

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matters of )  
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Professional Association for Customer )  
Engagement and Glide Talk, Ltd. )  
 )  
Petitions for Expedited Declaratory Ruling )  
\_\_\_\_\_

CG Docket No. CG 02-278

**COMMENTS OF TWILIO INC. IN SUPPORT OF  
PETITIONS FOR EXPEDITED DECLARATORY RULING**

Michael B. Hazzard  
Adam D. Bowser  
Arent Fox LLP  
1717 K. St., N.W.  
Washington, DC 20036-5339  
Tel: (202) 857-6029  
Fax: (202) 857-6395  
[michael.hazzard@arentfox.com](mailto:michael.hazzard@arentfox.com)  
[adam.bowser@arentfox.com](mailto:adam.bowser@arentfox.com)

*Counsel to Twilio Inc.*

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Twilio Inc. (“Twilio”) submits these comments in response to the Federal Communications Commission’s Public Notices seeking comment on the Petition for Expedited Declaratory Ruling from the Professional Association for Customer Engagement (“PACE”),<sup>1</sup> and the Petition for Expedited Declaratory Ruling from Glide Talk, Ltd. (“Glide Talk”),<sup>2</sup> which seek declaratory rulings clarifying the scope of the Telephone Consumer Protection Act (“TCPA”).<sup>3</sup>

## I. INTRODUCTION AND SUMMARY

The Commission should issue rule modifications, or at the very least an order, that clarifies the points raised by PACE and Glide Talk concerning the scope of equipment that fall within the definition of an automatic telephone dialing system (“ATDS” or “autodialer”). The Commission should also clarify that software providers that merely enable message transmission do not “make” calls under the TCPA. These clarifications would help bring some rationality to TCPA lawsuits and require plaintiffs’ lawyers to do more than just duplicate basic complaints against any company involved in the transmission of message used to reach consumers. At the same time, consumers would continue to be protected from unsolicited text messages because companies actually using equipment that dials random and sequential telephone numbers or who make calls without prior express consent would be liable under the TCPA.

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<sup>1</sup> *Professional Association for Customer Engagement.*, Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”).

<sup>2</sup> *Glide Talk, Ltd.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 28, 2013) (“Glide Talk Petition”)

<sup>3</sup> See Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking from the Professional Association for Customer Engagement.*, CG Docket No. CG 02-278, DA 13-220 (Nov. 19, 2013); see also Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Glide Talk, Ltd.*, CG Docket No. CG 02-278, DA 13-220 (Dec. 2, 2013)

Twilio therefore urges the Commission to grant the PACE and Glide Talk Petitions and end a long-standing source of uncertainty regarding what equipment constitutes an ATDS under the TCPA and the potential liability of application developers that provide users the ability to initiate communications to their friends and family. The development of software applications that facilitate user-initiated messages is quickly outpacing Commission regulation and the lack of guidance from the Commission has led to a drastic increase in class action lawsuits. Messaging applications have exploded in popularity and consumers and businesses see incredible value in messaging applications as a communications medium for sharing alerts, solicited marketing, and other information. This rise in popularity combined with the absence of Commission guidance has turned the TCPA into plaintiffs' lawyers' "go-to" statute to sue virtually any company that utilizes messaging applications for millions of dollars, regardless of whether there was an actual violation that the TCPA is intended to prevent.<sup>4</sup> The TCPA is quickly becoming a deterrent to using innovative messaging applications for any reason, because the risk of a TCPA lawsuit is too great.

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<sup>4</sup> Several petitions in addition to PACE's and Glide Talk's are pending at the Commission that seek Commission guidance related to SMS. See *Public Knowledge, et al.*, Petition For Declaratory Ruling that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Non-Discrimination Rules, WT 08-7 (Dec. 11, 2007); Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Club Texting's Petition for Declaratory Relief that Text Broadcasters are Not "Senders" of Text Messages Under § 227(b)(1) of the Telephone Consumer Protection Act*, CG Docket No. 02-278, DA 09-2387 (Nov. 9, 2009).

