

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
)
Petition of Network Communications)
International Corp. For Expedited Declaratory)
Ruling That Network Communications)
International Corp.'s Inmate Calling Services)
Protocol Does Not Violate the TCPA)

PETITION FOR EXPEDITED DECLARATORY RULING

Network Communications International Corp.

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Summary

Network Communications International Corp. (“NCIC”) is a provider of an inmate calling service (“ICS”) that enables incarcerated individuals to place collect calls from correctional facilities to residential or cellphone lines. Through the course of its services, NCIC confronts an issue commonly encountered by ICS providers: Often when an inmate initiates a collect call through an ICS provider, the call cannot be completed either because the called party’s cellphone service provider blocks incoming collect calls or the called party does not properly answer the incoming call as he/she often may not recognize the correctional facility’s caller identification number. Under such circumstances, the collect call initiated by the inmate is not completed and the called party does not receive adequate notice of the inmate’s attempted call. This issue creates a substantial problem for incarcerated individuals because they have very restrictive access to channels of communication compared to an ordinary citizen and cannot efficiently follow up with their friends, loved ones, or counsel to ensure success for future call attempts. This issue is also troubling for NCIC, whose general responsibilities to inmate needs, its contractual obligations with correctional facilities, and its goodwill are all based in substantial part on the reliability and effectiveness of its ICS to reach inmates’ friends, family, and counsel while incarcerated.

Some ICS providers have developed protocols that follow through on behalf of the inmate to properly notify a called party about an inmate’s unsuccessful collect call and address the need to establish a billing relationship between the ICS provider and the called party so that an inmate can successfully make phone calls within a reasonable timeframe. Specifically, another ICS provider, GTL, has addressed the issue by using a protocol whereby the called party is contacted with as many as three follow-up, prerecorded phone calls. This protocol was expressly permitted by the Commission in a declaratory ruling.

The purpose of this Petition is to confirm that NCIC may utilize a single follow-up text message protocol, rather than a prerecorded call, for unsuccessful collect calls initiated by

individuals through NCIC's network. Such an order would clarify that NCIC's protocol comports with the Commission's qualified exemption to the TCPA's requirement of prior express consent for certain ICS calls made to cellphone numbers as set forth in the Commission's decision regarding GTL and elsewhere. Moreover, although the issue need not be decided for the purposes of resolving NCIC's Petition, NCIC's single text follow-up would not contravene the TCPA in the first instance because each text message is part of a single end-to-end communication achieved *through* NCIC's ICS system but *initiated by* the inmate. Furthermore, such messages are not sourced from a system that utilizes an "automatic telephone dialing system" or "autodialer" ("ATDS") because NCIC's system operates only by using phone numbers entered individually by an inmate caller—random or sequential number generation has no relevance to NCIC's purpose of connecting a single call between an inmate and his or her called party.

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PETITION FOR EXPEDITED DECLARATORY RULING

Network Communication International Corp. (“NCIC”), by its attorneys and pursuant to 47 C.F.R. § 1.2 of the rules and regulations of the Federal Communications Commission (“Commission”), hereby respectfully requests that the Commission declare as follows: that the Telephone Consumer Protection Act of 1991 (“TCPA”)¹ and the Commission’s rules and regulations implementing it are not applicable to NCIC’s use of a one-time informational text message used for the sole purpose of establishing a billing relationship with a called party who does not answer or respond to a collect call from an incarcerated individual using NCIC’s inmate calling service.

Allowing NCIC to send a single follow-up text message in these circumstances is consistent with the Commission’s policies (including the express finding that a similar type of communication does not violate the TCPA as set forth in the Commission’s July 2015 Omnibus TCPA Ruling)², which recognize the unique restraints and obligations inmate calling service providers face to facilitate calls between inmates and their loved ones or legal counsel. NCIC’s

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227.

² In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al., CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015), at 7984-89, ¶¶ 38-46 [hereinafter “GTL Decision”]

proposed one-time follow-up text would also promote the public interest. It would streamline NCIC's inmate calling service process and improve service quality. Accordingly, NCIC's Petition should be granted to ensure NCIC can send a single,³ informational text message without being subject to potential liability from frivolous lawsuits under the TCPA.

