

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

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

**ANTHONY COFFMAN'S COMMENT ON
GLIDE TALK, LTD.'S PETITION FOR EXPEDITED DECLARATORY RULING**

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TABLE OF CONTENTS

I.	SUMMARY OF THE FILING.....	1
II.	BACKGROUND	3
III.	DISCUSSION.....	6
	A. The TCPA’s prohibition on spam-viting does not stifle innovation or the public’s access to new products.....	7
	B. Glide’s requested “clarifications” to the TCPA are unnecessary and inconsistent with both the text and the purpose of the statute	8
	1. There is no need to clarify the definition of ATDS, and, in any event, even under Glide’s proposed re-definition, it uses an ATDS	9
	2. Glide—not its users—creates and sends the spam text messages, and the Commission should reject Glide’s request to interpret the statutory term “make” so as to exclude its conduct	15
	3. The fact that someone’s cell phone number is in an app user’s contact list in no way establishes consent to receive text messages from the app developer	17
IV.	CONCLUSION.....	21

I. SUMMARY OF THE FILING

Anthony Coffman submits this comment in response to the Petition of Glide Talk, Ltd. for Expedited Declaratory Ruling (the “Petition”). Glide, in order to promote a mobile phone app it developed, engages in a new kind of automated telemarketing called “spam-viting.” When a potential user downloads Glide’s app to their mobile device, Glide sends text message advertisements to cell phone numbers it surreptitiously collects from the contact list on the user’s mobile device. The text messages—though created and sent by Glide—are designed to appear to the recipient to be not from Glide, but from the mobile device owner inviting and encouraging the recipient to download Glide’s app.

Mr. Coffman, a victim of Glide’s spam-viting, filed a class action lawsuit against Glide for violating the Telephone Consumer Protection Act¹ (“TCPA”), which is currently pending in federal court in Illinois. In an effort to avoid or delay those judicial proceedings, however, Glide filed the Petition, asserting that Mr. Coffman’s suit “threaten[s] to deprive the public of innovative new communications products and services” and requesting that the Commission clarify “lingering regulatory uncertainty” surrounding the TCPA.²

Contrary to Glide’s alarmist predictions, however, ensuring that Glide and other app developers comply with the law will not stifle innovation or the public’s access to new products. Mr. Coffman’s lawsuit seeking to stop Glide’s spam-viting has *nothing* to do with Glide’s app itself, only with the unlawful way in which Glide markets that app in its quest for profit. Further, Glide’s assertion that a declaratory ruling is necessary to “clarify” the TCPA is simply false. The law—and the Commission’s consistent interpretation of it—is clear: Glide’s sending unauthorized text message advertisements to untold numbers of cell phone owners (like Mr.

¹ 47 U.S.C. § 227.

² Petition at 1-2.

Coffman) violates both the language and the purpose of the TCPA’s prohibition on autodialed calls to cell phones. The Commission should not give its blessing to Glide’s spam-viting, and instead should reject each of Glide’s proposed “clarifications” to the law.

First, the Commission should reject Glide’s proposed re-definition of the statutory term “automatic telephone dialing system” (“ATDS”). The purported distinction between present and future capacity to store or produce numbers that Glide seeks to insert into the definition of ATDS is not supported by the plain language of the TCPA and is meaningless in any event. Even according to the vague descriptions offered by Glide, the equipment it uses to spam-vite its users’ contacts falls within the definition of ATDS whether or not that definition includes Glide’s proposed present/future capacity distinction.

Second, the Commission should reject Glide’s request for a ruling that it “merely facilitate[s]” the sending of text messages by its users and thus does not “make” calls within the meaning of the TCPA.³ Glide—not its users—makes the calls here. App developers like Glide that create and send pre-written text messages to cell phone numbers surreptitiously gathered from their users’ contact lists don’t “merely facilitate” the sending of text messages—they send unauthorized text message spam to cell phones, and no interpretation of the statutory term “make” that allows such conduct should be adopted.

Finally, the Commission should reject Glide’s interpretation of the consent exception in the TCPA. Glide’s overly broad reading of consent lacks any connection to reality or the “social conventions” on which Glide purports to rely.⁴ Contrary to Glide’s assertion, the fact that someone’s cell phone number is in an app user’s contact list in no way establishes consent to receive text messages from the developer of that app.

³ *Id.* at 14.

⁴ *Id.* at 16.

II. BACKGROUND

Glide and other developers of mobile phone apps have recently been engaging in a noxious new form of text message marketing called “spam-viting,”⁵ which has been described as “shady” and “dubious.”⁶ Spam-viting works like this: whenever a user downloads one of these developers’ apps to their mobile device, the developer scrapes⁷ cell phone numbers found in the device’s contact list and sends a pre-written text message to each of those contacts encouraging them to download the app.⁸ This technique is sometimes used by app developers in an attempt to quickly boost their user base before a fundraising campaign or potential acquisition,⁹ but

⁵ Sarah Perez, *Video Texting App Glide is Going “Viral,” Now Ranked Just Ahead of Instagram in App Store*, Techcrunch (July 24, 2013), <http://techcrunch.com/2013/07/24/video-texting-app-glide-is-going-viral-now-ranked-just-ahead-of-instagram-in-app-store/> (“App Store reviews are filled with users who had unwittingly *spam-vited* everyone in their address book to Glide.”).

