November 13, 2018

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278 & CG Docket No. 18-152

Dear Ms. Dortch:

The purpose of this *ex parte* is to supplement the comments we filed on October 17th, 2018[1] responding to the decision in *Marks v. Crunch San Diego, LLC.*[2] This *ex parte* is submitted on behalf of NCLC's low-income clients, as well as Consumer Federation of American, Consumers Union, Electronic Privacy Information Center, and Public Knowledge. This *ex parte* is in furtherance of the comments[3] we submitted on June 13, 2018 in this proceeding on behalf of forty-one other national and state public interest groups and legal services organizations.[4]

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[1] Comments of the National Consumer Law Center, on behalf of its low-income clients, October 17, 2018. Available at https://ecfsapi.fcc.gov/file/1018245262122/NCLC%20Comments%20on%20Marks%20Decision.pdf.

[2] 904 F.3d 1041 (9th Cir. 2018).

[3] Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, CG Dockets 02-278 and 18-152 (June 13, 2018) [hereinafter NCLC Primary Comments], *available at* https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf.

[4] The national public interest organizations on whose behalf our primary comments were filed on June 13, 2018, were: Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, NAACP, National Association of Consumer Advocates (NACA), National Association of Consumer Bankruptcy Attorneys (NACBA), National Legal Aid & Defender Association, Prosperity Now, Public Justice, Public Knowledge, US PIRG; the state public interest and legal services programs were

A Smartphone as Manufactured is Not an ATDS.

The request for comments[5] asks whether there is a potential conflict between the *Marks* case and the recent D.C. Circuit Court case of *ACA Int'l v. FCC*:[6]

> [T]he [Marks] court interpreted the statutory language expansively so that an "automatic telephone dialing system" . . . includes devices with the capacity to store numbers and to dial stored numbers automatically." The ACA court, however, held that the TCPA unambiguously foreclosed any interpretation that "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage."[7]

We agree with the unstated assumption in this statement that the Ninth Circuit's decision in *Marks would* conflict with the D.C. Circuit's holding in *ACA Int'l -- if* the consequence of the *Marks* decision was that ordinary smartphones met the definition of automated telephone dialing system (ATDS). But that is not the case.

Americans overwhelmingly hate receiving unwanted robocalls. They steal our time, tie up our phones, distract us while driving or operating machinery, and, with some plans, cost us money. Without restrictions on unwanted robocalls, cell phones would become unusable. But, at the same time, we agree with *ACA International* that the TCPA's definition of ATDS should not encompass the ordinary use of a smartphone. Indeed, Chairman Pai made this same point in his dissent to the 2015 Order when he was a Commissioner.[8]

Arkansans Against Abusive Payday Lending, Housing and Economic Rights Advocates, California, Public Good Law Center, California, Connecticut Legal Services, Inc., Jacksonville Area Legal Aid, Inc., Florida, Florida Alliance for Consumer Protection, LAF, Illinois, Greater Boston Legal Services, Massachusetts on behalf of its low-income clients, Public Justice Center, Maryland, Michigan Poverty Law Program, Legal Aid Center of Southern Nevada, Legal Services of New Jersey, Public Utility Law Project of New York, Bronx Legal Services, New York, Brooklyn Legal Services, New York, Long Term Care Community Coalition, New York, Manhattan Legal Services, New York, Queens Legal Services, New York, Staten Island Legal Services, New York, Financial Protection Law Center, North Carolina, North Carolina Justice Center, Legal Aid Society of Southwest Ohio, South Carolina Appleseed Legal Justice Center, Texas Legal Service Center, Virginia Poverty Law Center, Washington Defender Association, West Virginia Center on Budget and Policy, Mountain State Justice, West Virginia, and One Wisconsin Now.

[5] Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision. (CGAB Request for Comments). October 3, 2018, available at https://ecfsapi.fcc.gov/file/10032573521648/DA-18-1014A1.pdf.

[6] ACA Int'l et al. v. FCC, 885 F.3d 687 (D.C. Cir. 2018).

[7] CGAB Request for Comments at 2.

[8] *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (2015 Order), Dissenting Statement of Commissioner Ajit Pai, at 8074-8077 (F.C.C. July 10, 2015).

