

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

**COMMENTS OF DIRECTV, LLC IN SUPPORT OF PETITION FOR  
DECLARATORY RULING FILED BY COMMUNICATION INNOVATORS**

**I. INTRODUCTION**

In this proceeding, Communications Innovators (“CI”) has asked that the Commission state that predictive dialers that “do not have the **current ability** to generate and dial random or sequential numbers” are not automatic telephone dialing systems (“ATDS”) subject to liability under the Telephone Consumer Protection Act (“TCPA”) for non-marketing calls.<sup>1</sup> Because the TCPA generates so much litigation—and in particular, class action litigation—that has been bogging down America’s companies with frivolous claims, DIRECTV agrees with CI that a clarification from the Commission on the nature of predictive dialers is both important and much needed. The Commission should clarify that non-marketing calls made with dialer equipment that could be programmed to store or produce, and dial, random or sequential numbers should only be restricted where the dialer **is actually programmed** to place calls to random or sequential numbers, i.e., has the “current ability” to be used in such a fashion.

DIRECTV has over 20 million subscribers in the United States with whom it has an ongoing relationship. Due to the nature of multichannel video services, DIRECTV and its

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<sup>1</sup> See *Petition for Expedited Declaratory Ruling and Clarification*, Communication Innovations, CG Docket No. 02-278, at 1 (filed June 7, 2012) (“CI Petition”).

customers communicate with each other often. DIRECTV offers 24-hour customer service lines and handles millions of inbound calls monthly from its subscribers. Customers call for a wide variety of reasons, such as purchasing a PPV event, asking about the channel on which their favorite sports team's game is being shown that day, requesting to upgrade equipment, making changes to programming packages, addressing a technical issue, questioning a bill, etc. For circumstances where DIRECTV is able to anticipate common questions and issues, it uses modern calling technology to reach out efficiently to its affected customers with important account and service information. With a service customers use on a 24/7 basis, like pay TV, it is important to have quick and efficient means of communication. It does not serve the purpose of the TCPA nor is it in the best interest of consumers to unfairly inhibit important non-marketing communications that companies like DIRECTV make to customers. And yet, DIRECTV faces the risk of being forced to defend TCPA litigation every time it reaches out to its customers through modern call technology on sophisticated equipment developed decades after the implementation of the TCPA—equipment that is not used to generate or produce and then dial random or sequential numbers, even if the equipment could hypothetically be programmed to do so.

Although DIRECTV can prevail on TCPA claims by showing that its customers have consented to receive calls,<sup>2</sup> establishing such a defense can be expensive and time-consuming.

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<sup>2</sup> Indeed, the Commission has been clear that prior consent to receive non-telemarketing calls even at a cellular telephone number does exist when a customer provides a business such as DIRECTV with that telephone number. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, ¶ 21 (2012) (“While a few commenters argue that we should require written consent for all autodialed or prerecorded calls (i.e., not simply those delivering marketing messages), we conclude that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls. For instance, bank account balance, credit card fraud alert, package delivery, and school closing information are types of information calls that we do not want to unnecessarily impede.”).

Like many other companies, DIRECTV has found itself embroiled in frivolous TCPA litigation centered on non-marketing calls even though the plaintiff does not claim (and would not be able to claim) that his or her number was randomly or sequentially generated and dialed—the harms targeted by the TCPA’s limitations on ATDS equipment.

The TCPA was designed to protect privacy and to stop invasive and persistent telemarketing, primarily of the “cold call” kind which ensues when telemarketers use dialing technology to randomly or sequentially dial numbers. It was not designed to subject companies to claims regarding “autodialed” calls when they reach out to targeted, segmented lists of their own customers who have a common need for information using the telephone numbers (including cellular phone numbers) provided by those customers.<sup>3</sup> Thus, the restriction on the use of dialing equipment for non-marketing calls should not hinge solely upon such equipment’s potential ability or capacity, if programmed in a different way, but should rely on the actual capacity of that machine as it has been programmed and used.<sup>4</sup>

## II. DISCUSSION

### A. Companies Such As DIRECTV Have Many Valid Reasons To Reach Out To Their Customers, And Yet Are Facing An Onslaught Of TCPA-Based Litigation.

