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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:	)	
	)	
Consumer and Government Affairs Bureau	)	CG Docket No. 18-152
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 of 1991	)	
	)	
	)	

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REPLY COMMENTS OF JOHN A. SHAW

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These comments are made in response to the Commission's Public Notice seeking comment on the interpretation of the Telephone Consumer Protection Act ("TCPA")[1] and in reply to comments submitted by Crunch San Diego, LLC[2] and TCN Inc.[3] and other comments that support the position that the definition of an automatic telephone dialing system does not include devices that store telephone numbers that are not generated by "a random or sequential number generator".

I urge the commission to adopt the definition of ATDS favored by the *Marks* court which considers any device that stores telephone numbers and dials those numbers to be an ATDS for the reasons given below.

INTERPRETATION OF THE TCPA

At issue is the section in the TCPA that defines an "Automatic Telephone Dialing System" (ATDS)[4]. The relevant phrase of the TCPA reads "(A) to *store* or *produce* telephone numbers to be called, *using a random or sequential number generator*" (emphasis added). The issue is, does the phrase "using a random or sequential number generator" apply to both words "store" and "produce" or just to the second word, "produce"?

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[1] 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 (Oct. 3, 2018) ("Public Notice").
[2] Comments of Crunch, LLC to CG Dockets 18-52 and 02-278 (Crunch Comments)
[3] Comments of TNC Inc. to CG Dockets 18-52 and 02-278 (TCN Comments)
[4] 47 U.S.C. § 227(a)(1).

In the case *ACA International v. FCC*[5] the DC Circuit Court of Appeals decided that the phrase applied to both words "store" and "produce", limiting the TCPA's definition of ATDSs to only those devices that use a random or sequential number generator. This would exclude devices that store a curated list of numbers and automatically call numbers from that list.

However, in the case *Marks v. Crunch San Diego, LLC*[6] the Ninth Circuit Court of Appeals ruled that the phrase only applied to the word "produce" but not to the word "store". Under this interpretation any device that stores telephone numbers would be considered to be an ATDS.

The words "store" and "produce" are antecedents to the phrase "using a random or sequential number generator". The *ACA Int'l* court contends that the phrase limits both antecedents. The *Marks* court claimed that the phrase does not limit the word "store" and that a system that stores numbers from a curated list can still be classified as an ATDS.

The Ninth Circuit Court, in the *Marks* decision, stated that the provision in the TCPA "is not susceptible to a straightforward interpretation based on the plain language alone" and that "the statutory text is ambiguous on its face."[7] I agree.

Because of the ambiguity of the purely grammatical interpretation, we must look at the logic of the sentence. A random or sequential number generator does not store numbers. Therefore, that phrase can logically only be applied to a system that *produces* numbers but not to a system that only *stores* numbers. For that reason, I believe that the only logical interpretation of the TCPA's definition of an ATDS is that it applies to any device that either stores a list of numbers and dials from that list or produces numbers using sequential or random number generation and dials those numbers. I agree with the *Marks* decision.

THE SMART PHONE PROBLEM

Smart phones store numbers that can then be dialed by the user. In addition, any form of "speed dial" or automatic dialer software in a computer can allow a number to be dialed, from a stored list or data base by a single push of a button or click of a mouse. The *Marks* definition of ATDS will include such devices.

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[5] *ACA Int'l v. FCC,* 885 F.3d 687 (D.C. Cir. 2018).
[6] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) (*Marks*)
[7] *Marks* at 20.

One method for the commission to solve the smart phone problem is to promulgate regulations that will apply the TCPA provisions only to devices that use prerecorded or artificial voices, that automatically dial numbers without human intervention, generate numbers by random or sequential means, or are in violation of the do-not-call list (other than a call made for emergency purposes or made with the prior express consent of the called party).

CONCLUSION

I request that the Commission adopt the *Marks'* court definition that the phrase "*using a random or sequential number generator*" applies only to systems that produce telephone numbers and then dials the numbers, and that systems that store numbers not produced by a random or sequential number generator are classified as automatic telephone dialing systems.

I also ask that the commission adopt regulations that will apply the TCPA provisions only to devices that use prerecorded or artificial voices, that automatically dial numbers without human intervention, that generate numbers by random or sequential means, or that are used in violation of the do-not-call list.

Respectfully submitted,

John A. Shaw