

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

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

CG Docket No. 18-152

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

Reply Comments of Robert Biggerstaff

Robert Biggerstaff submits these reply comments on the *Public Notice* regarding the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*.¹

INTRODUCTION

There is no incompatibility between the D.C. Circuit opinion in *ACA International*² and *Marks*.³ Any claim otherwise is a false dichotomy that the industry wants to exist. In reality, *Marks* and *ACA International* are not in conflict. The conflict arises from the Commission's interpretation of "capacity" which is a question *Marks* expressly did not reach.⁴ If the FCC adopts the construction of *Marks*, and a less expansive construction of

¹ *Public Notice: 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*, CG Docket Nos. 02-278; 18-152 (October 3, 2018) DA18-1014 ("Notice").

² *ACA Int'l et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

³ *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. Sept. 20, 2018).

⁴ See *Marks* at n.9.

“capacity”, *ACA International* is completely satisfied, the statute is logically construed without declaring any portion a mere surplusage,⁵ and consumers are still substantially protected from the mischiefs the TCPA was intended to address.

ARGUMENT

I believe that with this *Notice*, the Commission has incorrectly implied that the definition of ATDS must be revised with respect to whether it is limited to devices that generate and then dial phone numbers rather than a device that dials phone numbers from a list. I believe the FCC’s existing guidance on that point is both consistent with the construction adopted by *Marks* and consistent with the D.C. Circuit in *ACA International*. What is inconsistent with *ACA International*, and was deferred by *Marks*, is the construction of “capacity” adopted by the Commission. Indeed, a more limited construction of “capacity” solves the “smartphone” issue and to the extent any further question remains (or might arise in the future) the *ACA International* court expressly invited the Commission to solve that issue with a exemption pursuant to 227(b)(2)(C) to “fashion exemptions preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.”

Numbers Cannot Be “Stored” with a Random Number Generator.

Marks and similar decisions are of course correct on the critical point: one cannot “store” phone numbers with a random number generator.⁶ That’s like trying to “store”

⁵ This Commission itself has oft cited this maxim. *See, e.g., Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket 98-121 (Oct. 13, 1998) Memorandum Opinion and Order, at note 67, citing *See, e.g., Ark. Best Corp. v. Comm’r*, 485 U.S. 212, 218 (1988) (declining to read a particular provision of a statute in a way that renders a prior statutory exclusion mere surplusage in the absence of a clearly expressed congressional intent to do so).

⁶ The *Marks* court noted “it is unclear how a number can be *stored* (as opposed to *produced*) using ‘a random or sequential number generator.’” *Marks* at n.8, citing the unpublished decision in *Dominguez v. Yahoo, Inc.*, 629 F. App’x 369, 372 n.1 (3d Cir. 2015) (emphasis in original) where the Third Circuit itself highlighted that very inconsistency in the statutory language.

electricity with an electrical generator. You have to have something else for storage, like a battery or a capacitor. Therefore the statute must be read to avoid that absurdity.

I hold a BS in Engineering, I am a certified forensic computer examiner, and a programmer in over a dozen computer languages for over 35 years. I found the lay opinions in industry comments on this docket claiming that a random number generator must necessarily “store” a number that it generates is simply wrong.⁷ A true random number generator contains no facility for storage, but feeds the number at the instant of “generation” to another device that then accepts the number and that second device may ultimately store it. This is true for both simple generators such as a pair of dice as well as complex such as one that uses sampling of multiple oscillator frequencies with significant disturbance signals such as jitter and phase noise or even radioactive decay and the photoelectric effect. Because random numbers are critical in cryptographic applications, the notion of storage of a generated random number by the random number generator would be a serious point of potential security compromise.

Even if this were not the case, to “store” a number must mean something more than transient presence while traveling through a device. Storage in this context contemplates data at rest for some indeterminate time in a medium for retrieval at will at some future time. If that were not the case, a message being transmitted by telegraph would be considered “stored” in the wire carrying the signal from source to destination. Such a concept of “storage” is nonsensical.

