

March 24, 2014

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Petition for Rulemaking of ACA International
RM-11712; CG Docket No. 02-278**

Dear Ms. Dortch:

Global Connect is a leading provider of hosted dialing and communications services. New calling technologies offered by Global Connect allow a wide variety of organizations, including hotels, utilities, educators, and government entities, to reach their contacts quickly, easily, and cost-effectively. We write today to express our support for ACA International's request that the Commission confirm that: (1) predictive dialers are not necessarily "automatic telephone dialing systems" (autodialers) under the Telephone Consumer Protection Act (TCPA) and the Commissions' TCPA rules; (2) "capacity" in the autodialer definition means "present ability"; and (3) parties are not liable for autodialed or prerecorded non-telemarketing calls to wireless telephone numbers for which the caller had obtained "prior express consent" but which were reassigned to another subscriber without the caller's knowledge.¹

As discussed below, ACA's petition highlights numerous TCPA issues in need of clarification, many of which are already before the Commission in pending petitions for declaratory ruling. Although the ACA petition is styled as a request for rulemaking, that long process may not be necessary to resolve many of the issues that ACA identified. For example, a large coalition of organizations supports granting the Communication Innovators (CI)² and United Healthcare Services, Inc. (United)³ petitions, which discuss the predictive dialer and capacity issues (CI) and the reassigned number issue (United). Through

¹ *Petition for Rulemaking*, ACA International, CG Docket No. 02-278 (Jan. 31, 2014) ("ACA Petition").

² *Petition for Declaratory Ruling*, Communication Innovators, CG Docket No. 02-278 (June 7, 2012) ("CI Petition").

³ See *Petition for Expedited Declaratory Ruling*, United Healthcare Services, Inc., CG Docket No. 02-278 (Jan. 16, 2014).

numerous comment cycles, the FCC has built the record that it needs to support a grant of the requested clarifications. A declaratory ruling is also appropriate because there is ongoing uncertainty that the Commission should resolve. If the Commission only pursues a rulemaking, today's uncertainty will remain for calls already placed (or that are placed until the completion of a rulemaking). However, if the FCC does invest the time and resources in a rulemaking, it should seek comment broadly on potential changes to its TCPA rules, not just the specific issues that ACA identified.

About Global Connect. Global Connect offers state-of-the-art calling software and equipment, including preview and predictive dialing technology, to help clients reach large numbers of contacts quickly and accurately. Our clients use this technology to make a variety of non-telemarketing calls, including flight delay or cancellation notifications; disaster relief, utility outage, and school closing announcements; federal grant program updates; healthcare notifications; accounts receivable correspondence; and fraud and identity theft prevention alerts. For example, Global Connect's technology has helped more than 4,000 schools quickly distribute time-sensitive messages to students, parents, and staff on everything from absence notifications to urgent disaster relief information. Our consumer-friendly dialing solutions offer many privacy benefits and help callers comply with state and federal laws and regulations.

Predictive dialers are not necessarily "autodialers." Global Connect agrees with ACA and numerous other parties who have petitioned the Commission that predictive dialers are not necessarily "autodialers."⁴ The TCPA specifically requires that equipment have 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" to be considered an "autodialer."⁵ As many other parties have recognized, Congress did not intend to restrict the use of innovative new technologies such as preview dialing and predictive dialing that have no random or sequential number generating capabilities.⁶

Nonetheless, some courts and plaintiffs' attorneys have adopted an overbroad interpretation of the autodialer definition that encompasses today's preview dialing and predictive dialing technologies (and other communications platforms), which could encourage companies and other organizations, including non-profits, to significantly curtail the provision of time-sensitive communications with members, customers, accountholders, constituents, and other parties. It could also threaten new broadband-enabled call center jobs in the United States.⁷ No rulemaking is required on this issue; the Commission need only refer parties to the plain language of the statute.

"Capacity" means "present ability." Global Connect also agrees with the many parties that have stated over the last several years that whether equipment qualifies as an autodialer should be determined by its "present" or "current" ability at the time the call is made instead of what the theoretical

⁴ See, e.g., ACA Petition at 6-9; CI Petition.

⁵ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1); see also Memorandum Re: Motion for Summary Judgment at 11-12 n.6, *Dominguez v. YAHOO!, Inc.*, No. 13-1887 (E.D. Pa. Mar. 20, 2014) (concluding that the TCPA's autodialer definition is "clear and unambiguous" and that the technology at issue in the case was not an autodialer because it did not have "the capacity to randomly or sequentially generate telephone numbers (as opposed to simply storing telephone numbers), as required by the statutory definition of [an autodialer]").

