

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

SIRIUS XM RADIO INC.,

Petitioner,

v.

**FEDERAL COMMUNICATIONS
COMMISSION and UNITED
STATES,**

Respondents.

**No. 15-1218 (consolidated with
Nos. 15-1211 & 15-1244)**

NON-BINDING STATEMENT OF ISSUES TO BE RAISED

In accordance with this Court’s July 16, 2015 Order, Petitioner Sirius XM Radio Inc. submits this non-binding statement of issues to be raised in this case.

Among other things, the Telephone Consumer Protection Act of 1991 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 service” 47 U.S.C. § 227(b)(1)(A)(iii). It further defines an “automatic telephone dialing system” (ATDS) as “equipment which has the capacity—(A) to store or produce numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *Id.* § 227(a)(1).

In the order under review,¹ the Federal Communications Commission held that the term “capacity” refers not to the equipment’s present ability—that is, to what it actually could have done at the time the call was made—but to its “potential functionalities”—that is, to what it could have done had it been reprogrammed or reconfigured in some unknown, undefined way. It also set forth three different tests for what kind of potential ability the statute requires: the potential ability to *store or produce randomly or sequentially generated numbers*; the potential ability to store or produce numbers and then *dial them randomly, sequentially, or from a list*; and the potential ability to dial *without human intervention*.

The Commission also concluded that the term “called party” means “the subscriber or customary user” of the number in question, not the intended recipient of the call, even though callers often have no way of knowing that a number has been reassigned from one person to another. Recognizing the unfairness of that outcome, the Commission also interpreted the TCPA’s “prior express consent” provision to give callers one liability-free call to a number that has been reassigned. However, regardless of whether that call provides them with any information regarding the number’s current status—indeed, regardless of whether

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, FCC 15-72, CG Docket No. 02-278, WC Docket No. 07-135 (released July 10, 2015).

anyone even answers the phone—callers remain liable for any subsequent call made without the prior express consent of the subscriber or customary user.

Additionally, the Commission concluded that callers cannot specify the manner in which those who have previously given them consent may revoke it.

The issues to be raised are:

1. Whether the Commission’s “potential functionalities” test for “capacity” under the TCPA is arbitrarily vague under the Administrative Procedure Act and the Due Process Clause, violates the plain text of the TCPA, and conflicts with the First Amendment by subjecting millions of everyday devices to the TCPA’s prohibitions.

2. Whether the Commission’s order is arbitrary and capricious, violates due process, and is otherwise contrary to law because it sets forth contradictory—and therefore incomprehensible—tests for what equipment must be capable of doing in order to qualify as an ATDS.

3. Whether the Commission violated the TCPA and the APA insofar as it extended the TCPA to cover equipment that lacks the present ability to store or produce telephone numbers to be called, using a random or sequential number generator.

4. Whether the Commission violated the TCPA and the APA by interpreting “called party” to mean “subscriber or customary user” rather than “intended recipient.”

5. Whether the Commission acted arbitrarily and in defiance of proper rulemaking procedures by interpreting the TCPA to allow only one liability-free call (or attempted call) to a reassigned number, even though callers will rarely have either actual or constructive knowledge of the reassignment after such a call.

6. Whether the Commission violated the TCPA and the APA by prohibiting callers from specifying the manner in which consent may be revoked and by forcing callers to accept revocations delivered in ways that do not reasonably inform them of the called party’s preferences.

7. Whether the Commission lacks authority under the TCPA to define the term “prior express consent” to require prior express *written* consent for telemarketing calls.

Dated: August 17, 2015

Respectfully submitted,

/s/ Shay Dvoretzky

Shay Dvoretzky

Michael F. Murray

Jeffrey R. Johnson

JONES DAY

51 Louisiana Avenue N.W.

Washington, DC 20001-2113

Tel: (202) 879-3474

Fax: (202) 626-1700

sdvoretzky@jonesday.com

Thomas Demitrack

JONES DAY

North Point

901 Lakeside Avenue

Cleveland, OH 44114-1190

Tel: (216) 586-7141

Fax: (216) 579-0212

tdemitrack@jonesday.com

Counsel for Sirius XM Radio Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, I electronically filed the foregoing Non-Binding Statement of Issues To Be Raised on the Court's CM/ECF System, which caused it to be served on all parties or their counsel.

/s/ Shay Dvoretzky

Counsel for Sirius XM Radio Inc.