⁶ Eliza Kern, *Video Messaging App Glide Said It Has Stopped Spamming Users*, Gigaom (July 31, 2013, 3:41 PM), <http://gigaom.com/2013/07/31/video-messaging-app-glide-said-it-has-stopped-spamming-users/>. See also Megan Rose Dickey, *It Turns Out Path, Considered A Threat To Facebook, May Just Be Really Good At Spamming*, Business Insider (May 1, 2013, 10:01 AM), <http://www.businessinsider.com/path-spamming-users-2013-5>.

⁷ See, generally, Wikipedia, http://en.wikipedia.org/wiki/Contact_scraping (last visited Jan. 3, 2014).

⁸ Glide is by no means the only app developer surreptitiously scraping and storing its users’ contact lists. See, e.g., Dieter Bohn, *iOS Apps and the Address Book: Who Has Your Data, and How They’re Getting It*, The Verge, (Feb. 14, 2012, 8:22 PM), <http://www.theverge.com/2012/2/14/2798008/ios-apps-and-the-address-book-what-you-need-to-know> (describing apps that “upload[] your address book data without either informing you of [their] actions or without presenting you with a clear and obvious button that implies what [they are] about to do,” and apps that do “not necessarily always make clear that your entire address book is being uploaded”); Dustin Curtis, *Stealing Your Address Book*, <http://dcurt.is/stealing-your-address-book> (last visited Jan. 3, 2014) (describing informal survey of 15 popular app developers finding that 13 had databases containing millions of numbers scraped from users’ address books).

⁹ See, e.g., Sam Biddle & Nitasha Tiku, *Did Path Cheat Its Way to The Top?*, Valleywag (June 12, 2013, 1:53 PM), <http://valleywag.gawker.com/did-path-cheat-its-way-to-the-top-494127268>; Perez, *supra* note 5.

regardless of the reason, the result is the same: the developer sends untold numbers of unwanted advertising text messages to people who did not consent to their receipt.

Anthony Coffman was the recipient of such a spam-vitation. Glide sent him a text message stating that “Chad Bisnette has something to show you on Glide,” and which included a link to Glide’s website where consumers are encouraged to download Glide’s app (the “Glide App”). Mr. Coffman did not recognize the number from which the message was sent, which was a long code controlled by Glide.¹⁰ Other consumers have similarly complained of receiving spam text messages from Glide posing as an individual:

- “I got a text [from an unknown number] that said ‘Diane Jones has something to show you on Glide [http://i.glide.me/7HbFGx\[.\]](http://i.glide.me/7HbFGx[.])’ I don’t know a Diane Jones and if I HAD, she could’ve texted me herself.”
- “Got a text from [an unknown number]. States my friend ... (who doesn’t have a cell phone) has a message for me at <http://i.glide.me/U=z7tT>.”
- “I got a text from [two unknown numbers] that said ‘Robert Neal has something to show you on Glide [http://i.glide.me/7HbFGx\[.\]](http://i.glide.me/7HbFGx[.])’ I don’t know a Robert Neal. They came back to back, how funny one from WY and the other GA, same person.”
- “I got a text a few minutes ago from a Guadalupe Azzure, [I don’t] know any Guadalupe. Same type of text[:] I have something to show you on glide.... Also a cell number I don’t recognize[.]”
- “Text came in from [unknown number] said ‘Seen this? – my brother’s name!!? With some weird URL.... It was not his cell number. I clicked on the link and it brought me to Glide on my Google play store....”¹¹

¹⁰ Long codes, also known as virtual mobile numbers or dedicated mobile numbers, are 10-digit numbers that, when connected to a text-messaging gateway, can be used to send SMS text messages. *See, generally*, Wikipedia, http://en.wikipedia.org/wiki/Long_number (last visited Jan. 3, 2014).

¹¹ 800notes.com Directory of Unknown Callers, <http://800notes.com/Phone.aspx/1-606-930-4301> (last visited Jan. 3, 2014). 800notes.com is a website where consumers can share information about calls or text messages received from unknown numbers.

In addition, not only has this type of text message spamming prompted complaints from the recipients of the unwanted text messages, it has also generated complaints from those who downloaded the apps only to find that everyone in their address book had been spammed.¹²