## II. BACKGROUND

### A. The Purpose of the TCPA

The TCPA was intended “[t]o protect consumers from unwanted calls.”<sup>5</sup>

However, recognizing that the TCPA called for a balancing of consumer privacy and business interests, the Commission in crafting the initial rules that implemented the TCPA stated that “[o]ur task in this proceeding is to implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as well as the legitimate business interests of telemarketers.”<sup>6</sup> In addition to protecting privacy rights, the Commission’s rules are focused on maintaining the health and safety of consumers by preventing unwanted calls.<sup>7</sup>

In 2003, the Commission recognized that the changing marketplace of telemarketing and facsimile advertisements warranted an update to the TCPA rules. In addition to establishing a do-not-call list, the Commission revised rules for facsimile advertisements and clarified the connection between “senders” and “fax broadcasters.”<sup>8</sup> Relevant to Glide Talk’s Petition is the Commission’s consideration of the relationship between companies wishing to send fax advertisements and fax broadcasters, the separate companies with the technology to send fax advertisements. The Commission recognized that if a fax broadcaster simply provides

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<sup>5</sup> *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 55 Communications Reg. (P&F) 356, 2012 WL 507959, ¶ 4 (F.C.C. Feb. 15, 2012).

<sup>6</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774, ¶ 3 (1992) (“1992 TCPA Order”); *see also id.* ¶ 59 (“Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing.”).

<sup>7</sup> *Id.* ¶ 58 (“The regulations implemented satisfy the TCPA’s requirements that residential subscribers be provided with a means to avoid unwanted telephone solicitations, and that autodialers and prerecorded or artificial voice messages be used responsibly in ways that do not impede commerce or threaten public health and safety.”).

<sup>8</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (“2003 TCPA Order”).

the transmission technology and does not provide telephone numbers or determine the content of an advertisement, the fax broadcaster should not be liable under the TCPA. Specifically, the Commission found:

The Commission has determined to amend the rules to explicitly state that a fax broadcaster will be liable for an unsolicited fax if there is a high degree of involvement or actual notice on the part of the broadcaster. The new rules provide that if the fax broadcaster supplies the fax numbers used to transmit the advertisement, the fax broadcaster will be liable for any unsolicited advertisement faxed to consumers and businesses without their prior express invitation or permission. We agree, however, that if the company whose products are advertised has supplied the list of fax numbers, that company is in the best position to ensure that recipients have consented to receive the faxes and should be liable for violations of the prohibition. Therefore, the fax broadcaster will not be responsible for the ads, in the absence of any other close involvement, such as determining the content of the faxed message.<sup>9</sup>

The Commission also clarified that for common carriers, “if a common carrier is merely providing the network over which a subscriber (a fax broadcaster or other individual, business, or entity) sends an unsolicited facsimile message, that common carrier will not be liable for the facsimile.”<sup>10</sup> In all cases, the Commission is focused on “nature of an entity’s activity” to determine whether the TCPA applies to that entity.<sup>11</sup> In short, it is clear that the Commission recognizes where an entity simply provides a transmission path, in the absence of any greater involvement, that entity should not be liable under the TCPA for any alleged violations of the actual sender.

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<sup>9</sup> *Id.* ¶ 195.

<sup>10</sup> *Id.* ¶ 196.

<sup>11</sup> *Id.* ¶ 195.

## **B. The Increasing Popularity of SMS and the Rise of SMS TCPA Litigation**

In 2003 the Commission also extended the term “call” in the TCPA to incorporate SMS, which courts have subsequently followed.<sup>12</sup> Parallel to this expansion of the TCPA, the use of SMS has skyrocketed in the past decade. As the Commission has noted, “consumers are increasingly substituting among voice, messaging, and data services, and, in particular, are willing to move from voice to messaging or data services for an increasing portion of their communications needs.”<sup>13</sup> As consumers use SMS in increasing numbers, companies have created innovative and beneficial SMS-based services such as weather alerts, emergency notifications, sports scores, group text messaging, and mobile coupons, among many others. Technological advances and creative thinking are powering the expansion of SMS by consumers and companies, with only more to come.

Unfortunately, with the expansion of the TCPA and the expansion of the use of SMS by consumers and companies, TCPA lawsuits have significantly increased, causing companies that use SMS to face million dollar judgments or settlements. These suits have also raised legal questions about the TCPA that remain unresolved or have resulted in inconsistent opinions in the courts. In fact, TCPA lawsuits are being filed on almost a daily basis across the country. The same plaintiffs’ law firms are involved in many of these TCPA lawsuits,

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<sup>12</sup> See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003) (“This [prohibition] encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls...”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (affirming FCC’s determination that a text message is a call for purposes of 47 U.S.C. § 227); *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1009 (N.D. Ill. 2010) (same); see also *Kramer v. Autobytel, Inc.*, 2010 WL 5463116 (N.D. Cal. 2010) (same); *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831 (Ariz. App. 2005) (same).

