BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Request for Further Comment on	)	DA 18-1014
Interpretation of the Telephone Consumer	)	
Protection Act in Light of the Ninth	)	CG Docket No. 18-152
Circuit's *Marks v. Crunch San Diego, LLC*	)	CG Docket No. 02-278
Decision	)	

COMMENTS OF FIVE9, INC.

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I.   SUMMARY

Five9, Inc., a leading provider of cloud software for contact centers, appreciates and responds to the FCC's request for comments about interpretation of the Telephone Consumer Protection Act (TCPA) in light of the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*.[1] The *Marks* decision is emblematic of the chaotic state of affairs that has arisen from tortuous attempts to define an "automatic telephone dialing system" (ATDS) under the TCPA. While many had hoped that the D.C. Circuit's recent decision in *ACA International*[2] would prompt a return to a plain and sensible reading of the statutory definition of ATDS, *Marks* demonstrates that clarity through the courts is unlikely absent further FCC guidance or rulings.

In light of *ACA International* and *Marks,* it is critically important that the FCC clarify the statutory definition of an ATDS: "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."[3] This statutory definition alone is insufficient as there has been significant divergence on what "capacity" (present, future, or something in between) is necessary and whether "using a random or sequential number generator" modifies both "store" and "produce," or just "produce." Lack of clarity on these issues will continue to curb innovation and fuel litigation.

To resolve these issues, the FCC should: (A) clarify that "capacity" means "present capacity," (B) confirm that the qualifier "using a random or sequential number generator" applies to both "store" and "produce," and (C) provide clear guidance on what is plainly *not* an ATDS.

These steps would provide developers and users of dialing technology with certainty and predictability, while continuing to protect American consumers from the harms of the *en masse*, indiscriminate dialing that the TCPA seeks to address.

II.   OVERVIEW OF FIVE9, INC.

Five9 is a pioneer and leading provider of cloud software for contact centers. Contact centers are vital hubs of interaction between organizations and their customers and, therefore, are essential to delivering successful customer service, sales, and marketing strategies. Unlike legacy on-premise contact center systems, Five9's solution requires minimal up-front investment, can be rapidly deployed, and is maintained in the cloud. Many businesses rely on Five9's calling solutions to place outbound calls, to receive inbound calls, and to track and manage their compliance obligations in connection with their calls, including honoring do-not-call requests and updating their internal do-not-call lists.

Five9's calling solutions offer a variety of outbound dialer modes. These include a patented predictive dialer capability that enhances the productivity of agents and sales representatives by increasing productive talk time and minimizing idle time spent listening to voice mail and busy signals, as well as a preview mode that enables an agent or sales representative to review a contact

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[1]   No. 14-56834, 2018 U.S. App. LEXIS 26883 (9th Cir. Sep. 20, 2018).

[2]   *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

[3]   47 U.S.C. § 227(a)(1).

record and decide whether to dial or skip that record. In addition, responsive to the FCC's prior rulings on the ATDS definition, Five9 also invested resources to design a segregated manual touch mode system that requires a separate login and manual input of all phone numbers.

As a developer of dialing technology, Five9 offers a unique perspective into what should constitute an ATDS.

III. WHAT SHOULD CONSTITUTE AN ATDS

Post *ACA International*, courts have diverged on what effect, if any, the decision had on the FCC's prior rulings on what is an ATDS, including its 2003 and 2008 predictive dialer rulings. Some courts have held that the prior rulings were completely overturned,[4] while others have held that they were not overturned at all.[5] And some courts have taken narrower approaches, for example, by holding that prior rulings were not overturned for purposes of the "human intervention" rule.[6]

The result of this divergence is that the definition of an ATDS is arguably even less clear now than it was prior to *ACA International*, and there is the possibility that courts could now construe technology to be an ATDS that would not have been considered as such under prior precedent. The *Marks* decision highlights this problem. By stripping away past FCC rulings and holding that "only the statutory definition of ATDS as set forth by Congress in 1991 remains[,]" *Marks* leaves the door open for interpreting the ATDS definition in ways that could encompass technology not previously considered to be an ATDS. Indeed, the *Marks* decision construed the definition of "using a random or sequential number generator" to qualify only "produce," but not "store" in the definition – a novel twisting of the statutory text that other courts have avoided.[7]

The possibility that the ATDS definition may be expanding, instead of contracting, is contrary to *ACA International's* criticism of the vacated ATDS definition as overbroad and potentially reaching every smartphone in America. It imposes significant uncertainty and risk on those who have built businesses and made investments based on what was considered to be outside the scope of the ATDS definition. Whatever clarifications or rulings are provided concerning the ATDS definition, they should not expand the scope of the ATDS definition to technologies that would previously not have been considered an ATDS. For these reasons, the FCC should (A) clarify that

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[4]   *E.g.*, *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 U.S. App. LEXIS 26883 (9th Cir. Sep. 20, 2018); *Pinkus v. Sirius XM Radio*, No. 16-10858, 2018 U.S. Dist. LEXIS 125043 (N.D. Ill. July 26, 2018).

[5]   *E.g.*, *Reyes v. BCA Fin. Servs., Inc.* No. 16-24077, 2018 U.S. Dist. LEXIS 80690 (S.D. Fla. May 14, 2018); *Somogyi v. Freedom Mortg. Corp.*, No. 17-6546, 2018 U.S. Dist. LEXIS 129697 (D. N.J. Aug. 2, 2018).

