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

In the Matter of	**)**	
	)	
Rules and Regulations Implementing the	**)**	**CG Docket No. 18-152**
Telephone Consumer Protection Act of 1991	**)**	**CG Docket No. 02-278**
	)	
Petition for Expedited Declaratory Ruling	**)**	
of the Insights Association		

REPLY COMMENTS OF J.D. POWER

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I. INTRODUCTION

On behalf of J.D. Power, I am writing to reply to the comments that have been filed in response to the Commission's Public Notice of October 3, 2018 (the "Notice"). The Notice seeks further comment on what constitutes an "automatic telephone dialing system" ("ATDS" or "autodialer") within the meaning of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.[1]

[1] "As used in this section—(1) The term 'automatic telephone dialing system' means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

On September 20, in *Marks v. Crunch San Diego, LLC*,[2] the Ninth Circuit interpreted the TCPA's autodialer definition expansively, concluding the definition is "not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to store numbers and to dial stored numbers automatically."[3] As the Commission explained in the Notice, this interpretation is in conflict with the D.C. Circuit's decision in *ACA International v. Federal Communications Commission*,[4] which "held that the TCPA unambiguously foreclosed any interpretation that 'would appear to subject ordinary calls from any conventional smartphone to the Act's coverage.'"[5]

For a number of reasons, I believe the D.C. Circuit's analysis of the autodialer definition is correct, and Ninth Circuit's analysis is myopic, and deeply flawed. As an initial matter, in finding the statutory language "ambiguous on its face," the *Marks* decision arguably conflicts with prior Ninth Circuit precedent that the autodialer definition in §227(a)(1) is "clear and unambiguous."[6] Additionally, I believe the court got the plain reading of the statutory language wrong: as defendant Crunch San Diego argued, the placement of the comma in §227(a)(1) strongly suggests the phrase "using a random or sequential number generator" modifies *both* "store" and "produce." Despite expressly acknowledging this argument, the *Marks* court, somewhat inexplicably, did not deal with it directly.[7]

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[2] No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).
[3] *Id.* at *9.
[4] 885 F.3d 687 (2018).
[5] Public Notice at 2 (quoting *ACA International*, 885 F.3d at 692). *See also Dominguez ex rel Himself v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) (holding that in light of the D.C. Circuit's holding, the court was free to interpret the statutory definition of an autodialer as it had prior to the issuance of the FCC's 2015 order).
[6] *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). The *Marks* court contended that the statement in *Satterfield* "referred to only one aspect of the text: whether a device had the "*capacity* 'to store or produce telephone numbers . . . .'" *Marks*, 2018 WL 4495553 at *20 n.6 (quoting *Satterfield*, 569 F.3d at 951 (emphasis in original)).
[7] *Id.* at *20.

In justifying its interpretation, the court's reasoning also makes critical logical leaps. For example, the court reasoned that, because a caller could only take advantage of the TCPA's consent and debt collection exceptions by dialing from a list of numbers, this means the definition does not require equipment to generate random or sequential numbers to be an ATDS.[8] Regardless of whether the court is correct about what these exceptions suggest, it does not necessarily follow that the ATDS definition must therefore extend to all technology that can dial from stored lists automatically.

Indeed, and as the D.C. Circuit explained, "[n]othing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the majority of Americans."[9] The *Marks* decision, which purports to recognize the D.C. Circuit's vacation of the Commission's 2015 Order and "begin anew to consider the definition of ATDS,"[10] merely reverts to the Commission's 2015 status quo by adopting an interpretation that sweeps in every device that can dial numbers automatically from a stored list, including smartphones. It is noteworthy that the *Marks* decision only mentions smartphones when discussing the *ACA International* decision, and does not, at any point in the opinion, address the D.C. Circuit's critical contention that the TCPA was never intended to assume such an "eye-popping sweep."[11] In other words, I believe the *Marks* court engaged in an unduly narrow, purely academic engagement of the statute's text without considering the ramifications of its interpretation and whether those ramifications could reasonably be squared with today's technological realities and the TCPA's overarching purpose.

[8] *Id.* at *21-22.
[9] *ACA International*, 885 F.3d at 699.
[10] *Marks*, 2018 WL 4495553 at *17-18.
[11] *ACA International*, 885 F.3d at 697.

The stakes for our business, and for America's economy, are high. As has been communicated to the Commission in a number of times in recent years, TCPA litigation is out of control.[12] In August of 2017 the U.S. Chamber of Commerce reported that "after the FCC's July 2015 Order, TCPA litigation boomed—increasing by 46%."[13] The *ACA International* decision was a long overdue step in the right direction, and remains an opportunity for the TCPA to implement a new commonsense regime which is fairer to legitimate, well-intentioned businesses, and better in line with the TCPA's original intent.

I can personally attest that abusive TCPA litigation has chilled legitimate research work designed to benefit both businesses and consumers. Thank you for your consideration of this vital issue. I appreciate the opportunity to comment.

[12] *See, e.g.*, Petition of The Insights Association and the American Association for Public Opinion Research, CG Docket No. 02-278, *18 (filed Oct. 30, 2017) ("TCPA litigation nearly doubled between 2013 and 2015. This trend has shown no signs of slowing."); Comments of J.D. Power to Insights Petition, CG Docket No. 02-278, *6 ("the deluge of abusive TCPA litigation has chilled legitimate survey work").

[13] U.S. Chamber of Commerce Institute for Legal Reform, *TCPA Litigation Sprawl*, August 31, 2017, https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.