DIRECTV has over 20 million customers in the United States, and requires in its Customer Agreements that each customer provide a telephone number and keep that number

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<sup>3</sup> Some kinds of non-marketing calls, such as collections calls, have independent sets of rules that apply to ensure those calls are not abusive or overly intrusive. *See, e.g.*, 15 U.S.C. § 1692 (Fair Debt Collection Practices Act).

<sup>4</sup> DIRECTV notes that a recently filed Petition for Expedited Declaratory Ruling and Clarification by GroupMe, Inc. similarly asked the Commission to clarify and limit the scope of the term “capacity” in the autodialer definition to encompass “only equipment that, **at the time of use, could, in fact, have employed the functionalities described in the TCPA without human intervention and without first being technologically altered.**” *See Petition for Expedited Declaratory Ruling and Clarification*, GroupMe, Inc., CG Docket No. 02-278 (filed Mar. 1, 2012) (emphasis added).

current so that DIRECTV has a means to communicate with the customer. DIRECTV makes many different kinds of non-marketing calls to its customers, and makes these calls to the numbers the customers have elected to provide (whether a landline or a cell phone). For purposes of efficiency, DIRECTV is able to segment and create call lists of hundreds or thousands (or hundreds of thousands) of customers in like situations and to load all their numbers in telephone systems that then quickly contact the customers with information, notices, and alerts. These numbers are not randomly or sequentially selected.

Just a few examples of typical non-marketing calls are described below:

**Technician Arrival Time Calls.** When a technician is ready to head to a customer's home within the timeframe that had previously been set for installation or service, a call goes out to the customer based on the technician's estimated drive time from the previous job. The customer will receive an automated call that says: "Hello, this is a message from DIRECTV. We're calling to let you know that a technician will arrive at your location in the next 15 minutes." The message varies depending on the estimated travel time (from 15 minutes to 2 hours). This message allows customers both to prepare for the technician's arrival and to ensure someone is at home when the technician arrives, so that the customer can get the desired service.

**Calls Related To Weather Events.** When weather events (such as the recent Hurricane Sandy) are known to be heading to an area, DIRECTV's systems locate the customers in the affected area and will make automated calls to cancel appointments scheduled during a time that technicians will not be able to work outside on satellite dishes and roofs. Customers can also receive informational calls after a weather event letting them know about how to get programming during the time their satellite dishes may be out of alignment (or blown off the roof entirely). For example, after Hurricane Sandy hit the Northeast in October 2012, DIRECTV programmed a call to go out to the customer-provided telephone numbers of all NFL Sunday Ticket subscribers in the affected areas with a message to let them know that DIRECTV had temporarily authorized (at no charge) an upgrade to NFL Sunday Ticket Max so that customers unable to access their programming due to storm-related dish issues could nevertheless access the games on computers and/or mobile devices.

**Account-Related Calls.** DIRECTV wants to make sure that customers are aware when changes may be coming to their bills, and so makes an informational call to subscribers when an initial rebate period is going to end, to remind the subscriber that the rebate will soon be over and asking if the subscriber would like to ask any questions of a DIRECTV representative. Further, DIRECTV issues calls to persons disconnecting from the platform who have leased equipment, reminding them to return such equipment in the boxes DIRECTV will provide, so that customers will not be charged an equipment non-return fee.

With such innocuous, non-marketing calls—viewed by the vast majority of customers as helpful and welcome—made to the numbers customers provided DIRECTV as their points of contact, DIRECTV should not need to worry about facing legal complaints under the TCPA prohibitions against calls made by generating random or sequential telephone numbers.<sup>5</sup> And yet, DIRECTV has found itself named in TCPA cases brought over the receipt of such calls.

