

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**ACA INTERNATIONAL,**

**Petitioner,**

v.

**FEDERAL COMMUNICATIONS  
COMMISSION and UNITED  
STATES,**

**Respondents.**

**No. 15-1211 (consolidated with  
Nos. 15-1218, 15-1244, 15-1290,  
15-1306, 15-1304, 15-1311, 15-  
1313, & 15-1314)**

**PETITIONERS' JOINT UNOPPOSED MOTION FOR BRIEFING  
FORMAT AND SCHEDULE**

These consolidated cases seek review of the Federal Communications Commission's order in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015) ("2015 TCPA Order"). Petitioners<sup>1</sup> respectfully ask the Court to adopt the briefing format and schedule set forth below. Respondents (the Federal Communications Commission and the United States) and Intervenors

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<sup>1</sup> Petitioners are ACA International (No. 15-1211); Sirius XM Radio Inc. (No. 15-1218); Professional Association for Customer Engagement, Inc. (No. 15-1244); salesforce.com inc. and ExactTarget, Inc. (No. 15-1290); Chamber of Commerce of the United States of America (No. 15-1306); Consumer Bankers Association (No. 15-1304); Vibes Media, LLC (No. 15-1311); Rite Aid Hdqtrs. Corp. ("Rite Aid") (No. 15-1313); and Portfolio Recovery Associates (No. 15-1314).

Supporting Petitioners (both those whose motions to intervene have been granted<sup>2</sup> and those whose motions remain pending<sup>3</sup>) consent to Petitioners' request.

## **BACKGROUND**

### **A. The TCPA and the 2015 TCPA Order**

The Telephone Consumer Protection Act of 1991 (“TCPA”) generally makes it unlawful “to make any call (other than a call ... made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service ....” 47 U.S.C. § 227(b)(1)(A)(iii). In turn, the TCPA defines an “automatic telephone dialing system” (or “ATDS”) as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *Id.* § 227(a)(1). Those who unknowingly violate this restriction face a \$500 penalty per call (interpreted by the Commission to include text messages), while “willful[] or knowing[]” violations trigger a \$1500 penalty per call. *Id.* § 227(b)(3).

The Commission has some authority to enforce the TCPA, and its prior interpretations of the TCPA’s restriction on calls from ATDSs have generated

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<sup>2</sup> Those intervenors are Council of American Survey Research Organizations and Marketing Research Association.

<sup>3</sup> Those intervenors are MRS BPO LLC; Cavalry Portfolio Services, LLC; Diversified Consultants, Inc.; and Mercantile Adjustment Bureau, LLC.

considerable confusion and controversy. As the Commission noted, it received “21 separate requests for clarification or other action regarding the TCPA or the Commission’s rules and orders.” 2015 TCPA Order ¶ 2. In its omnibus 81-page Order (accompanied by two lengthy dissents), the Commission addressed those requests.

In the process, it set forth its position on the proper interpretation of the TCPA’s ATDS-related restriction. For example, the 2015 TCPA Order addresses two fundamental questions regarding that restriction: what does it mean for a piece of equipment to have the “capacity” to perform specific functions, and what exact functions must equipment be able to perform in order to qualify as an ATDS? On the first question, the Commission concluded that “capacity” includes more than just a piece of equipment’s “present ability”; rather, it also includes what the equipment “could be *modified*” to do, at least where there was “more than a theoretical potential” for the requisite modification. *Id.* ¶ 18 (emphasis added). The Commission set forth various different conclusions on the second basic question—what functions must a piece of equipment be able to perform in order to qualify as an ATDS. *See, e.g., id.* ¶ 10 (equipment must “generally” have “the capacity to store or produce, and dial random or sequential numbers”); *id.* ¶ 12 (equipment need only have the capacity “to store or produce telephone numbers”

(internal quotation marks omitted)); *id.* ¶ 17 (equipment must be able to dial “without human intervention” (internal quotation marks omitted)).

