

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
United Healthcare Services, Inc. Petition for	)	CG Docket No. _____
Declaratory Ruling Regarding Reassigned	)	
Wireless Telephone Numbers	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**PETITION FOR EXPEDITED DECLARATORY RULING**

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**I. INTRODUCTION AND SUMMARY**

United Healthcare Services, Inc. (“United”),<sup>1</sup> pursuant to Section 1.2 of the Federal Communications Commission’s (“Commission”) rules,<sup>2</sup> respectfully submits this Petition for Expedited Declaratory Ruling (“Petition”) to clarify the applicability of the Telephone Consumer Protection Act (“TCPA”)<sup>3</sup> and the Commission’s TCPA rules<sup>4</sup> to informational, non-telemarketing autodialed and prerecorded calls to wireless numbers for which valid prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another.

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<sup>1</sup> Recognized as America’s most innovative healthcare company by Fortune magazine, United provides a diversified and comprehensive array of health and well-being products and services to more than 75 million individuals.

<sup>2</sup> 47 C.F.R. § 1.2.

<sup>3</sup> 47 U.S.C. § 227.

<sup>4</sup> 47 C.F.R. § 64.1200.

To facilitate high-quality healthcare and patient services, United contacts individuals to convey important, time-sensitive healthcare-related information, including:

- Prescription refill notifications;
- Annual influenza vaccine reminders;
- Appointment and exam scheduling confirmations and reminders;
- Pre-operative instruction calls;
- Lab result discussions;
- Post-discharge follow-up communications intended to prevent readmission;
- Home healthcare instructions;
- Notifications about health-related products or services that are provided by or included in a benefit plan, or that are available only to a health plan enrollee and add value to (but are not part of) plan benefits; and
- Communications about the entities participating in a healthcare provider network or health plan network, or about replacements of (or enhancements to) a health plan.

United obtains the requisite “prior express consent” from individuals before these calls are placed to wireless telephone numbers using an automatic telephone dialing system (“autodialer”) or an artificial or prerecorded voice.<sup>5</sup> United also targets these calls to specific individuals for particular purposes (*e.g.*, the person who has the prescription up for refill or who has an upcoming appointment). There is no need or incentive for United to contact anyone other than the intended recipient, nor is there any benefit to United to doing so. Nevertheless, unbeknownst to United, the wireless telephone numbers for which it obtained “prior express consent” are sometimes reassigned from one subscriber to another. As a result, United – like

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<sup>5</sup> Under the TCPA and the FCC’s TCPA rules, callers must obtain “prior express consent” to place informational, non-telemarketing autodialed or prerecorded calls to wireless numbers. 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

other companies – has been named as a defendant in TCPA class action litigation on the grounds that it did not have “prior express consent” to call the reassigned number.

It is inconsistent with the letter and purpose of the TCPA to expose to litigation callers that dial numbers for which they have obtained “prior express consent” to call just because those numbers have been reassigned without the caller’s knowledge. Organizations cannot completely avoid calling reassigned wireless telephone numbers. There is no public wireless telephone number directory, and individuals may change their phone numbers without notifying callers beforehand. Good faith errors also can occur. Thus, callers will inevitably call reassigned telephone numbers despite efforts to contact only the specific individuals who provided “prior express consent” for those wireless telephone numbers. The significant and growing litigation risk from such calls – and the potential for devastating TCPA class action damage awards – threatens organizations that have earnestly and in good faith attempted to meet their TCPA obligations. It also has the potential, contrary to Congress’s and the Commission’s TCPA goals, to chill the provision of time-sensitive, non-telemarketing informational messages that consumers strongly desire and have consented to receive.

The Commission should issue a narrow declaratory ruling to avoid this manifestly unreasonable outcome and resolve the current compliance uncertainty surrounding calls to reassigned numbers. Specifically, it should confirm that parties are not liable under the TCPA for informational, non-telemarketing autodialed and prerecorded calls, especially healthcare-related 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 place calls to that specific telephone number.

The Commission has ample legal authority to grant this Petition, and it can provide relief through a number of possible avenues. For example, the Commission could find that when a caller has properly obtained “prior express consent” from a party to call that party’s telephone number, such “prior express consent” encompasses autodialed and prerecorded non-telemarketing, informational calls to that telephone number until the caller learns (*e.g.*, from a call recipient) that the telephone number provided has been reassigned. Alternatively, the Commission could issue a declaratory ruling confirming that the term “called party”<sup>6</sup> encompasses both the consenting party and the new subscriber to a reassigned number until the caller learns from the call recipient that the two parties are not the same.

