

October 17, 2018

The Honorable Ajit Pai
Chairman of the Federal Communication Commission
445 12th Street, NW
Washington, DC 20552

Re: Telephone Consumer Protection Act in light of Ninth Circuit *Marks* Decision
Docket ID: 02-278, 18-152

Dear Chairman Pai:

Thank you for the opportunity to comment on the recent *Marks v. Crunch* opinion as it relates to the interpretation and implementation of the Telephone Consumer Protection Act (TCPA) and the definition of an automatic telephone dialing system.

Unwanted “Robocalls” are the #1 consumer complaint in America today. The number of people complaining about harassing robocalls is increasing at an alarming rate. In 2015, 2,125,968 complained to the Federal Trade Commission (FTC), in 2016 this number was 3,401,614 and in 2017 it was 4,501,967. However, the calling industry is urging the FCC to loosen, rather than strength, protections for consumers. If the FCC issues a definition of “automated telephone dialing system” which is limited to dialing systems which must use a random or sequential number generator to both produce numbers as well as store numbers, as calling industry urges, no currently operating systems will be covered. It is an impossibility. Proponents of this non-sensical approach are merely trying skirt all liability under the TCPA and deny all consumers any sort of protections the TCPA intended to provide.

In other words, if the system already has the numbers in it (stored), then there would be no need for it to produce or generate numbers, so the phrase “using a random or sequential number generator” must modify only the word “produce.” Storage is an entirely separate function from generation of numbers, and is an alternative in the statute to production.

However, if the FCC were to turn to, as the Ninth Circuit did in *Marks*, the statutory context, particularly the permitted use of autodialers to make calls with prior express consent of the called party, the necessary interpretation becomes clear. As pointed out by the Ninth Circuit, “to take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers.” *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553, at *8 (9th Cir. Sept. 20, 2018). In order for the prior express consent exemption to be rendered anything other than superfluous, the definition of an ATDS must be read to have the capacity to (A) store or (B) produce telephone numbers to be called, using an automatic telephone dialing system.

The FCC has been handed a unique opportunity to ensure citizens receive the protections the TCPA intended to afford them. Under the interpretation found in *Marks*, businesses are able to utilize automatic dialing technology (through prior express consent) to their advantage and consumers are protected from the abuses 4,501,967 citizens are all too familiar with.

Thank you for considering my views.

Sincerely,

Amanda J. Allen