FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing	)	**CG Docket 02-278**
the Telephone Consumer Protection Act	)	
	)	
Targeting and Eliminating Unlawful Text Messages	)	**CG Docket 21-402**
	)	
Regarding the Petition for Declaratory Ruling and/or of Ecommerce Innovation Alliance, *et al.*	)	

Comments of

National Consumer Law Center
on behalf of its low-income clients
and
Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
National Consumers League
Public Knowledge
U.S. PIRG

In Opposition to the Petition for Declaratory Ruling and/or Waiver submitted by Ecommerce Innovation Alliance *et al.*

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Comments

I. Introduction and Summary

Pursuant to the Public Notice[1] issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC) files these comments on behalf of its low-income clients and **Consumer Action**, **Consumer Federation of America**, **Electronic Privacy Information Center**, **National Consumers League**, **Public Knowledge**, and **U.S. PIRG.** We respectfully oppose, in all respects, all requests made by Ecommerce Innovation Alliance and others (Ecommerce) in their petition.[2]

Ecommerce asks the Federal Communications Commission (FCC or Commission) to take actions that would significantly impact telephone solicitations in the future. The petition requests a ruling regarding the meaning of the regulations relating to allowed call times for telephone solicitations, and a waiver of the application of the call times requirements for calls to cell phones. Additionally, the petition requests that the Commission provide what would essentially be an unnecessary and counterproductive safe harbor (a non-rebuttable presumption) that would permit telemarketers to make unwanted solicitation calls to some cell phones even in the middle of the night.

With respect, all of these requests are unnecessary and would be illegal if granted. The regulations speak for themselves, and do not require reiteration or further interpretation. There is no reason the FCC should insert itself between private litigants in TCPA actions. Regarding the requests specific to calling times, there is no statutory authority that would permit the Commission to provide the interpretations requested, as all would lead to more invasive telemarketing calls. In addition, granting the Petitioners' requests would undermine the incentives that the current regulations create for telemarketers to avoid annoying subscribers who have consented to receive messages.

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[1] Public Notice, Federal Commc'ns Comm'n, Consumer and Governmental Affairs Bureau Seeks Comments on Petition for Declaratory Ruling and/or Waiver of the Ecommerce Innovation Alliance and Other Petitioners (Rel. Mar. 11, 2025), *available at* https://docs.fcc.gov/public/attachments/DA-25-216A1.pdf.

[2] *See In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Targeting and Eliminating Unlawful Text Messages, Petition for Declaratory Ruling and/or Waiver of the Ecommerce Innovation Alliance and Other Petitioners, CG Docket Nos. 02-278, 21-402 (Mar. 3, 2025), *available at* https://www.fcc.gov/ecfs/search/search-filings/filing/1030382368996.

In the TCPA, Congress explicitly instructed the FCC to protect subscribers from unwanted calls (*see* 47 U.S.C. § 227(b)(2) & 227 (c)(1)). Congress did not give the FCC any authority to issue preemptive protections for telemarketers that have been sued for violating its rules.

II. The Commission Should Not Issue a Ruling Restating What the Rules Say.

The petition requests that the FCC reiterate what its rules on telephone solicitations and calling times say.[3] This is entirely unnecessary and inappropriate. The rules speak for themselves.

Restating the rules would be more likely to introduce ambiguities and new complexities than promote clarity. For example, restating the rules in different words could raise questions about whether the Commission intended to change the meaning of the regulations. The restatement could be open to a Hobbs Act challenge. Issuing a declaratory ruling to reiterate what the rules already say is particularly inappropriate since the Petitioners have not identified any specific ambiguity in the rules.

III. The Courts, Not the FCC, Are the Appropriate Forum to Deal With These Cases.

The petition complains that lawyers have filed "frivolous litigation,"[4] and that it is necessary for the FCC to step in to "curb abusive TCPA litigation . . .[and] protect legitimate businesses from undue legal burdens."[5] Ecommerce criticizes the Commission, saying "it has done little to address the abusive litigation that continues to proliferate under the TCPA . . . ."[6]

We dispute the assertion that the litigation described in the petition is abusive. If any of these consumers were on the DNC list, the text messages are illegal regardless of the time of day, unless the sender proves that the consumer provided prior express invitation or permission.[7] For consumers not on the DNC list, there is no general prohibition against making telephone solicitations, but the calling time restrictions of 47 C.F.R. § 64.1200(c)(1) apply, as long as the call meets the definition of "telephone solicitation."[8] Thus it is likely that many of the text messages in these cases violate the Commission's rules.

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[3] *Id.* at II.

[4] *Id.* at ii.

[5] *Id.* at iii.

