BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

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The Retail Energy Supply Association ("RESA")[1] hereby submits these comments in response to the Commission's recent Public Notice[2] seeking comment on interpretation of the Telephone Consumer Protection Act[3] ("TCPA") in light of the D.C. Circuit's recent *ACA International, et al. v. FCC* decision.[4] RESA urges the Commission

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, DA 18-493, CG Docket No. 18-152, CG Docket No. 02-278 (rel. May 14, 2018).

[3] 47 U.S.C. § 227.

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

to interpret the TCPA in a manner consistent with the plain language and Congressional intent of the statute. By adhering to the TCPA's original intent, the Commission will ensure that the TCPA protects consumers, while still permitting RESA members and other businesses to rely on the nation's public telecommunications networks to communicate effectively with their current customers, as well as to reach out to prospective competitive energy customers and expand the availability of competitive offerings, as RESA members have done for decades.

I. INTRODUCTION AND SUMMARY

RESA urges the Commission to restore the initial intent of the TCPA by adhering to the plain language of the statute, particularly as it relates to the definition of an Automatic Telephone Dialing System ("ATDS"), which the statute defines as necessarily including a random or sequential number generation capability. The D.C. Circuit in *ACA International* laid out the framework for the Commission to find that such number generation capability is integral to the definition of an ATDS.

The Commission should also find that the TCPA is only implicated by callers that are actually using ATDS capabilities to make calls, again, as the statute requires, and not by equipment that merely has the latent or theoretical "capacity" to use such functionality. The *ACA International* court was emphatic in its rejection of the Commission's prior interpretation of "capacity" as an "expansive" one, "having the apparent effect of embracing all smartphones."[5] By requiring actual use of an ATDS, as suggested by Commissioner O'Rielly in 2015, the Commission would establish a bright

[5] *ACA Int'l*, 885 F.3d at 696.

line rule that avoids difficult questions of when a device should be deemed to have the capacity to perform ATDS functions.

The statutory intent also recommends that the Commission define the "called party" as the party the caller reasonably expected to reach. The Commission should also require a showing that the calling party had actual knowledge that a number has been reassigned before considering the reassigned number to be the "called party."

As to the issue of what should be required to revoke consent to receive robocalls, RESA, many of which are smaller companies, supports clearly-defined and easy-to-use opt-out methods that allow for the flexibility to offer lower-tech methods, including sending an e-mail to a designated email address. In addition to responding to clear verbal indications like "stop calling" or "stop texting," callers should be required to provide one written method (*e.g.*, email or website) as a method for the revocation of consent.

By adopting these RESA recommendations, which hew to the TCPA's statutory intent, the Commission will not only protect consumers as intended by the TCPA, but will also allow RESA to continue to market effectively competitive energy product offerings using the public telecommunications networks.

II. RESA MARKETING EFFORTS PROMOTE ELECTRICITY AND NATURAL GAS COMPETITION

RESA is comprised of over twenty retail electricity and natural gas suppliers operating throughout the United States.[6] Some members of RESA supply both electricity and natural gas to residential, commercial, and industrial customers, while some members may supply only electricity or natural gas. However, all of RESA's members share the

[6] *Who We Are*, RESAUSA.ORG, https://www.resausa.org/about-us/who-we-are (last visited January 22, 2018).

common vision that competitive retail electricity and natural gas markets deliver a more efficient, customer-oriented outcome than does the monopoly-protected, rate-regulated utility structure. RESA's marketing efforts promoting competition in the retail electric and natural gas industries are critical to implementing important public policy goals in those markets.

Unsurprisingly, competition in electric and natural gas markets has had a similar effect as the earlier introduction of competition into telecommunications markets.[7] Competitive choice for retail electricity and natural gas is now available in thirteen states and the District of Columbia.[8] In these jurisdictions, average electricity prices fell against inflation, whereas average electricity prices far exceeded inflation in states with traditional monopoly regulation.[9] Moreover, jurisdictions with competitive choice, as a group, have outperformed states with traditional monopoly regulation in energy generation, attracting billions of dollars of investment in new, more efficient generation.[10]

Competitive energy supply is a product offering that consumers are increasingly demanding and a public policy objective that requires RESA members to have the ability to reach out to potential customers through phone calling, in addition to other marketing