Background

NCIC is a provider of an inmate calling service ("ICS"). For purposes of the legal issues raised by this Petition, NCIC's service is virtually identical to a service provided by another ICS provider, GTL, whose follow-up communication after unsuccessful inmate initiated calls the Commission found to be compliant with the TCPA.⁴ As part of the GTL Decision, the Commission addressed the following specific issue raised by GTL and commonly encountered by other ICS providers: Often when an inmate (the "calling party") initiates a collect call through an ICS provider, the call cannot be completed either because the called party's cellphone service provider blocks incoming collect calls, the called party does not answer his/her phone, or the called party is non-responsive to the incoming call.⁵ Under such circumstances, the collect call initiated by the inmate is not completed and the called party does not receive adequate notice of the inmate's attempted call. GTL has addressed the issue by using a protocol whereby the called party is contacted with as many as three follow-up, prerecorded phone calls. This protocol was expressly permitted by the Commission in the GTL Decision.⁶ Under the protocol developed by NCIC, the called party would be contacted using a single follow-up text message.

³ The maximum length of a short message service text message is 160 characters. In the event the disclosure of an inmate's name and/or the name of a correctional facility causes the follow-up message to exceed the 160 character limit, NCIC's follow-up text message will automatically be split into two simultaneous messages at the 153 character mark. Otherwise, the follow-up text message will be completed in a single text.

⁴ Id.

⁵ A non-responsive call is one in which the called party answers the call, but terminates the call without responding to NCIC's automated requests to accept or reject the call, or affirmatively opt-out of receiving future contact from NCIC.

⁶ Id.

ICS providers have worked to create a solution to the problem of uncompleted collect calls from inmates because incarcerated individuals simply do not have the freedom and flexibility to make unlimited additional calls as would an ordinary citizen. Inmates have only limited time and limited means to communicate with loved ones or legal counsel.⁷ Furthermore, incarcerated individuals can engage in telephonic communications only if they are the initiator of an out-bound call—inmates cannot receive calls from the public so the process in a sense functions only one-way. In circumstances where inmates' collect call attempts are unsuccessful, ICS providers must have enhanced systems that can follow through on behalf of the inmate. ICS providers also must satisfy contractual relationships with correctional facilities and general responsibilities to the public. ICS providers serve a significant role with respect to incarcerated individuals communicating with the public. An ICS provider's goodwill is based in substantial part on the reliability and effectiveness of the ICS to reach inmates' friends, family, and counsel while incarcerated. Moreover, ICS providers face unique public safety and security issues that distinguish their services from those delivered by providers of non-ICS telephone services. Many laws and correctional facility rules in fact require that ICS systems be entirely automated without any interaction between inmates and live operators.

Accordingly, given these unique circumstances, ICS providers have developed protocols intended to properly notify a called party about an inmate's unsuccessful collect call, and to address the need to establish a billing relationship between the ICS provider and the called party so that an inmate can successfully make phone calls within a reasonable timeframe. Although NCIC consumers typically want to receive calls processed by NCIC—as NCIC connects consumers to their incarcerated loved ones, friends, or legal clients—NCIC is understandably hesitant to implement its follow-up single text protocol without additional clarity from the Commission. On average, NCIC facilitates hundreds of thousands of ICS calls per day. Given

⁷ The Commission itself recognizes that inmates represent “some of society's most vulnerable: people trying to stay in touch with loved ones serving time in jail or prison.” See <https://www.fcc.gov/consumers/guides/inmate-telephone-service> (Federal Communications Commission information on ICS rate caps).

the magnitude of NCIC's ICS operations, and in light of the recent rise of TCPA class action lawsuits, NCIC hopes the Commission appreciates NCIC's caution and desire for certainty.

The purpose of this Petition is to confirm that NCIC may utilize a single text message to effectuate its follow-up protocol for unsuccessful collect calls initiated by individuals through NCIC's network. Such an order would clarify that NCIC's protocol comports with the Commission's qualified exemption to the TCPA's requirement of prior express consent for certain ICS calls made to cellphone numbers as set forth in the GTL Decision and elsewhere. Moreover, although the issue need not be decided for the purposes of resolving NCIC's Petition, NCIC's single text follow-up would not contravene the TCPA in the first instance because each text message would immediately follow the collect call attempt initiated by an inmate caller, not NCIC, as part of a single end-to-end communication achieved *through* NCIC's ICS system but *initiated by* the inmate. Furthermore, such messages are not sourced from a system that utilizes an "automatic telephone dialing system" or "autodialer" ("ATDS"). NCIC's system, even if it included a follow-up text message protocol, operates only by using phone numbers entered individually by an inmate caller. Random or sequential number generation is not used by NCIC's ICS system and has no relevance to its purpose—connecting a single call between an inmate and his or her called party.

