

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER to the
FEDERAL COMMUNICATIONS COMMISSION

Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA
International Decision

[DA-18-493]

June 13, 2018

The Electronic Privacy Information Center (“EPIC”) submits these written comments in response to the Federal Communication Commission’s (“FCC”) notice.¹ Unwanted robocalls are an invasion of privacy, and the prevalence of cellphones makes unwanted robocalls even more intrusive than when the Telephone Consumer Protection Act (“TCPA”) was passed.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC submitted an amicus brief³ in *ACA Int’l v. FCC*, the case that was the impetus for this comment opportunity. EPIC contributed to the development of the TCPA and has advised Congress about emerging challenges to consumer protection law.⁴ EPIC has also submitted numerous comments to the FCC and the Federal Trade

¹ FCC, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, DA-18-493 (May 14, 2018), <https://www.fcc.gov/document/cgb-seeks-comment-tcpa-light-dc-circuit-decision-aca-intl> (hereinafter “Notice”).

² See *About EPIC*, EPIC, <https://epic.org/epic/about.html>.

³ Brief of Amici Curiae EPIC et al., *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), <https://epic.org/amicus/acaintl/EPIC-Amicus.pdf>.

⁴ See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304, Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy and Commerce, 102d Cong., 1st Sess. 43 (April 24, 1991) (Testimony of Marc Rotenberg), <http://www.c-span.org/video/?18726->

Commission concerning the implementation of the TCPA.⁵

In Part I, EPIC advises the FCC to define “called party” under the TCPA as the number’s current subscriber to protect the privacy of consumers with reassigned numbers. In Part II, EPIC advises the FCC to require callers to facilitate the revocation of consent by called parties by (1) informing consumers of their right to revoke, (2) providing a simple means of revocation, and (3) complying with the revocation in a timely manner.

I. How to Treat Calls to Reassigned Numbers Under the TCPA (Definition of “Called Party”)

The FCC should interpret “called party” to mean the “wireless number’s present-day subscriber after reassignment” rather than “the person the caller expected to reach.” The D.C. Circuit left this question open, but the court’s reasoning strongly supports the interpretation of “called party” as the current subscriber. The term “called party” appears seven times in the TCPA. As the court noted, four of the statutory references “unmistakably denote the current subscriber,” “one denotes whoever answers the call (usually the [current] subscriber),” and the other two are unclear.⁶ There is no statutory basis for understanding the term to mean “the person the caller expected to reach” or “the party the caller reasonably expected to reach.”

[1/telephone-solicitation](#); S.1963, The Wireless 411 Privacy Act: Hearing Before the S. Comm. on Commerce, Sci., & Transp., 108th Cong., 2d Sess. (Sept. 21, 2004), (Testimony of Marc Rotenberg discussing privacy issues raised by a proposed wireless directory for customers of wireless telephone services).

⁵ See, e.g., EPIC, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, FCC 17-24 (July 31, 2017), <https://epic.org/apa/comments/EPIC-FCC-Robocall-ReplyComments.pdf>; EPIC, *On Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC CG 05-338 (Jan. 18, 2006), <https://epic.org/privacy/telemarketing/jfpacom11806.html>; EPIC et al., *Comments in the Matter of Telemarketing Rulemaking*, FTC File No. R411001 (2002), <https://epic.org/privacy/telemarketing/tsrcomments.html>; EPIC et al., *Comments in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (2002), <https://epic.org/privacy/telemarketing/tcpacomments.html>.

⁶ *ACA Int’l, et al. v. FCC*, 885 F.3d 687, 706 (D.C. Cir. 2018).

A definition of “called party” as “the person the caller expected to reach” would not protect consumers. It would not make sense for consent given by the previous owner to be imposed on a new subscriber after the number has been reassigned. Consent must be given by the subscriber, regardless of who the caller intends to reach. An owner may consent to let a friend drive their car, but if they subsequently sell the car their friend would not still have permission to drive. The same logic applies to reassigned numbers. Furthermore, the alternative definition of “called party” would make other statutory consent rules incoherent. How could a current subscriber revoke consent if they never gave consent? The previous subscriber would have no reason to revoke consent for a number that is no longer theirs. The rules are only coherent if called party is interpreted to mean the current subscriber, which is why numerous federal courts have adopted this definition.⁷

The Commission’s proceeding to establish a reassigned numbers database⁸ further supports the definition of “called party” as the “wireless number’s present-day subscriber after reassignment” and eliminates the need for a statutory safe harbor. Under the alternative definition, callers would have no incentive to use the reassigned numbers database, because they would rely on consent given by the previous subscriber. Without a reassigned numbers database, it can be difficult for callers to know when a number has been reassigned (and therefore they no longer have consent from the number’s current subscriber).

