Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs	)	CG Docket No. 18-152
Bureau Seeks Comment on Interpretation	)	
Of the Telephone Consumer Protection Act	)	
In Light of DC Circuit's ACA International	)	
Decision	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of	)	CG Docket No. 02-278
1991	)	

COMMENTS OF TATANGO, INC. IN RESPONSE TO THE CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU'S PUBLIC NOTICE

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SUMMARY

Tatango is a text messaging platform provider that allows some of the world's most respected brands to harness the power of text messaging to communicate with their customers. Tatango welcomed the Public Notice indicating that the Commission was reviewing several important issues following the D.C. Circuit's decision in *ACA International v. FCC*. The Commission has an opportunity to provide businesses across the country with much-needed clarity, to return the TCPA to its original intent, and to help bring an end to the cottage industry of professional TCPA plaintiffs that have fueled an alarming rise in TCPA litigation in recent years.

Tatango therefore respectfully urge the Commission to declare the following:

1. An ATDS is a device that has the present capacity, and is being used to, dial random or sequential numbers;
2. A business which sends text messages to a list of numbers provided by that business's customers or that uses a predictive dialer is not using an ATDS;
3. The phrase "called party" should be understood as "the person the caller expected to reach"; and
4. Businesses subject to the TCPA that send text messages are only required to honor "STOP," "END," "CANCEL," "UNSUBSCRIBE," and "QUIT" or, in the alternative, are not prohibited from including in their SMS marketing campaign terms and conditions a contractual obligation requiring consumers to utilize one of the five universally-recognized keywords to revoke consent.

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COMMENTS OF TATANGO, INC.
IN RESPONSE TO THE CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU'S PUBLIC NOTICE

Tatango, Inc. ("Tatango") respectfully submits these comments in response to the Commission's Public Notice of May 14, 2018,[1] inviting comment on several issues related to the proper interpretation of the Telephone Consumer Protection Act[2] in light of the conclusions reached by the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC*.[3]

Tatango is a text message marketing platform provider that works with some of the world's most respected brands, helping them harness the power of text messaging to communicate with their customers. In recent years, Tatango has watched as the Commission continuously expanded the reach of the TCPA, making compliance increasingly difficult. At the same time, the Commission's actions, coupled with the TCPA's uncapped statutory damages,

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1 *In the Matter of 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*, Public Notice, DA 18-493, CG Docket Nos. 18-152 and 02-278 (May 14, 2018) ("Public Notice").

2 47 U.S.C. § 227.

3 885 F.3d 687 (D.C. Cir. 2018).

has led to the well-documented rise in TCPA litigation, which more and more often are being pursued as class actions. For these reasons, Tatango encourages the Commission to act promptly to provide guidance and to return the TCPA to its original intent.

I. INTRODUCTION

As Commissioner O'Rielly described it, the TCPA seeks to "protect consumers from unwanted communications while enabling legitimate businesses to reach individuals that wish to be contacted," but the Commission's 2015 Omnibus TCPA Order[4] was an "unfathomable action" that "expand[ed] the scope of the TCPA and [swept] in a variety of communications."[5] Fortunately, *ACA International* wiped away some of the most egregious parts of the FCC's 2015 Omnibus TCPA Order, which Chairman Pai correctly described at the time as "twist[ing] the law's words [ ] to target useful communications between legitimate businesses and their customers."[6]

For this reason, Tatango is pleased that the D.C. Circuit has given the Commission an opportunity to correct the profound mistakes of the past. Tatango looks forward to Commission action that more appropriately balances the legitimate expectations of consumers to avoid unwanted communications, while not unfairly exposing law-abiding companies to the threats of crippling TCPA litigation.

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4 *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling and Order, 30 FCC Rcd. 7961 (July 10, 2015) ("2015 Omnibus TCPA Order").

5 2015 Omnibus TCPA Order, Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part, 30 FCC Rcd. 7961, 8087 ("O'Rielly Dissent").

6 2015 Omnibus TCPA Order, Dissenting Statement of Commissioner Ajit Pai, 30 FCC Rcd. 7961, 8073 ("Pai Dissent").

