



PUBLIC NOTICE

Federal Communications Commission
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CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITION FOR EXPEDITED DECLARATORY RULING ON AUTODIALER ISSUE FROM MILTON H. FRIED, JR. AND RICHARD EVANS

CG Docket No. 02-278

Comment Date: August 8, 2014
Reply Comment Date: August 25, 2014

On May 27, 2014, Milton H. Fried, Jr. and Richard Evans filed a Petition for Expedited Declaratory Ruling¹ that asks the Commission to clarify whether certain equipment, individually or combined, that is used to transmit text messages constitutes an “automatic telephone dialing system” within the meaning of the Telephone Consumer Protection Act (TCPA)² and the Commission’s related rules.³ We seek comment on the issues raised in the Petition.

The TCPA makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . 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 . . . 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.”⁴ The TCPA defines an “automatic telephone dialing system” (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.”⁵

The Petition brings before the Commission a primary jurisdiction referral from the United States District Court for the Southern District of Texas.⁶ According to the Petition, the underlying litigation arose after Sensia Salon, Inc. engaged Textmunications, Inc. to conduct marketing on Sensia’s behalf.⁷

¹ *Petition for Expedited Declaratory Ruling on Autodialer Issue*, CG Docket No. 02-278, filed by Milton H. Fried, Jr. and Richard Evans on May 27, 2014 (Petition).

² Codified as 47 U.S.C. § 227.

³ 47 C.F.R. § 64.1200.

⁴ 47 U.S.C. § 227(b)(1)(A)(iii); *see also* 47 C.F.R. § 64.1200(a)(1)(iii).

⁵ 47 U.S.C. § 227(a)(1); *see also* 47 C.F.R. § 64.1200(f)(2).

⁶ *Fried v. Sensia Salon, Inc.*, No. 4:13-cv-00312 (S.D.Tex. Nov. 27, 2013).

⁷ Petition at 4.

Textmunications, which allegedly stored Sensia's customer data in its equipment and databases, contracted with Air2Web to use Air2Web's equipment to transmit SMS text messages containing Sensia's marketing content.⁸ Air2Web allegedly sent these text messages through various common carriers to the cellular telephones of Sensia's former or current customers.⁹ Fried and Evans, former customers of Sensia, filed a complaint in the United States District Court for the Southern District of Texas, claiming violations of the TCPA and the Commission's associated rules because they allegedly received text messages from Sensia on their cellular telephones without prior express consent.¹⁰

According to the Petition, Textmunications and Air2Web have argued in the underlying litigation that they did not use an ATDS to call Fried and Evans because the hardware utilized by Air2Web does not have the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers, with or without human intervention.¹¹ The Petition asserts that Sensia, Textmunications, and Air2Web each had a high degree of involvement in the transmissions regardless of which entity ultimately "dialed" the consumer's phone number.¹² The Petition seeks clarification on whether the use of the combined equipment and capacities constitutes use of an ATDS within the meaning of the TCPA and the Commission's rules.¹³

Pursuant to sections 1.415 and 1.419 of the Commission's rules,¹⁴ interested parties may file comments and reply comments on or before the respective dates indicated on the first page of this Notice. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6.

¹² *Id.* at 4.

¹³ *Id.* at 5.

¹⁴ 47 C.F.R. §§ 1.415, 1.419.

with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: Cynthia Bryant, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 202-418-8164, and cynthia.bryant@fcc.gov.

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¹⁵ 47 C.F.R. §§ 1.1200 *et seq.*