The Commission also laid out its interpretation of the term “called party” in the part of the ATDS provision that excludes calls “made with the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A). This term is important because the frequent reassignment of cellular numbers, combined with the lack of any reliable method for callers to determine whether a given number has been reassigned, leads to a vexing, recurring problem: the caller complies with the TCPA by obtaining valid consent to call someone and attempts to do so, only to unwittingly reach another person to whom the called number has been reassigned. The Commission concluded that, because it believed the term “called party” refers to the “current subscriber (or non-subscriber customary user of the phone)” rather than the “intended recipient” of the call, callers are ordinarily liable for such calls. 2015 TCPA Order ¶ 72. The Commission also purported to create an opportunity for callers to obtain knowledge that a number has been reassigned by providing that they may make one call to a reassigned number without liability if they reasonably believe they have consent. *See id.* However, even if no one answers that call (or responds to that text), the Commission concluded that the caller is liable for any subsequent call, on the theory that the caller (and its subsidiaries and

affiliates) then possesses “constructive knowledge” of the reassignment. *See id.* ¶ 72 & n.261.

The 2015 TCPA Order set forth the Commission’s views on a host of other TCPA-related questions as well. The Commission concluded, for example, that callers and their customers may not agree on a particular means through which consent may be revoked. *See id.* ¶ 63. Rather, callers must accept revocation provided in any “reasonable” manner, including orally notifying an employee at one of the caller’s “in-store bill payment location[s].” *Id.* ¶ 64. The Commission also declared that healthcare-related messages (already heavily regulated under HIPAA) that are delivered to a cellular number require consent, even though identical messages to residential lines do not. *See id.* ¶ 148. Similarly, the Commission exempted certain healthcare messages “for which there is exigency and that have a healthcare treatment purpose” from the TCPA’s ATDS restrictions, but not other healthcare-related messages permitted under federal health privacy law. *Id.* ¶ 146.

## **B. Petitioners’ Interests and Arguments**

Because the TCPA applies to “any person” who makes a covered “call,” 47 U.S.C. § 227(b)(1), its impact is not limited to any particular industry. Petitioners represent a broad array of businesses that operate in widely varying economic sectors, from healthcare services to satellite radio to debt collection. Given the

considerable differences among them, each Petitioner brings a somewhat different focus to this litigation. Some represent those who market their products and services through telephone calls and text messages, or who provide the technology used to facilitate customer-requested informational and marketing messages; they are more concerned about what qualifies as an ATDS than about the particularities regarding consent. Others represent those who seek to communicate with their existing, consenting customers or who use prerecorded or artificial voice messages and are more troubled by the Order's handling of reassigned numbers and the revocation of consent. Rite Aid, for its part, is concerned about the Commission's restrictions on delivery of healthcare information to its customers.

Despite these differences, Petitioners are collaborating and intend to primarily challenge three aspects of the 2015 TCPA Order in one consolidated brief:

- *Interpretation of ATDS*: Petitioners believe that the Commission has set forth an impermissibly vague, unlawfully self-contradictory, and statutorily forbidden interpretation of the definition of an ATDS. By interpreting "capacity" to include "potential functionalities," 2015 TCPA Order ¶ 16, the Commission failed to provide adequate guidance to the regulated community, contravened the TCPA's plain meaning, and ignored Congress's intent to impose targeted restrictions. At the same time, by setting forth different, mutually incompatible tests for what an ATDS must be able to do (each of which conflicts with the statute), the Commission again failed to provide sufficient guidance and acted arbitrarily, capriciously, and contrary to law. Through both of these actions, the Commission interpreted the TCPA in a manner that expands its prohibitive scope far beyond the limited restrictions Congress intended. Indeed, if the

Commission's interpretation of the TCPA were correct, it would violate the First Amendment, or at least raise significant constitutional questions.

- *Treatment of Reassigned Numbers:* Petitioners believe that the Commission's handling of the reassigned numbers problem is also arbitrary and capricious, violating the TCPA, the Administrative Procedure Act, the First Amendment, and due process. By interpreting "called party" to refer to the current subscriber or customary user of the number rather than the intended recipient of the call, the Commission exceeded the TCPA's text and put callers to an impossible choice: refrain from contacting those who have asked to be contacted at a designated cellular number or risk considerable TCPA liability if the number has been reassigned. The Commission's "one-call safe harbor" arbitrarily fails to solve this acknowledged problem because callers seldom learn of a reassignment after one (possibly unanswered) call.
- *Treatment of Revocation of Consent:* Petitioners believe that the Commission's rules regarding revocation of consent arbitrarily impose onerous burdens upon callers and their customers. Callers and consumers are ordinarily free to structure their relationship as they see fit, but the 2015 TCPA Order requires callers to accept revocation of consent by any "reasonable" means. By defining "reasonable" means of revocation to include actions such as informing an employee at an in-store payment location, the 2015 TCPA Order puts impossible, unnecessary logistical demands on businesses.