II. THE PROPER SCOPE OF THE DEFINITION OF "AUTOMATIC TELEPHONE DIALING SYSTEM"

In 2015, the Commission dramatically expanded the definition of "automatic telephone dialing system" ("ATDS" or "autodialer") to encompass any device that has the capacity to be modified, such as through software changes, to dial telephone numbers automatically.[7] The Commission rejected arguments that the TCPA was intended to regulate devices with the "present capacity" to function as an autodialer. According to the D.C. Circuit, the Commission's interpretation was so expansive that it had "the apparent effect of embracing any and all smartphones: the device routinely used by the vast majority of citizens to make calls and send messages (and for many people, the sole phone equipment they own)."[8] Given this clear overreach, the D.C. Circuit found that the Commission's 2015 decision was "an unreasonable, and impermissible, interpretation of the statute's reach."[9]

A clear definition of ATDS is central to a business's ability to discern whether its calls or text messages are subject to the TCPA. The TCPA defines an "automatic telephone dialing system" 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."[10] In turn, the TCPA makes it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) **using** any automatic telephone dialing system or an artificial or prerecorded voice" to "any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call."[11] Thus,

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7 *See* 2015 Omnibus TCPA Order, 30 FCC Rcd. 7961, ¶¶ 16, 20.
8 *ACA Int'l*, 885 F.3d at 696.
9 *Id.* at 697.
10 47 U.S.C. § 227(a)(1).
11 *Id.* at § 227(b)(1)(A)(iii).

because a company using an ATDS to make calls or send text messages must receive prior express consent before initiating the calls or text messages, and given the potential liability that may accrue for improperly evaluating this issue, it is essential that the Commission act promptly to provide concrete guidance and clarify the ATDS definition.

Tatango respectfully urges the Commission to return to an interpretation of ATDS that complies with the spirit and intent of the TCPA as adopted by Congress. Such an approach would focus on the **present capacity** of the device to store or produce telephone numbers to be called and the **use** of a random or sequential number generator to dial such numbers. Thus, a device would not be within the statutory definition unless it's current configuration meets three distinct elements: (1) the device must have the ability to store or produce telephone numbers; (2) the device must be used to store or produce numbers either randomly or sequentially; and (3) the device must dial such numbers automatically, meaning without human intervention. Tatango also urges the Commission to expressly clarify that (1) the phrase "random or sequential number generator" does not encompass lists of wireless telephone numbers that a business creates by obtaining a customer's telephone number directly from the consumer during the course of its business relationship with that customer and (2) the Commission's earlier rulings about predictive dialers are no longer binding or valid, such that predictive dialers are not considered ATDSs under the TCPA.

As Chairman Pai stated in 2015:

> When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems "clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services[], because the numbers called *are not generated in a random or sequential fashion*." Indeed, in that same order, the Commission made clear that calls not "dialed using a random or sequential number generator" "are not autodialer calls."

> Confirming this interpretation (what some proponents call the "present capacity" or "present ability" approach) is the statutory definition's use of the present tense and indicative mood. An automatic telephone dialing system is "equipment which has the capacity" to dial random or sequential numbers, meaning that system actually can dial such numbers at the time the call is made. Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as "equipment which has, has had, or could have the capacity." But it didn't. We must respect the precise contours of the statute that Congress enacted.[12]

The Commission's obligation to act consistent with the intent of Congress and not to expand the TCPA's reach through agency action was also a grave concern of Commissioner O'Rielly, who wrote:

> "Random or sequential number generator" cannot reasonably refer broadly to any list of numbers dialed in random or sequential order, as this would effectively nullify the entire clause. If the statute meant to only require that an ATDS include any list or database of numbers, it would simply define an ATDS as a system with "the capacity to store or produce numbers to be called"; "random or sequential number generator" would be rendered superfluous. This phrase's inclusion requires it to have some limiting effect. When a court construes a statute it should, if possible, do so as to prevent any clause, sentence, or word, from being superfluous or insignificant. It therefore naturally follows that "random or sequential number generator" refers to the genesis of the list of numbers, not to an interpretation that renders "number generator" synonymous with "order to be called."
>
> Moreover, the fact that the FCC previously stated that dialing from a list is sufficient is unavailing because "[t]he [FCC] does not have the statutory authority to change the TCPA's definition of an ATDS."[13]

Tatango agrees fully with Commissioner O'Rielly's view of the limited reach of the TCPA. In 1991, Congress was concerned about the "use of the telephone to market goods and services to the home and other businesses," finding that it had become "pervasive due to the

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[12] Pai Dissent, 30 FCC Rcd. at 8074 (footnotes omitted) (emphasis and alterations in original).

