

**ORAL STATEMENT OF COMMISSIONER MICHAEL O'RIELLY
DISSENTING IN PART AND APPROVING IN PART**

Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135

Today's order has been hailed as "protecting" Americans from harassing robocalls and texts. That is a farce. Instead, the order penalizes businesses and institutions acting in good faith to reach their customers using modern technologies. I'm sure it will be said that we are approving half of the petitions before us. But, that is a completely misleading point, because many of the petitions were filed due to the belief that the Commission would not do anything to properly address the two big issues: reassigned numbers and autodialers.

I have made clear, on multiple occasions, that I do not condone abusive calling practices. In fact, I had been working for over a year in the hopes of advancing an item that would protect consumers from unwanted communications while enabling legitimate businesses to reach individuals that wish to be contacted. That is the balance that Congress struck when it enacted the Telephone Consumer Protection Act (TCPA) in 1991.

Unfortunately, that balance has been turned on its head by prior FCC decisions that expanded the scope of the TCPA, and through litigation across the country that, in many cases, has further increased liability for good actors. Indeed, it has been reported that over 2,000 TCPA class action lawsuits were filed in 2014 alone. Far from protecting consumers, however, "[t]his current state of affairs, where companies must choose between potentially crushing damages under the TCPA or cease providing valuable communications specifically requested by consumers, contravenes Congress's intent for the statute not to interfere with normal, expected, and desired communications *that consumers have expressly consented to receive.*"¹ These include:

- Alerts from a school that a child did not arrive at school, or that the building is on lockdown
- Product recall and safety notifications
- Notifications of utility outages
- Immunization reminders for underserved, low-income populations
- Tweets (and other social media updates) and Instant Message notifications received by text
- Updates from airlines to let their customers know their flight has been delayed

Moreover, this is despite evidence in the record of the benefits of informational calls and texts. Indeed, other federal agencies, including the Department of Health and Human Services, have been promoting text messaging as a way to benefit Americans. Some agencies even require companies to make a certain number of calls to consumers. Additionally, companies can be obligated under state law to contact their customers. The record also shows that these types of services are popular with consumers, as long as they provide *timely and relevant* information. Supporting examples are provided in my complete written statement.

¹ Letter from Monica S. Desai, Counsel to Abercrombie & Fitch Co. and Hollister Co., to Marlene S. Dortch, Secretary, FCC, CG Docket No. 02-278, at 4 (filed May 13, 2015) (Abercrombie May 13, 2015 Comments) (emphasis added); Comments of Twitter, CG Docket No. 02-278, at 12 (filed Apr. 22, 2015) ("In enacting the TCPA, Congress could not have intended for legitimate businesses...to choose between risking massive liability or denying consumers the chance to receive useful text messages that they expressly requested.").

The Commission's unfathomable action today further expands the scope of the TCPA and sweeps in a variety of communications, either by denying relief outright or by penalizing companies that dial a number that, unbeknownst to them, has been reassigned to someone else. Indeed, the order paints companies from virtually every sector of the economy as bad actors, even when they are acting in good faith to reach their customers. Incredibly, it even concludes that consumers experience a real and cognizable harm—an intrusion of privacy—by receiving as few as two stray calls or texts.

To be sure, the FCC narrowly selects certain calls and texts *it* thinks consumers should receive and allows them under very limited circumstances. I approve the relief to the extent it is granted but caution that it may not be as helpful as some would claim. I'm not even sure it is workable. Otherwise, the decisions today will make it much harder for consumers to receive information that they want and need, and will discourage companies from pursuing services that consumers might find beneficial. Therefore, I strongly dissent from the remainder of the order.

Starting with a threshold issue, I disagree with the premise that the TCPA applies to text messages. The TCPA was enacted in 1991 – before the first text message was ever sent. The Commission should have gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.

The order also impermissibly expands the statutory definition of an “automatic telephone dialing system” (also known as an autodialer or ATDS) far beyond what the TCPA contemplated.

