



Consumer Federation of America



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July 12, 2019

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

This *ex parte* notice is intended to respond to the petition filed by the P2P Alliance on May 3, 2018,<sup>1</sup> which requests that the Commission “clarify that P2P text messaging is not subject to the Telephone Consumer Protection Act’s (TCPA)<sup>2</sup> restrictions on calls to mobile phone numbers.”<sup>3</sup> This *ex parte* is submitted on behalf of the low-income clients of the **National Consumer Law Center, Consumer Reports, Consumer Federation of America, Consumer Action, National Association of Consumer Advocates, Public Knowledge** and **U.S. PIRG**.

On behalf of many of the nation’s recipients of unwanted robotexts, we urge the Commission to reject this request. At best, this request is premature, as the record is completely devoid of information about the technical capabilities of the platforms that enable P2P’s automated texts. Neither the petition requesting the exemption nor the information about the platform available publicly provides sufficient support for this exemption, or gives commenters, representatives of consumers, or the Commission, sufficient information to make a reasonable determination regarding the technical aspects of the systems under consideration. Making a determination about this messaging platform at this point in time—without this key information—would be based on conjecture and unsubstantiated assertions by the industry.

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<sup>1</sup> *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) [hereinafter Petition], available at <https://ecfsapi.fcc.gov/file/10503899411027/P2P%20Petition%20-%20FINAL.pdf>.

<sup>2</sup> 42 U.S.C. § 227.

<sup>3</sup> Petition at 2-3.

Granting the petition would also mark a major setback in the Commission’s efforts to address unwanted and illegal robocalls and robotexts. These messages are already impacting tens of millions of consumers<sup>4</sup> and prompting consumer complaints.<sup>5</sup> Consumers are complaining loudly. If the Commission were to grant the petition, telemarketers and spammers would immediately gravitate to P2P systems as a way to evade the TCPA’s restrictions on unwanted calls.

**I. The question is whether the systems on which the P2P messages are sent meet the ATDS definition, not whether each message is sent using the system’s automated function.**

While the petitioner’s argument focuses on the way the P2P messages are sent, that is not the determinative issue in this inquiry. The structure of the TCPA shows that Congress intended to require consent not just to automated calls, but to all calls made on systems that meet the definition of an automated telephone dialing system. In section 227(a)(1), the statute defines the equipment that triggers the statute’s protections as an “automatic telephone dialing system.” Then, in an entirely separate section, the statute requires consent when calls are made using that equipment:

(B) RESTRICTIONS ON USE OF AUTOMATED TELEPHONE EQUIPMENT

(1) PROHIBITIONS

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(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-- . . . .<sup>6</sup>

This prohibition is explicitly and unquestionably applicable to “any call . . . using any automatic telephone dialing system.”<sup>7</sup> A narrower reading of this language to except calls from this prohibition unless it is proven that the particular call was actually dialed in an automated manner is not supported by the statute, and would be unreasonable and inconsistent with its purpose. If that

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<sup>4</sup> See, e.g., RumbleUp’s website, which advertises “conversations with thousands (or millions) of voters,” at [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](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).

<sup>5</sup> See section IV, *infra*.

<sup>6</sup> 47 U.S.C. § 227(b)(1)(A) (emphasis added).

<sup>7</sup> 47 U.S.C. § 227(b)(1)(A) (emphasis added). See *Mey v. Venture Data, L.L.C.*, 245 F. Supp. 3d 771, 785–789 (N.D. W. Va. 2017) (fact question as to whether an ATDS was used to make the calls); *Nelson v. Santander Consumer USA, Inc.*, 931 F. Supp. 2d 919, 930 (W.D. Wis. 2013) (whether system’s preview dialing capacity was used to make the calls in question is irrelevant where there is no dispute that it also had the capacity to operate as a predictive dialer), *vacated by stipulation*, 2013 WL 5377280 (W.D. Wis. June 7, 2013). *But see* *Frisch v. AllianceOne Receivables Mgmt., Inc.*, 2017 WL 25471 (E.D. Wis. Jan. 3, 2017) (calls were not autodialed when callers used manual process, such as clicking on a number on a screen, for each call, even if system also had capacity to operate as predictive dialer).

were the intent of Congress, then the separate definition of an ATDS would have been completely unnecessary, as the prohibition simply could have been against calls dialed in an automated manner, either as part of a list of calls or generated by a machine. Instead, the statute defines the equipment and then restricts “any call” made on the defined equipment.

Importantly, were the Commission to limit the TCPA’s requirements for consent only to those calls—or texts—that are shown to be made using the automated mechanisms of an ATDS, the impact would be to render those requirements unenforceable. No one could ever prove which capabilities of the system a particular call utilized when it was placed. And it could not have been the intent of Congress to create a protection against automated calls (requiring consent for those calls) that could never be enforced. It was likely for this very practical reason that Congress specifically required consent for calls made using an ATDS, not just for automated calls.