⁶ See *Reply Comments of Communication Innovators*, CG Docket No. 02-278 at 8-9 (Nov. 3, 2012).

⁷ See Letter from Darrin R. Bird and David W. Sargent, CG Docket No. 02-278 (dated Oct. 1, 2012).

capacity of the equipment could be if it were modified or altered in some way.⁸ Because Congress did not define “capacity” but did adopt the present tense in the statutory language, the FCC should adopt the ordinary, present tense meaning of the word: current ability.⁹ Otherwise, the term autodialer could encompass calling technologies that Congress never intended to regulate, including nearly all smartphones, tablets, e-readers, and computers. With sufficient effort, each of these devices could be modified to store or produce, and dial, random or sequential telephone numbers. Although these interpretations of the TCPA clearly depart from Congressional intent, they continue to create litigation risks for callers, threatening to chill the use of modern calling technologies. Here again, the Commission need not undertake the long process of a rulemaking. Resolving this issue does not require the Commission to change any of its rules. Instead, the FCC should address the ongoing confusion by clarifying the application of its existing TCPA rules.

The TCPA does not impose liability for calls to reassigned wireless numbers when the caller is unaware of the reassignment. Global Connect supports Commission action to confirm that parties are not liable for autodialed or prerecorded “wrong number” non-telemarketing calls to reassigned wireless numbers when the caller had obtained “prior express consent” to call the number but was unaware of the reassignment. This confirmation would, among other things, make clear that callers are not liable for calls placed in error to numbers no longer assigned to the person who gave consent to be contacted. The organizations that use Global Connect’s technology to reach their members, customers, and constituents already work diligently to comply with the TCPA and avoid reaching the wrong person. Unfortunately, a small number of misdirected calls simply cannot be avoided.

For example, millions of consumers change their phone numbers each year, and many of them do not notify all organizations from which they have consented to receive calls. No currently available database or third-party resource can prevent all calls to numbers that once belonged to a client, customer, or other contact but have been reassigned unbeknownst to the caller. Callers using Global Connect’s technology get no benefit from these mistaken contacts and have strong incentives to update their lists as soon as they learn of the change in order to avoid the costs of reaching the wrong person in the future. Imposing liability on callers who have properly obtained “prior express consent” to call a number and made an unavoidable mistake is unfair and outside the TCPA’s purpose. Moreover, a failure to provide this urgently needed clarification will also hinder the ability of organizations to provide time-sensitive non-telemarketing communications to their subscribers.

Conclusion. Clarifying these issues consistent with the TCPA’s plain language and Congressional intent will help resolve the significant confusion among courts and plaintiffs’ attorneys over the application of the Commission’s prior TCPA decisions to modern technologies and to reassigned telephone numbers.¹⁰ ACA’s petition adds to the growing chorus of parties asking the Commission to

⁸ See, e.g., ACA Petition at 9-12; *Reply Comments of the National Council of Higher Education Resources*, CG Docket No. 02-278 at 2 (Jan. 3, 2014); *Comments of the American Financial Services Association*, CG Docket No. 02-278 at 2-3 (Jan. 3, 2014); *Comments of Nicor Energy Services Company*, CG Docket No. 02-278 at 6-8 (Dec. 19, 2013); *Ex Parte Letter from Communication Innovators*, CG Docket No. 02-278 (filed Oct. 29, 2013); *Comments of Noble Systems Corporation*, CG Docket No. 02-278 at 8 (Nov. 15, 2012); *Reply Comments of Communication Innovators*, CG Docket No. 02-278 3-7 (Nov. 3, 2012).

⁹ See, e.g., PACE Petition at 11 (providing dictionary definitions); see also *Hunt v. 21st Mortg. Corp.*, 2013 WL 5230061, at *4 (N.D. Ala. Sept. 17, 2013) (“to meet the TCPA definition of an ‘automatic telephone dialing system,’ a system must have a **present** capacity, at the time calls [are] being made, to store or produce and call numbers from a number generator.”) (emphasis in original).

¹⁰ See *Ex Parte Letter from Communication Innovators*, CG Docket No. 02-278 (Sept. 13, 2013).

bring uniformity, certainty, and reason back to TCPA compliance. We urge the Commission to act promptly to grant these requests and issue appropriate confirmations.

Respectfully submitted,

/s/ Darrin R. Bird

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