The *Marks* court correctly interpreted the statute in this regard. The reading the *Marks* court reached is straightforward:

[W]e read § 227(a)(1) to provide that the term “automatic telephone dialing system” means equipment which has the capacity—(1) to store numbers to

⁷ See, e.g., Comments of Five9, Inc., at p. 5.

be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically.

Indeed, the necessity of the second function—to dial numbers automatically—is the touchstone of an ATDS. The two prefatory clauses are necessary to prevent evasion of the statute.

The Marks Construction of ATDS Is the Best Construction

The TCPA is a remedial consumer protection statute and “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.”⁸ With that canon of construction in mind, consider if one of the prefatory clauses—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—was absent.

- If the first prefatory clause was omitted (or if the dialing industry’s proposed construction was adopted), then a dialer that dialed from a stored list would be exempt and someone could simply store every random or sequential number in the country⁹ in a list and load that list into the dialer.
- If the second prefatory clause was omitted, a dialer that created the numbers on-the-fly without a list would be exempted.

Either of those outcomes would be untenable for consumers. Hence the wisdom of Congress in including both.

The 750 million phone numbers in use in North America can be stored on a \$5 USB stick. It is trivially easy to autodial every “random” phone number in the country (or any subset thereof) by autodialing them from a list. Congress could not have intended the statute to be so easily evaded. In short, automated calls to “random or sequential numbers”

⁸ *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949).

⁹ Or in your area code, or your telephone exchange, or based on any other identifier.

can be accomplished by simply dialing from a “list” of such numbers. The construction adopted by *Marks* is sound and affirmatively necessary to prevent evasions of the statutory scheme.

In contrast, consider if the industry suggested construction was adopted so that an ATDS is strictly limited to devices that both generate and dial random or sequential numbers. Cell phones would become unusable since massive, unrestricted dialers dialing from lists of millions of numbers could pump out calls and text messages by the millions each day without regard to who they are calling, without any compulsion to refrain from calling emergency lines, hospitals, nursing homes, etc. There would be no legal obligation to refrain from calling reassigned numbers. Anyone who lives in a state with a close election coming up is already receiving suspicious text messages.¹⁰ Absent the TCPA, massive bulk text message campaigns would flourish and engulf cell phone users on a daily basis.

None of the industry comments adequately address this result that flows from their proposed constructions of ATDS. Robodialers operating from a list would operate in a free fire zone due to a legislative vacuum, and blast out calls and texts at will.¹¹

There is also a logical inconsistency that is fatal to the construction of ATDS proposed by the industry commenters. Congress established in the text of the TCPA that use of a ATDS to call a cell phone was permitted with “prior express consent.” Yet unless someone was dialing from a list, how would they be able to limit ATDS calls to people from whom the caller had obtained that consent? Put another way, how could the express

¹⁰ See, e.g., <https://www.hustle.com>. This is just one market-based solution that arose organically, demonstrating the incentive to make such calls is strong, and must remain appropriately regulated.

¹¹ While certain *telemarketing* messages would still be subject to some restrictions, the important provisions of the TCPA protect cell phones apply to non-commercial calls and texts as well would no longer apply.

consent exemption for ATDS calls be used by a caller if an ATDS is only a dialer that generates and dials random or sequential numbers? *Marks* identified this precise issue—and others—that are wholly inconsistent with a ATDS being defined to exclude a dialer that merely dials from a list rather than dialing random or sequential numbers generated within the dialer.¹² The industry commenters would have the consent exemption declared a mere surplusage.