[7] *Telecommunications Act of 1996*, FCC.GOV, https://www.fcc.gov/general/telecommunications-act-1996 (last visited January 22, 2018) ("The Telecommunications Act of 1996 is the first major overhaul of telecommunications law in almost 62 years. The goal of this new law is to let anyone enter any communications business — to let any communications business compete in any market against any other.").
[8] Philip R. O'Connor, Ph.D and Erin M. O'Connell-Diaz, *Evolution of The Revolution: The Sustained Success of Retail Electricity Competition*, HARVARD.EDU (July 2015), https://sites.hks.harvard.edu/hepg/Papers/2015/Massey_Evolution%20of%20Revolution.pdf (last visited January 22, 2018).
[9] *Id.*
[10] *Id.*

channels. From 2003-2014, in the fourteen jurisdictions served by competitive suppliers grew dramatically even in an era of overall flat growth in electricity consumption: 181% for commercial / industrial customers and 673% for residential, accounting for twenty of every one hundred kilowatt hours sold in the contiguous United States.[11] Nonetheless, there is still more room for growth, using telephone marketing as their primary marketing channel.

This proceeding provides the Commission an opportunity to unshackle the RESA and similar companies from overly burdensome definitions developed in several of the Commission's prior TCPA orders. The D.C. Circuit, in its March 16 *ACA International* decision, provided critical guidance to the Commission that permits it to revisit its prior TCPA decisions in a manner that will permit RESA to realize the potential growth in the competitive energy supply market.

III. RESA SUPPORTS A MORE NARROW INTERPRETATION OF "AUTOMATIC TELEPHONE DIALING SYSTEM" CONSISTENT WITH THE STATUTE

A. The TCPA Definition of "Automatic Telephone Dialing System"

Because many of the TCPA's prohibitions relate to calls made using an ATDS, the definition of ATDS has been closely scrutinized by the Commission and the courts for over twenty years. The *ACA International* decision provides the Commission an opportunity to define ATDS in a manner consistent with the Congressional statutory intent, as well as earlier Commission decisions.

The TCPA defines an ATDS as:

equipment which has the capacity—

[11] *Id.*

> (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
> (B) to dial such numbers.

The issue before the D.C. Circuit and now back before the Commission is whether equipment itself must have the ability to generate random or sequential numbers in order to qualify as an ATDS, or as the Court asked, "is it enough if the device can call from a database of telephone numbers generated elsewhere?"[12]

Beginning with the statute, the statutory definition plainly requires two prerequisites, the capacity to dial certain numbers, "***and***" the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator . . . ." By its terms, the ATDS definition requires that the equipment itself uses "a random or sequential number generator." Those who seek to achieve a different result, somehow must extract or ignore the random-or-sequential-number-generation function from the statutory definition. But any equipment that qualifies as ATDS equipment must have that generation capability because it is an integral component of the first, necessary prong of the definition. Chairman Pai, in his dissent to the *2015 Declaratory Ruling*, emphasized that the plain language of the statute does not permit any interpretation that reads generation out of the statute as a necessary function of an ATDS.[13]

Read in the context of that statutory requirement, the *2015 Declaratory Ruling* now appears tortured: "We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of "autodialer") even if it is not presently used for

[12] *ACA Int'l*, 885 F.3d at 701.
[13] *See* Pai Dissent ("As three separate petitions explain, trial lawyers have sought to apply this prohibition to equipment that *cannot* store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* dial such numbers.")

that purpose, including when the caller is calling a set list of consumers."[14] But no amount of verbal or legal gymnastics can eliminate the generation requirement from the TCPA's statutory definition of an ATDS.

