

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

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
P2P Alliance Petition for Clarification)	

To the Commission:

Opposition to Application for Review of Action Taken Pursuant to Delegated Authority

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August 7, 2020

I. Introduction and Background

Pursuant to Section 1.115 of the Federal Communications Commission's ("Commission") rules,¹ the P2P Alliance files this Opposition to the Application for Review of Action Taken Pursuant to Delegated Authority ("Application for Review") submitted by the National Consumer Law Center, Consumer Federation of America, Consumer Action, EPIC, Public Knowledge, and the National Association of Consumer Advocates on July 24, 2020.²

The Application for Review addresses a Declaratory Ruling ("Ruling") from the Commission's Consumer and Governmental Affairs Bureau ("Bureau")³ regarding a petition for clarification filed by the P2P Alliance ("Petition").⁴ As further described below, the Ruling is fully consistent with the Telephone Consumer Protection Act ("TCPA") and related Commission precedent and policies, and correctly recognizes that a texting platform that is not capable of originating a text without an individual "actively and affirmatively" sending each text one at a time is not an automatic telephone dialing system ("autodialer"), nor are the texts made using such platform subject to the TCPA's restrictions on texts to mobile phone numbers.⁵

¹ See 47 C.F.R. § 1.115.

² National Consumer Law Center, Consumer Federation of America, Consumer Action, EPIC, Public Knowledge, and the National Association of Consumer Advocates, Application for Review of Action Taken Pursuant to Delegated Authority, CG Docket No. 02-278 (filed July 24, 2020) ("Application for Review").

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, P2P Alliance Petition for Clarification*, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 6526, (2020) ("Ruling").

⁴ P2P Alliance, Petition for Clarification, CG Docket No. 02-278, (filed May 3, 2018) ("Petition").

⁵ See 47 U.S.C. § 227(b)(1)(A).

II. The Ruling Correctly Relies on the TCPA and Related Commission Precedent and Policies to Recognize that P2P Text Messaging Platforms are Not Autodialers

The Application for Review fails to demonstrate that the Ruling is in conflict with the TCPA or related Commission precedent or policies, as required by the agency's rules.⁶ Instead, the Application for Review presents largely confusing and misguided arguments that attempt to rewrite the TCPA and the Commission's prior rulings, and raises inaccurate and speculative descriptions of peer-to-peer ("P2P") texting technology in general, and certain platforms in particular.

As an initial matter, the Application for Review seeks to use the Bureau's narrow Ruling to draw the Commission into a broader debate about what constitutes an autodialer, even while acknowledging that the Petition "concerned whether the level of human intervention in dialing the numbers removed the system from the [autodialer] definition."⁷ However, the Bureau correctly found such debate unnecessary in the light of the Petition's narrow focus, and the fact that the Commission is considering this question in the context of a separate petition.⁸ Crucially, the Application for Review misunderstands the central element of the Ruling: because their operation requires "a person to actively and affirmatively manually dial[] each [text],"⁹ P2P text message platforms are not autodialers pursuant to the statutory definition of that term, nor are texts from such platforms sent using an autodialer.

⁶ Among other requirements, the Commission's rules mandate that an application for review "shall concisely and plainly state the questions presented for review with reference ... to the findings of fact or conclusions of law [and] specify with particularity ... the factor(s) which warrant Commission consideration [as to]: the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent or established Commission policy." 47 C.F.R. § 1.115(b)(1)-(2)(i).

⁷ Application for Review at 7 (internal citations omitted).

⁸ See U.S. Chamber Institute for Legal Reform, *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018); *Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, CG Docket Nos. 18-152 and 02-278, 33 FCC Rcd 4864 (2018).

⁹ Ruling at ¶ 8.