While Glide describes its conduct as “enabl[ing] users to select friends and family from their devices’ contact lists and to invite those individuals to use the app themselves,”¹³ that description is, at best, misleading. First, prior to late July 2013, Glide automatically sent the text message solicitations to all of a user’s contacts unless the user affirmatively opted out—and there is no indication how clear or easy-to-exercise the opt-out mechanism was.¹⁴ Although Glide has modified its spam-viting practices in apparent recognition of its unlawfulness, it is the pre-July 2013 methods of spam-viting that are at issue in Coffman’s litigation against Glide, and consequently, to the extent Glide seeks Commission approval of its *current* practices (the detail of which it does not provide), any such approval would have no affect on the pending lawsuit addressing Glide’s *past* conduct. Second, even if Glide now requires some sort of user opt-in before Glide spam-vites the user’s contacts, again there is no indication as to how such an opt-in procedure works or how clear Glide makes it to users that Glide is sending text message advertisements to the users’ contacts. In either case, Glide’s characterization of its conduct glosses over the fact that, both before and after July 2013, the spam-vitations were sent from SMS long codes controlled by Glide. Thus, it is Glide—not any of its users—that is sending pre-written advertising text message spam to cell phones without those cell phone owners’ consent,

¹² See Perez, *supra* note 5; Adrienne Jeffries, *Path is Spamming Address Books with Unwanted Texts and Robocalls—Again*, The Verge (Apr. 30, 2013, 12:39 PM), <http://www.theverge.com/2013/4/30/4286090/path-is-spamming-address-books-with-unwanted-texts-and-robocalls>.

¹³ Petition at 3.

¹⁴ See Kern, *supra* note 6.

which is exactly the kind of conduct that is prohibited by both the plain language and the intent of the TCPA.¹⁵

III. DISCUSSION

As the Commission is well aware, Congress enacted the TCPA to address the “intrusive invasion of privacy” that results from “unrestricted telemarketing.”¹⁶ Among other things, the statute makes it unlawful “to make any call ... using an automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone.”¹⁷ Over a decade ago, the Commission clarified that this prohibition applies not only to voice calls, but to text messages as well.¹⁸ Nevertheless, the incidence of spam text messaging continues to rise, with the number of such messages sent more than doubling from 2.2 to 4.5 *billion* between 2009 and 2011 alone.¹⁹ Nearly 70% of cell phone owners who use text messaging say they get unwanted spam or text messages, one-quarter of whom experience such problems *at least*

¹⁵ It may be the case that currently—though not prior to July 2013—when Glide spam-vites less than ten cell phone numbers scraped from a user’s contact list, they are sent from the user’s mobile device rather than long codes controlled by Glide. Though it asks the Commission to find its conduct consistent with the TCPA, Glide provides absolutely no detail about how it sends the text messages it seeks Commission approval to send. That simply supports the idea that the proper mechanism through which to address Glide’s conduct is litigation in court—where a factual record can be fully developed using the tools of civil discovery—rather than an FCC declaratory ruling where Glide misrepresents the facts.

¹⁶ *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

¹⁷ 47 U.S.C. § 227(b)(1)(A)(iii).

¹⁸ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd 14014, 14115 ¶ 165 (2003) (“2003 Order”).

¹⁹ Gitte Laasby, *Spam Text Messages a Growing Problem*, Milwaukee Journal Sentinel (July 16, 2012), <http://www.jsonline.com/news/Wisconsin/spam-text-messages-a-growing-problem-6d62f17-162666806.html>.

weekly.²⁰ Despite these alarming statistics, Glide asks the Commission to issue a ruling that would increase the use of spam text messaging even further by allowing app developers to spam-vite their users' contacts to promote their apps and make money. The Commission should refuse to do so.

A. The TCPA's prohibition on spam-viting does not stifle innovation or the public's access to new products.

Throughout its Petition, Glide suggests that the TCPA's prohibition on its text message marketing deprives consumers of access to innovative new products,²¹ but this is wrong for two reasons. First, spam-viting is entirely distinct from an app itself. The Glide App, which allows for the exchange of videos that in no way involves SMS or MMS text messaging technology, is not *itself* a spam-viting app; Glide uses spam-viting to *promote* the Glide App. Whatever the benefit to the public the Glide App may provide, it is completely irrelevant to the legality of how that app is marketed. While Glide asserts that lawsuits seeking to enforce the TCPA's prohibitions "threaten valuable service that the public desires,"²² one thing the public most certainly does *not* desire is the receipt of text message spam from an app developer that obtained their cell phone number by scraping the contact list on someone else's mobile device. Expanding the growth of the mobile app industry may be desirable, but not at the expense of the privacy rights the TCPA is designed to protect. Glide's innovation must occur within the bounds of the law.

²⁰ Jan Lauren Boyles & Lee Rainie, *Mobile Phone Problems*, Pew Internet & American Life Project (Aug. 2, 2012), <http://www.pewinternet.org/Reports/2012/Mobile-phone-problems/Main-findings.aspx>.

²¹ *See, e.g.*, Petition at 4-5, 8 n.21.

²² *Id.* at 8-9.

Second, as Glide itself repeatedly notes,²³ users can send text messages to their contacts telling them about a new app themselves (not to mention users can share such information by phone, e-mail, or a face-to-face conversation). If an app is beneficial to consumers, users will let their friends and family know about it on their own, obviating the need for the developer to manufacture a viral campaign artificially. Indeed, most successful apps do *not* rely on spam-viting campaigns by their developers. Consequently, there is no harm to consumers from the TCPA's prohibition on Glide and other app developers' scraping and text-spamming their users' contact lists. To the contrary, allowing such conduct would be intrusive, inconvenient, and costly to consumers, which are precisely the problems Congress sought to address in enacting the TCPA.²⁴

B. Glide's requested "clarifications" to the TCPA are unnecessary and inconsistent with both the text and purpose of the statute.

