

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**COMMENTS OF COMMUNICATION INNOVATORS**

**I. INTRODUCTION**

Communication Innovators (“CI”)<sup>1</sup> respectfully submits these comments in response to the December 2, 2013 Public Notice released by the Federal Communications Commission’s (the “FCC” or “Commission”) Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.<sup>2</sup> In the Public Notice, the Bureau seeks comment on the Petition of Glide Talk, Ltd. (“Glide”) for Expedited Declaratory Ruling.<sup>3</sup> The Glide Petition asks the Commission to, among other things, clarify that the term “automatic telephone dialing system” (“autodialer”) in the Telephone Consumer Protection Act (“TCPA”) encompasses only equipment that can, at the time of the call, be used to store or generate sequential or randomized telephone numbers.<sup>4</sup>

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<sup>1</sup> CI is a 501(c)(4) organization that seeks to maximize the pace of telecommunications innovation and its benefit for American consumers and businesses. CI and its member technology companies strongly endorse efforts by the President, the Commission, and many in Congress to minimize the burden imposed on innovators and entrepreneurs by outdated, unnecessary, or inefficient regulations.

<sup>2</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Glide Talk, Ltd.*, CG Docket No. 02-278, Public Notice, DA 13-2303 (Dec. 2, 2013) (“Public Notice”).

<sup>3</sup> See *Petition for Expedited Declaratory Ruling*, Glide Talk, Ltd., CG Docket No. 02-278 (filed Oct. 28, 2013) (“Glide Petition”).

<sup>4</sup> *Id.* at 5.

As discussed below, CI agrees that, to be considered an autodialer, equipment must have the “present capacity” or “current ability” to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers. In addition, consistent with the text of the TCPA, any clarification in response to the Glide Petition should apply to all voice calling and text messaging platforms that are used to make calls or deliver messages to wireless telephone numbers, not solely to Glide’s messaging service.

As CI and Glide have explained, there continues to be significant confusion among plaintiffs’ attorneys and courts over the Commission’s prior TCPA decisions and the applicability of the TCPA to modern dialing and text messaging solutions.<sup>5</sup> For example, some courts have interpreted the FCC’s past statements to mean that any predictive dialing solution is an autodialer, regardless of whether it has the statutorily required “capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.”<sup>6</sup> Other courts have held that the Commission altered the statutory definition of autodialer such that now any equipment that has “the capacity to dial numbers without human intervention” is an autodialer.<sup>7</sup> These rulings and the FCC’s TCPA decisions have opened the door for virtually every type of telephone or computerized equipment in existence to be deemed an autodialer. The Commission can resolve this uncertainty by confirming that modern

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<sup>5</sup> See, e.g., *id.* at 6-8 (“[A] declaratory ruling would provide clarity with respect to two Commission decisions over the past 10 years that were intended to address the behavior of telemarketers but have been read more broadly – and inappropriately – by class action plaintiffs’ lawyers.”); *Ex Parte* Letter from Communication Innovators, CG Docket No. 02-278 (filed Sept. 13, 2013) (“CI September *Ex Parte* Letter”).

<sup>6</sup> See, e.g., *Griffith v. Consumer Portfolio Servs., Inc.*, 838 F. Supp. 2d 723 (2011); see also 47 U.S.C. § 227(a)(1).

<sup>7</sup> See, e.g., *Gragg v. Orange Cab Co.*, 942 F. Supp. 2d 1111, 1113 (W.D. Wash. 2013); *Buslepp v. Improv Miami*, 2012 WL 4932692 at \*2 (S.D. Fla. Oct. 16, 2012).

communications technologies that do not have the “present capacity” or “current ability” to store or produce, and dial, random or sequential numbers are not autodialers under the TCPA.

CI also encourages the Commission to grant the separate CI Petition and confirm that predictive dialers and other advanced communications technologies are not autodialers under the TCPA and the Commission’s TCPA rules if they: (1) are not used for telemarketing purposes; and (2) do not have the “present capacity” or “current ability” to generate and dial random or sequential numbers.<sup>8</sup> At a minimum, the Commission should issue a narrow declaratory ruling acknowledging that: (1) there are a variety of predictive dialing solutions available today; and (2) as noted above, to be considered an autodialer, any solution must have the “capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers.”<sup>9</sup>

## **II. TO BE CONSIDERED AN AUTODIALER, EQUIPMENT MUST HAVE THE “PRESENT CAPACITY” OR “CURRENT ABILITY” TO STORE OR PRODUCE, AND DIAL, RANDOM OR SEQUENTIAL NUMBERS**

Under the TCPA, the term “autodialer” includes only equipment that “*has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator.*”<sup>10</sup> Congress’s choice of the present tense “has the capacity,” instead of the future tense “will have the capacity,” is informative.<sup>11</sup> Thus, consistent with Glide’s request, equipment and technologies only qualify as autodialers if, *at the time of use*, they can store or

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<sup>8</sup> *Petition for Declaratory Ruling*, Communication Innovators, CG Docket No. 02-278 (filed June 7, 2012) (“CI Petition”).

<sup>9</sup> CI September *Ex Parte* Letter.

<sup>10</sup> 47 U.S.C. § 227(a)(1) (emphasis added).

