Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENT OF BURKE LAW OFFICES, LLC REGARDING
INTERPRETATION OF THE TCPA IN LIGHT OF *ACA INTERNATIONAL*

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Alexander H. Burke
Daniel J. Marovitch
BURKE LAW OFFICES, LLC
155 N. Michigan Ave., Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
Facsimile: (312) 729-5289
aburke@burkelawllc.com
dmarovitch@burkelawllc.com
www.BurkeLawLLC.com

We submit these comments in response to the Commission's Public Notice of May 14, 2018, seeking public comment on the interpretation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, in light of the D.C. Circuit's decision in *ACA Int'l v. FCC*, 885 F. 3d 687 (D.C. Cir. 2018).

I. Automatic Telephone Dialing System

The TCPA defines an "automatic telephone dialing system" ("ATDS" or "autodialer") 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."[1] Among other things, it generally prohibits making any call using an ATDS or an artificial or prerecorded voice to a cell phone number, except in an emergency or with the "prior express consent" of the called party.[2] Interpreting an ATDS to mean equipment that makes calls only through random or sequential dialing would render the statute's "prior express consent" exception meaningless: If calls are truly being made to numbers generated sequentially without reference to a call list, or simply at random, then a caller would ***never*** have the called party's prior express consent to call his or her number because it would only be by pure happenstance that the person's number was dialed. Similarly, why would anyone want to call random telephone numbers because of an "emergency" as referenced in the statute? Such a bizarre interpretation cannot be what Congress intended, and would upend more than twenty-five years of FCC interpretations.

There are two possible, similar interpretations of what constitutes an ATDS that would reasonably interpret the statute by its plain language and in the context of the TCPA's remedial purpose.

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1 47 U.S.C. § 227(a)(1).

2 47 U.S.C. § 227(b)(1)(A)(iii).

One reasonable view is that the TCPA's reference to the use of a "random or sequential number generator" relates only to the capacity to *produce* telephone numbers to be called, separate and apart from any capacity to store numbers. This makes sense because a number generator does not *store* telephone numbers; by definition, it *generates* them.[3] The plain language of the TCPA includes the disjunctive "or," meaning the definition of ATDS must include systems that have the capacity to **either** *store* telephone numbers **or** *produce* telephone numbers.[4] Thus, interpreting the definition of an ATDS in reference to only equipment that can *generate* numbers would impermissibly ignore Congress' language concerning *storage* capacity, an equal and independent basis for qualifying as an ATDS.[5] Under this interpretation, then, an ATDS includes equipment that has the capacity to store telephone numbers and dial those numbers (e.g., from a list or database), *or* to produce numbers using a random and sequential number generator, and dial such numbers. This common sense construction of the statute would cover not only the predictive dialers and similar dialing systems that now predominate the ATDS marketplace using a database or list of stored numbers, but would also prohibit war dialers and similar outdated technology which, for example, blindly generate and call all numbers in an area code consecutively, as opposed to from a list of targeted recipients.

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[3] *See* The Concise Oxford Dictionary (1990) defining "generate" as a verb meaning to "bring into existence, produce, evolve"); *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015) ("[T]he statutory definition is explicit that the autodialing equipment may have the capacity to store *or* to produce the randomly or sequentially generated numbers to be dialed…. [I]t is unclear how a number can be *stored* (as opposed to *produced*) using a 'random or sequential number generator.'").

[4] *See Bourff v. Rubin Lublin, LLC*, 674 F. 3d 1238, 1241 (11th Cir. 2016) (explaining the use of "or" in a statute).

[5] Congress considered the ability to dial from databases/stored lists of numbers as constituting the type of automated dialing technology it intended to address in enacting the TCPA. *See* H.R. Rep. No. 102-317, 7 (Nov. 15, 1991) (explaining that "computer assistance [includes] dialing the telephone number of the prospective customer and transferring the call to the next available telemarketing service representative[,]" and that "[m]odern telemarketing software organizes information on current and prospective clients into ***databases*** designed to support businesses in every aspect of telephone sales[;] ... hundreds of companies sell customized and off-the-self software for data base applications within mainframe, mini and personal computer environments") (emphasis added).