For example, DIRECTV found itself threatened with classwide TCPA claims based on a single call made to a customer’s cellular telephone number a few days after the customer had disconnected from the DIRECTV platform. The call was placed to remind the customer to return his leased equipment in order to avoid a non-return fee, but the customer’s attorney argued that his client had not consented to such a reminder. Last year, DIRECTV also found itself in federal court fighting a putative nationwide class action brought over a few “late-bill” reminder calls that DIRECTV placed to the telephone number provided by a long-time subscriber. The actual DIRECTV customer had changed his telephone number a few months before without telling DIRECTV, and the number DIRECTV had been provided—and called—had been reassigned to a new person’s cell phone. The plaintiff challenged DIRECTV’s consent defense, arguing that consent would exist only in relation to DIRECTV’s own customer and not to the person who inherited that customer’s number unbeknownst to DIRECTV. While DIRECTV eventually succeeded in having both the claim and case discussed above dismissed, it could have done so more quickly and economically had the Commission issued the ruling requested by CI to make clear that the TCPA restrictions on calls to cellular phones do not apply to non-marketing calls

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<sup>5</sup> For informational calls designed to reach certain customers with specific information, it would make no sense for DIRECTV to generate numbers or pick random numbers to call with such messages. DIRECTV is only interested in reaching out to its own customers, and it would not be beneficial for DIRECTV to pay to make non-marketing calls to random non-customers.

made with equipment that is not programmed or being used to make randomly or sequentially generated calls (and therefore lacks the capacity to dial random or sequential numbers).

Such clarification would be welcome because cases in which persons challenge consent related to non-marketing calls to cellular telephones are being brought at an increasing pace, particularly since the Seventh Circuit's recent determination that "consent" in that circuit does not apply to calls made to a number a company has on file for its customer if the number has been reassigned to a different person. This potential confusion over the nature of "consent" highlights the need for the Commission to clarify that certain non-marketing calls do not violate the TCPA, even before reaching any issue of consent.

Accordingly, the Commission should clarify that non-marketing calls made with equipment programmed only to dial targeted and segmented lists of customers are not made with ATDS equipment defined by the statute to have the "capacity (A) to store or produce numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."<sup>6</sup> Without such clarification, DIRECTV and other companies making non-marketing telephone calls in the United States will continue to face putative class actions brought by plaintiffs' lawyers who have turned TCPA litigation into a very lucrative cottage industry, because companies are often willing to settle for enormous amounts even for non-marketing calls rather than risk statutory damages of \$500 to \$1,500 per call (since there is no cap on overall damages). CI mentions in its Petition that "one San Diego plaintiffs' firm alone has filed at least 32 class action complaints since 2008" focused on the TCPA.<sup>7</sup> However, this far understates the situation in TCPA litigation hotbeds such as San Diego. DIRECTV checked for complaints filed by one San Diego TCPA plaintiffs' attorney that has attempted (and failed) three times to bring different

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<sup>6</sup> 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

<sup>7</sup> See CI Petition at 15 n.40.

TPCA class actions against DIRECTV, and immediately found in excess of 32 class action complaints pursued by that single attorney—some focused on marketing calls, but others focused on non-marketing calls such as the confirmatory text message a person receives after texting “STOP” to a company to assure a consumer that his or her request no longer receive messages she previously opted to receive is acknowledged and will be acted upon.<sup>8</sup> The purpose of the TCPA is to protect consumers’ privacy and to prevent bulk telemarketing stemming from equipment set to randomly or sequentially generate telephone numbers; the TCPA was not designed to hinder companies from efficiently contacting their own customers with non-marketing calls.<sup>9</sup>

Thus, as detailed below, DIRECTV supports CI’s petition asking the Commission to provide clarity in the context of non-marketing calls as to what is meant by “capacity” to store or produce numbers that were randomly or sequentially generated. Companies need assurance that they can continue to reach out to their own customers efficiently with non-marketing calls at the numbers provided by those customers without fear that every call could generate a lawsuit in which a consent defense would need to be developed through discovery (which can be very expensive and lengthy), or for which consent defenses may face challenges (if a customer has changed his or her number since providing it to the company). In the absence of this clarification, companies face the Hobson’s choice of potentially defending against litigation with

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<sup>8</sup> Companies that did not have the protection of clarification from the Commission on what would constitute ATDS equipment prohibited from contacting cellular telephones were so concerned about the risk of litigation that one bank, which had sent “STOP” confirmation text messages, recently settled class claims for those non-marketing confirmation texts with a payment of over \$8 million.