As discussed and fully cited in the Ruling, over the course of two decades, the Commission has consistently interpreted the TCPA’s definition of an autodialer to encompass equipment that has a “basic function...to dial numbers without human intervention.”¹⁰ On the other hand, if a calling platform operates with a “person actively and affirmatively manually dialing each”¹¹ number, “that platform is not an autodialer and calls made using it are not subject to the TCPA’s restrictions on calls to wireless phones.”¹² The Application for Review acknowledges the significance of human intervention in evaluating whether a platform is an autodialer: “The degree of automation involved is an important consideration in determining whether a particular platform meets the ATDS definition.”¹³

As a result, the central element of the Ruling is quite straightforward: “whether [a] calling platform or equipment is an autodialer turns on whether such equipment is capable of dialing random or sequential telephone numbers *without human intervention*.”¹⁴ Moreover, this clarification is entirely consistent with the TCPA and related Commission precedent and policies.¹⁵

In addition, the Application for Review and its proponents have repeatedly claimed – without merit – that P2P text messaging platforms do not require human intervention, or require only such minimal human intervention as to be irrelevant: “the individual human involvement in sending these messages is so vanishingly small as to be meaningless and is inserted into the

¹⁰ Ruling at ¶ 9 (internal citations omitted).

¹¹ *Id.* at ¶ 8.

¹² *Id.*

¹³ Application for Review at 10.

¹⁴ Ruling at ¶ 8 (emphasis added).

¹⁵ See *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); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014, 14092, ¶ 132 (2003) (internal citations omitted); *Telephone Consumer Protection Act Robocall and Text Rules: Biennial Reminder for Political Campaigns About Robocalls and Text Abuse*, Enforcement Advisory No. 2016-03, (rel. Mar. 14, 2016).

process simply for purposes of evasion.”¹⁶ Indeed, the Application for Review goes as far as to impugn the motives of individuals volunteering their time to assist in a political campaign, asserting that “the sole function of the volunteer appears to be to deliberately evade TCPA coverage.”¹⁷

Next, the Application for Review incorrectly claims 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.”¹⁸ Thus, the filing ignores the scope of the Ruling, which, by its very terms, applies to P2P text messaging “that allows organizations to use either an online platform or a mobile application to send text messages to recipients from a single sender to a single recipient to initiate a two-way communication.”¹⁹

The Petition requested clarification for those P2P text messaging platforms that require a person to manually send each and every individual message, and that each message be manually sent to one person at a time. Contrary to the assertions in the Application for Review, the Petition addressed messaging platforms that allow senders wide discretion, including to determine whether to send a message to a particular recipient in the first place, as well as the message’s content and timing of delivery. Importantly, messages sent using such platforms allow for two-way communication between individuals, as the recipient of a message can respond to the message, and the original sender can reply in turn with whatever text or content he or she sees fit.²⁰

¹⁶ Application for Review at 13.

¹⁷ *Id.* (internal citations omitted).

¹⁸ Application for Review at 13.

¹⁹ Ruling at ¶ 10.

²⁰ *See* Letter from Howard Waltzman, Counsel to the P2P Alliance, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed July 30, 2019).

As such, human intervention *is* a necessary and fundamental component of these platforms. As the Ruling notes, P2P text messaging platforms “require[] a person to actively and affirmatively manually dial each recipient’s number and transmit each message one at a time.”²¹ Accordingly, “such platform[s] would not be an 'autodialer' that is subject to the TCPA.”²²

Finally, the Application for Review erroneously asserts that the Ruling somehow evinces the Bureau's conclusion that any and all P2P text platforms would fall within the scope of the decision. To the contrary, the Bureau concluded that:

We do not rule on whether any particular P2P text platform is an autodialer because the record lacks a sufficient factual basis for us to confirm (or for commenters to assess) whether any particular P2P text platform actually works as claimed in the [Petition].²³

The Bureau has simply made clear that P2P text platforms that require the level of human intervention articulated by the P2P Alliance are not autodialers subject to the TCPA’s restrictions on texts to mobile phone numbers.

III. Conclusion

The Application for Review fails to demonstrate that the Ruling conflicts with the TCPA or related Commission precedent and policies as required by Section 1.115(b)(2)(i), and therefore must be denied. The Ruling correctly recognizes that P2P text messaging platforms addressed in the Petition require human intervention for the development and transmission of text messages. These platforms require that an individual manually send a single text message to one recipient at a time, enable two-way communications, and provide the individual sending such texts with a high level of discretion regarding their delivery. As a result, these platforms are not “autodialers” under the TCPA, and the Ruling appropriately clarifies the application of the

²¹ Ruling at ¶ 11.

²² *Id.*

²³ *Id.*

TCPA to such platforms, and does not invite the broader debate about the definition of an autodialer sought by the Application for Review. In light of these factors, the Commission must deny the Application for Review.

Respectfully submitted,

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