

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

In the Matter of)	
)	
Petition for Rulemaking of ACA International)	RM-11712
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

COMMENTS OF COMMUNICATION INNOVATORS

I. INTRODUCTION

Communication Innovators (“CI”),¹ through its counsel, respectfully submits these comments in response to the February 21, 2014 Public Notice released by the Federal Communications Commission (the “FCC” or “Commission”) Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.² In the Public Notice, the Bureau seeks comment on the Petition for Rulemaking of ACA International (“ACA”), which asks the Commission to, *inter alia*: (1) confirm that not all predictive dialers are categorically “automatic telephone dialing systems” (“autodialer”) under the Telephone Consumer Protection Act (“TCPA”) and the Commission’s rules; and (2) confirm that “capacity” under the TCPA means “present ability.”³ As discussed below, CI agrees that not all predictive dialers are autodialers. Moreover, CI agrees that, to be considered an autodialer, a predictive dialer or other equipment

¹ 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the President, the Commission, and many in Congress to minimize the burden imposed on innovators and entrepreneurs by outdated, unnecessary, or inefficient regulations.

² *Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, RM-11712, Public Notice, Rpt. No. 2999 (Feb. 21, 2014) (“Public Notice”).

³ See *Petition for Rulemaking*, ACA International, RM-11712, CG Docket No. 02-278 (filed Jan. 31, 2014) (“ACA Petition”).

must have the “present ability” (or “current ability”) to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers. CI also encourages the Commission to grant the separate CI Petition that raises overlapping issues under the TCPA.⁴

II. THE COMMISSION SHOULD CONFIRM THAT NOT ALL PREDICTIVE DIALERS ARE “AUTODIALERS”

CI supports the Commission’s efforts to address the confusion over the scope and meaning of the TCPA’s autodialer restriction. As CI, ACA, and many other parties have explained in separate filings in this docket, 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 predictive dialers and other modern dialing solutions.⁵ For example, some courts have interpreted the FCC’s past statements to mean that any predictive dialing solution is categorically 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.”⁶ Other courts have held that the Commission altered the

⁴ Specifically as requested by CI, the Commission should 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. *Petition for Declaratory Ruling*, Communication Innovators, CG Docket No. 02-278 (filed June 7, 2012) (“CI Petition”). 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) 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.” *Ex Parte* Letter from Communication Innovators, CG Docket No. 02-278 (filed Sept. 13, 2013) (“CI September *Ex Parte* Letter”).

⁵ See, e.g., ACA Petition at 7-8; CI September *Ex Parte* Letter at 2; *Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking*, Professional Association for Customer Engagement, CG Docket No. 02-278, at 7-12 (filed Oct. 18, 2013); *Petition for Expedited Declaratory Ruling and Clarification*, GroupMe, Inc., CG Docket No. 02-278, at 14 (filed Mar. 1, 2012) (“GroupMe Petition”); *Petition for Expedited Declaratory Ruling*, YouMail, Inc., CG Docket No. 02-278, at 11 (filed Apr. 19, 2013) (“YouMail Petition”); *Petition for Expedited Declaratory Ruling*, Glide Talk, Ltd., CG Docket No. 02-278, at 9-13 (filed Oct. 28, 2013) (“Glide Talk Petition”).

⁶ See, e.g., *Griffith v. Consumer Portfolio Servs., Inc.*, 838 F. Supp. 2d 723, 726 (2011); see also 47 U.S.C. § 227(a)(1).

statutory definition of autodialer such that now any equipment that has “the capacity to dial numbers without human intervention” is an autodialer.⁷ 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.

As CI and other parties have stated, equipment must have the “capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers” to meet the statutory definition of autodialer.⁸ Courts have agreed with this approach stating that the TCPA’s definition of an autodialer is “clear and unambiguous.”⁹ In *Dominguez*, for example, the Court concluded that YAHOO!, Inc.’s messaging system 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 [autodialer].”¹⁰

As demonstrated by the record developed in response to the CI Petition and other TCPA petitions pending before the FCC, organizations in the healthcare, financial services, education, electric and gas utilities, insurance, and transportation industries – as well as unions and political campaigns¹¹ – all use predictive dialers to connect live representatives with consumers as quickly

⁷ 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); see also ACA Petition at 7 (“[T]he Commission’s language in the 2003 and 2008 orders has been twisted in litigation to support the theory that a predictive dialer does not even have to meet the statutory definition of an [autodialer] to be an [autodialer] under the statute.”).

⁸ See, e.g., *Griffith*, 838 F. Supp. 2d at 726; CI September *Ex Parte* Letter at 2; ACA Petition at 1; GroupMe Petition at 4-15; YouMail Petition at 9-10; Glide Talk Petition at 9-10.

