

Ronald W. Del Sesto, Jr.
Direct Phone: (202) 373-6023
Direct Fax: (202) 373-6421
r.delsesto@bingham.com

March 18, 2014

Via ECFS and Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

**Re: Petition for Expedited Declaratory Ruling and Clarification
CG Docket No. 02-278**

Dear Secretary Dortch:

On behalf of TextMe, Inc., enclosed for filing is an original and four (4) copies of a Petition for Expedited Declaratory Ruling and Clarification.

Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

/s/ Ronald W. Del Sesto, Jr.

Ronald W. Del Sesto, Jr.
Counsel for TextMe, Inc.

Enclosure

cc: Michael Jacobs (FCC)
Karen Johnson (FCC)

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

A/75956493.1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

_____)	
In the Matter of)	
)	
TextMe, Inc.)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling)	
_____)	

**TEXTME, INC.’S PETITION FOR
EXPEDITED DECLARATORY RULING AND CLARIFICATION**

James G. Snell
Ronald W. Del Sesto, Jr
Bingham McCutchen, LLP
2020 K STREET, NW
Washington, DC 20006
Counsel for TextMe, Inc.

Dated: March 18, 2014

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Summary

TextMe provides a free social communications service (the “TextMe App” or “App”) that enables users to send non-commercial text messages to family, friends, and other personal contacts within the United States. The App also allows for the receipt of free calls to the user, *i.e.*, TextMe does not charge users. Because the value of TextMe’s service to users is enhanced if users’ contacts also use TextMe, users could choose to select contacts from their devices’ address books and send text messages inviting those individuals to use the service.

The Commission has determined that it has been given congressional authority to define the meaning of an automatic telephone dialing system (“ATDS”) pursuant to the Telephone Consumer Protection Act (“TCPA”). Therefore, by this Petition, TextMe asks the Commission to: (1) clarify that the term “capacity” as used in the statutory definition of an ATDS under § 227(a)(1) of the TCPA encompasses only equipment that, at the time of use, could in fact perform the functions described in the TCPA without human intervention and without first being technologically altered; and (2) clarify that TextMe does not “make” calls or send text messages pursuant to the TCPA; instead, users do. Alternatively, TextMe requests that the Commission clarify that third party consent obtained through an intermediary satisfies the TCPA’s “prior express consent” requirement for non-commercial, informational calls or text messages to wireless numbers.

Class action litigation under the TCPA has increased considerably in the last several years, largely due to the lack of clarity regarding the meaning of “capacity” in the statutory definition of an ATDS, as well as a lack of clarity regarding how prior express consent may be given, particularly where intermediaries are involved. Rather than discourage the abusive marketing practices that Congress and the Commission found harmful to consumers, these lawsuits

stifle innovation and threaten the development of novel tools for communication. Commission action is necessary to prevent the TCPA from being read so broadly as to deprive consumers of access to innovative products and services.

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**TEXTME, INC.’S PETITION FOR
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TextMe, Inc. (“TextMe”), through its counsel, and pursuant to Section 1.2 of the Federal Communications Commission’s (“Commission” or “FCC”) rules, respectfully requests that the Commission issue an expedited declaratory ruling and clarification regarding certain provisions of the Telephone Consumer Protection Act (“TCPA”).¹ In particular, TextMe requests a ruling clarifying and limiting the scope of the term “capacity” as used to define the phrase “automatic telephone dialing system” (“ATDS”) under 47 U.S.C. § 227(a)(1). TextMe also respectfully requests that the Commission clarify that TextMe does not “make” calls or send text messages pursuant to the TCPA; instead, users do. Alternatively, TextMe requests that the Commission clarify that third party consent obtained through an intermediary satisfies the TCPA’s “prior express consent” requirement for non-commercial, informational calls or text messages to wireless numbers. These issues require clarification because they are dispositive of state court

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (current version at 47 U.S.C. § 227 (2010)); 47 C.F.R. § 1200.

claims pending against TextMe, and the Commission has primary jurisdiction over issues left unresolved in the *2012 TCPA Order*.²

