

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
WASHINGTON

November 30, 2012

Via ECFS

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

*Re: CG Docket No. 02-278, In re Communication Innovators
Petition for Declaratory Ruling*

Dear Secretary Dortch:

Portfolio Recovery Associates, LLC,¹ by its attorneys and pursuant to the Commission's Public Notice in the above-referenced proceeding,² hereby submits these reply comments in connection with the Petition for Declaratory Ruling filed by Communications Innovators ("CI").³

The overwhelming majority of comments support the CI Petition — and for good reason: the CI Petition asks only that the Commission adopt a cogent and rational interpretation of the term "capacity" in the definition of an "automatic telephone dialing system" ("ATDS") under the Telephone Consumer Protection Act ("TCPA").⁴ The few comments that do not support the CI Petition fail to recognize that the Commission's legacy approach to this issue misinterprets the plain language and legislative history of the TCPA; they also fail to recognize how that legacy approach is harmful to businesses, consumers, and the American economy — all without providing a meaningful and bona fide consumer privacy benefit.

The TCPA was enacted to eliminate abusive telemarketing practices that were a danger to public safety and an invasion of consumer privacy. As a consequence, the TCPA imposes restrictions on the use of ATDS, which it defines as equipment which has the "capacity" to generate numbers randomly or sequentially and to dial those numbers.⁵ However, over the years

¹ Portfolio Recovery Associates, LLC, is a leader in the debt recovery industry. PRA's debt service representatives contact consumers to inform them of their obligations and work with them to find ways to repay their debts.

² *Consumer and Government Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from Communication Innovators*, Public Notice, DA 12-1653 (October 16, 2012) ("*CI Petition Public Notice*").

³ See *Communication Innovators, Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed June 7, 2012) ("*CI Petition*").

⁴ 47 U.S.C. §227.

⁵ *Id.* at § 227(a)(1).

Letter to Ms. Dortch
November 30, 2012
Page 2

the ATDS moniker has been applied far beyond its intended scope to equipment such as modern-day predictive dialers that neither possess — nor can possess without significant modification — these statutorily-required capabilities.⁶ The Commission’s historical rationale for interpreting the term ATDS in this manner cannot — and does not — hold in an era when widely available consumer devices such as smartphones are just as “capable” of dialing randomly- or sequentially-generated numbers as predictive dialers. The Commission’s rationale also is inappropriate because consumers today expect and want businesses to provide them with informational calls to their mobile phones in a cost-efficient manner.

Fortunately, the Commission has an opportunity to correct this strained legacy interpretation by clarifying that when a predictive dialer (1) is not used for telemarketing purposes, and (2) does not have the current ability to generate and dial random or sequential numbers, it does not meet the definition of an ATDS under the TCPA and related Commission rules.⁷

It is worth noting that every entity that filed comments in support of the CI Petition possesses practical, longstanding experience communicating with consumers. As noted by the U.S. Chamber of Commerce, consumer expectations of autodialed informational calls have changed over the years.⁸ Today, customers want to obtain information via their mobile devices and expect companies to be proactive in providing such information on a timely basis.⁹ Predictive dialers help make this happen. They allow businesses to reach consumers in an accurate, efficient and quality-controlled manner. They do not misdial programmed telephone numbers, call before or after permissible times of day, or call more frequently than intended.

The Commission has acknowledged that both the statutory language and legislative history of the TCPA support the notion that the Commission should consider changes in technology when interpreting the TCPA’s terms.¹⁰ If the Commission truly “seeks to promulgate rules that are ‘technology neutral’ because [it] believe[s] that ideally it is in the public interest for competing telecommunications technologies to succeed or fail in the marketplace on the basis of their merits and other market factors, and not primarily because of government regulation,”¹¹

⁶ *CI Petition* at 10-11.

⁷ *Id.* at 1. *See also CI Petition Public Notice* at 1.

⁸ Comments of The U.S. Chamber of Commerce, *CI Petition* (November 15, 2012) at 3.

⁹ *Id.* (over half of mobile-phone users rely on their mobile device to access information and expect the businesses with whom they work to keep them informed by contacting them at that number).

¹⁰ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14092 (2003) (footnotes omitted) (“2003 TCPA Order”).

¹¹ *See Biennial Regulatory Review - Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, Third Report and Order, 23 FCC Rcd 5319, 5325 (2008). *Cf. Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order on Reconsideration, 17 FCC Rcd 14789, 14794-95 (2002) (“The Commission has strenuously avoided solutions that are other than technology-neutral in crafting regulatory requirements for E911 implementation.”).

Letter to Ms. Dortch
November 30, 2012
Page 3

then granting the CI Petition should be an easy decision. Technology is evolving more rapidly today than ever before. In the TCPA context, a technology-neutral interpretation, such as the interpretation advanced by the CI Petition, would provide businesses and consumers with the certainty they need to thrive in the digital economy.

