Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Consumer and Government Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of D.C. Circuit's ACA International 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

COMMENTS OF SIRIUS XM RADIO INC.

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Sirius XM Radio Inc. ("SiriusXM") hereby submits these comments in response to the Commission's Public Notice seeking comment on the interpretation of the Telephone Consumer Protection Act ("TCPA"),[1] following the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*.[2] Pursuant to the D.C. Circuit's guidance, the Commission should return its interpretation of an automatic telephone dialing system ("ATDS") under the TCPA to that which is required by the statute's plain text and consistent with its intent.

I. INTRODUCTION AND SUMMARY

SiriusXM is the world's largest radio company and serves over 33 million subscribers. SiriusXM's satellite radio service is available in vehicles from every major automobile manufacturer and on smartphones and other connected devices as well as online at siriusxm.com.

[1] *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, CG Docket No. 18-152, CG Docket No. 02-278, DA 18-493 (May 14, 2018) ("Public Notice").

[2] *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

Similar to other legitimate businesses, SiriusXM makes telephone calls to its customers, often as follow-up calls to paying subscribers or to trial customers who get a subscription with their purchase of a new or used vehicle.

Although Congress has spoken with clarity about the definition of ATDS, the Commission has not. Over the years, the Commission has put forth contradictory interpretations of the functionalities of an ATDS, sometimes tracking the statutory ATDS definition, sometimes not. In 2003, the Commission deviated from the long-settled and understood scope of the TCPA's ATDS restriction by ruling that "predictive dialers" qualify as ATDS.[3] The Commission, however, suggested varied tests for liability: whether the equipment can dial "at random, in sequential order, or from a database of numbers,"[4] whether it can "store or produce telephone numbers … using a random or sequential number generator,"[5] and whether it can "dial numbers without human intervention."[6] The Commission stood by this jumble in 2008 and 2012, and then again in its most recent order in 2015.[7]

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[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 133 (2003) ("[A] predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress."). The Commission indicated that "a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.* ¶ 131.

[4] *Id.* ¶ 131.

[5] *Id.* ¶¶ 132-33.

[6] *Id.* ¶ 132.

[7] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559 ¶¶ 12-14 (2008); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 15391 ¶ 2 n.5 (2012); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961 ¶ 16 (2015) ("*2015 TCPA Omnibus Order*").

SiriusXM led a group of petitioners in challenging, among other things, the Commission's interpretation of an ATDS.[8] In response, the D.C. Circuit vacated the *2015 TCPA Omnibus Order* in relevant part, as well as the earlier 2003, 2008, and 2012 Orders that the *2015 TCPA Omnibus Order* reaffirmed.[9] The court first set aside the Commission's interpretation of "capacity," reasoning that the Commission's interpretation was too broad: if "capacity" includes "features that can be added … through software changes or updates," every smartphone would be an ATDS, because "any smartphone, with the addition of software, can gain the statutorily enumerated features."[10] The D.C. Circuit also set aside the Commission's interpretation of the functions of an ATDS, finding it arbitrary and capricious because it set forth multiple, conflicting views.[11]

The D.C. Circuit's decision imposes a responsibility on the Commission to finally right the ship with respect to its ATDS interpretations. As explained further below, the decision provides important guidance regarding the functions of an ATDS by emphasizing the statute's intention of thwarting only automatic, unthinking random-dialing devices. It also addresses when a device has the "capacity" to perform such functions: at most, a device's "capacity" includes the functions it can perform with its current software. In light of this new guidance, it is

[8] *See* Joint Brief for Petitioners ACA International, SiriusXM, PACE, salesforce.com, ExactTarget, Consumer Bankers Association, U.S. Chamber of Commerce, Vibes Media, and Portfolio Recovery Associates, No. 15-1211 (D.C. Cir. Feb. 24, 2016).

[9] The *2015 TCPA Omnibus Order* reaffirmed those prior orders and therefore, by holding that the *2015 TCPA Omnibus Order* was arbitrary and capricious, the D.C. Circuit necessarily ruled that the orders it reaffirmed were also arbitrary and capricious to the extent they discuss the functions of an ATDS. Moreover, the D.C. Circuit explicitly rejected the Commission's argument that the determinations in the earlier orders were not subject to review. *See ACA International*, 885 F.3d at 701.

[10] *Id.* at 695-96.

[11] *Id.* at 703.

now time for the Commission to change course and once again interpret the ATDS definition in accordance with Congress's objectives in enacting the TCPA.

