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October 28, 2013

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

ACCEPTED/FILED

OCT 28 2013

Federal Communications Commission
Office of the Secretary

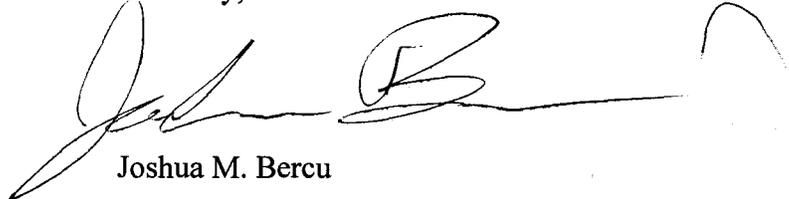
Re: *Petition for Expedited Declaratory Ruling*
CG Docket No. 02-278

Dear Ms. Dortch:

On behalf of Glide Talk, Ltd. ("Glide Talk"), please find enclosed the original and four copies of Glide Talk's Petition for Expedited Declaratory Ruling.

An extra copy of the Petition also is enclosed. Please stamp the extra copy as filed and return to the courier. If you have any questions, please do not hesitate to contact me at (202) 383-3425 or jbercu@wbklaw.com.

Sincerely,



Joshua M. Bercu

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)
)
Petition of Glide Talk, Ltd. for Expedited)
Declaratory Ruling)
)

**PETITION OF GLIDE TALK, LTD.
FOR EXPEDITED DECLARATORY RULING**

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October 28, 2013

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EXECUTIVE SUMMARY

Glide Talk, Ltd. requests the Commission to issue a declaratory ruling clarifying the scope of the TCPA with respect to the Glide App video messaging service. Commission action is necessary – and time is of the essence – to avoid regulatory uncertainty associated with potentially costly class action lawsuits, such as the one recently naming Glide Talk as a defendant. These suits rely on misplaced and virtually boundless interpretations of the TCPA, and they undermine the important consumer-oriented goals of the statute by threatening to deprive the public of innovative new communications products and services like the Glide App.

The Glide App has been called “the world’s first video walkie talkie.” If a recipient is available, he or she can see the message live as it is broadcast; if not, messages are stored in the cloud and can be watched (and responded to) later. Although the Glide App is not a conventional text messaging service, the service offers users the ability to invite friends to join using SMS text messages. Like any networked service, the Glide App’s appeal and usability for any individual depends on whether that individual’s friends and family members also are users of the Glide App. Thus, users can select friends and family from their devices’ contact lists and invite those individuals to use the app themselves. The user controls these invitation messages and chooses the recipients.

In the suit against Glide Talk filed in the United States District Court for the Northern District of Illinois, plaintiff Anthony Coffman seeks an injunction and statutory damages for alleged violations of the TCPA. In particular, Coffman claims that Glide Talk, through its invitation mechanism, willfully and knowingly “made unauthorized commercial text message calls” to Coffman’s cellular telephone number using equipment that “had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator” and that, as a result, Coffman and other members of the putative class are entitled to a minimum of \$500 per violation, as well as treble damages and attorneys’ fees.

It should be clear, however, that the Glide App invitational text messages initiated by users are not the sort of calls against which the TCPA was designed to protect. Moreover, a finding against Glide Talk would severely threaten the ability of this innovative start-up company to develop and offer the type of new mobile app consumer demand. The Commission thus should confirm that Glide Talk’s service does not violate the TCPA. As a general matter, the Commission should rebuff attempts to read its interpretations of the TCPA so broadly as to deprive consumers of access to innovative new products and services and limit their ability to choose to use text messaging in connection with such products and services. Specifically, the Commission should issue a declaratory ruling confirming that (a) the TCPA’s automatic telephone dialing system restriction applies only to equipment that can, at the time of the call, be used to store or generate sequential or randomized telephone numbers, (b) software and app providers that enable consumers to choose to send invitational text messages do not “make” calls under the TCPA merely by facilitating the ability of their users to send the text messages, and (c) in the event the Commission considers the provider to “make” the call, third-party consent is sufficient for non-telemarketing, user-initiated invitational text messages to wireless numbers. By doing so, the Commission can continue to aggressively protect consumers as Congress intended under the TCPA, without punishing innovation or limiting consumers’ access to desired new products and services.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
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Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
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)	
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**PETITION OF GLIDE TALK, LTD.
FOR EXPEDITED DECLARATORY RULING**