<sup>13</sup> See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664, 9687-9688, ¶ 4 (2011) (*Fifteenth Mobile Wireless Report*).

duplicating the same basic complaint against any company that uses SMS or is involved in the transmission of an SMS message. The companies in turn must spend energy and dollars fighting these lawsuits, and often settle for millions of dollars, despite the fact that the vast majority of the users of their SMS services never complain. In contrast to the claims in these lawsuits, most consumers want the SMS alerts, coupons, and other information provided by through SMS marketing by the companies.

Despite the upheaval in the legal landscape relating to the TCPA and SMS, the Commission has provided little guidance since its 2003 expansion of the term “call.” As useful SMS-based services are created that benefit consumers, the Commission should take this opportunity to provide clarity in the TCPA with rule revisions, or at the very least a clarifying order, in light of these technological advances to ensure that the SMS technologies and application developers can continue to innovate and benefit consumers, while preserving the protections of the TCPA to eliminate truly unwanted SMS.

### **C. Twilio’s Role in the Modern Telecommunications Network**

Twilio was founded in 2007 as an innovative Internet-based cloud communications company that is reinventing telecommunications by merging cloud computing, web services, and traditional telecommunications. Twilio provides an application programming interface, or “API,” to developers who use the API to create applications and programs. An API is a software language and message format used to communicate with an operating system or other application programs. APIs are typically pre-fabricated blocks of software code which perform certain low-level, but crucial functions, such as displaying text or graphics on a computer screen. APIs let developers and programmers create more sophisticated programs and applications from the base of the relatively simple APIs.

Twilio's API allows a developer to integrate traditional phone service and SMS with existing programming languages. Developers can create new applications or add features to existing products to allow those applications to make and receive phone calls and text messages. Using Twilio's API, web developers and businesses can build sophisticated unified communications solutions such as call centers, office phone systems, call tracking tools, SMS alerts, and more that interoperate with multiple telephone networks. Twilio's API works simultaneously across platforms, allowing web browsers, mobile phones, and tablets running iOS or Android to communicate seamlessly. Over 200,000 developers have used Twilio to integrate telecommunications into their applications and products.

While Twilio's API enables others to make and receive phone calls and SMS, Twilio does not direct, influence or control how its customers' applications send or receive messages. Instead, Twilio's API acts as a conduit between the traditional telecommunications infrastructure and users of applications developed to transmit messages via Twilio's API. When Twilio receives information from applications utilizing the Twilio API, Twilio forwards that information without alteration either directly to downstream telecommunications carriers or to so-called aggregators. Aggregators facilitate the transmission of information from Twilio to downstream telecommunications carriers. Further, Twilio's API standing alone does not function as a communications program. Rather, the API is simply the building block of the application created and used by Twilio's customers to enable message transmission. In other words, Twilio's API is not a finished product.

Twilio's Acceptable Use Policy and Terms of Service require that its customers do not violate the TCPA and other laws, but Twilio does not monitor messages or calls.<sup>14</sup> If Twilio learns of a violation of the law, Twilio has the right to terminate that customer's use of Twilio's API. Much like the fax broadcasters described above and common carriers, Twilio simply transmits the call or SMS per the routing instructions from the developer's application.

#### **D. Twilio's Role in Message Delivery**

As discussed above, Twilio's API acts as an intermediary between the traditional telecommunications infrastructure and application developers. This intermediary role results from Twilio's agreements with Amazon Web Services, a cloud hosting company, traditional telecommunication carriers, like Verizon, Bandwidth.com, and Level 3 Communications, and SMS aggregators, like Syniverse and Sybase, among others. Twilio's API allows a developer to interact with all of these entities as necessary to hear from or reach a consumer through calls and SMS, but the developer does not need any direct relationship with those parties. Twilio's API facilitates the call or SMS path through those entities as necessary and as directed by the developer's application.