Communication by text message is becoming increasingly prevalent, if not ubiquitous, among cell phone users. This trend has inspired a number of innovative technologies, including the TextMe App, that enable users to conduct personal, social communications more efficiently and without the cost often associated with traditional telephone carriers. However, due to a lack of clarity regarding the meaning of “capacity” in the statutory definition of an ATDS, as well as a lack of clarity regarding how prior express consent may be given, this innovation threatens to be stifled as these technologies face a growing wave of class action litigation under the TCPA.³

This proliferation in litigation is evidenced, in part, by the fact that TextMe has been sued in a putative class action alleging a TCPA violation in relation to invitational text messages sent by users of TextMe. In particular, plaintiff Omar Atebar claims that TextMe sent (or caused to be sent) an unsolicited and un-consented to text message and that, as a result, he and other members of the putative class are entitled to statutory damages under the TCPA, as well as attorneys’ fees and costs.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 27 FCC Rcd 1830 (2012) (“*2012 TCPA Order*”).

³ Courts have acknowledged increased use of TCPA class actions as devices “for the solicitation of litigation,” and have observed that class counsel often stand to benefit substantially, with little benefit to class members. *See, e.g., West Concord 5-10-1.00 Store, Inc. v. Interstate Mat Corp.*, No. 2010-00356, 31 Mass. L. Rep. 58 (Mass. Super. Ct. Mar. 5, 2013) (rejecting use of TCPA “as a device for the solicitation of litigation” and “as a device to generate legal fees in cases in which the attorneys have a far greater interest and stake in certification of a class than the putative class members”); *Saunders v. NCO Fin. Sys., Inc.*, 910 F. Supp. 2d 464, 465 (E.D.N.Y. 2012) (granting summary judgment in TCPA case and ordering plaintiff to show cause as to why sanctions should not be imposed, noting that “remedial laws can themselves be abused and perverted into money-making vehicles for individuals and lawyers”).

Other putative class action lawsuits under the TCPA similarly stem from the lack of clarity as to the meaning of the term ATDS and whether consent has been obtained. Rather than discourage the abusive marketing practices that the TCPA was meant to target, these lawsuits stifle innovation and threaten the development of novel tools for communications. Clarifying the TCPA as advocated here would provide valuable guidance to courts handling an ever-increasing volume of TCPA-related lawsuits.

By this Petition, TextMe respectfully requests that the Commission: (1) clarify that the term “capacity” as used in the statutory definition of an ATDS under § 227(a)(1) of the TCPA encompasses only equipment that, at the time of use, could in fact perform the functions described in the TCPA without human intervention and without first being technologically altered; and (2) clarify that TextMe does not “make” calls or send text messages pursuant to the TCPA; instead, users are the parties responsible for initiating such calls or text messages.⁴ In the alternative, TextMe requests that the Commission clarify that third party consent obtained through an intermediary satisfies the “prior express consent” requirement for non-commercial informational calls and text messages to wireless numbers.

⁴ Other parties have sought similar clarification. *See, e.g., Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (filed Jan. 31, 2014); *Glide Talk, LTD Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Oct. 28, 2013) (“Glide Talk Petition”); *Professional Association for Customer Engagement Petition for Expedited Declaratory Ruling or, in the Alternative, Petition for Expedited Rulemaking*, CG Docket No. 02-278 (filed Oct. 18, 2013) (“PACE Petition”); *YouMail, Inc. Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (filed Apr. 19, 2013) (“YouMail Petition”); *Communication Innovators Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed June 7, 2012); *GroupMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition”).

I. TEXTME'S TEXT MESSAGING SERVICES

TextMe, founded in March 2011, is a young, innovative, self-funded company that offers users free instant messaging, text messaging, and voice and video calling. TextMe provides a free mobile application (the "TextMe App" or "App") that enables its users to send non-commercial calls and text messages, and offers users the ability to invite friends to join the TextMe App via invitational text messages. TextMe's unified platform is device-agnostic and can turn any smartphone or any tablet, using the Apple iOS or the Android operating system, into a communication device rivaling classic communications alternatives.