Glide Talk, Ltd. (“Glide Talk”), by its attorneys, hereby petitions the Federal Communications Commission (“Commission”) for declaratory ruling pursuant to Section 1.2 of the Commission’s rules.¹ Glide Talk requests the Commission to clarify, on an expedited basis, certain aspects of the scope of the Telephone Consumer Protection Act (“TCPA”).² Time is of the essence because Glide Talk has been named as a defendant in a class action lawsuit based on the invitational text messaging component of its innovative, consumer-oriented “video walkie-talkie” service. While the suit is meritless and Glide is confident it will be dismissed, Commission action is necessary to avoid lingering regulatory uncertainty associated with this and other potentially costly class action lawsuits.³ Suits such as these undermine the important

¹ 47 C.F.R. § 1.2.

² See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (current version at 47 U.S.C. § 227 (2010)); 47 C.F.R. § 1200.

³ The Commission also should rule in favor of certain other pending petitions to reduce regulatory uncertainty. See YouMail, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Apr. 19, 2013) (“YouMail Petition”) (requesting clarification that its auto-reply system is not an automatic telephone dialing system, that

consumer-oriented goals of the TCPA and threaten to deprive the public of innovative new communications products and services. Further, they rely on misplaced, opportunistic, and virtually boundless interpretations of the TCPA. To remedy the situation, the Commission should confirm that Glide Talk’s service does not violate the TCPA and issue the requested declaratory ruling.

I. INTRODUCTION AND BACKGROUND

Glide Talk was founded in 2012 by three entrepreneurs who live in Israel, thousands of miles from many of their American friends and family members. Frustrated by the difficulties of communicating across multiple time zones, they created an easier way to stay in touch using video chat and the transmission of recorded video messages. The Glide Talk video messaging service (“Glide App”), which is available for Apple and Android devices,⁴ has been called “the world’s first video walkie talkie.”⁵ The Glide App is the first communications product to enable

YouMail does not “initiate” the sending of auto-replies, and that calling parties consent to the receipt of auto-replies); Communication Innovators Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012) (requesting clarification that equipment which is not used for telemarketing purposes and does not have the current ability to generate and dial random or sequential numbers is not an automatic telephone dialing system under the TCPA); GroupMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition”) (requesting clarification regarding the scope of the term “capacity” and that third-party consent is sufficient for non-telemarketing, informational calls or text messages to wireless numbers under the TCPA); Petition for Expedited Declaratory Ruling or, in the Alternative, Petition for Expedited Rulemaking of Professional Association for Customer Engagement, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”) (requesting clarification that a system is not an automatic telephone dialing system unless it has the capacity to dial numbers without human intervention and that a system’s capacity is limited to what it is capable of doing, without further modification, at the time the call is placed). Glide Talk filed reply comments in support of the YouMail Petition. *See* Reply Comments of Glide Talk, Ltd., CG Docket No. 02-278 (filed Aug. 9, 2013).

⁴ The Android version of the Glide App is currently in beta.