The D.C. Circuit in *ACA International* rejected as arbitrary and capricious the Commission's prior findings that generation is not necessary to an ATDS, not only as stated in the Commission's *2015 Declaratory Ruling*, but also the similar findings in the Commission's 2003 and 2008 rulings. The Court found that not only the *2015 Declaratory Ruling* but also that the "agency's prior [2003 and 2008] rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform."[15] The Court found the Petitioners had duly requested review of the ambiguities in all three prior Commission orders, that the Court had the authority to set aside the pertinent provisions of those orders, and that the "lack of clarity about which functions qualify as a devices as an autodialer" required the Court to "set aside the Commission's treatment of those matters."[16]

As the D.C. Circuit highlighted, the *2015 Declaratory Ruling* itself "treats the ability to 'dial random or sequential numbers' as the ability to *generate* and then dial 'random or sequential numbers.'"[17] The D.C. Circuit further found that the *2003 Declaratory Ruling* also made a similar distinction "between calling from a list of numbers, on one hand, and 'creating or dialing' a random or arbitrary list of numbers, on the other hand."[18] The Court also noted that the *2003 Declaratory Ruling* recognized that

[14] *2015 Declaratory Ruling* at 10.
[15] *ACA Int'l*, 885 F.3d at 701.
[16] *Id.* at 703.
[17] *Id.* at 702 (emphasis in original) (citing *2015 Declaratory Ruling*, ¶¶ 10, 15).
[18] *Id.*

telemarketers had progressed to using predictive dialers that no longer generated numbers:

> In its 2003 ruling addressing predictive dialers, the Commission observed that, "[i]n the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily." 2003 Order, 18 FCC Rcd. at 14,092 ¶ 132 (emphasis added). But the industry had "progressed to the point where" it had become "far more cost effective" instead to "us[e] lists of numbers." *Id.*

Again, the Commission was making a distinction between equipment that generates numbers as opposed to relying on externally generated lists of numbers.

Although the D.C. Circuit in *ACA International* conceded that the Commission had read the statute in competing ways, it opened the door to the more sound reading that equipment must perform number generation in order to qualify as an ATDS.[19] Indeed, when the Commission first interpreted the TCPA in 1992 and 1995, it found that calls not "dialed using a random or sequential number generator . . . are not autodialer calls."[20] And given that the 2003, 2008, and 2015 orders were overturned on this point, it is currently the law today that number generation is a necessary prerequisite of an ATDS.

Chairman Pai, in his dissenting statement on the *2015 Declaratory Ruling*, also found that the common sense, plain language interpretation of the TCPA requires number generation in order for equipment to qualify as an ATDS: "We must respect the precise contours of the statute that Congress enacted."[21] As then Commissioner Pai pointed out, not only was the *2015 Declaratory Ruling* reaching beyond the scope of the statute, but it

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[19] *ACA Int'l*, 885 F.3d at 703 ("It might be permissible for the Commission to adopt either interpretation.")

[20] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8773, para. 39 (1992); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995); s*ee also* Pai Dissent.

[21] Pai Dissent.

was unnecessary for the Commission to go there because the statute had actually achieved its intended purpose:

> The *Order* then protests that interpreting the statute to mean what it says—that automatic telephone dialing equipment must be able to dial random or sequential numbers—"could render the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer." But what the Commission deems defeat is in fact a victory for consumers. Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.[22]

As the D.C. Circuit put it in *ACA International*, "Congress need not be presumed to have intended the term 'automatic telephone dialing system' to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."[23]

The U.S. Chamber Institute for Legal Reform of Commerce, in its recent Petition for Declaratory Ruling ("*Chamber Petition*"), reached the same conclusion that the statute plainly states that number generation is a necessary function of an ATDS:

> Devices that cannot perform these functions cannot meet the statutory definition of an ATDS. Clarifying this definition (and rejecting earlier expansions that sweep all predictive dialers into the category of "ATDS") is critical to restoring Congress' intent for what constitutes an ATDS. Such a clarification would help businesses and other legitimate callers by confirming that both elements must be satisfied for a device to constitute an ATDS.[24]

Commissioner O'Rielly likewise dissented in 2015, stating:

> The order misreads the statute by including equipment that merely has the capacity to dial from a list of numbers. That not what the TCPA says. It

[22] *Id.*
[23] *ACA Int'l*, 885 F.3d at 699.
[24] *Chamber Petition* at 22.

> makes clear that the telephone numbers must be stored or produced "using a random or sequential number generator". Therefore, calling off a contract list or from a database of customers, for example, does not fit the definition.[25]

The Congressional intent of the TCPA has been achieved, discouraging the use of ATDS equipment that randomly or sequentially generates numbers. RESA members therefore urge the Commission to realign the scope of the TCPA with the original Congressional intent and 1992 and 1995 Commission interpretation, requiring number generation and excluding from the definition of ATDS any dialing where companies rely on lists, and where their predictive dialing or other dialing equipment performs no such generation functions.