Glide asks the Commission to endorse its text-spamming activities by "clarifying" certain aspects of the TCPA.²⁵ But while a declaratory ruling may be issued to "terminat[e] a controversy or remov[e] uncertainty,"²⁶ there is no controversy to terminate or uncertainty to remove here. To the extent Mr. Coffman's lawsuit against Glide is a "controversy," it involves Glide's pre-July 2013 conduct and would thus not be terminated by the Commission's endorsement of Glide's current conduct. As such, Glide's request for expedited ruling is misplaced. To the extent Glide instead simply seeks to "remov[e] uncertainty," as explained below the "clarifications" requested by Glide are unnecessary and inconsistent with both the text and the purpose of the TCPA. First, the statutory definition of ATDS needs no clarification, and,

²³ See, e.g., *id.* at 6 n.11, 15 n.37.

²⁴ See 2003 Order at 14115 ¶ 165.

²⁵ Petition at 1.

²⁶ 47 C.F.R. § 1.2.

in any event, Glide’s proposed re-definition would not save its conduct from running afoul of the TCPA. Second, contrary to Glide’s assertion, Glide—not its users—creates and sends the spam text messages and thus “makes” calls prohibited by the TCPA. Finally, the fact that someone’s cell phone number is in an app user’s contact list in no way establishes prior express consent to receive text messages from the app developer promoting its app. For all these reasons, the Commission should reject Glide’s request for a declaratory ruling, and instead make clear—to the extent it isn’t already—that app developers’ scraping and text-spamming their users’ contact lists violates the TCPA.²⁷

1. There is no need to clarify the definition of ATDS, and, in any event, even under Glide’s proposed re-definition, it uses an ATDS.

The TCPA defines an ATDS as “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.”²⁸ While Glide asserts that a declaratory ruling is necessary to remove uncertainty surrounding this definition, it is simply not the case that there is widespread—or even any—confusion regarding what constitutes an ATDS. Glide cites absolutely no evidence of any

²⁷ Glide also requests that if the Commission declines to issue a declaratory ruling, it nevertheless grant Glide a retroactive waiver or an exemption from the TCPA. Petition at 5 n.9. Neither request should be granted. First, with respect to waiver, the regulation cited by Glide, 47 C.F.R. § 1.3, allows the Commission only to waive its *rules*; it does not allow the Commission to waive compliance with a *statute* such as the TCPA. Further, a waiver can only be granted “for good cause shown,” *id.*, which, for the reasons discussed herein, Glide has not established. Second, with respect to an exemption, the Commission may exempt from the TCPA’s prohibitions calls to cell phones “that are not charged to the called party.” 47 U.S.C. § 227(b)(2)(C). But cell phone owners must pay their wireless carriers—either for each individual message or as part of a texting plan—for incoming text messages such as those sent by Glide. Further, such an exemption can only be granted “subject to such conditions ... as necessary in the interest of the privacy rights [the TCPA] is intended to protect.” *Id.* Again, for the reasons discussed in this comment, allowing Glide to continue sending text-spam to unconsenting cell phone owners is antithetical to, not consistent with, the privacy rights the TCPA is intended to protect.

²⁸ 47 U.S.C. § 227(a)(1).

uncertainty or other difficulty that the Commission or courts have ever had in interpreting and applying this statutory definition. Indeed, the truth is to the contrary.

In 2003, the Commission stated—not surprisingly—that the statutory definition of ATDS must be read at face value. Specifically, given the express terms of the statutory definition, equipment need only have *the capacity* to store or produce numbers to be called without human intervention in order to be considered an ATDS.²⁹ Not only is such a face-value reading consistent with the statutory text, held the Commission, it ensures that the statute’s prohibition on autodialed calls not be circumvented by equipment that uses a list of given numbers rather than randomly or sequentially generated numbers.³⁰ Courts throughout the country have consistently applied this straightforward face-value reading of the statute,³¹ and the Commission recently reiterated it.³² Thus, contrary to Glide’s unsupported assertion, there simply is nothing to clarify here.

Despite the clarity of the statutory definition of ATDS and the uniform agency and judicial application of that definition, Glide nevertheless argues that the Commission should issue a declaratory ruling clarifying that equipment must have the capacity to store or produce

²⁹ 2003 Order at 14091-93 ¶¶ 132-33.

³⁰ *Id.*

³¹ *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009); *Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471, *4 (N.D. Ill. Dec. 14, 2009); *Moore v. Firstsource Advantage, LLC*, No. 07-CV-770, 2011 WL 4345703, *8 (W.D.N.Y. Sept. 15, 2011); *Brown v. Enter. Recovery Sys., Inc.*, No. 02-11-00436-CV, 2013 WL 4506582, *7 (Tex. App. Aug. 22, 2013).

