Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION

June 7, 2018

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I. INTRODUCTION & SUMMARY

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits these comments in response to the Second Further Notice of Proposed Rulemaking[2] adopted by the Federal Communications Commission ("Commission") in the above-captioned proceeding. The *Notice* seeks comment on methods by which the Commission could (1) address the issue of unwanted calls to reassigned telephone numbers and (2) reduce the incidence of legitimate callers' violations of the Telephone Consumer Protection Act ("TCPA").[3]

The Commission should encourage the use of commercial databases (sometimes referred to as "TCPA compliance solutions") to address the problem of unwanted calls to reassigned

[1] NTCA represents approximately 850 rural rate-of-return regulated telecommunications providers ("RLECs"). All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

[2] *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Further Notice of Proposed Rulemaking, FCC 18-31 (rel. Mar. 23, 2018) ("*Notice*").

[3] The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, codified at 47 U.S.C. § 227.

telephone numbers. The alternative of a Commission-established[4] database would be a "greenfield exercise," that is, an entirely new undertaking that must first comport with the Commission's RFP and procurement processes before being established, much less up and running. Consumers receiving calls meant for another recipient should not—and indeed need not—wait for such a process to play out. A number of existing commercial databases already exist.[5] Commission adoption of a safe harbor that grants callers utilizing such databases relief from TCPA liability would spur the further development of a market for data on reassigned numbers. This would, in turn, make these tools a highly reliable method of reducing calls made to consumers in error.

Regardless, however, of the path chosen, under no circumstances should carriers be required to report to a reassigned numbers database without some mechanism in place to provide reimbursement for the costs of doing so. Whether commercial or Commission-established, the costs of standing up, maintaining, and reporting into *any* reassigned numbers database must be borne entirely by those entities that will most benefit from its use; those parties seeking to avoid placing calls to the wrong consumer. It is only fair and equitable that the entities that deem robocalls to consumers a necessary part of their business operations—even if such calls are desired and consented to by consumers—foot the bill for a database that assists them in avoiding liability for violations of federal law. As discussed further below, the use of commercial

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[4] As utilized herein, the term "Commission-established" refers to a database similar to the current Number Portability Administration Center ("NPAC"), one administered by a private entity under contract to the Commission and established via a Request for Proposal ("RFP") process. This is to be distinguished from commercial entities providing what are termed "TCPA compliance solutions" (as referenced in the *Notice*) that are operated by private entities entirely outside the Commission's jurisdiction or oversight.

[5] *See Notice*, fn. 7.

databases, with a safe harbor from TCPA liability for entities that utilize such tools, will create a market for reassigned numbers that not only enhances the utility of these solutions but also ensures that the costs are equitably borne.

II. THE COMMISSION SHOULD ENCOURAGE THE USE OF COMMERCIAL DATABASE SOLUTIONS TO ADDRESS THE PROBLEM OF UNWANTED CALLS TO REASSIGNED TELEPHONE NUMBERS.

Like operators all across the nation, RLECs receive a large number of consumer complaints about unwanted "robocalls." And, like service providers all across the nation, RLECs are in search of solutions that mitigate the incidence of robocalls or other unwanted calls to their customers, whether those are originated for nefarious purposes or are simply intended for a consumer that changed his or her telephone number without informing those parties to whom consent was granted. In terms of the instant proceeding, NTCA supports the Commission's effort to address unwanted calls to reassigned numbers. That said, the Commission should, and indeed can, adopt a solution that avoids imposing unnecessary costs on rural consumers and instead places the financial responsibility on those that will most benefit from a method to identify reassigned numbers.

A. Reliance on commercial databases already in existence today, paired with a safe harbor from TCPA liability that would enhance these tools' utility, would address the reassigned numbers problem more expeditiously than creation of an entirely new Commission database.