B. ATDS Equipment Must be Used as an Autodialer to Violate the TCPA

RESA agrees with Commissioner O'Rielly's 2015 Dissent[26] and the Chamber of Commerce[27] and urges the Commission to conclude that the TCPA is only implicated by the use of actual ATDS capabilities in making calls to cellphones. The statute addresses the initiation of calls "using" an ATDS, so it would again be beyond the scope of the statute to apply it to devices with capabilities not in use.

The TCPA, in section 227(b)(1)(A)(iii) relating to ATDS calls to cellphones—the TCPA section most often exploited by plaintiffs' attorneys—provides:

> (b) Restrictions on use of automated telephone equipment
>
> (1) Prohibitions
>
> It shall be unlawful for any person with the United States, or any person outside the United States if the recipient is within the United States—

[25] O'Rielly Dissent.
[26] O'Rielly Dissent.
[27] *Chamber Petition* at 25.

> (A) ***to make any call*** (other than a call made for emergency purposes or made with the prior express consent of the called party) ***using any automatic telephone dialing system*** or an artificial or prerecorded voice—
>
> . . .
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call . . . .[28]

Commissioner O'Rielly noted that, while the 2015 Commission definition of an ATDS focuses on the "***capacity*** . . . to store or produce telephone numbers to be called, using a random or sequential number generator . . . ," the actual TCPA prohibits actually ***using*** any ATDS ***to make any call***.[29]

The D.C. Circuit highlighted this argument in *ACA International*, noting that by focusing on actual use to make calls, the issue of what constitutes "capacity" becomes much less important:

> The dissenting commissioner's interpretation would substantially diminish the practical significance of the Commission's expansive understanding of "capacity" in the autodialer definition. Even if the definition encompasses any device capable of gaining autodialer functionality through the downloading of software, the mere possibility of adding those features would not matter unless they were downloaded and used to make calls. Under the dissent's understanding of the phrase, "make any call," then, everyday calls made with a smartphone would not infringe the statute: the fact that a smartphone could be configured to function as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages.[30]

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[28] 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

[29] O'Rielly Dissent, n. 22 (citing Letter from Steven A. Augustino, Counsel to Five9, to Marlene H. Dortsch, FCC, CG Docket No. 02-278 (filed June 11, 2015)).

[30] O'Rielly Dissent. The D.C. Circuit's discussion on this point is arguably dicta but the Court noted that the Commission "could choose to revisit the issue in a future rulemaking or declaratory order, and a party might then raise the issue on judicial review." *ACA Int'l*, 885 F.3d at 704.

The Commission should therefore emphasize that equipment must not only have the "capacity" to function as an autodialer when actual calls are made, but that the calling party must also actually be using that capacity to make the calls for TCPA restrictions to apply. The equipment's future capacity or adaptability would then be a moot point. *See also Chamber Petition* at 25-26 ("The FCC should adopt the D.C. Circuit's roadmap and clarify that the TCPA is only implicated *by the use of actual ATDS capabilities in making calls*.") (emphasis in original).

The Commission should make the counterpart finding that "capacity" includes only the functions that can be performed as a device is currently programmed. The D.C. Circuit, of course, was highly critical of the Commission's 2015 interpretation as "highly unreasonable," by virtue of the fact that it included in "capacity" features that could be added through software changes or upgrades, and as such extending the definition of ATDS to include essentially every smartphone or tablet.[31] This narrower definition of "capacity" will again narrow the Commission's interpretation to realign it with the statutory intent of the TCPA.