TextMe offers the App for free and allows free inbound and outbound U.S. domestic text messaging over subscribers' existing mobile data service or other broadband connection, like Wi-Fi, as well as free user-generated content sharing capability via SMS text message to any number in the United States. There are no charges imposed by TextMe for any messages of any sort exchanged between two TextMe users. Also, TextMe does not charge for out-of-network text messages to U.S. numbers or for any inbound calls, no matter where they originate.⁵ The App also permits outbound voice calls, however, users are not required to purchase an outbound calling functionality. To the extent users wish to make outbound voice calls or send text messages to telephone numbers associated with international destinations, they can do so through a platform that allows users to earn calling credits in a number of ways, including by watching videos or completing promotional offers. Users can also purchase TextMe credits and use these credits to place outbound calls or send text messages internationally to recipients that are not App users.

⁵ TextMe does not charge any fee for individuals to receive invitational text messages.

A. Technical Details of TextMe’s Offering and Invitational Texts

TextMe users use the service for text messaging or for voice calls. As is true of any social network, the appeal of the TextMe App to users is related to its number of users and its functionality. TextMe issues every user a free personal E.164 telephone number, so that each user can automatically send and receive text messages from any mobile device, and can place or receive calls from any phone, whether or not the recipient is a TextMe user.

To facilitate users’ ability to communicate for free, TextMe allows its users to select contacts from their device address books and invite those individuals to use the App themselves. Users may invite friends to use the App by sharing a message about TextMe via third party social networks or by email. Users were also able to invite friends via text message by engaging in a multi-step process in which users had to make a number of affirmative choices throughout the invite process.⁶

For users in the United States, the text message invite function – which is currently disabled but is the basis for the lawsuit – was accessed through an invite screen by tapping a button that reads “INVITE YOUR FRIENDS.” To send an invitational text message, users would then choose whether to invite friends by email or text messages. After selecting the option “Invite your friends by Text,” users were presented with the option to invite all their friends or could individually select contacts. Finally, users would have to make another affirmative choice to send the invitational text message by selecting another button. The entire process would require a user to make three, separate, affirmative choices in order for the user to send an invitational text. In addition, it should be noted that when a user signed up for the service, she was

⁶ TextMe has since disabled the text messaging invite functionality until such time as the FCC clarifies that sending text messages as described herein is consistent with the TCPA and the FCC’s rules.

asked to grant access to her device address book.⁷ This constitutes another prior, affirmative choice without which the user would not be able to send an invitational text. Moreover, at any time during this multi-step process, users could cancel by selecting a “Cancel” button. The invitational text message included users’ TextMe handle and invited the recipient to install the App so the user and the contact invited by the user could call and text for free.

B. TextMe Invitational Text Messages are Non-Commercial, User-Initiated Speech

The services provided by the TextMe App are not marketing tools, and TextMe prohibits commercial use of its services. By using the TextMe App and thereby agreeing to TextMe’s Terms and Conditions, each user agrees to use the App “only for [herself] and for lawful non-commercial purposes” and agrees not to “[g]enerate, download, upload or transmit any kind of advertisement or solicitations of commercial activities.”⁸ Each user also agrees not to use the TextMe App to generate bulk mail, spam, or similar content, or to engage in certain activities impacting TextMe users “without their consent.”⁹ Users accept sole responsibility for any content they generate or transmit through the TextMe App,¹⁰ and agree that their use of the App may be unilaterally suspended for “excessive use.”¹¹ TextMe does not send any text messages to

⁷ TextMe provided users the opportunity to elect whether to allow the App to access the contact information stored on the mobile device when users set up the App on their device.

⁸ See, e.g., TextMe Terms and Conditions, “Limitations of Use,” available at http://go-text.me/assets/rf/tc_v11.rtf. Users also agree “to comply with any United States law or regulation and any law or regulation [he or she] may be subject to in the use of the phone number allocated . . . by TextMe.”

⁹ *Id.* (“You will not use the TextMe contents, products and services to . . . [g]enerate and distribute bulk mail, spam, chain linked messages or any similar content[, e]ngage into activities leading to, or intending to (a) data collection on other TextMe users, without their consent”).

¹⁰ *Id.*

¹¹ *Id.*, “Short Message Service (SMS), Multimedia Message Service (MMS), volume limitations.”

non-users. Recipients of the invitational text messages initiated by TextMe users are all contacts of TextMe users.