[6] *Id.* at 3.

[7] 47 C.F.R. §§ 64.1200(c)(2)(ii), (f)(15).

[8] 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(15).

But whether these texts are illegal is a mixed question of fact and law that only a court can decide. The trial court must determine first whether the recipients received text messages that fit the statutory and regulatory definition of "telephone solicitation." It will then have to determine what times the messages were received, and whether the recipient is a residential telephone subscriber covered by 47 U.S.C. § 227(c). Other issues that the court will be required to determine include whether the telemarketers can prove that they had prior express invitation or permission (PEIP) to send a telemarketing message to that line, whether that PEIP had been revoked, and whether the solicitation was pursuant to an established business relationship between the telemarketer and the subscriber.[9] Depending on the resolution of these questions of fact and law, the telemarketers may be subject to the statutory damages Congress created to incentivize telemarketers to comply with the FCC's restrictions.

A trial court, not the FCC, is the appropriate forum for deciding the correct application of the TCPA to a particular set of facts. In a trial court, the decision is based on evidence considered pursuant to clear and uniformly applicable evidentiary rules. A trial court can take sworn testimony from experts and others impacted by the actions of the parties, which can be tested by cross-examination. By contrast, the FCC is not a fact-finding body. It does not have a formal process to review transcripts, hear sworn testimony, and evaluate the facts based on conflicting evidence presented by adversary parties. The FCC does not have the capacity to do the necessary deep dive into the evidence presented by litigants. As a result, the petition should simply be denied as an inappropriate request to an administrative agency.

IV. The Commission Should Not Create a Presumption About Quiet Times Based on the Called Party's Area Code and Local Exchange.

Petitioners request that the FCC either waive the application of the quiet times limit for cell phone users or, in the alternative, create a non-rebuttable presumption that the user is in the time

[9] The rules are clear that the burden is on the caller to show that it has the requisite consent for the calls. *See* Van Patten v. Vertical Fitness Group, L.L.C., 847 F.3d 1037, 1044 (9th Cir. 2017) ("Express consent is not an element of a plaintiff's prima facie case but is an affirmative defense for which the defendant bears the burden of proof."); Gulden v. Dickey's Barbeque Restaurants, Inc., 2018 WL 6181659, at *2 (D. Ariz. July 9, 2018) ("prior express invitation or permission, as expressed under § 64.1200(c)(2)(ii)… is a complete defense to a plaintiff's TCPA claims to which the defendant bears the burden of proof").

zone represented by the area code and the next three digits of their phone number. Both suggestions are unworkable and would harm cell phone users.

According to a Pew report from 2016, 10% of U.S. adults have a cell phone number from another state.[10] Nine years later, this number is undoubtedly much greater. If the FCC were to create the suggested non-rebuttable presumption—that sending messages based on the subscriber's area code and telephone number is *always* protected from liability under the TCPA's section (c)—that would mean that calls made during quiet times to lines that are not on the DNC list would be more difficult to stop.[11] Many of the subscribers who live in places different from those indicated by their cell phone numbers would be subjected to calls during the quiet hours.

We acknowledge that the practice of many cell phone owners of maintaining their telephone numbers after moving to different time zones may make determining their location—and thus the local time—for telemarketers more challenging. But callers have a simple remedy to avoid liability: do not send messages to any telephones for they which do not have PEIP. Once they have PEIP, regardless of whether that subscriber is registered on the Do Not Call list, their messages will not qualify as "solicitations," and the FCC's quiet hours rule will not apply.

Telemarketers who want to maintain communications with potential customers will endeavor to ensure that they are calling or texting during the non-quiet time hours, so will take into account the possibility that the consumer might be in a different time zone than the consumer's area code indicates. Indeed, the TCPA protects telemarketers who strive to comply with the law via the safe harbor from liability in 47 U.S.C. § 227(c)(5)(C). As a result, if telemarketers have "reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under [section (c) of the TCPA]," they will not be liable for damages.

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[10] Meredith Dost & Kyley McGeeney, Pew Research Ctr., Moving Without Changing Your Cellphone Number: A Predicament for Pollsters (Aug. 1, 2016, *available at* https://www.pewresearch.org/methods/2016/08/01/moving-without-changing-your-cellphone-number-a-predicament-for-pollsters/?utm_source=chatgpt.com.