C. An ATDS Must Operate Without Human Intervention

The D.C. Circuit in *ACA International* also spoke to the need for the Commission to clarify that equipment must be capable of dialing without human intervention in order to qualify as an ATDS. The Court noted that it "makes sense" for the Commission to require that there be no human intervention, noting that the terms "auto" in "autodialer" and "automatic" in "automatic telephone dialing system" "would seem to envision non-manual dialing of telephone numbers."[32] The Court noted that the Commission, in its

[31] *ACA Int'l*, 885 F.3d at 699.
[32] *Id.* at 703.

prior 2003 and 2008 orders, had previously required "human intervention," but was not willing to make that same statement again in its *2015 Declaratory Ruling*.[33]

Commissioner O'Rielly, in his dissent to the *2015 Declaratory Ruling*, noted the Commission's reversal on this issue from previous orders:

> the Commission previously clarified that to be considered "automatic", an autodialer must function "without human intervention". Therefore, it should be clear that non-de minimis human intervention would disqualify it from being an autodialer. This is important because there is litigation around the country regarding the level of human intervention. Yet the order refuses to provide any additional clarity, claiming that this must be done through a case-by-case determination.[34]

RESA therefore urges the Commission to follow the Court's suggestion and require that if there is human intervention, equipment cannot qualify as an ATDS. The Commission should further clarify that the intervention can be either in the generation or the dialing function of the equipment.[35] This is consistent with the previous recommendation that, where numbers are provided from independent lists, equipment would not qualify as an ATDS.

These clarifications are critical to RESA members in their daily operations. As the Court has duly noted, dialing systems have evolved to the point where they now use separate lists of numbers. Companies like RESA members need to have the business certainty that they can reach out to customers over the public telecommunications networks without feeling like they are walking through a legal minefield of restrictions

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[33] *Id.* (citing 2003 Order, 18 FCC Rcd. at 14,092, ¶132; *2008 Declaratory Ruling*, 23 FCC Rcd. at 566, ¶13). The Commission in the *2015 Declaratory Ruling* found: "Because the Commission has previously rejected a restrictive interpretation of autodialer in favor of one based on a piece of equipment's potential ability, we find that PACE's argument amounts to a simple variation on the "present ability" arguments we reject above." *2015 Declaratory Ruling*, 30 FCC Rcd. at 7976, ¶20.

[34] O'Rielly Dissent (citations omitted).

[35] *See Chamber Petition* at 24-25.

and caveats. Where numbers are not generated by an ATDS or where there is human intervention in the generation or dialing of the numbers, RESA members need to know that they can reach out to potential or existing customers without unduly risking extensive liability. Commission clarification on these points will enable RESA members to continue to market competitive energy products and services, with all their attendant public benefits, without the impediment of potentially daunting financial exposure.

IV. TREATMENT OF CALLS TO REASSIGNED WIRELESS NUMBERS

A. FCC and D.C. Circuit History

The TCPA provides an exception for calls "made for emergency purposes or made with the prior express consent of the called party."[36] Previously, the FCC found that, in the case of reassigned numbers, the "called party" refers to the new subscriber, and also established a one-call safe harbor.[37] Pursuant to this safe harbor, a calling party is allowed to place one — and only one — phone call to a reassigned numbers without incurring potential liability under the TCPA.[38]

However, the D.C. Circuit found that the FCC's one-call safe harbor was arbitrary and capricious, finding that there was no basis to conclude that additional calls to a number not known to be reassigned would also not be equally reasonable: "a caller's reasonable reliance on the previous subscriber's consent would be just as reasonable for a second call."[39] The Court also invalidated the Commission's finding that the "called party" refers to the new subscriber to a reassigned number.[40]

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[36] 47 U.S.C. § 227(b)(1)(A).
[37] *2015 Declaratory Ruling*, 30 F.C.C. Rcd. 7961, 8000, ¶ 72.
[38] *Id*.
[39] *ACA Int'l*, 885 F.3d at 707.
[40] *Id*. at 708-09.

B. The Commission Should Define the Called Party as the Party the Caller Reasonably Expected to Reach

The Commission should find that the "called party" should be defined as the party that the caller reasonably expected to reach. That would mean that if you have consent from the party you reasonably expected to reach, you would not have liability. The Commission should require a showing that the calling party had actual knowledge that a number has been reassigned before considering the reassigned number party to be the "called party." As noted by several courts, the statutory text and overall structure of the TCPA provides the FCC with the discretion to interpret "called party" as the party that the caller reasonably intended to reach. For example, in the *ACA International* decision, the DC Circuit extensively quoted the Seventh Circuit's *Soppet* case for this proposition.[41]

The FCC's previous interpretation of the statute simply asked too much of calling parties. Court have long held that it is a flawed and unreasonable construction of any statute to read it "in a manner that demands the impossible."[42] In the past, the FCC has provided a fifteen (15) day safe harbor for phone calls to numbers that have been recently ported from wireline service to wireless services.[43] Through the creation of this safe harbor, the Commission attempted to ensure that callers would have a reasonable opportunity to comply with rules while at the same time protecting consumer privacy interests. Moreover, the safe harbor allowed the Commission to ensure that its application of the TCPA would not require the impossible of calling parties.[44]

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[41] *See Id*. at 706 (citing *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012)).
[42] *See, e.g., McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000)
[43] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Order, 19 F.C.C. Rcd. 19215, 19215, ¶ 1 (2004).
[44] *Id.* ¶ 9.

