

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
P2P Alliance Petition for Clarification)	

**Application for Review of Action
Taken Pursuant to Delegated Authority**

July 24, 2020

by

National Consumer Law Center
(on behalf of its low-income clients)
and

Consumer Federation of America
Consumer Action
EPIC
Public Knowledge
National Association of Consumer Advocates

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APPLICATION FOR REVIEW

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Summary

This is an Application for Review of the Consumer and Governmental Affairs Bureau's recent ruling on P2P texts, submitted by the **National Consumer Law Center** on behalf of its low-income clients and **Consumer Federation of America, Consumer Action, EPIC, National Association of Consumer Advocates, and Public Knowledge**, is filed pursuant to Section 1.115 of the Commission's rules. The Bureau's P2P Ruling ("Ruling") includes interpretations of the Telephone Consumer Protection Act ("TCPA") and its application to the P2P texting platform that are in conflict with the TCPA itself, established Commission policy, and case precedent. The Ruling implicitly relies on facts regarding the P2P system's level of automation that are not supported by the record and are contrary to readily available information.

The Ruling repeatedly characterizes the statutory definition of an automated telephone dialing system ("ATDS") in ways that deviate from the statutory language, and conflict with each other, with the Commission's rulings, and with prevailing case law. For example, the Commission has repeatedly ruled that a predictive dialer is an ATDS, yet language in the Ruling would potentially preclude this interpretation. And the Ruling fails to reconcile its interpretation of an ATDS with recent decisions in the Second and Ninth Circuits Courts of Appeal.

Contrary to the legislative history, the Commission's previous policy statements, and case precedent, the Ruling disclaims the Commission's authority to address evasions and interpret the TCPA to adapt to future technologies. In places, it takes the position that the capacity of a system to make a huge volume of calls *en masse* is not even probative to the question whether the system is an autodialer.

Additionally, the Ruling ignores the actual automated capacity of the P2P systems and fails to apply the TCPA's fundamental principle that the definition of ATDS refers to the "capacity" of the "equipment" used by the caller, not on how the individual calls are sent out. The Ruling ignores

the fact that these systems do send out entirely automated messages, at least in response to the “stop” requests of the messages’ recipients. It also ignores the fact that the telephone industry itself views P2P messages as so automated that the industry requires recipient consent before these P2P systems are permitted to access the volume texting platforms provided for mass texters by the telephone industry.

APPLICATION FOR REVIEW

I. The Bureau's P2P declaratory ruling should be reversed.

Pursuant to Section 1.115 of the Commission's rules,¹ Applicant **National Consumer Law Center**, on behalf of its low-income clients, **Consumer Federation of America**, **Consumer Action**, **EPIC**, **National Association of Consumer Advocates**, and **Public Knowledge**, seeks review by the full Federal Communications Commission ("Commission" or "FCC") of the Declaratory Ruling issued by the Consumer and Governmental Affairs Bureau ("Bureau") on June 25, 2020, in the above-captioned proceeding.² As explained more fully below, the Ruling includes a series of statements interpreting the Telephone Consumer Protection Act³ and its application to the P2P texting platform that are in conflict with the TCPA itself, established Commission policy, and case precedent.⁴ It also addresses questions of law and policy regarding the definition of an ATDSs that have not been directly resolved by the Commission, and it does so in ways contrary to previous Commission decisions.⁶ And, the Ruling implicitly relies on facts regarding the P2P platform's level of automation that are not supported by the record and are contrary to readily-available information.⁷

The Ruling, which blesses P2P texting platforms that were created just for the purpose of evading the TCPA's protections, does not explain how it either follows or diverges from the

¹ 47 C.F.R. § 1.115.

² Dec. Rul., on P2P Alliance Petition, June 25, 2020, DA 20-670, *available at* <https://www.fcc.gov/ecfs/filing/10629526112567>.

³ 47 U.S.C. § 227 *et seq.*

⁴ 47 C.F.R. § 1.115(b)(2)(i).

⁵ 47 U.S.C. § 227(a)(1).

⁶ 47 C.F.R. § 1.115(b)(2)(i).

⁷ 47 C.F.R. § 1.115(b)(2)(iv).

Commission's previous decisions interpreting the definition of an ATDS. Nor does the Ruling reconcile its conflicting statements with highly relevant court decisions.

If left unchanged, the unjustified and unsubstantiated statements in the Ruling will have consequences. They will contribute to the proliferation of unwanted and unconsented-to text messages, invading the privacy of the individuals and businesses receiving them. And the Ruling could tie the Commission's hands in pursuing the calling industry's ever-increasing and ever-more-inventive evasions of the TCPA's restrictions. Indeed, in part because of unnecessary and confused language in the decision, the calling industry is already labeling the Ruling as a huge curtailment of the Commission's prior interpretations.⁸

Just three weeks ago, in the watershed decision *Barr v. American Association of Political Consultants, Inc.*,⁹ Justice Kavanaugh observed:

Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints.