<sup>9</sup> See S. Rep. 102–178, at 4–5 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1972 (“TCPA’s statutory and legislative history emphasize that the statute’s purpose is to prevent unsolicited automated telemarketing and bulk communications.”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009)(“the purpose and history of the TCPA indicate that Congress was trying to prohibit use of [automatic telephone dialing system]s in a manner that would be an invasion of privacy.”).

the inherent risks involved, or alternatively, abandoning use of sophisticated and efficient equipment and manually dialing each and every affected customer, even if hundreds of thousands of people need the same information quickly.

**B. The Commission Should Specify That A Dialing Mechanism’s “Capacity” Is Defined By Its Programmed Capabilities.**

The Commission should clarify that, when a predictive dialer is programmed by a company to only call its own customers at specific numbers to deliver non-telemarketing messages, the equipment being used to make such calls does not have the “capacity” of dialing random or sequential numbers. This clarification is justified because both the business rules and the equipment’s programming would need to be rewritten before such a “capacity” could exist. When a company is calling its own customers by reaching out to the numbers those customers provided, there is at most a hypothesis of potential, future “capacity” for the ATDS equipment to become a mechanism for storing, producing, and/or dialing randomly or sequentially generated numbers. The “capacity” of a dialing technology should therefore be tethered to its actual programmed function and use—*i.e.*, its “current ability.”

Clarification is warranted because of the nebulous nature of the word “capacity”, which can be construed to refer to the future—and not actual—ability to do something. *See, e.g.*, Merriam-Webster Online Dictionary, definition of “capacity” at 2a (“the potential or suitability for holding, storing, or accommodating <a large seating capacity>”). But the future element of “capacity” does not range into the purely hypothetical; for example, the “potential” inherent in a room’s seating capacity contemplates the currently existing space, and does not include options where a building’s walls could be demolished and then rebuilt further out to accommodate more seats (especially when there are no plans for such alterations to the building).

DIRECTV understands why the Commission would be concerned about “possibilities”

where telemarketing calls are concerned. Nearly a decade ago, when the Commission first considered predictive dialers and whether such machines would be deemed ATDS equipment, the Commission was concerned that telemarketers would use predictive dialers to avoid regulation under the TCPA. Thus, in 2003, the Commission ruled that ATDS equipment that did not use random or sequential number generators would be “autodialers” subject to TCPA liability so long as the equipment had “capacity” to store or produce telephone numbers.<sup>10</sup> When the Commission revisited this issue in 2008, it reached a similar conclusion based on concerns about telemarketers trying to skirt the rules; but the Commission did not consider whether a different conclusion would be appropriate in the context of non-telemarketing calls.<sup>11</sup> Now that non-telemarketing calls (which the Commission has separated from telemarketing calls in its most recent TCPA order) are so frequently made with sophisticated dialing equipment, such clarification is needed.

In its Petition, CI suggests defining “capacity” as “current ability,” which would be helpful in that the word “current” could anchor the capacity to present use.<sup>12</sup> DIRECTV agrees that in order to ensure that “capacity” is defined in a clear manner consistent with the nature and purpose of the TCPA, the Commission should clarify that “capacity” in the context of 47 C.F.R. § 64.1200(f)(1) is limited to the manner in which the dialing mechanism is actually programmed, at least for non-marketing calls. It is only the current configuration of a predictive dialer (*i.e.*, whether it is set to generate random/sequential numbers) that should factor into a TCPA analysis, and not the hypothetical reprogramming that could be conducted to make the dialer do something

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<sup>10</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 ¶ 133 (2003).

<sup>11</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559 (2009).

<sup>12</sup> See CI Petition at 1.

else at some point in the future.

### **III. CONCLUSION**

Loading customers' phone numbers into a dialing system so that the numbers can be efficiently called by a company for non-marketing purposes is not the same thing as using ATDS equipment defined by the TCPA as having the "capacity" to randomly or sequentially generate numbers to call. Instead, for equipment to be the kind of ATDS equipment defined by the TCPA as prohibited from calling cellular telephones without consent, the equipment must be programmed to store and/or produce, and to dial, randomly or sequentially generated telephone numbers, for that equipment to have the "capacity" to do so.

Respectfully submitted,

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