Preventing the undesirable consequences of turning over mass outbound telephone platforms to machines is the *sine qua non* of the TCPA. The TCPA's sponsor, Senator Fritz Hollings, captured consumers' collective frustrations with autodialers when he famously said when introducing the TCPA:

Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.¹³

Autodialers embody those evils in two ways: they automatically initiate the calls like an industrial cyborg, and they use overdialing and robotically hang up on millions of consumers when too many calls are made and no "human" is available to talk to them (i.e. abandon calls) or play recorded messages to answering machines and voice mail.¹⁴

Congress itself found such automated calls "regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." This express finding by Congress

¹² *Marks*, slip op. at 21, and at note 7.

¹³ 137 Cong. Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings); *See also*, 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("It is telephone terrorism, and it has got to stop.")

¹⁴ Even the inventor of the predictive dialer referred to abandons as "the answering party suffering a nuisance." Douglas Samuelson, *Predictive Dialing for Outbound Telephone Call Centers*. Indeed, one particularly obnoxious result of abandoned calls that play a message is that without a human on the line, they do not wait for the outgoing voice mail greeting to complete, so the recorded message they attempt to leave is cut off and they do not acknowledge a DNC request that a consumer may put in their voice mail greeting.

rebutts the claims of certain industry commenters that “their” calls are welcome and it is only some nefarious “telemarketer” that is deserving of regulation. If their calls indeed are welcome, they should have no problem obtaining prior consent.

Smartphones and Capacity—The Issue *Marks* Did Not Reach

While *Marks* did correctly interpret the statute, it refrained from addressing an important related issue: how to construe “capacity.”¹⁵ Because *Marks* did not address the “capacity” issue it did not need to address the “smartphone” question. The Commission expressly raises it in this proceeding. The D.C. Circuit raised it. It is inextricably tied up with the construction of “capacity” so both must be discussed together.

When I look at a dialer versus a conventional smartphone, what is the difference under the TCPA? They are both devices that store lists of phone numbers and can dial a number from that list. They both have random number generators and the capacity to generate random or sequential numbers.

So what’s the difference?

First, the statute uses the plural “numbers” (“to dial such numbers.”) My iPhone can’t dial phone numbers (plural). It dials only a single phone number (after I select that number from the contact list) and stops unless I the caller take further action. Nothing I can do (within reason) can get it to proceed to the next number and dial it automatically on its own.

Secondly, my smartphone does not automatically “hang up” on people that answer the phone (abandons) because I dialed too many calls at once (overdialing) like a preview dialer with a timeout, a power dialer, or a predictive dialer.

¹⁵ *Marks* at n.9 (“Because we vacate the district court’s decision on this ground, we decline to reach the question whether the device needs to have the current capacity to perform the required functions or just the potential capacity to do so.”)

These two distinctions show that the construction adopted by *Marks* makes sense. It fits with the “automatic” in ATDS and the title of subsection (b) of “Restrictions on use of *automated* telephone equipment.” That’s exactly the contours circumscribed by the *Marks* court.

However the Commission suggested that software might be able to add those features to a smartphone. This does not mean that a wholesale reinterpretation of ATDS is called for. To the contrary, only construction of the term “capacity” need be revisited.

Dialers are designed for the express purpose of dialing automatically from a list or otherwise automatically making calls. While this feature may be “latent” in some dialers and requires an additional license to be purchased, that is an intended function of the device in its basic design specifications . . . not an afterthought bolted onto it as a one-off Frankenstein project.¹⁶

At the other end of the spectrum, if someone cobbles together the previously mentioned Frankenstein project—such as a predictive dialing system using an iPhone—then that is and should be treated as an ATDS under the statute. Those calls would not be “ordinary calls from any conventional smartphone” as the D.C. Circuit described in *ACA International*. They are neither “ordinary” calls nor would such a smartphone be “conventional.”