In addition, another option would be for the Commission to confirm that a good faith exception from TCPA liability exists for autodialed and prerecorded informational, non-telemarketing calls to telephone numbers that have been reassigned from a prior express consenting party (until the caller learns of the reassignment). These clarifications would not alter the caller’s obligation to obtain “prior express consent” from the individual that provided his or her telephone number. Moreover, upon learning that a telephone number has been reassigned, the caller would then need to obtain separate “prior express consent” to place additional calls to that telephone number. Regardless of which path the Commission chooses, however, the result should be the same: to make clear that parties are not liable for calls to reassigned wireless telephone numbers under the TCPA absent the caller’s knowledge of the reassignment.

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<sup>6</sup> 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1), (a)(3).

## **II. PARTIES SHOULD NOT BE LIABLE UNDER THE TCPA FOR CALLS TO REASSIGNED NUMBERS WHEN THEY ARE NOT AWARE OF THE REASSIGNMENT.**

Because organizations cannot always know whether a telephone number has been reassigned, they would be exposed to significant class action litigation regardless of their efforts to obtain valid “prior express consent” and comply with the TCPA if calls to reassigned numbers could give rise to TCPA liability. Telephone numbers can be reassigned to different consumers for a variety of reasons and at any time. Telephone companies recycle as many as 37 million telephone numbers each year.<sup>7</sup> Consumers interact with a variety of organizations for their business and social activities, and they understandably do not notify all of those organizations immediately whenever they change telephone numbers. Moreover, as noted above, there is no single, definitive directory of wireless subscribers.

To avoid mistakenly reaching the wrong person, organizations could potentially need to reconfirm the subscriber for a particular telephone number before every single autodialed or prerecorded call (*e.g.*, by placing a live, manually dialed call to that telephone number). Such a solution is impractical and prohibitively expensive, especially for informational, non-telemarketing calls. Congress did not intend to prohibit those calls entirely, and the Commission has never suggested that parties must reacquire consent before each call. Moreover, a statute intended to reduce unwanted contacts to consumers should not be read to require companies to repeatedly and frequently contact consumers to learn if their numbers have changed.

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<sup>7</sup> Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, WALL STREET JOURNAL (Dec. 1, 2011).

Furthermore, even when an organization learns about a reassigned telephone number, it takes time to update the calling lists. The Commission recognized as much when it crafted a conditional, 15-day safe harbor for wireline numbers recently ported to wireless.<sup>8</sup>

### **III. IMPOSING LIABILITY FOR CALLS TO REASSIGNED NUMBERS WOULD CHILL THE DELIVERY OF IMPORTANT NON-TELEMARKETING, INFORMATIONAL CALLS TO WIRELESS CONSUMERS.**

The Commission should encourage, not hinder, requested and consented-to informational, non-telemarketing calls to wireless telephone numbers. The Commission has recognized that many wireless consumers have come to rely on important informational messages, and it stated in the Robocall Report and Order that it does not want to “impede” or “unnecessarily restrict” purely informational calls to wireless telephone numbers.<sup>9</sup> The Commission also expressly recognized the particular importance of healthcare-related calls when it exempted certain healthcare communications from its new “prior express written consent” requirements.<sup>10</sup>

If the Petition is not granted, organizations effectively will be required either to expose themselves to potentially serious litigation risk or cease providing non-telemarketing informational messages to consumers. This could have harmful effects on consumers, as wireless users may be precluded from receiving valuable and desired informational, non-telemarketing messages. Numerous non-telemarketing, informational calls would be negatively affected, including: healthcare-related calls; data breach and identity theft notifications;

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<sup>8</sup> 47 C.F.R. § 64.1200(a)(1)(iv); *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 ¶ 9 (2004).

<sup>9</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 21 (2012) (stating that the Commission does not want to “unnecessarily impede” informational calls including, for example, “bank account balance, credit card fraud alert, package delivery, and school closing information”) (“Robocall Report and Order”).

<sup>10</sup> *See id.* ¶¶ 57, 60-65.



fraudulent activity warnings and updates; shipping and delivery notifications; appointment reminders; calls inquiring about missed payments and advising of the prospect of interrupted service or coverage; service outage or interruption reports; school closure announcements; product recall and safety notifications; and urgent employee communications.

