

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**REPLY COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)¹**

CCIA respectfully submits these reply comments in support of the Petition for Expedited Declaratory Ruling filed by TextMe, Inc.² TextMe is the commercial provider of a mobile phone application (“app”) that allows a user to make calls or send text messages to contacts in a user’s address book. TextMe has asked the Commission to clarify several provisions in the Telephone Consumer Protection Act of 1991 (TCPA):³ (1) the meaning of the term “capacity” in the TCPA’s definition of “automatic telephone dialing system,”⁴ and (2) that it is users of TextMe’s service, rather than TextMe itself, that make or send calls or text messages as a practical matter, and for purposes of the TCPA.

¹ CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA’s members employ more than 600,000 people and generate annual revenues in excess of \$465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA’s members is available online at <http://www.ccianet.org/members>.

² *TextMe, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Mar. 18, 2014) (“TextMe Petition”); see also *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from TextMe, Inc.*, Public Notice, CG Docket No. 02-278, DA 14-468 (rel. Apr. 7, 2014).

³ See 47 U.S.C. §227.

⁴ See *id.* §227(a)(1) (“(1) The term ‘automatic telephone dialing system’ means 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.”).

I. Human Intervention Should Be The Determining Factor In Defining Whether A Call Qualifies As ATDS

Congress passed the TCPA in 1991 to restrict telemarketing calls, automatic telephone dialing systems (ATDS), and artificial or prerecorded voice messages.⁵ The definition of ATDS in 47 U.S.C. §227(a)(1) makes clear that it is the equipment that must have “the capacity . . . to dial such numbers,” which is distinct from the user having the capacity to do so.

As Noble Systems Corporation (NSC)’s comments state, the “capacity” element of an ATDS must be the capacity that is used to “dial such numbers,”⁶ and “capacity” is only relevant for calls or text messages being dialed by equipment directly using that capacity.⁷ Even if automatic capacity is present in an app, if that capacity is not actually used, a call is not an ATDS call and is not covered under the TCPA. NSC also explains that if a text message is sent only because of human intervention, then sending the text should not qualify as an ATDS.⁸

Several commenters have argued that numbers read from a list automatically implicate the use of an ATDS,⁹ but as explained above that is insufficient. And in fact, one of those commenters later says, “Any device that stores numbers to be called and then automatically dials those numbers is an automatic dialer under the TCPA.”¹⁰ If this statement is true, then it implies that human intervention disqualifies any ATDS claim, because they are not automatically dialed.

⁵ See FCC Encyclopedia, *Telemarketing and Robocalls*, available at <http://www.fcc.gov/encyclopedia/telemarketing>.

⁶ See *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of Noble Systems Corporation (filed May 7, 2014) (“NSC Comments”), at 3.

⁷ NSC Comments at 1-2.

⁸ NSC Comments at 6.

⁹ See *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of Gerald Roylance (filed May 7, 2014), at 2; *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of Al Smith (filed May 7, 2014), at 1; *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of Joe Shields (filed May 7, 2014), at 6; *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of Randall Synder (filed May 7, 2014), at 4.

¹⁰ See *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of Joe Shields (filed May 7, 2014), at 6.

TextMe’s app does not at present have the technical capabilities to dial numbers or send messages without the user’s input. The FCC should interpret the term “capacity” in the TCPA as describing the present capabilities of TextMe, not the theoretical or potential capacity.¹¹

Imposing broad liability for possible updates to apps in the future would cripple the software industry and chill innovation.

II. An End User Invoking a “Click-To-Send” Action Makes A Call, Not The Equipment

TextMe’s app allows an end user to select individuals the user wishes to contact. The end user contacts individuals through functions built into a phone, or uses the features built into the TextMe app. Ultimately, it is the user that makes the choice to contact an individual. As NSC observes, “service providers that allow others to select and control what numbers are dialed do not initiate a call ... service providers merely providing a platform allowing others to initiate calls are not ‘making calls’ under the TCPA.”¹² The app user, after selecting a contact, must then click a button to send a text. In such circumstances it is the user, not the equipment, that makes the call for purposes of the TCPA. Even one of the commenters that opposes the petition agrees that equipment requiring one click per call or per message is not an ATDS.¹³

III. The TCPA Is Being Increasingly Abused By Opportunist Litigants

The TCPA is being misused by plaintiffs complaining of things that the Act was never intended to cover. There has been a notable increase in TCPA litigation, particularly class actions, and many predict that litigation will only increase.¹⁴ It’s quite unfortunate that the

¹¹ See *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Comments of Internet Association (filed May 7, 2014), at 2-4; see also NSC Comments at 1-3.

¹² NSC Comments at 7.

¹³ See *In the Matter of TextMe, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Reply Comments of Gerald Roylance (filed May 20, 2014), at 3 (“The plain intent of ‘human intervention’ is the human is placed between (‘inter-’) each call rather than in front of all calls”).

¹⁴ Allison Grande, *TCPA Class Action Surge Shows No Signs Of Abating*, LAW360, May 24, 2013, available at <http://www.law360.com/articles/444874/tcpa-class-action-surge-shows-no-signs-of-abating>.

TCPA, meant to stem the tide of unwanted commercial communications, would be used more than two decades later to sue individuals who, for instance, inadvertently dial or text a number that someone they know used to have, or otherwise engage in a one-on-one communication as opposed to mass solicitation. These litigants could even be conceptualized as ‘TCPA trolls,’ for using a statute as a litigation weapon to demand statutory damages if they receive even one of these calls or messages, particularly from a business with deep pockets. Further, as the TextMe Petition says, “these lawsuits stifle innovation and threaten the development of novel tools for communication.”¹⁵ The Commission must act to relieve the unhealthy uncertainty over the reach of the TCPA and prevent it from being read so broadly as to deprive consumers of innovative new products and services.

IV. Conclusion

CCIA respectfully requests that the Commission clarify that (1) calls made by apps or other equipment requiring direct human intervention do not satisfy the “capacity” element of an ATDS, and (2) online service providers and other intermediaries like app makers are not liable under the TCPA when it is an end user who deliberately makes a particular call or text.

May 22, 2014

Respectfully submitted,

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¹⁵ TextMe Petition at i-ii.