First, the TCPA defines an autodialer as equipment that “has the capacity” to perform specific functions. Therefore, it seems obvious that the equipment must have the capacity to function as an autodialer *when the call is made* not at some undefined future point in time. Moreover, the TCPA bars companies from using autodialers to “make any call” subject to certain exceptions. This indicates that the equipment must, in fact, be used *as an autodialer* to make the calls.

Not so according to the order. Equipment that could conceivably function as an autodialer *in the future* counts as an autodialer *today*. Indeed, the new definition is so expansive that the FCC has to use a rotary phone as an example of a technology that would not be covered because the modifications needed to make it an autodialer would be too extensive. That is like the FAA regulating vehicles because with enough modifications cars and trucks could fly, and then using a skateboard as an example of a vehicle that does not meet the definition.

Second, the order misreads the statute by including equipment that merely has the capacity to dial from a list of numbers. That's not what the TCPA says.

Third, the Commission previously clarified that to be considered “automatic”, an autodialer must function “without human intervention”. Therefore, it should be clear that non-de minimis human intervention would disqualify it from being an autodialer.

Fourth, the distinction drawn between different types of apps is without merit. While it is true that different apps may require different levels of engagement by the user before sending messages to the user's contacts, no messages would be sent at all but for the user signing up for the service.

Turning to reassigned numbers, every day, an estimated 100,000 cell phone numbers are recycled to new users. As a result, numerous companies, acting in good faith to contact consumers who have consented to receive calls or texts, are exposed to liability when it turns out that numbers have been reassigned without their knowledge.

Today's order offers companies fake relief instead of a solution: one free pass. That is, if a company makes a single call or text to a number that has been reassigned, the company will not be liable for that single contact. If a call is made to a wrong number (i.e., misdialed) there's no free pass at all.

Indeed, we may have provided a new way for consumers acting in bad faith to entrap legitimate companies. A person could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap.

The idea that, after one call, a caller would have "constructive knowledge" that a number has been reassigned—even if there was no response—is absolutely ludicrous. The FCC expects callers to divine from mere silence the current status of a telephone number. Think about this in the context of Twitter, which consumers can set to text if anything happens involving them. Before Twitter can even realize the number has been reassigned, they are already liable for hundreds or perhaps thousands of "violations". The only solution is to stop the practice in its entirety.

The FCC points to a list of suggestions in the record to help callers determine whether a number has been reassigned, such as checking a numbering database. But then the item does not provide any relief or a safe harbor for doing so.

Moreover, some of the alternatives that the FCC suggests go so far as to be *anti-consumer*. For example, the FCC notes that companies could require consumers who give consent to notify those companies when they relinquish their numbers. If they do not, the FCC observes that "the caller may wish to seek legal remedies for violation of the agreement." In other words, the FCC thinks it's reasonable *to have companies sue their own customers*.

Sadly, there were reasonable options that the Commission rejected. In particular, a number of petitioners and commenters asked the FCC to interpret "called party" to mean the "intended recipient". This commonsense approach would have allowed a company to reasonably rely on consent obtained for a particular number.

The order also decides that the TCPA includes a right to revoke consent to receive non-telemarketing calls. But this right appears nowhere in the statute. Instead, the order turns to common law tort principles to read into the statute a right to revoke consent. Talk about bureaucratic activism.

As a longtime Congressional staffer, I was stunned by this analysis. Usually, we start with the premise that a statute says what it means and means what it says. If Congress did not address an issue, then the FCC should not presume to act in its stead.

I certainly do not understand why the FCC would resort to common law principles before turning to Congress for guidance or to request a statutory fix. Clearly, this is an area where Congress has been active—not just on TCPA generally, but also on the very issue of revocation of consent.

The order does grant slight relief in a few limited circumstances and very narrowly; namely to enable consumers to receive fraud alerts, data breach information, money transfers, medical appointment and refill reminders, hospital registration and discharge information, and home healthcare instructions. I support the relief to the extent it is provided but would have gone further. Everyone will soon know that even the relief granted is limited and potentially unworkable.

In sum, I am beyond incredibly disappointed in the outcome today. It will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors. I dissent in part and approve in part for the reasons already discussed.