[13] O'Rielly Dissent, 30 FCC Rcd. at 8089 (footnotes omitted) (alterations in original).

increased use of cost-effective telemarketing techniques."[14] At the time the statute was adopted, the Congressional Record reveals that the intention was to address the use of pre-recorded messages and calls made randomly to telephone numbers or to numbers listed sequentially in a telephone directory.[15] In other words, there is little indication that Congress intended to prohibit companies from contacting consumers with whom they had an established business relationship; in fact, the opposite is true.[16] Indeed, for many years the Commission recognized that an "established business relationship" was sufficient for businesses to establish consent to call consumers at home[17] and send consumers unsolicited faxes.[18] Because wireless phones and text

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14 47 U.S.C. § 227 note, Pub. L. No. 102-243, § 2(1), 105 Stat. 2394, 2394.

15 Comments of Rep. Markey, 137 Cong. Rec. H11307-01 (Nov. 26, 1991) ("[A]utomatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems."); *id.,* Comments of Rep. Roukema ("Today, we unfortunately find that automatic dialing recorded message players are being used in record numbers to systematically solicit unsuspecting and unwilling residential and commercial telephone subscribers.");

16 *Id.*, Comments of Rep. Rinaldo ("In drafting this legislation, we recognized that many legitimate businesses make telephone calls, including solicitations, without annoying consumers. Thus, the bill exempts businesses that have a preestablished business relationship with a customer as well as telephone calls from nonprofit organizations."); *Id.,* Comments of Rep. Richardson ("The bill appropriately singles out calls in which there is an existing business relationship between the caller and the consumer. Different rules should apply to these types of calls. Businesses need to be able to contact customers with whom they have a prior or existing business relationship. Generally, these calls are not objectionable to the recipient; they allow the customer to take advantage of special promotions and other offers from vendors with whom they are already familiar."); Comments of Sen. Pressler, 137 Cong. Rec. S18317-01 (Nov. 26, 1991) ("We include in this bill an exemption for businesses that have an established business relationship with their customers.").

17 *See, e.g., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, ¶ 34 (Oct. 16, 1992) ("1992 TCPA Order") ("We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. . . . [T]he legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships.").

18 *See, e.g.*, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, ¶ 189 (June 26, 2003). Indeed, when the Commission indicated an intention to eliminate the established business relationship ("EBR") for faxes, Congress acted to codify the EBR in the Junk Fax Prevention Act of 2005.

messaging are now the primary communication methods for millions of Americans, the logic that led the Commission to acknowledge that the TCPA did not prohibit calls between businesses and its customers is equally applicable to text messages sent to wireless phones today.

Much has changed since 1991. Text messages were invented and have become a ubiquitous form of communication. The costs associated with texting having dramatically decreased. With estimates that 90 percent of consumers receive unlimited text messages as part of their monthly mobile service, the times when consumers paid a pricey per-message fee to receive a text message are long gone.[19] Some may argue that, because of these changes, the Commission must protect consumers from being inundated with commercial text messages, apparently even if it means adopting rules well beyond those envisioned and authorized by Congress. But the Commission's past decisions to act beyond the bounds of its authority has created a mess that businesses must confront.

First, while courts now understand that the 2015 Omnibus TCPA Order's ATDS interpretation should not be referenced in determining whether a predictive dialer is or is not an ATDS, these same courts are uncertain whether pre-2015 FCC interpretations should be consulted. For example, in *Reyes v. BCA Financial Services, Inc.*, which was decided on June 8, 2018, the District Court for the Southern District of Florida determined that the defendant's predictive dialer software was an ATDS as a matter of law because "the earlier [pre-2015] FCC rulings about predictive dialers are still valid and binding."[20] But, as the defendant in *Reyes* noted, other federal courts have reached the opposite conclusion, finding that both the 2015

See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order, 22 FCC Rcd. 5050 (Mar. 14, 2007).

[19] *See* Josh Zagorsky, *Almost 90% of Americans Have Unlimited Texting*, INSTANT CENSUS (Dec. 5, 2015), https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting.

[20] 2018 WL 2849768, at *3 (S.D. Fla. June 8, 2018).

