Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Consumer and Government 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

To: The Commission

REPLY COMMENTS OF CRUNCH SAN DIEGO, LLC

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Crunch San Diego, LLC ("Crunch") hereby submits these brief comments in reply to the Comment of Law Offices of Todd M. Friedman, P.C., Kazerouni Law Group, APC, and Hyde & Swigart, APC,[1] counsel of record for the plaintiff in the *Marks* case (collectively, "Plaintiff's Counsel").

As a matter of statutory interpretation, the ATDS definition cannot be construed so that the phrase "using a random or sequential number generator" modifies only the term "produce" but not "store" in the preceding phrase of § 226(a)(1)(A). While Plaintiff's Counsel and other pro-*Marks* commentators rely on the last antecedent rule (also called the "nearest reasonable reference cannon"[2]) to support *Marks*'s reading of the statute, such reliance is misplaced, as that rule is neither mandatory nor does it always yield the most reasonable interpretation of a statute or regulation.[3] The Supreme Court has held that the last-antecedent rule generally does not apply where, as here, "[t]he modifying clause appear[s] . . . at the end of a single, integrated list."[4] Rather, in that instance, the opposite is true: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."[5] In this case, "the presence of a comma before the last clause in the statute suggests that the limiting clause applies to the entire

[1] The comments were submitted in response to the Commission's notice, *see 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, CG Docket No. 02-278, DA 18-1014 (October 3, 2018) ("Public Notice").

[2] *See Canyon Fuel Co., LLC v. Sec'y of Labor*, 894 F.3d 1279, 1289 (10th Cir. 2018).

[3] *See Barnhart v. U.S.*, 540 U.S. 20, 26 (2003) ("[T]h[e] [last antecedent] rule is not an absolute and can assuredly be overcome by other indicia of meaning . . . .").

[4] *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 345 n.4 (2005).

[5] *Paroline v. United States*, 572 U.S. 434, 447 (2014) (rejecting the last antecedent rule, ruling that it "not an absolute and can assuredly be overcome by other indicia of meaning" and that "[t]he Court has not applied it in a mechanical way where it would require accepting 'unlikely premises.'") (citations omitted).

series."[6] By contrast, Plaintiff's Counsel's interpretation, namely its application of "the last-antecedent rule[,] would render the [phrase "using a random and sequential number generator"] superfluous."[7] Nor do the "textual and contextual justifications" offered by *Marks* and restated in the comments filed by Plaintiff's Counsel support reading out this statutory requirement.[8]

Plaintiff's Counsel also offers no principled way to distinguish dialing from a list using a platform that stores "a list of numbers" and "automatically transmit[s] SMS messages" (like the one at issue in *Marks*),[9] from dialing from a stored list using a smartphone or any other computerized device. They admit that "[o]rdinary smartphones have the capacity to both store telephone numbers and automatically send text messages."[10] Adopting the *Marks* construction of ATDS would therefore revive the very overbreadth problem that the D.C. Circuit ruled in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) was "impermissible" in scope because it would "render every smartphone an ATDS."[11] But beyond smartphones, the comments demonstrate that the *Marks* interpretation would potentially implicate virtually "any computing system with a memory bank, and a software interface allowing for the input and storage of phone numbers," which "would include most modern telephone systems, and in fact most computing devices."[12]

This overbreadth problem would not be resolved by creating an exemption for smartphones (but not other computing devices),[13] as Plaintiff's Counsel proposes. Indeed, their comments

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[6] *Elliot Coal Min. Co. v. Dir., Office of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994).
[7] *United States v. Hayes*, 555 U.S. 415, 425-26 (2009) (refusing to apply the last antecedent rule where doing so would violate the rule against superfluity).
[8] *See* Comments Of Sirius XM Radio, Inc. at 6-7; *see also* Comments Of Crunch San Diego, LLC, Exh. A at 7-14.
[9] Comments by Plaintiff's Counsel, at 24.
[10] Comments by Plaintiff's Counsel, at 27.
[11] *ACA*, 885 F.3d at 697-98.
[12] Comments by Plaintiff's Counsel, at 24.
[13] *See* Comments by Plaintiff's Counsel at 28.

provide no guidance on what a "common-sense exemption for smartphones" should specifically address.[14] While a blanket smartphone exemption would not address the concerns of other commentators that certain software applications could be downloaded to smartphones to give it ATDS-type functionalities,[15] neither Plaintiff's Counsel nor other pro-*Marks* commentators offer any *meaningful* guidance on how a smartphone exemption or clarification should be crafted. While one specific proposal requests that the Commission draw delineations between various smartphone functionalities, so that individual texting would be a non-ATDS function but group texting would qualify a smartphone as an ATDS if "multiple, identical or near-identical group text messages were sent,"[16] the purported distinction between this type of group messaging and others is hardly a clear standard and could potentially lead to "differential treatment of seemingly like cases"[17] because it does not "satisfactorily explain why a challenged standard embraces one potential application but leaves out another, seemingly similar one."[18]

Accordingly, the Commission should reject the proposal by Plaintiff's Counsel and other pro-*Marks* commentators and instead adopt an interpretation of ATDS that is consistent with the statutory text and legislative history, which confirms that an ATDS must have the capacity to generate and dial random or sequential numbers.

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Respectfully submitted,

By: /s/ Ian C. Ballon

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[14] *Id.*
[15] *See, e.g.*, Comments of the National Consumer Law Center, at 9.
[16] *See* Comments of the National Consumer Law Center, at 12-13.
[17] *ACA*, 885 F.3d at 700.
[18] *Id.*

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