The Commission should address the problem of unwanted calls to reassigned telephone numbers by leveraging already available resources that can expeditiously alleviate the problem. More specifically, as referenced in the *Notice*, several commercial databases already offer "TCPA compliance solutions."[6] While the *Notice* states that these commercial databases are not

[6] *Id.*

at present a guaranteed method to identify every reassigned number, certain provisions as proposed by the Commission and endorsed herein—in particular a safe harbor from TCPA liability for callers' use of these databases—will enhance the utility of these tools. Simply put, a Commission safe harbor will create the appropriate incentives for every party involved and spur further development and enhancement of such services. Operators of existing commercial databases (and possibly newly created tools spawned by a TCPA safe harbor as discussed below) will have a strong incentive to enter into contractual relationships with as many providers as possible to capture comprehensive and timely data on reassigned numbers. This is particularly true if the Commission adopts a requirement that databases seeking to qualify for TCPA safe harbor protection capture, for example, 90 percent of service providers' data. Such a requirement would provide database operators a strong incentive to work with providers of all sizes and technologies to agree on terms and conditions for access to provider data on reassigned numbers. Providers would be incented as well to enter into such contractual relationships with the knowledge that their data on reassigned numbers is suddenly much more valuable. Finally, legitimate callers would have an incentive to demand that such databases are as comprehensive as possible.

The use of commercial databases is preferable to the proposal for a Commission-established reassigned numbers database. A Commission-established database would, most likely, take longer to provide relief to consumers. The RFP process to select a database administrator, followed by the actual creation of the database itself, may take a year or perhaps much longer. Moreover, as the *Notice* acknowledges,[7] the NPAC is likely not a good candidate

[7] *Id.*, ¶ 36.

to serve in this capacity absent substantial changes to that database which currently lacks sufficient information on reassigned telephone numbers. Resolution of that issue aside, the Commission may under federal procurement law be required to issue a RFP before selecting the NPAC and its current administrator as the party responsible for the administration of the reassigned numbers database. The better approach here—one that would provide more immediate relief to consumers by leveraging existing assets—is the use of existing commercial solutions that will be substantially improved by a TCPA safe harbor.

It is important, however, that the Commission adopt a voluntary reporting regime as applicable to providers. For one, as NTCA stated in previous comments in response to an earlier Notice of Inquiry in this docket,[8] RLECs face substantial regulatory requirements that consume significant amounts of staff time in addition to often requiring the use of outside consultants. Additional mandatory reporting requirements will only exacerbate the cumulative effect on these small entities. As noted further in Section III, *infra*, the Initial Regulatory Flexibility Analysis ("IRFA") contained in the *Notice* is deficient, yet consideration of a voluntary reporting mechanism would go a long way towards Commission compliance with the Regulatory Flexibility Act.

That said, a mandatory reporting obligation is also entirely unnecessary. The creation of a market for reassigned number data as discussed above is likely to bring commercial database operators and carriers with that data together into sufficiently lucrative partnerships that will accomplish the same end result as a mandatory reporting regime: a comprehensive data set on reassigned numbers that substantially mitigates the number of unwanted calls. Moreover,

[8] Comments of NTCA–The Rural Broadband Association, CG Docket No. 17-59 (fil. Aug. 28, 2017).

providers will receive compensation for reporting their data and any costs associated with reporting on such data, and would-be callers needing access to the data at issue will foot the bill for a service that improves the viability of their product. It is difficult to envision a better market-based outcome for every party involved, and it is one that can be achieved without a mandatory reporting obligation.

B. The Commission has the legal authority to adopt a safe harbor from TCPA liability for callers that rely on commercial database solutions.

The Commission has the legal authority to adopt a safe harbor that protects callers from liability for TCPA violations. The Commission's plenary authority over numbering issues as long ago established by the Communications Act, as well as the agency's inherent authority to adopt safe harbors when necessary to enable parties to come into compliance with its rules, support such protections that will enable legitimate callers to continue to operate.

As an initial matter, the Commission has long recognized its plenary authority over the administration of numbering resources. Even prior to the Telecommunications Act of 1996, the Commission noted, quoting Section 201(a) of the Communications Act that, "[t]elephone numbers are an indispensable part of the 'facilities and regulations' for operating these 'through routes' of physical interconnection between carriers and are therefore subject to our plenary jurisdiction under the Act."[9] Moreover, Section 251(e)(1), adopted in 1996, states that "[t]he

[9] Administration of the North American Numbering Plan Phases One and Two, CC Docket No. 92-237, Notice of Proposed Rulemaking, FCC 94-79 (rel. Apr. 4, 1994), ¶ 8. ("[U]nder Section 201(a) of the Act, 47 U.S.C. § 201(a), it is 'the duty of every common carrier engaged in interstate or foreign communications ... in accordance with the orders of ... [this] Commission … to establish physical connections with other carriers, to establish through routes . . . applicable thereto . . . and to establish and provide facilities and regulations for operating such through routes.' Telephone numbers are an indispensable part of the 'facilities and regulations' for operating these 'through routes' of physical interconnection between carriers and are therefore subject to our plenary jurisdiction under the Act.

Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[10] The Commission has in the past relied on Section 251(e)(1) to adopt rules related to Local Number Portability ("LNP")[11] and has proposed rules to enable Nationwide Number Portability ("NNP")[12] using that provision as well. A TCPA safe harbor as proposed herein, like existing LNP rules and proposed NNP provisions, is at bottom a method of ensuring that numbering resources are used to benefit consumers to the fullest extent possible. More specifically, it will prevent consumers from receiving calls they do not want (and can receive calls they do want). Thus, similar to the actions taken or proposed in the number portability proceedings, the Commission's adoption of a safe harbor from TCPA liability via commercial databases is at the heart of the agency's administration of telephone numbers.

In addition, a safe harbor as proposed herein would be entirely consistent with the Commission's previous adoption of a similar provision with respect to robocalls to ported telephone numbers. In 2004, the Commission addressed the necessity of a safe harbor from TCPA liability for telemarketers' calls to ported telephone numbers, stating that:

Accordingly, this Commission may issue orders and otherwise regulate such numbers and their administration.") (Internal citations omitted).

[10] 47 U.S.C. § 251(e)(1).

[11] *Local Number Portability Porting Interval and Validation Requirements*, WC Docket No. 07-244, *Telephone Number Portability*, CC Docket No. 95-116, Report and Order and Further Notice of Proposed Rulemaking, FCC 09-41 (rel. May 13, 2009), ¶ 2 (stating that "section 251(e) of the Act gives the Commission plenary jurisdiction over the North American Numbering Plan (NANP) and related telephone numbering issues in the United States.").

[12] *Nationwide Number Portability*, WC Docket No. 17-244, *Numbering Policies for Modern Communications*, WC Docket No. 13-97, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-133 (rel. Oct. 26, 2017), ¶ 4.

> it is impossible for telemarketers to identify immediately those numbers that have been ported from a wireline service to a wireless service provider. Commenters maintain that, absent a limited safe harbor period, telemarketers simply cannot comply with the statute. The safe harbor is not an "exemption" from the requirements on calls to wireless numbers; it is instead a time period necessary to allow callers to come into compliance with the rules. Otherwise, the statute would "demand the impossible."[13]

A similar line of reasoning applies here and thus confers legal authority on the Commission as proposed herein. More specifically, legitimate callers (in this instance legitimate businesses attempting to place calls that consumers actually want but simply directed to the wrong consumer), absent a reassigned numbers database paired with a safe harbor, cannot comply with the TCPA 100 percent of the time. Yet a database paired with an appropriately crafted safe harbor would, rather than "demanding the impossible," grant these legitimate callers a *method* by which to determine which numbers have been reassigned and to modify their calling lists and therefore come into compliance with the TCPA. In that regard, much like the ported telephone numbers safe harbor that gave callers a time period to come into compliance, this would not function as an "exemption" from the TCPA—instead, it would simply be a method of enabling compliance. Thus the Commission is on solid legal footing in granting a TCPA safe harbor for calls to reassigned numbers if it requires that callers utilize commercial databases as a method of weeding out telephone numbers no longer associated with the party that previous provided consent to receive calls.

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[13] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, FCC 04-204 (rel. Sep. 21, 2002), ¶ 9.

C. Commercial or Commission-established, those that benefit from a reassigned numbers database must be entirely responsible for its cost.

The *Notice* seeks comment on whether providers should be compensated for the costs incurred with respect to reporting on reassigned numbers. A cost-recovery mechanism is essential to ensure that, whether commercial or Commission-established, the costs of *any* reassigned numbers database is borne entirely by those entities most responsible for creating the need for such a database and that will benefit from its use: those parties initiating the calls.

As noted above, RLECs in particular currently operate under substantial constraints, with limited USF budgets and performance and reporting obligations applying to operations in the most rural, hard-to-serve parts of the country. Additional reporting requirements would add to an already overwhelming list.