I. NCIC's Follow-up Text Message Protocol Comports With The Conditions And Policies Contained In The Commission's GTL Decision.

In the GTL Decision, the FCC specifically recognized the need for ICS providers to establish necessary billing relationships to facilitate inmate calls. As described in the GTL Decision, GTL's follow-up protocol functions as follows:

[W]hen an inmate attempts to call a number and GTL has no means to bill it to the called party, GTL advises the inmate that it cannot complete the call, terminates the call, and then, over the course of three days, places up to three subsequent calls to the number in an effort to establish a prepaid account with the called party. GTL uses its IVR⁸ to place

⁸ "IVR" means interactive voice response, which is a technology that allows individual callers to interact with telephonic computer systems through the use of voice or dual-tone multi-frequency signaling (DTMF).

these prerecorded calls to residential and wireless telephone numbers.⁹ ...GTL maintains that it permanently abandons the notification attempts after three attempts.¹⁰

In the GTL Decision, the Commission addressed the narrow issue of whether GTL could provide such informational, prerecorded follow-up calls to individuals, who had not provided GTL prior express consent, without violating the TCPA's prohibition on robocalls placed to cellphones without prior express consent.¹¹ With regard to this issue, the Commission ruled that:

As noted above, we believe that GTL's follow-up calls to residential numbers seeking to make billing arrangements for a specific collect call serve to implement the Commission's policy of promoting a pre-paid calling option for ICS as set out in the *Inmate Calling Order*. [See *In the Matter of Rates for Inmate Calling Services, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 12-375, 28 FCC Rcd 14107 (2013).] We find that this rationale applies to GTL's follow-up calls to wireless telephone numbers assigned to a cellular service where GTL seeks to make billing arrangements for collect calls. Moreover, the calls that GTL would make to arrange billing for a particular collect call would allow for completion of a collect call that has already been attempted. We therefore conclude that exempting such calls to cellular telephone numbers from the prior express consent requirement will ensure that inmate calls can be completed in a timely manner.¹²

As part of its ruling, the Commission adopted the following seven conditions necessary for ICS providers to avail themselves of this express exemption:

- (1) collect call attempt notifications to cellular telephone numbers shall not be charged to the called party;
- (2) notifications must identify the name of the collect call service provider and include contact information;
- (3) notifications must not include any telemarketing, solicitation, debt collection, or advertising content;
- (4) notifications must be clear and concise, generally one minute or less;
- (5) collect call service providers shall send no more than three notifications for each inmate call, and shall not retain the called party's number upon call completion or, in the alternative, not beyond the third notification attempt; and

⁹ GTL Decision at 7986, ¶ 41.

¹⁰ Id. at 7987, n.166.

¹¹ Id. at 7987-88, ¶¶ 43-44.

¹² Id. at 7988, ¶ 44.

(6) each notification call must include information on how to opt out of future calls; voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make an opt-out request prior to terminating the call; voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future notification calls; and

(7) the collect call service provider must honor opt-out requests immediately.¹³

A. NCIC's Follow-up Text Message Protocol Would Satisfy The Commission's Conditions.

NCIC's follow-up single-text protocol would work according to the following three steps:

(1) *Initiating a first-time call:* An incarcerated individual would initiate a first-time call using NCIC's ICS to a called party who does not have a preexisting billing relationship with NCIC. Before the call is placed, the inmate would receive NCIC's automated pre-call instructions and disclosures in compliance with the law and correctional facility rules. Among these pre-call disclosures would include a prompt stating that if the inmate's attempted call is not completed because the called party does not answer his/her phone, is non-responsive to the call, or the called party's telephone service provider blocks collect calls, the called party will be notified via text message of the inmate's call and the need to establish a billing account with NCIC in order to accept calls in the future.¹⁴

(2) *The call is initiated and unsuccessful:* After the necessary pre-call disclosures, NCIC's system would place the inmate on hold and attempt to facilitate the inmate's call to the intended recipient. If the call fails, either because the called party did not answer, the called party was non-responsive, or the number was serviced by a cellphone provider that blocks collect calls, NCIC's system would temporarily capture the dialed number, and NCIC would terminate the call to the called party. NCIC would provide the inmate a prerecorded notification that the call was unsuccessful. NCIC would terminate the inmate's end of the line.¹⁵