Alternatively, it would not be unreasonable for the Commission to apply the "random or sequential number generator" language to numbers that are either stored or produced, but with the understanding that the act of generating random or sequential numbers encompasses pulling numbers from a call list or database of stored numbers. Under this interpretation, there are at least two ways to automatically generate numbers from a stored database for dialing, either truly at random or in some sequence (e.g., a dialing algorithm). *See also ACA Int'l v. FCC,* 885 F. 3d 687, 701 (D.C. Cir. 2018) (recognizing that "[a]nytime 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."). Of course, if the numbers are not automatically generated, a person can call stored telephone numbers by manual/cognitive selection at the time of the call, which would be neither random nor sequential. For instance, using the redial function, traditional speed dialing,[6] or calling from a contact list (such as ordinary smart phones) would be neither random nor sequential because the person calling is manually choosing the telephone number to call at the time of the call, rather than having the number automatically generated from the stored database to call the next number in queue. This automatic system generation of the next number in the dataset to be called distinguishes an autodialer from other devices that merely store telephone numbers and then dial them at the caller's intervening command. Accordingly, under this interpretation, a system that "stores" a database of phone numbers, "generates" such numbers to be called (either randomly or sequentially) from the stored database, and then dials such numbers, is an ATDS.

[6] "Speed Dialing" refers to single digit dialing for frequently used telephone numbers. For instance, it is, or was, common for telephones to allow persons to program frequently used numbers so that such numbers could be called by the press of a single button. Because the caller would have to choose which person to speed dial at the time of the call and press the button, such a system would not be an ATDS. In such a case, the telephone itself does not randomly or sequentially generate the telephone number to be called – the person calling selects it.

The D.C. Circuit also found that the FCC's interpretation of "capacity" was arbitrary and capricious because "it would appear to subject ordinary calls from any conventional smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute." *ACA Int'l*, 885 F.3d at 692. Both of the above interpretations would assuage the D.C. Circuit's fears because they do not apply to conventional smartphone use: In both cases, person-to-person calls in which a person manually places the calls—whether as part of a traditional phone call, group text, or otherwise—are not at issue.

That said, smartphones are sophisticated computers, with far greater capacities in many respects than the kinds of dialers in regular use when the TCPA was first enacted over a quarter century ago. It is not inconceivable that a bad actor could one day (if not presently) have a smartphone app predictively dial tens of thousands or more numbers for telemarketing or other purposes over a course of a few minutes. Failing to protect Americans from such abusive calling would not only create a loophole that would undermine the intent and effectiveness of the TCPA; it would arbitrarily contradict the TCPA's remedial purpose in protecting consumers from such automated calling.[7] Thus, in terms of dialing equipment's *capacity* to be an autodialer, the use, creation, or downloading of an autodialing software or platform would certainly make that system have the capacity to automatically dial telephone numbers. For conventional, off-the-shelf smartphones without autodialing software installed, TCPA liability would not be a concern, but this Commission *does* need to protect consumers to the extent bad actors are using personal electronic devices to make unsolicited telemarketing, debt collection, or other phone calls to consumers' cell phones *en masse*.

However the Commission ultimately interprets an "automatic telephone dialing system," we urge it to do so broadly, in order to curb the current, widespread use of mass-calling

[7] Pub. L. No. 102–243, §2(13), 105 Stat 2394 (Dec. 20, 1991)

technology and prevent future technological advancements designed to disingenuously circumvent the TCPA while still making thousands of outbound calls per minute.

II. Reassigned Numbers

The TCPA's plain language prohibits making "any call" using an ATDS or an artificial or prerecorded voice to any cell phone number, except in cases of an emergency or with the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A)(iii). Before the Commission issued its 2015 Ruling, courts nationwide had already rejected the argument that it was the "intended recipient" whose consent mattered under the TCPA, as opposed to the consumer recipient whose privacy is actually invaded with the unwanted calling. *E.g., Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012). This is still good law.[8] Indeed, the D.C. Circuit explicitly *rejected* the petitioners' objections to the Commission's interpretation of this provision in its Omnibus Ruling:

> When a wireless number is reassigned without the caller's awareness, petitioners' interpretation would mean that a caller would avoid liability for a post-reassignment call because the "called party"—the former owner of the number—had given consent. In petitioners' view, the Commission's contrary interpretation of "called party" to refer to the new (post-reassignment) subscriber is foreclosed by the statute. We disagree.[9]

The FCC's holding in its Omnibus Declaratory Ruling—i.e., the prior express consent of the "the current subscriber or customary user"—was correct, and supported by longstanding case law and the remedial purpose of the TCPA in protecting the privacy rights of call recipients. Where courts—including all federal appellate courts to have assessed the issue—have all rejected the

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[8] *See also Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1251 (11th Cir. 2014) (agreeing with *Soppet*); *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 326 (3d Cir. 2015) ("Limiting standing to the intended recipient would disserve the very purposes Congress articulated in the text of the Act. If the caller intended to call one party without its consent but mistakenly called another, neither the actual recipient nor the (uninjured) intended recipient could sue, even if the calls continued indefinitely. We doubt Congress meant to leave the actual recipient with no recourse against even the most unrelenting caller.")