⁵ Confirming the transformative potential of the Glide App, Glide Talk recently was voted an Audience Choice winner at TechCrunch’s Disrupt NY 2013 Startup Battlefield. *See* Chris Velazco, *Glide Rolls Out The Beta Version Of its Video Messaging Android App At Disrupt NY*,

real-time communication through video messaging. It combines the intimacy of a video call with the convenience of texting by allowing users to send private video messages to friends with just a single tap on their mobile devices. If the recipient is available, he or she can see the message live as it is broadcast; if not, messages are stored in the cloud and can be watched (and responded to) later, like a text message. As a result, the Glide App overcomes many of the shortcomings inherent in other real time video communication tools – the hassle of scheduling, poor picture quality, and calls freezing or dropping – by combining low latency streaming video technology with traditional messaging. The Glide App differs from other video messaging services due largely to the service’s speed; Glide streams videos, most of which are watched before the message sender has even completed the message. Moreover, the Glide App’s simple, one-touch user interface enables users to avoid the cumbersome process of attaching video files to texts.

Although the Glide App is not a conventional text messaging service and does not rely on Short Message Service (“SMS”) or Multimedia Messaging Service technology for its primary functionality,⁶ the service offers users the ability to invite friends to join using SMS text messages. Like any networked service, the Glide App’s appeal and usability for any individual depends on whether that individual’s friends and family members also are users of the Glide App. Thus, the Glide App enables users to select friends and family from their devices’ contact lists and to invite those individuals to use the app themselves. The user controls these invitation messages and chooses the recipients. The Glide App merely provides a convenient mechanism

TECHCRUNCH, Apr. 29, 2013, <http://techcrunch.com/2013/04/29/glide-rolls-out-the-beta-version-of-its-video-messaging-android-app-at-disrupt-ny/>.

⁶ The Glide App is a cloud-based, proprietary video messaging service that utilizes the Internet connectivity of users’ devices to transmit video messages between users of the Glide App.

through which a Glide App user may send a text message invitation, just as the user could do directly on the same device by using the device's text messaging interface outside of the Glide App.

On July 19, 2013, Anthony Coffman filed a class action complaint against Glide Talk in the United States District Court for the Northern District of Illinois, Eastern Division.⁷ Coffman seeks an injunction and statutory damages for alleged violations of the TCPA by Glide Talk. In particular, Coffman claims that Glide Talk willfully and knowingly “made unauthorized commercial text message calls” to Coffman’s cellular telephone number using equipment that “had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator” and that, as a result, Coffman and other members of the putative class are entitled to a minimum of \$500 per violation, as well as treble damages and attorneys’ fees. As discussed in more detail herein, the Glide App invitational text messages initiated by users are not the sort of communications the TCPA was designed to protect against. A finding against Glide Talk would severely threaten the ability of this innovative start-up company to develop and offer the type of new mobile apps consumers demand. Therefore, the Commission should clarify its interpretation of the TCPA in a manner that will eliminate the uncertainty that threatens the continued availability of popular services like the Glide App. The agency should take into account the characteristics of the mobile app ecosystem and text message architecture, which differ from traditional voice calls and even differ from the wireless landscape ten years ago, at the time the Commission first wrestled with some of these issues.

The Commission should rebuff attempts to read its interpretations of the TCPA so broadly as to deprive consumers of access to innovative new products and services and limit

⁷ Coffman v. Glide Talk, Ltd., No. 13-cv-05190, Complaint (N.D. IL Jul. 19, 2013).

their ability to choose to use text messaging in connection with such products and services. Specifically, the Commission should issue a declaratory ruling confirming that (a) the TCPA's automatic telephone dialing system ("ATDS") restriction⁸ applies only to equipment that can, at the time of the call, be used to store or generate sequential or randomized telephone numbers, (b) software and application providers that enable consumers to choose to send invitational text messages do not "make" calls under the TCPA merely by facilitating the ability of their users to send the text messages, and (c) in the event the Commission considers the provider to "make" the call, third-party consent is sufficient for non-telemarketing, user-initiated invitational text messages to wireless numbers. By doing so, the Commission can continue to aggressively protect consumers as Congress intended under the TCPA without punishing innovation or limiting consumers' access to desired new products and services.⁹

⁸ 47 U.S.C. § 227(1) ("The term 'automatic telephone dialing system' means 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.").

