to require a result that severe." *Id.* Rather, the Commission read the statute to "anticipate[ ] the caller's ability to rely on prior express consent," which the Commission interpreted "to mean reasonable reliance." *Id.* (internal quotation marks omitted). The Commission effectuated its "reasonable reliance" approach by enabling a caller who lacks knowledge of a reassignment "to avoid liability for the first call to a wireless number following reassignment."

[17] *Id.*

3. **It took other robust steps to avoid calling reassigned numbers.** This requires recognition that just calling people based on old information is not reasonable. In addition, the caller should be required to prove that it took at least one of the following steps to avoid calling reassigned numbers:

a) **Use of a commercial database.** The commercial databases that are available to check whether a number has been reassigned are not comprehensive—which is why the reassigned number database will be such an improvement. Nonetheless, the commercial databases capture a large number of reassigned numbers. A caller who claims reasonable reliance on the consent of a former owner of a telephone number could at least be required to have checked the number against one of the commercial databases within a reasonable time before making the call, and to show that the database did not list the number as reassigned.

b) **Employing an easy-to-use and publicized method to allow called parties to stop the calls.** In the alternative, the caller could be required to prove that it used an automated interactive voice and/or keypress activated opt-out mechanism for the calls in question. The FTC has already articulated exactly this system for prerecorded voice calls in its telemarketing rules. These rules require that, within two (2) seconds after greeting the person called, the telemarketer play a prerecorded message that promptly states one or both of the following: a) In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request; or b) In the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request.[18]

   In automated calls made with a live agent, the agent would similarly inform the person reached within two seconds after the call has been answered of the opportunity to stop the calls, and should stop the calls immediately upon request. Voice mails should mirror the requirements applied to prerecorded calls.

It is essential that no revocation system require that the consumer actually speak to or actively engage with a caller. The FTC and others all advise consumers *not* to engage with callers.[19] Accordingly, no revocation method should mandate this type of active engagement. Both a keypress system and an automated toll-free number (for calling after a voice mail) should always be available.

c) **Regularly scheduled checking of numbers, and purging of numbers that cannot be confirmed.** A final alternative would be a regular schedule of checking numbers to make sure they have not been reassigned, and purging of numbers that cannot be confirmed. For examples, vendors could ask their customers to verify their phone

[18] 16 C.F.R. § 310.4(b)(1)(B): Abusive Telemarketing Practices. This set of rules has been required to be used by telemarketers since 2011.[18]

[19] *See e.g.* https://www.consumer.ftc.gov/media/video-0028-what-do-if-you-get-robocall; https://www.verizon.com/support/consumer/consumer-education/robocalls/nomoroboI.

numbers when making purchases, and could purge numbers that have not been verified after a certain period.

B. Reasonable reliance after the database is operational.

Once the reassigned number database is fully operational, properly using it should be only one part of a test to establish a reasonable reliance defense. The safe harbor already established by the Commission protects callers from mistakes in the database, but the Commission should make clear that, in order to avoid liability, the caller must also prove that it had consent from the party it intended to call.

Use of the database should be a *sine qua non* for any reasonable reliance test involving reassigned numbers. In order to make sure that small entities have the ability to make use of the database, we urge the Commission to make it inexpensive for small requests.

V. The Commission Should Consider Mandating an Automated Interactive Opt-Out System for All Calls.

These comments focus on reassigned numbers. However, we urge the Commission to apply some of these principles more broadly. In particular, we urge the Commission to consider mandating an automated opt-out system for all prerecorded calls and texts, separate and apart from the reassigned number question. Consumers are plagued by many other types of wrong-number calls and unwanted calls. Communicating a request that the calls stop can be impossible when the calls are prerecorded. Since the FTC has already designed such a system for prerecorded voice calls, the Commission could build on the FTC's work. In addition to the Commission's general authority in § 227(b)(2) to adopt rules, its authority in § 227(d)(3) to establish technical and procedural standards for prerecorded calls would allow it to impose this requirement.

VI. Conclusion

"In regulation, as in sports, it is good to have clear rules."[20] These wise words are particularly relevant here: reasonable reliance as an excuse for calling reassigned numbers should only be considered if callers have engaged in reasonable behavior.

We would be happy to answer any questions. This disclosure is made pursuant to 47 C.F.R. § 1.1206. Thank you very much.

Sincerely,

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[20] *SoundBite*, 27 FCC Rcd. at 15401 (Chairman Pai, concurring).

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