<sup>11</sup> *See* Glide Petition at 11 (noting that Congress did not use the language “has *or could develop* the capacity” (emphasis in original)).

produce, and dial, random or sequential numbers without first being technologically altered. Equipment and technologies meeting this standard would have as a functioning feature the capability to store or produce, and dial, random or sequential numbers and the ability to use that functionality without the installation of new software or hardware or the modification of existing software or hardware.<sup>12</sup>

In addition, as Glide explains, the everyday meaning of “capacity” refers to current capabilities, rather than theoretical or future capabilities available only after additional modifications are made to the equipment.<sup>13</sup> Glide notes that Congress could have “referenced equipment with the ‘potential’ to store or produce random or sequential numbers for dialing” but it did not do so, and “congressional choices must be respected.”<sup>14</sup> The plain English meaning of “capacity” is “ability,”<sup>15</sup> and many dialing and text message technologies currently on the market have no number-generating abilities (sequential, random, or otherwise).

Moreover, as CI and others have explained, an overbroad interpretation of “capacity” would sweep in all kinds of electronics under the TCPA’s autodialer definition.<sup>16</sup> Millions of devices that do not implicate the TCPA’s goals, including mobile phones, smart phones, tablets, e-readers, and personal computers, could all theoretically be modified to store or produce, and dial, random or sequential telephone numbers. Businesses and consumers could be subject to

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<sup>12</sup> See *id.* at 11; *Ex Parte* Letter from Communication Innovators, CG Docket No. 02-278, 3 (filed Oct. 29, 2013).

<sup>13</sup> Glide Petition at 11.

<sup>14</sup> *Id.*

<sup>15</sup> Oxford English Dictionary (2012) (defining “capacity” as “[t]he power, ability, or faculty for anything in particular”); see also Glide Petition at 11 (stating Congress limited “capacity” to “present capability”).

<sup>16</sup> See, e.g., CI September *Ex Parte* Letter at 3; Glide Petition at 8-9; *Petition for Expedited Declaratory Ruling*, YouMail, Inc., CG Docket No. 02-278, 11 (filed Apr. 19, 2013) (“YouMail Petition”).

TCPA litigation if they send a text message or even manually dial a voice call to a wrong number, as such calls would be viewed as having been made using an autodialer. In addition, an unbounded interpretation would prompt additional parties like Glide to seek declaratory rulings with the Commission on a case-by-case basis as they get sued, imposing an unnecessary administrative burden on Commission staff.

The Commission should interpret the TCPA in a way that gives effect to the meaning of each word chosen by Congress, and a consistent reading of the statute and its legislative history must give meaning to the phrase “using a random or sequential number generator.”<sup>17</sup> A reading of the statute that requires autodialer to have the “present capacity” or “current ability” to store or produce, and dial, random or sequential numbers would be consistent both with the plain language of the statute and with longstanding Commission precedent that the autodialer restriction “clearly” does not apply to “functions like ‘speed dialing,’ ‘call forwarding,’” and other services “where numbers called are not generated in a random or sequential fashion.”<sup>18</sup>

Congress did not intend to curtail the use of advanced communications technologies with no random or sequential number generating capabilities because these technologies provide significant consumer benefits.<sup>19</sup> For example, they can be programmed to protect consumers against improper calls and to comply with a variety of state and federal laws and regulations.

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<sup>17</sup> See 47 U.S.C. § 227(a)(1).

<sup>18</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).

<sup>19</sup> See Letter from Sen. Blunt to FCC Chairman Julius Genachowski, CG Docket No. 02-278 (dated June 28, 2011) (stating that “[t]he current generation of predictive dialers does not raise concerns about calling random numbers – the practice that Congress intended to prevent when it enacted the TCPA”); see also Glide Petition at 12 (President George H.W. Bush signed the TCPA into law but acknowledged that “the TCPA ‘could also lead to unnecessary regulation or curtailment of legitimate business activities,’ [and] that he had signed it only ‘because it gives the [FCC] ample authority to preserve legitimate business practices.’”).

Such technologies are also exponentially more efficient than manual dialing, thereby increasing productivity and lowering costs for consumers.

### **III. ANY CLARIFICATION OF THE MEANING OF “AUTODIALER” OR “CAPACITY” SHOULD APPLY TO ALL TECHNOLOGY PLATFORMS**

The TCPA’s definition of “autodialer” does not distinguish between voice calling and text (or other) messaging platforms. Instead, it is only the specific capabilities of those platforms – and how those capabilities are used – that are relevant. Thus, consistent with the text of the TCPA, any clarification in response to the Glide Petition should apply to all voice calling and text messaging platforms that are used to make calls or deliver messages to wireless telephone numbers, not solely to Glide’s messaging service.

Glide states that “[p]redictive dialers have no relation to [its] services, nor to text messaging generally,<sup>20</sup> and it attempts to distinguish its service from predictive dialer technologies. As CI described in its Petition, issues left unanswered by the 2003 and 2008 decisions effectively created the widespread confusion and resulting skyrocketing litigation seen today.<sup>21</sup> Glide’s reliance on text messages instead of voice calls as the transmission medium for its invite-a-friend feature does not change the legal analysis required under the TCPA. Like predictive dialers, Glide’s service relies on specific telephone numbers to be called or messaged. And, just like predictive dialers that are used for informational calls, Glide’s technology does not have the “present capacity” or “current ability” to generate or dial random or sequential numbers.

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<sup>20</sup> Glide Petition at 8 n.17.

<sup>21</sup> CI Petition at 10-14.

#### IV. CONCLUSION

For the foregoing reasons, CI urges the Commission to confirm that, to be considered an autodialer, equipment must have the “present capacity” or “current ability” to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers. It should also confirm that predictive dialers and other new technologies are not autodialers under the TCPA and the Commission’s TCPA rules if they: (1) are not used for telemarketing purposes; and (2) do not have the present capacity or current ability to generate and dial random or sequential numbers.<sup>22</sup>

Respectfully submitted,

*/s/ Darrin R. Bird*

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<sup>22</sup> CI Petition at 1.