⁹ If the Commission declines to issue the requested declaratory ruling, it should grant Glide Talk a retroactive waiver for the App's invitation mechanism. 47 C.F.R. § 1.3. Alternatively, the Commission could exempt from the TCPA rules the pro-consumer invitation mechanism offered through the Glide App. Even if user-initiated invitation messages could be considered to be made for a commercial purpose – and they should not be – such messages would still satisfy the statutory requirements for a Commission exemption: The Glide App's user-initiated invitation messages do not adversely affect the privacy rights of recipients because they are caused to be sent by a user to recipients with whom the user has a prior social, familial, or professional relationship. User-initiated invitation messages also do not contain an unsolicited advertisement, because they neither are an advertisement (the messages are controlled by the user) nor are they unsolicited (the user requests the invitation for the recipient as an agent of the recipient). *See* 47 U.S.C. § 227(b)(2)(c) (The Commission "may, by rule or order, exempt from the requirements ... calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect....").

II. THE REQUESTED CLARIFICATION WILL PROVIDE GREATER CERTAINTY AND THEREBY PROMOTE INVESTMENT AND INNOVATION

Glide Talk supports the goals of the TCPA, which Congress enacted in 1991 to address certain undesirable telemarketing practices that “could be an intrusive invasion of privacy and, in some instances, a risk to public safety.”¹⁰ Glide Talk believes, however, that the current uncertainty surrounding interpretation of the TCPA must be addressed to ensure that mobile app developers and other industry players can continue to innovate and invest in new products and services.

As a preliminary matter, the Commission should view these issues in the context of the broader landscape of wireless services and mobile apps. Many of today’s most popular offerings were unthinkable when the Commission launched its ATDS discussion and affirmed that text messages can be “calls” under the TCPA in some circumstances.¹¹ More specifically, a declaratory ruling would provide clarity with respect to two Commission decisions over the past

¹⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8753 ¶ 2 (1992) (“1992 Order”); *accord Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14018 ¶ 4 (2003) (“2003 Order”); TCPA, 105 Stat. 2394, 2395; S. REP. NO. 102-178, at 1 (1991); 137 Cong. Rec. 18123 (1991) (stating that the legislation was introduced to ban “computer voice” telemarketing calls).

¹¹ This affirmation that text messages are the same as voice calls may make sense for many purposes under the TCPA, but perhaps does not hold in all cases. Text messages are more akin to instant messages or emails than voice calls, particularly because an individual consumer can use virtually any smartphone’s native text messaging applications to send text messages easily to multiple contacts. For example, in the context of personal invitations, the function used by the Glide App and many other apps could not and would not be replicated by any of a user’s device’s native voice applications. A consumer cannot seamlessly send a voicemail recommending the Glide App to a large number of family and friends, but could do so via his device’s native text messaging application. The Glide App merely makes it easier for the consumer to send these text messages; it does not offer a capability that is not otherwise available. Thus, some limitations and concerns under the TCPA that are appropriate for voice calls may need to be approached differently for text messages, and Glide Talk urges the Commission to examine and clarify these distinctions.

10 years that were intended to address the behavior of telemarketers but have been read more broadly – and inappropriately – by class action plaintiffs’ lawyers.¹²

Initially, the Commission adopted rules that appropriately effectuated the statute’s provisions barring the transmission of calls using random or sequential number generators. The Commission specified, however, that this prohibition does *not* apply to services or functions where “the numbers called are not generated in a random or sequential fashion.”¹³ Thereafter, the Commission confirmed that the TCPA’s ATDS prohibition does not apply to calls that “are not directed to randomly or sequentially generated telephone numbers. . . .”¹⁴

In 2003, however, the Commission reviewed its implementation of the TCPA, citing the fact that “the telemarketing industry has undergone significant changes in the technologies and methods used to contact consumers.”¹⁵ The Commission suggested in this and certain subsequent decisions that the TCPA prohibits the use of an autodialer to make “Telemarketing Calls to Wireless Numbers,” including SMS calls.¹⁶ Specifically, to clarify that telemarketers could not circumvent the TCPA’s protections by using lists of numbers rather than randomly generated or sequentially generated numbers, the Commission suggested that the use of

¹² See *2003 Order; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559 (2008) (“*2008 Order*”).