Granting the Petition is also consistent with Congress's and the FCC's TCPA goals and would not permit any new telemarketing calls. Congress intended for the TCPA to "target[] calls that are the source of consumer complaints – telemarketing calls placed to the home."<sup>11</sup> Specifically, the TCPA restricts calls that cause an invasion of privacy, increase risks to public safety, or improperly shift marketing costs to consumers. Informational calls, such as United's healthcare-related communications, do not involve solicitation or advertising, do not contact random or sequential numbers, and do not endanger public safety by tying up blocks of telephone lines. This Petition seeks only a narrow clarification of the Commission's rules to prevent a perpetual stream of new TCPA liability for organizations placing such non-telemarketing calls. It does not seek to disturb the requirement for demonstrable "prior express consent" or to facilitate any telemarketing calls.

**IV. THE COMMISSION SHOULD CONFIRM THAT CALLERS ARE NOT LIABLE FOR CALLS PLACED TO INDIVIDUALS WHO GAVE VALID "PRIOR EXPRESS CONSENT" AND WHOSE TELEPHONE NUMBERS HAVE SUBSEQUENTLY BEEN REASSIGNED.**

**A. The Commission has the authority to confirm that there is no TCPA liability for calls to reassigned numbers.**

The Commission can issue a declaratory ruling to resolve an existing controversy or uncertainty.<sup>12</sup> Express guidance from the Commission regarding the status of calls to reassigned

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<sup>11</sup> See 137 Cong. Rec. S9840-02 (daily ed. July 11, 1991) (statement of Sen. Hollings).

<sup>12</sup> 47 C.F.R. § 1.2.

numbers would provide meaningful direction for actual and potential litigants, as well as the courts, in this important, emerging area of TCPA litigation because plaintiffs' lawyers continue to bring cases based on this theory of liability.

The potential liability for calls made in good faith to parties who have consented to receive them, but whose telephone numbers have subsequently been reassigned, threatens to prevent callers from communicating with their existing contacts. Even a single call recipient can seek to have a nationwide class certified that covers other call recipients. To prevent this harmful outcome, the Commission should issue a declaratory ruling confirming that parties are not liable under the TCPA for informational, non-telemarketing calls, especially healthcare-related calls, to telephone numbers that have been reassigned without the caller's knowledge – as long as the caller previously obtained “prior express consent” to place calls to that specific telephone number.

Congress did not include any requirement in the TCPA that callers continually conduct extensive, expensive, and unreliable checks to confirm that a consenting party's telephone number has not been changed.<sup>13</sup> The TCPA's legislative history confirms further that Congress did not intend for the TCPA's restrictions on autodialed and prerecorded calls to significantly obstruct non-telemarketing, informational calls.<sup>14</sup> In addition, the Commission has not imposed any requirements on callers to identify reassigned numbers, nor would any such requirement be tenable.

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<sup>13</sup> See 47 U.S.C. § 227.

<sup>14</sup> See, e.g., 137 Cong. Rec. H1132 (daily ed. Nov. 26, 1991) (statement of Rep. Lent) (“Calls informing a customer that a bill is overdue, or a previously unstocked item is now available at a store are clearly not burdensome, and should not be prohibited.”).

The Commission also recently determined that prerecorded healthcare-related messages subject to HIPAA should be protected.<sup>15</sup> Specifically, the Commission found that “these calls serve a public interest purpose: to ensure continued consumer access to health care-related information.”<sup>16</sup> Furthermore, these calls “do not tread heavily upon the consumer privacy interests [that the TCPA was intended to protect] because these calls are placed by the consumer’s health care provider to the consumer and concern the consumers’ health.”<sup>17</sup> The Commission should confirm that parties are not subject to TCPA liability for such healthcare-related calls when made to a reassigned number.

Many courts have agreed that callers should not face TCPA liability when they direct their communications to an intended recipient but a non-consenting party actually answers the telephone.<sup>18</sup> However, some courts have concluded that, when a call is answered by someone who informs the caller that the intended recipient can no longer be reached at that number, a TCPA violation has occurred.<sup>19</sup> This mixed case law has emboldened plaintiffs’ lawyers to assert enormous TCPA claims against companies that all would agree have diligently attempted to comply with the TCPA but are simply not notified by consenting contacts who change telephone numbers. It also means different rules could apply in different jurisdictions, increasing the potential for inadvertent violations by companies attempting to provide information to customers spread throughout the country. Moreover, rewriting the TCPA to include a

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<sup>15</sup> See 47 C.F.R. § 64.1200(a)(2), (a)(3)(v); Robocall Report and Order ¶ 60.