Consumers file millions of complaints every year about unwanted and voluminous calls and text messages.¹⁰ In particular, political texts of the type at issue in this proceeding are a growing

⁸ “First, the FCC implies — if not outright states — that dialing from a stored list of numbers that are not randomly or sequentially generated does not fall within the ATDS definition. Second, the FCC eliminates the idea that simply using equipment with the capacity to dial large volumes of numbers is, in and of itself, probative. Third, equipment that requires manual dialing of each phone number is not an ATDS. And fourth, the FCC rejects the notion that the TCPA was intended to grow with technology, outright stating that it was not intended to stop all calls.” Mark Eisen, Suzanne Aldon de Eraso and David Krueger, *FCC's New Autodialer Definition Departs From Past Approach*, Law360 Consumer Protection (July 7, 2020), [available at https://www.law360.com/articles/1289241/fcc-s-new-autodialer-definition-departs-from-past-approach](https://www.law360.com/articles/1289241/fcc-s-new-autodialer-definition-departs-from-past-approach) (subscription required).

⁹ 140 S.Ct. 2335, ___, 2020 WL 3633780, at *2 (July 6, 2020).

¹⁰ Complaints at the FCC: Consumers have filed 1,019,609 complaints with the FCC about unwanted calls and texts, and 37,076 complaints noting text messages specifically. Federal Communications Commission, “CGB - Consumer Complaints Data,” *available*

concern.¹¹ As described specifically in section V, below, the telephone service providers are fielding numerous complaints from customers about the providers allowing these unwanted text messages

at <https://opendata.fcc.gov/Consumer/CGB-Consumer-Complaints-Data/3xyp-aqkj> (last visited July 22, 2020).

The FTC Do Not Call Data Book for 2019 also reports 5,422,298 complaints received that year. Federal Trade Commission, *Do Not Call Registry Data Book for Fiscal Year 2019* (Oct. 17 2019), available at https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2019/dnc_data_book_2019.pdf.

¹¹ See, e.g., Wired Opinion, *Texts From Politicians Could Be More Dangerous Than Ever* (April 4, 2020) (With rallies and canvassing on ice, 2020 election campaigns are rapidly turning to peer-to-peer texting, which isn't the panacea it appears to be), available at <https://www.wired.com/story/opinion-texts-from-politicians-could-be-more-dangerous-than-ever/>; James Gelin, Komando.Com, *Sick of texts from political campaigns? Here's how to stop them* (March 6, 2020), available at <https://www.komando.com/news/stop-political-texts/709893/>; Hanna Kozłowska, Olivia Goldhill & Jeremy B. Merrill, *Why you get campaign texts calling you the wrong name*, Xerox (Feb. 22, 2020), available at <https://qz.com/1806581/why-youre-getting-campaign-texts-calling-you-the-wrong-name/>; Breck Dumas, *Political candidates continue spamming cellphones with texts despite consumer complaints*, The Blaze (Oct. 22, 2018), available at <https://www.theblaze.com/news/2018/10/22/political-candidates-continue-spamming-cellphones-with-texts-despite-consumer-complaints>; Skyler Swisher and Doreen Christensen, *Plz Vote4Me: Here's why your phone is blowing up with political text messages you didn't sign up for*, South Florida Sun Sentinel (Oct. 21, 2018), available at <https://www.sun-sentinel.com/news/politics/fl-ne-candidates-texting-voters-20181016-story.html> (“Not everyone on the receiving end of the text messages likes them. Shelly Soffer, 40, of Coconut Creek, says her phone has been inundated with political text messages that she never signed up to receive. ‘I’m annoyed beyond belief,’ Soffer says. ‘They are presumptuous and obnoxious and borderline harassment. I never gave my cellphone number out.’”); Press Release, State of Montana, *Commissioner Responds to Concern Over Political Robotexts: Texts Without Attribution Violate Montana Law* (Oct. 19, 2018), available at <https://news.mt.gov/commissioner-responds-to-concerns-over-political-robotexts> (quoting the Commissioner: “Complaints have come in about federal, state, and local political texts and concern the campaign communications of candidates, political parties, and committees.”); Joe Kukura, *Political Spampaign*, SF Weekly (Apr. 12, 2018), available at <http://www.sfweekly.com/news/political-spampaign/> (“Political campaigns for the June election have opened a can of spam on smartphones all over San Francisco. Piles of political mailers are already beginning to clog mailboxes, but now campaigns have a new tool to sway voters — bulk, mass text messages are being sent to registered San Francisco voters who never signed up to receive them.”). See also Kim Hart, *Why political text messages are flooding your phone*, Axios (Oct. 24, 2018), available at <https://www.axios.com/why-political-text-messages-are-flooding-your-phone-ed1c2864-729a-4b3b-a695-9337b98343ec.html> (incorrectly concluding that these texts are not covered by the TCPA); Kevin Roose, *Campaigns Enter Texting Era With a Plea: Will U Vote 4 Me?*, The New York Times (Oct. 1, 2018), available at <https://www.nytimes.com/2018/08/01/technology/campaign-text-messages.html>.

through to their phones.¹² Moreover, telemarketers now appear to be using this same technology in an attempt to evade TCPA consent requirements.¹³

For the reasons discussed herein, the Commission should reverse the Ruling under Rule 1.115(b)(2). In the alternative, the Commission should vacate the Ruling and remand the matter to the Bureau to address the errors listed in this petition.