¹³ *1992 Order*, 7 FCC Rcd at 8776 ¶ 47.

¹⁴ *Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, *Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12398 ¶ 19 (1995) (“*1995 Order*”).

¹⁵ *2003 Order*, 18 FCC Rcd at 14017 ¶ 2.

¹⁶ *Id.* at 14115 ¶ 165.

predictive dialers¹⁷ to call consumers without their consent is prohibited regardless of whether the dialer randomly generates numbers or uses a list.¹⁸

The Commission ruled that the TCPA covered calls by “predictive dialers,” but plaintiffs’ lawyers have gone much farther. They have filed putative class action claims on the theory that virtually any modern computerized equipment with the ability to dial phone numbers for a user, even an ordinary smartphone, could be classified as an ATDS.¹⁹ If this were so, the TCPA arguably would prohibit *any* call or SMS from being made from *any* smartphone without the prior express consent of the recipient.²⁰ It seems highly unlikely that the Commission anticipated or intended this result.²¹

While some suits brought under the TCPA may well be consistent with Congress’s intention to thwart telemarketers, many of the pending TCPA class action lawsuits threaten to distort the Commission’s careful regulatory scheme implementing the TCPA. These suits

¹⁷ “A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers’ telephone numbers in a manner that ‘predicts’ the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, a consumer answers the phone only to hear ‘dead air’ because no telemarketer is free to take the call.” *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14143 ¶ 8 n.31 (2003). Predictive dialers have no relation to Glide Talk’s services, nor to text messaging generally.

¹⁸ *Id.*; accord 2008 Order.

¹⁹ Numerous applications now exist that permit smartphones to place calls “without human intervention” or to place calls from numbers listed in a directory, such as a contact list.

²⁰ See, e.g., PACE Petition at 9; YouMail Petition at 11.

²¹ The unintended practical consequence of the Commission’s suggestion is even more severe – the Commission has offered fodder for class action lawsuits that do nothing to serve the consumer-oriented goals of the TCPA and instead limit the availability of new and innovative communications technologies to the public, thereby limiting consumers’ choices in how to communicate with their peers.

threaten valuable services that the public desires and that bear no nexus to the unwanted telemarketing against which the law is designed to protect. For example, the explosion in opportunistic TCPA class action lawsuits harms innovative mobile app providers, like Glide Talk, that have fueled the \$60 billion app economy and is expected to double by 2017.²² These suits are expensive to defend and unnecessarily divert precious human and economic resources away from research and development. Moreover, the plethora of complaints filed at a time of regulatory uncertainty creates a chilling effect, derailing – or, at best, delaying – introduction of new products and services to the marketplace.

The Commission must act to remove this uncertainty and avoid harm to industry and consumers. As discussed further herein, this can be accomplished through the requested declaratory ruling, with no reduction in the Commission’s commitment to enforcing the type of TCPA violations the statute was designed to capture.

III. THE COMMISSION SHOULD CONFIRM THAT THE ATDS RESTRICTION APPLIES ONLY TO EQUIPMENT THAT COULD, AT THE TIME OF THE CALL, BE USED TO STORE OR GENERATE SEQUENTIAL OR RANDOMIZED TELEPHONE NUMBERS

As noted above, the unintended consequence of the Commission’s more expansive construction of the TCPA’s scope would be that virtually *any* smartphone could be classified as an ATDS. The same is true for any SMS invitation mechanism: any mobile application or mechanism that allows a user to send SMS messages to multiple contacts, without individualized dialing, could be classified as an ATDS. However, these mechanisms are not capable of storing or generating sequential or randomized telephone numbers at the time of the call – they only