However, the problem of reassigned numbers has been vastly overstated. Petitioners in *ACA Int’l* asserted that 37 million telephone numbers are reassigned every year, but this number

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

⁸ FCC, *Advanced Methods To Target and Eliminate Unlawful Robocalls* (April 23, 201), <https://www.federalregister.gov/documents/2018/04/23/2018-08376/advanced-methods-to-target-and-eliminate-unlawful-robocalls>.

was based on a misreading of the Commission’s report on aging numbers.⁹ All citations for “37 million” lead back to a single 2011 article stating that “[a]lmost 37 million phone numbers get recycled each year, a 16% increase since 2007, according to the most recent figures from the Federal Communications Commission.”¹⁰ EPIC traced the figure to a 2011 FCC report which states that 36.895 million numbers were *aging*. Aging numbers are not reassigned numbers, they are “disconnected numbers that are not available for assignment to another end user or customer for a specified period of time.”¹¹ The journalist conflated aging numbers with reassigned numbers, and that misunderstanding has been used to argue that it is a large burden for callers to obtain consent from the current subscribers of reassigned numbers.¹²

⁹ Brief of Amici Curiae EPIC et al., *ACA Int’l, et al. v. FCC*, 885 F.3d 687, (D.C. Cir. 2018), at 17-21.

¹⁰ Alyssa Abkowitz, *Wrong Number? Blame Companies’ Recycling*, Wall St. J. (Dec. 1, 2011), <https://www.wsj.com/articles/SB10001424052970204012004577070122687462582>.

¹¹ 47 C.F.R. § 52.15(f)(1)(ii); see FCC, *Numbering Resource Utilization in the United States* at 5 (Jan. 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-303900A1.pdf.

¹² See, e.g., 2015 Order at 117 (statement of Comm’r Ajit Pai, dissenting); 2015 Order at 130 (statement of Comm’r Michael O’Rielly, dissenting in part and approving in part); Joint Brief of Petitioners ACA International, Sirius XM, PACE, salesforce.com, Exacttarget, Consumer Bankers Association, U.S. Chamber of Commerce, Vibes Media, & Portfolio Recovery Associates at 42–43, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. filed Nov. 25, 2015) [hereinafter “Joint Petitioners’ Brief”]; Brief for American Bankers Association, Credit Union National Association, & Independent Community Bankers as Amici Curiae Supporting Petitioners at 34, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015); Brief for American Financial Services Association, Consumer Mortgage Coalition, & Mortgage Bankers Association as Amici Curiae Supporting Petitioners, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015); Brief for American Gas Association, Edison Electric Institute, National Association of Water Companies, & National Rural Electric Cooperative Association as Amici Curiae Supporting Petitioners at 3, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015) [hereinafter “American Gas Association *et al.* Amicus Brief”]; Brief for CTIA—The Wireless Association as Amicus Curiae Supporting Petitioners at 4, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015) [hereinafter “CTIA Amicus Brief”]; Brief for Internet Association as Amicus Curiae Supporting Petitioners, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015) [hereinafter “Internet Association Amicus Brief”]; Brief for Retail Litigation Center, Inc., National Retail Federation, & National Restaurant Association as Amici Curiae Supporting Petitioners at 14, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. filed Dec. 2, 2015).

Furthermore, number portability and the increase in cellphone use have significantly reduced the number of consumers whose numbers must be reassigned. Number portability is a consumer's ability to keep the same phone number when changing service providers within the same geographic area, or to transfer a landline telephone number to a cellular service provider.¹³ Local number portability is mandated by Congress¹⁴ and after years of litigation, portability between wireless carriers became available in November 2003.¹⁵ The rise in cellphone use and corresponding decline in landline use will continue to reduce the reassignment burden.¹⁶ Cellphone numbers are not tied to geographic areas, so when consumers move they can retain their numbers and there is no need for reassignment. In sum, there is no evidence of a telephone number "reassignment" crisis, and the trend in cell phone portability has likely minimized whatever burden might have existed.