Omnibus TCPA Order and earlier FCC rulings should not be consulted in determining what a predictive dialer is.[21] Obviously, this disconnect has caused problems for the courts, and, consequently, unsuspecting, good-faith businesses lack the certainty that they require to run their enterprises.

Moreover, the TCPA's uncapped statutory damages provision fuels limitless litigation.[22] And a host of complicated industry-specific exceptions picks winners and losers in the guise of guessing what messages consumers want to receive and which they do not.[23] Those industry-specific exceptions are so packed with limitations and caveats that they provide little comfort to the businesses that they are intended to serve.[24] Furthermore, they conflict with the intention of the bill's chief patron, who repeatedly indicated that the TCPA would not discriminate based on the content of the message.[25] As a result of this TCPA quagmire, many businesses are simply so

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[21] *See, e.g.*, *Herrick v. GoDaddy.com, LLC*, 2018 WL 2229131 (D. Nev. May 14, 2018) (holding that *ACA International v. FCC* set aside all FCC guidance related to defining an ATDS – including the FCC's earlier predictive dialer rulings); *Marshall v. CBE Grp.*, 2018 WL 1567852 (D. Nev. Mar. 30, 2018) (concluding that, in *ACA International v. FCC*, the D.C. Circuit set aside the FCC's earlier rulings that predictive dialers that call numbers from a list and that cannot dial random or sequential numbers are nonetheless ATDSs).

[22] *See, e.g.,* U.S. CHAMBER INST. LEGAL REFORM, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* (Oct. 2013), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

[23] *See, e.g.,* 2015 Omnibus TCPA Order, 30 FCC Rcd. 7961, ¶¶ 125-148 (banking and healthcare exceptions); *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, Order, 29 FCC Rcd. 3432 (Mar. 27, 2014) (package deliveries exception); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Blackboard, Inc. Petition for Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 31 FCC Rcd. 9054 (Aug. 4, 2016) (utilities and schools exceptions).

[24] For example, the Commission imposed seven specific requirements for a financial institution to make a call that qualifies for the 2015 free-to-end-user banking exception, all of which must be met for the exception to apply. *See* 2015 Omnibus TCPA Order, 30 FCC Rcd 7961, ¶ 138.

[25] When Senator Hollings first introduced the draft bill, which at the time was known as the Automated Telephone Call Protection Act of 1991, he stated:

scared of litigation that they forgo all together the opportunity to use text messaging as part of their communication strategies. It does not have to be – and should not be – this way.

When Congress adopted the TCPA in 1991 it knew that technology would change; it knew that its 1991 solution to 1991 problems was not a panacea for the ages. That's why Congress directed the Commission to "consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, **propose specific restrictions to the Congress**."[26] While the specific mandate to consider asking Congress for additional authority was included as part of the Commission's 120-day post-enactment rulemaking process, the option remains equally valid today. If the Commission believes that consumers are best served by regulating a business's ability to send text messages to customers that have provided their cellular telephone number to that business, the Commission should return to Congress and ask it for authority to regulate that relationship.

> Some may argue that there are first amendment problems with this bill. The bill I am introducing today falls well within the scope of the first amendment. The first amendment allows the government every right to place reasonable time, place and manner restrictions on speech when necessary to protect consumers from a nuisance and an invasion of their privacy.
>
> This bill makes no distinction based on the content of the speech. It bans automated calls, regardless of whether they are used for commercial, political, or charitable purposes. The bill does not ban the message; it bans the means used to deliver that message-the computer voice.

Comments of Sen. Hollings, 137 Cong. Rec. S9840-02 (July 11, 1991); *see also* Comments of Sen. Hollings, 137 Cong. Rec. S18317-01 (Nov. 26, 1991) ("The complaints received by the Federal Communications Commission and my office indicate that people find these calls to be objectionable regardless of the content of the message or the initiator of the call. Restricting such calls is constitutionally acceptable as a reasonable place and manner restriction.").

[26] TELEPHONE CONSUMER PROTECTION ACT OF 1991, PL 102–243, 105 Stat 2394, § 227(c)(1)(D) (Dec. 20, 1991) (emphasis added).