(3) *NCIC's text message follow-up protocol:* Upon the termination of the inmate's end of the line, NCIC would immediately send a text message notification to the captured telephone number. The message would contain the following information: (1) the source of the text (i.e., NCIC); (2) NCIC's contact phone number; (3) the name of the incarcerated individual and his/her respective correctional facility; (4) a brief notification that the stated inmate has attempted to call the relevant phone number; (5) a brief

¹³ *Id.* at 7989, ¶ 45.

¹⁴ NCIC's follow-up protocol could also provide the inmate a prerecorded notification at the time the inmate is initiating the call that allows the inmate to elect, via DTMF, to authorize the follow-up text message notifying the called party of the inmate's attempted call and the need to establish a billing account with NCIC.

¹⁵ Currently, NCIC's system does not utilize a formal follow-up protocol.

instruction that if the called party wishes to receive the inmate's calls in the future, the called party should visit NCIC's website (website address would be included in the body of the text message) to set up a billing account or contact NCIC by phone; and (6) a brief instruction informing the called party how to immediately opt-out of future NCIC calls/texts (i.e., a "STOP" opt-out mechanism).

NCIC's follow-up protocol would thus strictly comply with the Commission's conditions: the text message would identify NCIC; the text message would not contain telemarketing, solicitation, debt collection, or advertising content;¹⁶ NCIC would send one text message,¹⁷ which is less than three notifications for each inmate call; and NCIC would provide an opt-out option. Moreover, after the single follow-up text message is sent, NCIC would not retain the called party's number.

NCIC's notifications would be clear and concise—the message would be brief and worded so that a called party could easily read it within one minute. In fact, as discussed further below, called parties would likely find such text messages clearer and more concise than a prerecorded follow-up voice message. NCIC's protocol would also employ a sufficient opt-out procedure, which NCIC would of course honor should a called party choose to opt-out from receiving future calls/texts from a particular inmate.

Lastly, NCIC's follow-up text message protocol would also substantially comply with the Commission's no-charge condition (i.e., the requirement that such notifications to cellular telephone numbers not be charged to the called party). In Soundbite, the Commission recognized that text messages do not incur monetary costs for the "many customers" who subscribe to the "many wireless providers" that offer unlimited texting plans.¹⁸ For those few

¹⁶ In the GTL Decision the Commission ruled that the purpose of ICS follow-up calls intended to notify the called party about the call and to establish a billing relationship with the ICS provider is commercial and not made to introduce an advertisement or constitute advertising pursuant to 47 C.F.R. Section 64.1200(a)(3)(iii). Id. at 7987, ¶ 42.

¹⁷ As noted above in footnote 3, NCIC requests clarity from the Commission that would permit NCIC's follow-up protocol even in instances where a text must be split into two simultaneous messages because the disclosure of an inmate's name and/or the name of a correctional facility exceeds 160 characters, which is the maximum length of a short message service text message.

¹⁸ In the Matter of the Rules and Regulation Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, FCC 12-143, 27 FCC Rcd 15391 (2012), at 15396, ¶ 10 [hereinafter Soundbite] (in Soundbite, the Commission ruled that the

cellphone users for whom there could be an incremental cost, the Commission in Soundbite balanced the incremental cost against the benefits afforded to the consumers receiving the text message.¹⁹ For reasons discussed further below, the benefits of receiving a follow-up text message would outweigh any small incremental cost that could potentially be imposed on some cellphone users. Moreover, the text message follow-up protocol is no different than the prerecorded message protocol approved by the Commission in the GTL Decision in that a small population of the public might still be charged for minutes associated with incoming voice calls as well.

B. NCIC’s Follow-up Text Message Protocol Promotes Efficiency, Benefits Service Quality, And Is Less Burdensome Than A Prerecorded Voice Call.

The Commission recognizes certain policy objectives specific to the particular challenges and legal constraints present in the ICS marketplace.²⁰ In this context, the Commission is concerned with protecting consumers’ privacy interests²¹ while enabling ICS providers to execute their duties and complete inmate calls in a timely manner using legitimate business practices.²² This is why the Commission has found it necessary to create a special exemption for ICS providers with regard to follow-up protocols. Without such an express exemption, ICS providers might hesitate to incorporate this beneficial procedure into their operations in light of TCPA liability risks, stifling service availability to the detriment of ICS users.