How Software Features Are “Enabled” With Electronic Switches in Software

In reading various decisions related to this issue, there seems to be a misunderstanding in the courts about what it means to have software “modified” or added

¹⁶ “Latent” is much more restrictive than “potential” in that latent capacity is present but hidden whereas potential capacity is much broader. One example is computer software that has multiple functions but some are hidden from the user until an additional license is purchased in order to use “turn on” or activate functions. This is consistent with D.C. Circuit’s analysis as well as that of other courts that even if limited to present capacity it includes features that can be activated with “the simple flipping of a switch.” *ACA Int’l*, 885 F.3d at 696.

in order for a dialer to have additional features enabled. This is not a complex process involving computer software developer spending hours writing code to perform those functions. Quite the contrary, it is trivially simple: the customer who purchased/leased the dialer simply clicks a few buttons on the screen. That will load/enable the software already written by the vendor of the dialer to load and run on the dialer. In some cases, all it takes is a phone call to the vendor who then charges the customer's credit card for "activating" the new feature and the user can then instantly begin to use it.

As an illustration, consider if you purchased a word processor for your personal computer, but you bought the least expensive "introductory" version for twenty dollars that did not provide spell checking. After using the software for a while, you decide you want the spell checking feature that costs an additional five dollars. In many instances you would be able to just click on a button to activate that feature, the five dollars would be charged to your credit card, and instantly you would have the spell check feature. In other cases, after charging your credit card you might receive an email with a licence code you then copy and paste into the software to instantly "activate" the spell check feature.

Applying this illustration to dialer software, you can purchase or lease a dialer with only preview-dialing capability, and then instantly enable the predictive dialer feature with a simple click of a button and charge to your credit card or an additional fee on your monthly invoice from the dialer vendor.

Another common paradigm is software that "phones home" over the Internet on a regular basis to determine which features you have paid for and are thus available to you to use. This is particularly popular with software features that are sold on a subscription model, or for which a license is purchased for limited periods of time. Many "cloud-based" dialers operate this way. A simple click of a button on a configuration panel and you

instantly have “switched on” additional features—along with a bill for those features you just activated.

In each of these examples, the additional features of a dialer require only trivial action by the customer to activate those latent features via nothing more than the equivalent of flipping a “software switch.” The construction of “capacity” in ATDS even by courts that have adopted or proposed restrictive constructions on that term, would all include such easily “switched on” features.

The Marks Construction in Practice

The statutory definition of ATDS, as adopted by *Marks*, is in practice best read to cover dialing “numbers” (plural) from on-the-fly generated random or sequential numbers or from a list of numbers, with some automated element. This includes a system that dials more than one number from a list automatically proceeding through the list without meaningful human interaction for each call, as well as a system with intentional overdialing which “automatically” abandons some calls or directs messages to answering machines. Thus a system that overdials and does automated call progress analysis (CPA) and automatically hangs up on some calls due to overdialing or hangs up or plays messages if it detects an answering machine, voice mail, etc., is an ATDS.

Construction of Capacity is the Real Problem Identified by *ACA International*

The core of the problem identified by the D.C. Circuit in *ACA International* is almost entirely attributable to an overly-broad construction of “capacity” and not to the Commission’s prior construction of the elements of an ATDS.

“Capacity” as used in the definition of ATDS should be construed as “present capacity as well as capacity that the manufacturer anticipated and intended to be able to be added to the system. This would also cover latent features that are “turned on” with electronic switches such as by purchasing an additional license.

This construction covers a smartphone if predictive dialer software is *actually* installed on the phone. It excludes smartphones that don't have the software actually installed because predictive dialing is not a function anticipated and intended by the smartphone manufacturer so it can't be "turned on" with an electronic switch. An agent-initiated preview-mode dialer that is not intended by the manufacturer to be able to be upgraded to a predictive dialer is not an ATDS. However, a preview-mode dialer that is intended to be able to be upgraded to a predictive dialer with an electronic switch (latent capacity) is covered as an ATDS.

I have, for several years, suggested that an agent-initiated¹⁷ preview dialer, where the agent who speaks to the consumer initiates the call and is on the line when the call is answered, and which does no automated CPA, should be permissible under the TCPA and Commission's rules. Such a system has no overdialing or abandoned calls, it has no misdials from manual dialing, it facilitates accurate recordkeeping for the caller, it does not play recorded messages clogging up answering machines or voice mail, and no consumers are left with "dead air" while a call is routed because the caller is already on the line before the consumer answers the phone.