That said, as the NPRM acknowledges, pursuant to a "voluntary approach [to reporting] … service providers would recover their reporting costs from data aggregators and those data aggregators would in turn pass those costs on to callers seeking to query their databases."[14] With that one sentence, the Commission has found the path forward on the cost recovery question; the market created by adoption of a TCPA safe harbor will not only enhance the efficacy of commercial databases, it will ensure that the entities most in need of access to data on reassigned numbers and that are primarily responsible for making such tools necessary compensate providers (even in if indirectly, through the purchase of services from the databases).

Any other approach to cost recovery is problematic at best and unfair to consumers at worst. For one, the Commission would have to establish some method by which reporting providers' costs are documented, so as not to overcompensate providers above and beyond what

[14] *Notice*, ¶ 59.

is actually incurred. But, even more problematic is an approach that does not compensate providers at all. Simply put, it cannot be argued that providers will not incur any costs in reporting to either commercial or Commission-established databases. Moreover, even absent an explicit passing on of those costs to end-users, such costs to providers come at the expense of consumers through higher rates or otherwise as providers divert resources better spent on new and improved services to reporting on reassigned numbers. Fortunately, the Commission has before it a simple cost recovery mechanism, one that that will be created by the very same market for reassigned numbers it can spawn by adopting a voluntary reporting requirement paired with an appropriate TCPA safe harbor.

III. THE INITIAL REGULATORY FLEXIBILITY ANALYSIS IS DEFICIENT, AS IT LACKS AN ANALYSIS OF THE BURDEN THAT CARRIERS WOULD FACE IN REPORTING ON REASSIGNED NUMBERS; ADOPTION OF A VOLUNTARY REPORTING MECHANISM TO COMMERCIAL DATABASES AS DISCUSSED IN SECTION II IS THE LESS BURDENSOME ALTERNATIVE.

The *Notice* includes an IRFA as is required by law;[15] yet in this instance, the Commission fails to comply in full with the provision. Pursuant to the statute, the Commission is required to perform an IRFA that goes beyond a simple description of the rules being considered and an estimate of the number of small entities to which the proposed rule will apply. The IRFA should also include a description of the projected compliance requirements of the proposed rule and an identification of all relevant federal rules which may duplicate, overlap, or conflict with the proposed rule.[16] It must also describe any significant alternatives to the proposed rule that could

[15] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[16] 5 U.S.C. § 603(b).

accomplish the Commission's objectives and that could minimize any significant economic impact of the proposed rule on small entities.[17] This should include, but not be limited to, differing compliance requirements that take into account the resources available to small entities.[18]

Unfortunately, the IRFA falls short on nearly all counts. For one, the IRFA makes the assumption that because providers may already track reassigned telephone numbers, the burden of the proposed rules will not be excessive.[19] In addition, the IRFA makes an assumption about all providers tracking reassigned numbers based on the comments of one provider, a large nationwide cable operator.[20] That this single provider "routinely" tracks reassigned numbers is simply not evidence that smaller carriers such as NTCA members that typically have a few dozen employees at most operate in the same manner. It is true that the IRFA observes that the *Notice* contemplates some form of cost recovery, and such an acknowledgment is appreciated. However, this does not negate the fact that the IRFA merely seeks comment on impacts and costs rather than, as the law requires, gathering that information *prior* to proposing new rules that include specifics on how such costs may be recovered. The Commission offers no description of the compliance requirements and no projection of the costs as the law requires. Seeking comment on the costs and including a basic statement that it does not anticipate they will be

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17 5 U.S.C. § 603(c).

18 *Id.*

19 IRFA, ¶ 25.

20 *Id.*, fn. 77.

excessive based on the comments of one, much larger provider is not sufficient for the Commission to meet its statutory responsibilities with respect to small business impacts.

Fortunately, the *Notice* itself hits upon a less burdensome alternative that can accomplish the Commission's goal here. As discussed in further detail above, the voluntary reporting option as proposed in the *Notice*—if paired with a TCPA safe harbor for reliance upon commercial databases—could minimize if not eliminate the economic impact of the proposed rule on small entities while providing relief to a large number of consumers from unwanted calls.

IV. CONCLUSION

For the reasons stated above, the Commission should:

- decline to pursue a Commission-established reassigned numbers database;
- encourage the use of commercial TCPA compliance solutions;
- adopt a voluntary report regime and;
- adopt a TCPA safe harbor for callers' use of such commercial databases.

Respectfully submitted,

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June 7, 2018