Only three brief comments were filed in opposition to the CI Petition. Two of them¹² simply refer to earlier arguments made in response to the GroupMe Petition¹³ — arguments to which PRA already has responded and that have been thoroughly discredited.¹⁴ The remaining opposing commenter argues that the TCPA regulates all autodialed calls to mobile phones, not just telemarketing calls.¹⁵ The Commission’s own recent precedent confirms that autodialed non-telemarketing calls merit *different* treatment from telemarketing calls because the former can be “highly desirable.”¹⁶ As noted by CI in its Petition, the Commission has recognized that restricting informational calls, such as credit card alerts, to mobile phones will unnecessarily impede consumer access to important and desired information.¹⁷ In short, the Commission has in the past exercised its authority to distinguish between telemarketing and non-telemarketing calls when interpreting the TCPA, and there is every reason to do so here.

Arguments that support continuing to interpret the term “capacity” broadly make little sense in the Information Age.¹⁸ The TCPA defines an ATDS 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.”¹⁹ A plain and natural reading of this language is that an ATDS consists of equipment that can generate numbers randomly or sequentially and then dial the numbers generated by that equipment; in other words, that having the “capacity” to generate and dial such numbers means having the *capability* to do so *at the time the call was placed*. Predictive dialers transmit calls to pre-programmed numbers; they do not use “a random or sequential number generator,” and they do not dial randomly- or sequentially-generated numbers. Relying on the term “capacity” to bridge these gaps overreaches and does not make any sense in today’s technology-driven world. If “capacity” means something more than present

¹² See Comments of Gerald Royland, *CI Petition* (November 15, 2012); Comments of Robert Biggerstaff, *CI Petition* (November 15, 2012).

¹³ *Consumer and Government Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc.*, Public Notice, DA 12-1180 (July 24, 2012) (“*GroupMe Petition*”).

¹⁴ See Comments of Portfolio Recovery Associates, *GroupMe Petition* (August 30, 2012); Reply Comments of Portfolio Recovery Associates, *GroupMe Petition* (September 10, 2012).

¹⁵ Comments of Joe Shields, *CI Petition* (November 15, 2012) at 2-3.

¹⁶ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1841 (2012) (“*2012 TCPA Order*”).

¹⁷ *2012 TCPA Order* at 1835 (requiring prior express written consent to transmit prerecorded or autodialed telemarketing calls to wireless numbers, but not informational, non-telemarketing calls).

¹⁸ Comments of Joe Shields, *CI Petition* (November 15, 2012) at 3-4.

¹⁹ 47 U.S.C. § 227(a)(1) (emphasis added).

Letter to Ms. Dortch
November 30, 2012
Page 4

capability, just about any digital device — including every smartphone — would have to be an ATDS, because just about every digital device is *capable* of generating and dialing random or sequential numbers with the right application. This cannot possibly mean what Congress intended when it enacted the TCPA.

Contrary to proponents of the status quo,²⁰ the current expansive interpretation of “capacity” in the definition of ATDS is confusing and harmful. It has resulted in a surge in costly and unnecessary litigation. Others have noted that in just a three-year period, from 2008 to 2011, the number of TCPA cases involving alleged unlawful ATDS use surged from 13 to 90.²¹ This has hampered the ability of companies to provide valuable services while providing no meaningful countervailing privacy protection to consumers. As DirecTV points out, even if a company can prevail on claims concerning its calling practices, defending against these claims can be expensive and time-consuming.²² The current approach also has negative economic consequences by inhibiting communications between businesses and consumers that facilitate transactions; and, as explained by Noble Systems, it also results in jobs being moved offshore where the labor costs of manual dialing are lower.²³

As noted above, the circumstances that have unleashed these destructive forces have provided no meaningful countervailing privacy benefits to consumers. Indeed, the existing, expansive interpretation of the term “capacity” often does little more than require businesses to undertake more expensive, labor-intensive ways of contacting consumers to provide valuable information. It does not prevent the transmission of informational calls to mobile phones; it merely requires such calls to be dialed manually — an outcome that is inefficient and nonsensical in this day and age.

For all of these reasons, the CI Petition should be granted forthwith.

Respectfully submitted,

/s/

Yaron Dori
Kara Leibin Azocar*
Counsel for Portfolio Recovery Associates

²⁰ Comments of Joe Shields, *CI Petition* (November 15, 2012) at 1-2.

²¹ See *CI Petition* at 14-15.

²² See Comments of DIRECTV, LLC, *CI Petition* (November 15, 2012) at 2-3.

²³ Comments of Noble Systems Corporation, *CI Petition* (November 15, 2012) at 5-8.

* Member of the Bar of Maryland, but not admitted in District of Columbia; supervised by principals of the Firm.