³² *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991* 27 F.C.C. Rcd 15391, 15392 n.5 (2012) (“The Commission has emphasized that this definition covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.”) (emphasis in original).

numbers *at the time of the call* in order to be considered an ATDS.³³ Glide argues that the statute’s use of the phrase “has the capacity” requires such an interpretation because otherwise Congress would have referred to equipment with the “potential capacity” to store or produce numbers.³⁴ But “potential capacity” is redundant. If, as Glide suggests, Congress wanted to limit the definition of ATDS to equipment that had only the current ability to store or produce numbers, it would not have used the word “capacity” at all. Instead, it would have simply defined ATDS as equipment that “can” store or produce numbers.

In any event, while Glide tries to distinguish between equipment that has the present capacity to store or produce numbers and equipment that has the future capacity to do so, that is a distinction without a difference. This is illustrated by the fact that even if the definition of ATDS were limited as Glide requests, the equipment controlled by Glide comprising the system that sends the text messages would *still* be considered an ATDS. While Glide may be correct when it states that “the Glide App is not an ATDS,”³⁵ nobody is contending that it is. That is because while in isolation the *app* is not an ATDS, Glide pairs that app with other software and equipment to send text messages *en masse* to cell phone numbers scraped from its users’ mobile devices. It is the system as a whole that is the ATDS. Glide provides absolutely no explanation or description of the other software or equipment utilized, perhaps in an attempt to have the Commission assume that the messages are sent from the users’ devices, which simply is not the case. With the possible exception of post-July 2013 messages sent to less than ten recipients

³³ Petition at 9-13.

³⁴ *Id.* at 11.

³⁵ *Id.* at 13.

(which are currently transmitted from the user’s phone’s native text message program),³⁶ the text messages are sent from SMS long codes controlled by Glide.

But whatever the precise nature of the system used by Glide to send these messages, by Glide’s own description it would be an ATDS. That is because while Glide argues that its unspecified system lacks the present capacity to *generate* numbers,³⁷ it does not contend that its system lacks the present capacity to *store* numbers. Indeed, as described by Glide itself, at least one component of the equipment it uses to send its spam text messages necessarily *does* have such capacity. Glide explains that its equipment uses cell phone numbers obtained (*i.e.*, scraped) from its users’ contact lists,³⁸ but in order to send text messages to numbers from a given contact list, equipment necessarily must have the capacity to store such numbers. Thus, given that the statute expressly refers to equipment that has the capacity to “store *or* produce” numbers to be called,³⁹ (and consistent with the Commission’s 2003 Order holding that an autodialer using a list of numbers is an ATDS), Glide’s system has such capacity. Further, it has—by necessity—the capacity to do so at the time the text messages are sent, rendering Glide’s proposed present/future distinction meaningless. Consequently, Glide’s system is an ATDS whether or not “capacity” in the statutory definition of ATDS is limited to, as Glide proposes, capacity at the time of the call. Glide’s proposed re-definition of ATDS would not save it, and there is thus nothing for the Commission to clarify.

³⁶ See *supra* note 15.

³⁷ Petition at 13. However, it is not clear from the Petition or the litigation that Glide’s system lacks the present capacity to generate random or sequential numbers either. It may very well be able to perform such simple functions in addition to its proven present capacity to store numbers.

³⁸ *Id.* at 9-10, 13.

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

Perhaps seeking to perpetuate the fiction that app users, not Glide, send the spam-vitations, Glide argues that its proposed present/future capacity distinction is necessary because without it every smartphone is an ATDS.⁴⁰ Even though the distinction has zero impact on the “invitation” practices at issue, Glide nevertheless implies that such a result is absurd. There are two problems with this argument.

First, Glide’s proposed present/future capacity distinction would not avoid that result. Most smartphones can send a single text message to a group of different recipients (or an entire contact list), and can do so without any modification or third-party application necessary.⁴¹ Under Glide’s taxonomy, then, such smartphones have the *present* capacity to store and dial lists of numbers. Thus, even under the present/future capacity distinction Glide asks the Commission to adopt, most smartphones could still fall within the statutory definition of an ATDS, the supposedly absurd result that Glide’s proposed distinction purportedly seeks to avoid.

Second, in addition to Glide’s proposed distinction not resolving the supposed absurdity, it is not at all clear that the outcome Glide seeks to avoid is even absurd. In enacting the TCPA, Congress was well aware of concerns that a broad definition of ATDS could cover commonplace equipment not designed or intended to be used for telemarketing, as opposed to just equipment used at the time by the telemarketing industry.⁴² Nevertheless, despite these concerns, Congress

⁴⁰ See, e.g., Petition at 8.

⁴¹ See Sandra Vogel, *How to Send Group Texts from Android and iPhone*, PC Advisor (Oct. 9, 2013), <http://www.pcadvisor.co.uk/how-to/mobile-phone/3472964/how-to-send-group-texts-from-android-iphone/>.