The Appropriate Role of an Exemption

The Commission also has ample statutory authority under § 227(b)(2)(C) to adopt exemptions to the use of ATDS restrictions in § 227(b)(1)(A). The Commission can make explicitly clear that "ordinary calls from any conventional smartphone" are exempted from the provisions of § 227(b)(1)(A). In this context "ordinary calls from any conventional

¹⁷ "Agent-initiated" must be strictly construed, and "timeout" or other functions that will automatically progress the system through a list of numbers must be excluded. Also, the human initiating the dialing must be the agent on the line to talk to the answering consumer, and not just a "human robot" such as I have cautioned against previously, who may be 5,000 miles away paid to simply click on a "dial" button 200 times a minute.

smartphone” would encompass calls made with a consumer-grade smartphone using the software and features installed on the phone by the manufacturer, such as group texting.

Indeed, such an exemption for precisely this purpose was suggested by the D.C.

Circuit in *ACA International*:

In any event, the Commission retains a measure of authority under the TCPA to fashion exemptions to the restrictions on use of autodialers to call wireless numbers. *Id.* § 227(b)(2)(C). The agency presumably could, if needed, fashion exemptions preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.¹⁸

The D.C. Circuit invited the Commission to address this issue with an exemption, and the Commission should accept that invitation.

Congress Received Testimony Regarding Predictive Dialers

I note that at least one source has questioned whether Congress was aware of the use and function of predictive dialers when the TCPA was passed.¹⁹ The answer is affirmative as demonstrated by the hearing of the Communications Subcommittee of the Senate Committee on Commerce, Science, and Transportation.²⁰ Senator Pressler (R-SD) in particular engaged one witness, Robert Bulmash, regarding his extensive testimony regarding predictive dialers:

Senator Pressler: Mr. Bulmash, I was fascinated with your testimony where you said that they have a statistical thing where they want about 3 to 8 percent of the people. Rather than waiting, you get pick up the phone and nobody is there because they have gone on. If your phone rings, I suppose

¹⁸ *ACA Int'l* at 699.

¹⁹ Predictive algorithms were invented by Doug Samuelson and began to be deployed in the 1980's. But for many years before that, the usual practice in the industry at the time was to begin a new dialing attempt every n seconds. Those controlling such systems could vary the interval between dialing attempts depending on how busy the representatives were; typically, they made these adjustments too slowly, so the systems oscillated between too much idle time and too many abandoned calls.

²⁰ S. Hrg. 102-960, July 24, 1991, pp. 16-19; 24-25.

three or four times, the machine somehow directs the person or whatever to go on to the next one.

Mr. Bulmash: That is after you have answered the phone. After a person is on-line, they will hang up on 2 to 8 percent of those people called. And that is for the insurance industry, for the telecommunications industry.

CONCLUSION

In closing, I would like to emphasize that the TCPA's restrictions on ATDS calls only apply to such calls made *without prior consent*. Predictive dialers—indeed any type of dialer—can be freely used to call any phone, *including cell phones*, with prior consent.

Consumers hate uninvited calls to their cell phones. Congress expressly found they hate automated calls “regardless of the content or the initiator of the message.” Cell phones are *personal* devices that people carry on their person—many carry them 24 hours a day. Unexpected calls distract drivers, interrupt work, and intrude into your life. Unwanted interruptions are the scourge of modern life. But remaining connected to family, friends, customers, and to a means of emergency contact is critical so we have to respond when a call comes in to at least see who it is from. The intrusion is independent of whether you get 1 call or 20 . . . it is the officiousness and invasion of privacy from the uninvited call itself.

Sincerely

/s/ Robert Biggerstaff
Robert Biggerstaff, CCE
October 24, 2018