[9] *ACA Int'l*, 885 F.3d at 706.

"intended recipient" argument, it would be nonsensical and arbitrary for the Commission to alter its prior interpretation assigning consent to the current subscriber or customary user.

A stated goal of Congress in enacting the TCPA was to "ban all autodialed calls, and artificial or prerecorded calls, to ... cellular phones."[10] Indeed, Congress specifically found that "[b]anning such automated or prerecorded telephone calls to the home, except when the *receiving* party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion."[11] A principal problem with automatic dialing is that there is no human being available on the calling line to intelligently decide whether the call has reached the right person. The bystanders who receive these calls are the people the TCPA was designed to protect. Thus, ***any*** interpretation of the TCPA that provides a safe harbor for calls to reassigned numbers would directly contradict the intent of Congress, and be arbitrary and capricious.

III. Revocation of Consent

The D.C. Circuit affirmed the Commission's ruling that consumers may revoke consent through any reasonable means clearly expressing a desire to receive no further messages from the caller.[12] Any attempt "clarify" how and under what circumstances a consumer may revoke consent will only serve to limit and restrict consumers' revocation rights. Indeed, callers currently enjoy the benefit of the Commission's 2008 Order as to providing consent, which held that providing one's cellular telephone number to a person constitutes consent to receive autodialed calls as to the transaction in which the phone number was given. Other than that

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10 S. Rep. No. 102-178, 6, 1991 U.S.C.C.A.N. 1968, 1974 (Oct. 8, 1991).

11 Pub. L. No. 102–243, at § 2(12), 105 Stat. 2394 (Dec. 20, 1991).

12 *ACA Int'l*, 885 F.3d at 692 ("We uphold the Commission's approach to revocation of consent, under which a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller.").

provision of the number must be made as part of the same transaction, most courts have held that there are no limits to how the phone number must be given for informational calls. Creditors have designed call scripts around this rule, designed to trick consumers into unwittingly "consenting" to receive autodialed calls, sometimes in the same call in which they asked for calls to stop. To the extent that the Commission finds it appropriate to change this well-established rule adopted by every Circuit Court to consider such, it should maintain a rule that works in a reciprocal manner: giving consent should be just as easy as revoking consent. The Commission has already instituted a balanced and well-backed determination of consumers' right to revoke consent for unwanted calling, and it should be kept.

IV. *Broadnet*

The Commission's *Broadnet* ruling is terrible for consumers. By defining government contractors outside the statute on the basis that they aren't "persons" simply by virtue of their relationship with the government, the Commission has permitted wholesale calling abuses by debt collectors and other major TCPA violators. Nothing has ever stopped government contractors from obtaining consent before they robodial cell phones. Individual consumers are in the best position to know what calls they want or don't want to receive, and the intent of the TCPA is best served when consumers' right to self-determination is respected. The main government contractors who are making autodialed calls to consumers, debt collectors, are notorious for their abuses of the TCPA,[13] and where the Commission has already dealt with such callers in relation to the Budget Act, *Broadnet* is an unnecessary infringement on consumers' privacy rights the TCPA was intended to protect. The Commission should hold government contractors to the same standard as any other TCPA violators, and undo the damage of *Broadnet*.

[13] *In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, 8003 ¶ 79 (2015) (acknowledging debt collection call abuses, including "frequent or repeated calls; obscene, profane or other abusive language; and calls made after written requests to stop").

CONCLUSION

For the foregoing reasons, we respectfully ask that the Commission interpret the TCPA broadly in favor of consumers, in keeping with its remedial purpose and the intent of Congress.

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Respectfully submitted,

BURKE LAW OFFICES, LLC

By: */s/ Alexander H. Burke*
Alexander H. Burke

Alexander H. Burke
Daniel J. Marovitch
BURKE LAW OFFICES, LLC
155 N. Michigan Ave., Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
Facsimile: (312) 729-5289
aburke@burkelawllc.com
dmarovitch@burkelawllc.com
www.BurkeLawLLC.com