²² See Matt Hamblen, *App economy expected to double by 2017 to \$151B*, COMPUTERWORLD, July 15, 2013, http://www.computerworld.com/s/article/9240794/App_economy_expected_to_double_by_2017_to_151B.

utilize the specific telephone numbers provided in the address book of the user's device. To avoid a result that is irrational, inconsistent with the statute, and subjects companies such as Glide Talk to unnecessary litigation, the Commission should clarify that equipment used to make a call is an ATDS subject to the TCPA only if it is capable of storing or generating sequential or randomized numbers at the time of the call. This clarification would be consistent with the language of the statute and Congressional intent. If, however, the Commission declines to find that all equipment lacking current capability is not an ATDS, it should at a minimum find that such equipment is not an ATDS when used solely for consumer-initiated invitational purposes.

A. THE TCPA'S STATUTORY TEXT AND LEGISLATIVE HISTORY REQUIRE A MORE LIMITED DEFINITION OF ATDS

The TCPA's plain language makes clear that the statute's ATDS restrictions apply only to equipment that could, *at the time of the call*, be used to store or generate sequential or randomized telephone numbers. In relevant part, the TCPA provides that "[i]t 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 ... 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 ... 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."²³ The TCPA defines the term "automatic telephone dialing system" to mean "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."²⁴

²³ 47 U.S.C. § 227(b).

²⁴ *Id.* § 227(a)(1).

This language on its face does not support a claim that the ATDS requirement was meant to apply to calls (including text messages) from devices that *could be* configured to “store or produce telephone numbers to be called, using a random or sequential number generator,” even when they were *not* so configured at the time that the relevant calls were placed, and no random or sequential number generator was actually involved. The statute expressly limits the term “ATDS” to cover only “equipment which *has the capacity*” to store or produce such numbers.²⁵ First, Congress’s use of the present-tense word “has” made clear its intent that the device at issue be able to “store or produce” numbers “using a random or sequential number generator” at the time of the alleged violation – *i.e., at the time the call at issue is placed*. Congress could have defined ATDS to include equipment that “has *or could develop* the capacity,” but it did not. Second, Congress’s use of the term “capacity” confirms Congress’s intention that the term ATDS applies only to equipment that can generate or store randomized or sequential numbers, not to equipment that later could someday be reconfigured to do so. Congress might well have referenced equipment with the “potential” to store or produce random or sequential numbers for dialing, but – again – it did not. Rather, it included only equipment that has the “capacity” – the present capability – to do so. These congressional choices must be respected. Congress’s “choice of words is presumed to be deliberate,”²⁶ and bodies interpreting statutes must “give effect ... to every clause and word” that Congress uses.²⁷ An interpretation that treats as an ATDS any equipment not currently able to store or produce sequential or randomized numbers would unlawfully contravene the words that Congress chose.

²⁵ *Id.* (emphases added).

²⁶ *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013).

²⁷ *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (internal quotations and citations omitted).

The TCPA's legislative history further demonstrates that Congress was concerned with the actual use of sequential or random-number calling by telemarketers, not with the transmission of calls using devices that could be, but were not, programmed to place such calls. As Senator Fritz Hollings stated when he introduced the legislation: "This bill is purely targeted at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country – telemarketing calls placed to the home."²⁸ Thus, the Senate Report on the bill as passed expressed worry that telemarketers might "dial numbers in sequence, thereby tying up all the lines of a business and preventing outgoing calls,"²⁹ and the House Report observed that "[t]elemarketers often program their systems to dial sequential blocks of telephone numbers."³⁰ Signing the bill into law, President George H.W. Bush expressed concern that, notwithstanding its merits, the TCPA "could also lead to unnecessary regulation or curtailment of legitimate business activities," emphasizing that he had signed it only "because it gives the Federal Communications Commission ample authority to preserve legitimate business practices."³¹

In short, Congress used words that limited the ATDS definition to equipment currently able to generate or store sequential or randomized numbers – not equipment that might someday be configured to do so – and the President signed the law only because it enabled the Commission to limit the TCPA's scope appropriately. Those choices – which reflected

²⁸ 137 Cong. Rec. 18123 (1991).

