

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

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In the Matter of )  
Rules and Regulations Implementing the )  
Telephone Consumer Protection Act of 1991 )

Petition of Glide Talk, Ltd )  
For Expedited Declaratory Ruling )

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CG Docket No. 02-278

**GROUPME, INC.'S COMMENTS**

GroupMe, Inc. (“GroupMe”), by its undersigned counsel, submits these comments in support of Glide Talk, Ltd’s (“Glide Talk”) Petition for Expedited Declaratory Ruling pursuant to the Public Notice released December 2, 2013, by the Federal Communication Commission (“Commission”) in the above-referenced proceeding.<sup>1</sup> Among other relief, Glide Talk seeks clarification regarding: (i) the meaning of “prior express consent” under the Telephone Consumer Protection Act’s (“TCPA”); and (ii) the TCPA’s automatic telephone dialing system (“ATDS”) restriction.<sup>2</sup> GroupMe and many other parties seek similar clarification from the Commission.<sup>3</sup>

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling filed by Glide Talk, LTD, DA 13-2303 (rel. Dec. 2, 2013).*

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

<sup>3</sup> *See Professional Association for Customer Engagement Petition for Expedited Declaratory Ruling or, in the Alternative, Petition for Expedited Rulemaking, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”); YouMail, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Apr. 19, 2013) (“YouMail Petition”); Cargo Airlines Association Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 17, 2012); Communication Innovators Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012); GroupMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition”).*

The services offered by Glide Talk and GroupMe share many legally significant characteristics. The text messages triggered by users of both services are non-commercial and the services each prohibit users from using their platforms to send commercial text messages.<sup>4</sup> Additionally, neither service independently sends text messages; instead, both rely on users to establish an account such that the account creator, in the case of Glide Talk, or the group creator, in the case of GroupMe, triggers sending text messages to recipients.<sup>5</sup> The legal terms of both services also require that the account or group creator represents that they have the consent of recipients to receive the communications triggered by the account or group creator.<sup>6</sup> Moreover, the recipients of such text messages are people who have personal relationships with the account or group creator.<sup>7</sup> These facts demonstrate that the privacy protections and public safety concerns informing the TCPA and the ATDS restriction are simply irrelevant to the communications services enabled by Glide Talk and GroupMe.<sup>8</sup>

On a broader level, review of the Commission’s record developed in response to TCPA-related petitions reveals a number of common themes. First, the TCPA was passed to address

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<sup>4</sup> See, e.g., GroupMe Terms of Service, “User Responsibilities,” available at: <https://groupme.com/terms> (last visited Dec. 26, 2013); Glide Talk End User License Agreement, Section 7.B., available at: <http://www.glide.me/eula> (last visited Dec. 26, 2013).

<sup>5</sup> See *Glide Petition*, at 3-4; *GroupMe Petition*, at 4-8 (detailing the service offering and its use); *GroupMe Reply Comments*, CG Docket No. 02-278, at 4-6 (filed Sept. 10, 2012) (correcting the maximum allowed group sizes).

<sup>6</sup> See GroupMe Terms of Service, “GroupMe Messages and Consent,” available at: <https://groupme.com/terms> (last visited Dec. 26, 2013); Glide Talk End User License Agreement, Section 6, available at: <http://www.glide.me/eula> (last visited Dec. 26, 2013).

<sup>7</sup> See *Glide Petition*, at 5 n.9 (“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.”); *GroupMe Reply Comments*, CG Docket No. 02-278, at 17-24 (filed Sept. 10, 2012).

<sup>8</sup> See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd. 15391, 15391-92 (2012) (finding that Congress’s purpose in enacting the TCPA was to address invasion of privacy and public safety) (“*SoundBite Order*”).

particular types of commercial communications and the ATDS restriction targeted a specific type of technology used in connection with such communications.<sup>2</sup> Neither the commercial communications that are the object of the TCPA, nor the TCPA's ATDS restriction, apply to Glide Talk's or GroupMe's services. Next, the policy reasons that informed the Commission's decision to extend the statute to text messaging have resulted in the unintended consequence of subjecting non-commercial, administrative, and informational communications that wireless subscribers desire into a feeding frenzy for plaintiffs' attorneys undermining the policy goals of the TCPA.<sup>10</sup> Finally, text messaging has evolved from a premium, sparsely used service,<sup>11</sup> to an unlimited offering undergirding modern, robust social media tools.<sup>12</sup> In light of the evolution of the text

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<sup>2</sup> See, e.g., *id.*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003), 14054 (“2003 TCPA Order”) (“In effect, Congress has erected a wall - or more accurately permits a citizen to erect a wall - that no *advertiser* may penetrate without his acquiescence.”) (emphasis supplied). H.R. REP. NO. 102-317, at 11 (1991) (finding an ATDS can “seize” a recipients telephone line and not release it even after the called party hangs up); *2003 TCPA Order*, 18 FCC Rcd at 14022 (noting an ATDS enables “deliver[ing] prerecorded messages to thousands of potential customers every day”).

