Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
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

COMMENTS OF THE NEWS MEDIA ALLIANCE

The News Media Alliance ("the Alliance") writes in response to the FCC's Public Notice seeking comment on how the Commission should interpret certain elements of the Telephone Consumer Protection Act ("TCPA") in the wake of the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*.[1]

For decades, the news media industry has relied on the telephone to communicate with its subscribers and advertisers. The Alliance knows the value of clear agency interpretation and guidance of statutory requirements, and thus urges the FCC to reconsider and elucidate a clear and rational interpretation of the definition of an "automatic telephone dialing system" ("ATDS") as set forth in the statute. The TCPA defines an ATDS as "equipment which 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."[2] As explained more fully herein, the FCC should: (1) limit its interpretation of the term "capacity" in that definition to only those devices

[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 Nos. 02-078, 18-152 (rel. May 14, 2018) ("Public Notice").

[2] 47 U.S.C. § 227(a)(1).

that have the *present* ability to store, produce, and dial numbers; (2) clarify that a device is not an ATDS unless it can generate "random and sequential" numbers to be dialed (as opposed to selecting numbers from a set list); and (3) clarify that a device is not an ATDS unless it can dial numbers without human intervention. These clarifications would provide a bright-line standard to the many industries that make use of ATDS technology, including the news media, and would fall well within the Commission's authority.

I. THE COMMISSION SHOULD CONFIRM THAT "CAPACITY" MEANS *PRESENT* CAPACITY.

In light of the D.C. Circuit's decision, the FCC must change its previous interpretation of the term "capacity" in the TCPA's definition of an ATDS. In 2015 (and prior), the FCC interpreted "capacity" expansively to include even those devices that would require the addition of software to meet the plain language of the definition's requirements.[3] The D.C. Circuit set aside this interpretation, finding it so broad that it "lies considerably beyond the agency's zone of delegated authority for purposes of the *Chevron* framework."[4] In reframing its interpretation, the Commission should hew more closely to the statutory text, and ensure that its interpretation does not again yield results that Congress could not reasonably have intended. The best way to do this is for the Commission to interpret "capacity" to include only those devices that have the statutorily defined features of an ATDS *at the time the call is placed*.

This interpretation makes the most sense textually. As discussed above, the TCPA defines an ATDS to include only equipment that "*has* the capacity" both to store or produce

[3] *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7970 (2015) ("2015 Order").

[4] *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 698 (D.C. Cir. 2018).

random or sequential phone numbers and to dial those numbers."[5] In crafting the TCPA, Congress plainly demonstrated that it knew how to distinguish between present capacity and future capacity. Specifically, Section 227(a)(1) states that the "term 'automatic telephone dialing system' means equipment which *has the capacity*," whereas in Section 227(c)(1)(B) Congress directed the Commission to initiate a rulemaking proceeding to "evaluate the categories of public and private entities *that would have the capacity*" to establish means of protecting subscribers' privacy.[6] The Commission must respect Congress's choice to focus on present capacity in the ATDS definition.

The structure of the TCPA requires this same outcome. The TCPA makes it unlawful "to *make* any call . . . *using* any automatic telephone dialing system" to specified types of numbers except in an emergency or with the recipient's prior express consent.[7] In order for someone to "make" a call "using" an ATDS, the equipment being used would have to qualify as an ATDS *at the time the call is made*. Indeed, to comply with the TCPA, a caller must be able to determine whether the equipment it is using qualifies as an ATDS. It would be reasonable for Congress to require callers to understand the *current* capabilities of their equipment (*i.e.*, at their time of use). It would be unreasonable for Congress—or the Commission—to require callers to predict what their equipment *might* be capable of if the hardware or software were modified.

Measuring a device's "capacity" by its present capabilities is necessary to avoid the absurd results identified by then-Commissioner Pai and others when the 2015 order was

[5] 47 U.S.C. § 227(a)(1) (emphasis added).

[6] *Id*; *id.* at § 227(c)(1)(B) (emphasis added).

[7] *Id.* at § 227(b)(1)(A) (emphasis added).

released.[8] The FCC's earlier interpretation of "capacity" potentially swept in every smartphone. As the D.C. Circuit stated, "[n]othing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans."[9] To avoid this outcome, the Commission must interpret the term "capacity" in a manner that hews to the plain language and structure of the TCPA. The best way to do that is to conclude that the term "capacity" means a device's *present* capacity at the time the call is made.

II. THE COMMISSION SHOULD CONFIRM THAT A DEVICE IS NOT AN ATDS UNLESS IT HAS THE PRESENT CAPACITY TO GENERATE RANDOM OR SEQUENTIAL NUMBERS TO BE DIALED.

The D.C. Circuit's decision also requires the FCC to clarify how to interpret one of the two defining aspects of an ATDS, that it must have the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator."[10] This phrase has generated substantial questions over the years, including whether the device must itself have the ability to generate random or sequential numbers to be an ATDS, or have only the ability to select numbers from a set list. The 2015 order endorsed both views. But, as the D.C Circuit correctly explained, "the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order."[11] As explained below, the most cogent solution is that it must adopt the former.

