

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<i>In the Matter of</i>	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the Telephone	)	
Consumer Protection Act in Light of the Ninth	)	
Circuit's <i>Marks v. Crunch San Diego, LLC</i>	)	
Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**REPLY COMMENTS OF ADT LLC d/b/a ADT SECURITY SERVICES**

ADT LLC d/b/a ADT Security Services (“ADT”) submits these reply comments in response to the Consumer and Governmental Affairs Bureau’s October 3, 2018, *Public Notice* seeking further comment regarding the definition of an automatic telephone dialing system (“ATDS”) following the decision in *Marks v. Crunch San Diego, LLC*.<sup>1</sup>

The record demonstrates that the Ninth Circuit’s overly broad definition of automatic telephone dialing systems (“ATDS”) in *Marks* is contrary to the plain text of the statute and misreads and misapplies the legislative history and context of the Telephone Consumer Protection Act (“TCPA”).<sup>2</sup> The Commission has an ample record to define ATDS as Congress

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<sup>1</sup> *Consumer and Governmental Affairs 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*, Public Notice, DA-1014 (rel. Oct. 3, 2018) (“*Public Notice*”). See *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) (“*Marks*”). The appellee, Crunch, has filed a petition for *en banc* review. *Appellee’s Petition for Rehearing En Banc*, Case No. 14-56834, (9th Cir. Oct. 4, 2018).

<sup>2</sup> See, e.g., *Comments of Professional Association for Customer Engagement*, CG Docket Nos. 18-152, 02-278, at 4-6 (filed October 17, 2018); *Comments of U.S. Chamber Institute for Legal Reform*, CG Docket Nos. 18-152, 02-278, at 16-18 (filed October 17, 2018); *Comments of Sirius XM Radio Inc.*, CG Docket Nos. 18-152, 02-278, at 6-8 (filed October 17, 2018) (“*Sirius October 17<sup>th</sup> Comments*”).

originally intended – equipment that must generate numbers randomly or sequentially and then dial “such numbers.”

ADT submits these reply comments to address two discrete issues raised by comments submitted by a group of law firms that have brought numerous TCPA suits, including the *Marks* case.<sup>3</sup> First, that filing wrongly treats telemarketing calls and calls regarding overdue payments as one in the same, despite clear evidence that Congress understood them to be completely distinct and never intended to subject the latter to TCPA regulation. Second, the filing reflects the extent to which support of an expansive definition of ATDS equipment hinges on the discredited claim that random or sequential number generators cannot “store” numbers.

#### **I. Calls Regarding Past Due Payments Are Not the Same As Telemarketing Calls.**

The *Kazerouni Comments* wrongly conflate telemarketing and debt collection calls.<sup>4</sup> As detailed in ADT’s comments, the TCPA was “in no way intended to include calls to collect debts.”<sup>5</sup> Congress pinpointed unsolicited telemarketing calls, especially when using a prerecorded message, as the primary source of consumer complaints that the TCPA sought to curb.<sup>6</sup> Congress recognized a fundamental distinction between calls from telemarketers with whom the consumer had no relationship, and hence no expectation of receiving a call, and calls from entities with whom the consumer had transacted business and provided a phone number to

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<sup>3</sup> *Comment of Law Offices of Todd M. Friedman, P.C., Kazerouni Law Group, APC, and Hyde & Swigart, APC*, CG Docket Nos. 18-152, 02-278 (filed October 17, 2018) (“*Kazerouni Comments*”).

<sup>4</sup> *See, e.g., Kazerouni Comments* at 13 (“The FCC should not permit companies and individuals, especially in the telemarketing and debt collection industry to undue [sic] the meaning of an ATDS . . .”); *id.* at 16 (“Debt collectors and telemarketers do not want to contact people at random . . .”); *id.* at 17 (“Hundreds or even thousands of text messages in a short period of time can be sent out to people whose telephone numbers get added to a list by companies such as telemarketers and debt collectors.”); *id.* at 24 (“[P]redictive dialers are used commonly in the telemarketing and debt collection industries . . .”).

<sup>5</sup> *See Comments of ADT LLC d/b/a ADT Security Services*, CG Docket Nos. 18-152, 02-278, at 3 (filed October 17, 2018) (quoting H. Rep. 102-317 at 16) (“*ADT October 17<sup>th</sup> Comments*”).

<sup>6</sup> *See, e.g.,* 137 Cong. Rec. S18785 (daily ed. Nov. 27, 2019) (noting consumer “outcry over the explosion of unsolicited telephone advertising” and the “invasion of privacy by unrestricted telemarketing”) (statement of Sen. Pressler); *id.* (“The primary purpose of this legislation is to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations”). *See also Comments of U.S. Chamber Institute for Legal Reform*, CG Docket Nos. 18-152, 02-278, at 3 (filed June 13, 2018) (“*Chamber June 13<sup>th</sup> Comments*”).

be called.<sup>7</sup> Blurring these distinctions has reaped benefits for the plaintiffs' bar at the expense of legitimate businesses attempting to contact their customers regarding overdue payments or to deliver other important information to the consumer.