As an example, a Twilio customer might create an application that allows a consumer to enter their families' and friends' birthdays into the application and the application then sends an SMS alert the day before a particular birthday. The developer would first have to create the application using Twilio's API and other coding languages, and then market the application to obtain customers of its own. The developer would need to obtain express consent from its customers to send an SMS to the customer, which would likely be in the terms of service of the application. After the *customer* enters the birthdays, the application would then send an

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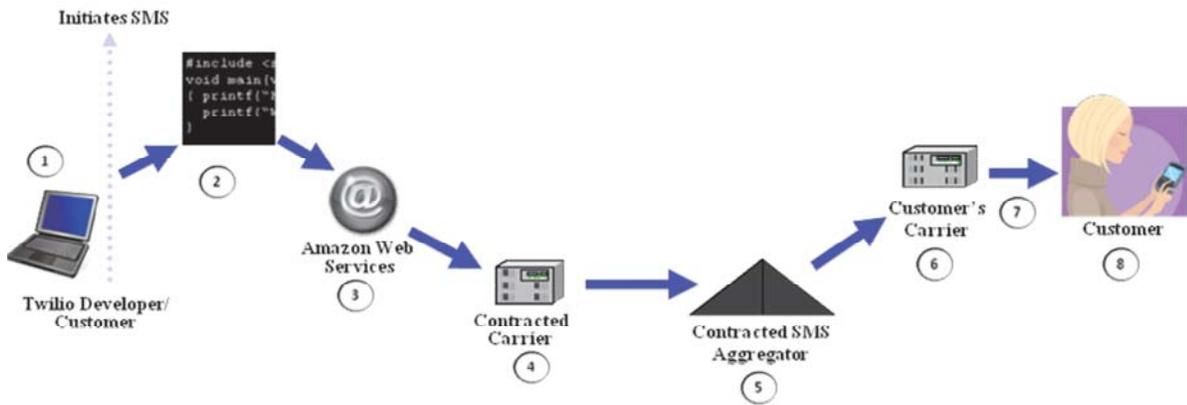
<sup>14</sup> Acceptable Use Policy, available at <http://www.twilio.com/legal/aup>; Terms of Service, available at <http://www.twilio.com/legal/tos>.

SMS once there was a triggering event, here the day before an entered birthday. The path of this SMS message, which would say something like “Just a reminder, Aunt Helen’s birthday is tomorrow,” would transmit down the following path:

- (1) Starts with the Developer’s application
- (2) Application uses Twilio’s API and other software code to generate and initiate the SMS to the specific telephone number
- (3) SMS routes through Amazon Web Services
- (4) Then to a carrier with whom Twilio has contracted
- (5) Then to an SMS aggregator with whom Twilio has contracted
- (6) SMS aggregator then routes the SMS to the customer’s carrier
- (7) Customer’s carrier then routes the SMS to the customer
- (8) Developer’s customer receives SMS on phone

This path is illustrated in **Figure 1**.

**Figure 1**



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- |   |   |  |  |
|---|---|--|--|
| ① Developer's application initiates the SMS   | ③ SMS routes through Amazon Web Services            | ⑤ Then to an SMS aggregator with whom Twilio has contracted    | ⑦ Customer's carrier then routes the SMS to the customer |
| ② Application uses Twilio's API and other software code to generate and initiate the SMS to the specific telephone number | ④ Then to a carrier with whom Twilio has contracted | ⑥ SMS aggregator then routes the SMS to the customer's carrier | ⑧ Developer's customer receives SMS on phone             |

If the developer's customer sends an SMS back to the birthday application, the path above would essentially operate in reverse except that customer's carrier would transmit the SMS through the most efficient route given its contractual relationships with various other carriers and aggregators.