II. THE D.C. CIRCUIT'S DECISION COMMANDS A LONG-OVERDUE COURSE CORRECTION OF THE COMMISSION'S INTERPRETATION OF AN ATDS

The TCPA defines an ATDS as equipment having "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."[12] The TCPA generally makes it unlawful "to make any call … using any automatic telephone dialing system" to certain emergency telephone lines, hospital lines, and wireless numbers.[13]

These statutory provisions raise three fundamental questions. First, what are the functions of an ATDS? Second, what does it mean to have the "capacity" to perform these functions? Third, what does it mean to "us[e]" an ATDS? The plain text of the statute—and the D.C. Circuit's opinion in *ACA International*—compel the answers to each of these questions. First, the functions of an ATDS consist of automatically generating and dialing random or sequential telephone numbers. Second, a device has the necessary "capacity" if the device, as programmed at the time of the call, has the ability perform these functions. Finally, a caller uses an ATDS if it makes a call using the capacity that makes the device an ATDS—in other words, if the caller uses the capacity to automatically generate and dial random or sequential telephone numbers.

A. An ATDS Automatically Generates and Dials Random or Sequential Telephone Numbers

An ATDS is, at bottom, a random or sequential dialer. More precisely, equipment qualifies as an ATDS only if it (1) has a random or sequential number-generator, (2) can use the

[12] 47 U.S.C. § 227(a).

[13] *Id.* § 227(b)(1)(A).

number-generator to store or produce telephone numbers to be called, (3) can dial those numbers, and (4) can perform all of these tasks automatically. This conclusion follows from the text of the TCPA and from the statute's legislative history.

Text. Section 227 establishes that, to qualify as an ATDS, equipment must be capable of performing three key tasks. First, the equipment must be able to generate random or sequential numbers. Otherwise, it cannot have the capacity to do anything "using a random or sequential number generator."[14] Second, the equipment must be able to use that random or sequential number generator in order to store or produce telephone numbers to be called. That is what it means to have the capacity "to store or produce telephone numbers . . . , *using* a random or sequential number generator."[15] Third, the equipment must be able to dial those telephone numbers. The terms of the definition—"dial *such* numbers"—refer back to the "telephone numbers" that were stored or produced "using a random or sequential number generator."[16]

The ATDS definition further requires the equipment to be capable of performing these functions *automatically*—without human intervention. Section 227(a)(1) defines "*automatic* telephone dialing system," and the Commission "cannot forget that [it] ultimately [is] determining the meaning of [that] term" when parsing subsections 227(a)(1)(A) and 227(a)(1)(B).[17] Because something "automatic" can "wor[k] by itself with little or no direct human control," an "automatic" telephone dialing system must be able to perform the requisite functions without human assistance.[18] The D.C. Circuit agrees: the "'automatic' in 'automatic

[14] *Id.* § 227(a)(1)(A); *see Dominguez v. Yahoo, Inc.*, 629 Fed. App'x 369, 372–73 & n.2 (3d Cir. 2015).

[15] 47 U.S.C. § 227(a)(1)(A) (emphasis added).

[16] *Id.* § 227(a)(1) (emphasis added).

[17] *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004).

[18] *The New Oxford American Dictionary* (1st ed. 2001).

telephone dialing system' … would seem to envision non-manual dialing of telephone numbers."[19]

Legislative History. This straightforward reading of the statute is confirmed by the TCPA's legislative history. When Congress enacted the TCPA, it understood that random and sequential dialers cause distinctive problems. It therefore adopted a statute that restricts those—and only those—kinds of equipment.

At least as early as the 1960s, callers began experimenting with machines that could dial telephone numbers more efficiently than human beings could.[20] Such machines became widespread by the 1980s. A congressional hearing in 1989 revealed that more than 180,000 telemarketers used automated dialers "to call more than 7 million Americans" every day.[21] Many of these automated dialers called telephone numbers "at random,"[22] or dialed "whole blocks of numbers" "sequentially,"[23] often only to leave a prerecorded message.[24]

Congress understood that such random and sequential dialers caused particular problems. By definition, these devices called telephone numbers indiscriminately. As a result, they often reached "lines reserved for [specialized] purposes," including lines belonging to emergency rooms, police stations, and fire departments.[25] For example, lawmakers heard about one 911

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[19] *ACA International*, 885 F.3d at 703.

[20] *See Unsolicited Telephone Calls*, Memorandum Opinion and Order, 77 FCC 2d 1023 ¶ 2 (1980).

[21] *Telemarketing Practices: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 101st Cong. 1 (1989) ("*Telemarketing Practices*") (statement of Rep. Markey).

[22] *Id.* at 3 (statement of Rep. Rinaldo).

[23] *Id.* at 2 (statement of Rep. Markey).

[24] *Id.* at 3 (statement of Rep. Rinaldo).