II. The Ruling’s confused language about the definition of an ATDS conflicts with the TCPA, case precedent, and the Commission’s long-established policies and rulings.

In footnote 2, the Ruling disavows any intent to rule on “the details of the Commission’s interpretation of the autodialer definition,” stating that “[u]ntil that issue is decided by the Commission, we rely on the statutory definition of autodialer.” However, the Ruling then repeatedly characterizes the statutory definition in ways that deviate from the statutory language¹⁴ and conflict with each other and with the Commission’s rulings. The Ruling’s different characterizations on the ATDS definition include:

[W]hether the calling platform or equipment is an autodialer turns on whether such equipment *is capable of dialing random or sequential telephone numbers* without human intervention. ¶8

¹² See, e.g., James Hercher, *AdExchanger Politics: Text Messaging Captures The Spotlight This Year*, AdExchanger (Apr. 29, 2020), available at <https://www.adexchanger.com/politics/adexchanger-politics-text-messaging-captures-the-spotlight-this-year/> (“The M3AAWG, a mobile carrier trade group, released new political texting best practice guidelines last week – an early warning that messages from candidates and political parties could be filtered or blocked by mobile carriers. ‘Our member companies are reporting significant volumes of complaints about unwanted political messages,’ said Alex Bobotek, who chairs the M3AAWG mobile tech committee. Bobotek is AT&T’s senior architect for anti-abuse infrastructure, though he doesn’t represent AT&T in the M3AAWG committee.”)

¹³ See e.g. Sarah Jarvis, *Michigan Cannabis Co. Hit with TCPA Suit Over Text Ads*, Law360 Consumer Protection, July 22, 2020), available at <https://www.law360.com/articles/1294276/michigan-cannabis-co-hit-with-tcpa-suit-over-text-ads>. (Plaintiff alleged repeated automated text messages, even after “Stop” request, from a 10-digit phone number was used to deceive recipients into thinking the message was personalized.)(Subscription required.)

¹⁴ 47 C.F.R. § 227(a)(1).

[O]nly technology that has the capacity to store or produce numbers to be called using a random or sequential number generator, and to dial such numbers, is deemed to be an autodialer. ¶9¹⁵

The first of these iterations likely includes predictive dialers, since they are capable of dialing random or sequential numbers, as they simply dial from a list, in the order presented by the list. But the second has been seized upon by the industry as a retreat from the Commission’s many rulings that the TCPA definition encompasses predictive dialers. A recent industry commentary asserts: “[T]he FCC implies—if not outright states—that dialing from a stored list of numbers that are not randomly or sequentially generated does not fall within the ATDS definition.”¹⁶

The Commission has repeatedly ruled that a predictive dialer is an ATDS.¹⁷ Even though it is in the middle of a proceeding to address those rulings in light of *ACA International*,¹⁸ it has never deviated from that view. In the meantime, the issue is hotly contested in the courts. Although the Eleventh¹⁹ and the Seventh Circuits²⁰ have read the word “store” out of the definition and held that

¹⁵ This definition is more or less repeated in paragraph 12: “If a text platform is not capable of *storing or producing numbers to be called using a random or sequential number generator* and dialing such numbers automatically but instead requires active and affirmative manual dialing, it is not an autodialer....”

¹⁶ Mark Eisen, Suzanne Aldon de Eraso and David Krueger, *FCC’s New Autodialer Definition Departs From Past Approach*, Law360 Consumer Protection (July 7, 2020), available at <https://www.law360.com/articles/1289241/fcc-s-new-autodialer-definition-departs-from-past-approach> (subscription required).

¹⁷ In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,014 (2003) (“2003 Order”); In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559 (2008) (“2008 Order”).

¹⁸ *ACA Int’l v. Fed. Commc’ns Comm’n*, 885 F.3d 687 (D.C. Cir. 2018).

¹⁹ *Glasser v. Hilton Grand Vacations Company, LLC.*, 948 F.3d 1301 (11th Cir. 2020).

²⁰ *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020). See also *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3^d Cir. 2018) (criticized in *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041, 1052 n.8 (9th Cir. 2018), as “unpersuasive” because it “avoided the interpretive questions raised”).

a system that dials numbers from a stored list is not an ATDS, two other Circuits—the Ninth²¹ and the Second²²— have explicitly rejected this interpretation of the statute, holding that a system’s capacity to call from a stored list is sufficient. The interpretation of the ATDS definition is currently pending before the United States Supreme Court.²³

If this Ruling is intended as an official renunciation of the Commission’s prior rulings that a system that dials numbers automatically from a stored list is an ATDS, it is woefully lacking in analysis. There is no evaluation of the intent of Congress, the proper interpretation of the grammatical structure of the ATDS definition, or the logic behind the potentially conflicting requirements for consent for ATDS calls and the impossibility for callers to know who they are calling unless they are making calls from a stored list.²⁴ There is no discussion of how or why its pronouncements differ from the previous Commission rulings on the ATDS definition in 2003,²⁵ 2008,²⁶ and 2012.²⁷ Nor does the ruling address, or even mention, the issues that the D.C. Circuit’s decision in *ACA International v. Federal Communications Commission*²⁸ requires the Commission to resolve.