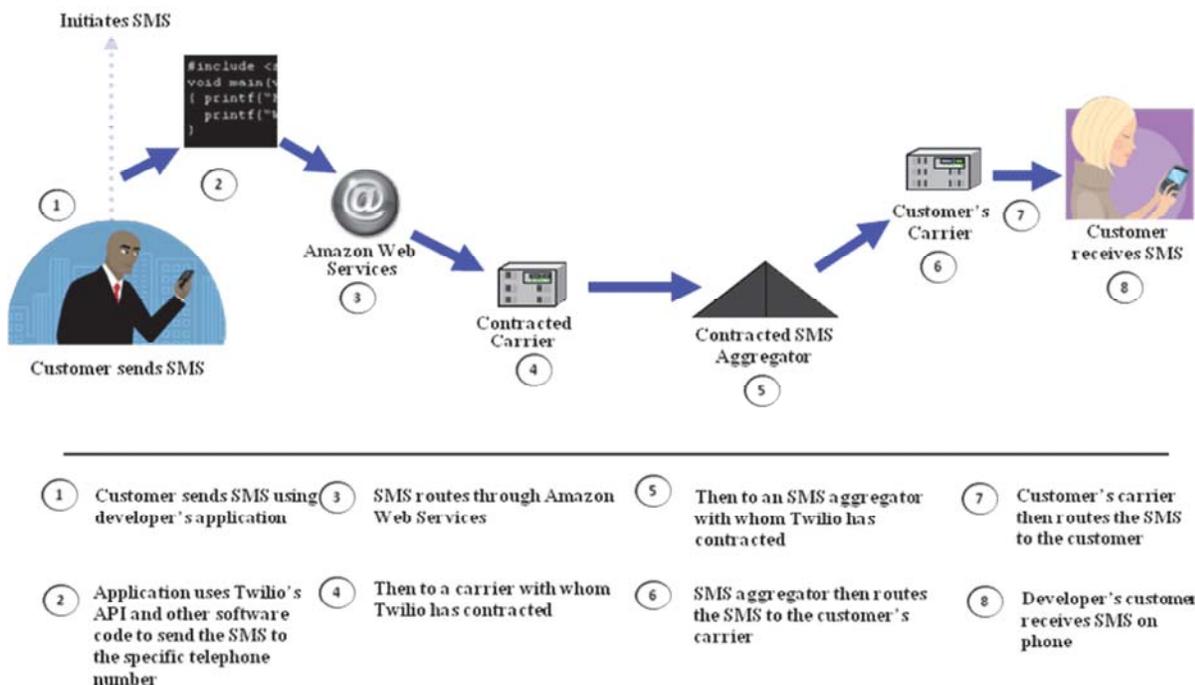
Another variation using Twilio's API is where the developer has created an application that transmits SMS between cell phone users, such as a group texting application. There, the path would be essentially the same, except that the developer's *customer* would initiate the SMS, rather than the application. This path is represented as follows:

- (1) Customer sends SMS using developer's application
- (2) Application uses Twilio's API and other software code to send the SMS to the specific telephone number
- (3) SMS routes through Amazon Web Services

- (4) Then to a carrier with whom Twilio has contracted
- (5) Then to an SMS aggregator with whom Twilio has contracted
- (6) SMS aggregator then routes the SMS to the customer's carrier
- (7) Customer's carrier then routes the SMS to the customer
- (8) Developer's customer receives SMS on phone

This path is represented in **Figure 2**.

**Figure 2**



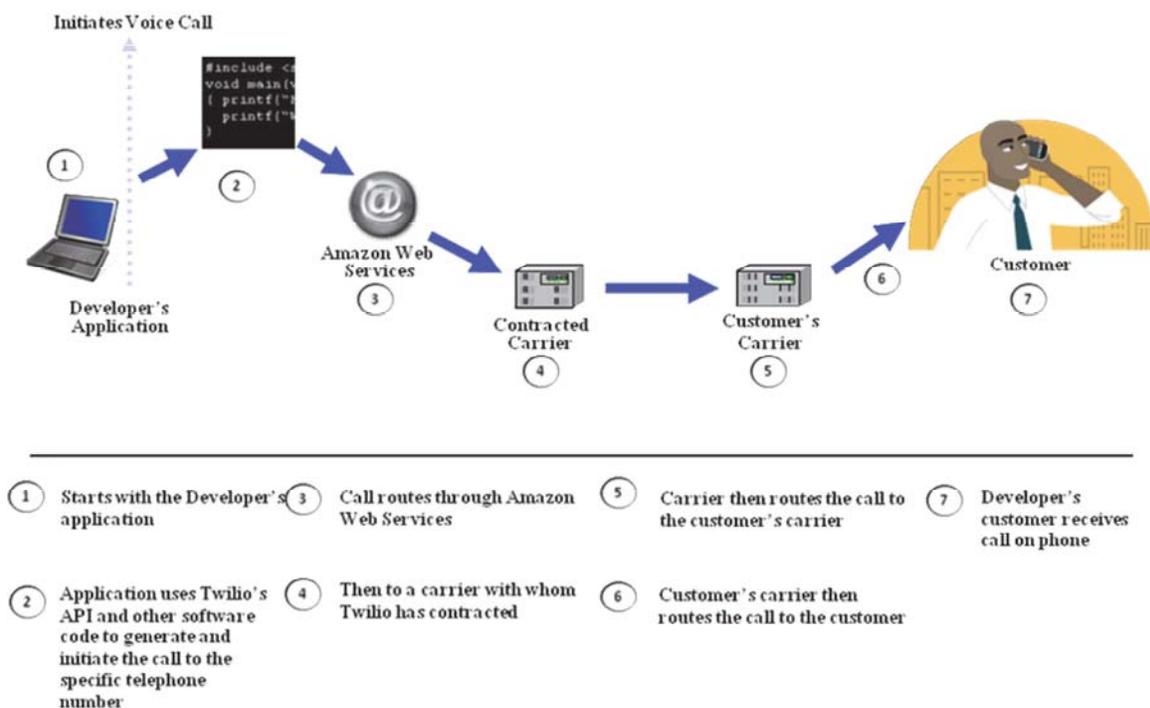
A voice call would follow a similar pattern except an SMS aggregator would not be necessary. If in the above birthday application example, after the *customer* enters birthdays into the application, the application performed a call reminder instead of sending an SMS, the path would be as follows:

- (1) Starts with the Developer's application

- (2) Application uses Twilio's API and other software code to generate and initiate the call to the specific telephone number
- (3) Call routes through Amazon Web Services
- (4) Then to a carrier with whom Twilio has contracted
- (5) Carrier then routes the call to the customer's carrier
- (6) Customer's carrier then routes the call to the customer
- (7) Developer's customer receives call on phone

This path is represented in **Figure 3**.

**Figure 3**



In sum the developer's application or the developer's *customer* is the starting point for each instance where a call or SMS is directed at a consumer using Twilio's API. In each circumstance, Twilio is akin to a common carrier, aggregator, or fax broadcaster and no more "sends" or "initiates" the call or message than any of those entities.

### III. THE FCC SHOULD CLARIFY ASPECTS OF THE TCPA IDENTIFIED BY PACE AND GLIDE TALK

#### A. The Definition of ATDS Must Be Reasonable to Avoid Absurd Results

The TCPA prohibits using an ATDS to make any call to a wireless telephone number without the prior express consent of the called party.<sup>15</sup> An ATDS is defined as “equipment that 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.”<sup>16</sup> This definition has not changed since the enactment of the TCPA in 1991, and has become overwhelmed by technological advances, especially if “capacity” is interpreted broadly. Almost all modern telecommunications equipment has the “capacity,” if “capacity” means the mere possibility, to autodial random or sequential numbers without human intervention through software and/or hardware alterations.

The Commission should alter the existing rules to clarify the meaning of “capacity” in the definition of an ATDS and find that “capacity” means the “present and immediate ability” to store and dial random or sequential telephone numbers.<sup>17</sup> At the very least, the Commission should issue an order clarifying the meaning of capacity, as the Commission has always worked towards statutory interpretations that are reasonable and consistent with Congressional intent.<sup>18</sup>

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<sup>15</sup> 47 U.S.C. § 227(b)(1)(A)(iii).

<sup>16</sup> *Id.* § 227(a)(1) (emphasis added); 47 C.F.R. § 64.1200(f)(2).

<sup>17</sup> See PACE Petition at 10-12.

<sup>18</sup> See e.g., *In the Matter of Implementation of Section 210 of the Satellite Home Viewer Extension & Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, 20 FCC Rcd. 14242, 14262 ¶ 10 and n. 43 (2005) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (stating that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available); *Lawson v. Suwanee Fruit & S.S. Co.*, 69 S. Ct. 503 (1949) (statutory definitions

In contrast, a broader definition of capacity interpreted to mean the “possibility or option” to store and dial random or sequential telephone numbers, as some courts have found, would be an absurd reading of the TCPA because nearly every piece of computer and telecommunications equipment today has the “possibility or option” to be reprogrammed or altered to perform such functions. Under the broader interpretation of “capacity,” the ATDS requirement in the TCPA is actually written out of the statute because the very fact that a call has been made using computer and telecommunications equipment would then satisfy the ATDS requirement. The Commission should clarify that such a result is not consistent with the TCPA, and clarify that the narrower definition of ATDS is the appropriate definition.