[25] S. Rep. No. 102-178, at 2 (1991).

operator who received an automated call that began, "This is your lucky day."[26] The impact was widespread: "The Coast Guard, national defense organizations, police, fire department, hospitals, doctors, you name it; [they were] all affected."[27]

Aimless dialing likewise led random and sequential dialers to reach places such as hospital wards and patient rooms. One "horror stor[y]" involved "the man in the hospital bed in the intensive care ward" who received an automated call "offering him a trip to Hawaii."[28] Observers found it "sickening" that "a person can . . . be in a major trauma hospital receiving care, and be harassed by this type of communication."[29]

Indiscriminate dialing also hurt users of cell phones and pagers. These users paid charges—in the early 1990s, hefty charges—for calls they received.[30] They were therefore saddled with the cost of random and sequential calls to their telephones, even though the caller dialed their numbers without any basis for believing that they would be interested in the message. For example, one doctor who was "called on his beeper" with an offer of a "deal on diet pills" was "then charged $3 for the call."[31] Sequential dialing also caused these problems and more. Dialing whole blocks of numbers could overwhelm *all* of the telephone lines in a

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[26] *Computerized Telephone Sales Calls and 900 Service: Hearings Before the Senate Committee on Commerce, Science, and Transportation*, 102d Cong. 34 (1991) ("*Computerized Telephone Sales Calls and 900 Service*") (statement of Chuck Whitehead).

[27] *Telemarketing/Privacy Issues: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 102d Cong. 111 (1991) ("*Telemarketing/Privacy*") (statement of Michael J. Frawley).

[28] *Id.* at 28 (statement of Rep. Unsoeld).

[29] *Computerized Telephone Sales Calls and 900 Service* 55 (statement of James M. Faircloth).

[30] *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, First Report, 10 FCC Rcd 8844, tbls. 3–4 (1995) (60-minutes-per-month plan cost $63—the equivalent of $117 today—in 1991).

[31] *Telemarketing/Privacy Issues* 28 (statement of Rep. Unsoeld).

hospital or police station or fire department.[32] In one case, a dialer sequentially called telephones in a hospital in Watertown, New York, tying up "exam rooms, patient rooms, offices, labs, emergency rooms, and x-ray facilities" with a pitch for a contest in which participants could win a vacation.[33] "Lives literally 'hung in the balance' while hospitals were unable to page doctors [or] to reach code blue teams," forced to "stand by, watching the dialer call each and every pager number, one by one, until the dialer ha[d] done its job and all the calls [were] completed."[34] Cellular networks, too, were vulnerable to sequential dialing. Because cellular carriers "obtain[ed] large blocks of consecutive phone numbers for their subscribers," a sequential dialer running through such a group of numbers could "saturate mobile facilities, thereby blocking the provision of service to the public."[35] One carrier "had its system seized by autodialers three separate times for approximately 3 hours each time, during which time the service was totally disrupted to almost 1,000 customers."[36]

Telephone users were "especially frustrated" because there was "no way to prevent these calls."[37] Even leaving one's number unlisted could not "prevent those telemarketers that call numbers randomly or sequentially."[38]

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[32] H.R. Rep. No. 102-317, at 10 (1991); *see also* S. Rep. No. 102-178, at 2 (similar).

[33] *S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing Before the Subcommittee on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 43 (1991) (statement of Michael F. Jacobson).

[34] *Telemarketing Practices* 79 (statement of Steven S. Seltzer, President, Modern Communications Corporation).

[35] *Telemarketing/Privacy Issues* 113 (statement of Michael J. Frawley).

[36] *Id.*

[37] S. Rep. No. 102-178, at 1.

[38] *Id.* at 2.

Congress responded to the unique problems posed by random and sequential dialers by enacting the TCPA's restrictions on ATDS equipment. Focusing on the technology responsible for these problems, Congress defined an ATDS as equipment that "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."[39] Further targeting the types of telephone lines that were vulnerable to these problems, Congress prohibited ATDS calls "to any emergency telephone line," "to the telephone line of any guest room or patient room" of a medical establishment, or "to any telephone line assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."[40]

If lawmakers had meant to prohibit *all* unwanted or computer-dialed calls to such numbers, one would expect Congress to have said so. It did not. If lawmakers had desired to protect privacy generally rather than guard against the dangers posed by random and sequential dialing in particular, one would expect Congress to have prohibited ATDS calls to then-dominant wireline numbers as well. It did not.[41] From first to last, the TCPA's legislative history thus reflects what its text declares: that only equipment with the capacity to generate and dial randomly or sequentially generated numbers falls within its ambit. In the TCPA, Congress did not restrict all equipment capable of calling from a list, but instead restricted the use of an ATDS – *i.e.*, a random or sequential dialer. Even if callers have switched away from random and sequential dialers to other kinds of dialing technologies since the TCPA was adopted in 1991, the Commission cannot go back and rewrite the statute. The D.C. Circuit makes this point

[39] 47 U.S.C. § 227(a)(1) (emphasis added).

[40] *Id.* § 227(b)(1)(A).

