

March 1, 2019

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street SW
Washington, DC 20554

**Re: Interpretation of the Telephone Consumer Protection Act, CG Docket No. 18-152
Implementation of the Telephone Consumer Protection Act, CG Docket No. 02-278**

Dear Ms. Dortch,

On February 27, 2019, Steve Morris of NCTA – The Internet & Television Association (NCTA), Audrey Connors of Charter Communications, Beth Choroser of Comcast, and Barry Ohlson on behalf of Cox Communications, met with Zenji Nakazawa, Legal Advisor to Chairman Pai, to discuss the above-referenced proceedings.

During the meeting, we explained that there is an urgent need for the Commission to provide guidance on the application of key terms in the Telephone Consumer Protection Act of 1991 (TCPA). The lack of predictability that currently exists due to the rejection of significant elements of the Commission’s *2015 TCPA Order* in *ACA International v. FCC*¹ has exposed companies to unwarranted litigation risk and substantially increased the challenge of communicating with customers.

Consistent with NCTA’s pleadings in these proceedings, we urged the Commission to clarify that equipment should be classified as an “automatic telephone dialing system” for purposes of the TCPA only if it has the present capability to generate numbers randomly or sequentially and that capability is used, without human intervention, in making the relevant calls.² An interpretation of the statutory definition that covered equipment that merely stores numbers without use of a random or sequential number generator would be at odds with the statutory language and congressional intent.³

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (2015 TCPA Order), *vacated in part*, *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

² *See* Comments of NCTA – The Internet & Television Association, CG Docket No. 18-152 (filed Oct. 17, 2018) at 4-6; Comments of NCTA – The Internet & Television Association, CG Docket No. 18-152 (filed June 13, 2018) (NCTA June 2018 Comments) at 3.

³ *See, e.g., 2015 TCPA Order*, Dissenting Statement of Commissioner Ajit Pai, 30 FCC Rcd at 8076 (Pai Dissent) (“Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA.”); Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part, *id.* at 8089

We also advocated for the Commission to make clear that the intended recipient of the call is the “called party” for purposes of the TCPA until the caller is informed that the number has been reassigned.⁴ We explained that there are two parties to any call and interpreting this term from the perspective of the calling party makes sense because it is the calling party that is subject to the law.⁵ Additionally, such an interpretation would not inhibit enforcement against bad actors for making illegal calls to consumers without their consent, but simply eliminate the uncertainty and unwarranted liability surrounding legitimate, but inadvertent, calls to reassigned numbers. While implementation of the reassigned numbers database (and corresponding safe harbor for use of that database) will help to reduce the number of calls to unintended recipients, until that database is fully operational cable operators will continue to face unwarranted litigation risk in connection with legitimate calls to customers who have changed their number without informing their service provider. The Commission should make clear that this interpretation of “called party” applies not just prospectively, but also retroactively in light of the court’s decision in *ACA International* vacating the Commission’s “one call” safe harbor and the court’s analysis of the Commission’s previous interpretation of called party.⁶

Finally, we encouraged the Commission to clarify the rules governing the revocation of consent. We expressed concern that the current approach enables consumers to revoke consent through means that may be extremely difficult for companies to execute (e.g., informing a repair technician who has no access to the requisite database). We suggested that the Commission could address this concern by allowing companies to establish a phone number and/or web address as the sole means of revoking consent provided such an approach is clearly defined and easy for customers to use.⁷

Respectfully submitted,

/s/ **Steven F. Morris**

Steven F. Morris

cc: Zenji Nakazawa

(“Second, the order misreads the statute by including equipment that merely has the capacity to dial from a list of numbers. That’s not what the TCPA says. It makes clear that the telephone numbers must be stored or produced ‘using a random or sequential number generator.’”).

⁴ NCTA June 2018 Comments at 7-8.

⁵ As Chairman Pai explained in his dissent to the *2015 TCPA Order*, “[t]he expected-recipient approach respects Congress’s intent that the TCPA ‘balance the privacy rights of the individual and the commercial speech right of the telemarketer.’” Pai Dissent at 8079.

⁶ *ACA International v. FCC*, 885 F.3d at 708-09.

⁷ NCTA June 2018 Comments at 9, *citing ACA International*, 885 F.3d at 710.