In the *2015 Declaratory Ruling*, the Commission noted that it desired that the calling party rather than the recipient of the call bear "the risk that the call was made without the prior express consent required under the statute."[45] However, given the well documented abuse and potential for even greater abuse of TCPA lawsuits by some members of the plaintiff's bar,[46] it is simply not reasonable to ask calling parties to risk a potential multimillion dollar class action lawsuit instead of asking call recipients to affirmatively notify the calling party when they have been reached erroneously. Moreover, the development of the reassigned number database, if reasonably accessible to all parties, could provide a technological solution to this issue. However, even with access to the database, originating callers would now have four separate sources to check: federal Do Not Call, state Do Not Call, internal Do Not Call lists, and now the reassigned number database. Should such a database become available, RESA proposes that originating callers should have a grace period of at least ninety (90) days to update their calling lists based on the reassigned number database.

V. REVOCATION OF EXPRESS CONSENT TO RECEIVE ROBOCALLS

In its *2015 Declaratory Ruling*, the Commission concluded that "a party may revoke consent at any time and through any reasonable means . . . that clearly expresses a desire not to receive further messages."[47] The D.C. Circuit, for the most part, upheld the Commission's ruling on this point and reasoned that "callers will have every incentive to

[45] *2015 Declaratory Ruling*, n. 312.
[46] *2015 Declaratory Ruling*, Dissenting Statement of Commissioner Ajit Pai, n. 8 (citing Adonis Hoffman, "Sorry, Wrong Number, Now Pay Up," The Wall Street Journal (June 16, 2015), available at http://on.wsj.com/1GuwfMJ).
[47] *2015 Declaratory Ruling*, 30 FCC Rcd. at 7996 ¶ 62.

avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods."[48]

Despite the D.C. Circuit leaving the Commission's rules intact with respect to the revocation of consent, the Commission has requested additional input as to standards for clearly-defined and easy-to-use opt-out methods. To the extent that the Commission is currently considering specific methods for revocation of consent, RESA recommends that the Commission allow for flexibility to allow for lower-tech options for smaller companies, including the option to send an email to a designated address to opt-out. Callers should be required to provide one written method (*e.g.*, email or website), as well as the ability to provide a clear verbal indication to "stop calling" to a live caller or "stop texting" to an unwanted text. If the Commission provides such options, it must also clarify that any third-party marketing or telemarketing company is required to convey any such message back to the company on whose behalf it is making the calls. Otherwise, this could leave smaller companies that rely on third-party telemarketers, including many RESA members, exposed as to messages that are not transmitted back to the company hiring the third-party telemarketing services.

No specific method should be required by the Commission unless it is unquestionably "clearly-defined" and "easy-to-use." Given the immense amount of potential liability calling parties can face under the TCPA, any new rule issued by the Commission can easily cause more harm than good. Thus, the Commission should refrain from imposing any additional obligation on calling parties unless the obligation is

[48] *ACA Int'l*, 885 F.3d at 709.

unambiguous and will not require an unreasonable amount of effort to ensure compliance.

VI. CONCLUSION

RESA's members, like countless other business entities, utilize telemarketing as a primary sales channel to reach consumers and promote competitive electricity and natural gas markets. These companies need to be able to continue to rely upon the public telecommunications networks in order to reach out to customers. The Commission's prior expansive interpretation of the TCPA in the *2015 Declaratory Ruling* served as an obstacle to effective marketing by RESA members and went far beyond the more narrow intent of Congress. Following the guidance of the D.C. Circuit in *ACA International*, the Commission should take this opportunity to realign its interpretation of the TCPA with the language of the statute.

Respectfully Submitted,

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