The Ruling’s characterizations of the statutory definition are particularly unfortunate since they were unnecessary. The question that the P2P petition presented had nothing to do with

²¹ *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), petition for cert. dismissed, 139 S. Ct. 1289, 203 L. Ed. 2d 300 (2019).

²² *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020).

²³ *Certiorari Granted in Part by Facebook v. Duguid*, ___ U.S. ___, 2020 WL 3865252 (July 9, 2020).

²⁴ *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, at 1049-1053 (employing structural, intentional, and purposive analyses in resolving an ATDS question).

²⁵ 2003 Order.

²⁶ 2008 Order.

²⁷ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 15391, at n.5 (F.C.C. Nov. 29, 2012).

²⁸ 885 F.3d 687 (D.C. Cir. 2018).

random or sequential number generation; rather it concerned whether the level of human intervention in dialing the numbers removed the system from the ATDS definition.²⁹ As argued in § III below, the Bureau’s resolution of that question is error and should be reversed. But it was also wrong—and inconsistent with the Commission’s prior rulings—for the Ruling to repeatedly discuss and unnecessarily opine on the meaning of other elements of the ATDS definition.

The Ruling’s statements articulating an interpretation of the ATDS definition that may exclude predictive dialers are clearly in conflict with case precedent and established Commission policy.³⁰ The Ruling also “involves a question of law which has not previously been resolved by the Commission,” as the Ruling itself admits: the “details of the Commission’s interpretation of the autodialer definition remain pending . . .”³¹ These problems justify the full Commission’s review and reversal of the Ruling.

III. The Ruling is inconsistent with case precedent that a system like P2P’s is an autodialer.

Another reason that the Ruling must be reversed is that it conflicts with the Second Circuit’s highly germane decision in *Duran v. La Boom Disco, Inc.*,³² decided over two months before the issuance of the Ruling. *Duran* explicitly addresses the question of how much human intervention in the act of dialing a number to send a text is sufficient to take the texting platform out of the definition of an ATDS. Yet the Ruling does not discuss—or even mention—*Duran*.

In *Duran*, the Second Circuit evaluated a system quite similar to those described in P2P’s Petition. The court ruled:

²⁹ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Clarification of the P2P Alliance, CG Docket No. 02-278 (filed May 3, 2018), *available at* <https://ecfsapi.fcc.gov/file/10503899411027/P2P%20Petition%20-%20FINAL.pdf>.

³⁰ 47 C.F.R. § 1.115 (b)(2)(i).

³¹ Ruling ¶1 n.2.

³² 955 F.3d 279 (2d Cir. 2020).

Merely clicking “send” or an equivalent button in a text messaging program—much like the programs at issue here—is not the same thing as dialing a number. When a person clicks “send” in such a program, he may be instructing the system to dial the numbers, but he is not actually dialing the numbers himself. His activity is one step removed.

Indeed, if it were otherwise—if merely clicking “send” on its own amounted to dialing—then it is hard to imagine how any dialing system could qualify as automatic. Presumably, when one uses a dialing system, a “send” button or an “initiate phone campaign” button—or even merely an “on” switch—must be operated by a human somewhere along the way. Under LBD’s approach, any such operation might be enough to remove the dialing system from the ATDS category, since there would be too much human intervention for the dialing system to be truly automatic. But this approach seems to defy Congress’s ultimate purpose in passing the TCPA, which was to embrace within its scope those dialing systems which can blast out messages to thousands of phone numbers at once, at least cost to the telemarketer.³³

Duran holds that a platform like those addressed in this Ruling *is* an ATDS as defined by the TCPA. The Ruling directly conflicts with this decision and does so without analyzing or even acknowledging the existence of the decision. The Commission should reverse the Ruling because of its direct conflict with this case precedent.

IV. The Ruling conflicts with the Commission’s authority to address evasions of the TCPA.

The legislative history clearly shows Congress’s intent that the Commission should interpret the TCPA to adapt to future technologies. Senator Hollings, describing the bill that became the TCPA, stated: “The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.”³⁴ The Commission has stated “The TCPA’s text and legislative history reveal Congress’s intent to give the Commission broad authority to enforce the protections from unwanted robocalls as new technologies emerge.”³⁵ Courts have also held that

³³ *Duran*, 955 F.3d at 289 (2d Cir. 2020) (emphasis added).

³⁴ 137 Cong. Rec. S18781-02 (1991) (statement of Sen. Hollings).

