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

Re: **CORRECTED VERSION – Ex Parte Notice – ACA International (“ACA”),
Petition for Rulemaking, CG Docket No. CG 02-278**

Dear Ms. Dortch:

On March 6, 2014, Pat Morris, CEO, Robert Föehl, General Counsel, and Lucia Lebens, Director of Federal Government Affairs, of ACA International (“ACA”), along with Monica Desai of Patton Boggs LLP, counsel to ACA, met with John B. Adams (Acting Deputy Chief, Consumer Policy Division), and Kristi Lemoine (Attorney), both in the Federal Communications Commission Consumer and Governmental Affairs Bureau.

During the meeting, ACA and its counsel reviewed the issues raised in its Petition for Rulemaking.¹ Specifically, ACA asked that the Commission initiate a proceeding to address several current, significant issues related to the application of the Telephone Consumer Protection Act (“TCPA”) and the Commission’s rules.² ACA reiterated its request that the Commission: (1) confirm that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS”); (2) clarify that “capacity” under the TCPA means present ability; (3) declare that prior express consent attaches to the person who incurs a debt, not only the specific telephone number the debtor provides at the time of consent; and (4) create a safe harbor for autodialed “wrong number” non-telemarketing calls to wireless numbers.

First, ACA stated that the Commission should clarify that just because a predictive dialer *can* be an ATDS, not every predictive dialer *must* be an ATDS under the TCPA. The statute specifically

¹ ACA International, *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed Jan. 31, 2014) (“Petition”); see also *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Report No. 2999, Feb. 21, 2014, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0221/DOC-325716A1.pdf.

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (“TCPA”); 47 C.F.R. § 64.1200 *et seq.*

defines ATDS 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.”³ However, this language has been stretched beyond the breaking point in an increasing number of class action lawsuits, with some courts even holding that predictive dialers need not meet the statutory definition to be deemed an ATDS.⁴ As ACA described, an explicit clarification that the Commission did not (and in fact, could not) alter the statutory definition of an ATDS would alleviate the current uncertainty and impact to businesses, while preserving Congress’ intent and the TCPA’s important consumer privacy protections.

Next, the Commission should confirm that “capacity” for TCPA purposes means the “present ability” of a dialing system. Federal courts recently have espoused a “common sense” approach to TCPA analysis and have supported this interpretation.⁵

Third, ACA explained that prior express consent should attach to the person who incurs a debt, not only the specific telephone number the debtor provides at the time of consent. While the FCC has recognized that “the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt,”⁶ consumers frequently change their telephone numbers and recent research shows that over one-third of Americans now live in wireless-only households.⁷ It is critical that creditors be able to contact debtors on wireless telephone numbers, where prior express consent has been given, to recover funds owed for goods and services received, despite that consenting consumer having changed telephone numbers, unbeknownst to the debt collector.

³ 47 U.S.C. § 227(a)(1).

⁴ *See, e.g., Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) (“The FCC concluded that predictive dialers are governed by the TCPA because, like earlier autodialers, they have the capacity to dial numbers ‘without human intervention.’ In doing so, it interpreted ‘automatic telephone dialing system’ to include equipment that utilizes lists or databases of known, nonrandom telephone numbers.”)(internal footnotes omitted).

⁵ *See Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at *11 (D. Ala. Sept. 17, 2013); *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 at *8-9 (W.D. Wa. Feb. 7, 2014).

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559 at ¶ 9 (2008).

⁷ Centers for Disease Control and Prevention (CDC), *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2013*, Stephen J. Blumberg, Ph.D. and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, released Dec. 2013, at pp. 1-2, available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf> (last accessed Mar. 10, 2014).

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Lastly, ACA detailed the need to address autodialed “wrong number” non-telemarketing calls to wireless numbers, as presented in its Petition.⁸

ACA emphasized that addressing these issues is critical to removing the current confusion and uncertainty that has brought on an explosion in frivolous and expensive TCPA class action litigation.

Respectfully submitted,



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⁸ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 at ¶1 (2004).