⁹ Memorandum Re: Motion for Summary Judgment at 11-12 n.6, *Dominguez v. YAHOO!, Inc.*, No. 13-1887 (E.D. Pa. Mar. 20, 2014) (citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2006)).

¹⁰ *Id.* at 11.

¹¹ See, e.g., *Shamblin v. Obama for America*, No. 8:13-cv-2428, 2014 WL 631931 (M.D. Fla. Feb. 18, 2014). In *Shamblin*, the Plaintiff alleged that the President’s campaign targeted voter cell phones with

as possible to provide timely, useful, non-telemarketing information.¹² The ongoing confusion regarding the definition of autodialer is discouraging innovation in these and other sectors, diverting time and resources away from consumer-facing operations, chilling critical account and political communications, and creating substantial costs that are inevitably passed on to consumers. The Commission can resolve the existing confusion and prevent further harm to consumers by confirming that predictive dialers are not categorically autodialers under the TCPA.

III. TO BE CONSIDERED AN AUTODIALER, EQUIPMENT MUST HAVE THE “PRESENT ABILITY” TO STORE OR PRODUCE, AND DIAL, RANDOM OR SEQUENTIAL NUMBERS

Under the TCPA, only equipment that “*has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator*” is an autodialer.¹³ Congress’s choice of the present tense “has the capacity” is informative. Thus, as explained by CI, ACA, and other parties, equipment and technologies only qualify as autodialers if, *at the time of use*, they can store or produce, and dial, random or sequential numbers without first being technologically altered.¹⁴ Equipment and technologies meeting this standard would have as a functioning feature the capability to store or produce, and dial, random or sequential

autodialed calls and prerecorded messages leading up to the November 2012 election. The court denied Obama for America’s motion to dismiss the TCPA claims and its motion to strike class allegations.

¹² See, e.g., *Ex Parte* Letter from the U.S. Chamber of Commerce, American Association of Healthcare Administrative Management, American Bankers Association, Coalition of Higher Education Assistance Organizations, American Financial Services Association, Edison Electric Institute, Consumer Bankers Association, National Association of College and University Business Officers, American Gas Association, National Council of Higher Education Resources, Student Loan Servicing Alliance (SLSA) and SLSA Private Loan Committee (SLSA PLC), National Council of Higher Education Resources, Communication Innovators, CG Docket No. 02-278 (filed Mar. 4, 2014); ACA Petition at 6-7.

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

¹⁴ See ACA Petition at 1; GroupMe Petition at 4-15; YouMail Petition at 9-10; Glide Talk Petition at 9-10.

numbers and the ability to use that functionality without the installation of new software or hardware or the modification of existing software or hardware.¹⁵

In addition, as ACA 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.¹⁶ ACA notes that dictionary definitions support the everyday meaning of “capacity” as “present ability.”¹⁷ The plain English meaning of “capacity” is “ability,”¹⁸ 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.¹⁹ 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. 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.²⁰ For example,

¹⁵ See ACA Petition at 11 (“The court specifically rejected plaintiff’s argument that the equipment had the requisite TCPA capacity simply because it was possible for ‘certain software’ to be installed in the future to make automatic dialing possible.”); *Ex Parte* Letter from Communication Innovators, CG Docket No. 02-278, at 3 (filed Oct. 29, 2013).

¹⁶ ACA Petition at 11.

¹⁷ *Id.*

¹⁸ Oxford English Dictionary (2012) (defining “capacity” as “[t]he power, ability, or faculty for anything in particular”); see also ACA Petition at 11 (stating Merriam-Webster Dictionary defines “capacity” as “the facility or power to produce, perform, or deploy”).

¹⁹ See, e.g., CI September *Ex Parte* Letter at 3; ACA Petition at 9; YouMail Petition at 11; Glide Talk Petition at 9; GroupMe Petition at 10.

²⁰ 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”); ACA Petition at 8.

they can be programmed to protect consumers against improper calls and to comply with a variety of state and federal laws and regulations. Such technologies are also exponentially more efficient than manual dialing, thereby increasing productivity and lowering costs for consumers.

Under an overbroad interpretation, businesses and consumers could also be subject to TCPA litigation if they 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 of “capacity” would prompt additional parties 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.”²¹ Similarly, a reading of the statute that requires autodialers to have the “present ability” (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 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.”²²

IV. CONCLUSION

For the foregoing reasons, and consistent with the request in the CI Petition, CI urges the Commission to confirm that predictive dialers are not categorically autodialers. Specifically, to be an autodialer, equipment must have the “present ability” (or “current ability”) to store or

²¹ See 47 U.S.C. § 227(a)(1).

²² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).

produce numbers to be called, using a random or sequential number generator, and to dial such numbers.

Respectfully submitted,

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