³⁵ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, ¶ 113 (F.C.C. July 10, 2015) (“2015 Order”) (describing text messaging technology and explaining why TCPA applies to text messaging), appeal resolved, *ACA Int’l v. Fed. Commc’ns*

consumer protection statutes, including the TCPA, must be liberally construed to protect consumers and discourage evasions.³⁶

It is essential to preserve the Commission’s authority to address evasions of the TCPA. The calling industry is focused intently on finding ways to evade the TCPA’s restrictions on robocalls. If the Commission were to abandon its authority to address and stop evasions, the unwanted calls that would flood consumers’ telephones would not only cause a massive number of complaints, it would also undermine the country’s telecommunications system.

The Bureau’s misguided ruling is already being touted by the calling industry as a rejection of the legislative history and a green light for evasion. A recent article claims that, with the Ruling, “the FCC eliminates the idea that simply using equipment with the capacity to dial large volumes of numbers is, in and of itself, probative” and that “the FCC rejects the notion that the TCPA was intended to grow with technology, outright stating that it was not intended to stop all calls.”³⁷

Comm’n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside portions of FCC’s 2015 Order dealing with ATDS definition and treatment of reassigned cell phone numbers but leaving this portion of the order undisturbed). *See also id.* at ¶ 115 (“Finding otherwise—that merely adding a domain to the telephone number means the number has not been “dialed”—when the effect on the recipient is identical, would elevate form over substance, *thwart Congressional intent that evolving technologies not deprive mobile consumers of the TCPA’s protections*, and potentially open a floodgate of unwanted text messages to wireless consumers”) (emphasis added).

³⁶ *See, e.g.,* Carlton & Harris Chiropractic, Inc. v. PDR Network, L.L.C., 883 F.3d 459, 474 (4th Cir. 2018) (“Because the TCPA is a remedial statute, it ‘should be liberally construed and . . . interpreted . . . in a manner tending to discourage attempted evasions by wrongdoers.’”) (quoting Scarborough v. Atl. Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1949), *cert. denied*, 339 U.S. 919), *vacated, remanded on other grounds*, 139 S. Ct. 2051 (2019); Gentry v. Harborage Cottages-Stuart, L.L.L.P., 654 F.3d 1247 (11th Cir. 2011) (applying anti-evasion provision of Interstate Land Sales Full Disclosure Act; party seeking to fall into an exemption must show “legitimate business purpose” for its actions); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1171-1172 (S.D. Ind. 1997) (allowing defendant’s actions to avoid the TCPA would make its protections “effectively . . . meaningless”), *reconsideration denied*, 962 F.Supp. 1162.

³⁷ Mark Eisen, Suzanne Aldon de Eraso and David Krueger, *FCC’s New Autodialer Definition Departs From Past Approach*, Law360 Consumer Protection (July 7, 2020), *available at* <https://www.law360.com/articles/1289241/fcc-s-new-autodialer-definition-departs-from-past-approach> (subscription required).

The Ruling’s error is twofold. First—in language that is inconsistent and confusing—it states that “the fact that a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not *probative* of whether that equipment constitutes an autodialer under the TCPA.”³⁸ This statement is astonishing. The degree of automation involved is an important consideration in determining whether a particular platform meets the ATDS definition. And the volume of calls that the platform can produce is an indication of that automation. If a dialing system produced a million calls a day, wouldn’t the Commission want to take that fact into account in determining the credibility of the caller’s claim that the numbers were not automatically dialed? The Commission would abandon its duty to the public if it deliberately blinded itself to the actual capabilities of dialing systems. These statements are also in conflict with the Commission’s previous deliberations on volume calling,³⁹ as well as the considerations of numerous federal courts.⁴⁰

³⁸ Ruling ¶3 (emphasis added).

³⁹ See e.g. 2015 Order at ¶ 111 (“The record confirms that Internet-to-phone text messaging campaigns have purportedly sent tens of thousands of such messages to wireless consumers. . . . The equipment used to send these messages thus must necessarily store, or at least have the capacity to store, large volumes of numbers to be called, and nothing in the record suggests otherwise.”).

⁴⁰ See *Blow v. Bijora, Inc.*, 855 F.3d 793, 802 (7th Cir. 2017) (describing evolution of definition of autodialer; human intervention at nearly every step does not exclude dialer from definition; fact question here when humans drafted messages, decided when they would be sent, and pressed a button to send them or schedule a future sending, but human involvement was “unnecessary at the precise point of action barred by the TCPA: using technology to ‘push’ the texts to an aggregator that sends the messages out simultaneously to hundreds or thousands of cell phone users at a predetermined date or time”) (emphasis added); *Hale v. Natera, Inc.*, 2019 WL 4059851 (N.D. Cal. Aug. 28, 2019) (allegation that the text message was impersonal and generic, and instructed consumer to text “STOP” to opt out, and was sent en masse, is sufficient even if message included some individualized information) (emphasis added); *Mettel v. Town Sports Int’l, LLC*, 2019 WL 1299939 (S.D.N.Y. Mar. 21, 2019) (allegations that defendants sent generic text message, which arrived via a short code telephone number, and that it used a platform that advertises ability to send mass texts, are sufficient) (emphasis added); *Santiago v. Merriman River Assocs.*, 2018 WL 2465358 (D. Conn. June 1, 2018) (pleading that the called party’s telephone number has always been a cell phone, that the caller’s website says its infrastructure allows it to make thousands of simultaneous calls, and that the called party’s number is registered on the nationwide do-not-call list is sufficient to allege willfulness) (emphasis added); *Izsak v. Draftkings, Inc.*, 191 F. Supp. 3d 900 (N.D. Ill. 2016)