II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING CLARIFYING AND LIMITING THE SCOPE OF THE TCPA'S DEFINITION OF AN ATDS

The TCPA makes it unlawful to make a call to a cellular telephone, using an ATDS, without the prior express consent of the called party.¹² Congress defined the term 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.”¹³ The Commission has determined that it has been given congressional authority to further define the term ATDS under the TCPA.¹⁴ However, the Commission has not clarified the meaning of “capacity” for purposes of defining an ATDS, except to note in its *2003 TCPA Report and Order* that the definition of an ATDS covers any equipment that has the capacity to generate and dial numbers without human intervention.¹⁵ As a result, some courts have construed “capacity” broadly to encompass equipment that is capable of automatically dialing random or sequential numbers, *even if it does not actually do so, or even if it must be altered to make it capable of doing so.*¹⁶

The unintended result of this seemingly limitless theory of “capacity” is that the definition now threatens to impact tens of millions of devices. In its *2012 TCPA Order*, the Commission recognized that wireless subscribers rely on wireless services for a variety of

¹² See 47 U.S.C. § 227(b)(1)(A).

¹³ § 227(a)(1).

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14092 (2003) (“*2003 TCPA Report and Order*”).

¹⁵ *Id.*

¹⁶ See, e.g., *Satterfield v. Simon & Schuster, Inc., et al.*, 569 F.3d 946, 951 (9th Cir. 2009) (as construed by subsequent opinions).

communications that were not available when the TCPA was enacted.¹⁷ Whereas the capacity to store or produce telephone numbers using a random or sequential number generator was once a rare phenomenon, wireless services have become ubiquitous, and this capacity, as broadly defined, is now commonplace.¹⁸ Nearly any modern-day smartphone could arguably have “capacity” to dial numbers randomly or sequentially, as these devices are typically programmable and users can easily install applications that add or alter device functionality.¹⁹ The Commission should reject an interpretation that would subject even ordinary wireless subscribers to statutory damages where the communications require human intervention but the device arguably has the “capacity” to dial numbers randomly or sequentially.

Although some courts have rejected such broad interpretations of “capacity,”²⁰ this expansive approach has caused a swelling tide of litigation. Putative class action claims are now frequently filed on the theory that virtually any modem computerized equipment with the ability to dial phone numbers may constitute an ATDS, leaving countless businesses and even individual consumers subject to claimed violations of the TCPA. Even if a court were to find such claims frivolous in nature, courts have shown reluctance to dismiss claims at an early stage given the expansive interpretations of capacity, meaning parties often endure costly discovery and motion practice, despite ultimately prevailing.²¹

¹⁷ See *2012 TCPA Order*, 27 FCC Rcd 1830, 1841–42 (“we employ the flexibility Congress afforded to address new and existing technologies and thereby limit the prior express written consent requirement to autodialed or prerecorded *telemarketing* calls”) (emphasis supplied).

¹⁸ See, e.g., GroupMe Petition, at 10.

¹⁹ See *id.* at 10–11 (explaining how a new iPhone may qualify as an ATDS).

²⁰ See *infra* discussion, Section IV.

²¹ See GroupMe Petition, at 11 (“Faced with appellate decisions that seemingly embrace this expansive definition of capacity, district courts are reluctant to dismiss even absurd cases like these without allowing expensive discovery followed by summary judgment motions or trial.”).

The language of the TCPA, on its face, does not support a claim that the term ATDS includes a device that could be technologically altered or re-configured to have the capacity to “store or produce telephone numbers to be called, using a random or sequential number generator,” *even if* it lacked such capacity at the time the relevant calls were placed, and no random or sequential number generator was employed. Congress expressly limited the term to include only “equipment which has the capacity” to store or produce such numbers, and Congress’ reference to present capacity (“has”) as opposed to potential capacity (“has or could have”) makes clear its intent that to constitute an ATDS, a device must be able to store or produce numbers using a random or sequential number generator *at the time a call is placed*.²² An interpretation that includes within the scope of an ATDS a system that is not currently able to store or produce sequential or randomized numbers contravenes legislative intent apparent in the statutory language.²³

The harms that Congress sought to prevent in enacting the TCPA are not implicated by TextMe or the TextMe App. As explained above, neither TextMe nor its users engage in mass unsolicited commercial text messaging, and the App is not capable of sending text messages to randomly generated or sequential telephone numbers. Rather, users supply telephone numbers for the personal contacts they wish to invite to use the App, and initiate invitational text messag-

²² 47 U.S.C. § 227(a)(1).