With regard to NCIC, in situations where an inmate attempts to make a call to a cellphone number that blocks incoming collect calls or is not answered or properly responded to, the called party does not receive proper timely notice of the call or instructions on how to

benefits of users receiving a text message confirming a user’s successful opt-out request outweighed the potential incremental costs incurred by some).

¹⁹ Soundbite at 15396, ¶ 10.

²⁰ GTL Decision, at 7987, ¶ 42.

²¹ Id. at 7989, ¶ 46.

²² Id. at 7987, ¶ 42; see also, id. at 7964, ¶ 2 (“In enacting the TCPA, Congress made clear that [i]ndividuals privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”).

establish a billing relationship with NCIC.²³ Without timely notification, it is quite possible an inmate's successive attempts at initiating a call through NCIC's services would also achieve an unsuccessful result in substantial part because inmates do not have unbridled access and freedom to all channels of communication. Correctional facilities establish the time and manner in which inmates may use phone services and other forms of communication such as in-person visits, use of email, or written letters. Inmates, on their own, cannot provide called parties timely notice of their failed call attempts. Without ICS providers delivering notice on behalf of inmates, inmates could be left in a position of continually waiting for an ICS billing account to be established, resulting in substantial delay in their ability to connect with family or legal counsel.

A text message follow-up protocol offers the same solution as GTL's approved prerecorded follow-up voice message notification. Both protocols similarly increase the probability that the inmate will be able to speak to the called party during the inmate's next opportunity to use the telephone. A follow-up text message protocol also maintains the automated nature of ICS services and comports with certain laws and correctional institution rules that forbid incarcerated individuals from communicating with live operators for safety and security purposes, including but not limited to preventing harassment and fraudulent activity.

NCIC has determined, however, that for its own operations a text message follow-up protocol is more efficient than one utilizing prerecorded calls for the following reasons:

First, a text message protocol is practical in light of the hundreds of thousands of calls initiated through NCIC's system each day to cellphones, which block incoming collect calls. Text messages are a cost-effective solution, which in turn can help reduce the costs of NCIC's services for its users.

²³ See *id.* at 7988, 7989, ¶¶ 44, 46. In circumstances where NCIC's call is not blocked, which is typically the case with residential landlines, and the called party has caller identification, the called party is able to see NCIC's 800-number. As discussed further in this Petition, NCIC's 800-number without any other information content may falsely suggest to called parties that they are receiving a telemarketing call, not a potentially desirable call from an incarcerated individual. For the vast majority of consumers who are ever increasingly abandoning landlines and using exclusively cellphones, NCIC's calls are blocked without the called party even receiving notice of NCIC's 800-number.

Second, a text message assures that a called party receives necessary disclosures within a timely manner. With a follow-up prerecorded call, there is a substantial risk that a called party will answer the call and preemptively “hang-up” falsely assuming the call is a typical telemarketing robocall from an 800-number. Such an outcome is problematic especially if the called party would otherwise be interested in receiving notification and establishing a billing relationship with an ICS. Text messages, however, disclose the necessary follow-up information all at once, and therefore, are more reliable for completing an inmate initiated collect call. Research also supports that people are generally highly responsive to text messages, which have proven useful, and in some circumstances, essential for communicating time-sensitive information.²⁴

Third, a text message enables a called party to review the disclosures at his/her convenience; whereas, a prerecorded voice call may need to be played and listened to several times, start-to-finish, in order for the listener to properly comprehend its contents.

Fourth, the use of a single text message rather than three follow-up calls from a prerecorded voice is less intrusive and burdensome. NCIC believes consumers find informational text messages less taxing than receiving prerecorded voice calls. For members of the public that do not want to receive ICS follow-up notifications, a text message—even in the unusual event where the called party incurs an incremental cost—does not pose the same burden as receiving as many as three prerecorded voice calls.