<sup>10</sup> See, e.g., U.S. Chamber of Commerce Comments, CG 02-278, at 3-4 (filed Dec. 19, 2013) (reporting there have been 1,332 TCPA lawsuits filed in the first 9 months of 2013 compared to 824 in all of 2011, an increase of 64%, and detailing the impact of such lawsuits on businesses); *Glide Talk Petition*, at 8, n.21; Twilio, Inc., Comments, CG Docket No. 02-278, at 5, 5 n.14, n.15 (filed Aug. 30, 2012) (detailing numerous TCPA-related class action lawsuits and noting many of these complaints are filed by the same plaintiffs' law firms using boilerplate complaints) (“Twilio Comments”); *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, 02-278, at 2 n.4 filed Feb. 16, 2012) (identifying numerous lawsuits filed against various companies for alleged violation of the TCPA) *granted* 27 FCC Rcd. 15391 (2012).

<sup>11</sup> See, e.g., *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, Sixteenth Report, 28 FCC Rcd 3700, 3712-3713 (2013) (finding average text messages sent per user, per month has grown from 29 to 594 over a 7-year period ending December, 2011) (“Sixteenth Report”).

<sup>12</sup> See, e.g., *id.* at 3723-3724 (identifying messaging and social networking as the top categories of mobile applications available in app stores); *SoundBite Order*, 27 FCC Rcd at 15396, ¶ 10 n.45 (recognizing the unlimited text and call offerings of the four largest wireless carriers).

messaging marketplace, coupled with the distortion of the TCPA by plaintiffs' attorneys, the Commission should expeditiously clarify the TCPA as proposed by GroupMe and other parties.

GroupMe's service, as well as that of other petitioners, represents a natural evolution in the wireless services marketplace. In the *2012 TCPA Order*,<sup>13</sup> the Commission recognized that wireless subscribers rely on wireless services for a variety of communications that were not available in 1991, the year when the TCPA was enacted, or in 2003, when the FCC found that the TCPA encompassed text messaging. Wireless subscribers invite and rely on communications from service providers, like banks, or package delivery companies, as well as from schools and doctors' offices even if consent to receive such communications was provided by an intermediary.<sup>14</sup> Since 2003, wireless communications services have become more pervasive and encompass more communications that recipients invite, desire, and rely upon.

Alongside the explosive growth in wireless services and subscribers is the change in rate plans since the *2003 TCPA Order*. In finding that the TCPA encompassed text messages, the Commission examined the rates consumers paid for such services. Most wireless carriers offered plans according to "buckets" of wireless minutes. Receiving calls deducted recipients' available wireless minutes.<sup>15</sup> While subscribers may not incur a per-call charge for a particular call, the Commission found that the resulting loss of a minute from a "bucket" of total minutes was enough to constitute a charge under the statute.<sup>16</sup>

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<sup>13</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830 (2012) ("*2012 TCPA Order*").

<sup>14</sup> *See id.* at 1838, ¶ 21.

<sup>15</sup> *See, e.g., Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 02-179, Seventh Report, 17 FCC Rcd. 12985, 13015 ("Today all of the nationwide operators offer a . . . pricing plan that allows customers to purchase a bucket of MOUs . . .").

<sup>16</sup> *See 2003 TCPA Order*, 18 FCC Rcd at 14115, ¶ 165.