²³ *See, e.g.*, GlideTalk Petition, at 11–12 (noting congressional and executive concern with “actual use of sequential or random-number calling by telemarketers, not with the transmission of calls using devices that could be, but were not, programmed to place such calls”). “Signing the bill into law, President George H.W. Bush expressed concern that, notwithstanding its merits, the TCPA ‘could also lead to unnecessary regulation or curtailment of legitimate business activities,’ emphasizing that he had signed it only ‘because it gives the [FCC] ample authority to preserve legitimate business practices.’” *Id.* (citing George Bush: “Statement on Signing the Telephone Consumer Protection Act of 1991,” December 20, 1991, *available at* <http://www.presidency.ucsb.edu/ws/?pid=20384>).

es to those personal contacts. These messages are standard text messages, can be delivered during a recipient's call without interrupting the call in progress, and the recipient does not lose the ability to place a call when a text message is received. A user's ability to communicate personally with her contacts in her social network is a key feature of the TextMe App, and these communications are far from the uninvited and intrusive commercial communications intended to be prohibited by the TCPA.

III. TEXTME'S PROPOSED DEFINITION OF CAPACITY

To avoid a result that is irrational, inconsistent with statutory language, and subjects companies such as TextMe to unnecessary litigation, TextMe requests that the Commission clarify that the term "capacity" as used in the statutory definition of an ATDS encompasses only equipment that, at the time of use, could in fact perform the functions described in the TCPA, without human intervention and without first being technologically altered.

The invitational text messages sent by users via the TextMe App should not fall within the definition of an ATDS because the system simply does not and cannot send text messages without human intervention. The only numbers that the TextMe App is able to access or contact are those contained in a user's device address book or numbers manually entered by the user via a dial pad (*i.e.*, contacts). To use the invite mechanism, a TextMe user (who has agreed to TextMe's terms of use) must first enter numbers into her device address book. These contacts, by virtue of being listed in the address book, are necessarily individuals with whom the user has a prior relationship, demonstrating that they expect and intend to receive messages from the user regardless of the technology used to contact them. TextMe's mechanisms are not capable of storing or generating sequential or random telephone numbers at the time an invitational text message is sent; they utilize only the specific telephone numbers provided from the user's contacts, and are sent only upon initiation by the TextMe user. TextMe's requested clarification

is consistent with statutory language and legislative intent, and would resolve illogical interpretations of the law. Such clarification would not exclude from the TCPA’s definition the ability to dial numbers “without human intervention,”²⁴ and would not undermine the Commission’s rulings regarding predictive dialers.²⁵

Courts have rejected broad interpretations of the term “capacity.” In *Hunt v. 21st Mortgage*,²⁶ plaintiff claimed an ATDS was used even where defendant dialed calls manually, because the system could be capable of automatic dialing if certain software were installed. The Northern District of Alabama rejected this interpretation, observing that the system was “in its present state incapable of automatic dialing,” and a defendant “cannot be held liable if substantial modification or alteration of the system would be required to achieve that capability.”²⁷

Most recently, in *Gragg v. Orange Cab Company, Inc.*,²⁸ the Western District of Washington granted summary judgment for defendants where plaintiff claimed he received an unsolicited text message inviting him to download a smartphone app after he arranged for a cab. Defendants argued the texts were not sent using an ATDS, as the app is only capable of generat-

²⁴ 2003 TCPA Report and Order, 18 FCC Rcd. 14014, 14092.

²⁵ Those rulings found predictive dialers to fall within the scope of an ATDS because they permit a caller to initiate and dial numbers from a “database of existing telephone numbers” or “customer lists” without human intervention. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559, 566–67 (2008) (“2008 Declaratory Ruling”); 2003 TCPA Report and Order, 18 FCC Rcd at 14022, 14091–96.

²⁶ 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013) (order on motion to compel).

