

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Consumer and Governmental Affairs)	CG Docket No. 18-152
Bureau Seeks Further Comment on)	
Interpretation of the Telephone Consumer)	
Protection Act in Light of the Ninth)	
Circuit's Marks v. Crunch San Diego, LLC)	
Decision)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act)	
)	
To: The Commission)	

**REPLY COMMENTS OF THE
ALARM INDUSTRY COMMUNICATIONS COMMITTEE**

The Alarm Industry Communications Committee ("AICC"), on behalf of its members,¹ hereby files reply comments on the Commission's *Public Notice* dated October 3, 2018 in the above-captioned proceeding, in which the Commission seeks to supplement the record developed

¹ The Monitoring Association (TMA) (formerly known as Central Station Alarm Association), Electronic Security Association (ESA), Security Industry Association (SIA), the National Public Safety Telecommunications Council, Ackerman Security, ADS, ADT, AES- IntelliNet, AFA Protective Systems, Alarm.com, Alarm Detection Systems, ASG Security, Axis Communications, Bay Alarm, Bosch Security Systems, COPS Monitoring, CRN Wireless, LLC, DGA Security, Digital Monitoring Products, Digital Security Control, FM Approvals, Honeywell Security, Inovonics, Interlogix, Intertek Testing, iPDatatel, Napco Security, NetOne, Inc., Nortek, Protection One, Rapid Response Monitoring, Security Central NC, Select Security/Security Partners, Stanley Security, Supreme Security Systems, Inc., Telular Corp., Tyco Integrated Security, Tyco Security Products, Underwriters Laboratories, Universal Atlantic Systems, Vector Security, Inc., Vivint, and Wayne Alarm.

in response to its prior Public Notice² in light of the U.S. Court of Appeals for the Ninth Circuit’s decision in *Marks v. Crunch San Diego, LLC*. AICC is concerned about the uncertainty that is introduced by the Ninth Circuit’s opinion in *Marks*, and that is likely to continue to develop if the Commission does not act. A patchwork of legal requirements across various jurisdictions will negatively impact competition and the ability of alarm companies to communicate with and provide alarm services to consumers. To that end, AICC continues to support the adoption of a narrow interpretation of the definition of “autodialer” (“ADTS”).

I. The Ninth Circuit’s Decision Demonstrates the Need for Commission Action

As the U.S. Chamber Institute for Legal Reform and the U.S. Chamber Technology Engagement Center (together, the “Chamber”) note in their comments, several cases on the TCPA have been decided since the D.C. Circuit’s *ACA International v. FCC* ruling.³ Those courts, including the Ninth Circuit, have understood the *ACA International* to render the Commission’s prior TCPA precedent non-binding, leaving them free to interpret the statute as they so choose.⁴

Prior to the Ninth Circuit’s decision, the Third Circuit had interpreted the definition of ATDS narrowly, holding that a device is not an ATDS unless it can generate random or

² *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*, Public Notice, DA 18-493, CG Docket No. 18-152, 02-278, released May 14, 2018.

³ *ACA Int’l v. FCC*, 885 F.3d 687 (2018). See Comments of the U.S. Chamber Institute for Legal Chamber for Legal Reform, CG Docket Nos. 18-152 and 02-278, filed October 17 (“Chamber Comments”) at 5.

⁴ *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) at 17, citing *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3rd Cir. Jun. 2018) and *King v. Time Warner Cable, Inc.*, 849 F.3d 473 (2d Cir. Aug. 2018).

sequential telephone numbers.⁵ The Ninth Circuit expressly rejected the Third Circuit’s interpretation, finding that it had failed to provide any reasoning in support of its decision.⁶ Instead, the Ninth Circuit interpreted the definition of ATDS broadly, finding that equipment meets the definition of ATDS if it can store “telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator.”⁷ As a result, companies whose activities fall under the TCPA are forced to operate with two irreconcilably different definitions of what type of equipment triggers TCPA liability in the first place, depending on where they offer service and/or where they are principally located.

AICC shares the concerns raised by those industry stakeholders citing the uncertainty and concomitant risk posed by conflicting judicial opinions.⁸ As a regulatory agency, the Commission is well aware of the dangers of patchwork legal requirements to a competitive market; in its recent *Restoring Internet Freedom* order, for example, the Commission acknowledged that patchwork legal requirements would impose “an undue burden on ISPs that could inhibit broadband investment and deployment and would increase costs for consumers.” AICC respectfully submits that the same result will yield from courts establishing conflicting precedent in their respective jurisdictions unless the Commission steps in and offers a uniform interpretation of the TCPA. Conflicting judicial opinions are also an open invitation to continued litigation over the applicability of the TCPA, as ADT points out.⁹ Competition is negatively impacted by such litigation because larger companies are better able to shoulder the costs associated with TCPA litigation than smaller companies.

⁵ Chamber Comments at 5, *Marks* at 7.

⁶ *Id.* at fn. 8.

⁷ *Marks* at 4.

⁸ See, e.g., Comments of Five9, Inc., CG Docket Nos. 18-152 and 02-278, filed October 17 at 3; Comments of NAFCU, CG Docket Nos. 18-152 and 02-278, filed October 17, at 2.

⁹ ADT at 22.

II. The Commission Should Construe “ATDS” Narrowly

AICC again urges the Commission to bear in mind its stated goal of “ensur[ing] consumers will get the messages they want, indeed that are often critical, without undermining the TCPA's goal of protecting consumers from unwanted messages.”¹⁰ As demonstrated in AICC’s previous comments, automated contacts from the alarm industry are beneficial to and desired by its customers.¹¹ There, AICC explained that in addition to notifications for triggered alarms, alarm systems also may send other types of notifications – such as a device with low battery power – that also are critical to the safety of the subscriber.¹² And, AICC explained, alarm companies also place automated calls that are closely related to the purchased alarm service, and are the type of communications customers expect to receive by providing their cell phone number to an alarm company.¹³ Accordingly, AICC maintains that a narrow interpretation of the term ATDS best addresses Congress’ concerns while maximizing the transmission of desirable communications, per the Commission’s objective.¹⁴

As ADT correctly notes, the Ninth Circuit’s interpretation would trump an interpretation by this Commission “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.” Since the Ninth Circuit found the statute to be ambiguous, the Commission is not restrained by that court’s ruling. Instead, AICC supports ADT, the Chamber, and ACA International in their assertions that

¹⁰ Reply Comments of AICC, CG Docket Nos. 18-152 and 02-278, filed May 18 at 2, citing *In re: Blackboard, Inc. Petition for Declaratory Ruling, et al.*, FCC 16-88, CG Docket No. 02-278, released August 4, 2016 at ¶18.

¹¹ *Id.* at 2-4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 4-5.

the Ninth Circuit's interpretation ignores the plain meaning of the statutory language, which is clear on its face, and should not be followed.¹⁵

III. Conclusion

For the forgoing reasons, AICC urges the Commission to act promptly on the questions presented in its Public Notice, and in a way that aligns with its stated goal of minimizing unwanted automated calls while ensuring customers continue to receive the automated calls they do want. This means, at a minimum, adopting a narrow definition of ATDS that cleaves closely to the plain language of the statute.

Respectfully submitted,

**ALARM INDUSTRY COMMUNICATIONS
COMMITTEE**

A handwritten signature in black ink that reads "Louis T. Fiore". The signature is written in a cursive, flowing style.

Louis T. Fiore
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¹⁵ Comments of ADT at 9; Chamber Comments at 9; Comments of ACA International, CG Docket Nos. 18-152 and 02-278, filed October 17 at 9-10. See also, Reply Comments of AICC at 4-5.