

February 27, 2019

VIA ECFS

Marlene H. Dortch
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
*Consumer And Governmental Affairs Bureau Seeks Comment On
Interpretation Of The Telephone Consumer Protection Act In Light Of DC
Circuit's ACA International Decision*, CG Docket No. 18-152
*Rules and Regulations Implementing the Telephone Consumer Protection
Act of 1991*, CG Docket No. 02-278

Dear Ms. Dortch:

On February 25, 2019, on behalf of Sirius XM Radio Inc. (“SiriusXM”), Ruth Ziegler, Senior Vice President and Deputy General Counsel of SiriusXM, Shay Dvoretzky and Jeffrey R. Johnson of Jones Day, and Bryan Tramont and the undersigned of Wilkinson Barker Knauer LLP, met with Nick Degani and Zenji Nakazawa of Chairman Ajit Pai’s office. During the meetings, we reiterated points made in SiriusXM’s comments in response to the Consumer and Governmental Affairs Bureau’s Public Notice seeking comment on interpreting and implementing the Telephone Consumer Protection Act (“TCPA”) in light of the Ninth Circuit’s *Marks v. Crunch San Diego LLC* decision,¹ as well as in SiriusXM’s comments and reply comments in response to the Commission’s Public Notice in light of the D.C. Circuit’s *ACA International* decision.²

¹ Public Notice, *Consumer and Governmental Affairs Bureau Seeks Further Comment on the Telephone Consumer Protection Act in Light of the Ninth Circuit’s Marks v. Crunch San Diego, LLC Decision*, CG Docket Nos. 18-152 & 02-278 (rel. Oct. 3, 2018); Comments of Sirius XM Radio Inc., CG Docket Nos. 18-152 & 02-278 (filed Oct. 17, 2018).

² Public Notice, *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*, CG Docket Nos. 18-152 & 02-278 (rel. May 14, 2018); Comments of Sirius XM Radio Inc., CG Docket Nos.

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Specifically, we explained that, consistent with the plain text of the statute, the term “automatic telephone dialing system” (“ATDS”) in the TCPA includes only such equipment that can generate and automatically dial random or sequential numbers, and only to the extent such equipment is configured to do so at the time the call is made. We also explained that nothing in the *Marks* decision counsels otherwise, as the ATDS interpretation set forth in *Marks* contorts the language of the statute and leads directly to the result that the D.C. Circuit determined unlawful in *ACA International*. By authorizing suits against users of equipment that merely stores and dials numbers, we explained that the Ninth Circuit’s decision in *Marks* will catch even legitimate businesses within the TCPA’s clutches simply for trying to reach their customers in an efficient manner. Furthermore, even if the Ninth Circuit’s interpretation of the statute was a permissible one – and it is not – the Commission is free to disregard it under *Brand X* and instead confirm that an ATDS must have present capacity to generate and automatically dial random or sequential numbers.³ We urged the Commission to act quickly to confirm that definition.

Please contact the undersigned with any questions.

Sincerely,

/s Jennifer Tatel
Jennifer Tatel

18-152 & 02-278 (filed June 13, 2018); Reply Comments of Sirius XM Radio Inc., CG Docket Nos. 18-152 & 02-278 (filed June 28, 2018).

³ *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) (A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”) (emphasis added).