²⁷ Thereafter, in *Stockwell v. Credit Management LP*, a California trial court granted summary judgment for defendant in a TCPA action, holding that because the system at issue did not have a number generator and no contrary evidence was presented, the system did not meet the requirements of an ATDS. Case No. 30-2012-00596110 (Cal. Super. Ct. Oct. 2, 2013) (order on motion for summary judgment).

²⁸ Case No. C–12–0576, 2014 WL 494862 (W.D. Wash. Feb. 7, 2014) (order on motion for summary judgment).

ing and sending text messages in response to a driver’s acceptance of an individualized customer request. The court agreed, rejecting plaintiff’s argument that the modem used to operate the app is an ATDS because it has the ability to store multiple phone numbers and transmit mass text messages to those numbers. The court acknowledged that a predictive dialer is an ATDS pursuant to the Commission’s past rulings, but found the app was not a predictive dialer because no text could be sent without a human clicking a button.²⁹ The court subsequently declined to reconsider its ruling on the issue of capacity, rejecting plaintiff’s request for discovery regarding modifications that could be made to make defendant’s system function as an ATDS, or how difficult it would be to make such modification.³⁰ “The mere fact that defendants’ modem could, if paired with different software, develop the requisite capability is not enough under the TCPA or *Satterfield*. To hold otherwise would subject almost all sophisticated computers and cell phones to TCPA liability, a result Congress surely did not intend.”³¹

TextMe cannot be liable under the TCPA for precisely the same reason defendants in *Orange Cab* could not be liable: human invention is required for the alleged texts to be sent. No invitational text can be sent without a live TextMe user loading her contacts into the App and affirmatively authorizing an invitation to be sent to a given contact. The TCPA is a privacy statute meant to prohibit communications that consumers find intrusive – not personal communications that consumers desire. Clarifying the TCPA as requested by TextMe would provide valuable guidance to courts facing an ever-increasing volume of TCPA-related lawsuits, which

²⁹ *Id.* (“The system is able to dial and transmit the dispatch notification only after the driver has physically pressed ‘accept’: human intervention is essential ... The court therefore finds that the TaxiMagic program is not a predictive dialer.”)

³⁰ *Gragg v. Orange Cab Company, Inc., et al*, Case No. C–12–0576, 2014 WL 801305 (W.D. Wash. Feb. 28, 2014) (order on motion for reconsideration).

³¹ *Id.* at *7.

stifle innovation and threaten the development of novel tools for communications.

IV. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING CLARIFYING THAT TEXTME DOES NOT MAKE CALLS PURSUANT TO THE TCPA

The TCPA prohibits parties from “mak[ing] any call . . . using any [ATDS] . . .”³² The Commission has made clear that the rules it promulgated under the TCPA apply to users of services and not the underlying carriers that transmit the calls.³³ As described herein, TextMe does not send invitational text messages to users’ contacts.³⁴ Instead, users select contacts from their mobile device and initiate text messages to such parties.³⁵ As such, the invitational text message is the start of a private conversation to which TextMe is not a party. TextMe provides software services allowing users to transmit text messages to whom they choose. The purposes of invitational text messages that users send is to create personal networks and to ease communications among those invited to join.

The increasing use of social network applications for these types of communications and their reliance on invitational text messages is well known to the Commission. Numerous parties face lawsuits for similar types of text messages, even though it is users that are responsible for initiating such communications, and are seeking relief from the Commission.³⁶ Moreover, since such services rely on the users’ contacts, users send the communications that they believe the recipients desire. In passing the TCPA, Congress sought to regulate the use of telephones as an

³² 47 U.S.C. § 227(b)(1).

³³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8776 n.83 (1992).

³⁴ *See supra* Section I.A.

³⁵ As noted *supra* in Section I.A., the text messaging functionality is currently disabled. But when it was available, users were required to complete three affirmative steps in order to send an invitational text message to their family, friends and other contacts. *See id.*

³⁶ *See, e.g.*, Glide Talk Petition, at 14-15; YouMail Petition, at 11-12.

instrument of mass, commercial speech that citizens found annoying and disruptive.³⁷ But Congress also found that citizens do not react to the same way when the communication received is non-commercial or personal rather than generic, commercial speech.³⁸ Simply put, non-commercial, informational communications are not subject to the TCPA as recipients desire to receive such communications. Moreover, when a software developer provides a tool to users requiring *voluntary and affirmative* interaction, enabling users to initiate communications to *their* contacts, it is the user and not the software developer making the call or sending the text message pursuant to the TCPA.

