

Case No. 15-1211

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ACA International,

Petitioner,

v.

Federal Communications Commission,  
named as United States of America,

Respondent.

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**PETITIONER ACA INTERNATIONAL'S  
STATEMENT OF ISSUES**

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Pursuant to the Order (July 13, 2015) [Doc. 1562219], Petitioner ACA International states these issues to be raised:

For this statement's purposes, the "2015 TCPA Order" means *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (FCC July 10, 2015), which is the subject of ACA's petition for review.<sup>1</sup>

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<sup>1</sup>See Am. Pet. Review (July 13, 2015) [Doc. 1562251].

## I. **Automatic telephone dialing system**

The Federal Communications Commission's attempted redefinition of "automatic telephone dialing system" under the Telephone Consumer Protection Act — including but not limited to the 2015 TCPA Order's treatment of "capacity" within the definition of an "automatic telephone dialing system," and its treatment of predictive dialers — is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and results in an approach that does not comport with a caller's constitutional rights of due process and freedom of speech and that disregards the applicable statute.

A. Congress enacted a precise definition of "automatic telephone dialing system" that distinguishes some telephones from others, and excludes telephones that are not "automatic telephone dialing systems" from the Telephone Consumer Protection Act's reach. The Order disregards the statutory definition and unlawfully expands the kinds of equipment that the Act covers — among other things, by including predictive dialers that do not fall within the statutory definition, and by disregarding the term "using a random or sequential number generator" in the

definition — and extends the Commission’s jurisdiction to regulate telephones that are not “automatic telephone dialing systems” within that definition.

- B. The Order’s treatment of “capacity” in determining whether a device is an automatic telephone dialing system is so vague, and so lacks meaningful standards, that it is arbitrary, capricious, and an abuse of discretion.
- C. The Order’s treatment of “capacity” in determining whether a device is an automatic telephone dialing system “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement,”<sup>2</sup> and thereby does not comport with a caller’s constitutional right of due process.
- D. The Order’s overly broad definition of capacity is not only inconsistent with the interpretation that the Department of Justice has advocated, but establishes a regulatory regime that is constitutionally overbroad and is impossible to comply with.

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<sup>2</sup>*FCC v. Fox Television Stations, Inc.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

E. The Order's failure to follow the statutory definition of an automatic telephone dialing system, and its imposition of a broader definition that extends beyond the statutory bounds, unlawfully interferes with and unduly burdens and chills callers' exercise of their right to communicate with their customers and other consumers, and thereby unlawfully abridges a caller's constitutional right of free speech.

## II. **Prior Express Consent**

The Commission's treatment of "prior express consent" (including but not limited to its treatment of reassigned numbers) was arbitrary, capricious, and an abuse of discretion, and does not comport with a caller's constitutional right of due process.

- A. The 2015 TCPA Order defines "called party" in a way that misinterprets the statutory text and will result in liability for innocent and unknowing conduct.
- B. The Order acknowledges that "callers lack guaranteed methods to discover all reassignments immediately after they occur," but its conclusion that "we deem the caller to have constructive knowledge" of a reassigned number after one call — even if the

call goes unanswered — is arbitrary, capricious, and an abuse of discretion.

- C. The Order's one-call safe harbor creates a perverse incentive for a called party who is not the caller's intended recipient to conceal that fact in order to manufacture and multiply the caller's liability for innocent and unknowing conduct. That approach does not comport with a caller's constitutional right of due process.
- D. The one-call safe harbor is a rulemaking without observance of the procedure required by law.
- E. The Order creates a right of revocation under 47 U.S.C. § 227(b)(1)(A) despite the fact that Congress enacted such a right under section 227(b)(1)(C) but did not enact any such right under § 227(b)(1)(A). Such an exercise of unwarranted regulatory jurisdiction is arbitrary and capricious, and not in accordance with law.
- F. The Order provides for a consumer's exercise of the right of revocation under 47 U.S.C. § 227(b)(1)(A) in ways that are not commercially viable, while rejecting several available

approaches that were more reasonable and that also protected consumers. The Order in that respect is arbitrary, capricious, and an abuse of discretion.

### III. **Disregard of Statute**

The 2015 TCPA Order, both with respect to the topics enumerated above and otherwise, was arbitrary, capricious, and an abuse of discretion because it disregards Congress's findings in the Telephone Consumer Protection Act, the statute from which the Commission's jurisdiction and authority derive. When Congress enacted the statute,<sup>3</sup> it found that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."<sup>4</sup> The 2015 TCPA Order repeatedly rejects that balance in favor of an unbalanced approach that disregards "commercial freedoms of speech and trade" and that weaves a regulatory web so tangled that it snares legitimate, compliant,

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<sup>3</sup>Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

<sup>4</sup>*Id.*, § 2(9) (not codified in U.S.C.).

law-abiding actors along with the abusive and intrusive callers at whose conduct the law is aimed.

August 12, 2015.

DYKEMA GOSSETT PLLC

/s/ Brian Melendez

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**Certificate of Service**

On August 12, 2015, I filed this document via the CM/ECF system, and served it by electronic mail on the attorneys and others listed below, at these email addresses:

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