

June 27, 2013

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278**

Dear Ms. Dortch:

On Tuesday, June 25, 2013, Mark W. Brennan, counsel to Communication Innovators (“CI”), along with David McCann, President & Chief Executive Officer of Varolii Corporation (“Varolii”), and Brian Moore, Executive Director & Industry Practice Leader of Varolii, met with Mark Stone from the Commission’s Consumer & Governmental Affairs Bureau to discuss CI’s pending Petition for Declaratory Ruling (“Petition”) regarding the non-telemarketing use of predictive dialer solutions under the Telephone Consumer Protection Act (“TCPA”).

During the meeting, the representatives encouraged the Commission to grant the CI Petition and address the widespread confusion – and resulting harmful class action litigation – regarding whether predictive dialers that lack the statutorily required ability to store, produce, and dial random or sequential numbers are “automatic telephone dialing systems” (“autodialers”) under the TCPA. They explained that there are dozens of detailed examples where predictive dialer solutions are used today to place critical, time-sensitive non-telemarketing customer service calls to benefit consumers, including in the healthcare, financial services, transportation, and other sectors.¹ As demonstrated by these examples, today’s predictive dialer solutions (many of which are software- or cloud-based solutions) promote consumer-friendly calling practices and allow businesses with a legitimate need to contact large numbers of specific customers for particular non-telemarketing purposes to do so accurately, efficiently, and cost-effectively while complying with federal and state consumer protection laws. They connect live representatives with consumers as quickly as possible to provide timely, useful information.

The representatives explained that a grant of the CI Petition is urgently needed because of significant confusion by courts over the Commission’s prior TCPA decisions regarding the applicability of the TCPA to predictive dialers. Specifically, some courts are now interpreting the Commission’s prior TCPA rulings to mean that all predictive dialers are “autodialers” even if they do

¹ See, e.g., *Ex Parte* Letter filed by Communication Innovators *et al.*, CG Docket No. 02-278 (filed June 17, 2013).

not meet the statutory definition of an “autodialer.” As a result, companies are being sued in TCPA class actions and are facing potentially devastating penalties just for using predictive dialers or other new technologies. More than 500 TCPA cases have already been filed in court this year (nearly double the number of cases filed during the same period a year ago), with many involving allegations of predictive dialer use. The representatives stated that the specter of continued (and increasing) litigation is causing some leading companies to consider whether to stop placing many of the beneficial non-telemarketing customer service calls mentioned above.

The Commission can resolve much of this litigation by clarifying that a predictive dialer solution that does not meet the statutory requirements of an “autodialer” is not an “autodialer.” To provide meaningful relief, however, the Commission must specifically clarify the scope of the term “autodialer” under the TCPA. For example, clarifying the meaning of “prior express consent” instead of clarifying the term “autodialer” will provide no protection against opportunistic TCPA plaintiffs and will instead encourage further unnecessary litigation and increase costs to consumers, undermining the TCPA’s consumer protection goals.

In addition, any clarification must remain consistent with the statutory text of and legislative intent behind the TCPA – including by giving meaning to the phrase “using a random or sequential number generator.”² It must also remain consistent with the FCC’s longstanding precedent that the autodialer restriction “clearly” does not apply “to functions like ‘speed dialing,’ ‘call forwarding,’” and other services where “the numbers called are not generated in a random or sequential fashion.”³ Any approach that fails to give effect to these elements would not only be contrary to law but extremely harmful to consumers, as it would sweep in all kinds of electronics, including smartphones and many software- or cloud-based services where no “equipment” is being used, under the definition of “autodialer.”

Any clarification of the term “capacity” must also be consistent with the TCPA’s text and underlying Congressional intent. Specifically, the autodialer restriction only applies to equipment that “has the capacity” to store or produce, and dial, randomly or sequentially generated numbers. It does not extend to equipment – or software – that *could be modified* to provide such capacity.

Pursuant to Section 1.1206(b) of the Commission’s rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

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cc: Mark Stone

² See 47 U.S.C. § 227(a)(1).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).