

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

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the	)	
Telephone Consumer Protection Act in Light of	)	
The D.C. Circuit’s ACA International Decision	)	
Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**REPLY COMMENTS OF INCOMPAS**

INCOMPAS, by its undersigned counsel, hereby submits these reply comments in response to the Consumer and Governmental Affairs Bureau’s *Public Notice* seeking comment on how the Federal Communications Commission (“Commission” or “FCC”) should interpret and implement the Telephone Consumer Protection Act (“TCPA”)<sup>1</sup> following the recent decision of the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) in *Marks v. Crunch San Diego, LLC*.<sup>2</sup>

**I. INTRODUCTION & SUMMARY**

INCOMPAS appreciates the opportunity to once again provide comment on how the Commission should interpret specific terms in the TCPA, including an “automatic telephone dialing system” (“ATDS” or “autodialer”) which is defined in the statute as “equipment which

---

<sup>1</sup> *Consumer and Government 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*, CG Docket No. 18-152, CG Docket No. 02-278, Public Notice, DA 18-1014 (rel. Oct. 3, 2018) (“Notice”).

<sup>2</sup> *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sep. 20, 2018).

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.”<sup>3</sup> Following the D.C. Circuit’s decision in *ACA International v. FCC*, in which the court set aside an “unreasonably expansive interpretation” of an autodialer adopted by the Commission in 2015,<sup>4</sup> other circuit courts have issued decisions that examine aspects of the TCPA, including the definition of an ATDS. These decisions embraced the conclusions of the D.C. Circuit in *ACA International*, narrowing the interpretation of an ATDS<sup>5</sup> and finding that *current* capacity to perform the functions of an autodialer is required under the definition.<sup>6</sup>

However, the Ninth Circuit recently reached the opposite conclusion in *Marks v. Crunch San Diego, LLC*.—that an ATDS includes devices that transmit calls and/or text messages to a list of prescribed telephone numbers. The court came to this conclusion based on its own finding that the statutory language was “ambiguous on its face” and after determining that it could interpret the ATDS definition for itself in the absence of an expert agency’s interpretation.<sup>7</sup> INCOMPAS represents competitive communications and technology companies that rely on these very devices to routinely communicate with customers. This concerning decision could

---

<sup>3</sup> 47 U.S.C. § 227(a)(1).

<sup>4</sup> *ACA Int’l v. FCC*, 885 F.3d 687, 692 (D.C. Cir 2018) (mandate issued May 8, 2018) affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“2015 TCPA Declaratory Ruling and Order”).

<sup>5</sup> See *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. Jun. 2018) (concluding that a device is not an ATDS unless it can generate random or sequential telephone numbers).

<sup>6</sup> See *King v. Time Warner Cable, Inc.*, 849 F.3d 473 (2d Cir. Aug. 2018) (holding that a device must have the current capacity to perform the functions of an autodialer to be considered an ATDS).

<sup>7</sup> *Marks*, 2018 WL 4495553 at \*8.

open untold companies to liability under the TCPA and demonstrates why it is critical that the Commission reform its TCPA jurisprudence by the end of 2018. As the Commission now wrestles with conflicting judicial interpretations of the Telephone Consumer Protection Act, INCOMPAS urges the Commission to quickly adopt a narrow interpretation of ATDS that follows the conclusions reached by the D.C. Circuit in *ACA International*. If the Commission does not do so quickly, it increases the possibility that other circuits may follow the *Marks* decision, opening the TCPA up to further confusion and jurisdictional imbalance. Moreover, there is overwhelming support in the record generated in this proceeding for the Commission to adopt a narrow interpretation of Section 227(a)(1).

**II. THE COMMISSION SHOULD ADOPT A NARROW CONSTRUCTION OF “AUTOMATIC TELEPHONE DIALING SYSTEM” RATHER THAN THE EXPANSIVE INTERPRETATION OF THE *MARKS* COURT.**

Following the D.C. Circuit’s decision in *ACA International*, in which the court set aside the Commission’s interpretation of what equipment constitutes an ATDS for being “unreasonably expansive,”<sup>8</sup> INCOMPAS welcomed the Commission’s efforts to more narrowly interpret the Act’s terms “to better comport with the congressional findings and the intended reach of the statute.”<sup>9</sup> Indeed, the Commission’s 2015 decision to include the “potential ability” of a piece of equipment to become an ATDS<sup>10</sup>—seemingly qualifying every smartphone as an

---

<sup>8</sup> *ACA Int’l*, 885 F.3d at 692 (indicating that the Commission’s 2015 interpretation subjects “ordinary calls from any conventional smartphone to the Act’s coverage”).

<sup>9</sup> Notice at 2.