<sup>16</sup> Robocall Report and Order ¶ 60.

<sup>17</sup> *Id.* ¶ 63.

<sup>18</sup> See, e.g., *Leyse v. Bank of Am.*, No. 09–7654 (JGK), 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 Partnership d/b/a Verizon Wireless v. Dealers Warranty, LLC*, No. 09–1814 (FLW), 2010 WL 3946713 (D.N.J. Oct. 5, 2010); *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40–42 (D.D.C. 2008).

<sup>19</sup> See, e.g., *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 641–43 (7th Cir. 2012).

requirement to check for reassigned numbers – as some plaintiffs’ attorneys are attempting to do – could lead to companies placing unnecessary calls to their contacts as they seek to confirm the accuracy of their contact lists.

**B. The Commission has several options to grant relief for calls to reassigned telephone numbers.**

The Commission can issue a declaratory ruling and grant relief to United and others similarly situated through a variety of approaches. For example, the Commission could find that when a caller has obtained valid “prior express consent of the called party” to call that party’s telephone number, such “prior express consent” encompasses non-telemarketing, informational calls to the telephone number provided until the caller learns that the telephone number has been reassigned.<sup>20</sup> Alternatively, the Commission could issue a declaratory ruling confirming that the term “called party”<sup>21</sup> encompasses both the consenting party and the new subscriber to a reassigned number, until the caller learns that the two parties are not the same.

The Commission could also confirm that a good faith exception from TCPA liability exists for informational, non-telemarketing calls to telephone numbers that have been reassigned from a prior express consenting party (until the caller learns of the reassignment). Such good faith exemptions have been provided in other contexts; specifically, the Commission has provided a conditional good faith exemption for non-autodialed or prerecorded telemarketing calls to telephone numbers on the Do-Not-Call registry even when a consumer has expressly

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<sup>20</sup> In its Declaratory Ruling granting the petition of SoundBite Communications, Inc., the Commission ruled that the “prior express consent” of a party encompasses a single opt-out confirmation text message delivered shortly after a party requests not to receive future messages. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 27 FCC Rcd 15391, 15931 (2012).

<sup>21</sup> 47 C.F.R. § 64.1200(a)(1), (a)(3).

stated that he or she does not wish to be contacted.<sup>22</sup> Likewise, the federal courts have started to recognize a good faith exception to TCPA liability.<sup>23</sup> To the extent necessary, the Commission can also exercise its ancillary authority under Title I of the Communications Act because granting the Petition is “reasonably ancillary to the effective performance of the Commission’s statutorily mandated responsibilities” under the TCPA.<sup>24</sup>

These options for granting relief would not alter the caller’s obligation to obtain valid “prior express consent” from the individual that provided his or her telephone number. Moreover, upon learning that a telephone number has been reassigned, the caller would then need to obtain separate “prior express consent” to place additional calls to that telephone number.

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<sup>22</sup> *Id.* § 64.1200(c)(2). Persons or entities making telephone solicitations (or on whose behalf telephone solicitations are made) are not liable for violating the restriction on calls to telephone numbers on the Do-Not-Call registry if, *e.g.*, they can demonstrate that the violation is the result of error and that they maintain certain routine business practices.

<sup>23</sup> *Chyba v. First Fin. Asset Mgmt., Inc.*, 12-CV-1721-BEN WVG, 2013 WL 6880237, at \*12 (S.D. Cal. Nov. 20, 2013) (“Thus, although Plaintiff did not give consent directly to Defendant to call her cell phone number, it is sufficient that Defendant had a good-faith basis to believe that Plaintiff had provided consent to the creditor on whose behalf Defendant sought to collect a debt. Even if Plaintiff is correct in stating that she never gave Defendant or Enterprise consent to call, and there was no *actual* prior consent from Plaintiff, Defendant is not liable for acting in good faith upon the information provided to it.”) (emphasis in original).

<sup>24</sup> *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 172–73 (1968); *accord United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972). *See also American Library Ass’n. v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005); *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010).

## V. CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling confirming that parties are not liable under the TCPA for informational, non-telemarketing calls, especially healthcare-related informational calls, to telephone numbers that have been reassigned without the caller's knowledge – as long as the caller previously obtained valid "prior express consent" to place calls to that telephone number.

Respectfully submitted,

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