Elsewhere in the Ruling, the Bureau states, somewhat differently, that making a large volume of calls “is not *determinative* of whether that equipment constitutes an autodialer under the TCPA.”⁴¹ The view that a large volume of calls is not, in itself, determinative of whether a system is an autodialer is more justifiable, but the calling industry has seized on the “not probative” language to claim that making a massive volume of calls is not even relevant to the question.

The Ruling’s second error is its even more extreme view that evasions of the TCPA’s protections are not the Commission’s concern. In ¶12, the Ruling states:

12. We disagree with NCLC’s contention that the TCPA’s restrictions should apply to P2P systems because otherwise “telemarketers and spammers would immediately gravitate to P2P systems as a way to evade the TCPA’s restrictions on unwanted calls.” . . . The TCPA does not and was not intended to stop every type of call. Rather, it was limited only to calls made using an autodialer or an artificial or prerecorded voice. If a text platform is not capable of storing or producing numbers to be called using a random or sequential number generator and dialing such numbers automatically but instead requires active and affirmative manual dialing, it is not an autodialer and callers using it are, by definition, not “evading” the TCPA.

Abandoning any pretense of policing the calling industry for evasions would be a disservice to consumers and in conflict with the legislative history and the Commission’s previous position. The Ruling is in conflict with case precedent and established Commission policy. It should be reversed, and these errors corrected.

(finding it sufficient to allege that defendant sent same text message en masse to thousands of numbers and that plaintiff received a prerecorded message when he called number from which text was sent) (emphasis added); Soular v. N. Tier Energy, L.P., 2015 WL 5024786 (D. Minn. Aug. 25, 2015) (allegations regarding generic and promotional content of text messages—that they were sent en masse from defendant’s text message service and sent with an autodialer—are sufficient (emphasis added); Gragg v. Orange Cab Co., 942 F. Supp. 2d 1111 (W.D. Wash. 2013) (allegations that defendants’ equipment sent tens of thousands of substantially similar text messages, and that there was a temporal disconnection between using defendants’ service and receiving text message, are sufficient to raise inference that autodialer was used) (emphasis added).

⁴¹ Ruling ¶8.

At the very least, the Commission should vacate the decision and remand it to the Bureau for a detailed analysis of the evasive nature of the P2P platform. There is compelling evidence in the public domain that evasion was the primary purpose behind the way P2P systems were built. As just one example, among many:

Arizona elections attorney Kory Langhofer told KNXV-TV, "There are these new apps that allow the parties to send a bunch of texts very quickly in a way that may be legal. I think it's fair to say that the apps were created to get around the laws prohibiting automatic text messages to cellphones."⁴²

The websites advertising P2P texting promise that the technology will support the sending of massive numbers of texts in tiny periods of time. One website touting the technology promises 200 messages per minute—an astonishing rate of less than one third of one second per message.⁴³

Another promises 1500 texts an hour.⁴⁴

The available information about P2P systems⁴⁵ indicates that the system itself populates a pre-written form text with recipients' phone numbers and names, and that volunteers sitting in front of a computer, or using a smartphone with an app installed, then press "send" for each message.⁴⁶

⁴² Breck Dumas, *Political candidates continue spamming cellphones with texts despite consumer complaints*, The Blaze, Oct. 22, 2018, available at <https://www.theblaze.com/news/2018/10/22/political-candidates-continue-spamming-cellphones-with-texts-despite-consumer-complaints> (emphasis added).

⁴³ See Get Thru, <https://www.getthru.io/thrutext/>. (last visited July 23, 2020).

⁴⁴ CallHub Peer to Peer Texting Campaigns, https://callhub.io/peer-to-peer-texting-campaign/?utm_expId=.EmqpnQJtSJSIUlovMjEohQ.1&utm_referrer=https%3A%2F%2Fwww.wired.com%2Fstory%2Fopinion-texts-from-politicians-could-be-more-dangerous-than-ever%2F (last visited July 23, 2020).

⁴⁵ See RumbleUp, https://win.rumbleup.com/political?utm_source=google&utm_medium=cpc&utm_campaign=rup_cpi_lpb_set1_adc&utm_content=influencer_impressions&campaignid=1747494890&adgroupid=76904560228&gclid=EAIaIQobChMIr6LZq-bf4gIVRCaGCh3CUAfcEAAAYASAAEgLaWPD_BwE (last visited July 23, 2020).

⁴⁶ See, e.g., OpnSesame, https://opnsesame.com/?gclid=EAIaIQobChMIr6LZq-bf4gIVRCaGCh3CUAfcEAAAYAiAAEgI7svD_BwE (last visited July 23, 2020).