[41] *See* 47 U.S.C. § 227(b)(1)(B).

abundantly clear: "Congress need not be presumed to have intended the term 'automatic telephone dialing system' to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."[42]

A. A Device Has the Necessary Capacity if the Device, as Programmed at the Time of the Call, Can Perform the Functions of an ATDS

The second question raised by the TCPA is what it means for a device to have the "capacity" to perform the functions of an ATDS. Prior to the D.C. Circuit's decision, the debate centered on whether "capacity" referred to a piece of equipment's "*present* capacity"—what it could do as currently configured—and its "*potential* ability"—what it might be able to do, if rebuilt, reprogrammed, or reconfigured.[43] The D.C. Circuit found this framing of the debate unhelpful. As the court put it, "the question whether equipment has the 'capacity' to perform the functions of an ATDS ultimately turns less on labels such as 'present' and 'potential' and more on considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?"[44]

In drawing the line between modifications to enable a device to function as an autodialer, the court focused on "how broad a swath … of telephone equipment" would fall within the TCPA given the placement of that line.[45] Under that approach, the D.C. Circuit held that, at

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[42] *ACA International*, 885 F.3d at 699; *see also 2015 TCPA Omnibus Order* at 8076 (Dissenting Statement of Commissioner Ajit Pai) ("[I]f the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress….").

[43] *2015 TCPA Omnibus Order* ¶¶ 11–17.

[44] *ACA International*, 885 F.3d at 696.

[45] *Id.*

most, a device has the "capacity" to do something only if it has the ability to perform that function *as currently programmed*. A more "expansive" view—interpreting "capacity" to include "features that can be added … through software changes or upgrades"—has the "effect of embracing any and all smartphones," because "[i]t's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers."[46] Put another way: "If a device's 'capacity' includes functions that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that all smartphones, under the Commission's approach, meet the statutory definition of an autodialer."[47]

The D.C. Circuit considered that result "untenable."[48] By 2016, "nearly 80% of American adults had become smartphone owners."[49] The definition of an ATDS cannot reasonably be interpreted "in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country."[50] "It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."[51]

The D.C. Circuit's decision thus resolves what "capacity" means: it includes, at most, the functions a device can perform with the software currently installed on it. It does not include abilities that a device could acquire through the downloading of new applications, the addition of

[46] *Id.*

[47] *Id.* at 697.

[48] *Id.* at 698.

[49] *Id.* at 697.

[50] *Id.* at 698.

[51] *Id.*

new software, reprogramming, or changes to its physical or technological configuration. Otherwise, the statute would assume an "utterly unreasonable" scope.[52]

B. A Caller Uses an ATDS If It Uses the Capacity that Makes the Device an ATDS

The final question raised by the TCPA is what it means to "use" an ATDS. A caller uses an ATDS only if it uses the capacity that makes a device an ATDS. In other words, a caller uses an ATDS only if the caller uses the device to automatically generate and dial random or sequential numbers.

This understanding comports with Congress' use of the word "use" elsewhere in the TCPA. For example, the statute defines "telephone facsimile machine" as "equipment which has the capacity … to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line."[53] It then refers to "the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements."[54] Congress plainly had in mind the use of fax machines *as fax machines*—in other words, the use of fax machines to "transcribe" unsolicited advertisements "into an electric signal and to transmit that signal over a regular telephone line." So too here; a caller has not "used an ATDS" if he or she fails to use the capacity that makes the device an ATDS.

Indeed, the contrary interpretation would raise serious constitutional doubts. Time, place, and manner restrictions on speech comply with the First Amendment only if they are "narrowly tailored to serve a significant governmental interest."[55] That means that a restriction must

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[52] *Id.* at 699.

[53] 47 U.S.C. § 227(a)(3).

[54] *Id.* § 227(f).

[55] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

"target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy."[56] Here, the exact source of the evil that Congress sought to remedy is autodialed calls. Interpreting the TCPA to restrict calls that are in fact autodialed targets and eliminates that source of evil. In contrast, interpreting the TCPA to restrict, not calls that are in fact autodialed, but any call made from a particular device if that device happens to have the ability to autodial, does not target the "exact source" of any problem. That result may not withstand constitutional scrutiny.[57]

III. CONCLUSION

Following the D.C. Circuit's recent decision in *ACA International v. FCC*, the Commission's path forward to interpret the definition of an ATDS is clear. Consistent with that definition and as required by the statute itself, the Commission must now confirm than an ATDS includes only such equipment that can generate and automatically dial random or sequential numbers, and only to the extent such equipment is currently configured to do so.

[56] *Initiative & Referendum Institute v. U.S. Postal Service*, 417 F.3d 1299, 1307 (D.C. Cir. 2005).

[57] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 588 (1988) (holding that an agency has an obligation to avoid statutory interpretations that raise constitutional questions if possible).

Respectfully submitted,

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