In preparing our previous filings on this question, we consulted a number of experts on smartphone technology in order to understand the details of their present capacity.[9] We have continued these consultations since our most recent filing. Our understanding has now advanced further, and we now understand that *smartphones as manufactured and delivered to consumers do not have the present capacity to dial multiple numbers simultaneously or send mass texts.*

Chairman Pai's dissent to the 2015 Order[10] when he was a Commissioner provides a framework for this analysis, as it points out the technological capacity of smartphones in a way that draws a simple and straightforward distinction between an ATDS and the ordinary use of a smartphone. In his dissent, then-Commissioner Pai stated his view that the test for whether a system meets the definition of ATDS must be based on its "present capacity" or "present ability."[11] The problem he identified with applying a "potential capacity" test to smartphones was the ability to add features to the phone: "It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers."[12] These observations by Chairman Pai set forth a path for drawing a clear and simple distinction that excludes smartphones from the definition of ATDS: assuming that present capacity is the test, smartphones simply are not manufactured with features that enable users to make simultaneous calls or send mass texts.

As we said in our comments filed on October 17, 2018, a smartphone should be treated as a box into which various programs and features are packed—the ability to make voice calls, a clock, a music player, internet access, texting capacity, etc. These capabilities should be examined one-by-one when determining whether smartphone is an ATDS. The fact that apps *could be* downloaded to the phone should not make the phone an ATDS unless the user has downloaded and has *used* such an app. Likewise for any special software that could enable mass dialing, unless it has been installed on the phone would not make the smartphone an ATDS.

Smartphones—just like any computer—do have the *potential* to be part of a system that could be an ATDS. But they do not come from the manufacturer already configured to be an ATDS. Smartphones are not manufactured with any inherent features that make them ATDSs. Unlike predictive dialers, they cannot make simultaneous calls to a batch of numbers automatically from a stored list. Calls are made from a smartphone only when the human caller scrolls through the list, chooses a number or name, and presses the call button (or when the human manually inputs the number or otherwise identifies the number to be called). That capability does not make the smartphone an ATDS. As Chairman Pai has noted,[13] the Commission has already explicitly held

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[9] We have reached out to numerous technological experts, including Professor Henning Schulzrinne, a Professor in the Department of Computer Science at Columbia University who is also associated with the university's Department of Electrical Engineering, formerly Chief Technology Officer of the FCC.

[10] 2015 Order, Dissenting Statement of Commissioner Ajit Pai, at 8075.

[11] *Id.* at 8075.

[12] *Id.* at 8075.

[13] *Id.* at 8074.

that "speed dialing" does not fall within the definition of an ATDS.[14]

Additionally, a smartphone cannot send mass texts (as opposed to group texts with modest limits on their number) without downloading an app or connecting to an Internet program. After much investigation, the only case[15] we have found in which a smartphone was used to send mass texts involved a user who downloaded an app: the smartphone did not come with this capability. Accordingly, a smartphone should be considered part of an automated telephone dialing system for the purpose of sending mass texts *only when the smartphone actually has an app or additional software added to it, or has connected to a web-based mechanism to send texts en masse.*

Thus, it is our considered view, first, that the *Marks* decision is absolutely right in interpreting the ATDS definition to encompass a device that dials numbers automatically from a stored list,[16] and, second, that this definition does not encompass the present capacity of smartphones as manufactured and delivered to consumers.

As the Commission has said repeatedly, the test for whether a device is an ATDS is whether it can "dial numbers without human intervention" and "dial thousands of numbers in a short period of time."[17] Smartphones, without the addition of apps or software, or the connection to the Internet to use web-capabilities, do not inherently meet these requirements.

Other statements in the record support our understanding that smartphones *as manufactured* do not have the capacity to engage in mass texting or automatic dialing of a batch of numbers for voice calls:

- The Commission's 2015 Order notes the argument made by certain members of the calling industry that "a broad interpretation of 'capacity' could potentially sweep in smartphones because they may have the capacity to store telephone numbers to be called and to dial such

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[14] 2015 Order, ¶ 17, 2015 Order, Dissenting Statement of Commissioner Ajit Pai, at 8074; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8776, para. 47.

[15] *Wanca v La Fitness*, No. 11 CH 4131 (Lake County, Il). (Defendants had downloaded a mass texting application to an iPhone and used that to telemarket.).

[16] *Marks* at 1053 ("we read § 227(a)(1) to provide that the term "automatic telephone dialing system" means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically "). See our comments filed October 17, 2018, for a full discussion of the reasons *Marks* is correct.

