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Submitted Via Electronic Filing

April 11, 2019

The Honorable Chairman Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Comments Concerning the Telephone Consumer Protection Act: *Gadelbak v. AT&T Services, Inc.*

Dear Chairman Pai:

On behalf of Ohio's 264 credit unions and their three million members, we are commenting on a recent court decision in *Gadelbak v. AT&T*¹ regarding the Federal Communications Commission's (FCC) prior orders interpreting the Telephone Consumer Protection Act's definition of an automatic telephone dialing system (ATDS). After the ruling in *ACA International v. FCC*², other courts have considered whether *ACA International* overruled the 2015 Omnibus Order or all previous FCC orders which presented competing views of an ATDS³.

As articulated by *ACA International* and relied upon in *Gadelbak*, previous FCC guidance, including the 2015 Omnibus Order, "adopted two irreconcilable definitions of the term ATDS⁴." For this reason, the D.C. Circuit in *ACA International* confirmed that the FCC "cannot, consistent with reasoned decision making, espouse both competing interpretations in the same order."⁵ Based on this, the court in *Gadelbak* held *ACA International* "invalidated the Commission's understanding of the term ATDS as articulated in the 2015 Declaratory Ruling, as well as the 2008 Declaratory Ruling and the 2003 Order."⁶ Essentially, the court determined that all previous FCC guidance is not effective or binding, because it articulated two competing views of an ATDS.

Under *Gadelbak*, no constitutional FCC interpretation of an ATDS exists. Based on *Gadelbak*, an ATDS is a predictive dialer that generates numbers either randomly or sequentially. However, it is not feasible for businesses to utilize the *Gadelbak* definition of an ATDS as that is only one court's decision, respectfully. As we have previously written the Commission, *Marks v. Crunch San Diego, LLC* adopts a contrasting definition of an ATDS.⁷ Thus, businesses are put in the untenable position of having to decipher and determine which court's opinion will dictate

¹ *Gadelbak v. AT&T Services, Inc.*, No. 17-01559 (N.D. Ill. Mar. 29, 2019).

² *ACA Int'l, Et Al v. Federal Communication Commission*, No. 15-1211 (D.C. Cir. Mar. 16, 2018).

³ See, *Pinkus v. Sirius XM Radio, Inc.* 319 F. Supp. 3d 927, 935 (N.D. Ill 2018) and *Johnson v. Yahoo!*, 346 F. Supp. 3d 1159, 1161 (N.D. Ill 2018).

⁴ *Gadelbak* at page 8.

⁵ *ACA Int'l* at page 27.

⁶ *Gadelbak* at page 10.

⁷ *Marks v. Crunch, San Diego, LLC.*, No. 14-5684 (9th Cir. Sep. 20, 2018) (concluding that the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator.)



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whether a business's equipment qualifies as an ATDS. This complexity is compounded by the fact the businesses and their customers are not typically confined to one geographic region.

Credit union members overwhelmingly expect and deserve timely communications and credit union outreach regarding their accounts. As long as there is uncertainty regarding how to comply with TCPA, beneficial consumer communications remain burdened and credit unions' service-focused interaction with member-owners remains uncertain and vulnerable to specious litigation threats and actions. A significant and growing percentage of the credit union membership utilizes cell phones as their primary method of contact. It is imperative that credit unions have an unfettered ability to provide time sensitive information through cell phone calls and text messages.

These circumstances are jeopardizing consumers' unabridged and continued access to open and timely communications provided by their cooperative financial institutions. We respectfully request that the FCC consider how the TCPA is negatively impacting member-owned credit unions. We urge the Commission to begin working on a modernized TCPA rules framework which fully accounts for both *technological advancements* and *existing established business relationships*.

Thank you for your careful consideration and for the opportunity to express these views.

Sincerely,

Handwritten signature of Paul Mercer in black ink.

Paul Mercer
President

Handwritten signature of Miriah Lee in black ink.

Miriah Lee
Regulatory Counsel



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