But this is no longer the case as the Commission recognized in the *SoundBite Order*. The four largest wireless carriers in the U.S. offer unlimited text and voice plans with data usage tiered that many subscribers choose.<sup>17</sup> In fact, Verizon Wireless, the nation's largest by subscriber count, requires new subscribers to choose a plan that *only* offers unlimited voice and data.<sup>18</sup> However, even for those consumers who might incur some minimum incremental cost for an opt-out text message, the Commission still found that benefits of receiving opt-out text messages outweighed such costs. Indeed, the Commission found that receipt of an opt-out text message, even in the absence of specific, prior express consent, was what consumers expected.<sup>19</sup>

So too with services that send non-commercial, administrative, or informational text messages where such messages are triggered by group or account creators having a personal relationship with the message recipient. In all probability, such recipients will likely not incur a charge to receive such messages given the wide availability of unlimited voice and text plans. But even for those who do, the minimal incremental costs that such recipients bear should not impede the development of new and innovative offerings or prevent wireless subscribers from receiving the multitude of useful communications identified in this proceeding's record that subscribers invite. Limiting the clarification to only non-commercial, administrative, or informational calls or text messages where the recipient has a personal relationship with the intermediary will not result in a deluge of uninvited, one-way commercial calls and text messages as such calls and text messages would continue to be prohibited by the Commission's rules.<sup>20</sup>

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<sup>17</sup> See *SoundBite Order*, 27 FCC Rcd at 15396, ¶ 10 n.45.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 15394-97, ¶¶ 8-11.

<sup>20</sup> See, e.g., *GroupMe Reply Comments*, CG Docket 02-273, at 15-24 (filed Sept. 10, 2012) (describing how granting GroupMe's petition would not provide a loophole for telemarketers).

Finally, the evolution of wireless devices also requires the Commission to clarify the meaning of an ATDS. The current ambiguity surrounding the scope of the definition stems from the reference to “capacity” in the statute. An ATDS is defined as “equipment which has the *capacity* - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>21</sup> Some courts have found “capacity” to mean: (1) equipment capable of autodialing random or sequential numbers whether or not used for that purpose; and (2) equipment that could be altered to make it capable of autodialing random or sequential numbers.<sup>22</sup> As explained by GroupMe and other parties, both of these interpretations are problematic, but the second would expand the meaning of an ATDS to include ordinary smartphones.<sup>23</sup> In 2012, more than 55% of U.S. consumers have smartphones, up from 41% in July, 2011, and 67% of new subscribers chose smartphones as their wireless device.<sup>24</sup> Surely Congress and the Commission did not intend to subject ordinary wireless subscribers to statutory damages under the TCPA for communicating with another wireless subscriber absent the called party’s prior express consent. Clarifying the definition as proposed by GroupMe would address many of the nuisance lawsuits that drove petitioners to the Commission in the first instance, including GroupMe, as well as resolve absurd applications of the law.<sup>25</sup> The Commission should clarify that the definition of an ATDS encompasses only equipment that, at the time of use,

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<sup>21</sup> 47 U.S.C. § 227(a)(1) (emphasis supplied).

<sup>22</sup> See, e.g., *Satterfield v. Simon & Schuster, et al.*, 569 F.3d 946, 951 (9th Cir. 2009) (“Accordingly, a[n] [ATDS] need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.”).

<sup>23</sup> See *GroupMe Petition*, at 10; Communication Innovators Comments, at 2 (filed Dec. 19, 2013) (highlighting an overbroad definition of “capacity” has “opened the door for virtually every type of telephone and computer equipment to be deemed an [ATDS].”); *YouMail Petition*, at 10-11 (noting the definition of an ATDS could include “every type of telephonic device. . .”).

<sup>24</sup> See *Sixteenth Report*, 28 FCC Rcd at 3721-22.

<sup>25</sup> See *GroupMe Petition*, at 10-12.

could, in fact, have autodialed random or sequential numbers without human intervention and without first being technologically altered.<sup>26</sup>

For the reasons set forth herein, GroupMe urges the Commission to grant the *GroupMe Petition* and the similar relief sought by Glide Talk. Specifically, the Commission should issue a ruling addressing two issues. First, the Commission should clarify that for non-telemarketing, administrative, or informational calls or text messages to wireless numbers, which can be permissibly made using an ATDS under the TCPA with the recipient's oral prior express consent, the caller can rely on an intermediary obtaining consent from the recipient. Second, the Commission should clarify that the definition of "capacity" under Section 227(a)(1) of the TCPA encompasses only equipment, at the time of use, could, in fact, have employed the functionalities described in the TCPA without human intervention and without first being technologically altered.

Respectfully submitted,

GroupMe, Inc.

By:           /electronically signed/          

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<sup>26</sup> See *GroupMe Petition*, at 14-16; *Pace Petition*, at 10; see, e.g., Covington and Burling LLP Comments, CG Docket No. 02-278, at 4-6 (filed Dec. 19, 2013) (emphasizing the text and structure of the TCPA supports interpreting "capacity" to mean a present capacity).