V. ALTERNATIVELY, THE COMMISSION SHOULD CLARIFY THAT CONSENT FOR NON-COMMERCIAL, INFORMATIONAL CALLS OR TEXT MESSAGES MAY BE GIVEN THROUGH INTERMEDIARIES

The TCPA makes it unlawful to make a call (or text) to a cellular telephone, using an ATDS, without the prior express consent of the called party.³⁹ But obtaining consent from the recipient of a text message is not always possible, even if the recipient would like to receive the text message. Therefore, and in the alternative, to the extent that an app provider is considered a “make[r]” of a call (which it is not), the Commission should clarify that for non-commercial, informational calls or text messages to wireless numbers, which can permissibly be made using an ATDS with the called party’s prior express consent, the caller can rely on a representation

³⁷ See H.R. REP. NO. 102-317 at 8 (1991) (highlighting the efficiency gains that marketers obtain when there is no human intervention as well as the one-way, uniform nature of the commercial speech that ATDS enabled); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14092 (July 3, 2003) (finding that use of an ATDS allows for calling thousands of people every day).

³⁸ See, H.R. Rep. No. 102-317, at 16 (1991) (finding that user expectations with respect to non-commercial communications are different than when such calls concern commercial matters).

³⁹ See 47 U.S.C. § 227(b)(1)(A).

from an intermediary that he or she has obtained the requisite consent from the called party.

The Commission has recognized that intermediary consent is the basis for communications recipients would like to receive. In its *2012 TCPA Order*, the Commission found that “requiring prior written express consent . . . would unnecessarily restrict consumer access to information communicated through purely informational calls.”⁴⁰ The Commission underscored a variety of non-commercial, administrative, or informational communications in which requiring written consent from the recipients would not promote the public interest, and found indirect consent to be a permissible alternative for certain non-telemarketing messages, including package delivery notifications, banking and credit fraud alerts, and school closing information.⁴¹ Other petitions have sought exemption from TCPA liability for particular types of communications, however, the rise in abusive litigation requires broader Commission action. The absence of direct consent is not informative of the recipient’s desire to receive such communications, particularly given that a personal contact is well-positioned to serve as an intermediary for the recipient and to represent that the recipient consents to receive non-commercial messages on a wireless device.

As explained above, an invitational text message sent via the TextMe App is neither an advertisement (it is a personal invitation from a user) nor unsolicited (the user requests the invitation as an agent of the recipient). Users employ the invite mechanism to enhance the value of the App to them, introducing their contacts to the App and thereby communicating for free with a broader group of individuals. Use of the software tool is completely voluntary, such that use of the tool demonstrates that users find it valuable and efficient. Users have prior, personal

⁴⁰ *2012 TCPA Order*, 27 FCC Rcd 1830, 1838.

⁴¹ *Id.* ¶ 21.

relationships with the contacts listed in their address books, and those contacts may be presumed to consent to receive social calls and text messages from the user, therefore prior express consent should be presumed for calls or messages “made” by users to such contacts.⁴² TextMe users decide when to send an invitation, how, and to whom. This type of non-commercial, informational, social communication does not implicate the consumer protection issues that Congress or the Commission sought to resolve through the TCPA and its implementing regulations.

The TCPA was enacted to address particular types of commercial communications, and the ATDS restriction was intended to target a specific type of technology used in connection with such communications.⁴³ Given the growing number of mobile calls and text messages,⁴⁴ coupled with increasing litigation stemming from an excessively broad interpretation of “capacity,” the Commission should clarify the TCPA as proposed by TextMe. The uncertainty surrounding interpretation of the TCPA must be resolved in order to ensure that mobile app developers and other industry players can continue to innovate. Limiting the clarification to only non-commercial, informational text messages where the recipient has a personal relationship with the

⁴² See also *Petition for Declaratory Ruling of Club Texting, Inc.*, CG Docket No. 02-278, at 1 (filed Aug. 25, 2009) (“Text broadcasters act neither as the sender or recipient of text messages, but rather as an intermediary and conduit operating a platform that enables message delivery.”).