⁴² See H.R. Rep. 101-633 (1990), 1990 WL 259268 (“It should be noted that the bill’s definition of an ‘automatic telephone dialing system’ is broad, not only including equipment which is designed or intended to be used to deliver automatically-dialed prerecorded messages, but also including equipment which has the ‘capability’ [sic] to be used in such manner. The Committee is aware of concerns that this broad definition could cover the mere ownership of office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages.”).

chose to go forward with a broad definition of ATDS, noting that mere *ownership* of such equipment was not unlawful, but only its *use* to deliver unwanted solicitations was prohibited.⁴³ Thus, the fact that smartphones may fall within the literal statutory definition of ATDS is not absurd, given that the TCPA does not prohibit ownership of such devices. If Glide’s CEO owns a smartphone, he is not violating the TCPA simply because his smartphone may be an ATDS. But if he were to input or download to his smartphone’s address book a list of thousands of cell phone numbers (easily available for purchase online),⁴⁴ and send a text message to “all contacts” inviting them to join Glide, that is clearly the kind of conduct that the TCPA was intended to prohibit. It would not be absurd at all in that situation to treat his smartphone as an ATDS.⁴⁵

In short, the Commission should refuse Glide’s request to “clarify” the TCPA’s definition of ATDS. The Commission and courts have consistently applied the statutory definition for years without problem. Further, Glide’s proposed current/future capacity distinction would neither make the equipment used by Glide not an ATDS, nor avoid the supposed absurdity that every smartphone is an ATDS—assuming such a result is even absurd.⁴⁶

⁴³ See *id.* (“[The TCPA] does not impose restrictions on the ownership of such equipment, but only its active ‘use’ to deliver automatically dialed prerecorded telephone solicitations....”).

⁴⁴ See, e.g., Cell-Phone-List.net, <http://www.cell-phone-list.net/index-3.html> (last visited Jan. 3, 2014) (advertising a database of over 430 million cell phone numbers, and offering for sale lists of numbers from any area code for \$295).

⁴⁵ Indeed, many text message spamming and phishing schemes are conducted in just this way, using an ordinary smartphone and a purchased list of cell phone numbers. See, e.g., Wikipedia, http://en.wikipedia.org/wiki/Mobile_phone_spam (last visited Jan. 3, 2014) (“Today, particularly in North America, most mobile phone spam is sent from mobile devices that have prepaid unlimited messaging rate plans.”).

⁴⁶ It is also worth noting that even if Glide’s equipment were deemed not to be an ATDS, Glide would *still* be violating the TCPA. As the Commission stated previously in clarifying that the statute applies to text messages, “under the TCPA, it is unlawful to make any call using an [ATDS] or an artificial or prerecorded message to any wireless telephone number.” 2003 Order at 14115 ¶ 165 (emphasis added). The spam text messages sent by Glide posing as individuals stating that “[some person] has something to show you on Glide” are precisely such artificial or

2. Glide—not its users—creates and sends the spam text messages, and the Commission should reject Glide’s request to interpret the statutory term “make” so as to exclude its conduct.

Glide next asks the Commission to rule that “app providers that merely facilitate the sending of text messages by their users do not ‘make’ calls,” and thus cannot be held liable for the sending of such messages.⁴⁷ Although Glide fails to detail the precise manner in which its spam-vitations are transmitted, it does not dispute that *Glide* drafts and sends the text messages; indeed, as noted above, they are sent from SMS long codes controlled by Glide. Consequently, Glide “makes” the calls (i.e., sends the text messages) under the TCPA.

Further, it simply is not the case that Glide and similar app developers “merely facilitate” the sending of text messages by their users that the user otherwise would have sent on his or her own. Glide tries to paint itself as just the transmitter of text messages sent by its users to their friends and family inviting them to download the Glide App, much in the way that wireless carriers such as AT&T and Verizon act as portals for messages sent among their respective subscribers.⁴⁸ According to Glide, the user—not Glide—initiates the text message, chooses the recipients, and controls the content of the message.⁴⁹ As noted above, however, such a

prerecorded messages. Consequently, Glide’s conduct violates the TCPA *even if no ATDS was used*. Further, while the TCPA refers to “an artificial or prerecorded *voice*,” 47 U.S.C. § 227(b)(1)(A) (emphasis added), the Commission’s reading of “voice” as including “message” is not unreasonable, given that “voice” is not limited to verbal communications. *See, e.g.*, Dictionary.com, <http://dictionary.reference.com/browse/voice> (last visited Jan. 3, 2014) (defining “voice” as, among other things, “expression in spoken or written words, or by other means”).

⁴⁷ Petition at 14.

⁴⁸ While the Commission has ruled that “fax broadcasters” who transmit other entities’ advertisements to fax machines are not liable for the transmission of prohibited faxes absent “a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,” 2003 Order at 14130-32 ¶¶ 194-96, given Glide’s level of involvement in the spam-viting at issue, it cannot seriously contend that the exception for fax broadcasters should apply to its practices.

⁴⁹ Petition at 14.

description is, at best, misleading, and, at worst, outright false. To the contrary, Glide—not its users—initiates the text messages, chooses the recipients, and controls the content of the message.