Each click of the button apparently triggers the sending of a text. There appears to be no discretion for the sender to determine the words of the text, the timing of the text, or even whether a particular recipient will be on the list to receive one of the texts. Indeed, the sole function of the volunteer appears to be to deliberately evade TCPA coverage, on the theory that the human clicking the button is sufficient human intervention to avoid coverage.⁴⁷

Clearly, the individual human involvement in sending these messages is so vanishingly small as to be meaningless and is inserted into the process simply for purposes of evasion. The Ruling's implicit blessing of these deliberate evasions of the TCPA, regardless of the P2P system's level of automation, is not supported by any evidence in the record and is contrary to readily-available information. This is an additional reason that the decision should be reversed.

V. The Ruling wrongly ignores the degree of automation in the P2P platform, and the actual capacity of the P2P systems.

A final reason that the Ruling should be reversed is that it erroneously focuses just on the P2P "platform," rather than the entire system used to send P2P texts. The TCPA's definition of ATDS refers to the "capacity" of the "equipment" used by the caller. The Commission's rulings have made clear that this standard encompasses both hardware and software, and that dividing functions among several pieces of hardware does not prevent equipment from meeting the definition of ATDS.⁴⁸

By focusing just on the P2P calling platform, the Ruling fails to recognize these fundamental principles. For example, if the P2P platform is part of a system that also allows dialing without a person needing to press a button for each call, then calls made using the platform are made with an

⁴⁷ See, e.g., Aaron Mak, *Getting the Message*, Slate.com, Apr. 3, 2019, available at <https://slate.com/technology/2019/04/2020-presidential-election-campaign-texting.html>.

⁴⁸ 2015 Order at ¶¶ 10, 23, 24, 30.

ATDS. While the Ruling recites the principle that the test is the system's capacity,⁴⁹ it fails to apply this test in its analysis.

The fact that P2P text messaging systems have the capacity to send automated messages without any human involvement is illustrated in a number of the cases filed in the courts alleging that P2P texts are violations of the TCPA. In many of these cases, the complaints specifically allege that the systems evidenced their automated capacity through the automated response to the recipient's request to "stop."⁵⁰ Typically, if a recipient of a P2P text types "stop," there will be an automatic, immediate response, that reads something like this:

You have successfully been unsubscribed. You will not receive any more messages from this number. Reply START to resubscribe.

Although the Commission has held that this confirmation of the stop request is not itself a violation of the TCPA,⁵¹ the fact that the confirmation of the "stop" request is entirely automatic and immediate is a clear indication that the underlying system has the capacity to send automated texts, without a human agent manually dialing each number.

Telephone providers also recognize the types of messages described by the P2P Alliance for what they are—autodialed messages that require prior express consent. In its 2019 Best Practices for text messages, the CTIA divides text communications into two major types: those between consumers, which CTIA labels as "Person to Person (P2P)," and all others, which CTIA labels as

⁴⁹ See, e.g., Ruling ¶¶ 9, 10, 11 (referring to the system's "capacity"), ¶¶ 3, 8, 9, 12 (referring to whether the system is "capable" of dialing numbers automatically).

⁵⁰ See e.g. *Brandon Diller v. Donald J. Trump for President, Inc.*, U.S. District Court for the Northern District of Illinois, Eastern Division, Case No. 20-1079. Complaint, ¶¶ 38-41; *Matthew Bowman, et al. v. Renee Unterman*, U.S. District Court for the Northern District of Georgia Atlanta Division, 20-cv-02612-JPB, ¶¶ 14-15; see also *Jacob Buller, et al. v. Bernie 2020 Inc.*, U. S. District Court District of Minnesota, Case No. 20-cv-1368.

⁵¹ 2015 Order at ¶ 31.

“Non-Consumer” or “Application-to-Person (A2P).”⁵² The CTIA specifically identifies the types of messages described by the P2P Alliance as non-consumer texts largely because of the degree of automation. CTIA characterizes *consumer to consumer texts* as “message exchanges [which] are consistent with conversational messaging among Consumers. . .”⁵³

In contrast, the CTIA points out that automation is not typically used in consumer operations.⁵⁴ Instead, automation is a sign of *business to consumer* texts, identified as A2P. CTIA describes these *business to consumer* texts as:

Non-Consumer (A2P) message traffic includes, but is not limited to, messaging to and from large-to-small businesses, entities, and organizations. For example, Non-Consumer (A2P) messages may include messages sent to multiple Consumers from businesses or their agents, messages exchanged with customer service response centers, service alerts and notifications (e.g., fraud, airline), and machine-to-machine communications. Non-Consumer (A2P) Message Senders may also include financial service providers, schools, medical practices, customer service entities, non-profit organizations, and political campaigns.⁵⁵

P2P messages sent to multiple consumers are nearly identical, or “repetitive messages,” which the CTIA identifies as a characteristic of business to consumer texts (or A2P).⁵⁶ They are “sent to multiple consumers from businesses or their agents . . .”⁵⁷ This is so whether or not each individual message is sent by the click of a computer button by a human. The CTIA list explicitly includes texts from political campaigns and non-profits.⁵⁸ Indeed, at the height of the 2020 political

⁵² CTIA, *Messaging Principles and Best Practices*, (July 2019), at 4, (*available at* <https://api.ctia.org/wp-content/uploads/2019/07/190719-CTIA-Messaging-Principles-and-Best-Practices-FINAL.pdf>).