## **II. P2P texts are clearly highly automated and appear to be sent in an automated fashion.**

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 promises that the platform will enable “3000 texts sent per hour, per agent.”<sup>8</sup> This speed means that one message will be sent every 1.2 seconds. Another website touting the technology promises 200 messages per minute—an astonishing rate of less than one third of one second per message.<sup>9</sup> 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.

While the P2P Alliance’s petition repeatedly makes the conclusory statement that the texts are not sent on an ATDS,<sup>10</sup> there is absolutely nothing in the record to support a determination that, when the P2P application has been uploaded onto either individual phones or computers, those P2P messages are not using technology, or are not part of a system, that meets the definition of an ATDS.

The case appears to be quite the opposite. The publicly available data about these platforms indicate that these systems work after a list is uploaded, recipients’ names and phone numbers are automatically populated by the application, and agents then press some buttons at some point in the

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<sup>8</sup> See RumbleUp’s website at [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-bf4gIVRCaGCh3CUAfcEAAYASAAEgLaWPD\\_BwE](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-bf4gIVRCaGCh3CUAfcEAAYASAAEgLaWPD_BwE). See also Opn Sesame’s website at [https://opnsesame.com/?gclid=EAIaIQobChMIr6LZq-bf4gIVRCaGCh3CUAfcEAAYAiAAEgI7svD\\_BwE](https://opnsesame.com/?gclid=EAIaIQobChMIr6LZq-bf4gIVRCaGCh3CUAfcEAAYAiAAEgI7svD_BwE).

<sup>9</sup> See Get Thru’s website at <https://www.getthru.io/thrutext/>.

<sup>10</sup> See [Petition](#) at 3.

process.<sup>11</sup> That is exactly how many ATDS systems work.<sup>12</sup> Any human intervention at any stage of the process is minuscule.<sup>13</sup>

Systems that automatically dial from a list—as do P2P platforms—repeatedly have been found to meet the test for an ATDS under the TCPA, including in the comprehensive decision recently issued by the Ninth Circuit in *Marks v. Crunch San Diego, L.L.C.*,<sup>14</sup> which held:

...the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA.<sup>15</sup>

There is every indication—and nothing in the record to the contrary, except the petitioner’s bald assertions—that P2P systems do meet the definition of an ATDS, and that the texts sent through these platforms therefore require consent.

### **III. P2P systems should not be permitted to evade TCPA coverage by inserting clicking agents to send automated messages without consent.**

The available information about P2P systems<sup>16</sup> indicates that the system itself populates a pre-written form text with recipients’ phone numbers and names, and that volunteers sitting in front

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<sup>11</sup> See <https://www.getthru.io/>.

<sup>12</sup> See, e.g., *Somogyi v. Freedom Mortg. Corp.*, 2018 WL 3656158 (D.N.J. Aug. 2, 2018) (citing FCC’s 2003 order and applying human intervention test; also rejecting argument that choosing numbers from a list meant that dialer was not an ATDS); *Zeidel v. A&M (2015) L.L.C.*, 2017 WL 1178150 (N.D. Ill. Mar. 30, 2017) (relying on 2003 order to hold that device that sends text messages *en masse* is ATDS regardless of whether it has capacity to generate numbers sequentially or randomly; device is ATDS if: it stores pre-programmed numbers or receives numbers from a computer database; it can dial those numbers at random, in sequential order, or from a database of numbers; and its basic function is the capacity to dial numbers without human intervention); *Swaney v. Regions Bank*, 2015 WL 12751706 (N.D. Ala. July 13, 2015) (relying on 2003 order; text message-sending system is ATDS because it has ability to dial numbers without human intervention).

<sup>13</sup> A news article about P2P systems explains: “In order to avoid running afoul of telecommunications laws, the platforms are set up so that people have to press a button each time they send a text. In practice, peer-to-peer texting usually involves a volunteer or staffer repeatedly mashing on the send button to contact up to 1,000 voters per day. Only a fraction of the recipients respond, at which point the volunteer can answer any questions and attempt to engage in a discussion.” Aaron Mak, *Getting the Message*, Slate.com, Apr. 3, 2019, available at <https://slate.com/technology/2019/04/2020-presidential-election-campaign-texting.html>.

<sup>14</sup> 904 F.3d 1041 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1289, 203 L. Ed. 2d 300 (2019)

<sup>15</sup> *Id.* at 1051.