When a user downloads an app that engages in what Glide calls “invitational” text messaging⁵⁰ (*i.e.*, “spam-viting”), the app developer scrapes cell phone numbers and other data from the user’s device and sends a pre-written text message composed by Glide to each of that user’s contacts encouraging them to download the app. It is not clear that Glide users are even informed of the developer’s sending of these text messages to all the user’s contacts. In fact, multiple Glide users have complained about everyone in their contact list being spam-vited to join Glide after the user downloaded the Glide App.⁵¹ Another app developer, Path, engages in similar conduct that has led to similar complaints from users, including the report of one user who uninstalled the Path app shortly after downloading it, but awoke the next day to find that “Path had gone on a rogue mission early in the morning, texting and robocalling an unknown number of his contacts, including his grandparents.”⁵² These are clearly not the stories of users who themselves—rather than the app developers—chose to send text messages to their contacts. In addition, the fact that the recipients of these spam text messages—not just the users whose contact lists were scraped—are also complaining about the messages (including that they have never heard of the person purportedly sending the text)⁵³ similarly undermines the picture Glide

⁵⁰ See, *e.g.*, *id.* at 14.

⁵¹ Perez, *supra* note 5.

⁵² Jeffries, *supra* note 12. The article notes that other Path users have made similar complaints.

⁵³ See 800notes.com, *supra* note 11.

tries to paint of users purposely utilizing an app’s “invitational” text messaging functionality to inform their friends and family about the app.⁵⁴

In short, it is clear that Glide and other app developers utilizing “invitational” text messaging mechanisms do not “merely facilitate” the sending of text messages by their users, but rather draft and send commercial text message solicitations *en masse* to cell phone numbers scraped from the contact lists of their users’ mobile devices to increase their user base and make money. Such conduct is completely at odds with both the letter and the purpose of the TCPA, and the Commission should refuse to adopt any interpretation of the term “make” that would allow it.

3. The fact that someone’s cell phone number is in an app user’s contact list in no way establishes consent to receive text messages from the app developer.

Finally, Glide asks the Commission to clarify an exception in the TCPA that allows the use of an autodialer or prerecorded message to make calls to cell phones when the recipient has consented to receive such calls. But like the statutory definition of ATDS and the meaning of the term “make,” the consent exception needs no clarification, and, in any event, should not be interpreted to allow an app developer to send spam text messages to cell phone numbers collected from an app user’s contact list.

⁵⁴ Further, despite Glide’s claims that the content of the texts originates from the app users, it is clear from the messages themselves that the app developers, not the users of those apps, draft the content. For example, Mr. Coffman received a text message stating that “Chad Bisnette has something to show you on Glide,” and including a link to Glide’s website. Other cell phone owners have reported receiving nearly identical texts stating that “Diane Jones has something to show you on Glide,” or “Robert Neal has something to show you on Glide.” 800notes.com, *supra* note 11. But if Chad Bisnette or Diane Jones or Robert Neal really wanted to send a text message inviting one of their friends or family members to join Glide, presumably they would have written something like “I have something to show you,” rather than using the stilted third person. As such, the Commission should reject Glide’s claims that individual users, rather than Glide, are drafting these unnaturally written—but virtually identical—text messages.

The TCPA provides that an otherwise prohibited telemarketing call to a cell phone can be made “with the prior express consent of the called party.”⁵⁵ Consistent with this statutory language, courts routinely hold that consent to place telemarketing calls to cell phones must be explicit.⁵⁶ The Commission has interpreted the statute to require prior express *written* consent.⁵⁷ Specifically, the Commission noted that “requiring prior written consent will better protect consumer privacy because such consent requires conspicuous action by the consumer—providing permission in writing—to authorize autodialed or prerecorded telemarketing calls....”⁵⁸

Here, there was no prior express consent—written or otherwise—given to Glide by the recipients of Glide’s spam text messages. Glide nevertheless asks the Commission to rule that “an app provider reasonably can rely on any consent to make social communications that the call recipient has provided to the app user.”⁵⁹ Such a ruling, however, would be completely at odds with the statutory requirement of “prior express consent” and inconsistent with one of the TCPA’s fundamental purposes: protecting cell phone owners from intrusive, unwanted spam.

⁵⁵ 47 U.S.C. § 227(b)(1)(A).

⁵⁶ See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (“Express consent is consent that is clearly and unmistakably stated) (internal quotations omitted); *Edeh v. Midland Credit Mgmt.*, 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010) (“‘Express’ means ‘explicit,’ not, as [defendant] seems to think, ‘implicit.’ [Defendant] was not permitted to make an automated call to [plaintiff’s] cellular phone unless [plaintiff] had previously said ... something like this: ‘I give you permission to use an automatic telephone dialing system to call my cellular phone.’”); *In re Jiffy Lube Int’l, Inc. Text Spam Litig.*, 847 F. Supp. 2d 1253, 1258 n.7 (S.D. Cal. 2012) (“The court ... is not persuaded that a customer’s provision of a telephone number on the invoice in question would constitute prior express consent.”).

⁵⁷ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C. Rcd. 1830, 1838 ¶ 20 (2012) (“2012 Order”).

⁵⁸ *Id.* at 1839 ¶ 20.

⁵⁹ Petition at 16.