⁴³ See, e.g., *2012 TCPA Order*, 27 FCC Rcd 1830, 1839 (2012) (finding that Congress’ purpose in enacting the TCPA was to address invasion of privacy and public safety) (SoundBite Order); H.R. REP. NO. 102-317, at 11 (Nov. 15, 1991) (finding an ATDS can “seize” a recipient’s telephone line and not release it even after the called party hangs up).

⁴⁴ Approximately 2.19 trillion text messages were sent over the course of 2012. See Summary of Year-End U.S. Figures from CTIA’s Wireless Industry Summary Report, Year-End 2012 Results, 2013, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts>. U.S. wireless users sent and received an average of 6 billion text messages per day, or 69,635 text messages every second. See CTIA’s Wireless Industry Indices: Semi-Annual Data Survey Results, A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry, Year-End 2012 Results, 2013, cited at <http://www.ctia.org/resource-library/facts-and-infographics/archive/us-text-messages-sms>.

intermediary will not cause consumers to be inundated with unwanted telemarketing messages, as such communications would continue to be prohibited by the Commission's rules.⁴⁵

Courts determining liability under the ATDS provision have frequently examined the totality of the communications, users' expectations, and policy underlying the TCPA.⁴⁶ These courts have made clear that to be actionable, a call or text must be the type of intrusive communication "that Congress sought to prohibit in enacting the TCPA."⁴⁷ Courts have also considered consumer expectations in evaluating TCPA claims and have found that providing a telephone number to another may constitute "prior express consent."⁴⁸

⁴⁵ See *GroupMe, Inc.'s Comments in Response to the Glide Talk, LTD Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, at 5 (filed Jan. 3, 2014).

⁴⁶ See, e.g., *Ibey v. Taco Bell Corp.*, No. 12-CV-0583, 2012 WL 2401972, at *3 (S.D. Cal. 2012) (concluding that a single confirmatory opt-out text following plaintiff's completion of a survey and subsequent opt-out request "did not constitute unsolicited telemarketing; Plaintiff had initiated contact with Defendant"); *Ryabyschuck v. Citibank (S.D.) N.A.*, No. 11-CV-1236, 2012 WL 5379143, at *3 (S.D. Cal. Oct. 30, 2012) (emphasis supplied) (finding a confirmatory opt-out text not actionable as the opt-out text was "plaintiff-initiated contact," which "[could] hardly be termed an invasion of plaintiff's privacy under the TCPA").

⁴⁷ *Emanuel v. The Los Angeles Lakers, Inc.*, No. CV-12-9936, 2013 WL 1719035, *3 (C.D. Cal. 2013) (quoting *Mims v. Arrow Fin. Servs., LLC*, U.S., 132 S. Ct. 740, 745 (2012)).

⁴⁸ See, e.g., *id.* (finding plaintiff invited informational text message by initiating communication); *Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039, at*5 (N.D. Ala. Nov. 9, 2012) (holding "prior express consent" is given when voluntarily providing a telephone number).

CONCLUSION

For the foregoing reasons, TextMe respectfully requests that the Commission issue a ruling on two issues. First, the Commission should clarify that the term “capacity” as used in the statutory definition of an ATDS under § 227(a)(1) of the TCPA encompasses only equipment that, at the time of use, could in fact perform the functions described in the TCPA without human intervention and without first being technologically altered. Second, the Commission should clarify that TextMe users, and not TextMe, are the parties making calls or sending text messages for purposes of the TCPA. In the alternative, the Commission should clarify that third party consent obtained through an intermediary satisfies the TCPA’s “prior express consent” requirement for non-commercial, informational calls or text messages to wireless numbers.

Respectfully submitted,

TextMe, Inc.

By: /s/ Ronald W. Del Sesto, Jr.

James G. Snell
Ronald W. Del Sesto, Jr.
Bingham McCutchen, LLP
2020 K STREET, NW
Washington, DC 20006

Counsel for TextMe, Inc.

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