<sup>16</sup> See RumbleUp’s website at [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-bf4gIVRCaGCh3CUAfcEAAYASAAAEgLaWPD\\_BwE](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-bf4gIVRCaGCh3CUAfcEAAYASAAAEgLaWPD_BwE)

of a computer, or using a smartphone with an app installed, then press “send” for each message.<sup>17</sup> Each click of the button apparently triggers the sending of a text. However, 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.<sup>18</sup> Indeed, some are admitting that evasion was the primary purpose behind the way P2P systems were built:

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."<sup>19</sup>

The Commission should be highly skeptical of deliberate efforts—such as those creating the P2P system—to evade the TCPA. Courts reviewing assertions of deliberate evasion of consumer protection statutes, including the TCPA, have noted that these statutes should be liberally construed to protect consumers and discourage evasions.<sup>20</sup>

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[https://opnsesame.com/?gclid=EAIaIQobChMIr6LZq-bf4gIVRCaGCh3CUAfcEAAYAAAEgI7svD\\_BwE](https://opnsesame.com/?gclid=EAIaIQobChMIr6LZq-bf4gIVRCaGCh3CUAfcEAAYAAAEgI7svD_BwE)

<sup>17</sup> *See id.*

<sup>18</sup> *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>; also see Note 13, *supra*.

<sup>19</sup> Breck Dumas, *Political candidates continue spamming cellphones with texts despite consumer complaints*, theblaze.com, 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).

<sup>20</sup> *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)), *vacated, remanded on other grounds*, \_\_\_, S. Ct. \_\_\_, 2019 WL 2527470 (U.S. June 20, 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”).

#### IV. Unconsented-to texts are unpopular and unwanted by consumers.

Complaints filed with the FCC<sup>21</sup> and cases filed in the courts<sup>22</sup> show that consumers are angry that they are being inundated with messages they have not consented to receive. Additionally, there are numerous media articles detailing the annoyance articulated by consumers about the unwanted messages received through the P2P platform.<sup>23</sup>

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<sup>21</sup> See, e.g., *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Comment of Matt Tucker (filed Oct. 22, 2018), available at <https://www.fcc.gov/ecfs/filing/101983426669> (“As a consumer and voter, . . . I ask that the FCC find that the TCPA rules apply to P2P messaging used for political and other purposes. With the ability for P2P text messaging providers to provide semi-automated text messaging frameworks, this provides too much capability for users, business, and other organizations to quickly disseminate messages to individuals who have not opted-in or had prior relationships with the sender. The only requirement to not be automated is to require an employee of the organization to click a button or press a key, or some other manual action. Because of this, an individual employee could easily send 30,000 messages per hour (conservatively at 10 messages/second), far outpacing the capability of users to report and block or opt-out of these unwanted messages. Phones with text messaging capabilities are a near-necessity for individuals to engage with other people, organizations, and businesses on a daily basis, and by exempting these P2P messaging services from TCPA will cause an undo [sic] burden on people to conduct their normal day-to-day business.”).

<sup>22</sup> See, e.g., *Syed v. Beto for Texas*, Civil Action No. 3:18-CV-2791 (N.D. Tex. filed Oct. 19, 2018) (alleging that 7,500 people contacted plaintiff’s attorney complaining about over 40,000 unconsented text messages and, further, that when plaintiff called the phone numbers that defendants’ text messages came from, all calls resulted in error messages or disconnected dial tones).

<sup>23</sup> See, e.g., Breck Dumas, *Political candidates continue spamming cellphones with texts despite consumer complaints*, theblaze.com, 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](https://www.axios.com/why-political-messages-are-flooding-your-phone), Axios, Oct. 24, 2018, available at [https://www.axios.com/why-political-](https://www.axios.com/why-political-messages-are-flooding-your-phone)

## V. Conclusion

The record is devoid of information to support an FCC determination that the platforms that send the P2P texts meet the definition of an ATDS. At the same time, there is plenty of evidence in the public domain that these text messages are highly automated and are bombarding consumers' cell phones with millions of unwanted and unconsented-to messages. The P2P platform appears to have been created to insert a minuscule and fictional element of human involvement for the sole purpose of evading the consumer protections of the TCPA. The FCC should not countenance this evasion. We urge the FCC to deny the petition.

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), [msaunders@nclc.org](mailto:msaunders@nclc.org) (202 452 6252, extension 104).

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you very much.

Sincerely,

Margot Saunders  
Senior Counsel  
National Consumer Law Center  
1001 Connecticut Ave., NW  
Washington, D.C. 20036  
[msaunders@nclc.org](mailto:msaunders@nclc.org)  
[www.nclc.org](http://www.nclc.org)

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[text-messages-are-flooding-your-phone-ed1c2864-729a-4b3b-a695-9337b98343ec.html](https://www.fcc.gov/record/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>.