Ultimately, a text message protocol not only promotes the policies that the Commission recognizes are unique to the ICS marketplace, it promotes reliable services and provides substantial value to inmates, their families, friends, and legal counsel using NCIC’s services. NCIC’s automated text message is not the type of robocall the TCPA seeks to prevent, but is part

²⁴ See GTL Decision at 8024-26, ¶¶ 128-133 (Commission provides exemption from TCPA’s prior-express-consent requirement for text messages sent from financial institutions to consumers regarding financial security information).

of the service NCIC is expected to provide in pursuit of its contractual obligations to correctional facilities and its responsibilities to the public.

II. NCIC's Follow-up Text Message Protocol Does Not Violate The TCPA.

The primary rationale behind the GTL Decision is that the follow-up protocol for ICS providers does not violate the TCPA. This is certainly true for NCIC's follow-up text protocol. Congress passed the TCPA to "address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy."²⁵ In Section 227(b)(1), Congress specifically addressed the use of some types of automated telephone equipment, providing:

(b) Restrictions on the use of automated telephone equipment.

(1) Prohibitions. - It shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States--

(A) 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

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.²⁶

The Commission's implementing regulations similarly restrict initiating a call using an ATDS or a pre-recorded voice to a telephone number assigned to a cellular telephone service. The Commission has interpreted the term "call" as used in this section to include text messages.²⁷

²⁵ In the Matter of the Rules and Regulation Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rcd 559, at 559, ¶ 2 (2008).

²⁶ 47 U.S.C. §227(b)(1)(A)(iii).

²⁷ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd 14014, 14115 (2003), ¶ 165 [hereinafter 2003 TCPA Order]; see also, Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009).

A. NCIC Does Not Initiate A Call Within The Meaning Of The TCPA.

The TCPA prohibits a person from “mak[ing]” a “call” to a cellphone using an automatic telephone dialing system or an artificial or prerecorded voice.²⁸ The Supreme Court has defined “make” to mean “to cause to exist, appear or occur.”²⁹ The Commission has also ruled that “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.”³⁰ In the ICS context, the initiating party—in this case, the inmate caller—is the party “making” the call. Without the initiating party, there would be no call at all. In accord, the Commission views ICS follow-up protocols as a continuation of the collect call that has already been attempted.³¹ Thus, calls facilitated through ICS providers as well as the follow-up call, “constitute a single end-to-end communication”³² initiated by the inmate caller.

In the context of text messages, the Commission has employed a totality of the circumstances test to determine the initiator.³³ Under this test, the Commission will examine the totality of the facts and circumstances to determine: “1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA.”³⁴ Applying this test, the Commission ruled in its July 2015 order in relation to the YouMail petition that YouMail, a smart phone software application, was not the “maker or initiator” of texts sent from YouMail’s application to recipients. The Commission found that YouMail texts were simply sent in response to a call made to the YouMail application user when the application

²⁸ 47 U.S.C. § 227(b)(1)(A).

²⁹ United States v. Giles, 300 U.S. 41, 48 (1937).

³⁰ GTL Decision at 7978-79, ¶ 27.

³¹ Id. at 7986, 7988, ¶¶ 40, 44.

³² Id.

³³ Id. at 7980, ¶ 30.

³⁴ Id.

user did not answer a call. Only then did a responsive YouMail text message get sent according to YouMail’s software features, and the responsive text message was sent only to that particular caller—in other words, there was a one-to-one relationship between the an incoming call and a responsive text message sent according to a YouMail user’s system preferences. The Commission ruled in YouMail that “[t]his kind of service differs from the non-consensual calling campaigns over which the TCPA was designed to give consumers some degree of control.”³⁵ Accordingly, “YouMail is not the maker or initiator of the text because it does not control the recipients, timing, or content, but instead “merely ha[s] some role, however minor, in the causal chain that results in the making of a telephone call.”³⁶

Here, a follow-up text message would not only be part of the single end-to-end communication initiated by the inmate, but it would also be sent only to the one party the inmate has unsuccessfully attempted to call. Therefore, pursuant to the Commission’s prior rulings, it is the inmate, rather than NCIC, who is the initiator of the call for the purposes of the TCPA. Moreover, as described above, when an inmate makes a call, a disclosure is made to the inmate such that he or she is aware of the fact that, where necessary, the inmate’s call will include a follow-up text message. The inmate, not NCIC, directs to whom the follow-up text message is sent. NCIC is merely the service by which an inmate executes a collect call, and a follow-up text message is no more than a component of this process of completing the inmate’s attempted collect call. This is not the sort of activity that falls within the purview of the TCPA, and for this reason provides substantial basis to support a finding that NCIC’s text message follow-up protocol would not violate the TCPA.