[17] 2015 Order, at ¶ 67, citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14092, para. 132-33; 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, FCC Docket No. 07-232, 23 FCC Rcd 559 at 566, para 13 (2008); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391 at 15392, para. 2 n.5. (2012).

numbers *through the use of an app or other software*."[18] Thus, the industry's argument that a broad ATDS definition potentially covered smartphones was not because of the capabilities which are *built into* the instruments. The argument was based on the *potential* of smart phones to make thousands of calls or send mass texts *by employing the Internet or adding an app or other software.*

- The 2015 order also states "Specifically, consumer consent is required for text messages sent from *text messaging apps* that enable entities to send text messages to all or substantially all text-capable U.S. telephone numbers, including through the use of *autodialer applications downloaded or otherwise installed on mobile phones*."[19]

- The Chamber of Commerce has taken this same position in response to the Commission's call for comments on the *Marks* decision: "Breaking this apart, cellular devices and computers have the capacity to store telephone numbers in contact lists and through various apps. Those numbers can be dialed automatically *through the use of apps or extensions*."[20]

Dialing from a Stored List Does Not Make a Smartphone an ATDS

Several of the comments filed on the decision in *Marks* claim that smartphones could be considered an ATDS just because calls from smartphones are dialed from a stored list. As explained above, a system's capacity to allow speed dialing—which involves dialing numbers from a stored list--has already been rejected as being the basis for defining it as an ATDS.

Additionally, as several federal courts have pointed out, human intervention is required at some point for any machine to function. The test for whether a device is an ATDS should be whether human intervention is required at the moment of dialing, not whether humans were involved in such matters as inputting the numbers to the list or programming the device to make the calls.[21] The definition of an ATDS requires that the system do the dialing, not a human—that is why the word "automatic" is used in the name of the technology being defined.

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[18] 2015 Order at ¶ 21 (emphasis added).

[19] *Id.* at ¶ 116.

[20] *See e.g.* Comments of U.S. Chamber Institute for Legal Reform, October 17, 2018. *Available at* https://ecfsapi.fcc.gov/file/101744954523/ILR.US%20Chamber%20FCC%20Comments%20Marks%20Decision.pdf. (emphasis added).

[21] Blow v. Bijora, Inc., 855 F.3d 793, 802 (7th Cir. 2017) (human intervention test asks whether "human involvement is in fact unnecessary at the precise point of action barred by the TCPA," i.e., dialing of the telephone number); Brown, 2015 U.S. Dist. LEXIS 73065, *6 ("the primary consideration" on the issue is "whether human intervention is required at the point in time at which the number is dialed.*"); see also* Strauss v. CBE Grp., Inc., 173 F. Supp. 3d 1302, 1310 (S.D. Fla. 2016), *reconsideration denied,* No. 15-62026-CIV, 2016 WL 4402270 (S.D. Fla. June 8, 2016) (human intervention must be "essential at the point and time that the number is dialed"); Daubert v. NRA Group, L.L.C., 189 F. Supp. 3d 442, 463 (M.D. Pa. 2016) (reversed on other grounds) ("[T]he proper inquiry revolves around whether there is any human intervention at the time a number is actually dialed, not simply before a call is placed and where a given set of numbers is entered.").

Human Intervention Creating the List Does Not Make a Smartphone an ATDS

Several industry commenters have argued that a system that makes automatic calls from a list that was downloaded by a human *cannot* be an ATDS.[22] But that position makes no sense. Congress did not completely outlaw the use of an ATDS to make calls. *Instead, calls from an ATDS are permitted, but the TCPA explicitly governs the conditions under which calls from ATDS equipment can be made:*

- ATDS calls to a cell phone, emergency telephone lines, health care facilities, poison control centers, fire protection and law enforcement agencies, and health care facility rooms *only if* the caller has prior express consent;[23]
  and
- Callers must ensure that calls made using ATDS equipment are not made "in such a ways that two or more telephone lines of a multi-line business are engaged simultaneously."[24]

In other words, Congress did not prohibit all calls from ATDS systems. *Instead, Congress required that callers using ATDS systems know exactly whom they are calling, to ensure that they are meeting these explicit conditions.* It would be impossible for callers to comply with these restrictions *unless* callers were carefully compiling the list of numbers to call from an ATDS. Thus, human intervention in the creation of a stored list used by a system to make automated calls cannot be used as a ground to exclude a system from the definition.

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), msaunders@nclc.org (202 452 6252, extension 104).

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you very much.

Sincerely,

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[22] *See e.g.* Comments of U.S. Chamber Institute for Legal Reform, October 17, 2018. *Available at* https://ecfsapi.fcc.gov/file/101744954523/ILR.US%20Chamber%20FCC%20Comments%20Marks%20Decision.pdf.

[23] 47 U.S.C. § 227(b)(1)(A).

[24] 47 U.S.C. § 227(b)(1)(D).