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July 30, 2019

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554  
Re: *Ex Parte* Presentation CG Docket No. 02-278

Dear Ms. Dortch:

This *ex parte* presentation responds to the July 12, 2019 filing made by the National Consumer Law Center and other groups (“NCLC”)<sup>1</sup> in response to the petition filed by the P2P Alliance<sup>2</sup> on May 3, 2018 (“Petition”).<sup>3</sup> The Federal Communications Commission (“Commission”) issued a Public Notice seeking comment on the Petition on May 23, 2018. Comments and Reply Comments were due on June 22, 2018 and July 9, 2018, respectively.<sup>4</sup>

Ten entities filed comments and reply comments in support of the Petition, including the National Association for the Advancement of Colored People, the National Association for Equal Opportunity in Higher Education, the National Black Justice Coalition, and Vote.Org. No entity filed a comment or reply comment in opposition to the Petition.

Now, more than a year after the filing window closed, NCLC submits its *ex parte* urging the Commission to reject the Petition, albeit without citing to any Commission precedent in support of its positions. The P2P Alliance welcomes this opportunity to clarify and further define what constitutes peer-to-peer (“P2P”) text messaging as well as to reiterate why the Telephone Consumer Protection Act<sup>5</sup> (“TCPA”) does not apply to P2P text messages.

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<sup>1</sup> *Ex Parte* Letter from Margot Saunders, Senior Counsel, National Consumer Law Center, to Marlene H. Dortch, Secretary, Fed’l Comm’n Comm’n in CG Docket No. 02-278 (filed July 11, 2019) (“NCLC Letter”).

<sup>2</sup> The P2P Alliance is a coalition of providers and users of P2P text messaging services. It includes P2P providers that serve campaigns and entities from both major political parties as well as non-political entities. The P2P Alliance also includes organizations representing the wide range of users of P2P text messaging services, from nonprofit charities to commercial entities.

<sup>3</sup> *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Clarification of the P2P Alliance, CG Docket No. 02-278 (filed May 3, 2018), available at <https://ecfsapi.fcc.gov/file/10503899411027/P2P%20Petition%20-%20FINAL.pdf>.

<sup>4</sup> *In re* Comment on the P2P Alliance Petition for Clarification, 33 FCC Rcd 5037 (May 23, 2018), available at <https://ecfsapi.fcc.gov/file/052322323246/DA-18-547A1.pdf>.

<sup>5</sup> 47 U.S.C. § 227.

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Unlike “spam” text messaging - over which significant and rightful concerns have been raised - P2P text messaging involves a substantial degree of human intervention and interaction. Indeed, the very nature of P2P text messaging precludes the sending of mass texts to multiple people all at once or in rapid succession. As such, a P2P text messaging platform is not an automatic telephone dialing system (“autodialer”) as defined by the TCPA and the Commission’s interpretation of that statute.

### **P2P Text Messaging**

NCLC makes a number of inaccurate assertions about P2P text messaging, including that a P2P system “populates a pre-written form text with recipients’ phone numbers and names, and that volunteers sitting in front of a computer, or using a smartphone with an app installed, then press ‘send’ for each message.”<sup>6</sup> Further, NCLC alleges that “there appears to be no discretion for the sender to determine the words of the text, the timing of the text, or even whether a particular recipient will be on the list to receive one of the texts.”<sup>7</sup>

Contrary to NCLC’s assertions, P2P texting messaging platforms enable two-way text communications that require a person to manually send each message one at a time and involve significant discretion by the sender regarding the substance, timing, and recipients to whom the sender transmits a message.<sup>8</sup> In particular, a P2P text messaging platform means a system that has the following properties:

- A person has to manually send each individual message;
- Each message must be manually sent to one recipient at a time—reaching an additional recipient requires additional manual delivery by the sender;
- The sender has discretion to determine:
  - whether to send a message to a particular recipient in the first instance;
  - the content of the message;
  - the timing for delivery of the message;
  - whether to reply to a response from a recipient;
  - the content of a reply to a response from a recipient; and
  - the timing for delivery of a reply to a response from a recipient.
- In turn, the recipient has the discretion to respond at a time determined by the recipient; and

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<sup>6</sup> NCLC Letter at 4-5.