[11] As of the end of 2023, over 80 million cell phones in the United States were not registered on the Do Not Call Registry. *See* Consumer Affairs, Journal of Consumer Research, Cell phone statistics 2025 (updated Mar. 20, 2025), *available at* https://www.consumeraffairs.com/cell_phones/cell-phone-statistics.html (331million people in the U.S. have cell phones); Press Release, Federal Trade Comm'n, FTC Issues Biennial Report to Congress on the National Do Not Call Registry (Jan. 8, 2024), *available at* https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-issues-biennial-report-congress-national-do-not-call-registry (at the end of FY 2023 (the most recent year for which information is available), the DNC Registry had 249.5 million active registrations).

The current regulatory structure also provides incentives for telemarketers to comply with the quiet hours limits even for those subscribers for whom they have PEIP. Telemarketers who want to maintain their communications with potential customers will want to avoid "Stop Calling" requests. Once a potential customer does so, the telemarketer is required to place that customer on an internal Do Not Call list, so all messages after such a request are illegal, regardless of the time of day they are sent.[12]

The current situation also provides fertile ground for the development of technology to create mechanisms that will notify telemarketers when they are sending messages during the quiet time hours to cell phone recipients. Such a development would assist subscribers and telemarketers alike. Instead of allowing calls without regard to a cell phone user's actual location, the Commission should stand aside and let the marketplace develop technology solutions that will enable callers to avoid placing calls during quiet hours at the called party's location without impinging on privacy concerns.

We also dispute the assertions in the petition that the cell phone "Do Not Disturb" or "Silent Mode" functions that permit subscribers to control the delivery of their message notifications are sufficient to protect them from unwanted telemarketing messages. Many subscribers—such as those with college-age children or elderly parents—are often unwilling to use these functions. The Silent Mode function allows calls and texts from *known* telephone numbers to be delivered even in Silent Mode. However, in some situations people want to make sure that they are available to emergency personnel, friends of family members, and others, in case an emergency arises. These calls would come from unknown numbers. Turning off message notifications during quiet times is not an option for them.

We urge the Commission to ensure that its actions foster the development of practices by telemarketers to avoid sending texts or making calls to recipients during the quiet hours, rather than create a safe harbor that allows them to ignore the quiet hours. Creating the requested presumption would be harmful to telephone subscribers, leading to many more unwanted calls and texts at inconvenient times.

[12] 47 C.F.R. 64.1200(d).

V. A Waiver of Any Part of the TCPA Rules is Completely Unjustified in this Instance and Would Undermine the Goals of the TCPA.

As stated in section III of these comments, the courts are quite capable of interpreting the Commission's rules and applying them to the facts presented. Just as the FCC should refrain from preempting the judicial process by issuing a declaratory ruling about what the rules say or creating a presumption that undermines industry efforts to ensure compliance, it should also decline to issue a waiver of the quiet hours rule. The current regulation has been on the books for over twenty years. There is no justification for granting retroactive waivers of it for an unknown number of telemarketers. Waiving the rule would allow telemarketers open season on late-night communications to anyone not on the Do Not Call list.

The context for the passage of the TCPA is important to keep in mind here, especially when the Commission is dealing with telemarketing robocalls. The TCPA was created to deal with the scourge of unwanted—and unconsented-to—robocalls, because they are an invasion of privacy. As was forcefully stated by Senator Hollings, the sponsor of the TCPA, "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."[13] Congress passed the TCPA to deal with these telephonic intrusions:

> 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.[14]

[13] 137 Cong. Rec. S16204, S16205 (Nov. 7, 1991).

[14] S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973. See also the congressional findings accompanying the TCPA, which repeatedly stress the purpose of protecting consumers' privacy:

> (5) Unrestricted telemarketing, however, can be an *intrusive invasion* of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
>
> (6) Many consumers are outraged over the proliferation of *intrusive, nuisance calls to their homes from telemarketers.*

Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (emphasis added) (found as a note to 47 U.S.C.A. § 227).

VI. Conclusion

The FCC has noted repeatedly that "[u]nwanted calls . . . are the FCC's top consumer complaint and our top consumer protection priority."[15] Chairman Carr recently repeated this goal when he said: "Cracking down on illegal robocalls will be a top priority at the FCC . . . ."[16] Yet, if the FCC were to grant the petition in this case, the result would be an escalation in unwanted, unconsented-to telemarketing calls to the American public. We urge the FCC to deny all of Petitioners' requests.

Respectfully submitted, the 10th day of April, 2025, by:

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[15] Federal Commc'ns Comm'n, Stop Unwanted Robocalls and Texts, *available at* https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts.

[16] Press Release, Federal Commc'ns Comm'n, First Commission-Level Vote Under Chairman Carr Proposes a Nearly $4.5 Million Fine Stemming From Apparently Illegal Robocall Scheme (Feb. 4, 2025), *available at* https://docs.fcc.gov/public/attachments/DOC-409354A1.pdf.