This narrower definition of “capacity” is consistent with Congressional intent to protect consumers from calls that seized telephone lines and to limit the delivery of thousands of identical prerecorded messages sent without consumer consent, when consent is required. Through the TCPA, Congress intended to prohibit a specific type of equipment that dialed random or sequential telephone numbers, but could not have intended to prohibit any and all equipment that might be altered, but was not presently, engaged in such action.

Clarification by the Commission will ensure that the marketplace for innovative and useful messaging applications and services can continue to grow and benefit consumers without the threat of TCPA lawsuits, while still prohibiting the use of ATDS equipment that causes actual harm to consumers. The Commission should clarify that “capacity” in the

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usually control the meaning of statutory words, but not where obvious incongruities in language would be created and major purpose of statute would be destroyed); *Teva Pharm., USA, Inc. v. FDA*, 182 F.3d 1003, 1011 (D.C. Cir. 1999) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (asserting that the FDA must interpret that statute to avoid absurd results and further congressional intent)).

definition of ATDS in the TCPA means the “present and immediate ability” to dial random or sequential numbers.

**B. Intermediate Providers of Transmission Services Should Not Be Deemed to Make Calls under the TCPA**

Consistent with Glide Talk’s requested clarification,<sup>19</sup> the Commission should also issue rule modifications, or at the very least an order, that clarifies that intermediate communications service providers do not “make” calls when they provide their customers an API or software application that simply enables message transmission, but do not control the content, timing and recipients of the messages transmitted through the API or application. Indeed, Congress’ intent in enacting the TCPA was not to hold every entity involved in a call’s transmission responsible if a violation occurs. *See* S. Rep. No. 102-178, 1991 U.S.C.C.A.N. 1968, 1997, 1991 WL 211220 (“The regulations concerning the use of [automatic telephone dialing systems] apply to persons initiating the telephone call or sending the message and **do not apply to** the common carrier *or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message.*”) (emphasis added). The TCPA thus was not meant impose liability on any entity simply because it was involved in the transmission of a call. Twilio therefore urges the Commission to clarify the scope of liability under the TCPA consistent with these comments.

The Commission should thus confirm that only the initial person or entity making the call has an obligation to obtain consent before transporting a message; intermediaries in the transmission path should not be required to obtain consent, nor should intermediaries have any TCPA liability when they simply maintain the transmission path of a call or message initiated by a sender. Intermediaries should be able to rely on the *sender’s* transmission of the message that

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<sup>19</sup> Glide Talk Petition at 14-16.

the sender has already obtained any necessary consent. The Commission should thus clarify and confirm that entities in the transmission path should be free of TCPA liability, because they have no obligation to obtain consent under the TCPA.<sup>20</sup> Under this clarification, it would be clear that Twilio cannot be the *sender* because it is an intermediary in the path of a message as shown in the charts above. Twilio's customers or Twilio's customers' customers would be the senders because they are directing the messages and are interacting with the cell phone user that is receiving the messages. Twilio would have no obligation to obtain prior express consent, and therefore Twilio would have no liability under the TCPA if it simply maintained the transmission path of an SMS allegedly sent without prior express consent.

#### IV. CONCLUSION

In sum, Twilio strongly urges the Commission to grant the PACE and Glide Talk Petitions, consistent with these comments, and clarify both the definition of ATDS and the entities that must obtain and can provide prior express consent through rule changes, or at the very least, a clarifying order. These clarifications would protect consumers from unsolicited SMS and calls while preventing the TCPA from becoming essentially a prohibition on the use of messaging applications by any company to interact with its customers.

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<sup>20</sup> This issue is also before the Commission in a Petition from Club Texting. *See* Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Club Texting's Petition for Declaratory Relief that Text Broadcasters are Not "Senders" of Text Messages Under § 227(b)(1) of the Telephone Consumer Protection Act*, CG Docket No. 02-278, DA 09-2387 (Nov. 9, 2009), available at <http://apps.fcc.gov/ecfs/document/view?id=7020347885>.

Dated: December 19, 2013

Respectfully submitted,

By: s/ Michael B. Hazzard

Michael B. Hazzard

Adam D. Bowser

Arent Fox LLP

1717 K. St., N.W.

Washington, DC 20036-5339

Tel: (202) 857-6029

Fax: (202) 857-6395

michael.hazzard@arentfox.com

adam.bowser@arentfox.com

*Counsel to Twilio Inc.*