<sup>10</sup> 2015 TCPA Declaratory Ruling and Order at 7975.

autodialer—led the court to determine that the Commission’s broad interpretation of the statute and the term “capacity” was “unreasonable, and impermissible.”<sup>11</sup>

As the Commission considered other approaches to interpreting the statute in light of the D.C. Circuit’s decision, the Ninth Circuit determined in *Marks* that it could interpret the ATDS definition for itself not only because the FCC’s earlier interpretation of that term had been vacated, but also because it found that term to be ambiguous. Unlike other courts, the Ninth Circuit concluded that the phrase “using a random or sequential number generator” modified only equipment that *produced* telephone numbers to be called, and not equipment that *stores* telephone numbers.<sup>12</sup> This interpretation has the practical effect of expanding the number of devices that could face liability under the TCPA. Equipment that has the capacity to store telephone numbers to be called, and to dial such numbers, can be considered an ATDS according to the decision in *Marks*. This decision ensures that, at least in the Ninth Circuit, the definition of ATDS subsumes devices that transmit calls and/or text messages to a list of prescribed telephone numbers, a result that is incongruous with the decision of the D.C. Circuit in *ACA International*.

Rather than rely on the Ninth Circuit’s findings in *Marks*,<sup>13</sup> it is clear that the Commission should adopt a narrower interpretation of an ATDS. The TCPA defines an “automatic telephone dialing system” as “equipment which has the *capacity*—(A) to store or

---

<sup>11</sup> *ACA Int’l*, 885 F.3d at 703.

<sup>12</sup> *Marks*, 2018 WL 449553, at 9.

<sup>13</sup> See Comments of U.S. Chamber Institute for Legal Reform, CG Docket Nos. 18-152, 02-278 (filed Oct. 17, 2018), at 7 (finding that the Ninth Circuit’s determination that the statutory language of the TCPA was ambiguous on its face is contrary to a 2009 Ninth Circuit TCPA decision); see also Comments of NCTA—The Internet & Television Association, CG Docket Nos. 18-152, 02-278 (filed Oct. 17 2018), at 4 (arguing that the Marks decision is inconsistent with statutory language and congressional intent).

produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” INCOMPAS maintains that a device or calling technology must be *currently* able to store and generate a phone number in random and sequential order and to call the number generated to be considered an ATDS. This narrow construction of the statutory language is based on the most rational reading of the statute as well as the Third Circuit’s findings in *Dominguez v. Yahoo, Inc.* In that case, the court found that the phrase “using a random or sequential number generator” modifies both “store” and “produce” and that a device cannot be an ATDS unless it can presently generate random or sequential telephone numbers without modifications.<sup>14</sup> Under this reasonable reading of the statutory language, only a device that uses a “random or sequential number generator” to “store or produce telephone numbers to be called” should qualify as an ATDS. A device that can only dial and transmit messages or texts to a pre-prepared or curated list of telephone numbers does not use a random or sequential number generator, and therefore should be excluded from the ATDS classification. Accordingly, INCOMPAS would encourage the Commission to reject any interpretation, like the one proffered in *Marks*, that would allow equipment that lacks the capacity to generate and dial random or sequential numbers to meet the TCPA definition of an autodialer.

INCOMPAS also reiterates its proposal that to be considered an ATDS, technology must have the *current* ability to generate a phone number in random and sequential order and to call the number generated. The Commission should reject any interpretation of the statute that concerns the “potential ability” of a device to become an ATDS. The Commission should not classify a device that does not currently use a “random or sequential number generator to store or

---

<sup>14</sup> *Dominguez*, 894 F.3d at 7.

produce telephone numbers to be called” as an ATDS unless and until the device actually makes calls to numbers generated by its random and sequential numbering capability.

Finally, given the split between circuit courts and lingering ambiguity over the TCPA, INCOMPAS urges the Commission to adopt a new declaratory ruling related to the interpretation and implementation of the TCPA by the end of the current calendar year. The Commission has developed a robust record encouraging the agency to adopt a narrower construction of an ATDS and other TCPA terms in light of the *ACA International* decision, and further delay increases the chances that other circuit courts may follow *Marks*, or interpret the statutory language in a manner that threatens companies’ routine use of prescribed telephone numbers to communicate with customers.

### **III. CONCLUSION**

For the reasons stated herein, INCOMPAS urges the Commission to adopt a narrower construction of an “automatic telephone dialing system” than the interpretation offered by the Ninth Circuit in *Marks*. Furthermore, the Commission should act quickly to adopt a new statutory interpretation of ATDS and any other terms vacated by the D.C. Circuit in the *ACA International* decision. Adopting reforms to the TCPA by the end of 2018 will ensure that companies will be able to comply with the provisions of the TCPA without unnecessary uncertainty and the potential risk of liability.

Respectfully submitted,

INCOMPAS

*/s/ Christopher L. Shipley*

Christopher L. Shipley  
INCOMPAS  
2025 M Street NW  
Suite 800

Washington, D.C. 20036  
(202) 872-5746

October 24, 2018