<sup>7</sup> NCLC Letter at 5.

<sup>8</sup> The P2P Alliance recognizes that there are other types of technologies and platforms that enable organizations to send consumers text messages; P2P texting is not the only type of messaging available. However, the Petition seeks clarification of the applicability of the TCPA only for P2P text messaging. The Petition does not seek clarification for text messaging platforms that do not have the characteristics of P2P text messaging as defined in the Petition and this *ex parte*.

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- The recipient possesses the ability to opt out of the receipt of further P2P text messages at any point in time, both by automatic detection of keywords including STOP, as well as natural language requesting an opt-out (and such a request must be honored).

If a text messaging platform does not have these properties, it is a not P2P text messaging platform, and the messages delivered using such a platform are not P2P text messages.

The many staff members and volunteers for non-profit and other groups who spend their valuable time engaging in meaningful, highly personal two-way conversations using P2P platforms would be rather surprised to learn about NCLC's characterization of their efforts as "a miniscule and fictional element of human involvement for the sole purpose of evading the consumer protections of the TCPA."<sup>9</sup> Nor are such messages "highly automated and appear to be sent in an automated fashion."<sup>10</sup> As set forth above, the messages afford the sender substantial discretion, and their delivery requires as much human intervention as a message one friend sends to another from a smartphone.

### **P2P Text Messaging Equipment Is Not an Autodialer**

As previously explained in the Petition, the TCPA defines an 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."<sup>11</sup> The Commission has further interpreted this definition to mean equipment with "the capacity to dial numbers without human intervention."<sup>12</sup> The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") reaffirmed the Commission's interpretation: "That makes sense given that 'auto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system,' 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers."<sup>13</sup>

As described above (as well as in the Petition), a P2P text messaging platform does not allow a sender to transmit a message without human intervention; the platform provides the capability for a sender to determine the delivery, content, and timing of a message, as well as the capability to engage in a two-way communication with the recipient. A P2P platform requires a person to actively and affirmatively manually send each message, and transmit each message one at a time; the equipment does not permit the "automatic" transmittal of messages. P2P texting is entirely dependent on human intervention, and P2P text messages cannot be transmitted without affirmative human action.

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<sup>9</sup> NCLC Letter at 7.

<sup>10</sup> NCLC Letter at 3.

<sup>11</sup> 47 U.S.C. § 227 (a)(1).

<sup>12</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, 30 FCC Rcd 7961, 7975, ¶ 14 (2015) ("2015 Order").

<sup>13</sup> *ACA Int'l v. FCC*, 885 F.3d 687, 703 (D.C. Cir. 2018) ("ACA").

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In addition, a P2P text messaging platform does not include “the capacity ... to store or produce telephone numbers to be called, using a random or sequential number generator.” Such a platform cannot, therefore fall within Section 227(b)(1)(A)(iii)’s prohibition on “mak[ing] 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” to a telephone number assigned to a “cellular telephone service, specialized mobile radio service, or other radio common carrier service”<sup>14</sup> because the requirement only applies if equipment that falls within the definition of an autodialer is used to make such a call.

## Conclusion

The P2P Alliance recognizes that certain types of “spam” text messaging have raised concerns about undermining a communications medium that is a highly effective and personal way to reach consumers. But P2P text messaging involves a substantial degree of human intervention and interaction that precludes the abuse of P2P text messaging to send mass texts to multiple people all at once or in rapid succession. Under both the TCPA and the Commission’s interpretation of the statute, such a degree of human intervention is the antithesis of an autodialer, and is thus not subject to Section 227(b)(1)(A)(iii)’s prohibition.

The P2P Alliance respectfully renews its request for the Commission to approve the Petition expeditiously.

Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
Howard Waltzman  
*Counsel to the P2P Alliance*

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<sup>14</sup> 47 U.S.C. § 227(b)(1)(A)(iii).