²⁹ See S. REP. NO. 102-178, at 1-2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969.

³⁰ H.R. REP. NO. 102-317, at 10 (1991).

³¹ George Bush: "Statement on Signing the Telephone Consumer Protection Act of 1991," December 20, 1991, *available at* <http://www.presidency.ucsb.edu/ws/?pid=20384>.

underlying concerns regarding the activities of *telemarketers* – must be respected by bodies interpreting that legislation.

B. AT THE VERY LEAST, THE COMMISSION SHOULD CONFIRM THAT MECHANISMS THAT ENABLE USERS TO SEND INVITATIONAL MESSAGES TO CONTACTS ARE NOT ATDSs

Invitation mechanisms only use the phone numbers contained in a user's address book and thus should be viewed as having no capacity to store or generate sequential or randomized telephone numbers at all.³² To confirm this position and provide much needed clarity, the Commission should state that such invitation mechanisms are not ATDSs.³³ The Glide App, for example, allows users to send SMS messages to friends contained in their address book. The only numbers that the Glide App accesses – and can access – are those contained in the user's address book. In fact, neither Glide Talk, the Glide App, nor the App's invitation mechanism generates *any numbers whatsoever*, let alone randomized or sequential numbers. Instead, the invitation messaging mechanism enables messages to be sent only to numbers that are preset and defined by the device user in the device's address book. In other words, the Glide App and the App's invite mechanism used by the Glide App *never* have the *capacity* to generate randomized or sequential numbers, and do not provide users with the capability – *i.e.*, capacity – to generate randomized or sequential numbers. Accordingly, the Glide App is not an ATDS.

³² In order for an end user to utilize this type of invitation mechanism to send messages to sequential or randomized numbers, the user first would need to use a separate mechanism to create random or sequential numbers that are then input into the user's contact book. The invitation mechanism does not generate such numbers; the user's other mechanism does.

³³ Although this petition focuses on invitational text messages, certain other text messages also are not properly covered by the TCPA.

IV. SOFTWARE AND APP PROVIDERS THAT ENABLE CONSUMERS TO CHOOSE TO SEND INVITATIONAL MESSAGES DO NOT “MAKE” CALLS FOR PURPOSES OF THE TCPA

Software and app providers that merely facilitate the sending of text messages by their users do not “make” calls.³⁴ Consequently, even if the equipment used by software and app providers such as Glide Talk were properly characterized as ATDSs (and, for the reasons set forth above, they are not), text messages sent by the providers’ users via the apps and software developed by such providers cannot result in the violation of the TCPA by the providers.

The Commission should bear in mind the specific purpose and intent of invitational text messages in connection with a service such as the Glide App. Individuals use the Glide App’s invitation mechanism to reach out to their family members, friends, and acquaintances to seek additional participants in a communications service that depends on connections to other members. In other words, Glide App users utilize this mechanism to increase the value of the service offered by Glide Talk to them. Put simply, the provider does not initiate the text message(s) or choose the recipient(s) of the text message(s), and the provider does not cause the text message(s) to occur.³⁵ In addition, in many cases the provider does not control the content of the text messages. Instead, the provider’s software and apps merely “operate as intermediate

³⁴ See 47 U.S.C. § 227(b)(1) (“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* ... using any automatic telephone dialing system or an artificial or prerecorded voice....”) (emphasis added); see also CallFire Comments, CG Docket No. 02-278, at 4 (filed July 25, 2013) (“CallFire Comments”); see also American Financial Services Association Comments, CG Docket No. 02-278, at 4 (filed July 19, 2013).