Rite Aid further intends to present a separate challenge to the Commission's regulation of healthcare calls. Specifically, Rite Aid intends to argue that the 2015 TCPA Order arbitrarily and unlawfully subjects calls delivering protected healthcare-related information to cellular lines to different legal requirements than identical calls to residential lines and, relatedly, that the Commission acted

arbitrarily, capriciously, and unlawfully by exempting only a narrow set of exigent, treatment-related healthcare calls from the ATDS provision's restrictions.

### **ARGUMENT**

As explained above, Petitioners (other than Rite Aid) have identified significant, cross-cutting and generally applicable questions about the 2015 TCPA Order that they can brief jointly, per this Court's practice. Those questions, which go to the heart of the 2015 TCPA Order, deserve full briefing before this Court. Rite Aid, for its part, has its own healthcare-specific interests to protect. To accommodate both of these needs while respecting the Court's resources, Petitioners respectfully request that all Petitioners but Rite Aid be permitted to file an opening brief of 14,000 words addressing the three principal issues described above (and related issues), and that Rite Aid be permitted to file its own targeted 2,500-word opening brief addressing the healthcare-related aspect of the 2015 TCPA Order, each with corresponding replies (of 7,000 and 1,250 words, respectively). This will allow for significant consolidation among the core group of Petitioners, while allowing Rite Aid to present its arguments to the Court clearly and efficiently as well. Petitioners agree that, in light of this small addition of words, the FCC should be permitted to file a 16,500-word brief in response.

Petitioners also propose that the briefs in the case be filed according to the deadlines set forth below (*see* Attachment A), to which all parties have consented.

Petitioners desire to have oral argument held before the end of the 2015–2016 Term. The proposed briefing schedule—which concludes by February 2016—would give adequate time for proper briefing while still permitting oral argument during the current Court Term.

### **CONCLUSION**

For the foregoing reasons, Petitioners—with the consent of all other parties—respectfully request that the Court order briefing pursuant to the schedule and format proposed, and, to the extent possible, hear argument during the upcoming Term.

Dated: September 21, 2016

Respectfully submitted,

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**ATTACHMENT A**

<u>Document</u>	<u>Word Limit</u>	<u>Due Date</u>
Opening Brief for Petitioners Other Than Rite Aid	14,000	November 25, 2015
Opening Brief for Petitioner Rite Aid	2,500	November 25, 2015
Opening Brief for Intervenors Supporting Petitioners	8,750	December 2, 2015
Response Brief for Respondents	16,500	January 15, 2016
Response Brief for Intervenors Supporting Respondents (if any)	8,750	January 22, 2016
Reply Brief for Petitioners Other Than Rite Aid	7,000	February 16, 2016
Reply Brief for Petitioner Rite Aid	1,250	February 16, 2016
Reply Brief for Intervenors Supporting Petitioners	4,375	February 16, 2016
Joint Appendix		February 19, 2016
Final Form Briefs for All Parties		February 24, 2016

**RULE ECF-3(B) ATTESTATION**

In accordance with D.C. Circuit Rule ECF-3(B), I hereby attest that all other parties on whose behalf this joint motion is submitted concur in its content.

/s/ Shay Dvoretzky  
Shay Dvoretzky

*Counsel for Sirius XM Radio Inc. and  
Professional Association for Customer  
Engagement, Inc.*

Dated: September 21, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on September 21, 2015, I electronically filed the foregoing Petitioners' Joint Unopposed Motion for Briefing Format and Schedule on the Court's CM/ECF System, which caused those documents to be served on all parties or their counsel.

/s/ Shay Dvoretzky

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