II. How a Called Party May Revoke Prior Express Consent to Receive Robocalls

EPIC agrees with the Commission's decision, affirmed by the D.C. Circuit, that "a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller."¹⁷ This standard means that callers have "every incentive to

¹³ See Number Portability Administration Center, *What is LNP?*, <https://www.npac.com/number-portability/what-is-lnp>; FCC, *Keeping Your Telephone Number When Changing Service Providers* (Nov. 19, 2015), <https://www.fcc.gov/consumers/guides/keeping-your-telephone-number-when-changing-service-providers>.

¹⁴ 47 U.S.C § 251(b)(2).

¹⁵ FCC Memorandum Opinion and Order, *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, FCC 02-215 (adopted July 16, 2002, released July 26, 2002).

¹⁶ Pew Research Center, *Mobile Fact Sheet* (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/> (95% of Americans now own a cellphone); Jeff Clabaugh, *Cellphone only: Half have cut the landline*, WTOP (Jan. 19, 2017), <https://wtop.com/business-finance/2017/01/cellphone-only-half-have-cut-the-landline/> (52% of U.S. adults live in households with cellphones but without landlines and 71% of millennials do not have landlines).

¹⁷ *ACA Int'l*, 885 F.3d at 692.

avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods.”¹⁸ The revocation of consent should not be limited to a single prescribed method because callers would then have the incentive to make that method as difficult as possible to increase friction. The opt-out methods suggested by the FCC—pushing a standardized code such as “*7”, saying “stop calling”, offering opt-out on a website, replying “stop” to a text message—would all be reasonable methods. And it would be useful for subscribers to be given one or two simple methods for revoking consent to robocalls. For example, the inclusion of standard text in an automated voice message “To opt-out of receiving similar calls in the future, press *7 or say ‘stop calling’ now” would make it easier for callers to adjust their preferences. When offered such simple methods, subscribers would be less likely to choose a more burdensome method such as mailing a letter. However, if a subscriber uses a different (but still reasonable) method, the caller would still be required to comply.

The FCC should require callers to meet three conditions: (1) inform consumers of their right to revoke, (2) provide a simple means of revocation, and (3) comply in a timely manner. First, consumers must be informed of their right to revoke consent in every call or text. This notification could be similar to the “unsubscribe” link required for emails under the CAN-SPAM Act.¹⁹ This notification should be easy to understand and should be announced early in the call

¹⁸ *Id.* at 709.

¹⁹ 16 U.S.C. 316.5; FTC, *CAN-SPAM Act: A Compliance Guide for Business* (Sept. 2009), <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business> (“Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that’s easy for an ordinary person to recognize, read, and understand. Creative use of type size, color, and location can improve clarity. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you. You may create a menu to allow a recipient to opt out of certain types of messages, but you must include the option to stop all commercial messages from you.”).

(i.e., the subscriber should not have to listen to the entire robocall or select menu options to hear the notice). Second, the means of revocation must be simple, such as pushing a button or saying “stop calling.” Requiring a subscriber to navigate to a separate website would be unduly burdensome. If the call is to a landline, the subscriber would need to manually enter the address on a separate device to access the internet; and if the call is to a smartphone the subscriber would have to note the address and re-enter it into their browser once the call is completed. A reasonable revocation method should be available at the time of the call or text is received. Third, callers must comply with a subscriber’s revocation within 24 hours. Due to the frequency of some robocalls, a short compliance period is necessary to ensure that the called party’s revocation of consent is honored.

Conclusion

The *ACA Int’l* decision has given the FCC an opportunity to strengthen the TCPA to better protect consumer privacy. The Commission should use this opportunity to define “called party” so as to protect consumers with reassigned numbers and require callers to meet three conditions to simplify the revocation of consent: (1) inform consumers of their right to revoke, (2) provide a simple means of revocation, and (3) comply in a timely manner.

Sincerely,

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