³⁵ See YouMail Petition at 12; see also Petition for Expedited Declaration Ruling of 3G Collect Inc. and 3G Collect LLC, CG Docket No. 02-278, at 5 (filed Oct. 28, 2011) (initiating a call “requires the independent action of the calling party”).

conduits, and should be recognized by the Commission as such.”³⁶ Accordingly, even if invitational text messages associated with mobile apps fall under the TCPA, the app provider should not be deemed to “make” calls for purposes of the TCPA. A provider should not be subject to crippling penalties under the TCPA simply because it offers innovative new communications services that are widely embraced by the public to facilitate communications with other members of the public.

The Glide App is an excellent example of the fact that the users of communications software and apps, rather than the providers that developed them, “make” calls by sending text messages. Users of the Glide App must have the Glide App installed on their devices to exchange video messages over the Glide App. As a result, to fully realize the benefits of the Glide App, new users must introduce their friends and family members to the Glide App, which they often do by sending text message invitations instructing the message recipients how to download the Glide App. Although the Glide App facilitates this process, it is Glide App users, and not Glide Talk, who decide to send the text message invitations, determine to whom to send the text messages, and choose when to send the text messages.³⁷

Further, the text message invitations only can be sent by users through the Glide App to recipients with whom the user has a prior relationship, as demonstrated by the fact that the recipient is in the senders’ device’s contact list. This pre-existing relationship between the

³⁶ CallFire Comments at 4; *see also* Petition for Declaratory Ruling of Club Texting, Inc., CG Docket No. 02-278, at 1 (filed Aug. 25, 2009) (“Text broadcasters act neither as the sender or recipient of text messages, but rather as an intermediary and conduit operating a platform that enables message delivery.”).

³⁷ Even if the Glide App did not facilitate the sending of text message invitations by Glide App users, a user nevertheless could still choose to use text messages to introduce his or her friends and family members to the Glide App. The Glide App merely facilitates this process by reducing the administrative burden on users and enabling them to avoid potential fees that may be charged by their carriers for sending text messages.

sender of the text message invitation and its recipient demonstrates that the recipient expected and intended to receive messages from the sender. Thus, these text message invitations constitute peer-to-peer information communications. They are not the type of commercial telemarketing communications targeted by Congress when it adopted the TCPA, and they are not calls “made” by Glide Talk.

V. THE COMMISSION SHOULD CONFIRM THAT THE PROVISION OF A CONTACT’S PHONE NUMBER BY A CONSUMER CONSTITUTES PRIOR CONSENT

Consistent with the requests of GroupMe and the Cargo Airline Association,³⁸ to the extent that an app provider is considered a “make[r]” of a call, the Commission should clarify that the app provider reasonably can rely on any consent to make social communications that the call recipient has provided to the app user. Social conventions should serve as a foundation for determining users’ and consumers’ expectations. As general matter, device users have prior relationships with the contacts listed in their devices’ address books. In this context, the contact expects to receive social calls and messages from the user, and thus the user should be presumed to have prior express consent to “make” a call or message to such a contact.³⁹ The method by which the consumer chooses to “make” such a call, for example, through the device’s native messaging app or an app like the Glide App, should have no effect on the status of the consent. The Commission should clarify that, in the context of social communications, the user has prior express consent to send a message and can transfer that consent to any app provider that could be considered the “make[r]” of the message.

³⁸ GroupMe Petition at 16-19; Petition for Expedited Declaratory Ruling of the Cargo Airline Association, CG Docket No. 02-278, at 4-6 (filed Aug. 17, 2012).

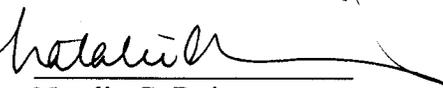
³⁹ See also *1992 Order*, 7 FCC Rcd at 8769 ¶ 31 (“[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”).

VI. CONCLUSION

For the reasons stated above, the Commission should grant the requested declaratory ruling expeditiously.

Respectfully submitted,

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October 28, 2013