Returning the TCPA to its original intent and allowing the people's elected representatives to craft legislation appropriately tailored to today's technology is a particularly laudable goal because the Commission's 26-year incremental expansion of the TCPA has subjected more and more well-intentioned and law-abiding American companies to the most severe form of civil damages available under any statute adopted by Congress (uncapped statutory damages of $500 to $1,500 per message). At the same time, TCPA litigation has flooded our courts. And despite Congress's intent to have TCPA violations pursued by individuals through their private right of action in small claims courts, such litigation has become the second-most-filed type of case in the entire federal court system.[27]

As the U.S. Chamber Institute for Legal Reform wrote in 2013:

> The TCPA has become a juggernaut: a destructive force that threatens companies with annihilation for technical violations that cause no actual injury or harm to any consumer. TCPA litigation will continue to expand and threaten well-meaning businesses with astronomical statutory damages unless something is done to limit those damages.[28]

Moreover, according to an economic analysis published in 2016, the TCPA's statutory damages provision is overwhelmingly punitive:

> [A] violating communication causes actual harm of between 6.8 cents and 70.7 cents per violating communication, depending on the communication channel used. The remainder of the TCPA's statutory damages is purely punitive. Thus, the punitive component of the TCPA's statutory damages is between 706 and 22,058 times the actual harm that a violating communication imposes on the recipient.
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> The punitive component of the TCPA's statutory damages is between 706 and 22,058 times the total actual damages that a violating communication imposes. That multiplier can vary significantly according to the specific circumstances of the violating communication. Given the Supreme Court's

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[27] According to an analysis by WebRecon, over 4,300 TCPA cases were filed in 2017 alone. *See* WEBRECON, *WebRecon Stats for December 2017 & Year in Review* (Dec. 2017), https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/.

[28] U.S. CHAMBER INST. LEGAL REFORM, *supra* note 22.

> jurisprudence on punitive damages, lower courts must take seriously the possibility that the TCPA's statutory damages violate the Due Process Clause of the Fifth Amendment as applied.[29]

In sum, the Commission should issue prompt guidance explaining that an ATDS is a device that has the present capacity, and is used to, dial random or sequential numbers and that a business that sends text messages to a list of numbers provided by that business's customers or that uses a predictive dialer is not using an ATDS. In so doing, the Commission would be respecting the intention of Congress and the bounds of its authority. Thereafter, Congress can evaluate whether to grant the Commission new authority to regulate the use of text messaging by businesses that desire to communicate with their customers and evaluate whether the TCPA's uncapped statutory damages provision is the appropriate remedy or if a more refined, carefully-tailored combination of obligations and remedies is appropriate in the context of legitimate businesses communicating with their customers.

III. THE APPROPRIATE TREATMENT OF REASSIGNED NUMBERS UNDER THE TCPA

The Public Notice also seeks comments about "how to treat calls to reassigned wireless numbers under the TCPA" in light of the D.C. Circuit's decision to "vacate[] as arbitrary and capricious the Commission's interpretation of the term 'called party,' including a one-call safe harbor for callers to detect reassignments."[30] Specifically, the Commission asks whether the term "called party" should be interpreted to mean "the person the caller expected to reach," "the party the caller reasonably expected to reach," or "the person actually reached," meaning "the

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[29] Gregory J. Sidak, *Does the Telephone Consumer Protection Act Violate Due Process as Applied?*, 68 FLA. L. REV. 1403, 1411-12 (2016).

[30] Public Notice, at 3.

wireless number's present-day subscriber."[31] Tatango urges the Commission to return[32] to a common-sense and practical interpretation of the statute by defining "called party" to mean the "person the caller expected to reach."

As Chairman Pai observed in 2015:

> [T]he statute takes into account a caller's knowledge. Recall that the statute exempts calls "made with the prior express consent of the called party." Interpreting the term "called party" to mean the expected recipient—that is, the party expected to answer the call—is by far the best reading of the statute.[33]

Commissioner O'Rielly agreed with Chairman Pai's statement, observing that "a number of petitioners and commenters asked the FCC to interpret 'called party' to mean the 'intended recipient'" and that "this commonsense approach would have allowed a company to reasonably rely on consent obtained for a particular number."[34] As Commissioner O'Rielly observed, it is likely that this approach best balances risks and rewards by eliminating the perverse incentive for individuals to remain silent about the fact that they are not the person the caller is trying to reach and then using their willful silence to claim substantial TCPA damages when the "unwanted" calls continue.[35]

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31 *Id.*

32 In 2008, the Commission wrote in the context of debt collection that "calls to wireless numbers provided by the called party . . . are made with the 'prior express consent' of the called party." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559, ¶ 9 (Jan. 4, 2008). As the Commission acknowledged in that 2008 Order, this was also the Commission's view in 1992 when it implemented the TCPA. *See id.* ¶ 9 ("In the *1992 TCPA Order*, the Commission determined that 'persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.'") (quoting 1992 TCPA Order, 7 FCC Rcd. 8752, ¶ 31).