ADT and others have thus called on the Commission to use this opportunity to not only reverse years of overly broad interpretations of TCPA's specific terms, but to restore the balance that Congress initially envisioned when it declared its intent to protect legitimate business communications.<sup>8</sup> The Commission can do so by exempting informational calls, including calls regarding past due amounts, made to cellular phones just as those calls are exempt when made to residential lines.<sup>9</sup> In this way, the Commission can refocus the TCPA's restrictions on unsolicited telemarketing and scam calling as Congress originally intended.<sup>10</sup>

## **II. Dialing Systems That Use Random or Sequential Number Generators Also Store Numbers.**

For years, consumer groups and plaintiffs' firms have predicated their claim that ATDS must include equipment capable of calling from stored lists of numbers on the ostensibly technical argument that a random or sequential number generator cannot store numbers.<sup>11</sup> As a result, the argument goes, the modifying phrase "using a random or sequential number generator" can only modify the term "produce" as it would be nonsensical to view number

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<sup>7</sup> See, e.g., 137 Cong. Rec. H11310 (daily ed. Nov. 26, 1991) (authorizing the Commission to exempt calls that do not adversely affect the privacy rights the TCPA is intended to protect such as "leav[ing] messages with consumers to call a debt collection agency. . . .") (statement of Rep. Markey).

<sup>8</sup> *ADT October 17<sup>th</sup> Comments* at 22-23; *Comments of the Credit Union National Association*, CG Docket Nos. 18-152, 02-278, at 3 (filed October 17, 2018) ("*CUNA October 17<sup>th</sup> Comments*").

<sup>9</sup> *ADT October 17<sup>th</sup> Comments* at 22-24; *CUNA October 17<sup>th</sup> Comments* at 21-25.

<sup>10</sup> See, e.g., *Chamber June 13<sup>th</sup> Comments* at 5 ("trial lawyers have found legitimate, domestic businesses a much more profitable target than illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters") (quoting Pai Dissent to 2015 Omnibus TCPA Order).

<sup>11</sup> *Kazerouni Comments* at 12; *Comments of National Consumer Law Center*, CG Docket Nos. 18-152, 02-278, at 4 (filed October 17, 2018) (arguing that number generation and storage are mutually exclusive) ("*NCLC October 17<sup>th</sup> Comments*").

generators as storing numbers.<sup>12</sup> The Ninth Circuit credited the argument as well.<sup>13</sup> The argument, however, is rarely, if ever, accompanied by any attempt to discuss or understand the technical functions of automated dialing systems “using a random or sequential number generator” that were actually in use when the TCPA was enacted.

The comments filed by Noble Systems provide such a technical explanation and, in doing so, destroy the shibboleth that number generators are not “storage devices.”<sup>14</sup> The comments provide a detailed technical examination of the capabilities of automatic dialing systems to store telephone numbers as described in patents on file at the time the TCPA was adopted.<sup>15</sup> The comments persuasively demonstrate that random and sequential number generators used by telephone dialers in that era both produced and stored numbers.<sup>16</sup> The comments explain that digital dialing systems “stored the random/sequential numbers they produced for dialing” as an inherent function of the digital circuitry used to produce such numbers.<sup>17</sup> More importantly, the comments note the importance of storing numbers to ensure that the random dialing of numbers, for example randomly dialing all of the numbers in a 10,000 number block, would not result in the same number being repeatedly called.<sup>18</sup> The comments also highlight the necessity of statutory language to address both the storage and the production of numbers using a random or sequential number generator.<sup>19</sup> Noble’s comments substantiate the statements by ADT and

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<sup>12</sup> *Kazerouni Comments* at 15; *NCLC October 17<sup>th</sup> Comments* at 3 (“a number generator is not a storage device”) (quoting *Marks*, 2018 WL 4495553 at \*8).

<sup>13</sup> *Marks*, 2018 WL 4495553 at \*8.

<sup>14</sup> *See Comments of Noble Systems Corporation*, CG Docket Nos. 18-152, 02-278 (filed October 16, 2018) (“*Noble Comments*”).

<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 12-16.

<sup>19</sup> *Id.* at 15-16.

others that ATDS are dialing *systems* that have the capacity to store the telephone numbers generated randomly or sequentially.<sup>20</sup>

Noble's comments should remove any remaining hesitancy to utilize common canons of statutory construction to give effect to the plain meaning of the TCPA's ATDS definition as requiring the capability to randomly or sequentially generate numbers to be called. As ADT noted, the linguistic problem identified by the Ninth Circuit that number generators are not storage devices has been resolved by other courts.<sup>21</sup> Noble's Comments reveal the linguistic problem has been wholly fabricated by wrongly asserting that ATDS using a random or sequential number generator do not have the ability to store numbers.

### **Conclusion**

The record thoroughly repudiates the argument that the statutory definition of an ATDS must be read to include calling from lists of specific, targeted telephone numbers in order to give effect to the term "store." Automatic dialing systems using random/sequential generators in fact stored telephone numbers, as well as produced them when the TCPA was enacted. The Commission should abide by the TCPA's plain language and define an ATDS as equipment that has the present capacity both to generate numbers randomly and sequentially, and to dial them without human intervention. The Commission should also resist efforts to conflate unsolicited telemarketing with legitimate efforts by companies to provide information to existing customers regarding overdue payments and other matters.

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<sup>20</sup> *Reply Comments of ADT LLC d/b/a ADT Security Services*, CG Docket Nos. 18-152, 02-278 at 4 (filed June 28, 2018). The *NCLC October 17<sup>th</sup> Comments* and the *Kazerouni Comments* largely avoid discussion of another key attribute of an ATDS, the ability to dial numbers without human intervention. Even if equipment dialing specific numbers from preprogrammed lists were to be considered ATDS, which they are not, such equipment still would not qualify as ATDS if there is human intervention.

<sup>21</sup> *ADT October 17<sup>th</sup> Comments* at 11 (citing *Pinkus v. Sirius XM Radio Inc.*, 319 F.Supp.3d 927, 936–40 (N.D. Ill. 2018)).

Respectfully submitted,

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