B. NCIC’s System Is Not An ATDS.

An ATDS is defined as: [E]quipment 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

³⁵ Id. at 7981, ¶ 32.

³⁶ Id. at 7982, ¶ 33.

such numbers.³⁷ The Commission has long held that the basic functions of an ATDS “are to ‘dial numbers without human intervention’ and to ‘dial thousands of numbers in a short period of time.’ ”³⁸ “How the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination.”³⁹

Courts ruling on allegations of TCPA violations also focus on the equipment’s capacity rather than its actual use. For example, the Ninth Circuit in its decision in Satterfield v. Simon & Schuster, Inc.,⁴⁰ ruled that when determining whether a system is an ATDS, the relevant inquiry is to focus on whether the system has the capacity to store or produce telephone numbers to be called via a random or sequential number generator. Over time, the Commission has adopted a definition of ATDS focusing on the word “capacity” and interpreting it to mean any device that has “more than a theoretical potential” to be modified to satisfy the original definition (i.e., to dial randomly or sequentially).⁴¹

NCIC’s protocol is unique in that it would never be modified to generate random or sequential numbers; in this sense, there is no theoretical potential of it being modified as such. NCIC does not maintain a database of numbers to be called, it does not generate numbers from a calling list, and it has no capability to select the telephone numbers to be dialed “without human intervention” by the inmate, who solely determines what telephone number will be called.⁴² As

³⁷ 47 U.S.C. §227(a)(1).

³⁸ GTL Decision at 7975, ¶ 17

³⁹ Id.

⁴⁰ 569 F.3d 946 (9th Cir. 2009).

⁴¹ GTL Decision at 7974-75, ¶¶ 16-18. *Cf.* 47 C.F.R. § 64.1200(f)(2). An “automatic telephone dialing system” or “autodialer” is “equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.” 47 C.F.R. § 64.1200(f)(2). The definition also includes predictive dialers, which dial numbers using a database of numbers. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd 559, ¶ 12 (2008). The key distinguishing factor is whether the technology has, as a basic function, “the capacity to dial numbers without human intervention.” See 2003 TCPA Order at 14092, ¶ 132.

⁴² See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd 15391, n.5 (2012) (finding the “autodialer” definition “covers any equipment that has the specified capacity to generate

noted above, NCIC's system is designed to act a conduit in that it responds one time, to a single input, and only when initiated by an inmate caller. NCIC's system does not and will not store or produce or dial telephone numbers in any random or sequential manner or even to call them from a list or database. The very one-to-one, input/output, nature of NCIC's ICS is essential for NCIC to achieve the necessary accuracy between the telephone number an inmate inputs into the system and the number corresponding to the phone line of the intended called party. Here, there is no indicia of circumvention, as NCIC's ICS service, including a follow-up text message protocol, must follow the same logical sequence, initiated only by an inmate caller. Accordingly, NCIC's system warrants the Commission's declaration, based on its case-by-case review, that NCIC is not an ATDS; therefore, for this additional reason, a text message follow-up protocol does not implicate the TCPA.

Conclusion

ICS providers are unique and have multifaceted obligations and responsibilities. They are contractually obligated by their agreements with correctional institutions to facilitate collect calls attempted by inmates. They have a duty to efficiently provide their services to inmate callers, who cannot otherwise reach loved ones or counsel without the assistance of an ICS. ICS providers are also obliged to facilitate inmate calls in a timely manner, and to achieve this objective in a manner that is secure, cost-effective, and ensures service quality. For these reasons, ICS providers are compelled to employ the best systems suited for their unique circumstances. NCIC believes a text message follow-up protocol would provide the best solution to the problem faced by ICS providers when a called party's cellphone service blocks incoming collect calls, or the called party does not answer or respond to a first-time call from an inmate using NCIC's services to establish a billing relationship.

numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists") (emphasis in original).

For all the foregoing reasons, NCIC, by counsel, respectfully requests that the Commission take expedited action to issue a Declaratory Ruling establishing that a single text message follow-up protocol as described herein does not violate the TCPA because: (a) it does not require prior express consent from the called parties pursuant to the GTL Decision, (b) it is “initiated” by inmate callers, and/or, (c) it does not involve an ATDS.

Respectfully submitted,

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