⁵³ *Id.* at 10.

⁵⁴ *Id.* (“automation in whole or in part used by Non-Consumers to facilitate messaging is not typical Consumer operation”).

⁵⁵ *Id.* at 11 (*emphasis added*).

⁵⁶ *Id.* at 10 (a characteristic of a business text is “Repetitive Messages”; “Typical Consumer behavior is not to send essentially or substantially repetitive messages”).

⁵⁷ *Id.* at 11.

⁵⁸ *Id.*

season, CTIA “confirms what we hear every day from consumers—that political texts are often viewed by consumers as a nuisance or spam. This is one area of actual bipartisanship—74% of Republicans and 67% of Democrats. Spam is spam whether it’s an unwanted text from a bank, a concert promoter or a campaign.”⁵⁹ The industry blog post includes a reminder that the telephone service providers require consent from the recipients of political texts,⁶⁰ or the industry will shut down the platforms.⁶¹

Telephone providers condition access to their mass texting platforms on the user’s express agreement to “adhere to the Non-Consumer (A2P) Best Practices” They *require* that texters accessing their mass texting platforms—

- 1) Obtain the consumer’s consent to receive their texts;
- 2) Ensure that consumers have the ability to revoke consent; and
- 3) Document that they have complied.⁶²

⁵⁹ *Protecting Consumers From Spam Texts*; CTIA, (July 27, 2020), *available at* <https://www.ctia.org/news/blog-protecting-consumers-from-spam-texts>. (“Consumers and campaigns who want to exchange text messages can help all of us keep this platform spam-free by following some commonsense best practices. Our Messaging Principles and Best Practices recommend that non-consumer text message senders, like businesses, charities and political campaigns, seek to make sure that consumers are only receiving the text messages they want. Senders should adopt consumer-centric practices, such as communicating only with consumers who have opted-in, telling consumers how to opt-out—by replying “STOP,” for example—honoring those opt-out requests, and establishing clear privacy and security policies and practices. These best practices are designed to apply the same standards and same consumer protections regardless of whether the sender or the consumer is an airline or a bank, a hospital or a college, a Republican or a Democrat.” (Emphasis added).)

⁶⁰ *Id.*

⁶¹ *See*, Sean Miller, *Potential for texting crackdown looms large over 2020*, Campaigns and Elections, (July 21, 2020), *available at* <https://www.campaignsandelections.com/campaign-insider/potential-for-texting-crackdown-looms-large-over-2020> (noting that the telephone service providers are shutting down platforms that do not comply with the industry’s best practices.); Alex Isenstadt & John Hendel, *Corporate giants shut down Trump texting program*, Politico, (July 20, 2020), *available at* <https://www.politico.com/news/2020/07/20/trump-massive-texting-program-suspended-372302>.

⁶² *CTIA, Messaging Principles and Best Practices* at 14. *See also* Verizon Enterprise Messaging FAQs, <https://www.verizon.com/support/enterprise-messaging-faqs/> (last visited July 23, 2020) (“4. . . . You can also send messages to other Verizon Wireless subscribers, provided you establish a process for them to opt-in to receive your messages. / 8. . . . Enterprise Messaging is designed for businesses and institutions to send alerts, updates or campaigns to their distribution lists of Verizon Wireless

The Ruling is not only inconsistent with telephone providers' recognition of P2P texts as autodialed, but also undermines the carriers' efforts to protect their systems and their customers from these unwanted automated messages.

The failure to acknowledge and address these critical facts is an indication that the Ruling is based on "an erroneous finding as to an important or material question of fact,"⁶³ which necessitates the full Commission's review and reversal.

Conclusion

The Bureau's Declaratory Ruling on the P2P Petition conflicts with the TCPA, established Commission policy and rulings, case precedent, and clear Congressional intent. It addresses issues on which the Commission has not yet ruled, and commits many errors in doing so. It relies on implicit findings of fact that are not supported by the record and that are incorrect. It should be reviewed and reversed. In the alternative, it should be vacated and returned to the Bureau with instructions to reconsider its finding in compliance with applicable law.

Respectively submitted, this the 24th day of July 2020, by

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subscribers that have opted in to receive the company's messages. Enterprise Messaging can't be used to send unsolicited (SPAM), objectionable or illegal messages. Use of Enterprise Messaging is subject to industry (MMA, CTIA) and Verizon Wireless content standards.") (Emphasis added) <https://www.verizon.com/support/enterprise-messaging-faqs/>.

⁶³ 47 C.F.R. § 1.115(b)(2)(iv).