33 Pai Dissent, 30 FCC Rcd. at 8078.

34 O'Rielly Dissent, 30 FCC Rcd. at 8094.

35 *Id.* ("[T]he idea that a recipient should have no responsibility whatsoever to notify a company that they reached the wrong person or even to be truthful and act in good faith is preposterous.").

As a practical matter, businesses have every incentive to spend their time and money engaging with people that are receptive to their messages. Therefore, there is little reason to assume that legitimate businesses will continue sending text messages to a telephone number if the recipient informs the business that the number no longer belongs to their customer.[36]

In sum, Tatango encourages the Commission to confirm that the term "called party" is best understood as "the person the caller expected to reach."

IV. CODIFYING THE "REASONABLE" METHODS FOR CONSUMERS TO REVOKE CONSENT TO RECEIVE FUTURE TEXT MESSAGES

Tatango also wishes to respond to the Commission's request for comments on the manners by which a called party may revoke prior express consent. Tatango encourages the Commission to make clear that companies sending text messages (to the extent they are using an ATDS) only have a duty to honor responses sent by text message that are consistent with CTIA's current Shortcode Monitoring Handbook. That handbook identifies "STOP," "END," "CANCEL," "UNSUBSCRIBE," and "QUIT" as "universal keywords" that every text message marketing campaign should accept as a consumer's revocation of consent.[37]

Given the reasonableness of this universal opt-out methodology, Tatango further encourages the Commission to make clear that companies who send text messages to consumers – and the platforms that facilitate the delivery of those messages – have no duty to honor opt-out requests made in another manner. This includes no duty to bear the costs of manually reviewing each consumer's response to look for other words that may indicate a desire to stop receiving messages.

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[36] This approach may also have the benefit of negating the need to establish a new reassigned number database, which would impose further regulatory burdens on telecommunications carriers to monitor and report disconnected and/or reassigned numbers.

[37] CTIA, SHORTCODE MONITORING HANDBOOK, at § A.2.04 (2017).

In the alternative, and at a minimum, the Commission should make clear that there is no prohibition against a company including in its terms and conditions a contractual obligation requiring customers to utilize one of the five universally-recognized keywords to revoke consent. While the Commission appears to have conceded this point in a footnote in its brief to the D.C. Circuit,[38] footnotes in legal briefs are not the place or the manner by which the Commission typically announces policy. Therefore, the Commission should take this opportunity to not only make clear that the 2015 Omnibus TCPA Order did not "address" the issue of consent revocation, but to affirmatively declare that businesses can include a reasonable-methods-opt-out provision within contracts and mandate that customers utilize those proscribed methods in revoking their consent.

CONCLUSION

Tatango encourages the Commission to take prompt action to eliminate the scourge of opportunistic TCPA litigation that has stymied legitimate businesses from communicating with their customers. Therefore, Tatango requests that the Commission declare the following:

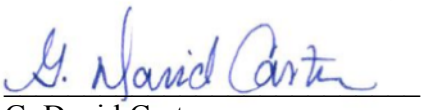
1. An ATDS is a device that has the present capacity, and is used to, dial random or sequential numbers;
2. A business which sends text messages to a list of numbers provided by that business's customers or that uses a predictive dialer is not using an ATDS;
3. The phrase "called party" should be understood as "the person the caller expected to reach"; and

[38] *ACA Int'l,* 885 F.3d at 710 ("The Commission correctly concedes, however, that the ruling 'did not address whether contracting parties can select a particular revocation procedure by mutual agreement.'") (quoting FCC Br. at 64 n.16).

4. Business subject to the TCPA that send text messages are only required to honor "STOP," "END," "CANCEL," "UNSUBSCRIBE," and "QUIT" or, in the alternative, are not prohibited from including in their SMS marketing campaign terms and conditions a contractual obligation requiring consumers to utilize one of the five universally-recognized keywords to revoke consent.

Dated: June 13, 2018

Respectfully submitted,



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