[6]   *E.g.*, *Maddox v. CBE Grp., Inc.*, No. 1:17-1909, 2018 U.S. Dist. LEXIS 88568 (N.D. Ga. May 22, 2018); *Glasser v. Hilton Grand Vacations Co.*, No. 16-952, 2018 U.S. Dist. LEXIS 162867 (M.D. Fla. Sep. 24, 2018).

[7]   *E.g.*, *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 120-21 (3d Cir. 2018) (holding that plaintiff's claims failed because there was no factual dispute as to whether the dialing technology "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Pinkus v. Sirius XM Radio, Inc.*, No16-10858, 2018 U.S. Dist. LEXIS 125043, at *28–29 (N.D. Ill. July 26, 2018) ("Because the phrase 'using a random or sequential number generator' refers to the kinds of 'telephone numbers to be called' that an ATDS must have the capacity to store or produce, it follows that that phrase is best understood to describe the process by which those numbers are generated in the first place.")

"capacity" means "present capacity," (B) confirm that the qualifier "using a random or sequential number generator" applies to both "store" and "produce," and (C) provide clear guidance on what is plainly *not* an ATDS.

A.   Capacity means present capacity.

In *Marks*, the Ninth Circuit expressly stated that it "decline[d] to reach the question on whether the device needs to have the current capacity to perform the required functions or just the potential capacity to do so."[8] This question, however, is critical to the ATDS definition and should be clarified by the FCC. The prior interpretation of capacity, which included future or potential capacity, proved unwieldy and near-impossible to apply.

Developing technology to conform to this prior definition proved cumbersome. To avoid the argument that technology may have future or potential capacity to perform functions that it did not presently have, developers resorted to a variety of inefficient and costly measures such as hosting different types of dialing solutions on separate servers, using segregated processing equipment to execute distinct dialing platform applications, and requiring unique login procedures for accessing different types of dialing solutions. These costly and burdensome measures, however, did not avoid disputes over what technology qualified as an ATDS, as competing "experts" fought over hypotheticals of how certain technology could be modified and how difficult modifications would be.

More concerning, these hurdles to meet the technicalities of an amorphous definition had no impact on furthering the purpose of the TCPA as they did nothing to alter improper use of autodialing technology. Those wishing to use autodialing technology simply used that technology instead of the meticulously engineered, segregated manual dialers. Moreover, because the "potential" or "future" capacity of a technology did not indicate how the technology was used to place any particular call, some faced potential liability for manually-placed calls simply because of how the dialing technology might be modified in the future instead of how the technology operated when it was used.

To resolve these issues, the FCC should clarify that "capacity" refers to the "present capacity" of the dialing technology as it is used to place the call at issue. This straightforward approach would advance the purpose of the TCPA by continuing to allow for legal challenge to illegal autodialed calls, providing sufficient certainty for industry to rely on for future product development, and avoiding costly and inefficient technology development.

B.   "Using a random or sequential number generator" applies to both "store" and "produce."

The *Marks* court departed from other courts by reading "using a random or sequential number generator" so that it modified only "produce" and not "store" within the statutory definition "equipment which has the capacity . . . to store or produce telephone numbers to be called, using

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8   *Marks*, 2018 U.S. App. LEXIS 26883 at *27 n.9.

a random or sequential number generator. . . ."[9] In doing so, the *Marks* court found the plaintiff's argument convincing that "a number generator is not a storage device; a device could not use a 'random or sequential number generator' to store telephone numbers."[10] But this premise—*i.e.,* that a number cannot be stored using a random or sequential number generator—is false. To the contrary, to generate a random or sequential number, that number would necessarily be stored in memory to initiate a call to it. The "store or produce" language, both modified by "using a random or sequential number generator," thus plainly addresses the mechanism by which technology can be used for indiscriminate dialing. Contorting the language of the statute otherwise, as in *Marks*, has the potential to turn every smartphone in America into an ATDS—an outcome foreclosed by the *ACA International* decision.[11] It also offers little guidance for developers on how to create a product that is not an ATDS. For these reasons, the FCC should clarify that both "store" and "produce" are modified by "using a random or sequential number generator."

C.   Clear guidance on what plainly is *not* an ATDS.

In addition to clarifying the definition of an ATDS, as discussed above, the FCC should provide clear guidance on what type of technology plainly is *not* an ATDS. Specifically, the guidance should provide that a call is not made using an ATDS when the dialing system, as used to place the call: (1) does not generate telephone numbers; (2) requires a separate manual human action (*e.g.*, a click of a mouse, the push of a button, etc.) by the person initiating the call for each and every call that is initiated; and (3) does not permit the person initiating the call to initiate more than one call at a time.

While failing to meet these three elements would not classify a particular technology as an ATDS (the definition of an ATDS would still need to be met), this type of guidance would provide predictability to both developers and users of dialing technology that plainly could not be used for *en masse*, indiscriminate dialing.

IV.   CONCLUSION

Five9 joins the many voices calling for a clear and sensible definition of an ATDS. By clarifying that "capacity" means "present capacity," confirming that the qualifier "using a random or sequential number generator" applies to both "store" and "produce," and providing clear guidance on what is plainly *not* an ATDS, the FCC can answer the call in a way that provides predictability to industry while protecting the public from indiscriminate, *en masse* dialing.

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[9]   47 U.S.C. § 227(a)(1).

[10]   *Marks*, 2018 U.S. App. LEXIS 26883 at *21.

[11]   *See ACA Int'l*, 885 F.3d at 698 ("It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.").