Each step in the argument Glide makes in support of its requested ruling fails. First, Glide asserts that the fact that someone’s cell phone number is in an app user’s contact list means that there is a prior relationship between the two. But while perhaps many of the contacts in a person’s address book are friends and family, it is not necessarily the case that a person has a prior relationship with everyone in their mobile device’s contact list. People can add numbers to their contact list that they get by asking a friend or coworker for some of *their* contacts, from a public directory, or, as noted earlier, from a website that sells lists of cell phone numbers.⁶⁰ Further, almost 37 million phone numbers get recycled each year, meaning that a phone number in someone’s contact list may no longer belong to the person to whom it originally belonged.⁶¹ It simply is not the case that a prior relationship necessarily exists between a person and everyone in their contact list.

Second, Glide asserts that “social conventions” dictate that the people in someone else’s contact list expect, and have therefore consented, to receive calls or text messages from the person in whose contact list they are found.⁶² But simply being in someone else’s contact list does not create an expectation of receiving calls or text messages from them. If a man asks a friend for the friend’s sister’s number so that he can ask her out, no social convention would dictate that the sister expects—let alone consents to—receiving calls or text messages from the would-be suitor whom she may hardly know. Moreover, this analogy is less intrusive than the conduct Glide seeks to have the Commission ratify because there is clearly no social convention creating an expectation that one may be called or texted by a salesperson simply because they

⁶⁰ See *supra* note 44.

⁶¹ See Alyssa Abkowitz, *Wrong Number? Blame Companies’ Recycling*, *The Wall Street Journal* (Dec. 1, 2011), <http://online.wsj.com/news/articles/SB100001424052970204012004577070122687462582>.

⁶² Petition at 16.

were able to obtain your cell phone number from some source. Further, regardless of whether there is a social convention creating an expectation of and consent to receiving calls or text messages from people simply because your name appears in their contact list, there is certainly a social convention against spamming one's entire contact list.⁶³ The fact that you might expect someone to call or text you in no way creates an expectation of, or consent to, receiving spam advertising messages from them or a third-party like Glide.⁶⁴

Finally, even assuming that social convention creates consent to receive text messages from people in whose contact lists one's number is found, Glide asserts that app developers can rely on such consent to send text message spam to their users' contacts. But even if there were some prior relationship between the text message recipient and the app user through which social conventions would establish consent to receive calls and texts, there is no such relationship between the recipient and the app developer. And as both the Commission and courts have recognized, consent to receive calls from one person for one purpose in no way constitutes consent to receive calls from someone else (or even the same person) for some other purpose.⁶⁵

⁶³ See, e.g., NetworkEtiquette.net, http://networketiquette.net/core_rules_do_not_spam.html (last visited Jan. 3, 2014) ("It is proper netiquette to refrain from sending unsolicited messages through the internet or responding to them. Unsolicited sales messages are spam."); Wikipedia, [http://en.wikipedia.org/wiki/Etiquette_\(technology\)](http://en.wikipedia.org/wiki/Etiquette_(technology)) (last visited Jan. 3, 2014) ("Common rules for e-mail and Usenet such as avoiding ... spam are constant across most mediums and communities.").

⁶⁴ Despite Glide's characterization of the unwanted advertising text messages it sends to its users' contacts as "social communications," Petition at 16, it cannot seriously be contended that such texts are anything other than spam sent for the sole purpose of increasing their user base.

⁶⁵ See, e.g., 2012 Order at 1840 ¶ 25 (explaining that consumers who provide a cell phone number for one purpose, such as service calls, in no way consent to receive cell phone calls for another purpose, such as telemarketing); *Satterfield*, 569 F.3d at 954-55 (holding that consent to receive text messages from one party did not constitute consent to receive text messages from another party); *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089, *3 (N.D. Ill. Sept. 4, 2012) ("[T]he consumer must give 'prior express consent' to robocalls—not to telephone calls in general—if they are to receive the automated calls that the legislature deemed invasive.") (emphasis added).

In short, the fact that someone’s cell phone number is in an app user’s contact list in no way establishes consent to receive text messages from the app developer. Glide’s argument to the contrary defies both common sense and the “social conventions” on which it purports to rely.

IV. CONCLUSION

Glide acknowledges that Congress enacted the TCPA to address undesirable telemarketing practices,⁶⁶ but what it fails to recognize is that Glide itself is engaging in those very same practices. While Glide may believe it is providing a valuable public service by telling the world about its app, sending unwanted and unauthorized advertising text messages to cell phones is precisely the kind of conduct prohibited by the TCPA. An app may be wonderfully innovative, but that has nothing to do with whether its developer may engage in unlawful spamming to promote it. For the reasons discussed above, the Commission should reject Glide’s request for a declaratory ruling that would allow it and other app developers to send annoying, intrusive, and costly text message spam to cell phone owners in order to increase their user bases to fulfill their financial aspirations. Instead, the Commission should make clear—to the extent it isn’t already—that app developers’ scraping and text-spamming their users’ contact lists violates the TCPA.

⁶⁶ Petition at 6.

Respectfully submitted,

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