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[8] 2015 Order, 30 FCC Rcd. at 8075 (Comm'r Pai, dissenting); *id.* at 8088 (Comm'r O'Rielly, dissenting).

[9] *ACA Int'l*, 885 F.3d at 699.

[10] 47 U.S.C. § 227(a)(1).

[11] *ACA Int'l*, 885 F.3d at 703.

The plain text of the statute requires this interpretation. In the sentence "[t]he term 'automatic telephone dialing system' means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator. . ."[12], "using a random or sequential number generator" modifies the verbs "store" and "produce." Therefore, an ATDS must, at the time a call is made, have a random or sequential number generator, use that generator to store and produce numbers to be called, and dial those numbers without human intervention. Reading the statute any other way would violate the rules of grammar. Further, it would yield the type of absurd result that the Commission's previous interpretation of "capacity" did. As the D.C. Circuit stated, "[a]ny time phone numbers are dialed from a set list, the database of numbers must be called in some order—either in a random or some other sequence."[13] If dialing from a set list makes a device an ATDS, any phone with a contact list is potentially an ATDS. That cannot be right.

The 2015 order nodded toward the correct interpretation by distinguishing between devices that "dial random or sequential numbers" and those that "call[] a set list of numbers."[14] If dialing from a set list in a random or sequential order met the definition of ATDS, there would be no reason for the Commission to have addressed these issues separately. However, the 2015 order muddied the waters by reaffirming the portion of the Commission's 2003 order that found predictive dialers to qualify as ATDSs. While it goes unmentioned in the 2015 order, the 2003 order made clear that, while some predictive dialers cannot be programmed to generate random

[12] 47 U.S.C. § 227(a)(1).

[13] *ACA Int'l*, 885 F.3d at 702.

[14] 2015 Order, 30 FCC Rcd. at 7972.

or sequential phone numbers, they still satisfy the statutory definition of an ATDS.[15] By incorporating this contradictory interpretation, the FCC "offer[ed] no meaningful guidance"[16] and instead caused needless confusion. It can remedy this by confirming that a device is not an ATDS unless it generates random or sequential numbers to be dialed, rather than by selecting and dialing numbers from a set list.

III. THE COMMISSION SHOULD CONFIRM THAT A DEVICE IS NOT AN ATDS UNLESS IT HAS THE PRESENT CAPACITY TO DIAL NUMBERS WITHOUT HUMAN INTERVENTION.

The D.C. Circuit highlighted a glaring inconsistency in the Commission's 2015 order: while the order stated that the "basic function" of an autodialer is the ability to "dial numbers without human intervention,"[17] the Commission nevertheless declined a request to "clarify[] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."[18] This inconsistency is unnecessary and avoidable; both the text and the legislative history of the TCPA make clear that a device that requires human intervention to initiate each call cannot be considered an ATDS under the TCPA.

The D.C. Circuit's analysis made an important textual point: that it "makes sense [that an autodialer should need to be able to dial numbers without human intervention], given that 'auto' in autodialer—or equivalently, 'automatic' in 'automated telephone dialing system,' 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers."[19] The

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[15] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-14093 (2003) ("2003 Order").

[16] *ACA Int'l*, 885 F.3d at 701 (citing *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 754 (D.C. Cir. 2015)).

[17] 2015 Order, 30 FCC Rcd. at 7973; *id.* at 7975.

[18] *Id.* at 7976.

[19] *ACA Int'l*, 885 F.3d at 703.

legislative history of the statute also supports this view: Congress' main concerns were aimed at "computerized," "automated," and "machine-generated" calling,[20] and Congress accordingly intended the TCPA's autodialer provisions "to impose greater restrictions on automated calls than on calls placed by 'live' persons."[21] As discussed above, it is equally clear that a device must have the *present* capacity to dial numbers without human intervention in order to be considered an autodialer. Given the clarity of the D.C. Circuit's findings, and given further the clear textual and historical support for its view, the Commission should affirm that equipment that requires human intervention to initiate each call—including through "point and click" and "click-to-dial" systems—cannot be considered an ATDS under the TCPA. Doing so will provide industry with important clarity, and hew closest to the language and intent of Congress.

CONCLUSION

News organizations, like other industries, must be able to communicate effectively with their customers. By reconceiving and clarifying its interpretations of the TCPA as described

[20] *See, e.g.*, 137 Cong. Rec. 18122-23, 35303 (1991).

[21] S. Rep. No. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972; see also 137 Cong. Rec. 35303 (statement of Rep. Rinaldo, ranking member of the Telecommunications and Finance Subcommittee) (distinguishing bill's restrictions on "autodialed" calls from bill's directive to FCC to consider methods of "allowing telephone subscribers to avoid live solicitation calls").

above, the Commission can provide unambiguous, workable standards that are well-grounded in its authority under the statute. The Alliance urges the Commission to do so without delay.

Respectfully submitted,

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Dated: June 13, 2018